

**UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND**

CONSERVATION LAW FOUNDATION)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES ENVIRONMENTAL)
 PROTECTION AGENCY,)
 Regina McCarthy, Administrator)
)
 and)
)
 UNITED STATES ENVIRONMENTAL)
 PROTECTION AGENCY, REGION 1,)
 H. Curtis Spalding, Regional Administrator)
)
 Defendants.)
 _____)

Case No. 1:15-cv-165-ML-PAS
NO JURY TRIAL

FIRST AMENDED
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The Conservation Law Foundation (“CLF”), on behalf of itself and its individual members who live in Rhode Island and throughout New England, now comes and alleges as follows:

I. NATURE OF THE ACTION

1. This is a citizen suit against Regina McCarthy in her capacity as Administrator of the United States Environmental Protection Agency (respectively, “the Administrator” and “EPA”) and H. Curtis Spalding in his capacity as Regional Administrator of the EPA for Region 1 (collectively, “Defendants”) for failure to carry out two non-discretionary duties under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (“the Clean Water Act,” “the Act,” or “CWA”): first, they have failed to notify certain commercial and industrial dischargers

that they are required to obtain discharge permits under the Rhode Island Pollution Discharge Elimination System because Defendants have determined that these dischargers are contributing to water quality violations and require stormwater controls; and second, they have failed to provide each of these commercial and industrial dischargers with an application for permit coverage. *See* 40 CFR § 124.52(b).

2. As a result of Defendants' failure to carry out these two non-discretionary duties, commercial and industrial stormwater dischargers to Mashapaug Pond in Providence, Rhode Island and Spectacle Pond in Cranston, Rhode Island are contributing to ongoing water quality violations in these ponds. Stormwater pollution from these dischargers has so degraded these ponds that people – including CLF's members – are unable to use them for swimming, boating, fishing, shellfishing, and other uses and activities due in part to toxic cyanobacteria blooms caused by excess phosphorus in the ponds.
3. Also as a result of Defendants' failure to carry out their non-discretionary duties, commercial and industrial stormwater dischargers to Bailey's Brook in Middletown, Rhode Island, North Easton Pond in Newport, Rhode Island, and the Cove and the Sakonnet River in Portsmouth, Rhode Island – all waters of Aquidneck Island – are contributing to ongoing water quality violations in these waters. Stormwater pollution from these dischargers has so degraded these waters that people – including CLF's members – are unable to use these waters and portions of the Atlantic Ocean for swimming, boating, fishing, shellfishing, and other uses and activities due to contamination by both bacteria and toxic cyanobacteria blooms caused by excess phosphorus.

4. To remedy these harms and restore these waters, CLF seeks an order directing Defendants to notify commercial and industrial stormwater dischargers of their obligation to obtain discharge permits and to include an application form with each notice. *See* CWA § 505(a), 33 U.S.C. § 1365(a). CLF also seeks to recover the costs of litigation, including attorneys' and expert witness fees, and to obtain any other relief this Court deems just and proper. CWA § 505(a) & (d), 33 U.S.C. § 1365(a) & (d).

II. JURISDICTION AND VENUE

5. This is a citizen suit under Clean Water Act section 505(a)(2), 33 U.S.C. 1365(a)(2) alleging the "failure of the Administrator to perform [an] act or duty under this chapter which is not discretionary with the Administrator."
6. This Court has subject matter jurisdiction over this action pursuant to Clean Water Act section 505(a), 33 U.S.C. § 1365(a), which provides that "the district courts shall have jurisdiction ... to order the Administrator to perform such an act or duty," as well as 28 U.S.C. § 1331 (original jurisdiction/federal question) and 28 U.S.C. §§ 2201-2202 (declaratory and other relief).
7. The Clean Water Act requires that plaintiffs provide 60 days' notice before filing a citizen suit under CWA § 505(a)(2), 33 U.S.C. § 1365(a)(2). *See* CWA § 505(b)(2), 33 U.S.C. § 1365(b)(2), 40 CFR § 135.2(b).
8. On February 10, 2015, CLF gave notice to Defendants that CLF intended to file this action by sending a 60-day Notice Letter ("the Notice Letter") via certified mail to the Administrator and via first class mail to the Regional Administrator. *See* CWA

§ 505(b)(2), 33 U.S.C. § 1365(b)(2), 40 CFR § 135.2(b). CLF also sent a copy of the Notice Letter to the Attorney General of the United States. 40 CFR § 135.2(b).

