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December 9, 2021

Department of Energy and Environmental Protection
Bureau of Water Protection and Land Reuse
79 Elm Street Hartford, CT 06106-5127
Via email: DEEP.Commissioner@ct.gov

Re: Petition for a Determination that Certain Commercial, Industrial, and Institutional Property Dischargers Contribute to Water Quality Standards Violations in Subwatersheds of the Naugatuck River, Mad River, and Still River in Litchfield County, Connecticut, and that NPDES Permitting of Such Properties is Required

Conservation Law Foundation (CLF) hereby petitions the Connecticut Department of Energy and Environmental Protection (DEEP) for a determination, pursuant to 40 C.F.R. § 122.26(f)(2),[1] that stormwater discharges (not currently permitted under the NPDES program) from privately owned commercial, industrial, and institutional real properties of half an acre or greater are contributing to a violation of a water quality standard or are significant contributors of pollutants to the East and West Branches of the Naugatuck River, the Naugatuck River, the Mad River, and the Still River in Litchfield County, Connecticut, and that these discharges require permits under the National Pollutant Discharge Elimination System (NPDES).[2]

CLF is a nonprofit organization working to protect the environment and people of New England. One of our goals is to restore the health of New England's waters, many of which are failing to meet basic water quality standards for public health, aquatic habitat, and recreation. CLF is a leader in advocating for stormwater regulation by states and the U.S. Environmental Protection Agency (EPA) under the Clean Water Act to remedy water pollution and flooding problems throughout New England. For example, CLF has petitioned EPA under the Clean Water Act to require cleanup of stormwater discharges from industrial and commercial properties in the Long Creek watershed in Maine and the Charles River, Mystic River, and

[1] "Any person may petition the Director to require a NPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 40 C.F.R. § 122.26(f)(2).
[2] 40 C.F.R. § 122.26(a)(9)(i)(D) ("[F]or discharges composed entirely of storm water . . . operators shall be required to obtain a NPDES permit only if . . . 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.").

Neponset River watersheds in Massachusetts. CLF has also litigated successfully in the Vermont Supreme Court and agency tribunals to require the state's Agency of Natural Resources to extend its Clean Water Act permitting authority to unregulated stormwater discharges in five polluted watersheds surrounding Burlington, Vermont.[3]

Across New England, stormwater pollution poses a major threat to the health of our rivers, lakes, and streams. Stormwater flows off parking lots, roads, and other impervious surfaces, carrying numerous pollutants, trash, and pathogens into our waters.[4] Also known as nonpoint source pollution, stormwater pollution "is now the source of the greatest number of water quality impairments in Connecticut and nationwide."[5] Climate change is exacerbating the problem by contributing to heavier and more frequent rainfall in northeastern states, including Connecticut.[6] Yet progress continues to be slow. Some of our region's most treasured waters—used by millions for recreation, fishing, and tourism—continue to suffer from poor water quality and unacceptably high public health risks due to stormwater runoff. In Connecticut, there is an urgent need for DEEP to use its residual designation authority under the Clean Water Act to remedy water quality impairments caused in whole or in part by stormwater discharges, including the impaired waterbodies at issue in this petition.

I. Factual Background

a. City of Torrington

The East and West Branches of the Naugatuck River flow through the city of Torrington in the Northwest Hills region of Connecticut. Torrington is the largest municipality in Litchfield County, with a population of 36,383. A former mill town, Torrington has struggled economically for years and is designated as a distressed municipality.[7] This designation includes municipalities with high unemployment and poverty, aging housing stock, and low or declining rates of growth

[3] *See In re Stormwater NPDES Petition*, 2006 VT 91; Judgment Order Docket No. 14-1-07 Vermont Environmental Court (Aug. 28, 2008).
[4] U.S. EPA, *NPDES Stormwater Permitting Program*, https://www.epa.gov/npdes/npdes-stormwater-program.
[5] CT DEEP, *Connecticut Nonpoint Source Management Program Plan*, 1 (2019), https://portal.ct.gov/-/media/DEEP/water/nps/2019ctdeepnpsplanpdf.pdf.
[6] U.S. Global Change Research Program, *Fourth National Climate Assessment, Vol. II: Impacts, Risks, and Adaptation in the United States*, 682 (2018), https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf.
[7] CT Dept. of Economic & Community Development, *Distressed Municipalities*, https://portal.ct.gov/DECD/Content/About_DECD/Research-and-Publications/02_Review_Publications/Distressed-Municipalities.

in job creation, population, and per capita income."[8] In 2020, Torrington ranked as the tenth most distressed municipality in Connecticut.[9]

Torrington has significantly more impervious surface cover than any other municipality in the upper northwest corner of Connecticut.[10] The East and West Branches of the Naugatuck River flow directly through downtown Torrington, which is densely developed and has many commercial properties, including several shopping malls with multi-acre parking lots. However, unlike most Connecticut municipalities, Torrington is not covered under the General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer Systems (MS4 General Permit).[11] Municipalities covered under the MS4 General Permit must implement best management practices to prevent or limit pollutants from stormwater discharges from entering local waters.[12] The lack of MS4 requirements in Torrington increases the necessity for DEEP to exercise its RDA authority as a means to control stormwater discharges and address the water quality impairments within the municipality.

