

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

UNITED STATES DISTRICT COURT 2015 FEB 18 PM 2:11
FOR THE
DISTRICT OF VERMONT

CLERK
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THE CITY OF RUTLAND, VERMONT,)

Plaintiff,)

v.)

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY, GINA McCARTHY,)
ADMINISTRATOR, UNITED STATES)
ENVIRONMENTAL PROTECTION AGENCY)
REGION 1, and CURT SPAULDING,)
REGIONAL ADMINISTRATOR.)

Defendants.)

Civil No. 2:15cv-35

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The City of Rutland, Vermont (“Rutland” or the “Plaintiff”), by and through its counsel, Kenlan Schwiebert, Facey & Goss, P.C., pursuant to the Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.* and 5 U.S.C. § 701 *et seq.*, hereby seeks declaratory and injunctive relief against the United States Environmental Protection Agency, its Administrator Gina McCarthy, the United States Environmental Protection Agency Region I, and Regional Administrator Curt Spaulding (collectively, “EPA” or “Defendants”). Rutland challenges EPA’s approval of the Total Maximum Daily Load to Address Biological Impairment in Moon Brook (VT03-06) (the “Moon Brook TMDL”) as being, among other things: (1) *ultra vires*, in excess of EPA’s statutory jurisdiction and authority; (2) arbitrary and capricious; and (2) illegal due to EPA’s failure to follow necessary procedures; and (3) based on inherently flawed, incomplete, and inaccurate assumptions and data. In support hereof, Rutland avers as follows:

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JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, as Rutland’s claims arise under the laws of the United States, and pursuant to the APA’s provisions for judicial review of final agency action at 5 U.S.C. §§ 701-706. *See also Friends of the Earth v. EPA*, 333 F.3d 184, 189 (D.C. Cir. 2003) (“[O]riginal jurisdiction over EPA actions not expressly listed in [33 U.S.C. §] 1369(b)(1) lies . . . with the district court.”).

2. The declaratory and injunctive relief requested is authorized by 28 U.S.C. §§ 2201 and 2202, and by 5 U.S.C. §§ 701-706, including the setting aside and/or the immediate postponement of the effective date of the Moon Brook TMDL to preserve Rutland’s status and rights under its designation as a Small Municipal Separate Storm Sewer Systems (the “MS4”), pending the conclusion of this litigation, as authorized by 5 U.S.C. § 705.

3. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 703 because EPA is an agency of the United States, and Rutland’s roads, highways and its MS4 permit affected by the Moon Brook TMDL are located in this district, and a substantial part of the events giving rise to the claims occurred within this district.

4. In the alternative to the above, to the extent that this action is deemed more properly brought as a “citizen suit” pursuant to 33 U.S.C. § 1365, this Court has subject matter jurisdiction over this claim by virtue of 33 U.S.C. § 1365(a) because this complaint alleges a failure of the Administrator to perform a duty which is non-discretionary under the act (specifically, EPA’s failure to reject the Moon Brook TMDL given its illegal regulation of a non-pollutant and inherent flaws). Additionally, jurisdiction exists under 5 U.S.C. § 701-706, 28 U.S.C § 1331, 28 U.S.C § 1361, and, 28 U.S.C. §§ 2201-2202.

5. Rutland has provided Defendants with at least sixty (60) days written notice of the violations of law alleged herein in the form and manner required by the 33 U.S.C. § 1365(b)(2).

A copy of the notice is attached as Exhibit A.

PARTIES

6. The Plaintiff, City of Rutland, Vermont, is a Vermont municipality with a principal place of business located at 1 Strongs Avenue, Rutland, Vermont 05701.

7. Rutland is an independent governmental body within the State of Vermont that operates a small municipal separate storm sewer system (MS4) that may be subject to regulation under a National Pollutant Discharge Elimination System (“NPDES”) permit. Under the current Vermont MS4 General Permit, the trigger for coverage is the presence of a stormwater impaired stream, which in this instance is directly affected by the Moon Brook TMDL.

8. In addition to providing conventional municipal services such as schools, police, fire, recreation, parks and roads, Rutland operates its own water and wastewater utilities.

9. Rutland’s wastewater treatment plant is the largest in the state, and was recognized in 2001 by EPA as the best operated and maintained treatment plant of its size class in the nation. Approximately 60 percent of the city’s stormwater collection system is combined, meaning collected stormwater is delivered to the wastewater treatment plant for treatment.

10. Throughout the investigation into the Moon Brook “impairment” Rutland has maintained that the principal cause of any alleged impairment is not urban stormwater.

11. Rutland objected to the 303(d) listing and offered comments on the draft TMDL challenging the state’s assertions and conclusions. Rutland petitioned EPA to reject the TMDL on the same grounds, prior to EPA’s approval.

12. In 2008, Rutland installed a swirl separator on a major Moon Brook outfall just below Piedmont Pond in an effort to address stormwater discharges to Moon Brook and its tributaries.

