BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)
Charles River Pollution Control District	)
NPDES Permit Appeal No. 14-01	)
NPDES Permit No. MA0102598	)

REGION 1'S RESPONSE TO THE PETITION FOR REVIEW

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EXHIBIT LIST

No.	AR No.	Name
1	K.1	"EPA Region 1 NPDES Permitting Approach for Publicly Owned Treatment Works That Include Municipal Satellite Sewage Collection Systems"
2	K.4	Letter. Janice Kelley Rowan, Warner & Stackpole, Attorneys at Law to Region 1. October 18, 1993.
3	A.27, A.28	2008 Draft NPDES Permit No. MA 0102598 and Fact Sheet.
4	I.26	"The Charles River Pollution Control District Wastewater Treatment Facility," Camp Dresser & McKee, Inc.
5	B.1	Response to Comments on Partially Revised Draft Permit and Draft NPDES Permit No. MA0102598. Charles River Pollution Control District. July 23, 2014.
6	A.1	Final NPDES Permit No. MA 0102598, Charles River Pollution Control District. July 23, 2014.
7	A.26	Partially Revised Fact Sheet for NPDES Permit No. MA0102598, Charles River Pollution Control District. August 29, 2012.
8	A.38	Final NPDES Permit No. MA 0102598, Charles River Pollution Control District. September 29, 2000.
9	I.22	Annual Infiltration and Inflow Report. Charles River Pollution Control District, NPDES No. MA0102598. 2012 and 2013.
10	I.1-I.12	SSO Notification Forms.
11	A.25	Partially Revised NPDES Draft Permit No. MA0102598, Charles River Pollution Control District. August 24, 2012.
12	D.1	Water Quality Certification. July 18, 2014.
13	A.15-18	Permit Application Waiver Determinations. July 23, 2014.

I. STATEMENT OF THE CASE

This petition arises out of EPA Region 1's issuance of an NPDES permit ("Permit") to the Charles River Pollution Control District ("CRPCD" or "District") in Medway, Massachusetts for discharges to the Charles River. The District owns and operates the CRPCD Treatment Plant, part of a Publicly Owned Treatment Works ("POTW") that includes separate municipally-operated collection systems. In addition to the POTW Treatment Plant, the Permit covers the separate municipal operators of the POTW's collection system, naming the Towns of Bellingham, Franklin, Medway and Millis ("Towns") as co-permittees. Based on the nature of this regional system, the history of collection system operation in the District, and other facts in the permit record, the Region imposed a limited subset of conditions on the Towns to assure proper maintenance and operation of the portions of the POTW that they operate, as well as to prevent the discharge of untreated sewage to waters of the United States.

Petitioners object. The Upper Blackstone Water Pollution Abatement District ("UBWPAD") joins the Towns in arguing that the Region, in placing National Pollutant Discharge Elimination System ("NPDES") permit conditions on the municipal collection system operators, has ventured beyond its jurisdiction under the Clean Water Act, and done so only by "fail[ing] to acknowledge or reference the operative terms of the CWA that trigger NPDES permitting," namely "the discharge of any pollutant by any person." *Petition for Review* ("*Pet.*") at 6. Petitioners translate this term as 'the direct discharge of any pollutant by the operator of the final point of outfall to U.S. waters.' *Pet.* at 7-9. Although the Towns operate more than 225 miles of collection systems that indisputably—indeed, *by design*—contribute municipal waste to the CRPCD Treatment

Plant, *Pet.* at 2, Petitioners maintain that NPDES jurisdiction over a POTW is limited to the operator of the final "point" of discharge from the Treatment Plant outfall into U.S. waters.

Petitioners' reductionist interpretation of the CWA, under which responsibility for a discharge devolves to the last point source operator in line, and the mere presence of an intervening operator severs EPA's ability to impose NPDES permitting requirements on other point source operators who are contributing to a discharge to waters of the U.S., is unsupported by the text of the Act or judicial decisions interpreting it. Far from ignoring the Act's provisions, the Region squarely addressed Petitioners' overly narrow reading of the CWA—and soundly rejected it as inconsistent with the plain language of the statute. Under EPA's interpretation, the Towns, as operators of the municipal satellite collection systems that convey wastewater to the POTW Treatment Plant, are point sources that "discharge [] pollutant[s]" within the meaning of CWA section 301, 33 U.S.C. § 1311, and are subject to regulation under the NPDES permit program, a conclusion that allows EPA to fully implement the Act and to carry out its purpose, which is to render the Nation's waters safe for "the protection and propagation of fish, shellfish, and wildlife and…for recreation in and on the water." 33 U.S.C. § 1251(a).

A. Statutory and Factual Background

1. The Clean Water Act

Under CWA section 402, 33 U.S.C. § 1342, EPA may issue NPDES permits "for the discharge of any pollutant, or combination of pollutants" if the permit conditions assure that the discharge complies with certain requirements, including those of section 301 of the CWA, 33 U.S.C. § 1311. Under CWA § 301(a), the discharge of any

pollutant by any person is unlawful except in compliance with, *inter alia*, CWA § 402, which establishes the NPDES permit program. 33 U.S.C. §§ 1311(a), 1342.[1]

The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." CWA § 502(12); 33 U.S.C. § 1362(12). A point source is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." *Id.* § 502(14). The Act defines "pollutant" to mean, *inter alia*, "municipal . . . waste[]" and "sewage…discharged into water." *Id.* § 502(6). Further, the Act defines "treatment works" as "any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage…including intercepting sewers, outfall sewers, *sewage collection systems*, pumping, power and other equipment, and their appurtenances…" *Id.* § 212(A); 33 U.S.C. § 1292(A)(emphasis added).

In order for a point source to be subject to the restrictions of Sections 301 and 402, it must discharge a pollutant to navigable waters. *See United States v. Johnson*, 437 F.3d 157, 161 (1st Cir. 2006), vacated on other grounds, 467 F.3d 56 (1st Cir. 2006).

II. FACTUAL AND PROCEDURAL BACKGROUND

POTWs comprised of municipal satellite sewage collection systems owned by one or more entities, with treatment plants owned by another, are known as "regionally integrated POTWs." Ex. 1 ("EPA Region 1 NPDES Permitting Approach for Publicly Owned Treatment Works That Include Municipal Satellite Sewage Collection Systems") ("Analysis") at i (AR K.1). Region 1's practice when issuing NPDES permits involving

[1] The Commonwealth of Massachusetts has not obtained NPDES program authorization. Therefore, Region 1 issues NPDES permits to point source dischargers in Massachusetts.

these types of sanitary sewer systems has been to cover, where necessary, the owners/operators of the municipal satellite collection systems under the permit as "co-permittees," in order to ensure that all portions of the treatment works are properly operated and maintained. *Id.* at i-ii.

The District is one such regional POTW.[2] It is comprised of a 5.7 million gallon per day advanced plant providing treatment to domestic, commercial, and industrial wastewater (the "Treatment Plant") in Medway, Massachusetts; intercepting sewers and related appurtenances; as well as satellite collection systems operated by the Towns. *Pet.* Ex. B at 2 (Permit Application) (listing the Towns as owners of the "collection system").[3] Over 238 miles of sewer lines contribute to the Treatment Plant. Approximately 13 miles of interceptor lines are owned and operated by the District, which also operates the Treatment Plant, while the Towns' satellite sewer collection systems consist of approximately 125 miles owned by Franklin, 53 miles owned by Medway, 27 miles owned by Millis, and 22 miles owned by Bellingham. *Pet.* at 2; Ex. 3 (AR A.27-28) (2008 Permit and Fact Sheet) at Figures 1-3; Ex. 4 ("The Charles River Pollution Control District Wastewater Treatment Facility") (AR I.26). The District has no legal jurisdiction over the Towns' collection systems. Ex. 5 (RTC) at 43-44, 48, 63 (AR B.1).

From its Treatment Plant, the District discharges treated wastewater effluent from Outfall 001 to the Charles River under NPDES Permit No. MA 0102598. The discharge

[2] The District was created in March 1973 pursuant to M.G.L. c.21, § 28. Ex. 2 (Warner and Stackpole Letter) (providing an explanation of District formation and structure and attaching Town Warrants) (AR K.4).

[3] The Treatment Plant, intercepting sewers, and Towns' collections systems are together referred to as the "POTW" or "Treatment Works."

is into a reach of the Charles River that has been classified by the Commonwealth in its Surface Water Quality Standards, 314 Mass. Code Regs. 4.00 *et seq.* as a Class B Warm Water Fishery. As such, it is designated as a habitat for fish, other aquatic life and wildlife and for primary (*e.g.*, swimming) and secondary (*e.g.*, fishing and boating) contact recreation. 314 CMR §§ 4.05(3)(b), 4.06 (Table 18).

Following permit development, including a review of facts pertaining to the Treatment Works, discharge data, inflow and infiltration ("I/I") reports, and other information, the Region on July 23, 2014, issued a final NPDES permit for the discharge ("Final Permit"), Ex. 6 (Final Permit) at 1 (AR A.1), naming CRPCD as the permittee and the Towns as co-permittees, subjecting the latter to Final Permit Sections I.B (Unauthorized Discharges) and I.C (Operation and Maintenance of the Sewer System) only.