9. More than 60 days have passed since CLF mailed the Notice Letter to Defendants and the Attorney General.
10. The Clean Water Act violations complained of in the Notice Letter are of a continuing nature.
11. Defendants remain in violation of the Clean Water Act.
12. Defendants have not acted to redress the violations identified in the Notice Letter and this Complaint.
13. Venue lies in the District of Rhode Island because the waters and the commercial and industrial stormwater dischargers that are the subject of this action are located within the District and because Defendants have an official place of business in this district and perform duties with respect to the subject matter of this Complaint in this district. 28 U.S.C. § 1391(e)(1)(A) & (B).

III. PARTIES

14. Plaintiff CLF is a nonprofit, member-supported environmental advocacy organization incorporated under the laws of Massachusetts, with an office at 55 Dorrance Street, Providence, Rhode Island, 02903, and a principal place of business at 62 Summer Street, Boston, Massachusetts, 02110.
15. CLF is a regional organization with about 4,000 members throughout New England including about 200 members in Rhode Island. CLF is dedicated to protecting New England's environment for the benefit of all people. CLF has a long history of working

- to reduce stormwater pollution by enforcing the Clean Water Act on behalf of its members.
16. CLF has an interest in protecting and restoring the quality and health of Rhode Island's waters on its members' behalf.
 17. CLF also has an interest in protecting and restoring the quality and health of Rhode Island's waters on its own behalf.
 18. CLF's mission includes the conservation, protection, restoration, and enhancement of New England's waters for the benefit of the communities that use these waters.
 19. CLF is therefore a "citizen" who may bring suit pursuant to CWA § 505(a), 33 U.S.C. § 1365(a) and CWA § 505(g), 33 U.S.C. § 505(g).
 20. Members of CLF live near Mashapaug Pond and wish to use the Pond for recreational, aesthetic, and scientific purposes.
 21. CLF's members are unable to fully use and enjoy the Pond as a result of Defendants' failures.
 22. Defendants' failure to notify commercial and industrial stormwater dischargers to Mashapaug Pond that they are required to obtain discharge permits has resulted in uncontrolled, unpermitted discharges that adversely affect CLF members' use and enjoyment of the Pond.
 23. Defendants' failure to provide each of these commercial and industrial dischargers with an application for permit coverage has resulted in uncontrolled, unpermitted discharges that adversely affect CLF members' use and enjoyment of the Pond.
 24. If this Court orders Defendants to comply with the Clean Water Act by requiring that commercial and industrial stormwater dischargers to Mashapaug Pond obtain discharge

- permits, the result will be the widespread implementation of stormwater controls that reduce discharges from these commercial and industrial sites.
25. By requiring permits leading to the implementation of stormwater controls, Defendants' action will reduce discharges of pollution to Mashapaug Pond.
 26. By requiring permits leading to the implementation of stormwater controls, Defendants' action will restore Mashapaug Pond's water quality and redress the harms that Defendants' inaction has caused to CLF and its members.
 27. Members of CLF live on Aquidneck Island and wish to use the Island's waters for recreational, aesthetic, and scientific purposes.
 28. CLF's members are unable to fully use and enjoy Aquidneck Island's waters as a result of Defendants' failures.
 29. Defendants' failure to notify commercial and industrial stormwater dischargers to the waters of Aquidneck Island that they are required to obtain discharge permits has resulted in uncontrolled, unpermitted discharges that adversely affect CLF members' use and enjoyment of these waters.
 30. Defendants' failure to provide each of these commercial and industrial dischargers with an application for permit coverage has resulted in uncontrolled, unpermitted discharges that adversely affect CLF members' use and enjoyment of Aquidneck Island's waters.
 31. If this Court orders Defendants to comply with the Clean Water Act by requiring that commercial and industrial stormwater dischargers to the waters of Aquidneck Island obtain discharge permits, the result will be the widespread implementation of stormwater controls that reduce discharges from these commercial and industrial sites.

32. By requiring permits leading to the implementation of stormwater controls, Defendants' action will reduce discharges of pollution to the waters of Aquidneck Island.
33. By requiring permits leading to the implementation of stormwater controls, Defendants' action will restore the water quality of Aquidneck Island's waters and redress the harms that Defendants' inaction has caused to CLF and its members.
34. Defendant Regina McCarthy is the Administrator of the EPA, and in that capacity is responsible for the supervision, administration, and enforcement of the Clean Water Act, including CWA § 402, 33 U.S.C. § 1342, and its implementing regulations, including 40 CFR §§ 122.26 & 124.52. As Administrator, she has the authority and capacity to remedy the harm inflicted by Defendants' acts and omissions. She is sued in her official capacity only.
35. Defendant H. Curtis Spalding is the Regional Administrator of EPA Region 1, and in that capacity is responsible for the supervision, administration, and enforcement of the Clean Water Act, including CWA § 402, 33 U.S.C. § 1342, and its implementing regulations, including 40 CFR §§ 122.26 & 124.52. As Regional Administrator, he has the authority and capacity to remedy the harm inflicted by Defendants' acts and omissions. He is sued in his official capacity only.

