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For a thriving New England

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July 13, 2022

Michael S. Regan
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (Mail Code 3204A)
Washington, DC 20460

David Cash
Regional Administrator
U.S. Environmental Protection Agency, Region 1
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U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Notice of Violations and Intent to File Suit Under the Clean Water Act

Dear Administrator Regan, Regional Administrator Cash, and EPA,

Conservation Law Foundation ("CLF")[1] and Charles River Watershed Association ("CRWA")[2] hereby give notice to the addressed persons that CLF intends to file a civil action in the United States District Court for the District of Massachusetts under section 505 of the Federal Water Pollution Control Act ("Clean Water Act," "CWA," or "Act"), 33 U.S.C. § 1365(a)(2), against Michael S. Regan, in his official capacity as Administrator of the U.S. Environmental Protection Agency; David Cash, in his official capacity as Regional Administrator of EPA, Region 1, and the U.S. Environmental Protection Agency (collectively "EPA") for past and continuing violations. CLF and CRWA intend to seek appropriate equitable relief, civil penalties, and other relief no

[1] CLF is a not-for-profit 501(C)(3) organization dedicated to the conservation and protection of New England's environment. Its mission includes the conservation and protection of the many uses of the waters in and around the Charles River, Mystic River, and Neponset River watersheds for, among other things, fishing, recreation, boating, scenic/aesthetic, and scientific purposes. CLF's membership includes people who live in or near the Charles River, Mystic River, and Neponset River Watersheds, and use and enjoy the watershed for recreational, aesthetic, and/or scientific purposes. The interests of CLF's members are adversely affected by discharges of stormwater pollution to the receiving waters in violation of the Clean Water Act.

[2] CRWA is a not-for-profit 501(c)(3) organization dedicated to protecting, restoring, and enhancing the Charles River and its watershed through science, advocacy and the law. CRWA develops science-based strategies to increase resilience, protect public health, and promote environmental equity as we confront a changing climate. CRWA's membership includes people who live in or near the Charles River Watershed and use and enjoy the watershed, including the Charles River itself and its tributaries, for recreational, aesthetic, and/or scientific purposes. The interests of CRWA's members are adversely affected by discharges of stormwater pollution to the receiving waters in violation of the Clean Water Act.

earlier than sixty days from the postmark of this letter, which serves as notice pursuant to 33 U.S.C. § 1365(b) and 40 C.F.R. §§ 135.1–.3 (the "Notice").

The subject of this action is EPA's failure to perform an act or duty that is not discretionary under Section 402(p)(2)(E), 33 U.S.C. § 1342(p)(2)(E). *See also* 40 C.F.R. §§ 122.26(a)(1)(v), (a)(9)(i)(C)–(D), (f). CLF and CRWA submitted three petitions to EPA requesting the agency to make a final determination that certain commercial, industrial, institutional, and multi-family residential property stormwater discharges contribute to violations of water quality standards in the Charles River,[3] Mystic River,[4] and Neponset River Watersheds[5] and thus CWA permits for such properties are required. But EPA failed to make a final determination on CLF's and CRWA's petitions within the statutorily mandated, nondiscretionary 90-day period. 40 C.F.R. § 122.26(f)(5).

BACKGROUND

The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). This purpose includes the elimination of "the discharge of pollutants into the navigable waters" and attainment of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. §§ 1251(a)(1), (2).

As required by the CWA, 33 U.S.C. § 1313; 40 C.F.R. § 131.10, Massachusetts law establishes various water quality standards or class designations for surface waters, explains the criteria for each such class, and provides that a water body may not be degraded from its designated uses. *See* 314 MASS. CODE REGS. 4.00.

Across New England, stormwater pollution has emerged as the major threat to the health of our rivers, lakes, and streams. Some of New England's most treasured waters—used by millions for recreation, fishing, and other tourism—are suffering from toxic algae blooms and poor water quality due to bacteria- and nutrient-laden stormwater runoff flowing off parking lots and other paved areas. Especially troublesome pollutants include fertilizer, fecal coliform bacteria, *Escherichia coli* bacteria ("E. coli"), pathogens, and sediment. As CLF's and CRWA's petitions make clear, the Charles River, Mystic River, and Neponset River (the "Three Rivers") dramatically exemplify these pollution problems. Despite improvements from the decades-long work to clean these waters, water pollution remains rampant.