13. Working with the Natural Resource Conservation District, Rutland sought and

secured funding to plant shade trees on private property along the stream banks to lower in-stream temperatures. Rutland also cooperated with the District on the design and construction of a substantial Moon Brook stormwater treatment facility in 2014.

14. Rutland sought and secured funding through FEMA to acquire two residential properties in a Moon Brook flood zone to be redeveloped for stormwater treatment.

15. Working with the Vermont Youth Conservation Corps, Rutland has undertaken public education on stormwater issues including promoting rain gardens and rain barrels.

16. Rutland acquired a street sweeper through the SAFTEA grant program, for the purpose of improving water quality and has significantly increased its street sweeping activity, emphasizing on areas not served by combined sewers (except for the central business district).

17. If Rutland is forced to comply with the NPDES permit under EPA's unauthorized and erroneous approval of the Moon Brook TMDL, Rutland would be forced to expend an estimated \$20 million in additional public infrastructure investment, including the acquisition of property and engineering and construction, plus an estimated \$25 million in private infrastructure investment through NPDES regulation of existing privately owned stormwater discharges.

18. The injuries and hardship to Rutland and its constituents can only be redressed by an order from this Court vacating and setting aside the illegal Moon Brook TMDL.

19. The Defendant, United States Environmental Protection Agency (the "Federal Agency"), is the federal agency primarily responsible for overseeing the implementation of the CWA, including the review, approval, and, if necessary, direct establishment of Total Maximum Daily Loads ("TMDLs") in the United States, including the State of Vermont.

20. The Defendant, Gina McCarthy, is the Administrator of the United States Environmental Protection Agency and, as such, is charged with the supervision and management

of all decisions and actions of the agency. Defendant McCarthy is sued in her official capacity only.

21. The Defendant, United States Environmental Protection Agency Region I, is one of ten regional offices of the United States Environmental Protection Agency and is the regional office with concurrent jurisdiction over Vermont and Moon Brook (hereinafter, any reference to “EPA” includes the Federal Agency, the Regional office, and their respective administrators).

22. The Defendant, Curt Spaulding, is the Regional Administrator of the United States Environmental Protection Agency Region I and, as such, is charged with the supervision and management of all decisions and actions of the agency, Region I. Defendant Spaulding is sued in his official capacity only.

NATURE AND PURPOSE OF ACTION

23. On February 19, 2009, EPA, through the Acting Director of the Office of Ecosystem Protection of the EPA Region 1, established the Moon Brook TMDL (entitled, the “Total Maximum Daily Load to Address Biological Impairment in Moon Brook (VT03-06)”). A true and correct copy of EPA’s approval letter, and the Moon Brook TMDL, are attached hereto as Exhibit B. For purposes herein, “Moon Brook” includes Moon Brook, Mussey Brook, and all of their respective tributaries located within Rutland’s city limits.

24. The CWA authorizes EPA to regulate “pollutants,” which is a broadly but carefully defined term.

25. The CWA does not authorize EPA to regulate non-pollutants.

26. Neither water itself, nor its variants, “stormwater” or “flow,” are pollutants.

27. The Moon Brook TMDL is a so-called “flow TMDL.”

28. Flow TMDLs, like the Moon Brook TMDL, purport to regulate the amount of water flowing into a given stream, in this case Moon Brook, as a claimed “surrogate” for a given

pollutant, in this case sediment.

29. By approving the Moon Brook TMDL, EPA exceeded its authority under the CWA and APA by unlawfully and arbitrarily limiting the flow of water in Moon Brook as a claimed “surrogate” for the pollutant sediment, and by limiting flows from Rutland’s drainage systems known under the CWA as Municipal Separate Storm Sewer Systems (“MS4s”).

30. Rutland hereby challenges EPA’s effort to unilaterally expand its regulatory power from its CWA-authorized role of establishing TMDLs that limit “pollutant” discharges in order to meet water quality standards, to control the quantity, or flow of a non-pollutant: water itself.

31. Flow TMDLs have been the subject of several legal challenges across the United States.

32. On information and belief, only one case involving a flow TMDL has proceeded to verdict, a case involving the Accotink Watershed in Virginia.

33. In that case, the United States District Court for the Eastern District of Virginia held that the EPA exceeded its statutory authority under the Clean Water Act (“CWA”) by establishing a TMDL to limit the amount of water flowing into a water body. *See Va. Dep’t of Transp. (“VDOT”) v. U.S. EPA*, No. 12-775, 2013 WL 53741 (E.D. Va., Jan. 3, 2013). A true and correct copy of the Virginia Court’s final decision is attached hereto as Exhibit C (the “VDOT case”).

34. In the VDOT case, the court held that under the CWA, EPA is authorized to regulate “pollutants,” but is not authorized to regulate water itself, which is not a pollutant. *See id.*

35. In that case, EPA conceded that water (and its variants, “stormwater” and “flow”) are not pollutants. *Id.*

36. EPA did not appeal the VDOT case.

37. In 2010, *after* EPA's approval of the Moon Brook TMDL but *prior* to the VDOT case decision, EPA issued a guidance memorandum specifically authorizing the use of flow TMDLs.