i. The Naugatuck River

As mentioned above, the East and West Branches of the Naugatuck River flow through downtown Torrington, adjacent to roads, residential areas, and commercial developments. The East Branch joins the West Branch just north of East Albert Street to form the main stem of the Naugatuck River, which flows south for another 39 miles before merging with the Housatonic River in Derby, Connecticut.[13] There is a bacteria Total Maximum Daily Load (TMDL) for recreational uses of the Naugatuck River regional basin, which includes one of the segments at issue in this petition.[14] Stormwater runoff is listed as a potential source of impairment in the

[8] Conn. Gen. Stat. § 32-9p(b).
[9] CT Dept. of Economic & Community Development, *Distressed Municipalities*, https://portal.ct.gov/DECD/Content/About_DECD/Research-and-Publications/02_Review_Publications/Distressed-Municipalities.
[10] UConn Center for Land Use Education & Research, *Connecticut Land Cover Viewer*, http://clear.uconn.edu/projects/landscape/CT/landcoverviewer.htm#top.
[11] CT DEEP, *MS4 Municipalities* (2018), https://portal.ct.gov/-/media/DEEP/water_regulating_and_discharges/stormwater/municipal/180223MS4MunicipalitiesFeb2018pdf.pdf.
[12] CT DEEP, *General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer Systems* (2016), https://portal.ct.gov/-/media/DEEP/Permits_and_Licenses/Water_Discharge_General_Permits/MS4gppdf.pdf.
[13] Naugatuck River, *Geography and History*, https://naugatuckriver.net/index.php/about-the-river/geography-and-history/.
[14] CT DEEP, *A Total Maximum Daily Load Analysis for Recreational Uses of the Naugatuck River Regional Basin* (2008), https://portal.ct.gov/-/media/DEEP/water/tmdl/CTFinalTMDL/naugatuckRegional (Final E.coli TMDL for the Naugatuck River Regional Basin, including segment CT6900-00_06).

Naugatuck River bacteria TMDL,[15] which also states "that bacterial inputs are highest in the more developed locations" of the River.[16]

The West Branch of the Naugatuck River is about 5.9 miles long. It originates near the northwest municipal boundary of Torrington at the confluence of Jakes Brook, Hart Brook, and Hall Meadow Brook. From there, the river flows south parallel to Norfolk Road (Route 272) through a mostly rural area bordering forestland until it meets Stillwater Pond, a popular area for fishing and boating. South of the pond, the West Branch flows along Riverside Avenue through the northwest outskirts of the city, including some commercial and residential areas, until it reaches the downtown area of Torrington.

Downtown Torrington is densely developed. Large commercial properties abut the West Branch of the River, including the Torrington Commons Shopping Center and a shopping plaza for TJ Maxx, Staples, JOANN Fabrics and Crafts, and Dollar General. Both of these shopping centers have multi-acre parking lots. There are also numerous smaller residential and commercial properties in this area. South of the shopping plazas, the West Branch flows past a baseball field (Fuessenich Park) to the west and joins the East Branch of the River just north of East Albert Street. There is a large vacant parcel just north of the confluence of the branches with over two acres of impervious surface cover.[17]

The East Branch of the Naugatuck River is 11.4 miles long and originates at Lake Winchester near the town of Winchester. The East Branch flows south through forested land for miles along Newfield Road until it reaches the outskirts of Torrington (where Newfield Road becomes Main Street). Varying degrees of hydromodification are affecting the East Branch of the River, including bank alteration, channeling, straightening, slope alteration, riprap, and tree removal. The East Branch flows south past a large multi-acre parking lot serving Town Fair Tire, Price Rite, Laundry Magic Super Laundromat, and Ocean State Job Lot, and then continues past numerous commercial and residential properties in downtown Torrington until it merges with the West Branch of the Naugatuck River.

b. Town of Winchester/City of Winsted

Winchester is a town in Litchfield County north of Torrington, with a population of about 11,000. The downtown area is known as the City of Winsted and is highly developed with

[15] *Id.* at 4.
[16] *Id.* at Appendix A-1.
[17] The impervious surface is approximately 2.4 acres.

substantial impervious surface cover. The area around the town is forested and includes Lake Windsor, Crystal Lake, Highland Lake, and several smaller waterbodies. Like Torrington, Winchester is not covered under the MS4 General Permit.[18] This lack of MS4 coverage in Winchester increases the need for DEEP to exercise its RDA authority to address stormwater pollution in the municipality. Winchester recognizes the need to manage stormwater pollution in its Low Impact Development and Stormwater Management Manual, but the manual is ten years old and its recommendations are not mandatory.[19]

i. Mad River

The Mad River[20] enters Winchester from the town's western boundary and flows east through the Algonquin State Forest.[21] The River is one of the town's two main sources of public drinking water.[22] There is minimal development near the Mad River until it enters downtown Winchester (known as Winsted) from the north and flows along Route 44 past commercial and residential properties. The Mad River joins with the Still River just east of the downtown.[23] The Mad River watershed covers about 20,318 acres and includes three municipalities (Colebrook, Norfolk, and Winchester).[24] Three segments of the Mad River are impaired for the designated use of recreation due to high levels of bacteria.[25] The impaired segments are in Winchester and Norfolk.[26] There is only one permitted stormwater source in the watershed, the Conndot Winchester Maintenance and Repair Facility.[27]