[3] Attached hereto as Exhibit I. CLF and CRWA submitted this petition.
[4] Attached hereto as Exhibit II.
[5] Attached hereto as Exhibit III.

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Charles River

Situated in eastern Massachusetts, the Charles River is one of the busiest recreational river segments in the world and often filled with boaters, joggers, and other recreators.[6] The entire watershed is about 310 square miles. The Charles River Watershed is highly urbanized with a high level of impervious cover, which has resulted in the inability to absorb rainfall and remove pollutants, a function that vegetative cover and the soil matrix would perform under natural conditions by filtering the runoff.[7] Throughout the watershed, stormwater runoff discharges high levels of phosphorus into the Charles River, triggering excessive algae and aquatic plant growth and low and/or highly variably dissolved oxygen levels.

Cyanobacteria blooms have begun to occur annually in the Charles River, which negatively affect human and environmental health.[8] Cyanobacteria produce and emit cyanotoxins. EPA itself acknowledges that exposure to cyanotoxins can lead to: abdominal pain, headache, sore throat, vomiting and nausea, numbness, drowsiness, incoherent speech, salivation, and respiratory paralysis leading to death.[9] Studies link cyanotoxin exposure to neurodegenerative diseases, like amyotrophic lateral sclerosis ("ALS").[10] Phosphorus pollution in the Charles River also fuels excessive growth of aquatic invasive species, including Eurasian watermilfoil, variable watermilfoil, curly-leaf pondweed, fanwort, spiny/brittle naiad, and water chestnut.[11] These

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[6] EPA, *Charles River* (last updated Sept. 23, 2021), https://www.epa.gov/charlesriver/about-charles-river#:~:text=The%20Charles%20River%20is%20the,area%20of%20310%20square%20miles.

[7] Waterstone Engineering, TMDL Attainability Analyses for Phosphorus and Pathogens for the Charles River Watershed, Massachusetts (May 9, 2019).

[8] *See, e.g.*, Anjana Tamrakar, Clark University, "Cyanobacteria Monitoring in the Charles River Lower Basin: Water Quality Assessment and Implications for Future Practice 2006-2014" (2015), https://commons.clarku.edu/cgi/viewcontent.cgi?article=1001&context=idce_masters_papers; *Charles River Bacteria Levels Prompt Health Advisory*, BOS. GLOBE (Aug. 13, 2015), https://www.bostonglobe.com/metro/2015/08/13/dirty-water-once-again/l5LB4ylXyICdV1UeQ3UKVP/story.html; *Health Officials Warn of Blue-Green Algae Bloom In Charles River*, CBS BOS. (Aug. 31, 2016), https://boston.cbslocal.com/2016/08/31/charles-river-blue-green-algae-bloom/; *Stay Away From Parts Of Charles River During Bacteria Bloom, Officials Warn*, CBS BOS. (Aug. 2, 2017), https://boston.cbslocal.com/2017/08/02/charles-river-cyanobacteria-bloom-algae/; Barbara Moran, *EPA Moves to Reduce Runoff that Feeds Toxic Algae in Charles River*, WBUR (Aug. 14, 2020), https://www.wbur.org/news/2020/08/14/epa-stormwater-toxic-algae-phosphorus-charles-river.

[9] EPA, *Health Effects from Cyanotoxins* (last updated Oct. 1, 2021), https://www.epa.gov/cyanohabs/health-effects-cyanotoxins.

[10] Ex. I at 3–4.

[11] *See, e.g.*, EPA, *Indicators: Phosphorus*, https://www.epa.gov/national-aquatic-resource-surveys/indicators-phosphorus (last visited July 11, 2022); Youli Zhang et al., *Interactions Between Nitrogen, Phosphorus, and Invasive Alien Plants*, 14 SUSTAINABILITY 746, 751–52 (2022); Joëlle Gérard & Ludwig Triest, *The Effect of Phosphorus Reduction and Competition on Invasive Lemnids: Life Traits and Nutrient Uptake*, 2014 INT'L SCHOLARLY RES. NOTICES, https://www.hindawi.com/journals/isrn/2014/514294/; John D. Madsen, *Predicting*

aquatic invasive species pose recreational hazards, reduce biodiversity, limit habitat, degrade ecosystem health, outcompete native plants, and impair water quality.