38. After the VDOT case, EPA retracted the 2010 guidance memorandum. In its place, in 2014, EPA issued a new guidance memorandum that makes no mention of flow TMDLs.

39. In 2009, when EPA approved the Moon Brook TMDL, there was no statute, regulation, or guidance granting EPA the authority to issue or approve flow TMDLs.

40. At the time of this filing, there is no statute, regulation, or guidance granting EPA the authority to issue or approve flow TMDLs.

41. Even if the Court determines EPA has the statutory authority to regulate the flow of water through TMDLs and related NPDES discharge permits, which Rutland fervently denies, the Moon Brook TMDL remains fatally flawed due to other significant CWA and APA violations and major technical deficiencies that lack a rational basis in the administrative record.

42. Among other errors, EPA acted beyond its authority by approving the Moon Brook TMDL, which, *inter alia*:

- a) arbitrarily seeks to regulate a surrogate that is demonstrably inferior to the actual pollutant of concern (sediment);
- b) misidentifies the primary stressor (elevated temperature) in the upper section of Moon Brook while mischaracterizing and applying incorrect biocriteria to the lower section;
- c) utilizes an imprecise model (P8-UCM Model) to derive flow remediation targets of the stream;
- c) uses a single attainment stream to establish flow targets for Moon Brook, and then applies an arbitrary "adjustment" factor to the attainment stream, without which the two streams would be essentially identical;
- e) fails to investigate and consider chemical stressors that may be contributing to isolated areas of impairment of Moon Brook;

- f) fails to determine the true “maximum” loading capacity of Moon Brook; and
- g) overstates the stormwater flows discharged to the stream by failing to account for the portion of the Moon Brook watershed that discharges to Rutland’s combined sewer system.

43. Rutland shares EPA’s desire to improve stream characteristics such as the makeup of the fish and macroinvertebrate communities in Moon Brook and, in fact, has made and continues to make major water quality investments.

44. The surrogate-based Moon Brook TMDL will cost Rutland taxpayers more to implement than the “pollutant”-based alternative while failing to restore the stream’s aquatic life community, the purported purpose of the Moon Brook TMDL.

FACTS COMMON TO ALL COUNTS

A. Statutory and Regulatory Authority

1. The CWA

45. Congress enacted the CWA in 1972 with a goal to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” CWA § 101(a), 33 U.S.C. § 1251(a).

46. The CWA is an exercise in cooperative federalism and explicitly recognizes “the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under [the CWA].” CWA § 101(b), 33 U.S.C. § 1251(b).

47. In Vermont, most CWA-related programs and activities, whether regulatory or non-regulatory in nature, are administered by the Agency of Natural Resources, Department of Environmental Conservation and specifically its Watershed Management Division (collectively, the “Vermont DEC”).

48. The CWA requires states to establish and periodically review and revise “water quality standards,” which include “designated uses” for water bodies in the state, as well as narrative and/or numeric “water quality criteria” that define the water quality conditions considered to be protective of the uses designated by the state. CWA § 303(a)-(c), 33 U.S.C. § 1313(a)-(c); 40 C.F.R. §§ 130.3, 131.2, and 131.3(i).

49. Each state is required to identify those waters within its boundaries for which technology-based effluent limitations for point sources are insufficient to implement applicable water quality standards, CWA § 303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A), and submit its “303(d) list” of such impaired waters to EPA for review and approval every two years, 40 C.F.R. § 130.7(d).

50. In 1978, pursuant to CWA § 304(a)(2)(d), 33 U.S.C. § 1314(a)(2)(D), EPA identified all pollutants as suitable for TMDL calculations. 43 Fed. Reg. 60665 (Dec. 28, 1978) (“All pollutants, under the proper technical conditions, are suitable for the calculation of total maximum daily loads.”).

51. EPA is required to publish an “identification of *pollutants* suitable for maximum daily load measurement.” CWA § 304(a)(2)(d), 33 U.S.C. § 1314(a)(2)(D) (emphasis added).

52. “Pollutants” are defined in the CWA to mean “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” CWA § 502(6), 33 U.S.C. § 1362(6); see also 40 C.F.R. § 122.2. This definition includes many specific substances, but not the flow of water. See CWA § 502(6), 33 U.S.C. § 1362(6); see also 40 C.F.R. § 122.2.

53. Each state is required to establish a TMDL for those pollutants identified by EPA pursuant to CWA § 304(a)(2)(d), 33 U.S.C. § 1314(a)(2)(D), for each water identified on its

303(d) impaired waters list. CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1).

54. States must submit TMDLs to EPA for EPA's approval. CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2).

55. If EPA disapproves a state's TMDLs, EPA Administrator must "establish such loads for such waters as [EPA] determines necessary to implement the water quality standards applicable to such waters." *Id.*

56. A TMDL for a pollutant must "be established at a level necessary to implement the applicable water quality standard(s) with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1).

57. According to EPA's implementing regulations, a TMDL is comprised of wasteload allocations ("WLAs") for point sources and load allocations ("LAs") for nonpoint sources and natural background pollutant loads. 40 C.F.R. § 130.2(i).