IV. BACKGROUND

The Clean Water Act

36. The Clean Water Act is a major federal environmental statute whose "objective ... is to restore and maintain the chemical, physical, and biological integrity of the Nation's

waters,” in part by eliminating “the discharge of pollutants into the navigable waters.”

CWA § 101(a), 33 U.S.C. § 1251(a).

37. The Clean Water Act defines “navigable waters” as “waters of the United States.” CWA § 502(7), 33 U.S.C. § 1362(7).
38. The water bodies identified in this complaint are all “waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce” and are therefore “waters of the United States” as defined in 40 CFR § 122.2.
39. The Clean Water Act requires all states to adopt water quality standards (“WQS”) for their water bodies, subject to EPA review. CWA § 303(c)(1), 33 U.S.C. § 1313(c)(1). The WQS must: (1) designate uses of the waterway; (2) set water quality criteria; and (3) contain an anti-degradation policy that protects existing uses. *See* CWA § 303, 33 U.S.C. § 1313; 40 CFR § 131.10-12.
40. The Clean Water Act also requires states to identify impaired water bodies that do not meet WQS after the implementation of technology-based controls, and to prioritize and schedule them for development of “Total Maximum Daily Loads” (“TMDLs”). CWA § 303(d), 33 U.S.C. § 1313(d); 40 CFR § 130.7.
41. Each TMDL is designed to reduce the pollution flowing to the water body covered by the TMDL from the entire land area that eventually drains into that water body; this area is referred to as the “watershed” for that water body.
42. TMDLs set the maximum pollutant load that a body of water can receive while still maintaining the WQS, and TMDLs must account for all contributing sources of pollution. CWA § 303(d), 33 U.S.C. § 1313(d).

43. The Clean Water Act and its implementing regulations require that TMDLs include: (1) the “wasteload allocation” (“WLA”), or the portion of the pollutant load allocated to existing or future “point sources”; (2) the “load allocation” (“LA”), or the portion of pollutant load allocated to nonpoint sources; and (3) a margin of safety that takes into account any lack of knowledge concerning the relationship between pollution controls and water quality. CWA § 303(d), 33 U.S.C. § 1313(d); 40 CFR §§ 130.7(c)(1), 130.2(g), (h) & (i).
44. EPA guidance provides that “In many cases, the TMDL analysis is the trigger for determining the source(s) of pollutants” to a water body. U.S. EPA, Water Quality Standards Handbook, Chapter 7: Water Quality Standards and the Water Quality-based Approach to Pollution Control, p. 6 (Jan. 2015), available [here](https://www.epa.gov/sites/production/files/2014-10/documents/handbook-chapter7.pdf) (https://www.epa.gov/sites/production/files/2014-10/documents/handbook-chapter7.pdf).
45. Indeed, other EPA guidance notes the importance of determining the sources of pollutants to affected water bodies as a part of the TMDL-development process: “It is also important to understand the stormwater conveyance methods for each stormwater source in a watershed to determine whether the source is discharging to or affecting the impaired waterbody.” TMDLS TO STORMWATER PERMITS HANDBOOK (DRAFT), § 3.3.2 (November 2008), available [here](https://www.epa.gov/sites/production/files/2015-11/documents/tmdl-sw_permits11172008.pdf) (https://www.epa.gov/sites/production/files/2015-11/documents/tmdl-sw_permits11172008.pdf).
46. These EPA guidance documents are generally echoed by the Rhode Island Department of Environmental Management, which specifically acknowledges in guidance that TMDLs constitute determinations of the sources of pollution to a water body. *See, e.g.*, Rhode

Island Department of Environmental Management, Consolidated Assessment and Listing Methodology for the Preparation of the Integrated Water Quality Monitoring and Assessment Report, 2014 Assessment and Listing Cycle, § 5.5.2, available [here](http://www.dem.ri.gov/programs/benviron/water/quality/pdf/calm14.pdf) (<http://www.dem.ri.gov/programs/benviron/water/quality/pdf/calm14.pdf>) (“In general, the actual sources of impairment are not determined until a TMDL or similar analysis is conducted on the waterbody.”).

