

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

CONSERVATION LAW
FOUNDATION, INC.,
Plaintiff,

v.

TOWN OF BARNSTABLE,
MASSACHUSETTS,
Defendant.

Civil Action No. 1:24-cv-11886-ADB

**Leave to File Granted on
Oct. 22, 2024**

**PLAINTIFF CLF'S OPPOSITION TO
DEFENDANT TOWN OF BARNSTABLE'S MOTION TO DISMISS**

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INTRODUCTION

Plaintiff Conservation Law Foundation (“CLF”) brings this lawsuit to stop ongoing violations of the Clean Water Act that are polluting and degrading thirteen waterbodies in the Lewis Bay Watershed System of Cape Cod. By means of its Motion to Dismiss, ECF No. 7 (“Motion” or “MTD”), Defendant Town of Barnstable seeks to avoid legal adjudication of these claims and to forestall discovery entirely. To achieve this, Defendant seeks to introduce facts of its own, resolve fact disputes in its favor, ignore CLF’s well-pled facts, and focus attention on dated facts from a previous iteration of this suit. As the Court is aware, that is not appropriate for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). When the facts alleged in the instant Complaint are considered in the light most favorable to CLF, it is clear that the Defendant’s Motion must be denied.

In its Complaint, ECF 1, CLF alleges Defendant is violating the Clean Water Act by discharging pollutants from the Hyannis Water Pollution Control Facility (“Facility”), a point source, to thirteen waters of the United States (“WOTUS”) without a federal National Pollution Discharge Elimination System permit (“NPDES Permit”). Compl. ¶¶ 134, 259–263. The Complaint sets forth facts showing that (a) these thirteen receiving waters are waters of the United States within the meaning of the Clean Water Act, and (b) the Facility adds pollutants to those waters in a manner functionally equivalent to a direct discharge, in an ongoing violation of the Act.

In response, Defendant asserts that (a) a subset of the thirteen receiving waters are not waters of the United States, and (b) the manner in which the Facility adds pollutants to the waters is not the functional equivalent of a direct discharge. Significantly, Defendant does not dispute that five of the waterbodies at issue are waters of the United States. *See generally* MTD at 9, 11, 14. Defendant’s arguments thus apply, at most, to only eight of the waterbodies at issue. Further,

Defendant does not dispute that the Facility is a point source, its discharges are pollutants, the pollutants are added to at least some waters of the United States, and that it lacks a NPDES Permit for its discharges. *See id.*

CLF previously filed suit against the Defendant for discharges from the Facility. *See Conservation L. Found. v. Town of Barnstable, Mass.*, 615 F. Supp. 3d 14 (D. Mass 2022). This Court dismissed the suit without prejudice. *Id.* In response, CLF has made numerous substantive changes to this expanded Complaint to address the concerns the Court identified in its previous order. Significantly, the new Complaint addresses discharges to *thirteen* waterbodies, rather than one, and includes extensive factual detail showing why those waterbodies are waters of the United States. *E.g.*, Compl. ¶¶ 56, 60–62, 66, 68–73, 83, 180, 184, 188, 192, 197, 201, 205, 213, 219, 224, 227, 230–31, 234–35; ECF Nos. 1-11, 1-13, 1-16. In addition, the Complaint provides updated information on the time it takes pollutants to reach those waterbodies and includes a detailed expert report supporting CLF’s claims.

I. The Thirteen Waterbodies at Issue

Thirteen (13) waterbodies at issue constitute waters of the United States within the meaning of the Clean Water Act and the regulations promulgated under the Act. 40 C.F.R. § 120.2 (“WOTUS Rule”). As noted, five (5) waterbodies at issue—Halls Creek, Stewart’s Creek, Snows Creek, Hyannis Inner Harbor, and Lewis Bay—are undisputedly waters of the United States. *See* MTD at 9, 11, 14.

Four (4) of the waterbodies at issue—Fawcetts Pond, Aunt Bettys Pond, Simmons Pond, and Unnamed Pond B—have continuous surface water connection to other waters of the United States, qualifying them as waters of the United States under 40 C.F.R. § 120.2(a)(5). CLF bases its allegations on maps produced by Massachusetts Department of Environmental Protection (“MassDEP”) which show the interconnected surface waters, Compl. ¶ 66, and is supported by

expert analysis prepared by hydrogeologist Dr. Robert Roseen, Compl. ¶ 83, ECF 1-16.