Due to the pollution-related problems in the Charles River, Massachusetts developed total maximum daily loads ("TMDLs") for the river because it is impaired (fails to meet water quality standards) even after the implementation of technology-based controls. 33 U.S.C. § 1313(d), 40 CFR § 130.7. There are three TMDLs applicable to the Charles River: (1) Nutrient TMDL for the Upper/Middle Charles River;[12] (2) Nutrient TMDL for the Lower Charles River Basin;[13] and (3) Pathogen TMDL for the Charles River Watershed.[14] In all three TMDLs, EPA and the Massachusetts Department of Environmental Protection ("MassDEP") determined that stormwater runoff from unpermitted commercial, industrial, and high-density residential property dischargers of nutrient and pathogen-polluted stormwater are a primary cause of ongoing violations of water quality standards in the Charles River.

Mystic River

The Mystic River covers 76 square miles of Massachusetts, flowing from Reading into Arlington, Somerville, Medford, Everett, Chelsea, Charlestown, and East Boston.[15] Massachusetts water quality standards designate that all water bodies in the Mystic Watershed should be suitable for primary and secondary contact recreation[16]—but many communities around the Mystic River Watershed do not view the water as a safe place to swim or bring their pets.[17] EPA itself

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Invasion Success of Eurasian Watermilfoil, 36 J. OF AQUATIC PLANT MGMT. 28, 28 (1998); *State of Michigan's Status and Strategy for Eurasian Watermilfoil Management*, State of Michigan (2018), https://www.michigan.gov/-/media/Project/Websites/invasives/Documents/StatusStrategy/EWM.pdf?rev=de18752d421f42cc9cf427913d13a15; Ryan Thum & Jay T. Lennon, *Comparative Ecological Niche Models Predict the Invasive Spread of Variable-Leaf Milfoil and its Potential Impact on Closely Related Native Species*, 12 BIOLOGICAL INVASIONS 133, 138 (2009); Steven Heiskary & Ray D. Valley, *Curly-Leaf Pondweed Trends and Interrelationships with Water Quality*, MINN. DEP'T OF NAT. RES. INVESTIGATIONAL REPORT 558 (Aug. 2012), https://files.dnr.state.mn.us/publications/fisheries/investigational_reports/558.pdf.

[12] EPA & MASS. DEP'T OF ENVTL. PROT., TOTAL MAXIMUM DAILY LOAD FOR NUTRIENTS IN THE UPPER/MIDDLE CHARLES RIVER, MASSACHUSETTS (2011), HTTPS://WWW.MASS.GOV/DOC/FINAL-TMDL-FOR-NUTRIENTS-IN-THE-UPPERMIDDLE-CHARLES-RIVER-0/DOWNLOAD.

[13] EPA & MASS. DEP'T OF ENVTL. PROT., TOTAL MAXIMUM DAILY LOADS FOR NUTRIENTS IN THE LOWER CHARLES RIVER BASIN, MASSACHUSETTS (2007), HTTPS://WWW.MASS.GOV/DOC/FINAL-PHOSPHORUS-TMDL-REPORT-FOR-THE-LOWER-CHARLES-RIVER-BASIN/DOWNLOAD/.

[14] EPA & MASS. DEP'T OF ENVTL. PROT., FINAL PATHOGEN TMDL FOR THE CHARLES RIVER WATERSHED (2007) https://www.mass.gov/doc/final-pathogen-tmdl-reports-for-the-charles-river-watershed-0/download.

[15] MYSTIC RIVER WATERSHED ASS'N, *The Watershed* (last visited June 15, 2022), https://mysticriver.org/overview.