47. Moreover, EPA regulations refer to the analyses and conclusions of TMDLs as “determinations of TMDLs.” 40 CFR § 130.7(c)(1).
48. States must submit their TMDLs to the EPA Regional Administrator for approval. CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2); 40 CFR § 130.7.
49. A “point source” is defined under the Clean Water Act as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” CWA § 502(14), 33 U.S.C. § 1362(14).
50. To achieve its objective of eliminating the discharge of pollutants into waters of the United States, the Clean Water Act establishes that the discharge of pollutants into the waters of the United States requires a permit. CWA § 301(a), 33 U.S.C. § 1311(a) (“Except as in compliance with ... section ... 1342 ... of this title, the discharge of any pollutant by any person shall be unlawful.”); CWA § 402(k), 33 U.S.C. § 1342(k) (“Compliance with a permit issued pursuant to this section shall be deemed compliance ... with section[] 1311 ... of this title.”).

51. Permits for point source discharges under the National Pollutant Discharge Elimination System (NPDES) or an EPA-approved state permit program must contain limitations that are “necessary to meet water quality standards.” CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C); 40 CFR § 122.44(d).
52. The Administrator has authority over the Clean Water Act’s permit program, including both the NPDES program and state permit programs. CWA § 101(d), 33 U.S.C. § 1251(d) (establishing Administrator’s authority over CWA generally); CWA § 402, 33 U.S.C. § 1342 (establishing Administrator’s authority over CWA permit program).
53. Specifically, under the Clean Water Act, the Administrator may determine “that [a] stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.” CWA § 402(p)(2)(E), 33 U.S.C. § 1342(p)(2)(E).
54. The Clean Water Act requires a permit for any discharge subject to such a determination. CWA § 301(a), 33 U.S.C. § 1251(a) (requiring a permit for discharges); CWA § 402(p)(1), 33 U.S.C. § 1342(p)(1) (establishing the general rule that stormwater discharges do not require permits during a limited-duration moratorium); CWA § 403(p)(2), 33 U.S.C. § 1342(p)(2) (setting forth exceptions to the general rule that stormwater discharges do not require permits).
55. Additionally, under the Clean Water Act, the Administrator “shall issue regulations ... which designate stormwater discharges ... to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources.” CWA § 402(p)(6), 33 U.S.C. § 1342(p)(6).

56. The Administrator has issued regulations designating stormwater discharges to be regulated and establishing a comprehensive program to regulate such designated sources. *See* 55 Fed. Reg. 48,063; 40 CFR § 122.26.
57. The Administrator's stormwater regulations provide that prior to October 1, 1994, permits shall be required for "a discharge which the Director, or in States with approved NPDES programs, either the director or the EPA Regional Administrator, determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 40 CFR § 122.26(a)(1)(v).
58. The Administrator's stormwater regulations provide that after October 1, 1994, "for discharges composed entirely of storm water, that are not required by paragraph (a)(1) of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if: ... (C) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of 'total maximum daily loads' (TMDLs) that address the pollutant(s) of concern; or (D) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 40 CFR § 122.26(a)(9)(i).
59. The Administrator's stormwater regulations further establish a non-discretionary duty, requiring that "Whenever the Regional Administrator decides that an individual permit is required under this section ... the Regional Administrator shall notify the discharger in writing of that decision and the reasons for it, and shall send an application form with the

notice.” 40 CFR § 124.52(b); *see also* 40 CFR § 124.52(a) (clarifying that 40 CFR § 124.52 applies to determinations made under 40 CFR § 122.26).

60. The Administrator’s stormwater regulations only direct a discharger to apply for a permit within 60 days of receiving notice from the Regional Administrator that a determination has been made requiring the discharger to obtain a permit. 40 CFR § 124.52(b).
61. The Regional Administrator has acknowledged that EPA “has already determined that stormwater is a significant contributor of pollutants or is contributing to a water quality standard (or standards) being exceeded” in certain water bodies throughout New England. *See* March 11, 2014 letter from the Regional Administrator to American Rivers, the Conservation Law Foundation, and the Natural Resources Defense Council, page 1, available [here](http://www.epa.gov/region1/npdes/stormwater/assets/pdfs/RDALetterResponse.pdf) (<http://www.epa.gov/region1/npdes/stormwater/assets/pdfs/RDALetterResponse.pdf>).
62. Defendants have determined that stormwater discharges from commercial and industrial facilities contribute to violations of water quality standards governing bacteria and phosphorus concentrations in several Rhode Island water bodies. Details of these determinations follow below.
63. Defendants have determined that stormwater controls are needed for stormwater discharges from commercial and industrial facilities based on wasteload allocations that are part of TMDLs addressing bacteria and phosphorus concentrations in several Rhode Island water bodies. Details of these determinations follow below.
64. Defendants have failed to notify these commercial and industrial dischargers in writing of these determinations.