Finally, the four (4) remaining waterbodies—Duck Pond, Unnamed Pond A, Dunns Pond, Schoolhouse Pond—are subjects of interstate commerce, qualifying them as waters of the United States under 40 C.F.R. § 120.2(a)(1)(i). CLF bases its allegations on facts showing that saleable parcels of land include portions of the ponds themselves, Compl. ¶¶ 184, 188, 192, 213, and that out-of-state homebuyers make up approximately half of new homeowners on Cape Cod, Compl. ¶ 62. CLF includes additional facts showing that the ponds are in an interstate marketplace because they draw out-of-state tourists. Compl. ¶¶ 56, 60–61.

II. The Discharge of Pollutants

With respect to the nature of the discharges, CLF alleges facts sufficient to show that the Facility adds pollutants to waters of the United States in a manner functionally equivalent to a direct discharge. Under the relevant Supreme Court’s test, courts consider a non-exhaustive list of seven factors to determine whether there is a functional equivalent of a direct discharge. *Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 590 U.S. 165, 183 (2020) (“*Maui*”). CLF alleges facts showing all seven *Maui* factors weigh in favor of such a finding. *E.g.*, Compl. ¶¶ 69–75, 77–90, 94–96, 141–45, 180–236. For example, with respect to the time factor, CLF alleges—based on expert analysis—that groundwater travels at a rate of 2.5 feet per day, and that the pollutants also travel through surface waters, leading to transit times that are well within the accepted legal threshold. Compl. ¶¶ 83, 84. For the distance factor, CLF alleges that Defendant is adding pollutants to waterbodies ranging from 230 feet to 1.77 miles away from the Facility. Compl. ¶¶ 182, 186, 190, 195, 199, 203, 207, 211, 216, 221, 226, 229, 233. These distances are also well within the accepted legal threshold for distance. Indeed, even Defendant does not claim that distances less than 1.5 miles weigh in its favor. *See* MTD at 18–17.

The discharges at issue in this case are appropriate subjects for a federal NPDES Permit.

The Clean Water Act governs discharges from a point source that are added to waters of the United States in a manner functionally equivalent to a direct discharge. 33 U.S.C. §§ 1311(a), 1362(12); *Maui*, 590 U.S. at 83. In general, states regulate non-point source pollution not readily attributable to a single source. Here, an undisputed point source is adding pollutants to federal waters. Although the pollutants travel through groundwater for a portion of their journey, the polluting discharges are nevertheless readily attributable to this specific Facility. Compl. ¶¶ 5, 7. On these facts, application of the federal Clean Water Act to the Facility’s polluting discharges is not an undue intrusion on state authority; indeed, these are precisely the kinds of discharges that *Maui* finds are appropriate subjects for NPDES permitting. *Maui*, 590 U.S. at 174.

Despite the extensive factual allegations of the Complaint before the Court, Defendant seeks to dismiss CLF’s Complaint based on factual disputes and attempts to introduce evidence that is both disputed and outside the accepted scope of a motion to dismiss. Rather than deviate from accepted pleading standards, CLF asks the Court to give the Defendant what it is actually asking for: discovery and trial on the merits of the legality of the Facility’s conduct.

FACTUAL BACKGROUND

According to extensive research conducted by MassDEP, many commercial and recreational uses of Cape Cod’s Lewis Bay Watershed System will be greatly reduced or cease altogether because of nitrogen pollution. Compl. ¶ 63; ECF 1-5 at ii. Throughout the Lewis Bay Watershed System, algae have thrived on increased nitrogen levels and has crowded out the natural, bio-diverse flora that supported robust and varied aquatic wildlife. Compl. ¶ 97. In a process known as “eutrophication,” when levels of nitrogen increase, algae and aquatic plant concentrations can reach densities that overwhelm the natural ecosystem. Compl. ¶ 99; ECF 1-12 at 10. This has led

to “degraded water quality, adverse impacts to ecosystems, and limits on the use of water resources” in the Lewis Bay Watershed System. Compl. ¶ 116; ECF 1-5 at 3.

MassDEP determined that nitrogen concentrations in the surface waters of the Lewis Bay are eutrophic, above the threshold for ecological damage, and at risk of further damage from nitrogen loads. Compl. ¶¶ 112–15, 249; ECF 1-5 at 2, 6, 12. The highest nitrogen load from controllable sources to the Lewis Bay Watershed System is from human wastewater. Compl. ¶ 118; *see* ECF 1-5 at ii, 4, 12. To quote the Defendant: “a substantial portion of the Town’s saltwater estuaries are in jeopardy from the long-term buildup of nitrate-nitrogen, primarily from the subsurface discharge of sewage effluent.” Compl. ¶ 151.