A. Background

1. Sanitary Sewer Systems

a. Regionally Integrated POTWs and Satellite Collection Systems

A sanitary sewer system is a wastewater collection system owned by a state or municipality that conveys domestic, industrial and commercial wastewater (and limited amounts of infiltrated groundwater and some storm water runoff) to a POTW Treatment Plant. 40 C.F.R. § 35.2005(b)(37) (defining "sanitary sewer"). Ex. 1 (Analysis) at 2; Ex. 6 (Revised Fact Sheet) at Attachment A (AR A.26). The purpose of these systems is to transport wastewater uninterrupted from its source to a treatment facility. *Id.* at 3. While sanitary sewers are not designed to collect large amounts of runoff from precipitation events or provide widespread drainage, they typically are built with some allowance for

higher flows that occur during periods of high groundwater and storm events. *Id.* They are thus able to handle minor and controllable amounts of extraneous flow (*i.e.*, I/I) that enter the system. *Id.* Inflow generally refers to water other than wastewater—typically precipitation, like rain or snowmelt—that enters a sewer system through a direct connection to the sewer. Infiltration refers to other water that enters a sewer system from the ground, for example through defects in the sewer. *Id.*

Municipal sanitary sewer collection systems consist of a widespread network of pipes and associated components. Ex. 1 (Analysis) at 3. These systems provide wastewater collection service to the community in which they are located. *Id.* In some situations, the municipality that owns the collector sewers may not provide treatment of wastewater, but only conveys it to a collection system that is owned and operated by a different municipal entity (such as a regional sewer district) for treatment and final discharge. *Id.* A sewage collection system owner/operator that does not have ownership/operational control of the treatment facility and the wastewater outfall but rather the responsibility to collect and convey the community's wastewater to a POTW treatment plant for treatment is known as a "satellite community." *Id.*; Stakeholder Input; National Pollutant Discharge Elimination System (NPDES) Permit Requirements for Municipal Sanitary Sewer Collection Systems, Municipal Satellite Collection Systems, Sanitary Sewer Overflows, and Peak Wet Weather Discharges From Publicly Owned Treatment Works Treatment Plants Serving Separate Sanitary Sewer Collection Systems, 75 Fed. Reg. 30,395, 30,400 (June 1, 2010).

b. The Role of Sanitary Sewer Systems and the Consequences of Poor Operation and Maintenance

Municipal sanitary sewer collection systems play a critical role in protecting human health and the environment. Ex. 1 (Analysis) at 3. Proper operation and maintenance of sanitary sewer collection systems is integral to ensuring that wastewater is collected, transported, and treated at POTW treatment plants. *Id.* Through effective operation and maintenance, collection system operators can maintain the capacity of the collection system; reduce the occurrence of temporary problems, such as blockages; protect the structural integrity and capacity of the system; indirectly improve treatment plant performance by minimizing I/I-related hydraulic overloading; and, critically, anticipate potential problems and take preventive measures. *Id.*

Despite their integral role in the Nation's infrastructure, many collection systems exhibit poor performance and are subjected to flows that exceed system capacity. Ex. 1 (Analysis) at 3. Untreated or partially treated overflows from a sanitary sewer system are termed "sanitary sewer overflows" ("SSOs"). *Id.* SSOs include discharges from sanitary sewers to waters of the United States, as well as flows that back up into homes and flow out of manholes into city streets. *Id.*

The performance and efficiency of municipal sanitary sewer collection systems influence the performance of the overall treatment works, including the treatment plant. Ex. 1 (Analysis) at 4. When the structural integrity of a municipal sanitary sewer collection system deteriorates, large quantities of infiltration (including rainfall-induced infiltration) and inflow can enter the collection system, causing it to overflow. *Id.* Inflow and infiltration impacts are often regional in nature. *Id.* Satellite collection systems in the communities farthest from the POTW treatment plant can cause SSOs in communities between them and the treatment plant by using up capacity in the interceptors. *Id.* This

can cause SSOs in the interceptors themselves or in the municipal sanitary sewers that lead to them. *Id.* Extraneous flows are among the most serious and widespread operational challenges confronting treatment works. *Id.*

There are many underlying reasons for the poor performance of collection systems. Ex. 1 (Analysis) at 3. Of most relevance here, institutional arrangements relating to the operation of sewers may pose barriers to coordinated action, because many municipal sanitary sewer collection systems are not entirely owned or operated by a single municipal entity. *Id.*

B. Region 1's Approach to Permitting Regionally Integrated POTWs

1. Development of the Region's Approach

Region 1's approach to permitting regionally integrated POTWs has developed in tandem with its increasing focus on addressing I/I in sewer collection systems. Ex. 1 (Analysis) at 5. Up to the early 1990s, POTW permits issued by Region 1 generally did not include specific requirements for collection systems. *Id.* When I/I and the related issue of SSOs became a focus of concern both nationally and within the region in the mid-1990s, Region 1 began adding general requirements to POTW permits that required the permittees to "eliminate excessive infiltration and inflow" and provide an annual "summary report" of activities to reduce I/I. *Id.* As the Region gathered more information and gained more experience in assessing these reports and activities, it began to include more detailed requirements and reporting provisions in these permits. *Id.*

Before the focus on I/I, POTW permits did not contain specific requirements related to the collection system component of POTWs. Ex. 1 (Analysis) at 5. Therefore,

when issuing NPDES permits to authorize discharges from regionally integrated treatment POTWs, Region 1 had generally only included the legal entity owning and/or operating the regionally centralized wastewater treatment plant as the permittee. *Id.* Because the permit conditions focused on the treatment plant and its effluent discharge, Region 1 concluded that a permit issued only to the owner or operator of the treatment plant was sufficient to ensure that permit conditions could be fully implemented and enforced. *Id.*

Regional treatment plants presented unique permitting challenges. Ex. 1 (Analysis) at 5-6. It is generally the satellite communities, rather than the regional sewer district, that own and operate the collection systems that are the primary source of I/I. *Id.* Where circumstances dictated the imposition of more specific I/I requirements in order to ensure proper operation and maintenance of the POTW, the Region was confronted with regional sewer districts disclaiming any responsibility for, or jurisdiction over, the operation of the municipal collection systems, and *vice versa*. *Id.* Still, Region 1 initially sought to maintain the existing permitting structure of placing the responsibility on the regional sewer district to require activities to control I/I by the contributing systems and to collect the necessary information from those systems for submittal to EPA. *Id.* As existing NPDES permittees, the POTW treatment plants were an obvious locus of regulation. *Id.* at 6. The Region assumed the plants would be in a position to leverage preexisting legal and/or contractual relationships with the satellite collection systems they serve to perform a coordinating function, and that utilizing this existing structure would be more efficient than establishing a new system of direct reporting to EPA by the collection system owners. *Id.* While relying on this cooperative

approach, however, Region 1 also explained that it had the authority to require that POTW collection systems be included as NPDES permittees and that it would do so if it proved necessary. *Id.*

Over time, the Region realized that its practice of not directly imposing permit conditions on municipal satellite dischargers was becoming untenable in the face of mounting evidence that cooperative (or in some cases non-existent) efforts on the part of the POTW treatment plant and associated satellites were failing to comprehensively address the problem of extraneous flow entering the POTW. Ex. 1 (Analysis) at 6. The ability and/or willingness of regional sewer districts to attain meaningful I/I efforts in their member communities varied widely. *Id.* Finally, the structure the Region had adopted for controlling the independent collection systems through a permit issued exclusively to the regional sewer districts also made it difficult for EPA to enforce the implementation of meaningful I/I reduction programs, *id.*, as such districts often claimed to have absolutely no legal jurisdiction over their municipal satellite systems.

It became evident to Region 1 that a POTW's ability to comply with CWA requirements depended on successful operation and maintenance of not only the treatment plant but the collection system. Ex. 1 (Analysis) at 6. For example, the absence of effective I/I reduction and operation/maintenance programs within the collection systems was leading to adverse human health and water quality impacts associated with SSOs. *Id.* Additionally, these excess flows stressed POTW treatment plants from a hydraulic capacity and performance standpoint, adversely impacting effluent quality. *Id.* at *Exhibit B* (Analysis of extraneous flow trends and SSO reporting for representative systems). Addressing these issues in regional systems was essential,

as these include most of the largest systems in terms of flow, population served and area covered. *Id.* at 7.

The Region concluded that subjecting these satellite communities to co-permitting with the regional POTW treatment plant serving them would be necessary to give full effect to some of the standard permit conditions applicable to all NPDES permits at 40 C.F.R. § 122.41. Ex. 1 (Analysis) at 16. To illustrate, NPDES permitting regulations require standard conditions that "apply to all NPDES permits," pursuant to 40 C.F.R. § 122.41, including a duty to mitigate and to properly operate and maintain "all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of the permit." *Id.* § 122.41(d), (e). If the owner or operator of a downstream POTW treatment plant is unable, due to lack of legal authority or the unwillingness of the treatment plant operator to ensure that upstream collection systems are implementing requirements concerning the collection system, such as I/I requirements, then subjecting the upstream POTW collection system to its own specific permit requirements may be the only or best available option to give full effect to these permit obligations. Ex. 1 (Analysis) at 16.