65. Defendants have failed to send a permit-application form to these commercial and industrial dischargers.

Defendants' Determinations

Mashapaug Pond

66. Mashapaug Pond is located in the Reservoir Triangle neighborhood of Providence, Rhode Island. According to 2010 census data, the neighborhood is approximately 41% Hispanic, 13% non-Hispanic black, and 14% non-Hispanic Asian. Directly adjacent to the pond is Alvarez High School, whose student body is approximately 68% Hispanic, 15% African American, and 9% Asian. Approximately 80% of Alvarez High School's student body is eligible for free or reduced-price lunch.
67. According to EPA: "Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. EPA has this goal for all communities and persons across this Nation. It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work." *See* U.S. EPA, "What Is Environmental Justice?" available [here](http://www.epa.gov/compliance/ej/) (http://www.epa.gov/compliance/ej/).
68. Mashapaug Pond is listed by EPA as impaired for several criteria, including phosphorus, and is covered by a TMDL addressing violations of water quality standards relating to phosphorus impairment.
69. The Mashapaug Pond TMDL states that elevated phosphorus levels in the pond "contribute to algae concentrations, which in turn contribute to low dissolved oxygen

concentrations that impair fish and animal survival.” Mashapaug Pond TMDL, p. 5, available [here](#)

(<http://www.dem.ri.gov/programs/benviron/water/quality/rest/pdfs/mashpaug.pdf>).

70. The TMDL determines that excess phosphorus levels also “contribute to the growth of blue-green algae species ... that have been identified as hazardous to humans (through skin contact), making Mashapaug Pond unsafe for swimming.” *Id.*
71. The TMDL determines that sampling of Mashapaug Pond in 2001 showed phosphorus concentrations averaging 0.039 mg/L – over 1.5 times the standard of 0.025 mg/L. *Id.* at 19.
72. The TMDL determines that six storm drains discharge directly to the pond, “contribut[ing] 22% of the total phosphorus loading.” *Id.* at 12-13.
73. Charts in the TMDL show that areas contributing runoff to storm drains that discharge into the pond are 75% industrial. *Id.* at 13.
74. The Wasteload Allocation in the TMDL determines that additional controls are necessary to achieve a total phosphorus reduction of 65% from storm drains. *Id.* at 41.
75. The TMDL determines that direct stormwater runoff is responsible for 13% of the phosphorus load to the pond. *Id.* at 13.
76. Charts in the TMDL show that areas contributing runoff to the pond directly are 95% industrial. *Id.*
77. The TMDL also determines that “in addition to pollutant reduction, the volume of stormwater that directly discharges to Mashapaug Pond must be reduced” in order to achieve water quality standards, in particular by reducing impervious cover. *Id.*

78. To accomplish reduction of impervious cover, the TMDL determines that “commercial and industrial property owners . . . must be made aware of their responsibility to institute good housekeeping practices and cognizant of the fact that they contribute to the impairment to Mashapaug Pond.” *Id.* at 57.
79. The TMDL establishes a Waste Load Allocation (WLA) expressed as “a 62% reduction in stormwater point source loads,” plus a 3% margin of safety, and characterizes both discharges from storm drains and direct stormwater discharges as point sources subject to this WLA. *Id.* at 41.
80. Defendants approved the Mashapaug Pond TMDL, explicitly including its stormwater WLA, by letter dated September 27, 2007 available [here](http://www.epa.gov/region1/eco/tmdl/pdfs/ri/mashapaugpond.pdf) (<http://www.epa.gov/region1/eco/tmdl/pdfs/ri/mashapaugpond.pdf>).
81. Since approval of the Mashapaug Pond TMDL, the Pond has continued to suffer low dissolved oxygen, algae blooms (including those containing toxic cyanobacteria), and other effects of excess phosphorus pollution.

Spectacle Pond

82. Mashapaug Pond also receives phosphorus from neighboring Spectacle Pond in Cranston, Rhode Island, via a culvert that passes under Rhode Island Route 10.
83. Spectacle Pond is listed by EPA as impaired for phosphorus and is covered by a TMDL addressing violations of water quality standards relating to phosphorus impairment. *See* 9 Eutrophic Ponds TMDL, available [here](http://www.dem.ri.gov/programs/benviron/water/quality/rest/pdfs/eutropnd.pdf) (<http://www.dem.ri.gov/programs/benviron/water/quality/rest/pdfs/eutropnd.pdf>).
84. The TMDL (which includes both Spectacle Pond and other ponds) determines that “the volume of stormwater generated by the large amounts of impervious areas within the