[16] EPA & MASS. DEP'T OF ENVTL. PROT., FINAL PATHOGEN TMDL FOR THE BOSTON HARBOR, WEYMOUTH-WEIR, AND MYSTIC WATERSHEDS 15 (2018), https://www.mass.gov/doc/final-pathogen-tmdl-report-for-the-boston-harbor-weymouth-weir-and-mystic-watersheds/download.

[17] *E.g.*, Andrew Brinker, *Thousands of Dead Fish are Piling Up on the Shores of the Mystic River Near Assembly Row—Again*, BOST. GLOBE (Sept. 22, 2021), https://www.bostonglobe.com/2021/09/22/metro/thousands-dead-fish-

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acknowledges that the development of the watershed has increased stormwater pollution: "fields were replaced with parking lots, footpaths with highways, pastoral riverbanks with polluting industrial activity and shipyards with oil storage facilities. All these have contributed to the decline of the watershed and water quality in the Mystic River."[18]

Neponset River

The Neponset River flows from Foxborough to Dorchester and Quincy, is a drinking water source for about 120,000 people, and is home to various species of mammals, fish, birds, and plants.[19] However, the Neponset River experiences tremendous bacteria pollution problems,[20] and fecal coliform bacteria poses serious risks to human health, such as acute gastrointestinal illness, diarrhea, abdominal discomfort, and vomiting and nausea.[21] Stormwater pollution is a significant contributor to such bacteria in the Neponset River because much of the area surrounding the watershed has been urbanized or made residential, leading to many impervious surfaces.[22] There is one TMDL applicable to the Neponset River: Bacteria TMDL for the Neponset River Basin, which recognizes that "[i]mproving storm water runoff quality is essential for restoring water quality and recreational uses."[23]

FAILURE TO PERFORM NONDISCRETIONARY AND MANDATORY ACTS AND DUTIES

Under the National Pollutant Discharge Elimination System ("NPDES"), the CWA prohibits the discharge of pollutants from a point source without a permit. 33 U.S.C. § 1311(a). Although the Act exempts certain stormwater discharges from this prohibition, *id.* § 1342(p)(1), that exemption

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are-piling-up-shores-mystic-river-near-assembly-square-again/; Miriam Wasser, *Boston Rivers Were Pretty Clean in 2020, But Sewage is Still a Problem* Says EPA, WBUR (July 14, 2021), https://www.wbur.org/news/2021/07/14/epa-water-quality-report-card-2021-charles-mystic-neponset-rivers; Danielle McLean, *EPA: Mystic River Usually Boatable and Swimmable; Still Polluted,* WICKED LOCAL SOMERVILLE (2015), https://somerville.wickedlocal.com/article/20150724/NEWS/150727939.

[18] EPA, *About the Mystic River Watershed* (last updated Sept. 7, 2021), https://www.epa.gov/mysticriver/about-mystic-river-watershed.

[19] Neponset River Watershed Ass'n, *Watershed* (last visited June 14, 2022), https://www.neponset.org/your-watershed/.

[20] MASS. DEP'T OF ENVTL. PROT., TOTAL MAXIMUM DAILY LOADS OF BACTERIA FOR NEPONSET RIVER BASIN (2002), https://www.mass.gov/doc/final-tmdls-of-bacteria-for-neponset-river-basin/download#:~:text=The%20goal%20of%20the%20Neponset,water%20runoff%2C%20and%20ultimately%20restore; MASS. DEP'T OF ENVTL. PROT., ADDENDUM: FINAL TOTAL MAXIMUM DAILY LOADS OF BACTERIA FOR NEPONSET RIVER BASIN (2012), https://www.mass.gov/doc/final-neponset-bacteria-tmdl-addendum-0/download.

[21] *E.g.*, National Primary Drinking Water Regulations: Revisions to the Total Coliform Rule, 78 Fed. Reg. 10270, 10273 (Feb. 12, 2013).

[22] TOTAL MAXIMUM DAILY LOADS OF BACTERIA FOR NEPONSET RIVER BASIN, *supra* note 20, at 31; MASS. DEP'T OF ENVTL. PROT., ADDENDUM: FINAL TOTAL MAXIMUM DAILY LOADS OF BACTERIA FOR NEPONSET RIVER BASIN, *supra* note 20, at 12–13.