III. The Facility and Its Discharges

Defendant owns and operates the Hyannis Wastewater Treatment Plant (“Facility”). Compl. ¶ 122. On average as of 2020, 1.67 million gallons of wastewater flow through the Facility daily, Compl. ¶ 124; ECF 1-8 at 1-4, and planned sewer expansion is expected to increase the volume to approximately 4.4 million gallons per day, Compl. ¶ 125; ECF 1-8 at 5-4. Once wastewater enters the Facility, it passes through partial treatment stages, including septage handling, pretreatment, primary treatment, secondary treatment, and disinfection facilities. Compl. ¶ 126; ECF 1-8 at 2-11. The Facility’s partially treated wastewater, i.e., effluent, has higher concentrations of dissolved pollutants, including nitrogen, than fresh water. Compl. ¶ 127; ECF 1-8 at 5-11. The Facility does not remove as much nitrogen as current technology allows when it partially treats the raw sewage it receives. Compl. ¶ 140.

The Facility discharges pollutants, including its partially treated wastewater, into sand beds on the Facility’s premises. Compl. ¶ 128. The Facility’s partially treated wastewater runs straight down from the sand beds through the sandy soils below where it intersects with the water table and travels through the Lewis Bay Watershed System. Compl. ¶ 130. Defendant does not have an

NPDES Permit for discharges from the Facility. Compl. ¶ 134.

Sewage and other discharges from the Facility are not naturally filtered by the soil in Barnstable and so the pollutants reach the surface waters of the Lewis Bay Watershed System essentially unchanged from their initial discharge. Compl. ¶¶ 87, 90; *see* ECF 1-1 at 1, 25, 26. The Facility discharges partially treated wastewater into the sandy soil, which enters the groundwater system and travels through surface water bodies. Compl. ¶¶ 87, 128, 130; *see* ECF 1-5 at 5. Nearly all of the nitrogen in the Facility’s sewage reaches these surface waters without any chemical changes. Compl. ¶ 95. The Facility’s discharges contribute to elevated nitrogen concentrations and the nitrogen crisis in the Lewis Bay Watershed System. Compl. ¶¶ 96, 143, 145; ECF 1-1 at 34.

IV. The Lewis Bay Watershed System

The Facility is located within the drainage of the Lewis Bay Watershed System in Barnstable on Cape Cod. Compl. ¶ 64. There are seventy-one identified surface waters in the Lewis Bay Watershed System. Compl. ¶ 68. Among them are the thirteen waterbodies at issue in this litigation: Halls Creek, Snows Creek, Stewart’s Creek, Hyannis Inner Harbor, Lewis Bay itself, (collectively, “Tributaries and Traditional Waters”), Fawcetts Pond, Aunt Bettys Pond, Unnamed Pond B, Simmons Pond, (collectively, “Surface Connected Waters”), Duck Pond, Unnamed Pond A, Dunns Pond, and Schoolhouse Pond (collectively, “Inland Waters”). Compl. ¶¶ 66 (showing MassDEP map of relevant water features), 68.

Water in the Lewis Bay Watershed System makes its way continuously to the ocean through groundwater, and, in places, surface waters as it travels through ponds and streams. Compl. ¶ 73; ECF 1-13 at 2, 5. The ponds on Cape Cod are points at which the water table surfaces. Compl. ¶¶ 70–72; *see also* ECF Nos. 1-13, 1-12. On the Cape, the groundwater and surface waters are interconnected: “The groundwater that fills [Cape Cod’s] ponds is the same water we use for our drinking water. . . . [it] passes through our ponds on its way to the ocean.” Compl. ¶ 69.

All of the waterbodies at issue receive effluent from the Facility. Compl. ¶¶ 69–73, 77–90, 94–96, 118–121, 130–131, 143–451, 181–236. All of these waterbodies are suffering crippling effects of pollution as a result of discharges from the Facility. ECF 1-16 at 22–23.

A. Tributaries and Traditional Waters: Halls Creek, Stewart’s Creek, Snows Creek, Hyannis Inner Harbor, and Lewis Bay

Halls Creek, Stewart’s Creek, and Snows Creek are freshwater stream outlets of the Lewis Bay Watershed System. Compl. ¶¶ 66; 217, 218, 222, 223, 227; *see* ECF 1-1 at 21–22. They are waters of the United States because they are tributaries of waters designated as waters of the United States under 40 C.F.R. § 120.2(a)(1). Compl. ¶¶ 331, 339, 347; *see* 40 C.F.R. § 120.2(a)(3). Halls Creek is approximately 1.11 miles from the Facility. Compl. ¶ 216. Stewart’s Creek is approximately 5,444 feet from the Facility. ECF 1-16 at 22. Snows Creek is approximately 1.4 miles from the Facility. Compl. ¶ 226.

Hyannis Inner Harbor and Lewis Bay are traditional waters of the United States that support commercial and interstate boat activity and are connected the Atlantic Ocean. Compl. ¶¶ 230–31, 234–35; *see* ECF 1-1 at 21–22. Hyannis Inner Harbor is approximately 1.45 miles from the Facility. Compl. ¶ 229. Lewis Bay is approximately 1.6 miles from the Facility. Compl. ¶ 233.