In light of its past permitting experience, Region 1 decided that it was necessary to refashion permits issued to regionally integrated POTWs so as to impose requirements directly on all owners/operators of the treatment works (*i.e.*, the regional centralized POTW treatment plant *and* the associated municipal satellite collection systems) when necessary to effectively address the problem of extraneous flow on a system-wide basis. *Id.* at 7. Specifically, Region 1 determined that the satellite systems should be subject as co-permittees to a limited set of O&M-related conditions on permits issued for

discharges from regionally integrated treatment works. *Id.* These conditions apply only to the portions of the POTW collection system that the satellites own or operate. *Id.* This ensures maintenance and pollution control programs are implemented with respect to all portions of the POTW. *Id.* Accordingly, since 2005, Region 1 has generally included municipal satellite collection systems as co-permittees subject to some requirements while requiring the owner/operator of the treatment plant, as the primary permittee, to comply with the full array of NPDES requirements, including secondary treatment and water-quality based effluent limitations. *Id.*

2. The *Upper Blackstone* Decision and Development of the Co-Permittee Analysis

On May 28, 2010, the Environmental Appeals Board remanded to EPA the co-permitting provisions in a permit issued to UBWPAD in Millbury, Massachusetts, a regionally-operated POTW. *See In re Upper Blackstone Water Pollution Abatement Dist.*, NPDES Appeal Nos. 08-11 to 08-18 & 09-06 (EAB May 28, 2010). These conditions had been appealed to the Board by UBWPAD, which operates the Treatment Plant, and four of its satellite communities. In its Order, the Board "did not pass judgment" on the Region's position that its NPDES jurisdiction encompassed the entire POTW and not only the treatment plant, but found that EPA had not adequately articulated in the record of the proceeding a rule-of-decision, or interpretation, identifying the statutory and regulatory basis for construing NPDES authority to extend beyond the treatment plant owner and operator to separately owned and operated collection systems that discharge to the treatment plant. *Id.*, slip op**.** at 2, 18.

In light of this decision, the Region reexamined the legal underpinnings of its co-permitting approach. The Region concluded that municipal satellite collection systems

"discharge [] pollutants" within the meaning of the Act, and that the POTW in its entirety (*i.e.*, inclusive of the collection systems) would be subject to NPDES regulation as a point source discharger under the Act as necessary based upon a consideration of the facts and circumstances in the record. Ex. 1 (Analysis) at ii. The Region outlined its legal and policy analysis in a document entitled "EPA Region 1 NPDES Permitting Approach for Publicly Owned Treatment Works That Include Municipal Satellite Sewage Collection Systems," identifying the need for a "comprehensive" and "preventative" POTW-wide approach to a POTW operated by multiple persons as a primary objective of its approach. *Id.* at i. The Region cautioned, however, that "In determining whether to include municipal satellite collection systems as co-permittees in any particular circumstances, Region 1's decision will be made by applying the law and regulations to the specific facts of the case before the Region." *Id.* at 1.

C. Determination to Include Municipal Satellite Collection Systems on the District's NPDES Permit as Co-Permittees

The CRPCD regional POTW includes approximately 238 miles of sewer pipes, of which only 13 miles are owned by the District itself. *Pet.* at 2. The role of operating and maintaining municipal sanitary collection systems falls to the Towns, who among them operate over 200 miles of conveyances, associated pump stations and other equipment. Unsurprisingly, inflow/infiltration and SSO problems are largely related to issues in the Town-owned portions of the POTW, since the Towns own the vast majority, and the most vulnerable portions, of the collection system.

Since 2001, the Treatment Plant has been operating under a permit that places requirements on the District to implement I/I reduction programs with the operators of

the satellite collection systems, in contrast to Region 1's current approach of including, as necessary, the operators of the POTW's satellite collection systems on the NPDES permit as co-permittees. Ex. 8 (Prior Permit) at 7 (A.38). In reissuing the permit, EPA included more detailed operation and maintenance requirements for the collection systems, consistent with its ordinary practice in all POTW permits (both regional and non-regional). In addition, understanding that the Region has the authority to include municipal satellite collection systems as co-permittees on an NPDES permit issued for a regionally integrated POTW comprised of separately operated collection systems and treatment plants and that it would do so where necessary to control the discharges, *supra* at Section II.B.2, the Region considered the facts relative to operation of the entire POTW to determine whether inclusion of these entities was warranted. This included an assessment of whether the preexisting permitting structure (having the District implement programs with the satellite collection systems) had proven adequate, as indicated by analysis of I/I in the POTW, flow trends, wet weather flow violations, and SSO occurrences.

1. Extraneous Flow in the POTW

a. The Region's Analysis of I/I

To assess the degree of I/I in the POTW, the Region consulted flow data from the District's discharge monitoring reports ("DMRs"). Daily maximum flow (the highest flow recorded in a particular month) data for the CRPCD along with monthly precipitation data from nearby weather stations show CRPRD experiences high levels of wet weather flow. Ex. 1 (Analysis) at Exhibit B, Figure 1. The CRPCD system, moreover, often experiences high levels of groundwater infiltration into the system even

during dry weather. *Id.* at Figure 3. The Region concluded that the foregoing indicated that the POTW is receiving high levels of inflow and wet weather infiltration. *Id.*; Ex. 5 (RTC) at 51-54; 81-82.

b. Flow Trends

Maximum daily flow reflects the highest wet weather flow for each month. Ex. 1 (Analysis) at Exhibit B. Maximum daily flows over the period during which the CRPCD has been responsible for implementing cooperative I/I reduction programs with the operators of the satellite collection systems have been increasing, indicating that I/I has not been reduced in the system despite the permit requirements. *Id.* at Figure 5 (CRPCD Daily Maximum Flow Trend). This is reflected in an I/I report submitted by the District to EPA on February 24, 2014, indicating that "flow increased from 2012 to 2013 by approximately 63 million gallons." Ex. 9 (Annual Infiltration and Inflow Report. Charles River Pollution Control District, NPDES No. MA0102598. 2012 and 2013) (AR I.22).

c. Violations Associated with Wet Weather Flows

CRPCD has experienced permit violations that appear to be related to I/I, based on their occurrence during wet weather months. CRPCD violated effluent limits for CBOD (concentration) and TSS (concentration and percent removal) numerous times, with twelve of the sixteen violations occurring during months when daily maximum flows were high. Ex. 1 (Analysis) at Exhibit B, Figure 7.

d. SSO Occurrences

In addition, the Towns have had SSOs from their collection systems due to clogged sewers, forced main breaks, failed grinder pumps, insufficient capacity, and pump/lift station failures. Ex. 9 (SSO Reports) (AR I.1-1.12).

2. Determination to Include Satellite Collection Systems as Co-permittees on the CRPCD NPDES Permit

In light of the foregoing evidence of excessive extraneous flow in the Treatment Works despite years of attempting to implement I/I programs through the District, and attendant concerns about the operation and maintenance programs for these collection systems, the Region determined that the Towns should be included on the CRPCD NPDES permit and made responsible for compliance with the permit conditions under the Towns' control. Ex. 5 (RTC) at 59-83.

3. Revised Draft and Final Permit Issuance

From July 13 through August 11, 2012, the Region solicited public comments on a Revised Draft Permit[4] that included the Towns as co-permittees subject to a subset of conditions in the permit, specifically, requirements in Part I.B, Unauthorized Discharges and Part I.C, Operation and Maintenance of the Sewer System. Ex. 11 (Revised Draft Permit) at 1.

[4] The Revised Draft Permit partially superseded a Draft Permit released in July 3, 2008, which also listed the Towns as co-permittees. The Board's subsequent decision in *Upper Blackstone*, as well as other substantial new questions, prompted the Region to revise and re-open the Draft Permit for comment. The Analysis was included as Attachment A to the Revised Draft Permit Fact Sheet.

a. Revised Draft Permit Conditions

i. Unauthorized Discharges

Under Part I. B, Unauthorized Discharges, the only authorized discharge is from the Treatment Plant outfall, as listed in Part I.A.1. All other discharges are prohibited, including sanitary sewer overflows (SSOs).

ii. Operation and Maintenance of the Sewer System

The standard language and requirements in Part I.C, Operation and Maintenance of the Sewer System, require CRPCD and each co-permittee to develop and implement a collection system operation and maintenance plan, and to map its sanitary sewer system.

b. Public Comments

The Region received numerous comments on the Revised Draft Permit, including from CRPCD, the Towns, Kleinfelder, Inc. and UBWPAD.[5] Upon considering the comments received, the Region made a final decision to re-issue the permit authorizing the discharge, retaining the Towns as co-permittees. The Final Permit included the same conditions relating to unauthorized discharges and operation and maintenance of the sewer system as were in the Revised Draft Permit. Massachusetts certified the permit on July 18, 2014. Ex. 12 (Certification) (AR D.1). The Region issued the permit on July 23, 2014. Petitioners timely appealed.

III. ARGUMENT

[5] UBWPAD has commented on all but one draft permit containing co-permittee provisions since the remand in *Upper Blackstone*. The CRPCD Permit is the first to be issued final, although several others are forthcoming.

A. As Owners and Operators of the Point Source Discharges to U.S. Waters, the Towns are Subject to NPDES Permitting

1. The Region Has Reasonably Interpreted the Act and Implementing Regulations in Deciding to Cover Municipal Satellite Collection Systems on the CRPCD Treatment Plant Permit

Petitioners contend that the Region lacks legal authority to cover "the Towns, as owners and operators of sewer lines that convey wastewater to a separately owned POTW treatment plant for treatment" because the Towns do not "discharge" pollutants from a "point source" to waters of the United States within the meaning of Sections 301 and 402 of the Act. *Pet*. at 6-9. Instead, under Petitioners' reading of the Act, only the person operating the final "point" from which a pollutant is discharged to waters of the U.S. is subject to coverage under an NPDES permit, which Petitioners characterize as reaching only those entities involved in the "act of discharging a pollutant from a point source." *Id*. at 7-8. As the owner and operator of Outfall 001, the point at which treated wastewater effluent exits the Treatment Works and enters the Charles River, the CRPCD in Petitioners' opinion is the only such entity capable of a point source discharge. *Id.* In Petitioners' view, the interposition of a separately-operated point source between wastewater flowing from their respective portions of the Treatment Works and the receiving waters by definition absolves them from any possible responsibility under the NPDES program. *Id*. at 8.