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[18] CT DEEP, *MS4 Municipalities* (2018), https://portal.ct.gov/-/media/DEEP/water_regulating_and_discharges/stormwater/municipal/180223MS4MunicipalitiesFeb2018pdf.pdf.
[19] *Winchester Low Impact Development and Stormwater Management Manual* (2011), https://www.townofwinchester.org/sites/g/files/vyhlif1461/f/uploads/2011-05-02_lid_manual.pdf.
[20] There is another Mad River in Connecticut, which originates in Cedar Lake in Bristol and flows south until it merges with the Naugatuck River in Waterbury.
[21] *Winchester Low Impact Development and Stormwater Management Manual*, 13 (2011), https://www.townofwinchester.org/sites/g/files/vyhlif1461/f/uploads/2011-05-02_lid_manual.pdf.
[22] *Id.* at 14.
[23] *Id.*
[24] CT DEEP, *Statewide Bacteria TMDL - Mad River Watershed Summary*, 1-2 (2012), https://portal.ct.gov/-/media/DEEP/water/tmdl/CTFinalTMDL/madriver4302 ("Segment 1 of the Mad River has a water quality classification of B. Designated uses include habitat for fish and other aquatic life and wildlife, recreation, and industrial and agricultural water supply. The Mad River (Segment 2a) has a water quality classification of A. Designated uses include potential drinking water supplies, habitat for fish and other aquatic life and wildlife, recreation, and industrial and agricultural water supply. The Mad River (Segment 3) has a water quality classification of AA. Designated uses include existing or proposed drinking water supplies, habitat for fish and other aquatic life and wildlife, recreation, and industrial and agricultural water supply. These segments are impaired due to elevated bacteria concentrations, affecting the designated use of recreation.").
[25] *Id.* at 1.
[26] *Id.* at 12.
[27] *Id.* at 9, 11.

The statewide bacteria TMDL watershed summary for the Mad River identifies stormwater runoff as a potential source of bacteria in the watershed.[28] Much of the watershed is forested, but "portions of the watershed near the eastern portion of the watershed have a higher percentage of impervious cover."[29] Notably, "Winsted has an impervious cover greater than 7% with some [of] the extreme eastern areas ranging from 12-15%, indicating that stormwater runoff may be a source of bacteria."[30] Areas of the watershed with high impervious surface cover have high wet-weather levels of bacteria, which indicates that stormwater runoff is the source of these contaminants.[31] DEEP recognizes a correlation between impervious surface and bacteria in its approach to analyze the potential impact from stormwater discharges and potential for water quality impairment.

ii. Still River

The Still River[32] originates in Torrington and flows north along Route 8 on the eastern side of Winchester.[33] South of Winchester, the River flows past scattered commercial properties, which range in size from less than an acre to several acres, and then enters Winchester, where it flows past Northwest Connecticut Community College and many commercial and residential properties. The River continues along Route 8 north of Winchester past several large multi-acre commercial and industrial properties. The Winchester Low Impact Development and Stormwater Management Manual notes that "the water quality [in the Still River] is degraded, and some areas are designated as being impaired."[34] The manual recommends that "new developments or redevelopment in this area should seek to improve water quality in the watershed."[35] It also recommends that "[a]reas of existing industrial development should be encouraged to retrofit stormwater quality controls to help improve the overall water quality of the river."[36]

The Still River watershed covers about 10,315 acres and includes four municipalities, including Winchester and Torrington.[37] Three segments are impaired for the designated use of

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[28] *Id.* at 8.
[29] *Id*. at 15.
[30] *Id.*
[31] *Id.* at 19.
[32] There are two other Still Rivers in Connecticut (a tributary to the Housatonic River in Western Connecticut and a tributary to the Natchaug River in Central Connecticut).
[33] *Winchester Low Impact Development and Stormwater Management Manual*, 13 (2011), https://www.townofwinchester.org/sites/g/files/vyhlif1461/f/uploads/2011-05-02_lid_manual.pdf.
[34] *Id.*
[35] *Id.* at 14.
[36] *Id.*
[37] CT DEEP, *Statewide Bacteria TMDL - Still River Watershed Summary*, 1 (2012), https://portal.ct.gov/-/media/DEEP/water/tmdl/CTFinalTMDL/stillriver4303.

recreation due to high levels of bacteria.[38] The statewide bacteria TMDL watershed summary for the Still River identifies stormwater runoff as a potential bacteria source in the watershed.[39] The impaired segments are in Torrington, Winchester, and Colebrook—none of which are covered under the MS4 General Permit.[40] In addition, areas surrounding Segments 3 and 4 of the Still River "have an impervious cover of 7-11% or 12-15%, indicating that stormwater runoff may be a source of bacteria."[41] The TMDL analysis concludes that "these segments are likely receiving bacteria from stormwater runoff" because the surrounding areas "are the most heavily developed in the watershed."[42]

II. Statutory and Regulatory Background

Congress enacted the Clean Water Act (CWA) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[43] To achieve these objectives, the CWA prohibits the "discharge of a pollutant"[44] by "any person"[45] from any "point source"[46] into the waters of the United States, except when the discharge is authorized pursuant to a National Pollutant Discharge Elimination System (NPDES) permit.[47]

The CWA directs states to establish minimum water quality standards (WQS) to carry out the overall purpose of the Act.[48] These standards define a state's water quality goals by