B. Surface Connected Ponds: Fawcetts Pond, Aunt Bettys Pond, Simmons Pond, and Unnamed Pond B

Fawcetts Pond, Aunt Bettys Pond, Unnamed Pond B, and Simmons Pond, (collectively, “Surface Connected Ponds”) are part of the Lewis Bay Watershed System. Compl. ¶¶ 196, 200, 204, 208; ECF 1-1 at 21–22. The Surface Connected Ponds are relatively permanent waterbodies with continuous surface connections to traditional waters of the United States. Compl. ¶¶ 58, 66, 197, 201, 205, 209; *see* ECF 1-16 at 18. Fawcett Pond is approximately 4,472 feet from the Facility. ECF 1-16 at 18. Aunt Bettys Pond is approximately 5,000 feet from the Facility. Compl. ¶ 199. Unnamed Pond B is approximately 1.11 miles from the Facility. Compl. ¶ 203. Simmons Pond is

approximately 1.44 miles from the Facility. Compl. ¶ 207.

C. Inland, commercially relevant, navigable ponds: Duck Pond, Unnamed Pond A, Dunns Pond, and Schoolhouse Pond

Duck Pond, Unnamed Pond A, Dunns Pond, and Schoolhouse Pond (collectively, “Inland Ponds”) are part of the Lewis Bay Watershed System. Compl. ¶¶ 66, 183, 187, 191, 212; ECF 1-1 at 21–22. The Inland Ponds are used in, or may be susceptible to use in, interstate or foreign commerce. Compl. ¶¶ 56, 59–62, 267, 275, 283, 323; ECF 1-11. Duck Pond is approximately 230 feet from the Facility. Compl. ¶ 182. Unnamed Pond A is approximately 1,980 feet from the Facility. Compl. ¶ 190. Dunns Pond is approximately 1.08 miles from the Facility. Compl. ¶ 186. Schoolhouse Pond is 1.77 mi from the Facility. Compl. ¶ 211.

Cape Cod is a hub of interstate commerce. Each year approximately four million people visit the Cape Cod National Seashore. Compl. ¶ 56. It is not just coastal waters that draw in- and out-of-state tourists: the Cape’s ponds also “attract tourists and make Cape Cod a desirable place to live for year-round and seasonal residents.” Compl. ¶ 60; ECF 1-10 at 11. Home rentals like Airbnb, Vrbo, and boutique rental companies advertise pond views and access as features of houses available to rent. Compl. ¶¶ 61, 193, 214; ECF 1-11. Out-of-state residents own second homes on Cape Cod. Compl. ¶ 62. In a 2021 survey, only 51% of new homeowners on Cape Cod reported that their primary residence was in Massachusetts. Compl. ¶ 62.¹ On Cape Cod, some lots extend into portions of the ponds, so not only is access and proximity to ponds for sale, but portions of the Inland Ponds themselves are for sale. Compl. ¶¶ 62, 184, 192, 188, 213; ECF 1-18 at 1–7.

V. The Pollutants’ Paths to the Waterbodies at Issue

Water moves rapidly through Barnstable’s porous, sandy soil, which allows the sewage

¹ Thirteen percent of new homeowners on the Cape have their primary residence in Florida, 10% in New York, 8% in Connecticut, 3% in Rhode Island, 3% in New Jersey, 3% in Illinois, 3% in Texas, 2% in Pennsylvania. Compl. ¶ 62.

and other discharges from the Facility to enter the waters of the Lewis Bay Watershed System much more quickly than it would in other, less porous (i.e., hydraulically conductive) soil types. Compl. ¶¶ 77, 79–82; ECF 1-14 at 1, 2; *see also* ECF 1-12 at 4; ECF 1-1 at 10, 19. CLF’s expert hydrogeologist, Dr. Robert Roseen, reviewed available data and literature and estimates that groundwater between the Facility and the waterbodies moves toward Lewis Bay at a rate of 2.5 feet per day. Compl. ¶ 83; ECF 1-16 at 21.²

Surface water moves more quickly than groundwater. Compl. ¶ 84; *see also* ECF 1-16 at 17. In the Lewis Bay Watershed System, ground water intersects surface water in multiple places, increasing the average velocity of the water on its path, *i.e.*, decreasing the water’s travel time. Compl. ¶ 85; *see* ECF 1-16 at 17; ECF 1-1 at 1, 25. The fast percolation rate of water through sandy soil and its movement through surface water allows effluent sprayed or injected into the ground to descend rapidly into groundwater, through the Lewis Bay Watershed System, and into its many surface waterbodies. Compl. ¶ 86.