[23] TOTAL MAXIMUM DAILY LOADS OF BACTERIA FOR NEPONSET RIVER BASIN, *supra* note 20, at 38.

does not cover "[a] discharge for which the Administrator or the State, as the case may be, determines that the 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); *see also* 40 C.F.R. §§ 122.26(a)(1)(v), (a)(9)(i)(C)–(D) ("residual designation authority"). If such a determination is made, then the CWA mandates that such stormwater discharges obtain a NPDES permit.

"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).[24] Then, the Director "*shall* make a final determination on any petition received under [Section 122.26] within 90 days after receiving the petition." *Id.* § 122.26(f)(5) (emphasis added).

CLF and CRWA submitted three petitions to EPA for a determination that certain stormwater discharges contribute to water quality standards violations in the Charles River, Mystic River, and Neponset River. However, to date, EPA has failed to make a final determination on the three petitions. More than 90 days have passed since CLF sent the petitions. Therefore, EPA has failed to perform its nondiscretionary and mandatory duties under the CWA.

A. EPA failed to make a final determination on CLF's and CRWA's petition regarding the Charles River.

On May 9, 2019, CLF and CRWA submitted a petition to EPA for a determination that certain commercial, industrial, institutional, and multi-family residential property discharges contribute to violations of water quality standards in the Charles River Watershed and thus NDPES permitting of such properties is required.

To date, EPA has not made a final determination on such petition. More than 90 days have passed since CLF and CRWA submitted its petition. Although EPA undertook "a detailed stakeholder outreach process" in 2020,[25] EPA has failed to make a final determination on the petition in violation of its obligation to perform its nondiscretionary and mandatory duties under the CWA.

B. EPA failed to make a final determination on CLF's petition regarding the Mystic River.

On August 24, 2020, CLF submitted a petition to EPA for a determination that certain commercial, industrial, institutional, and multi-family residential property discharges contribute to water

[24] The "Director" is the "Regional Administrator" when there is an EPA-administered NPDES program. 40 C.F.R. § 122.2.
[25] EPA, *Environmental Challenges for the Charles River* (last updated May 9, 2022), https://www.epa.gov/charlesriver/environmental-challenges-charles-river.

quality standards violations in the Mystic River Watershed and thus NDPES permitting of such properties is required.

To date, EPA has not made a final determination on such petition. More than 90 days have passed since CLF submitted its petition. EPA has failed to make a final determination on the petition in violation of its obligation to perform its nondiscretionary and mandatory duties under the CWA.

C. EPA failed to make a final determination on CLF's petition regarding the Neponset River.

On August 24, 2020, CLF submitted a petition to EPA for a determination that certain commercial, industrial, institutional, and multi-family residential property discharges contribute to water quality standards violations in the Neponset River Watershed and thus NDPES permitting of such properties is required.

To date, EPA has not made a final determination on such petition. More than 90 days have passed since CLF submitted its petition. EPA has failed to make a final determination on the petition in violation of its obligation to perform its nondiscretionary and mandatory duties under the CWA.

CONCLUSION

EPA is in continuing violation of the Clean Water Act. 33 U.S.C. § 1342; 40 C.F.R. § 122.26. CLF and CRWA hereby provide this notice for past and continuing violations outlined above and for continuing violations after this notice. Additional information, including information in CLF's and CRWA's possession, may reveal further details about the CWA violations described above. This letter covers all such violations. This letter is being provided pursuant to Section 505(b) of the CWA, 33 U.S.C. § 1365(b). Unless EPA cures these violations within sixty days, CLF and CRWA reserve the right to bring a civil action to compel EPA to comply with the Clean Water Act to protect the Three Rivers.

CLF would welcome the opportunity to discuss this matter with you. If you are interested in discussing the matter, or if you believe any of the above information is incorrect, if you take steps to permanently correct the CWA violations, if you believe you are currently in compliance with the CWA, or if you have any questions concerning this notice, please contact me as soon as possible at (617) 850-1770 or at the address listed above.

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Sincerely,

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