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[38] *Id.* ("Segments 2 and 3 of the Still River have a water quality classification of B. Designated uses include habitat for fish and other aquatic life and wildlife, recreation, and industrial and agricultural water supply. The Still River (Segment 4) has a water quality classification of A. Designated uses include potential drinking water supplies, habitat for fish and other aquatic life and wildlife, recreation, and industrial and agricultural water supply. These segments are impaired due to elevated bacteria concentrations, affecting the designated use of recreation.").
[39] *Id.* at 8.
[40] *Id.* at 14.
[41] *Id.* at 18.
[42] *Id.* at 19.
[43] 33 U.S.C. § 1251(a). The United States Supreme Court has recognized that this objective incorporates "a broad, systematic view of the goal of maintaining and improving water quality," and that the word "integrity," as intended by Congress in the Act's statement of purpose, "refers to a condition in which the natural structure and function of ecosystems [are] maintained." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 132 (1972) (quoting H.R. Rep. No. 92- 911, at 76).
[44] In pertinent part, the CWA defines the term "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A); 40 C.F.R. § 122.2 (stating that this definition "includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man.").
[45] The CWA defines "person" as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." *Id.* § 1362 (5).
[46] In pertinent part, the CWA defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . from which a pollutant is or may be discharged." *Id.* § 1362(14).
[47] 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."); 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.").
[48] 33 U.S.C. § 1313; 40 C.F.R. § 131.2.

"designating the use or uses to be made of the water and by setting criteria necessary to protect those uses."[49] Connecticut has established, and EPA has approved, water quality standards pursuant to this requirement.[50]

The CWA also requires states to identify impaired waterbodies that do not meet WQS after the implementation of technology-based controls, and to prioritize and schedule them for the development of TMDLs.[51] Each TMDL is designed to reduce the pollution flowing to the waterbody from the entire area that drains into that waterbody. This area is referred to as the "watershed" for that waterbody. TMDLs set the maximum pollutant load that a waterbody can receive while still meeting WQS, and TMDLs must account for all contributing sources of pollution,[52] including nonpoint sources.

The CWA and its implementing regulations require TMDLs to include: (1) the "waste load allocation", or the portion of the pollutant load allocated to existing, or future, point sources; (2) the "load allocation", or the portion of pollutant load allocated to nonpoint sources; and (3) a "margin of safety" that considers any lack of knowledge concerning the relationship between pollution controls and water quality.[53] EPA guidance explains that "in many cases, the TMDL analysis is the trigger for determining the source(s) of pollutants" to a waterbody.[32] Making these determinations is a critical part of the TMDL development process because it is "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."[33] As discussed above, multiple segments of the rivers in this petition are subject to TMDLs for bacteria, which identify stormwater runoff as a likely contributing source.

It is well settled that "[s]torm sewers are established point sources subject to NPDES permitting requirements."[54] In fact, EPA recognized decades ago that "[f]rom a legal standpoint [] most urban runoff is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the CWA."[55] NPDES permits, "while authorizing some water pollution, place important restrictions on the quality and character of that licit

[49] 40 C.F.R. § 131.2.
[50] R.C.S.A. §§ 22a-426-1—22a-426-9.
[51] 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7.
[52] 33 U.S.C. § 1313(d).
[53] 33 U.S.C. § 1313(d); 40 C.F.R. §§ 130.7(c)(1), 130.2(g), (h) & (i).
[54] *Envt'l Def. Ctr. v. U.S. EPA*, 319 F.3d 398, 407 (9th Cir. 2003) (citing *NRDC v. Costle*, 568 F.2d 1369 at 1377 (D.C. Cir. 1977)).
[55] National Pollutant Discharge Elimination System (NPDES) Application for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,991 (Nov. 16, 1990).

pollution."[56] Those restrictions include categorical technology-based effluent limitations that apply to all dischargers, and more stringent individualized limitations as necessary to meet minimum WQS.[57]

In 1987, Congress amended the NPDES provisions for stormwater, directing EPA to phase in a comprehensive national regulatory program for stormwater discharges.[58] Congress singled out five categories of high-priority stormwater discharges for immediate and ongoing regulation through NPDES permitting.[59] These focused on well-documented and significant sources of stormwater pollution, such as runoff associated with industrial activities and large urban areas. However, Congress also required NPDES permits for any stormwater discharge that the EPA Administrator or State Director[60] determines "contribute[s] to a violation of a water quality standard or is a significant contributor of pollution to waters of the United States."[61] This mandate is commonly known as EPA's residual designation authority (RDA).[62]

EPA's Phase I stormwater rule continued to recognize the need for "immediate permitting" of stormwater discharges that contribute to violations of WQS.[63] In its Phase II stormwater rule, EPA affirmed the importance of immediately regulating stormwater discharges that contribute to water quality impairments.[64] The Phase II rule went a step further, however, and authorized EPA to issue RDA discharge-permit determinations "on a geographic or a