58. "Point source" means "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, landfill leachate collection system, vessel, or other floating craft from which *pollutants* are or may be discharged . . ." CWA § 502(14), 33 U.S.C. § 1362(14) (emphasis added); *see also* 40 C.F.R. § 122.2.

59. "Wasteload allocation" is defined as "[t]he portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution." 40 C.F.R. § 130.2(h) (emphasis added).

60. “Load allocation” means “[t]he portion of a receiving water’s loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources.” 40 C.F.R. § 130.2(g) (emphasis added).

61. “Loading capacity” is defined as “[t]he greatest amount of loading that a water can receive without violating water quality standards.” 40 C.F.R. § 130.2(f) (emphasis added).

62. “Load” or “loading” means “an amount of matter or thermal energy that is introduced into a receiving water; to introduce matter or thermal energy into a receiving water.” 40 C.F.R. § 130.2(e).

63. A TMDL establishes a water body’s “loading capacity,” which is the maximum amount of a pollutant that can be introduced into a water body per day without violating water quality standards. *See* 40 C.F.R. § 130.2 (e)-(i).

64. EPA made no meaningful effort to determine the true “maximum” loading capacity of Moon Brook in the Moon Brook TMDL. EPA uses modeling and an attainment stream to establish a flow rate that EPA believes would protect a hypothetical pristine stream from impairment.

65. Neither the criterion nor the Moon Brook TMDL itself provides any information predicting the in-stream effects of meeting this criterion in Moon Brook, which is already impaired. *See e.g.*, CWA § 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii) (“Permits for discharges from municipal storm sewers...shall require controls to reduce the discharge of pollutants to the maximum extent practicable...” (Emphasis added)).

66. EPA’s implementing regulations provide that TMDLs may be established “using a pollutant-by-pollutant or biomonitoring approach” (*e.g.*, directly measuring aquatic life), 40 C.F.R. § 130.7(c)(1)(i), “for all pollutants preventing or expected to prevent attainment of water quality

standards.” 40 C.F.R. § 130.7(c)(1)(ii) (emphasis added). The regulations do not purport to authorize the use of non-pollutant surrogates.

67. In contrast to the definition of “pollutants” for which a TMDL is required, the CWA defines “pollution” more generally and more broadly to include “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.” CWA § 502(19), 33 U.S.C. § 1362(19).

68. This statutory distinction between “pollutant” and “pollution” is fundamental to the structure and scope of the CWA, which makes pollutants the authorized focus of the TMDL program and NPDES permits. *See, e.g.*, CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C) (“Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation.” (emphasis added)); CWA § 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii) (“Permits for discharges from municipal storm sewers . . . shall require controls to reduce the discharge of pollutants to the maximum extent practicable . . .” (emphasis added)).

69. The flow or discharge of water itself, whether comprised of stormwater or otherwise, is not a “pollutant.” *See* CWA § 502(6), 33 U.S.C. § 1362(6).

70. EPA concedes that it “does not believe that flow, or lack of flow, is a pollutant as defined by the CWA Section 502(6).” *See Guidance for 2004 Assessment, Listing, and Reporting Requirements Pursuant to Sections 303(d) and 305(b) of the Clean Water Act* at 8 (July 21, 2003) (relevant excerpts attached hereto as Exhibit D).

71. EPA has conceded that water or “flow” is not a pollutant. *See* Exhibit D at 3.

72. Furthermore, neither the CWA nor EPA’s implementing regulations, including any existing guidance documents, provide express authority to regulate the discharge of water alone

as a “surrogate” for a defined pollutant.

2. NPDES Permit Program.

73. The CWA prohibits the discharge of “pollutants” by “point sources” to waters of the United States unless authorized by an NPDES permit. CWA § 301(a), 33 U.S.C. § 1311(a); CWA § 402, 33 U.S.C. § 1342.

74. Point sources include certain MS4s subject to EPA’s so-called Phase I and Phase II stormwater NPDES regulations, potentially including Rutland’s MS4 relating to the Moon Brook watershed (a Phase II permit). *See* 40 C.F.R. § 122.26.

75. “Storm water,” or “stormwater,” is defined as “storm water runoff, snow melt runoff, and surface runoff and drainage.” 40 C.F.R. § 122.26(b)(13).

76. Medium MS4s in cities and counties with populations of 100,000-249,999, and large MS4s in cities and counties with populations of at least 250,000 are regulated under the Phase I stormwater regulations. *See id.*

77. Small MS4s (potentially including Rutland’s MS4) in urbanized areas are regulated under the Phase II stormwater regulations. *See id.*

78. With respect to stormwater, the CWA’s NPDES permit program is limited to addressing the “discharge” of pollutants. CWA § 402(p), 33 U.S.C. § 1342(p); CWA § 502(12), 33 U.S.C. § 1362(12) (“The term ‘discharge’ when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.”). Thus, stormwater must contain a pollutant in order to be regulated by an NPDES permit.