- eutrophic pond watersheds suggest that it is the major source of impairments to the eutrophic ponds.” *Id.* at 55.
85. The TMDL finds that the percentage of impervious cover is significantly higher for commercial and industrial land uses than other land uses. *Id.* at 53.
86. The TMDL states that Spectacle Pond is located “in a highly urbanized area” where “commercial and industrial land use make up 17% and 10% of the watershed, respectively.” *Id.* at 9.
87. The TMDL states that nineteen storm drains and thirteen “areas of concentrated surface water flow” discharge to Spectacle Pond and hydrologically connected waters. *Id.* at 10.
88. The TMDL requires that the phosphorus load to Spectacle Pond be reduced by 68% and establishes a WLA of 38.6 kg of phosphorus per year to meet this requirement. *Id.* at 52-53.
89. The TMDL’s requirements for implementation of this WLA focus on reducing stormwater discharges to the pond. *Id.*
90. In particular, the TMDL requires a focus on priority outfalls and a feasibility study “to determine the types and locations of BMPs that will be most effective in reducing stormwater volumes and phosphorus loading to the pond to the maximum extent feasible.” *Id.* at 79.
91. Defendants approved the 9 Eutrophic Ponds TMDL, explicitly including its stormwater WLA, by letter dated September 27, 2007, available [here](http://www.epa.gov/region1/eco/tmdl/pdfs/ri/eutrophicponds.pdf) (<http://www.epa.gov/region1/eco/tmdl/pdfs/ri/eutrophicponds.pdf>).
92. Since approval of the 9 Eutrophic Ponds TMDL, Spectacle Pond has continued to suffer the effects of excess phosphorus pollution.

Bailey's Brook and North Easton Pond

93. Bailey's Brook in Middletown, Rhode Island is listed by EPA as impaired for bacteria and is covered by a TMDL addressing violations of water quality standards with respect to bacteria. Bailey's Brook TMDL, available [here](http://www.dem.ri.gov/programs/benviron/water/quality/swbpdf/bailey.pdf) (<http://www.dem.ri.gov/programs/benviron/water/quality/swbpdf/bailey.pdf>), part of the Rhode Island Statewide TMDL for Bacteria Impaired Waters ("the Statewide Bacteria TMDL").
94. The TMDL determines that Bailey's Brook "is a tributary within the Newport public drinking water supply system" and contains elevated levels of the bacterium *Enterococcus*, an indicator of feces carried by stormwater runoff. *Id.* at 4.
95. Sampling of the brook between 2006 and 2008 showed mean bacteria levels ranging from 84 to 713 colonies/100 mL, all significant exceedences of the 54 colonies/100 mL standard for bacteria. *Id.* at 4, 11-12.
96. The TMDL states that the Bailey's Brook watershed is 32% impervious cover, and concludes that stormwater runoff contributes to the Brook's impairment. *Id.* at 5.
97. Defendants approved the Statewide Bacteria TMDL, including the Bailey's Brook TMDL, by letter dated September 22, 2011 available [here](http://www.epa.gov/region1/eco/tmdl/pdfs/ri/RIstatewidebacteriaTMDL.pdf) (<http://www.epa.gov/region1/eco/tmdl/pdfs/ri/RIstatewidebacteriaTMDL.pdf>).
98. Bailey's Brook flows into North Easton Pond and is therefore part of the North Easton Pond watershed.
99. North Easton Pond, which spans the municipalities of Middletown and Newport, Rhode Island is listed as impaired for phosphorus and is covered by a TMDL addressing water quality violations with respect to phosphorus. *See* 9 Eutrophic Ponds TMDL.

100. The TMDL states that “North Easton Pond, along with eight other reservoirs, comprises the drinking water source utilized by the Newport Water Division.” *Id.* at 7.
101. Sampling of North Easton Pond in 2002 showed phosphorus concentrations averaging 0.110 mg/L – over 4 times the standard of 0.025 mg/L. *Id.* at 19.
102. The TMDL states that approximately 19% of North Easton Pond’s watershed is commercial, industrial, and mixed urban development. *Id.* at 7.
103. The TMDL states that “stormwater is likely the most significant source of external phosphorus to the pond,” *id.* at 39, and that stormwater enters North Easton Pond primarily as a result of flow from Bailey’s Brook. As a result, the TMDL concludes that “Bailey’s Brook appears to be the single biggest source of external phosphorus to the pond.” *Id.*
104. The TMDL establishes a WLA of 101.0 kg/yr phosphorus for North Easton Pond and concludes that “achieving standards requires that both the volume of storm water and its phosphorus concentration be reduced.” *Id.* at 55.
105. The TMDL requires a study to identify best management practices specific to North Easton Pond that will “reduc[e] stormwater volumes and phosphorus loading to the pond to the maximum extent feasible.” *Id.*
106. Defendants approved the TMDL for North Easton Pond, explicitly including its stormwater-focused WLA, by letter dated September 27, 2007, available [here](http://www.epa.gov/region1/eco/tmdl/pdfs/ri/eutrophicponds.pdf) (<http://www.epa.gov/region1/eco/tmdl/pdfs/ri/eutrophicponds.pdf>).
107. Since approval of the Statewide Bacteria TMDL and 9 Eutrophic Ponds TMDLs, Bailey’s Brook and North Easton Pond have continued to suffer from elevated bacteria levels and excess phosphorus pollution.