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[56] *Waterkeeper Alliance v. U.S. EPA*, 399 F.3d 486, 491 (2d Cir. 2005).
[57] *See* 33 U.S.C. § 1311(b).
[58] 33 U.S.C. §§ 1342(p)(4), (6). Congressional dissatisfaction with the slow pace of NPDES implementation for stormwater is evident in the legislative history of the 1987 amendments, such as this statement from Senator Durenberger during floor debate: "The Federal Water Pollution Control Act of 1972 required all point sources, including storm water discharges, to apply for NPDES permits within 180 days of enactment. Despite this clear directive, E.P.A. has failed to require most storm water point sources to apply for permits which would control the pollutants in their discharge. The conference bill therefore includes provisions which address industrial, municipal, and other storm water point sources. I participated in the development of this provision because I believe it is critical for the Environmental Protection Agency to begin addressing this serious environmental problem." 133 Cong. Rec. S752 (daily ed. Jan. 14, 1987).
[59] *Id.* §§ 1342(p)(1), (p)(2)(A)-(E).
[60] For states like Connecticut that have delegated authority to administer the NPDES permit program within their state.
[61] 33 U.S.C. § 1342(p)(2)(E); 40 C.F.R. § 122.26(a)(1)(v).
[62] U.S. EPA, *EPA's Residual Designation Authority*, https://www.epa.gov/npdes/epas-residual-designation-authority.
[63] National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47990, 47993 (Nov. 16, 1990).
[64] *See* Regulations for Revision of the Water Pollution Control Program Addressing Stormwater Discharge, 64 Fed. Reg. 68,721, 68,781 (Dec. 8, 1999), *codified at* 40 C.F.R. §§ 122.26(a)(1)(v) and 122.26(a)(9)(i)(D). See also *Envt'l Def. Ctr. v. EPA*, 344 F.3d 832, 875-76 (9th Cir. 2003) (upholding inclusion of residual designation authority against industry challenge).

categorical basis within identified geographic areas such as a State or watershed."[65] This action "expanded [the agency's] authority to issue permits on a significantly broader basis, for wholesale categories of discharges in a geographic area."[66] EPA explained that this broader permitting authority would "facilitate and promote" the overarching goal of "coordinated watershed planning."[67]

Importantly, exercise of "the Agency's residual designation authority is not optional."[68] Once the agency determines that a discharge, or a category of discharges, is contributing to a violation of WQS or significantly contributes to pollution in a waterbody, the operator(s) of those discharges "shall be required to obtain a [NPDES] permit."[69] EPA has explained that "designation is appropriate as soon as the adverse impacts from storm water are recognized."[70] While EPA has not defined a threshold level of pollutant contribution that triggers such a finding, the agency has acknowledged that it "would be reasonable to require permits for discharges that contribute more than *de minimis* amounts of pollutants identified as the cause of impairment to a water body."[71] This EPA analysis has been recognized as a valid interpretation of the RDA threshold by the Vermont Supreme Court.[72]

RDA determinations may be made directly at the initiative of the NPDES permitting authority or from the development of a waste load allocation in a TMDL analysis.[73] Additionally, any person may petition the Director[74] or Regional Administrator to designate a discharge or a category of discharges.[75] Once an RDA petition is submitted to the Director or the

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[65] 64 Fed. Reg. 68, 736 (codified at 40 C.F.R.§ 122.26(a)(9)(i)(D)).
[66] *In re Stormwater NPDES Petition*, 2006 VT 91, ¶ 12.
[67] 64 Fed. Reg. 68,739; *see also In re Stormwater NPDES Petition*, 2006 VT 91, ¶ 12.
[68] *In re Stormwater NPDES Petition*, 910 A.2d 824, 835 (Vt. 2006).
[69] 40 C.F.R. § 122.26(a)(9)(i)(D); *see also* 33 U.S.C. § 1342(p)(2)(E) (requiring NPDES permits for discharges composed entirely of stormwater that are determined to contribute to a violation of a water quality standard).
[70] *Letter from Tracy Mehan, III, EPA Assistant Administrator to Elizabeth McLain, Secretary, Vermont Agency of Natural Resources re: guidance on issues related to permits for discharges to impaired waters*, (Sept. 16, 2003) (citing James R. Elder, Director EPA Office of Water Enforcement and Permits, *Designation of Stormwater Discharges for Immediate Permitting* at 2 (Aug. 8, 1990)).
[71] *See id.* at 3.
[72] *In re Stormwater NPDES Petition*, 2006 VT 91, ¶ 28, n.6.
[73] *See* 40 C.F.R. § 122.26(a)(9)(i)(C).
[74] The term "Director" means either the EPA Regional Administrator or the director of the state NPDES permitting authority, as the context requires. 40 C.F.R. § 122.2. Where EPA retains the authority to take certain actions even when there is an approved state program, as it does with RDA designation, 40 C.F.R. § 122.26(a)(9)(i)(C), the term Director may also mean the Regional Administrator. *Id.*
[75] 40 C.F.R. § 122.26(f)(2). *See also In re Stormwater NPDES Petition*, 2006 VT 91, ¶¶ 12-14 (RDA petitions need not be made on a case-by-case basis, but may seek designation for whole classes of discharges).This petition authority is also compelled by Congress's mandate that EPA and the states provide for and encourage "public participation in the development … and enforcement of any regulation, standard, effluent limitation, plan or program" established under the Act. U.S.C. § 1251(e).