CLF’s expert calculated travel time for pollutants from the Facility to reach a representative set of waterbodies. ECF 1-16 at 22. At 2.5 feet per day, Compl. ¶ 83, it takes pollutants 0.25 years to reach Duck Pond. ECF 1-16 at 22. It takes pollutants 4.9 years to reach Fawcetts Pond. ECF 1-16 at 22. After the pollutants flow through Fawcetts Pond to reach the headwaters of Stewart’s Creek, which takes 5.96 years, they quickly travel by freshwater surface flow to outer Lewis Bay and the ocean within a matter of hours. ECF 1-16 at 21–22.

² It is well understood that water moves through soil on Cape Cod “quickly,”—and in the context of groundwater that can mean any speed one foot per day or faster. Compl. ¶¶ 80–82. While water is sometimes estimated to move at one to two feet per day, the enormous hydraulic conductivity of Cape Cod’s soil allows water to move more quickly. Compl. ¶ 82. When estimating that groundwater in Lewis Bay Watershed System takes less than ten years to reach the coast in all but one area, MassDEP stated that “more refined modeling would be required” to determine accurate flow times. Compl. ¶ 82; ECF 1-1 at 24–26. CLF included expert analysis with its Complaint to allege a more specific travel time than it was able to offer in the previous iteration of this suit. *See Conservation L. Found. v. Town of Barnstable, Mass.*, 615 F. Supp. 3d 14 (D. Mass. 2022).

LEGAL STANDARD

A motion to dismiss must be denied unless a complaint fails to state a claim for which relief can be granted. *See* Fed. R. Civ. Pro. 12(b)(6); *Cortes-Ramos v. Martin-Morales*, 956 F.3d 36, 41 (1st Cir. 2020). On a motion to dismiss, the Court must “accept as true all well-pleaded facts set out in the complaint and indulge all reasonable inferences in favor of the pleader.” *SEC v. Tam-bone*, 597 F.3d 436, 441 (1st Cir. 2010); *see also Trans-Spec Truck Serv., Inc. v. Caterpillar Inc.*, 524 F.3d 315, 321 (1st Cir. 2008) (“Under Rule 12(b)(6), the district court may properly consider only facts and documents that are part of or incorporated into the complaint . . .”). “[T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim of relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). A court should grant a 12(b)(6) motion “if, and only if, accepting all well-pleaded facts as a true and drawing all reasonable inferences in favor of [the plaintiff], the complaint ‘fails to state a claim upon which relief can be granted.’” *Fantini v. Salem State College*, 557 F.3d 22, 26 (1st Cir. 2009) (citation omitted).

A court may not decide questions of fact when ruling on a motion to dismiss. *Roeder v. Alpha Indus. Inc.*, 814 F.2d 22, 25 (1st Cir. 1987); *Maldonado v. Fontanes*, 568 F.3d 263, 268 (1st Cir. 2009); *Smith v. Raytheon Co.*, 297 F. Supp. 2d 399, 401 (D. Mass. 2004). Indeed, “a court may not disregard properly pled factual allegations, ‘even if it strikes a savvy judge that actual proof of those facts is improbable.’” *Duke v. Cmty. Health Connections, Inc.*, 355 F. Supp. 3d 49, 55 (D. Mass. 2019) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007)).

ARGUMENT

Under the Clean Water Act, an unauthorized discharge is the addition of a pollutant from a point source—or the functional equivalent of a direct discharge—into a water of the United States

without a NPDES Permit. 33 U.S.C. §§ 1311(a), 1362(12); *Maui*, 590 U.S. at 183. Waters of the United States are defined by regulation. WOTUS Rule, 40 C.F.R. § 120.2.

Defendant does not dispute that the Facility’s sand beds are a point source, that wastewater and nitrogen are pollutants, and that pollutants from the Facility reach all thirteen waterbodies at issue. *See* MTD at 9, 11, 14. Defendant does not dispute that five of the waterbodies are waters of the United States: Stewart’s Creek, Halls Creek, and Snows Creek, are each tributaries of waters of the United States as described in 40 C.F.R. § 120.2 (a)(3) and therefore are themselves waters of the United States; Hyannis Inner Harbor and Lewis Bay are waters of the United States under 40 C.F.R. 120.2 (a)(1). *See id.*

However, Defendant argues that eight of the thirteen waterbodies are not waters of the United States by, (a) raising factual challenges to the surface water connections and, (b) ignoring the commercial nature and interstate impact of the waterbodies at issue. *See* MTD at 10, 15. For the reasons described in Section I, below, Defendant is wrong on both counts. Next, Defendant argues that the addition of pollutants from the Facility to waters of the United States are not the functional equivalent of direct discharges under *Maui*. *See* MTD at 14–15. But, as Section II details below, the *Maui* factors strongly favor a finding of a direct discharge. Finally, Section III discusses why the discharges at issue are appropriate for federal oversight under the Clean Water Act.

