



For a thriving New England

CLF Massachusetts 62 Summer Street
Boston MA 02110
P: 617.350.0990
F: 617.350.4030
www.clf.org

February 10, 2014

Via Certified First Class Mail

Gina McCarthy, Administrator
United States Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

RE: Conservation Law Foundation and Charles River Watershed Association's Notice of Intent To Sue The Administrator of the United States Environmental Protection Agency for Failure to Notify Stormwater Dischargers in the Charles River Watershed of Massachusetts That They Must Obtain Clean Water Act Discharge Permits and for Failure to Act within 90 days on a Petition for Designation of Certain Stormwater Discharges into the Charles River

Dear Administrator McCarthy:

The Conservation Law Foundation ("CLF") and the Charles River Watershed Association ("CRWA") submit this letter pursuant to section 505 of the Clean Water Act as notice of their intent to sue the Administrator of the Environmental Protection Agency ("Administrator") for violations of the Clean Water Act ("CWA"). *See* CWA § 505, 33 U.S.C. § 1365; 40 CFR § 135.2. In particular, CLF and CRWA intend to sue the Administrator for failure to perform mandatory duties under 33 U.S.C. § 1365(a)(2), including: (1) failure to notify unpermitted commercial, industrial, institutional, and high density residential dischargers of nutrient-polluted stormwater into the Upper/Middle Charles River of their responsibility to obtain discharge permits, and to send an application form with the notice in accord with 40 CFR § 124.52(b); (2) failure to notify unpermitted commercial, industrial, institutional, and high density residential dischargers of nutrient-polluted stormwater in the Lower Charles River of their responsibility to obtain discharge permits, and to send an application form with the notice in accord with 40 CFR § 124.52(b); and (3) failure to make a final determination on CLF and CRWA's petition for designation of private commercial, industrial, institutional, and high density residential property stormwater dischargers of one acre or more of impervious area in the Charles River Watershed within 90 days pursuant to 40 CFR § 122.26(F)(5).



CLF and CRWA intend to file suit any time after sixty (60) days following the postmarked date of this letter to obtain an order directing the Administrator to notify these stormwater dischargers of their obligation to obtain NPDES discharge permits and to include an application form with such notice, to recover attorneys' fees and costs of litigation, and to obtain any other appropriate relief. CWA § 505(a) & (d), 33 U.S.C. § 1365(a) & (d). In the alternative, CLF and CRWA's suit will seek an order requiring the Administrator to make a final determination regarding CLF and CRWA's February 17, 2009 petition, to recover attorneys' fees and costs of litigation, and to obtain any other appropriate relief. *Id.*

This notice contains several sections. First, it identifies CLF and CRWA in more detail. Second, it provides background for CLF and CRWA's citizen suit, describing the harmful effects of stormwater runoff on the Charles River and the history of stormwater residual designation in the Charles River Watershed. Third, the notice sets forth the legal and factual bases for the Administrator's non-discretionary duty to notify stormwater dischargers in the Charles River Watershed of their obligations and asserts the Administrator's failure to carry out these duties, and the Administrator's failure to make a final determination on CLF and CRWA's petition within 90 days. Finally, the notice reiterates that CLF and CRWA intend to sue to remedy the violations identified herein.

Identification of Plaintiffs

Founded in 1966, CLF is a nonprofit, member-supported organization that operates advocacy centers in Boston, Massachusetts; Montpelier, Vermont; Concord, New Hampshire; Portland, Maine; and Providence, Rhode Island. CLF's corporate headquarters is located at 62 Summer Street, Boston, MA 02110. CLF works on behalf of its New England-wide membership and with other environmental and community-based organizations and individuals to ensure compliance with environmental laws including the Clean Water Act.