Regional Administrator, a final decision on the petition must be made within 90 days of its receipt.[76]

Federal courts have held that, once EPA or a Director determines that a stormwater discharge contributes to a violation of a WQS or significantly contributes to pollution in waters of the United States, the regulator *must* " (1) engage in the NPDES permitting process for the discharge at issue or (2) prohibit the discharge."[77] Notably, EPA or a state cannot simply point to the existence of other programs to address stormwater and assert that these programs are sufficient: "Unless these programs prevent such contributions altogether or reduce them to de minimis amounts, they cannot justify the Agency's decision not to issue a [NPDES] permit."[78] Once the regulator determines that there is "sufficient data available to demonstrate that stormwater discharges are contributing to water quality impairments . . . the statute *require[s]* EPA [or the state regulator] to engage in the permitting process or prohibit the discharge."[79]

III. The Contributing Discharges Require an NPDES Permit Because They Contribute to Ongoing Violations of Water Quality Standards and/or They Are Significant Contributors of Pollutants to the Rivers

The CWA and EPA's implementing regulations require federal permits for all existing stormwater discharges that contribute to violations of WQS or are significant contributors of pollutants.[80] DEEP and EPA acknowledge that stormwater runoff from impervious land uses like commercial, industrial, and institutional properties significantly contributes to water pollution in receiving waterbodies.[81] Current data and information indicates that stormwater discharges are impairing multiple segments of the rivers at issue in this petition, causing them to fail to meet state WQS and significantly contributing to pollution levels in these waterbodies.

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[76] 40 C.F.R. § 122.26(f)(5).
[77] *Los Angeles Waterkeeper v. Pruitt*, 320 F. Supp. 3d 1115, 22 (C.D. Cal. 2018), *order clarified*, No. 2:17-CV-03454-SVW-KS, 2018 WL 6071084 (C.D. Cal. Oct. 17, 2018); *see also Blue Water Baltimore v. Wheeler*, No. CV GLR-17-1253, 2019 WL 1317087, at *5 (D. Md. Mar. 22, 2019)("EPA demurred from answering . . . whether the stormwater discharges at issue contribute to violations of water quality standards—because it apparently preferred to address the environmental impacts of stormwater discharges through existing programs. This EPA may not do.").
[78] *Blue Water Baltimore*, 2019 WL 1317087 at *5.
[79] *Los Angeles Waterkeeper*, 320 F. Supp. 3d at 1123 (emphasis in original).
[80] 33 U.S.C. § 1342(p)(2)(E); 40 C.F.R. §§ 122.26(a)(1)(v), 122.26(a)(9)(i)(C) & (D).
[81] *See, e.g.*, CT DEEP, *2020 Integrated Water Quality Report*, 51 (2020), https://portal.ct.gov/-/media/DEEP/water/water_quality_management/305b/2020/2020IWQRFinal.pdf.

Connecticut's 2020 305b Assessment Results for Rivers and Streams[82] indicate that several segments of the rivers discussed in this petition are not supporting their designated uses. Relevant excerpts from the Assessment are included in Appendix 1 and summarized below:

- **Mad River:** Three segments (9.18 miles) of the Mad River are not supporting the designated use of recreation, and two segments (5.8 miles) are not supporting the designated use for aquatic life.[83]
- **Still River:** Three segments of the Still River (11.9 miles) are not supporting the designated use of recreation. One segment (1.67 miles) is not supporting the designated use for aquatic life. There was insufficient information to determine whether the longest segment (7.56 miles) supports the designated use of recreation.[84]
- **East Branch of the Naugatuck River:** One segment (1.33 miles) of the East Branch is not supporting the designated use for aquatic life. There was insufficient information to determine whether this segment supports the designated use of recreation.[85]
- **West Branch of the Naugatuck River:** One segment (0.97 miles) of the West Branch is not supporting the designated use for aquatic life.[86] Hart Brook, a tributary of the West Branch, is also not supporting the designated use for aquatic life.[87]
- **Naugatuck River:** Three adjacent segments of the main stem of the Naugatuck River in Torrington and surrounding towns (13.07 miles) are not supporting the designated use for aquatic life. The longest of these segments (9 miles) is not supporting the designated use of recreation, and there was insufficient information to determine whether the other two segments support recreation.[88] These three segments are downstream from the confluence of the East and West Branches of the Naugatuck River in downtown Torrington.

[82] CT DEEP, *Connecticut 305b Assessment Results for Rivers and Streams* (2020), https://portal.ct.gov/-/media/DEEP/water/water_quality_management/305b/2020/2020IWQRAppendixA1.pdf.
[83] *Id.* at 42.
[84] *Id.* at 43.
[85] *Id.* at 106.
[86] *Id.* at 105.
[87] *Id.*
[88] *Id.* at 103.

Several of these segments are included in Connecticut's list of impaired waterbodies[89] due to their inability to support their designated use as habitat for fish, other aquatic life, and wildlife.[90] This list includes segments of the Still River,[91] the East and West Branches of the Naugatuck River,[92] and the Naugatuck River.[93] The cause of impairment in these segments is reported as "cause unknown" except for one segment of the Naugatuck River, for which total phosphorus is identified as the cause of impairment.[94] This segment is included in Connecticut's Priority List of Waters for Action Plan Development.[95] None of the other impaired segments discussed above are included in the priority list.

Certain segments of all the rivers included in this petition are subject to TMDLs for bacteria. Three segments of the Mad River[96] and three segments of the Still River[97] are covered under the statewide 2012 bacteria TMDL.[98] There is also a bacteria TMDL for the Naugatuck River regional basin, which covers one of the segments at issue in this petition.[99] As discussed above, the TMDLs indicate that stormwater runoff from unpermitted sources contributes to ongoing WQS violations in several of the river segments at issue in this petition.