79. For point source stormwater discharges, NPDES permits require controls to reduce the discharge of pollutants to the maximum extent practicable, which may include various practices, techniques, methods, and other provisions. CWA § 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii).

80. In Vermont, the Vermont DEC is authorized by EPA to administer the NPDES permit program as to stormwater discharges from MS4s. DEC-issued NPDES permits are authorized as a matter of state law under the State of Vermont's separate stormwater management program, known as Act 140, 10 V.S.A. §§ 1264, et seq., and the Vermont Water Quality Standards ("VTWQS").

B. Location and Characteristics of Moon Brook

81. Moon Brook drains a watershed of approximately 5,545 acres located in Rutland and the nearby towns of Rutland and Mendon in Rutland County, Vermont. Figures and maps showing the location of Moon Brook, its mile markers, and its watershed are included in the Moon Brook TMDL, attached hereto as Exhibit B.

82. The headwaters drain the undeveloped forested area of East Mountain and the streams flow through an increasingly residential area below Town Line Road. *See* Exhibit B.

83. The Rutland landfill is located in this area at approximately river mile (RM) 3.3. From there the stream travels through a wooded area until flattening out just upstream of an impoundment, Combination Pond, at RM 2.9. From there the watershed becomes more highly developed characterized primarily by dense residential housing. A second on-stream impoundment, Piedmont Pond, is situated at river mile 2.4. *See* Exhibit B.

84. At RM 1.3, the stream flows near a public swimming facility, known as the White Memorial Swimming Pool Facility ("White's Pool"). *See* Exhibit B.

85. In October 2014, Rutland commissioned a study of White's Pool by a licensed engineer, who determined that the Pool "is currently facing many challenges in order to continue safely operate." *See White Memorial Pool Evaluation*, Aquatics Group at 8 (Oct. 2014). A true and correct copy of that study is attached hereto as Exhibit E.

86. Among other problems, the study found that White's Pool experiences "significant water loss" throughout the season due to a variety of contributing factors involving structural, surface, and hydraulic issues. *See Exhibit E at 14-16.*

87. Leaks from White's Pool may discharge into Moon Brook at or around RM 1.3.

88. After the study was released, White's Pool was closed and Rutland is currently contemplating whether to repair, replace, or remove White's Pool.

89. Shortly after passing White's Pool, at RM 1.2, Moon Brook crosses under U.S. Route 7, a major north/south connector. Soon thereafter, at RM 0.9, the stream passes the Howe Center, an 18 acre, 130-year-old industrial complex that is located on land that previously served as a foundry site. *See Exhibit B.*

90. The Howe Center currently is utilized by a variety of industrial and commercial enterprises.

91. Sediment chemistry of Moon Brook near the Howe Center, sampled in 2014, indicates elevated levels of several metals (especially iron, lead, nickel, zinc, and copper) as compared to all other sample stations in Moon Brook and other area streams.

92. These sediments may contribute to benthic community impairments at or near RM 0.9 of Moon Brook. *See Exhibit B.*

93. From the Howe Center, Moon Brook travels under Forest Street and then, at RM 0.3, the brook flattens out in a field before entering Otter Creek. *See Exhibit B.*

94. The entire length of Moon Brook and its tributaries are Class B waters designated as coldwater fish habitat pursuant to the Vermont Water Quality Standards.

C. The Moon Brook TMDL

95. The Moon Brook TMDL seeks to restrict the discharge of sediment into Moon Brook by regulating the amount of stormwater that can flow into it. The TMDL treats stormwater

as a “surrogate” for sediment.

96. In October, 2008, the Vermont DEC drafted the Moon Brook TMDL, and submitted it to EPA for approval.

97. On February 19, 2009, EPA approved the Vermont DEC’s draft, establishing the Moon Brook TMDL. A copy of EPA’s approval letter precedes the Moon Brook TMDL and is attached hereto as Exhibit B.

98. Upon information and belief, EPA has historically interpreted and applied the CWA to exclude the regulation of the quantity of water alone (including flow rate, volume, and velocity) by TMDLs and NPDES permits; upon information and belief, the Moon Brook TMDL was one of the first flow TMDLs established by EPA.

99. Upon information and belief, when EPA approved the Moon Brook TMDL, there was no statute, regulation, published guidance, or precedent purporting to authorize the regulation of pollutants via non-pollutant surrogates.

100. Upon information and belief, EPA issued its first guidance memorandum regarding flow TMDLs in 2010 (the “2010 TMDL Memorandum”), a true and correct copy of which is attached hereto as Exhibit F.

101. Upon information and belief, EPA issued the 2010 TMDL Memorandum without following any rulemaking procedures.

102. The 2010 TMDL Memorandum, encouraged TMDL writers to use “numeric parameters acting as surrogates for pollutants” and specifically recommended “stormwater flow volume or impervious cover” as “surrogate pollutant parameter[s],” although neither flow nor impervious cover is a pollutant. *See* Exhibit F at 2, 5.

103. In 2014, EPA issued a subsequent guidance memorandum (the “2014 TMDL Memorandum”), retracting the 2010 TMDL Memorandum in its entirety. A true and correct copy

of the 2014 TMDL Memorandum is attached hereto as Exhibit G.