CRWA is a non-profit environmental organization incorporated in Massachusetts with a mission to protect water quality, fish and wildlife habitat, recreational opportunities and scenic values of the Charles River. CRWA's members are concerned about the health of the Charles River, its natural resources and its contributing watershed. Its members use the river, its tributaries, and banks for fishing, canoeing, kayaking, swimming, hiking, bird watching, photography, passive recreation and education. Its members value the river's scenic beauty, its wildlife, avian and aquatic habitat, its natural resources and its recreational opportunities. Some of its members own real property abutting the Charles River and its tributaries. CRWA and its members are concerned about the pollutants, including but not limited to excessive levels of nutrients and



pathogens, and the impairment of the Charles River, which adversely affects their interests in fishing, swimming, recreation, and aesthetic enjoyment as well as their property interests.

CLF and CWRA will file suit on behalf of themselves and their members living, working and/or recreating within the Charles River Watershed, who are adversely affected by the Administrator's failure to act which has caused the Charles River to suffer degraded water quality from nutrient impairment, including toxic algal blooms.

Facts

Stormwater Harms the Charles River

The Upper and Middle Charles River watershed covers 268 square miles upstream of the Watertown Dam, and contain thirty-one impaired water body segments. The Lower Charles River watershed is the downstream portion of the river, an impounded 8.5-mile segment between the Watertown Dam and the New Charles River Dam, where it meets Boston Harbor. The Administrator has acknowledged that the entire Charles River is impaired for multiple water quality criteria, with phosphorus the pollutant of primary concern identified in the Administrator-approved Nutrient Total Maximum Daily Loads (TMDLs) for the Upper/Middle and Lower Charles River. High levels of phosphorus in the Charles River result in excessive algae and aquatic plant growth and low and/or highly variable dissolved oxygen levels. Recurring algal blooms, including species known to be toxic, degrade the aesthetic quality of the river, reduce water clarity, harm aquatic life, and impair recreational uses such as boating, wind surfing, and swimming.

The persistent presence of toxic cyanobacteria (commonly known as "blue-green algae") in the river is a health issue of particular concern. Toxic cyanobacteria species in the Charles River make the river unfit for boating, swimming, fishing, and fish consumption when blooms occur.

The Administrator has recognized that the primary cause of the Charles River's collective phosphorus impairment is stormwater runoff from rainfall or snowmelt events, and current controls for stormwater pollution are inadequate to protect the river from its harmful effects. Upper/Middle Charles TMDL at 86; Lower Charles TMDL at 47. Most stormwater runoff flows from paved surfaces and buildings, referred to as impervious land cover. The Administrator found that stormwater runoff from intense land uses (including commercial, industrial, institutional, and high density residential sites) contributed the highest annual phosphorus loads into the Upper/Middle Charles. *Id.* at 76. These intense land uses in the Greater Boston area also

send large amounts of phosphorus into the Lower Charles, joining the significant phosphorus loading from the Upper/Middle Charles that enters the Lower Charles from the Watertown Dam. Lower Charles TMDL at 47.

The Administrator-approved Upper/Middle Charles TMDL establishes a Waste Load Allocation for all intense land uses, mandating a 65% reduction in phosphorus loading. Upper/Middle Charles TMDL at 71, 75. The Lower Charles TMDL sets an aggregate Waste Load Allocation for all point and non-point sources in each of the subwatersheds that drain into the Lower Charles and in upstream subwatersheds that contribute to phosphorus loading in the Lower Charles at Watertown Dam. Lower Charles TMDL at vii-viii. Namely, the phosphorus loads must be reduced by 62% in the Stony Brook, Muddy River, Laundry Brook, and Faneuil Brook subwatersheds and all other tributary drainage systems that discharge directly to the Lower Charles and by 48% upstream at the Watertown Dam. *Id.*

In approving the Upper/Middle Charles TMDL, the Administrator stated that the Waste Load Allocation component was “appropriately set” and “adequately specified in the TMDL report at levels that will reduce phosphorus sufficiently to meet the water quality targets and hence, attain and maintain MA WQS.” EPA Region 1, Upper/Middle Charles Nutrient TMDL Review at 9. The Administrator approved the Upper/Middle Charles River TMDL, explicitly including its stormwater Waste Load Allocation, on June 10, 2011.