I. The Waterbodies Receiving Pollutants from the Facility are Waters of the United States.

Under the WOTUS Rule, updated this year to comply with the Supreme Court’s ruling in *Sackett v. EPA*, 598 U.S. 651 (2023), multiple types of waters can be “waters of the United States.” 40 C.F.R. § 120.2(a). These include: waters which are “[c]urrently used . . . or may be susceptible to use in interstate or foreign commerce,” territorial seas, and interstate waters (“Traditional Waters”); tributaries of Traditional Waters; and intrastate lakes and ponds that are “relatively

permanent, standing or continuously flowing bodies of water with a continuous surface connection” to waters used in commerce, territorial seas, or interstate waters. *Id.*

A. The Surface Connected Ponds are waters of the United States because they have continuous surface water connections to Traditional Waters.

The Surface Connected Ponds (Fawcetts Pond, Aunt Bettys Pond, Unnamed Pond B, and Simmons Pond) have continuous surface water connections to Lewis Bay, an undisputed water of the United States under 40 C.F.R. 120.2(a)(1), i.e., a Traditional Water. As the MassDEP map in the Complaint shows, Compl. ¶ 66, and as CLF’s expert states, Compl. ¶ 83, ECF 1-16 at 21, the Surface Connected Ponds are connected to Lewis Bay by streams, wetlands, creeks, and other ponds. CLF’s Complaint alleges sufficient facts to show surface water connections to meet its burden at this stage. Defendant’s attempt to introduce facts about the surface water connections, *see* MTD at 11–12; ECF 7-2–7-5, shows that these are disputed facts, and, therefore not appropriate for resolution at this stage and must be considered in the light most favorable to CLF. *See Roeder*, 814 F.2d at 25.

i. Wetlands do not disrupt a surface water connection.

The surface water connections between the Surface Connected Ponds and Lewis Bay are continuous, even where wetlands form a part of the connections. Wetlands can be part of a continuous surface water connection between a waterbody and a water of the United States. In *United States v. Lucas*, the Fifth Circuit determined that there was a continuous surface water connection where evidence at trial showed there was “a continuous band of wetlands and creeks that lead from the site to the [navigable] waters.” 516 F.3d 316, 326–27 (5th Cir. 2008); *see also United States v. Valentine*, No. 5:22-CV-00512-M, 2024 WL 4379735, at *1 (E.D.N.C. Sep. 27, 2024); *Waste Action Project v. Girard Res. & Recycling LLC*, No. 2:21-cv-00443-RAJ-GJL, 2024 WL 4366978, at *13 (W.D. Wash. Sep. 4, 2024).

Defendant’s argument that the wetlands that form a part of the continuous surface water connection between the Surface Connected Ponds and Lewis Bay sever that connection is illogical and contrary to law. *See* MTD at 11–12. It is illogical to assert that wetlands cannot form part of a continuous surface water connection when such a connection is precisely what is required for wetlands to receive federal protection. *See Sackett*, 598 U.S. at 676.

In the Lewis Bay Watershed System, wetlands are part of the continuous surface water connection between waterbodies that receive the Facility’s pollutants and Lewis Bay, a traditionally navigable water. Given that the wetlands that receive the Facility’s pollutants are themselves waters of the United States under *Sackett* and the WOTUS Rule, these wetlands do not sever the continuous surface water connection between waterbodies that receive the Facility’s pollutants and Lewis Bay. As in *Lucas*, the wetlands here are a part of the “continuous band” of waterways that connect these waterbodies to a navigable water.

ii. Intersections with roads do not disrupt surface water connections.

While “continuous surface water connection” is a term with legal meaning, it is also a question of fact. At the motion to dismiss stage, the Court must consider the factual portion of this mixed question of law and fact in the light most favorable to CLF. *See, e.g., McLaughlin v. Bos. Harbor Cruise Lines, Inc.*, 419 F.3d 47, 48 (1st Cir. 2005). CLF alleges that there is a continuous surface water connection between the Surface Connected Ponds and Lewis Bay, an undisputed Traditional Water. Compl. ¶¶ 66, 197, 201, 205, 209, 224. CLF supports this allegation with the MassDEP map in the Complaint, which shows the stream continuing on the other side of the roads the Defendant highlights, and many paragraphs detailing how water moves within the Lewis Bay Watershed System. *See, e.g.,* Compl. ¶¶ 66, 69–73, 83; *see also* ECF 1-16 at 18.