104. Guidance documents, like the 2010 TMDL Memorandum and the 2014 TMDL Memorandum, are “not regulation[s] and do not impose legally binding requirements on EPA or States” and cannot alter the clear language of the CWA. *See* Exhibit G at 1.

105. EPA has continued to approve (and/or failed to retract previously approved) flow TMDLs, such as the Moon Brook TMDL.

106. On information and belief, as of February 19, 2009, no authority existed that gave EPA the authority to regulate the mere flowing of water.

107. On information and belief, as of the date hereof, no authority exists that gives EPA the authority to regulate the mere flowing of water.

108. Allowing EPA to regulate a non-pollutant surrogate, as the Moon Brook TMDL purports to do, expands EPA’s TMDL and NPDES permit jurisdiction far beyond the management of “pollutants” authorized by the CWA.

109. Regulation of the flow of water or any other non-pollutant based on an alleged correlation to a CWA pollutant contravenes the clear congressional intent to limit EPA’s regulatory authority to the control of only the substances specifically enumerated in the definition of “pollutant.” *See* CWA §§ 303(d)(1)(C), 502(6), 33 U.S.C. §§ 1313(d)(1)(C), 1362(6).

110. EPA has no authority to arbitrarily expand the list of “pollutants” set by statute or to eviscerate the CWA’s explicit distinction between “pollution” and “pollutant,” as EPA has done in the Moon Brook TMDL. *See* CWA § 502(6), (19), 33 U.S.C. §§ 1362(6), (19).

111. EPA admits that it is actually regulating flow itself in the Moon Brook TMDL because high flows scour the creek’s banks and bottom. *See, e.g.,* Exhibit B at 5-6, 11.

112. To the extent that EPA is regulating flow because it believes that the flow or quantity of water, in and of itself, is “the problem,” EPA is not applying a surrogate approach at

all, and instead is directly regulating a non-pollutant in excess of EPA's statutory authority. EPA is literally treating water itself—the very substance the Clean Water Act was created to protect—as a pollutant.

113. EPA violated the CWA and APA by failing to determine, or even attempting to determine, the “maximum” loading capacity of the Moon Brook TMDL.

D. Moon Brook's Purported Impairment

1. EPA and Vermont DEC misidentified Moon Brook and then applied incorrect biocriteria to its Lower Stream Segment.

114. Vermont DEC and EPA consider Moon Brook to be impaired due to “non-support of aquatic life designated uses.” *See* Exhibit B.

115. Vermont DEC biologists monitor the health of Vermont's aquatic environment, and detect “aquatic life use support” (ALS) impairments, through the use of biological monitoring of fish and/or macroinvertebrate communities.

116. Macroinvertebrates are invertebrate organisms, such as insects, crustaceans, snails, or worms, which live on the bottom of streams and rivers that are large enough to be seen with the naked eye.

117. In the Moon Brook TMDL, DEC states that it determined that the impact of excessive stormwater flows into Moon Brook has resulted in a violation of the Vermont Water Quality Standards (“VTWQS”) §3-04(B)(4). *See* Exhibit B at 9-10.

118. In Vermont, DEC uses numeric biological indices to determine the condition of fish and aquatic life uses. *See* Exhibit B at 10.

119. Moon Brook is a Class B waterbody.

120. The biological monitoring program relies on data from reference sites to define biological community goals for a given stream type. *See Moon Brook TMDL at 5.*

121. Vermont DEC has established specific numeric biological criteria (biocriteria) for several stream types.

122. A fish and/or macroinvertebrate community may meet the numeric target for one stream type, meaning that the stream would not be deemed impaired, while the same community would not meet the numeric target for a different type stream, which therefore would be deemed impaired.

123. The Vermont DEC misclassified the lower segment of Moon Brook, between RM 1.5 and Otter Creek (the “Lower Stream Segment”) and analyzed its macroinvertebrate community under the wrong stream type.

124. The Lower Stream Segment is a low gradient, naturally soft-bottomed (sand-silt) stream known as a “slow winder.”

125. At the time the Moon Brook TMDL was issued and approved, the Vermont DEC had not developed fish or macroinvertebrate biocriteria for “slow winder” stream types.

126. Rather than developing criteria to apply to streams like the Lower Stream Segment, the Vermont DEC inappropriately applied biocriteria designed for warm water, medium gradient, cobble-bottom (and trout bearing) streams, which are entirely different types of streams with substantively different aquatic community targets and expectations.

127. Because portions of Moon Brook failed to meet the biocriteria for warm water, medium gradient, cobble-bottom streams, the DEC concluded that the entire stream did not support the designated uses for Class B waters, and therefore was impaired. *See Exhibit B.*

128. Moon Brook has been deemed impaired in large part due to its lack of sufficient brook trout populations.

129. The habitat naturally occurring in the stream (e.g., substrate, depth, velocity, cover, temperature, etc.), and in the Lower Stream Segment in particular, is not naturally

conducive to brook trout populations.