Stormwater runoff is also a likely source of impairment in the other impaired segments that are not currently covered under a TMDL. Notably, DEEP's 2020 Integrated Water Quality Report says that "Monitoring and assessment data used to determine the attainment of CT WQS and designated uses are *generally insufficient to provide specific indication of causes or sources*

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[89] "A waterbody is generally considered impaired when one or more sources of data or information indicate a water quality standard is not attained, providing that information is considered sufficient and credible. In resolving discrepancies in conflicting information, consideration is given to data quality, age, frequency and site-specific environmental factors. If reconciliation of conflicting data is not possible or the data are determined to be insufficient, the assessment unit is flagged for further monitoring." CT DEEP, *2020 Integrated Water Quality Report*, 13 (2020), https://portal.ct.gov/-/media/DEEP/water/water_quality_management/305b/2020/2020IWQRFinal.pdf.

[90] CT DEEP, *List of Impaired Waters for Connecticut* (2020), https://portal.ct.gov/-/media/DEEP/water/water_quality_management/305b/2020/2020IWQRAppendixB1.pdf.

[91] *Id.* at 10.

[92] *Id.* at 30.

[93] *Id.*

[94] *Id.* (Naugatuck River-07, Waterbody Segment ID CT6900-00_07).

[95] CT DEEP, *Priority List of Waters for Action Plan Development*, 5 (2020), https://portal.ct.gov/-/media/DEEP/water/water_quality_management/305b/2020/2020IWQRAppendixC1.pdf (TMDL Alternative, Phosphorus Discharges to Freshwater Wadable Streams).

[96] CT4302-00_01, CT4302-00_02a, and CT4302-00_03. CT DEEP, *Statewide Bacteria TMDL - Mad River Watershed Summary* (2012), https://portal.ct.gov/-/media/DEEP/water/tmdl/CTFinalTMDL/madriver4302.

[97] CT4303- 00_02, CT4303- 00_03, and CT4303- 00_04. CT DEEP, *Statewide Bacteria TMDL - Still River Watershed Summary* (2012), https://portal.ct.gov/-/media/DEEP/water/tmdl/CTFinalTMDL/stillriver4303.

[98] CT DEEP, *TMDLs*, 5, https://portal.ct.gov/-/media/DEEP/water/tmdl/CTFinalTMDL/CTTMDLs.pdf.

[99] CT DEEP, *A Total Maximum Daily Load Analysis for Recreational Uses of the Naugatuck River Regional Basin* (2008), https://portal.ct.gov/-/media/DEEP/water/tmdl/CTFinalTMDL/naugatuckRegional.

of impairment or potential sources of stress to a water body."[100] Thus, more targeted research and monitoring is necessary to precisely identify sources of pollution that are causing impairment in the affected waterbodies.

However, the available information[101] indicates that stormwater pollution significantly contributes to impairment of the rivers in this petition. For example, DEEP notes: "Developed areas whether industrial, commercial, residential or urban can contribute pollutants through stormwater runoff . . . Impervious cover, stormwater drainage systems and over land flow are primary factors in the transport of these pollutants to surface waters."[102] Connecticut's Nonpoint Source Management Program Plan also identifies stormwater as a common source of impairment to designated uses, including aquatic habitat and recreation[103] (the designated uses at issue in this petition). The plan notes that "in general, the higher the percentage of impervious cover within a watershed, the lower the water quality and support for aquatic life."[104]

IV. DEEP's Residual Designation Should Include, as a Class, All Existing Non-Permitted Commercial, Industrial, and Institutional Property Dischargers Within the Watersheds with a Half-Acre or More of Impervious Surface

The lack of MS4 permit requirements in Torrington, Winchester, and other towns along the rivers in this petition has resulted in minimal efforts to address stormwater pollution in these jurisdictions, despite their substantial impervious surface cover. The impaired river segments in this petition correlate to areas with high levels of impervious surface cover, which include many properties that should be subject to NPDES permitting requirements.[105] Only requiring NPDES permits for point sources that contribute to the receiving waterbodies is insufficient to attain state

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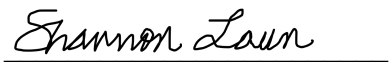
[100] CT DEEP, *2020 Integrated Water Quality Report*, 50 (2020), https://portal.ct.gov/-/media/DEEP/water/water_quality_management/305b/2020/2020IWQRFinal.pdf (emphasis added).
[101] DEEP notes, "General information, where available, can help to identify sources potentially contributing to the observed impairments . . . there are circumstances that are generally prone to contribute pollutants to waterbodies which may have an impact on designated uses." *Id.* at 51.
[102] *Id.*
[103] CT DEEP, *Connecticut Nonpoint Source Management Program Plan*, 11 (2019), https://portal.ct.gov/-/media/DEEP/water/nps/2019ctdeepnpsplanpdf.pdf.
[104] *Id.* at 2.
[105] Connecticut does have a general stormwater permit for commercial properties, which "requires operators of large paved commercial sites such as malls, movie theaters, and supermarkets to undertake actions such as parking lot sweeping and catch basin cleaning to keep stormwater clean before it reaches water bodies." CT DEEP, *Commercial Stormwater*, https://portal.ct.gov/DEEP/Water-Regulating-and-Discharges/Stormwater/Commercial-Stormwater. However, there is no publicly available information about which entities are registered under this permit and no enforcement data on DEEP's website. The ongoing impairment of numerous river segments in Connecticut, despite the commercial stormwater permit, indicates that this permit is inadequate and more effective stormwater control measures are required to limit the pollution.