Defendant’s Motion relies on an assertion that “water from Fawcetts Pond must flow over and across two roads,” and that “water leaving Aunt Betty’s Pond ... flow[s] over and across”

those roads. MTD at 7. However, CLF's Complaint does not allege that water flows over any roads to form the continuous surface water connections between Fawcetts Pond and Lewis Bay or between Aunt Bettys Pond and Lewis Bay. As CLF pled, and will demonstrate through discovery and at trial, Stewart's Creek provides a continuous surface connection from both Fawcetts Pond and Aunt Bettys Pond to Lewis Bay.

The Defendant asks the Court to decide that, if a continuous surface water connection intersects with a road, then, as a matter of law, the connection is severed. The Court should decline to do so for two reasons. First, there is established law, undisturbed by *Sackett*, that waters can pass under intersections or encounter manmade obstructions without severing a continuous surface water connection. Second, this is a factual issue that cannot be resolved on a motion to dismiss.

1. Intersections do not, as a matter of law, sever continuous surface water connections.

The question of whether a waterbody has a continuous surface water connection to a traditionally navigable water is not a new analysis since *Sackett*. Although *Sackett* applied the requirement to wetlands under the subsection of the WOTUS Rule that was at issue there, 598 U.S. at 678, courts have long evaluated such connections.

A surface water connection can be maintained even where there is an intersection or an obstruction, and a manmade obstacle does not strip a national waterbody of its federal protection. In *Deerfield Plantation Phase II-B Prop. Owners Ass'n, Inc. v. U.S. Army Corps of Engineers*, two non-navigable tributaries of the Atlantic Ocean were waters of the United States, even where one flowed through a box culvert, a stormwater detention pond, and a culvert that flowed under a highway before continuing into a traditionally navigable water. 801 F. Supp. 2d 446, 455, 465 (D.S.C. 2011), *aff'd sub nom.*, 501 F. App'x 268 (4th Cir. 2012); *see also United States v. Donovan*, 661 F.3d 174, 185–86 (2d Cir. 2011) (“multiple large culverts” were a part of a continuous

surface water connection); *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992) (holding culvert was a point source where waters from a pond marsh connected to a river floodplain through a culvert under a railroad track).

CLF's position is consistent with the reasoning in *Maui*. In *Maui*, the Supreme Court closed the "large and obvious loophole" in an interpretation of the Clean Water Act that would have allowed regulated entities to avoid a permit requirement by discharging their pollutants into waters of the United States via groundwater. *Maui*, 590 U.S. at 178–79. The purpose of *Maui* is to ensure that conduct intended to be regulated by the Clean Water Act cannot be sidestepped with clever workarounds. *See id.* That same principle is at play in *S.D. Warren v. Maine Board of Env'l Protection*, where the Supreme Court states that a dam that diverts a waterbody from its natural course cannot not "denationalize national waters." 547 U.S. 370, 379 n.5 (2006).

Defendants overread *Lewis v. United States*, which is not remotely analogous to the instant case. *See* 88 F.4th 1073 (5th Cir. 2023). First, *Lewis* considers whether tracts of "grass-covered, majority dry fields," located "ten to fifteen miles" from a traditionally navigable water were wetlands subject to federal regulation. *Id.* at 1076–77. Second, the water connecting the dry field "wetlands" to the navigable water passed not only through roadside ditches and a culvert, but also a "non-relatively permanent tributary." *Id.* at 1078 (emphasis added). The *Lewis* court does not splice which elements interrupt the connection because it concluded that "there is simply no connection whatsoever." *Id.* at 1078. *Lewis* is inapposite here. CLF has alleged that: (a) ponds, not dry fields; are (b) connected by ponds, wetlands, and a continuously flowing stream, not a series of non-relatively permanent connections that amount to "no connection whatsoever."

Assuming, however, that the Defendant is correct that as a matter of law, a surface water connection intersecting with a road severs the connection, (a) Defendant does not argue that the

same rule cuts off a WOTUS that is a tributary, like Stewart's Creek, and (b) even to the extent it shortens the area of tributary, then the WOTUS begins on the other side of the roads. Those distances, which Defendant both improperly alleges in its motion *and* miscalculates (claiming 1.53 miles rather than approximately 1.2 miles from the Facility to the beginning of Stewart's Creek on the far side of the road, MTD at 15), are issues of fact. At this stage, the Court should consider the disputed distances in the light most favorable to CLF. *See Roeder*, 814 F.2d at 25. Defendant's efforts to dispute the distances show at most that this case should progress to discovery so that the parties can further develop the facts. As discussed below, facts about whether a surface water connection is continuous and even where streams lie are appropriate subjects for expert testimony and are properly determined during summary judgment or trial, not in a motion to dismiss.