2. EPA and Vermont DEC Incorrectly Applied the P8-Urban Catchment Model, Which is an Inherently Inappropriate Source of Regulatory Limits

130. The Moon Brook TMDL contains flow remediation targets derived from the P8-Urban Catchment Model (“P8-UCM Model”).

131. The P8-UCM Model and the inputs upon which it relies are suited for coarse screening and planning but lacks the necessary precision to be used as a regulatory tool.

132. Within Rutland’s city limits, Moon Brook has two distinct sections: the first (the Lower Stream Segment) is characterized by a low gradient sand/silt bottom, the Otter Creek flood plain, but the second (the Upper Stream Segment) is characterized by medium gradients and a cobble bottom. Further upstream (beyond Rutland’s boundaries), Moon Brook passes through steep gradients on the western face of Mendon Mountain.

133. The P8-UCM Model is entirely incapable of distinguishing between two dissimilar reaches.

134. The P8-UCM Model assumes that the entire watershed is a single slope from headwaters to Otter Creek.

135. By ignoring the dissimilar catchment areas associated with each dissimilar reach, the P8-UCM models flows using generalized, watershed-wide averages.

136. As a result, the seemingly precise numeric targets generated by the P8-UCM Model are wholly unsuitable for serving as a source of regulatory limits for any of the specific, discrete reaches of the stream.

3. EPA and Vermont DEC erred by using a single, and distinguishable attainment stream

137. EPA and Vermont DEC used a single attainment stream, Tenney Brook, for setting flow targets for Moon Brook.

138. A single attainment stream is insufficient to establish a valid baseline for comparison. *See* Exhibit B at 13.

139. Tenney Brook has substantively distinguishable attributes from Moon Brook.

140. The Moon Brook TMDL adopts a so-called “modified approach” in an attempt to mathematically account for the lack of reference streams.

141. The Vermont DEC’s “modified approach” as approved by EPA is arbitrary and capricious and renders the TMDL inherently flawed.

4. EPA and Vermont DEC failed to account for combined sewers.

142. The P8-UCM Model used by Vermont DEC and approved by EPA fails to account for the portion of the Moon Brook watershed that discharges to Rutland’s combined sewer system, overstating the stormwater flows discharged to the stream and the required flow reduction allocation.

143. Combined sewers serve 476 acres in Rutland, or nearly 10 percent of the watershed.

144. Vermont DEC also overstated the impervious surfaces in the watershed by nearly nine percent (9%).

145. These errors resulted in an incorrect TMDL flow reduction allocation.

5. EPA and Vermont DEC ignored multiple stressors impacting Moon Brook.

146. Biological monitoring, as used by the Vermont DEC in establishing the Moon Brook TMDL, is limited when trying to identify the specific pollutant stressor(s) and the extent to which they might contribute to the impairment. *See* Exhibit B at 4.

147. Multiple stressors have been identified along the entire length of Moon Brook, *inter alia*, White’s Pool (RM 1.3), the Howe Center (RM 0.9), and elevated temperature caused by the in-stream impoundments at Combination Pond (RM 2.9) and Piedmont Pond (RM 2.4).

148. The Vermont DEC acknowledged the primary role of elevated summer temperatures in the Upper Stream Segment of Moon Brook.

149. In 2005, the Vermont Fish and Wildlife Commissioner, reviewed the 303(d) listing of Moon Brook as being impaired for stormwater and concluded, “Elevated summer water temperatures downstream of Combination Pond is almost certainly the factor that causes impairment of Moon Brook resulting in the listing as an impaired water.” *See Laroche Letter to Shelvey*, (Dec. 12, 2005), a true and correct copy of which is attached as Exhibit H.

CLAIMS FOR RELIEF

COUNT I

DECLARATORY AND INJUNCTIVE RELIEF: VIOLATIONS OF THE APA §706(2)(C)

150. Rutland re-asserts the allegations contained within paragraphs 1-149 and incorporates them by reference as if set forth in full herein.

151. Agency action, findings and conclusions must be held unlawful and set aside if found to be, among other things, *ultra vires*, in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, 5 U.S.C. § 706(2)(C); or arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. § 706(2)(A).

152. Pursuant to the CWA and EPA’s implementing regulations, a TMDL must be established for a “pollutant” in an impaired water “at a level necessary to implement the applicable water quality standards.” CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C); *see also* 40 C.F.R. § 130.7(c)(1) and (d)(2).

153. Neither the CWA nor EPA’s implementing regulations authorize EPA to regulate the flow of water (including volume, velocity, and flow rate) in, or that may be introduced into, a receiving water because the flow of water, by itself, is not a pollutant.

154. Neither the CWA nor its implementing regulations expressly authorize EPA to regulate a “surrogate” in the place of a pollutant.

155. EPA violated the CWA § 303(d) and its own implementing regulations, exceeded its statutory authority, and acted in an *ultra vires* manner in establishing the Moon Brook TMDL because EPA sought to regulate the non-pollutant flow of water.