Petitioners have, for the most part, merely repackaged comments made on the Revised Draft Permit, *compare Pet.* at 6-9 *with* Ex. 5 (RTC) at 59-61, which is insufficient to garner review, *Mich. Dep't of Envtl. Quality v. EPA*, 318 F.3d 705, 708 (6th Cir. 2003), *aff'g In re Wastewater Treatment Facility of Union Twp.*, NPDES Appeal Nos. 00-26 & 00-28 (EAB Jan. 23, 2001) (Order Denying Petitions for Review).

As to the merits, the plain language of the CWA prohibits any person from discharging any pollutant into the waters of the United States from any point source, except as authorized by, *inter alia*, an NPDES permit. CWA § 301; Ex. 5 (RTC) at 59-63. Contrary to Petitioners' suggestion, that prohibition is not limited to operators of "immediate" point source discharges to waters of the U.S. Ex. 5 (RTC) at 62. Whether that contributing point source discharger is the operator of the final "point" of discharge is immaterial under the Act, and Petitioners point to no contrary authority. *Id.* The Towns are very much in "the act of discharging a pollutant from a point source," to employ the Petitioners' formulation, *Pet.* at 6, 8, even if they do not own or operate the plant that treats the wastewater in the course of its conveyance to a water of the United States, or the actual outfall from which the wastewater finally is discharged to waters of the U.S.

Although Petitioners claim to derive their understanding of the term "discharge" in Sections 301, 402 and 502 from the plain language of the statute, their particular formulation is without any textual basis in the statute or regulations. Nor is it drawn from guidance or case law construing the term "discharge." It is, instead, a characterization of the Act that is of Petitioners' own making; it is also ambiguous, a convenience that allows Petitioners to invest the phrase with their own meaning. But it is most of all irrelevant, because it only begs the dispositive questions at issue on appeal: Do municipal satellite collection systems "discharge [] a pollutant" within the meaning of the statute and regulations even if the ultimate point of discharge is operated by another entity? And in the case of a regionally integrated POTW, does the scope of NPDES

authority extend to owners/operators of municipal satellite collection systems that convey wastewater to a treatment plant owned by another?

Under the Agency's interpretation of the Act, the answer to both these questions is "yes."

a. The CRPCD Collection Systems Are Portions of a POTW and "Point Sources" that "Discharge [] Pollutants" Under the Act and Thus Are Subject to Regulation Under the NPDES Permitting Program

The starting point for interpreting any statute is the language of the statute itself. *In re ArcelorMittal Cleveland Inc.*, NPDES Appeal No. 11-01, slip op. at 14 (EAB June 26, 2012) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)).

The Towns argue that they merely provide a conveyance for waste waters for treatment and discharge by another person from its point source. *Pet.* at 9. That is one way to put it. Put otherwise, the Towns are "persons" who "discharge" within the meaning of the Act and implementing regulations because they own or operate portions of the POTW and add pollutants to the waters of the United States. Ex. 1 (Analysis) at 8-12; Ex. 5 (RTC) at 59-63. The Towns' collection and "conveyance" via connecting pipes and sewers of "waste waters" from one portion of the treatment works (*i.e.*, the collection system) to another (*i.e.*, the POTW Treatment Plant) before its ultimate discharge into the Charles River is an addition of a pollutant or combination of pollutants to waters of the U.S. from a point source. *Id.* The Towns' satellite collection systems constitute portions of the POTW and are themselves point sources that discharge to waters of the U.S.; this interpretation is consistent with the definitions of "POTW," "point source," and "discharge" in the CWA and its regulations, as explained below.

i. Petitioners' Collection Systems Comprise a Portion of the POTW

"Publicly owned treatment works" are facilities that, when they discharge to waters of the U.S., are subject to the NPDES program. *See* CWA §§ 402(a)(1); § 301(b)(1)(B); *see also* 40 C.F.R. Part 133. A satellite collection system owned by one municipality that transports municipal sewage to another portion of the POTW owned by another municipality is part of a single integrated POTW system and discharges to waters of the U.S. Ex. 1 (Analysis) at 9-10; Ex. 5 (RTC) at 62-63. The CWA and its implementing regulations broadly define "POTW" to include not only wastewater treatment plants but also the sewer systems and associated equipment that collect wastewater and convey it to the treatment plants. Ex. 1 (Analysis) at 8-9; Ex. 5 (RTC) at 59-64. Under the Act, the term "treatment works" encompasses "sewage collection systems, pumping, power, and other equipment, and their appurtenances," and "sanitary sewer systems." CWA § 212(A), (B). Under EPA's regulations, a POTW "means a treatment works as defined by section 212 of the Act, which is owned by a State or municipality (as defined by section 502(4) of the Act)." 40 C.F.R. §§ 403.3(q), 122.2.

Municipal satellite systems fall within the definition of POTW. First, they are "sewage collection systems" under section 212(A) and "sanitary sewer systems" under section 212(B). Second, they convey wastewater to a POTW treatment plant for treatment under 40 C.F.R. § 403.3(q). Further, the definition of POTW makes no distinction as to ownership or operation, encompassing both the POTW treatment plant and municipal satellite collection systems conveying wastewater to the POTW treatment plant even if the treatment plant and the satellite collection system have different owners.

Petitioners unconvincingly assert that the Region's reliance on CWA § 212 and implementing regulations at 40 C.F.R. Part 403 in defining the POTW for the purposes of issuing an NPDES permit is erroneous, as Part 403 "deals not with permitting required of 'direct discharges' under Section 301(a) of the CWA, but instead pre-treatment regulations for industrial discharges to POTWs." *Pet.* at 10.

But this argument was not presented anywhere below, though it was clearly available, and is accordingly waived. *In re Upper Blackstone Water Pollution Abatement Dist.*, NPDES Appeal Nos. 10-09 through 10-12, slip op. at 7 (EAB Mar. 31, 2011), *aff'd*, 690 F.3d 9 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2382 (May 13, 2013).

On the merits, EPA relies on the language of section 403.3(q) because it is directed to do so by 40 C.F.R. § 122.2. The definitions of section 122.2 "apply to parts 122, 123 and 124" (the NPDES permitting regulations), and § 122.2 states, "POTW is defined at § 403.3(q) of this chapter." Section 403.3(q) itself references section 212 of the CWA, bringing the matter full circle.

Consistent with Region 1's interpretation, courts have taken a broad reading of the terms "treatment works" and POTW. Ex. 5 (RTC) at 10 n.8 (citing cases). Petitioners attempt to distinguish *United States v. Borowski*, 977 F.2d 27, 30 n.5 (1st Cir. 1992), claiming that the case "confirms that 'treatment works' as defined by § 212 applies to grants for construction, and not for the purpose of determining persons subject to NPDES permitting." *Pet.* at 10. Petitioners choose to elide the fact that the language quoted in the Petition related to the question of whether the term POTW encompassed privately-owned "pipes right up to the sink drain where the defendants dumped" hazardous materials, which is obviously not of any relevance to instant proceeding.

These are, after all, publicly-owned collection systems. Moreover, the Court expressly credited the very regulatory language relied on by EPA in this permit proceeding as reasonable and consistent with the Act. *Borowski*, 977 F.2d at 30. At any rate, the Region's reference to this case was in support of its statutory and regulatory interpretation, not an independent justification, and does not constitute any grounds for review.

Similarly, Petitioners' reliance on *Montgomery Environmental Coalition v. Costle*, 646 F.2d 568, 591 (D.C. Cir. 1980) relating to combined sewer overflows is misplaced. That case addressed whether secondary treatment standards applied to the discharges of such overflows, not whether such flows were point source discharges. Nothing the Region did here is inconsistent with that decision. In this permitting proceeding, the Region simply relied on the definition of "POTW" in its regulations implementing Sections 301, 307 and 402. The definition of POTW in 40 C.F.R. § 122.2 cross references the definition of POTW at 40 C.F.R. § 403.3(q) that, in turn states, among other things, that a POTW means a "treatment works" as defined in Section 212. The Court in *Montgomery Environmental Coalition* never addressed the issue of whether EPA could properly reference the definition of treatment works in Section 212 when promulgating a regulatory definition that interprets an ambiguous term of the statute.

ii. Petitioners' Collection Systems Comprising a Portion of the POTW are Point Sources that Discharge Pollutants to Waters of the U.S.

A point source is "*any* discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit... from which pollutants are or

may be discharged." CWA § 502(14) (emphasis added); 40 C.F.R. § 122.2. As Petitioners concede, "Each of the Towns owns and operates a sewer collection system that transports sewer flow to a wastewater treatment plant for treatment and discharge to U.S. waters." *Pet.* at 2. "The definition of a point source is to be broadly interpreted." *See Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d. Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992). The pipes and other conveyances comprising the satellite collection systems operated by the Towns fall within the broad definition of point source under both the statutory and regulatory definition.

b. Petitioners' Collection Systems Discharge Pollutants to Waters of the U.S. Even Given the Presence of a Separately-Operated Treatment Plant

The Towns' collection systems discharge pollutants because they add pollutants to waters of the U.S. from a point source. This position is consistent with the definition of "discharge of a pollutant" at CWA § 502(12) and 40 C.F.R. § 122.2. The Towns do not contest that their sewage and municipal waste are conveyed to waters of the U.S, but instead maintain that they are added from *another* point source operated by *another* person, and that only that *other* point source is subject to NPDES permitting. *Pet.* 7, 9. Petitioners are mistaken and fail to substantively grapple with the Region's rebuttal of this argument in a manner deserving of review. *LeBlanc v. EPA*, No. 08-3049, at 9 (6th Cir. Feb. 12, 2009), *aff'g In re Core Energy, LLC*, UIC Appeal No. 07-02 (EAB Dec. 19, 2007) (Order Denying Review).