WQS and protect designated uses. Available data indicates that stormwater runoff is significantly contributing to impairment and high pollution levels in these waterbodies, and these discharges must also be subject to NPDES permitting requirements to limit the pollution.

NPDES stormwater permits should be required for all commercial, industrial, and institutional property dischargers with a half-acre or more of impervious surface located within the watersheds identified in this petition. The largest of these properties are multi-acre parking lots and the roofs of big-box stores, some of which are immediately adjacent to the impaired waterbody. While these properties are the most obvious sources of stormwater runoff in the watersheds, there are also numerous smaller properties with a half-acre or more of impervious surface whose cumulative impact is significant. These contributing sources must be subject to NPDES permit requirements to limit stormwater pollution and help these rivers meet state WQS and support their designated uses.

CLF therefore petitions DEEP to exercise its residual designation authority and require commercial, industrial, and institutional properties with a half-acre or more of impervious surface within the subwatersheds of the Naugatuck River (including the East and West Branches), the Mad River, and the Still River in Litchfield County, Connecticut, to obtain NPDES permits in order to reduce pollutant runoff and improve water quality in the state.

Respectfully submitted on behalf of Conservation Law Foundation on December 9, 2021,



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Appendix A

Waterbody Segment ID	Waterbody Name	Location	Miles	Aquatic Life	Recreation
CT4302-00_01	Mad River (Winchester)-01	Mouth at Still River, US to Mad River Dam outlet, Winchester.	2.24	Fully Supporting	Not Supporting
CT4302-00_02a	Mad River (Winchester)-02a	From Mad River Dam outlet, Wincheter, US to outlet from Rugg Brook Reservoir.	1.77	Not Assessed	Not Supporting
CT4302-00_02b	Mad River (Winchester)-02b	Confluence Rugg Brook Reservoir outlet, US to diversion entrance for Rugg Brook Reservoir.	.63	Not Supporting	Not Assessed
CT4302-00_03	Mad River (Winchester)-03	From diversion entrance for Rugg Brook Reservoir (boundary of drinking water watershed), US to headwaters at Spaulding Pond outlet dam, Norfolk.	5.17	Not Supporting	Not Supporting
CT4303-00_02	Still River (Colebrook)-02	From confluence with Sandy Brook, Colebrook, US to Winchester (Winsted) POTW (east side of Route 8), Winsted.	2.67	Fully Supporting	Not Supporting
CT4303-00_03	Still River (Winsted)-03	From Winchester (Winsted) POTW, US to confuence with Mad River (just US of Route 44/183 crossing).	1.67	Not Supporting	Not Supporting
CT4303-00_04	Still River (Winsted/Torrington)-04	From confuence with Mad River (just US of Route 44/183 crossing), US to headwaters (on west side of Route 8, paralell with Exit 45 offramp), Torrington.	7.56	Insufficient Information	Not Supporting
CT6900-00_06	Naugatuck River-06	From confluence with Thomaston WPCF outfall (just US of confuence with Branch Brook), Thomaston, US to confluence with Spruce Brook (west side of Route 8), Litchfield/Harwinton town border.	9	Not Supporting	Not Supporting
CT6900-00_07	Naugatuck River-07	From confluence with Spruce Brook (west side of Route 8), Litchfield/Harwinton town border, US to confluence with Torrington WPCF (just US of bend north of plant), Harwinton/Torrington town border.	2.71	Not Supporting	Insufficient Information
CT6900-00_08	Naugatuck River-08	From confluence with Torrington WPCF (just US of bend, north of plant), Harwinton/Torrington town border, US to headwaters at confluence of East and West Branches of Naugatuck River (just US of East Albert Street crossing), Torrington.	1.36	Not Supporting	Insufficient Information
CT6902-00_01	Hart Brook-01	From mouth at confluence with Hall Meadow Brook, above West Branch Naugatuck River (just US of Norfolk Road (Route 272) crossing), US to Reuben Hart Reservoir outlet dam, Torrington.	.64	Not Supporting	Not Assessed
CT6904-00_01	West Branch Naugatuck River-01	From mouth at confluence with East Branch Naugatuck River, above Naugatuck River (US of East Albert Street crossing), US to Old Brass Mill Pond outlet dam (1st impoundment on river), just US of Church Street crossing, Torrington.	.97	Not Supporting	Not Assessed
CT6905-00_01	East Branch Naugatuck River-01	From mouth at confluence with West Branch Naugatuck River, above Naugatuck River (just DS of Franklin Drive crossing), US to North Elm Street Road (Route 4) crossing, Torrington.	1.33	Not Supporting	Insufficient Information

Source: Connecticut 305b Assessment Results for Rivers and Streams (2020), https://portal.ct.gov/-/media/DEEP/water/water_quality_management/305b/2020/2020IWQRAppendixA1.pdf (excerpted from p. 42-43, 103, and 105-106).