156. By approving the Moon Brook TMDL, which seeks to regulate the non-pollutant flow of water, EPA violated the CWA § 303(d) and APA § 706(2)(C) by acting in excess of its statutory authority, thereby causing Rutland significant and identifiable harm.

COUNT II
DECLARATORY AND INJUNCTIVE RELIEF: VIOLATIONS OF THE APA §706(2)(D)

157. Rutland re-asserts the allegations contained within paragraphs 1-156 and incorporates them by reference as if set forth in full herein.

158. Agency action, findings, and conclusions must be held unlawful and set aside if taken without observance of procedure required by law. *See* 5 U.S.C. § 706(2)(D). In addition, the reviewing court shall compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1).

159. EPA violated the CWA and APA § 706(2)(D) by failing to observe the procedures for rulemaking and/or for amending its regulations, in accordance with the public safeguards and requirements of notice and comment, before regulating flow in a TMDL.

160. EPA consequently failed to give proper public notice and violated APA § 553(b). EPA’s approval of the Moon Brook TMDL therefore failed to observe the procedure required by the CWA and APA and should therefore be set aside as invalid, void and of no effect.

COUNT III

DECLARATORY AND INJUNCTIVE RELIEF: VIOLATIONS OF THE APA §706(2)(A)

161. Rutland re-asserts the allegations contained within paragraphs 1-160 and incorporates them by reference as if set forth in full herein,

162. Agency action, findings and conclusions must be held unlawful and set aside if found to be, among other things, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. § 706(2)(A); *ultra vires*, in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, 5 U.S.C. § 706(2)(C); without observance of procedure required by law, 5 U.S.C. § 706(2)(D); or unsupported by substantial evidence, 5 U.S.C. § 706(2)(E).

163. Even assuming, *arguendo*, that EPA has the authority to regulate flow as a surrogate, EPA violated the CWA and the APA by establishing a “non-conventional TMDL” with an inferior surrogate, which will lead to higher implementation costs and worse water quality results.

164. EPA violated the CWA and the APA by misidentifying the primary stressor (elevated temperature) in the Upper Stream Segment of Moon Brook.

165. EPA violated the CWA and the APA by mischaracterizing and applying incorrect biocriteria to the Lower Stream Segment.

166. EPA violated the CWA and the APA by utilizing an imprecise model, the P8-UCM Model, to derive flow remediation targets of Moon Brook.

167. EPA violated the CWA and the APA by using a single attainment stream to establish flow targets for Moon Brook and then by applying an arbitrary “adjustment” factor to the attainment stream without which the two streams would be essentially identical.

168. EPA violated the CWA and the APA by failing to take into consideration point source discharges that are contributing to isolated areas of impairment of Moon Brook.

169. EPA violated the CWA and the APA by overstating the stormwater flows discharged to Moon Brook by failing to account for the portion of the Moon Brook watershed that discharges to the Rutland City's combined sewer system.

170. EPA violated the CWA and the APA by failing to take into account elevated temperature, stressor pollutants other than sediment, and physical changes other than flow to Moon Brook's channel and watershed, all of which have changed materially and irreversibly over time, such that there is no rational basis to conclude that the Moon Brook TMDL will meet its target of a balanced, indigenous population of benthic macrobiotic organisms simply by reducing stormwater flow.

171. EPA violated the CWA and the APA by failing to determine, or even attempting to determine, the "maximum" loading capacity of the TMDL for Moon Brook.

172. EPA violated the CWA and the APA by adopting MS4 permitting requirements contrary to the CWA's "maximum extent practicable" standard for MS4s. EPA is only authorized to approve and enforce MS4 requirements that are "practicable," which means that they do not place an undue hardship on the municipality or that the burden of compliance is not unreasonable. EPA's approval of the Moon Brook TMDL, to be enforced through the MS4 permit, violates the "practicable" standard because the TMDL establishes concrete permit thresholds and does not allow for considerations of hardship or reasonableness.

173. The Moon Brook TMDL is arbitrary, capricious, and contrary to law for EPA to fail to determine the "maximum" loading capacity of Moon Brook.

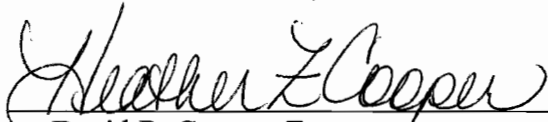
174. For the reasons stated herein, the Moon Brook TMDL is contrary to law and is arbitrary and capricious, in violation of the CWA and APA and should therefore be vacated and set aside as invalid, void and of no effect.

WHEREFORE, the City of Rutland, Vermont requests this Court to:

- (1) Declare that the Moon Brook TMDL violates the Administrative Procedure Act, Clean Water Act and Due Process Clause to the United States Constitution;
- (2) Vacate the Moon Brook TMDL;
- (3) Enjoin EPA from enforcing, instructing Rutland to enforce, or otherwise acting pursuant to the Moon Brook TMDL; and
- (4) Grant such other and further relief as the Court deems just and proper, including all fees and expenses herein incurred.

DATED at Rutland, Vermont this 18th day of February, 2015.

THE CITY OF RUTLAND, VERMONT

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