Under the Act, a party does not cease to discharge pollutants merely because the pollutants pass through a conveyance owned or operated by another before reaching the waters of the United States. Ex. 5 (RTC) at 62. The fact that a collection system may be

located in the upper reaches of the POTW and not necessarily near the ultimate discharge point at the treatment plant, or that its contribution may be commingled with other wastewater flows prior to the discharge point, is not material to the question of whether it "discharges" a pollutant. *Id.*

Thus, notwithstanding the presence of an intervening point source, the Towns may be subjected to NPDES permitting requirements because they operate portions of the POTW and discharge to waters of the U.S.. *Id*. at 61-62; Ex. 1 (Analysis) at 11; *Dague*, 935 F.2d at 1354-55. This has been EPA's consistent position, applied in contexts other than co-permitting, *see, e.g., EPA 2012 Construction General Permit*, and is essential to the effectiveness of the Clean Water Act. *See, e.g.,* 40 C.F.R. §§ 122.44(m) (contributors to privately-owned treatment works), 122.26(a)(4)–(6)(stormwater associated with industrial activity that is discharged through municipal or non-municipal separate storm sewers). If dischargers were able to sidestep the requirements of the CWA by virtue of, for instance, transferring ownership of the outfall to another entity, EPA's ability to implement the Act and carry out Congress's objectives would be impeded, because discharges often are most effectively controlled at their origin through pollution prevention measures.

Courts have consistently agreed with EPA's sensible position that dischargers do not need to own, operate or control the actual discharge point (outfall) to be subject to CWA jurisdiction. EPA has authority to require permits even when the discharge goes through a conveyance owned or operated by another discharger. *See, e.g., Dague* 935 F.2d at 1355 (holding that leachate from a landfill constituted a discharge from a pollutant even though it passed through railroad culvert owned by a third party to reach

the waters of the United States); *Puerto Rico Campers' Ass'n v. Puerto Rico Aqueduct and Sewer Auth.*, 219 F. Supp. 2d 201, 217 (D. Puerto Rico 2002) (holding that conveyance of pollutants from one waste water treatment plant to another constituted a "discharge" under the CWA); *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945, 947 (W.D. Tenn. 1976); s*ee generally Pepperell Assocs. v. United States EPA*, 246 F.3d 15 (1st Cir. 2001). The Region thus rejects the Towns' attempt to impose an arbitrary limitation on the reach of the Act and NPDES permitting, *i.e.*, that the permitted entity must own the actual treatment plant and outfall pipe. Therefore, the Towns may be regulated as co-permittees, because the satellite collection facilities constitute point sources that discharge pollutants under the CWA.

2. The Towns Are Not Indirect Dischargers Excluded from the Definition of Discharge Within the Meaning of 40 C.F.R. § 122.2, Because Their Collection Systems are not "a Non-Domestic Discharger Introducing 'Pollutants' Into a 'Publicly Owned Treatment Works,'" but Rather a Component of the POTW

Petitioners assert that the Towns fall within the definition of "indirect dischargers" under 40 C.F.R. § 122.2, and are thus excluded from NPDES permitting requirements under 40 C.F.R. § 122.3, because their collection systems "convey sanitary sewage and non-domestic wastewater to the treatment facility/POTW prior to discharge." *Pet.* at 12. Petitioners also contend that EPA incorrectly determined that "indirect dischargers" are the only source excluded from the term "discharge of a pollutant," and that municipal satellite collection systems should be excluded from permitting requirements under the Act. *Id.*

In large part, Petitioners have procedurally defaulted by simply restating their arguments below, which are subject to the same deficiencies pointed out by the Region in

its Response to Comments and the Analysis, namely that the Towns' collection systems are not "non-domestic dischargers introducing 'pollutants' to a 'publicly owned treatments works,'" but are themselves a portion of the "treatment works." *Compare Pet.* at 12 *with* Ex. 5 (RTC) at 61; Ex. 1 (Analysis) at 13-14.

Similarly, Petitioners also re-allege, without confronting the Region's response, that they do not fall within the definition of "municipality," because they have no "jurisdiction over disposal of sewage, industrial, wastes or other wastes…," under 502(4), but only jurisdiction over their collection systems, which in Petitioners' opinion fall outside the definition of POTW. *Pet.* at 12-13; Ex. 5 (RTC) at 63-64. However, in order to qualify under this definition, a wastewater collection system need only be "owned by a State or municipality." The Towns meet the CWA's definition of municipality because they have jurisdiction over a portion of the system for disposal of sewage and other wastes. Ex. 5 (RTC) at 63-64 (discussing the term "disposal of sewage"); Ex. 1 (Analysis) at 12-13. The Towns need not have jurisdiction over the POTW Treatment Plant if they own or operate other portions of the POTW, which they clearly do. *Supra* at Section III.A.1 (discussing 40 C.F.R. § 403.3(q) and CWA § 212(2)(A), (B)).

3. The Region Has Adequately Explained the Scope of Its NPDES Permitting Authority

Petitioners contend that the Region has failed to explain, "'the extent to which collection systems not owned by the entity owning or operating the treatment works are subject to NPDES permitting,'" *Pet.* at 13-14 (quoting *Upper Blackstone* at 587). But this ignores EPA's explanation of the term "collection system" in both the Analysis and the RTC. In its Analysis, the Region explicitly clarified its test for determining where the POTW ends and users begin. Ex. 1 at 11-12; Ex. 5 (RTC) at 78. Specifically, the Region

relies on the definition of "sewage collection system" at 40 C.F.R. § 35.905 (employing a primary purpose test of whether the common sewer is installed to receive and carry waste water from others to include public lateral sewers and exclude waste water from individual structures on private property to the public lateral sewer). *Id.*

Petitioners' also object to the Region's use of "sewage collection system" at 40 C.F.R. § 35.905, but raise an objection that was not preserved in comments on the Draft Permit, and moreover, do not confront the Region's rationale for referencing this definition. Petitioners specifically argue that EPA's reference to the definition of "sewage collection system" from the construction grants regulations for interpretative guidance is impermissible, because the regulations at 40 C.F.R. Part 35, subpart E limit the definitions to use in the subpart governing grants for construction of treatment works by the words "as used in this subpart." *Pet.* at 14. Petitioners, however, failed to preserve this specific argument. Should the Board look past this deficiency, EPA's reliance on the definition for guidance was reasonable because, as the Region explained in the Analysis and RTC, 40 C.F.R. Part 35, subpart E pertains to grants specifically for POTWs, the entity that is the subject of this NPDES policy. Ex. 1 (Analysis) at 11. Additionally, the term "sewage collection systems" expressly appears in the definition of treatment works under section 212 of the Act as noted above. *Id.; see Gustafson v. Alloyd Co.*, 513 U.S. 561, 567-69 (1995) (the same meaning is implied by the use of the same expression in every part of the act).

B. The Region's Approach of Requiring a Single Application from the Operator of the POTW Treatment Plant, and Information from Operators of Other

Components of the Treatment Works as Necessary, Comports With the Permit Application Requirements Under NPDES Regulations

1. Duty to Apply

Petitioners claim that EPA erred by deeming sufficient the permit application from the District, and not requiring the Towns, as point source operators of portion of the Treatment Works, to individually submit separate permit applications. *Pet.* at 14-15. Petitioners argue that it is irrational to deem the operators of the municipal satellite collection systems as discharging from point sources, while at the same time determining that a permit application is not required from each of these entities, given the requirements of § 122.21(a) ("Duty to Apply"). *Pet.* at 16. Petitioners argue that EPA has read the requirements of § 122.21(a) out of the regulations "in order to impose NPDES obligations upon the Towns," effectively absent their "consent" to the requirements of the CWA. *Id.* at 17.

Under Petitioners' reading of the Act, EPA's authority under Section 402 to impose NPDES permit requirements on persons discharging to waters of the U.S. in order to assure compliance with, *inter alia*, Section 301 is wholly predicated on that discharger's consent, which is conveyed, if at all, through the submission of a permit application at the election of the discharger. Petitioners regard permit application requirements as the *basis* for deeming satellite collection systems point source dischargers, although they are unable to cite to any authority for this unusual contention. As the Region has explained, under the Act and implementing regulations, the satellite collection systems are subject to the NPDES program because they are point source dischargers, not because they have submitted NPDES permit applications. Ex. 5 (RTC) at 66-67. While it is clear that Petitioners read the permit application regulations very

differently than the Region, their Petition consists of rehashing those differences, rather than demonstrating any clear error law or abuse of discretion on the Region's part. The Region's approach to the permit application process relative to municipal satellite collection systems was adequately explained and justified, and should be upheld.

a. The Region's Rationale Comports With the Permit Application Requirements Under NPDES Regulations, Including the Duty to Apply

Under 40 C.F.R. § 122.21(b), "Any person who discharges or proposes to discharge pollutants"… must comply with permit application requirements set forth in 40 C.F.R. § 122.21 ("Application for a Permit"), including the duty to apply in subsection 122.21(a). It is the operator's duty to obtain a permit. An operator of a sewage collection system in a regionally integrated treatment works is operating a portion of the POTW and thus can be asked to submit a separate permit application pursuant to § 122.21(a) (requiring applicants for "new and existing POTWs" to submit information required in 122.21(j)," which in turn requires "all POTWs," among others, to provide permit application information).