For the Lower Charles River TMDL, the Administrator concluded that the Waste Load Allocations, which explicitly included stormwater contributions, were “adequately specified in the TMDL at levels that will reduce phosphorus sufficiently to meet the chlorophyll *a* target and hence, attain and maintain MA WQS.” EPA Region 1, Lower Charles Nutrient TMDL Review at 17-18. The Administrator therefore approved the Lower Charles River TMDL, explicitly including its stormwater-focused Waste Load Allocation, on October 17, 2007.

History of Residual Designation Authority Activities in the Charles River Watershed

In November 2008, the Administrator issued a Record of Decision (“ROD”) documenting a preliminary determination pursuant to 40 C.F.R. § 122.26(4)(9)(i)(C) & (D) that unpermitted stormwater discharges contributed to water quality violations in three upstream Charles River watershed municipalities – Milford, Bellingham, and Franklin, MA. The preliminary determination found that unpermitted stormwater discharges from properties with two or more acres of impervious cover must implement controls and obtain NPDES permits.

In combination with their comments on the ROD, CLF and CRWA formally petitioned the Administrator for designation of all private commercial, industrial, institutional, and high-density residential property stormwater dischargers of one acre or more of impervious area in the entire Charles River Watershed. This petition, if granted, would extend Region 1's proposed permit program across the Charles River watershed, to properties with one acre or more of impervious surface.

In accord with the findings in the ROD, the Administrator issued a Draft General Permit for the specified dischargers in the three municipalities in April 2010. 75 Fed. Reg. 20,592 (Apr. 20, 2010). To this date, the Administrator has not acted upon CLF and CRWA's petition, the preliminary determination, or the Draft General Permit.

Legal Analysis

Failure to provide NPDES permit requirement notice and permit applications to dischargers

The Administrator has violated the Clean Water Act by failing to notify commercial, industrial, institutional, and high density residential dischargers responsible for stormwater runoff in the Charles River Watershed that they must apply for NPDES discharge permits and by failing to send a permit application form with the notice.

Sections 301 and 402 of the CWA require that the discharge of pollutants into waters of the United States requires a permit. Section 301 of the Clean Water Act provides that "except as in compliance with ... section ... 1342 ... of this title, the discharge of any pollutant by any person shall be unlawful." CWA § 301(a), 33 U.S.C. § 1311(a). Section 402 of the Clean Water Act establishes an effluent discharge permit program and provides that "compliance with a permit issued pursuant to this section shall be deemed compliance ... with section[] 1311 ... of this title." CWA § 402(k), 33 U.S.C. § 1342(k).

Section 402 of the Clean Water Act requires permits for "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).

The Clean Water Act and EPA's regulations implementing the Act require permits where there has been a determination either that stormwater controls are needed as part of Waste Load

Allocations established in TMDLs, or that stormwater discharges contribute to a violation of a water quality standard. 40 CFR § 122.26(a)(1)(v); 40 CFR § 122.26(a)(9)(i)(C) & (D).

The Charles River TMDLs and EPA letters approving these TMDLs are determinations that operators shall obtain permits under these provisions of the Clean Water Act and EPA's regulations implementing the Act.¹

The Upper/Middle and Lower Charles River TMDLs and EPA's approval letters and review documents include determinations that stormwater discharges from urban land and impervious areas such as paved streets, parking lots, and rooftops, many of which are commercial, industrial, institutional, and high density residential property, contribute to violations of water quality standards related to phosphorus in the respective segments of the Charles River. The TMDLs, approval letters, and review documents likewise include determinations that stormwater controls are needed for intense land use discharges based on the Waste Load Allocations that are part of the TMDLs into order to obtain compliance with Massachusetts water quality standards.

These determinations that stormwater controls are needed and that stormwater runoff contributes to water-quality-standard violations constitute determinations that operators must obtain permits for intense land use stormwater dischargers in the affected watersheds. *See* 40 CFR § 122.26(a)(1)(v), (a)(9)(1)(C) & (a)(9)(1)(D).