108. The state of Rhode Island recently reaffirmed the degraded state of water bodies on Aquidneck Island. In March 2015, the Rhode Island Department of Environmental Management and Department of Health announced a new “Source Water Protection Initiative” focused on Aquidneck Island’s drinking-water reservoirs, including North Easton Pond. The announcement stated that these “reservoirs are nutrient-enriched and experience frequent algal and cyanobacteria blooms - which impact aquatic life and the reservoirs’ use for drinking water purposes.”

Sakonnet River and Cove

109. Portions of the Sakonnet River and the Cove in Portsmouth, Rhode Island are listed by EPA as impaired for bacteria and are covered by a TMDL addressing water quality violations with respect to bacteria. The Sakonnet River – Portsmouth Park and The Cove – Island Park TMDL (“the Cove TMDL”), available [here](http://www.dem.ri.gov/programs/benviron/water/quality/rest/pdfs/sakonnet.pdf) (<http://www.dem.ri.gov/programs/benviron/water/quality/rest/pdfs/sakonnet.pdf>).
110. The TMDL states that these waters are “adjacent to Portsmouth Park and Island Park, two densely developed areas ... with a mix of commercial and industrial facilities, some of which are located directly adjacent to the shorelines.” *Id.* at 3.
111. The TMDL states that stormwater traveling from developed areas in the Sakonnet/Cove watershed collects sewage from “failing septic systems that flow (via groundwater seeps and/or overland flow) into storm drains, illegal connections to storm drains, and illegal direct discharges,” carries this sewage through stormwater infrastructure, and eventually is discharged through stormwater outfalls, leading to elevated bacteria levels in the Sakonnet River and the Cove. *Id.* at 6, 35.

112. The TMDL establishes a non-numeric WLA requiring the Town of Portsmouth to create and implement a Stormwater Management Plan including runoff control measures. *Id.* at 35.
113. Defendants approved the Cove TMDL, specifically reiterating the TMDL's stormwater-focused WLA requirements, by letter dated April 1, 2005.
114. Since approval of the Cove TMDL, portions of the Sakonnet River and the Cove have remained closed to shellfishing as a result of elevated bacteria levels. *See* [here](#).

V. CAUSES OF ACTION

COUNT I (Violation of Non-Discretionary Duty Under the Clean Water Act):

115. CLF repeats and realleges the allegations set forth in the preceding paragraphs as if fully set forth herein.
116. The Mashapaug Pond and 9 Eutrophic Ponds TMDLs are determinations that stormwater runoff discharged from commercial and industrial sites in the Mashapaug Pond and Spectacle Pond watershed is contributing to violations of water quality standards.
117. The Mashapaug Pond and 9 Eutrophic Ponds TMDLs are determinations that stormwater controls are needed for discharges from commercial and industrial sites in the Mashapaug Pond and Spectacle Pond watershed based on wasteload allocations that are part of these TMDLs.
118. By approving the Mashapaug Pond and 9 Eutrophic Ponds TMDLs, Defendants have determined that stormwater runoff discharged from commercial and industrial sites in the Mashapaug Pond and Spectacle Pond watershed is contributing to violations of water quality standards with respect to phosphorus concentrations.

119. By approving the Mashapaug Pond and 9 Eutrophic Ponds TMDLs, Defendants have determined that stormwater controls are needed for discharges from commercial and industrial sites in the Mashapaug Pond and Spectacle Pond watershed based on wasteload allocations that are part of these TMDLs to address phosphorus concentrations.
120. As a result of these determinations, each of these commercial and industrial dischargers “shall be required to obtain a NPDES permit.” 40 CFR §§ 122.26(a)(i), 122.26(a)(9)(i)(C) & (D).
121. Defendants have violated and are continuing to violate the Clean Water Act by failing to perform their non-discretionary duty to notify these commercial and industrial dischargers that they must obtain discharge permits. 40 CFR § 124.52(b).
122. Defendants have violated and are continuing to violate the Clean Water Act by failing to perform their non-discretionary duty to send a permit-application form to these commercial and industrial dischargers. 40 CFR § 124.52(b).