Although Petitioners perceive a fatal contradiction in only requiring a single permit application in a case where multiple point source operators contribute to a discharge, *Pet.* at 15-16, the Region's approach to the permit application process in this case was reasonable. Because EPA regulations do not specifically address how NPDES permit coverage is to be obtained by satellite collection system components of POTWs, Region 1 reasonably exercised its discretion in crafting an approach to fill the gap, doing so in a manner that was clearly explained and supported by the record. Ex. 5 (RTC) at 66. Ordinarily the treatment plant operator applies for the POTW's NPDES permit, and

discharges from the POTW, including those from the collection systems operated by others, are covered by the permit issued to the treatment plant. *Id.* Satellite collection system operators have generally not submitted separate permit applications for coverage under the POTW permit, because the treatment plant operator generally submits the information necessary for the permit writer to write terms and conditions in the permit applicable to all components of the POTW on the basis of the treatment plant's application. *Id.* Whether or not to require additional information from a satellite collection system by way of an application is separate and apart from whether the collection system should be named as a co-permittee on the POTW permit. *Id.* Both are case-by-case decisions, one based on the information available to the permit writer; the second based on whether the permit writer determines that specifying co-permittees on the POTW permit is necessary for all terms and conditions of the permit to be implemented. *Id.* Here, the Region determined that there was no need for any information from the satellite systems because it anticipated receiving substantially identical information from the District as it would from the Towns. *Id.* As a separate matter, the Region determined that naming the Towns as co-permittees was necessary for implementation of the POTW permit. *Id.*

"The goal of the application requirements is to provide the permit writer with the information necessary to develop appropriate NPDES permits consistent with requirements of the CWA." *See* NPDES Application Requirements for POTWs [], 64 Fed. Reg. 42,440 (Aug. 4, 1999). In the Region's experience sufficient information about the collection system is usually obtained from the treatment plant operator's permit application, and from other publicly available sources. Ex. 1 (Analysis) at 14-15; Ex. 5

(RTC) at 66; Ex. 12 (Waiver Determinations). The NPDES permit application for POTWs solicits information concerning portions of the POTW beyond the treatment plant itself, including the collection system used by the treatment works. *See* 40 C.F.R. § 122.21(j)(1).

In this instance, a timely re-application for an NPDES permit for the discharge was submitted, signed and certified by the District as operator of the POTW Treatment Plant, which in the Region's view was a reasonable factual basis for establishing permit requirements for the "POTW." Ex. 5 (RTC) at 71. As the recipient of contributing discharges from outlying portions of the POTW for final, combined discharge into the receiving water as well as the primary coordinator of the member communities, the District is uniquely positioned to provide information regarding the wider treatment works. *Id.* Moreover, two member communities—Franklin and Medway—sit on the District's Board. Although Petitioners express concern that the Region will rely in writing permits "solely upon information about its systems provided in Form 2A," *Pet.* at 19, as the administrative record reflects, EPA had ample information relative to the POTW's collection system and system-wide I/I from the District's application and the District's Annual I/I Report (a summary of all actions taken to minimize I/I and includes flow data, I/I trend analysis, unauthorized discharges from the collection system, and specific information submitted on these issues by each of the Towns) to process the permit. *See* AR Section I ("Treatment Works, I/I and Sanitary Sewer System Overflow Information").

Petitioners assert that they have no way of knowing whether they need to apply, or re-apply prior to the permit's expiration. *Pet.* 16-17. But EPA explained its practice

both in the Analysis and in the Response to Comments. Ex. 1 (Analysis) at 14-15; Ex. 5 (RTC) at 71-72. As a general matter, EPA does not foresee the need to require individual permit applications from each municipal satellite collection system operator, and anticipates that information in the POTW Treatment Plant operator's permit application and other information in the administrative record will be sufficient to establish permit terms for the entire treatment works. *Id.* With respect to re-application, EPA explained that it would *not* require the municipal satellite collection systems to submit individual applications prior to expiration, but would instead review the re-application from the main permittee to determine whether additional information from the satellites would be necessary. Ex. 5 (RTC) at 71-72; Ex. 1 (Analysis) at 14-15; Ex. 12 (Waivers). In other words, EPA set the clear expectation that, as it moves forward with its practice of co-permitting municipal satellite collection facilities, it will indicate whether it requires additional material from those entities operating the outlying portions of the treatment works to render the permit application "complete" under 40 C.F.R. § 124.3(c) after receiving and reviewing the re-application for the permit from the primary permittee, typically the operator of the POTW Treatment Plant. *Id.*

Petitioners further state that they have no idea "what terms and conditions the permit writer may consider 'necessary' or as applicable to them." *Pet.* at 17. As to Petitioners' complaint that they will not know the substantive terms of future permits that the permit writer may determine to be necessary going forward, that is not a demonstration of error, but merely an aspect of the NPDES permitting process, under which permit conditions are re-assessed at reissuance based on applicable law and facts in the record, and are subject to notice and comment, and appeal. To the extent that

Petitioners take issue with the process for imposing requirements on municipal satellite collection systems, their claim of error is with the NPDES permitting process generally, not with anything the Region has done in this case, and therefore is not a basis for review.

b. The Region Complied With NPDES Application Waiver Requirements

i. Waiver

The Towns assert that EPA erroneously applied the permit application waiver provisions at 40 C.F.R. § 122.21(j) in determining to waive permit applications and submittal requirements applicable to the municipal satellite collection systems, including signatory requirements, and argue that the Region's approach is inconsistent with 40 C.F.R. § 122.21(a)(1), which sets out permit application requirements for those persons who discharge pollutants from a point source. *Pet.* at 17. The Towns argue that, under 40 C.F.R. § 122.21(a)(1), each constituent point source operator in a regionally integrated treatment works *must* apply, even if the discharges are ultimately combined for treatment and discharge through a single outfall. *Id.* They further argue that once an application is received, the Region has no discretion to waive any information called for under the regulations, and the exercise of any such waiver authority is predicated on a request by the permit applicant. *Id.* Again, this structure ensures, in the Towns' view, that the discharger first "consent" prior to being covered by an NPDES permit. *Id.*

The Region has not waived the application requirement relative to the POTW in its entirety, only as to the operators of the satellite collection systems. Ex. 5 (RTC) at 69-70. The Region still required and received an application for the POTW's discharge from the District. Receiving a single application from the operator of a portion of the

discharging POTW is a reasonable way to structure the permit application process, particularly in the case of a regionally integrated treatment works where there is a centralized administrative entity responsible for operating the POTW Treatment Plant and coordinating wastewater flows from the multiple satellite collection system operators. *Id*. The Region has determined that "requiring a single permit application executed by the regional POTW treatment plant owner/operator will deliver 'substantially identical information'" to any application submitted by the Towns. *Id.* at 70; Ex. 13 (Waiver Letters). Therefore, Region 1 decided to "waiv[e] NPDES permit application and signatory requirements applicable to the . . . municipal satellite collection systems." *Id.* These requirements—including signatory requirements—are present at 40 C.F.R. § 122.21(j); therefore, the Region may waive any or all of these requirements as to the municipal satellites. The purpose of the waiver provision is to "allow the Director to waive *any requirement in paragraph (j)* if the Director has access to substantially identical information." NPDES Application Requirements for POTWs [], 64 Fed. Reg. at 42440 (emphasis added). This broad waiver authority is intended to reduce the inefficiency of redundant information submissions by regulated entities. *Id* at 42435. The Towns' interpretation of the waiver process would undermine this goal by requiring that the Region receive a redundant application before stating that the application is unnecessary.

The Towns' claim that Region 1 may only waive permit application requirements after receiving a waiver application from the permit applicant essentially reiterates their comments. *Pet.* at 18. In any event, EPA disagrees. There is not any requirement for an applicant to request a waiver in the first place. Ex. 5 (RTC) at 71. The waiver request in

section 122.21(j) that is referenced in section 122.21(e) refers to the request that the state director in an authorized state is obligated to submit to EPA if it wants to waive a requirement "that is not of material concern for a specific permit." The Towns further argue that the waiver provisions of section 122.21(j) are "obviously designed to allow waiver of some of the information required" but may not be used to waive the signatory and certification requirements. Ex. 5 (RTC) at 70-71. However, the signatory requirement is intended to certify that the information provided is—to the best of the signatory's knowledge—complete and accurate. 40 C.F.R. § 122.22(d); see also Ex. 5 (RTC) at 71. Such a certification and signature have been received from the operator of the POTW Treatment Plant, and along with other publicly available information has been deemed by the Region to be sufficient to consider the permit application to be complete. *Id.* The signatory and certification requirement serves no purpose if the preceding information has been waived. *Id.*

ii. Consistency with NPDES Regulations, Form 2A, and NPDES Permit Writers Manual

Petitioners assert that the lack of any explicit reference to "co-permittees" or similar label in 40 C.F.R. § 122.21, Form 2A, or the NPDES Permit Writers' Manual, or to "satellite collection systems," precludes Region 1 from framing an NPDES permit to encompass owners and operators of portions of the POTW that are "up system" of the ultimate outfall point but that nevertheless are point sources that add pollutants to waters of the U.S. *Pet.* 14-21. The Towns' attempt to read these materials as some sort of limitation on permit coverage, or the extent of EPA's legal authority under Section 301 and 402, is unconvincing, as these documents are not intended to deal with all possible

permitting variations or configurations that may be necessitated by site-specific information or circumstances relative to a discharge in order to address compliance with the Act. For example, the Permit Writers' Manual does not address the procedures by which dischargers into privately-owned treatment systems may be designated as needing permits. Nor does it discuss the permitting of industrial discharges into a separately permitted municipal storm system.