EPA's regulations spell out what the Administrator *must* do when she determines that a stormwater discharger requires a permit: referring specifically to 40 CFR § 122.26, these regulations require that "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)(emphases added). Once the Regional Administrator has notified a discharger that a permit is required, the discharger has 60 days to apply for a permit. *Id.*

The Administrator has failed to notify commercial, industrial, institutional, and high density residential stormwater dischargers in the Charles River Watershed that they shall obtain permits

¹ A March 11, 2014 letter from EPA Region 1 to American Rivers, the Conservation Law Foundation, and the Natural Resources Defense Council documents EPA's agreement that there are watersheds in the Region where "EPA or a state agency has already *determined* that stormwater is a significant contributor of pollutants or is contributing to a water quality standard (or standards) being exceeded." (Emphasis added). The *determinations* referenced by EPA Region 1 are almost certainly contained in TMDLs – detailed assessments of how pollutants cause water-quality impairments – and EPA letters approving these TMDLs. Again, EPA regulations provide that operators "shall be required to obtain a NPDES permit" once such a determination has been made. 40 CFR § 122.26(a)(9)(i).



governing their stormwater discharges because of determinations contained in TMDLs governing these watersheds and EPA letters approving these TMDLs. Furthermore, the Administrator has failed to include an application form with any such notice. These failures violate the Administrator's nondiscretionary duties subject to citizen-suit enforcement.

Failure to act within 90 days on CLF's petition for residual designation

Plaintiffs have an additional, alternative ground for suit. The Administrator has violated a nondiscretionary duty in failing to respond to CLF and CRWA's February 17, 2009 petition pursuant to 40 C.F.R. § 122.26(f)(2) for designation of all private commercial, industrial, institutional, and high-density residential property stormwater dischargers of one acre or more of impervious area in the Charles River Watershed. The Administrator was required to make a final determination on this petition within 90 days of its submission. 40 C.F.R. § 122.26(f)(5). This failure violates the Administrator's nondiscretionary duty subject to citizen-suit enforcement.

Notice

By this letter, CLF and CRWA now give notice to the Administrator that they intend to sue for the Administrator's failure to perform her non-discretionary duty to notify stormwater dischargers in the Charles River Watershed that they must apply for permits for their stormwater discharges. CLF and CRWA also give notice to the Administrator that they intend to sue for the Administrator's failure to act on CLF and CRWA's February 17, 2009 petition within 90 days. CLF and CRWA reserve all rights to amend this notice and identify additional claims as further facts are developed.

Sincerely,



Caitlin Peale Sloan, Esq. BBO No. 681484
Staff Attorney
Conservation Law Foundation
62 Summer Street
Boston, MA 02139
(617) 850-1770
cpeale@clf.org



Margaret Van Deusen, Esq.
General Counsel
Charles River Watershed Association
190 Park Road
Weston, MA 02493
(781) 788-0007, ext. 234
mvandeusen@crwa.org



Christopher Kilian, Esq.
Vice President and Program Director
Clean Water and Healthy Forests
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602
(802) 223-5992
ckilian@clf.org



Ivy L. Frignoca, Senior Attorney
Conservation Law Foundation
Maine Advocacy Office
47 Portland Street, Suite 4
Portland, ME 04101
(207) 210-6439 x 5011
ifrignoca@clf.org



CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on February 10, 2015, I caused a true and accurate copy of the *Conservation Law Foundation and Charles River Watershed Association's Notice of Intent to Sue the Administrator of the United States Environmental Protection Agency* to be mailed via certified first class mail to:

Gina McCarthy, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Eric Holder, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Courtesy copies of the same document were mailed via postage pre-paid, first class mail to:

Curt Spalding, Regional Administrator
U.S. Environmental Protection Agency
5 Post Office Square, Suite 100
Boston, MA 02109-3912

Martin Suuberg, Commissioner
MA Dept. of Environmental Protection
One Winter Street
Boston, MA 02108

Hon. Charles Baker, Governor
Massachusetts State House
Office of the Governor
Room 105
Boston, MA 02133

Maura Healey, Attorney General
Office of the Attorney General
1 Ashburton Place
Boston, MA 02108

A handwritten signature in blue ink, appearing to read "Caitlin Peale Sloan", is written over a horizontal line.

Caitlin Peale Sloan