COUNT II (Violation of Non-Discretionary Duty Under the Clean Water Act):

123. CLF repeats and realleges the allegations set forth in the preceding paragraphs as if fully set forth herein.
124. The Statewide Bacteria and 9 Eutrophic Ponds TMDLs are determinations that stormwater runoff discharged from commercial and industrial sites in the Bailey’s Brook and North Easton Pond watershed is contributing to violations of water quality standards with respect to phosphorus and bacteria concentrations.
125. The 9 Eutrophic Ponds TMDL is a determination that stormwater controls are needed for discharges from commercial and industrial sites in the Bailey’s Brook and North Easton

Pond watershed based on a wasteload allocation that is part of this TMDL to address phosphorus concentrations.

126. By approving the Statewide Bacteria and 9 Eutrophic Ponds TMDLs, Defendants have determined that stormwater runoff discharged from commercial and industrial sites in the Bailey's Brook and North Easton Pond watershed is contributing to violations of water quality standards with respect to bacteria and phosphorus concentrations.
127. By approving the 9 Eutrophic Ponds TMDL, Defendants have determined that stormwater controls are needed for discharges from commercial and industrial sites in the Bailey's Brook and North Easton Pond watershed based on a wasteload allocation that is part of this TMDL to address phosphorus concentrations.
128. As a result of these determinations, each of these commercial and industrial dischargers "shall be required to obtain a NPDES permit." 40 CFR §§ 122.26(a)(i), 122.26(a)(9)(i)(C) & (D).
129. Defendants have violated and are continuing to violate the Clean Water Act by failing to carry out their non-discretionary duty to notify these commercial and industrial dischargers that they must obtain discharge permits. 40 CFR § 124.52(b).
130. Defendants have violated and are continuing to violate the Clean Water Act by failing to carry out their non-discretionary duty to send a permit-application form to these commercial and industrial dischargers. 40 CFR § 124.52(b).

COUNT III (Violation of Non-Discretionary Duty Under the Clean Water Act):

131. CLF repeats and realleges the allegations set forth in the preceding paragraphs as if fully set forth herein.

132. The Cove TMDL constitutes a determination that stormwater controls are needed for discharges from commercial and industrial sites in the Sakonnet River and the Cove watershed based on a wasteload allocation that is part of this TMDL to address bacteria concentrations.
133. By approving the Cove TMDL, Defendants have determined that stormwater controls are needed for discharges from commercial and industrial sites in the Sakonnet River and the Cove watershed based on a wasteload allocation that is part of this TMDL to address bacteria concentrations.
134. As a result of this determination, each of these commercial and industrial dischargers “shall be required to obtain a NPDES permit.” 40 CFR §§ 122.26(a)(i), 122.26(a)(9)(i)(C) & (D).
135. Defendants have violated and are continuing to violate the Clean Water Act by failing to carry out their non-discretionary duty to notify these commercial and industrial dischargers that they must obtain discharge permits. 40 CFR § 124.52(b).
136. Defendants have violated and are continuing to violate the Clean Water Act by failing to carry out their non-discretionary duty to send a permit-application form to these commercial and industrial dischargers. 40 CFR § 124.52(b).

VI. PRAYER FOR RELIEF

WHEREFORE, CLF respectfully requests that this Court:

1. Declare that Defendants have violated and are continuing to violate the Clean Water Act by failing to perform their non-discretionary duty under the Clean Water Act to notify

commercial and industrial dischargers responsible for stormwater runoff in the above-identified watersheds that they must obtain discharge permits;

2. Declare that Defendants have violated and are continuing to violate the Clean Water Act by failing to perform their non-discretionary duty under the Clean Water Act to include a permit application form with each such notice;
3. Order Defendants to comply with the Clean Water Act by notifying commercial and industrial stormwater dischargers in the above-identified watersheds that they must obtain discharge permits;
4. Order Defendants to comply with the Clean Water Act by including a permit application form with each such notice;
5. Award CLF its reasonable costs and attorneys' fees; and
6. Grant such other relief as the Court deems just and proper.

VII. NO PRIOR LAWSUITS

CLF has filed no prior related lawsuits against Defendants seeking redress for these violations under the Clean Water Act.

VII. NO JURY TRIAL DEMAND

Consistent with its right under the Clean Water Act to bring a citizen suit, CLF does not seek a jury trial.

Dated: June 20, 2016

Respectfully submitted,

/s/ Max Greene

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