These materials are also not intended to define the scope of the NPDES permitting program. The Manual is a guidance and does not contain legally binding standards concerning the issuance of NPDES permits. *See* Manual at Cover Page ("Recommendations in this guidance are not binding; the permitting authority may consider other approaches consistent with the CWA and EPA regulations."). Contrary to Petitioners' claim, the Region is not ignoring "EPA's own regulations and EPA's Permit Writers' Manual in favor of creating a regional interpretation of the CWA." *Pet.* at 19. Instead, the Region is interpreting and implementing the regulations with respect to regionally integrated treatment works, with multiple point source operators contributing to a single discharge. It is sufficient that the Act and implementing regulations make reference to discharges of pollutants from point sources to waters of the U.S., terms that encompass discharges from the POTW's collection systems via the treatment plant. *Supra* Section III.A. Accordingly, neither the permit application requirements nor guidance precludes authority to impose NPDES permit requirements on portions of the treatment works upstream of the treatment plant.

C. Petitioners Are Wrong that the Region's Decision to Include the Towns' Collection Systems on the Permit Is a Legislative Rule Subject to Notice and Comment

Petitioners claim that the Region's explanation of its decision to include municipal satellite collection systems, as set forth in the Analysis, is a legislative rule that must be subject to notice and comment, alleging that the Region has gone beyond merely interpreting existing statutes and regulations to broaden the scope of existing legislative authorities. *Pet.* 21-24. Petitioners contend that the scope of that authority has been definitively established by the CFR, EPA's standard permit application forms, and the NPDES Permit Writer's Manual. *Id.* at 23-24. Petitioners further assert that "The Region's Analysis is a binding change in policy because it imposed obligations on the Towns that did not previously exist and, most importantly, "'has binding effect on private parties.'" *Id.* at 25 (quoting *Gen. Elec. Co. v. Envtl. Prot. Agency*, 290 F.3d 377, 382 (D.C. Cir. 2002)). Petitioners assert that, "The Region would not have, and historically has not had, jurisdiction to enforce its policies against the municipalities absent the change proposed by the Region's Analysis," *Pet*. at 22, a claim that neatly encapsulates Petitioners' misunderstanding of the Region's case-by-case approach to making co-permitting decisions, as well as the APA.

As a threshold matter, Petitioners have for the most part simply repeated objections made during the public comment period instead of demonstrating *why* the permitting authority's response to those objections warrants review. *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000). *Compare Pet.* at 21-26 *with* Ex. 5 (RTC) at 78, 83. Review of these issues should denied on this basis.

On the merits, Petitioners' fundamental mistake is to confuse the Region's *explanation* of its authority to include municipal satellite collection systems on NPDES permits based on existing statues and regulation with a purported *expansion* of its jurisdiction. It should be obvious that the Analysis provides the Region with no intrinsic authority to take any action or impose any requirements on any party. Rather, the Region's decision to include the Towns on the CRPCD Permit is entirely founded in the statute and regulations: the Towns are subject to 'binding' requirements as co-permittees under Sections 301 and 402 of the Act, and implementing regulations at 40 C.F.R. Parts 122 and 124, and only then upon consideration of site-specific facts pertaining to the collection systems' performance in the Permit record. The Analysis does not establish binding changes to EPA's permitting practice in the future. The Analysis explicitly provides that "Region 1's decision will be made by applying the law and regulations to the specific facts" and not by automatically regulating operators of satellite collection systems. Ex. 1 (Analysis) at i. This is borne out by the Permit record, which clearly establishes that the Region's decision to include the Towns on the NPDES permit issued to the Treatment Plant was a fact-based decision based on existing statutory and regulatory authority. *Supra* at Section II.C.

Although it is well-established that to obtain review a petitioner must "explain why, in light of the permit issuer's rationale, the permit is clearly erroneous or otherwise deserving of review," Petitioners fail to "substantively confront" material aspects of the Region's actual basis of decision, choosing not to mention the Region's site-specific analysis in their Petition. *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005).

Moreover, while Petitioners ascribe various motives to the Region in preparing the Analysis—*e.g.*, "The Region advanced [its statutory and regulatory arguments] in an effort to avoid the notice and comment requirements that are undeniably necessary to expand its legislative reach and affect [sic] the Region's desired change to regulate satellite collection systems." (*Pet.* at 22-23)—these types of arguments, are conclusory and conjectural, and fail to meaningfully grapple with the record basis of decision. They are, accordingly, insufficient to warrant review.

1. The Region's Legal Analysis Explaining its Approach to Addressing Discharges from Municipal Satellite Collection Systems is Not a Legislative Rule under the APA

The Towns' claim that the Region's Analysis is a legislative rule that ought to be subject to notice and comment under the APA is meritless. Under the APA, there are no procedural requirements when an agency promulgates "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b). The Analysis here is an interpretative statement made by the Region in the context of NPDES permit proceedings. Ex. 1 (Analysis) at i. The decision of whether to include co-permittees in any given NPDES permit is adjudicated on a case-by-case basis in light of the facts and circumstances surrounding the discharge and receiving waters. Therefore, it is not subject to the "notice and comment" requirements of the APA.

An interpretive rule creates no law, but rather is "a clarification or explanation of an existing statute or rule and is issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1st Cir. 1992) (internal quotation marks and citations omitted). Here, in the context of this adjudication on the NPDES permit, EPA simply

restated the definition of publicly owned treatment works in the Act and NPDES regulations to determine that the satellite systems are a part of the POTW at issue and as such it was appropriate to include them in the permit and make them subject to certain permit conditions. Moreover, the Region has clearly stated that the Analysis creates no law, but only describes the Region's current practices and views of the law and "details the legal and policy bases" for prior practices. Ex. 1 (Analysis) at 2. *Warder v. Shalala*, 149 F.3d 73, 80 (1st Cir. 1998) ("[A]n important factor in determining whether a rule is interpretive is the agency's own characterization.").

The "ultimate focus," however, of the inquiry into whether a rule is interpretive or legislative "is whether the agency action partakes of the fundamental characteristic of a regulation, i.e., that it has the force of law." *GMC v. EPA*, 363 F.3d 442, 448 (D.C. Cir. 2004) (quoting *Molycorp, Inc. v. U.S. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999)); *accord Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 227 (D.C. Cir. 2007). A rule has the 'force of law' "(1) when, in the absence of the rule, there would not be an adequate legislative basis for enforcement action; (2) when the agency has explicitly invoked its general legislative authority; or (3) when the rule effectively amends a prior legislative rule." *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003); *see also Syncor Int'l v. Shalala*, 127 F.3d 90, 96 (D.C. Cir. 1997). But, as noted earlier, the Analysis provides the Region with no intrinsic authority to take any action or impose any requirements on any party. Nor has the Region "explicitly invoked its general legislative authority." Moreover, "a rule is considered legislative under the 'amends a prior legislative rule' test 'only if it is inconsistent with another rule having the force of law,'" *Erringer v. Thompson*, 371 F.3d 625, 632 (9th Cir. 2004) (quoting *Hemp Industries*, 333

F.3d at 1088), but, as the Region has explained, there is no inconsistency between the Analysis and existing statutes and regulations. *See* Sections III.A and III.B, *supra*. The statutory and regulatory framework and the definitions of point source, discharge, and POTW are broad enough to encompass the co-permittees' collection systems. *See Warder*, 149 F.3d at 81.

Furthermore, the Analysis does not signify a change in the Region's regulatory practices, but even if it did, "a new position does not necessarily make a rule legislative rather than interpretive." *Metro. Sch. Dist. v. Davila*, 969 F.2d 485, 490 (7th Cir. 1992); *accord Warder*, 149 F.3d at 80-81. Petitioners' assertion that "The Region's Analysis is a binding change in policy because it imposed obligation on the Towns that did not previously exist and, most importantly, "has binding effects on private parties," *Pet.* at 25 (citing *Gen. Elec. Co. v. Envtl. Prot. Agency)*, is without merit. *See Davila*, 969 F.2d at 493 ("All rules which interpret the underlying statute must be binding because they set forth what the agency believes is congressional intent . . . . "[A] rule affecting rights and obligations is [not] *ipso facto* legislative.") (second set of brackets in original); *accord Warder*, 149 F.3d at 82-83.

Lastly, contrary to Petitioners' suggestion, the CFR, Form 2A and the NPDES Permit Writers Manual together do not amount to an "effective 'prior legislative rule'" that is inconsistent with the Region's interpretation of the CWA to allow inclusion of municipal satellite collection systems as co-permittees. *Pet.* at 23. Petitioners' assertion that, by failing to explicitly address the issue of whether municipal satellite collections in regionally operated treatment works are subject to the Act, these documents have effectively established a rule against them is untenable. In addition to being too late in

attempting to raise this argument for the first time before this Board, Petitioners merely assert but provide no legal authority to directly support this novel theory. *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 519 (EAB 2002) (explaining that making unsubstantiated assertions is not enough to accommodate a petitioner's desire for a remand). Finally, neither the CFR nor the Permit Writers' Manual address every possible or conceivable permitting scenario or configuration under Section 402 and 301. *See supra* Section III.B. Moreover, an interpretive "rule does not . . . become an amendment [of a prior legislative rule] merely because it supplies crisper and more detailed lines than the authority being interpreted. If that were so, no rule could pass as an interpretation of a legislative rule unless it were confined to parroting the rule or replacing the original vagueness with another." *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). Petitioners' interpretation would rob EPA of discretion to fashion NPDES permits to carry out Congress' objectives under the Act. *See Davila*, 969 F.2d at 492-93.

2. EPA's Past Rule Making Inquiries Support the Region's Co-Permittee Analysis

Petitioners argue that EPA's past rulemaking inquiries contradict both the Region's Analysis and its claim that it is interpretative, asserting that the "EPA inquiries into regulatory amendments" and preliminary rulemaking activities require EPA to halt its co-permitting practice "[u]ntil such time as EPA addresses this issue on a national level." *Pet.* at 26-27.

Petitioners in large part repeat their comments on the Revised Draft Permit without grappling with the Region's response, *compare Pet.* at 26-27 *with* Ex. 5 (RTC) at 75, 79, while alleging, without further explanation, that the Region's responses were "conclusory, elusive and erroneous," *Pet.* at 26-27. Repetition and rhetoric are

insufficient, however, to warrant review. *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000). Petitioners also impermissibly raise arguments concerning the 2010 rulemaking activity for the first time on appeal.

Substantively, Petitioners' argument is baseless. In 2010, EPA inquired into, among six other questions, whether it should propose a rule that would explicitly "require permit coverage for municipal satellite collection systems." 75 Fed. Reg. 30, 395, 30,401 (June 1, 2010). Similarly, in 2001, EPA contemplated regulations that would have *required* that NPDES permits implement standard conditions throughout a municipal satellite collection system and that NPDES permits be issued either to the owner or operator of the municipal satellite collection system or, where the treatment plant owner/operator that receives wastewater from such collection systems had adequate legal authority to implement the permit conditions in the collection systems, to the owner or operator of the treatment plant. National Pollutant Discharge Elimination System (NPDES) Permit Requirements for Municipal Sanitary Sewer Collection Systems, Municipal Satellite Collection Systems, and Sanitary Sewer Overflows, *proposed for codification at* 40 C.F.R. § 122.38(a).[6]

Contrary to Petitioners' characterization, *Pet.* at 26, nowhere in either action did EPA take the position that it does not have the *authority*, in the absence of regulations, to include satellite collection systems as co-permittees.[7] To the contrary, EPA's national

[6] The proposed rule was withdrawn from the Office of Federal Register in response to a memorandum issued from the Office of the President on the first day of the Bush Presidency. *See* Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 20, 2001).

[7] Similarly, Petitioners' refer to nothing that would suggest the preliminary rulemakings were withdrawn because EPA concluded that it lacked (or even questioned whether it

rulemaking inquiries proceed from the same premise as the Region. Since it started imposing specific collection system requirements, the Region has consistently expressed its view that satellite collection systems were in the scope of NPDES jurisdiction and that permit coverage could be required. In its preliminary rulemakings, EPA asked whether *all* NPDES permitting authorities (EPA and authorized states) should *require* permit coverage for satellite systems. This question clearly assumes that such coverage is within the scope of the CWA's NPDES program. The salient point was not that there was a change in the definition of discharge or the scope of EPA's authority, but that EPA would have made it explicit in regulation that *all* permitting authorities uniformly exercise their authority in this specific way. Petitioners' assertion that, "The Region claims it is entitled to have an interpretation of the CWA and its implementing regulations that is limited to Region 1, that *may* differ from the rest of EPA," *Pet.* at 26 (emphasis added), is unsupported conjecture unworthy of review, *In re Three Mountain Power, LLC*, 10 E.A.D. 39, 58 (EAB 2001).

Petitioners believe the mere existence of unfulfilled EPA inquiries into developing co-permittee requirements for municipal satellite collection systems nationally point to the importance of the issue and fault the Region for forging ahead, in its discretion, with its co-permitting approach. However, even if Region 1's analysis of its legal authority is of national significance, the Towns cite no authority for the proposition that this significance alone should subject Region 1's analysis to national

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had) authority under the CWA to include owners of municipal collection systems as co-permittees.

commentary if such commentary is not required by the APA, and, accordingly, have not identified any basis for review.

D. Massachusetts Regulations at 314 CMR 12.00, as revised, do not Diminish EPA's Authority to Include the Towns' Collection Systems on an NPDES Permit

Petitioners claim that the Region failed to explain why the operation and maintenance of the Towns' sewer systems are not being adequately regulated under the Commonwealth's regulations at 314 CMR 12.00, and claims that the "Region's dismissal of the important role of state regulations in the RTC and issuing the Permit without considering the revisions to 314 CMR § 12.04(2) typifies the cobbled nature of its arguments[.]" *Pet.* at 27-28.

Contrary to Petitioners' assertion, the Region did not 'dismiss' the Commonwealth's regulations, but highlighted the importance of including a comprehensive set of requirements applicable to the entire treatment works in a federally enforceable permit. The Region stated, "EPA's Analysis does not depend on the sufficiency or insufficiency of State regulations. . . State regulations, while welcome, are not subject to EPA enforcement and are not a substitute for permit requirements." Ex. 5 (RTC) at 82. In light of the sewer systems' "interconnectedness" and "the need for a comprehensive and preventative POTW-wide approach to a POTW operated by multiple persons," the Region opted against the fragmentary approach favored by Petitioners. *Id.* at 81-82 (citing Ex. 1 (Analysis) at 1).

Petitioners neither acknowledge nor substantively confront the Region's responses in their Petition for Review. *In re City of Pittsfield*, NPDES Appeal No. 08-19, slip op. at 11-13 (EAB Mar. 4, 2009) (Order Denying Review). Further, although

Petitioners assert that, "These regulations are better tailored to manage municipal separate sewer collection requirements[,]" *Pet.* at 28, that wholly unsubstantiated claim is not enough to warrant review. The Petitioners make no attempt to demonstrate that these regulations would be equivalent to the requirements actually imposed in the Permit, or that they will be more effective when actually implemented, but merely assume that they will be. That may well be Petitioners' belief, but "[s]peculative suggestions fall short of establishing clear error or abuse of discretion on appeal." *In re City of Palmdale*, PSD Appeal No. 11-07, slip op. at 52 n.37 (EAB Sept. 17, 2012). While Petitioners would surely prefer a different permit structure that leaves regulation of the Towns' collection systems solely to the Commonwealth and beyond the reach of the Act, the Region as a matter of policy discretion opted for a different approach, and clearly set out its reasons for doing so on the permit record. Ex. 5 (RTC) at 82. Where the Region has explained its exercise of discretion, and Petitioners have failed to explain how the existence of state regulations regarding sewer systems diminishes EPA's authority to impose permit conditions on the owners of satellite collection systems, Petitioners have identified no basis for the Board to disturb that judgment. *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 397 (EAB 1997).

E. The Permit Language Plainly States That the District and Towns Are Responsible *Only* for Portions of the Collection System That They Own or Operate

The Towns claim that purportedly vague permit language leaves them open to permit violations by the main permittee or the other permittees, stating that the Permit as written "leaves the District, as permittee, and the several Towns, as co-permittees, exposed to liability for violations in satellite collection systems they neither own or

operate." *Pet.* at 29. In support of this assertion, Petitioners cite to language from the Permit providing that "the permittee and each co-permittee shall… " take specified actions. *Id.* at 28-29 (citing Permit Part 1.B and 1C).

Petitioners' objections to the specific permit language cited in the Petition are unpreserved. Although the Region included in the Revised Draft Permit the precise co-permittee language now at issue, and made no changes to it in the Final Permit, no commenter requested the clarification Petitioners now seek.

Petitioners' misreading of the Permit is, in any event, at odds with the Permit and the record. Although Petitioners recite a portion of Part I.C, they seemingly ignore that part of the quoted sentence that specifies that each co-permittee is responsible "for the collection system *which it owns*." (emphasis added). Moreover, throughout these proceedings, the Region has made clear that the Permit holds the District and Towns responsible *only* for portions of the collection system that they own or operate. *See* Ex. 7 (Revised Fact Sheet) at 6; Ex. 1 (Analysis) at 7. In response to concerns by the District that it would be held liable for permit requirements imposed on the Towns, the Region explained that inclusion of the Towns as co-permittees did "not impose any responsibility upon the District for the implementation of the terms and conditions required by the permit that extend beyond the scope of the District's ownership or operational authority." Ex. 5 (RTC) at 4-5. Conversely, the Region also assured the Towns that they would not be held to account for the District's actions. *Id.* at 43; *see also* Ex. 1 (Analysis) at 7. The Region reaffirms its consistent reading of the Permit, which reflects Petitioners' desired interpretation: each permittee is *only* responsible for actions with respect to the portions of the collection system that it owns and operates, and is *not* liable for violations relative

to portions of the collection system operated by others. Not only is this the most natural meaning of the Permit's words, but it also is the Region's interpretation, and, therefore, this meaning is binding on the Region. *In re Austin Power Co.*, 6 E.A.D. 713, 717 (EAB 1997).

IV. CONCLUSION

The Petition should be denied.

Respectfully submitted,

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Samir Bukhari
Michael Curley
Assistant Regional Counsels

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that the Region's Response to the Petition for Review in the matter of Charles River Pollution Control District, NPDES Appeal No. 14-01, contains less than 14,000 words in accordance with 40 C.F.R. § 124.19(d)(3).

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Dated: September 26, 2014

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Samir Bukhari

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Response to the Petition for Review and Statement of Compliance with Word Limitations, in the matter of Charles River Pollution Control District, NPDES Appeal No. 14-01, was served on the following persons in the manner indicated:

By Electronic Filing and Overnight Mail:

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
U.S. EPA East Building, Room 3334
Washington, DC 20004

By U.S. Mail:

Robert D. Cox, Jr., Esq.
Norman E. Bartlett, II, Esq.
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Worcester, MA 01615-0156

Dated: September 26, 2014

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Samir Bukhari