2. *Defendant's argument that the waterbodies identified in the Complaint are not waters of the United States relies on disputes of fact.*

Whether there is a continuous surface water connection between the waterbodies receiving pollutant discharges from the Facility and the many interconnected waterbodies of the Lewis Bay Watershed System is an issue for trial. In *United States v. Lucas*, the Fifth Circuit held that the continuous surface water connection was sufficient based on the evidence presented at trial, including photographs and lay and expert testimony. 516 F.3d at 326–27. *United States v. Donovan* was decided at summary judgment and relied on multiple detailed expert reports that included, among other things: fifty-eight photographs, analysis of soil saturation, consideration of the “morphological conditions of the vegetation,” and a chemical tracing report. 661 F.3d at 185–86. *Lewis* was decided at summary judgment. 88 F.4th at 1078.

Here, the Defendant appears to agree that this is an issue for trial—or at least one requiring additional fact development—given its attempts to introduce evidence with its motion. MTD at 10–12; ECF 7-2-7-7. The materials Defendant attempts to introduce are all either unnecessary or

improper for two reasons. First, it is undisputed that two surface waters intersect with roads at three places. Plaintiffs demonstrated this in the MassDEP map that CLF included in its Complaint, Compl. ¶ 66, and does not require any additional materials to show. Defendant's exhibits are not "integral to" the Complaint and therefore should not be considered at this stage. *See Doe v. Pawtucket Sch. Dep't*, 969 F.3d 1, 8 (1st Cir. 2020).

Second, Defendant introduces exhibits and asks the Court to weigh them against the DEP Map in CLF's Complaint and appended expert report to make a finding of fact on the continuous surface water connection. *See* MTD at 11–12. Defendant is asking the Court to rely on the maps it appends to its Motion in support of their alleged fact that there is no continuous surface water connection. MTD at 11. That is not something that can be done (a) on a motion to dismiss or (b) relying solely on the materials that they include. With respect to (a), it is not appropriate to make findings on disputed facts at the motion to dismiss stage. *Cold Spring Harbor Lab. v. Ropes & Gray LLP*, 840 F. Supp. 2d 473, 478 n.7 (D. Mass. 2012) (declining to decide whether work was "unpatentable" because the court could not do so on a motion to dismiss). This is also true of mixed questions of law and fact. In *McLaughlin v. Bos. Harbor Cruise Lines, Inc.*, the First Circuit determined that the district court erred in dismissing the case at the Fed. R. Civ. P. 12(b)(6) stage because the application of the exception at issue to the employee was a fact-dependent issue that was best decided after a full factual record had been compiled. 419 F.3d at 48. And it is not appropriate to take judicial notice of disputed facts. *SimpliVity Corp. v. Springpath, Inc.*, No. 4:15-13345-TSH, 2016 WL 5388951, at *3–*4 (D. Mass. Apr. 27, 2016).

With respect to (b), the materials that Defendant includes are not dispositive. As *U.S. v. Donovan* illustrates, expert analysis including understandings of soil saturation and vegetation density are necessary to evaluate where surface waters lie. 661 F.3d at 185–86. Dr. Roseen

included illustrative points in his report that show where inlets and outlets appear to begin for some of the waterbodies at issue. ECF 1-16 at 21. That an untrained eye cannot identify a particular stream in a photo taken from space, or even an airplane, does not prove that the stream does not exist. *See* MTD at 7. And no eye, trained or otherwise, can determine from an arial photograph what water management infrastructure lies *beneath* a road.

B. The Inland Ponds are waters of the United States under the Commerce Clause.

The Inland Ponds are in the stream of interstate commerce and are therefore waters of the United States. *See* 40 C.F.R. § 120.2(a)(1)(i); Compl. ¶¶ 267 (Duck Pond), 275 (Dunns Pond), 283 (Unnamed Pond A), 323 (Schoolhouse Pond), 356 (Hyannis Inner Harbor), 366 (Lewis Bay).

Federal statutes and regulations reach waters—even purely intrastate waters—where the waters themselves are the subject of commercial activity. In *Sporhase v. Nebraska, ex rel. Douglas*, the Supreme Court held: “Ground water is an article of commerce and therefore subject to congressional regulation.” 458 U.S. 941, 941 (1982); *see also Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Nat. Res.*, 504 U.S. 353, 364 (1992). It is well established that even purely intrastate activity can affect commerce. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Wickard v. Filburn*, 317 U.S. 111, 118, 125 (1942) (holding that even abstention from the wheat market impacted interstate commerce). In *Voggenthaler v. Maryland Square LLC*, the Ninth Circuit upheld federal regulation of contaminated soil and groundwater located exclusively in Nevada. 724 F.3d 1050, 1059–61 (9th Cir. 2013). The court held that a commercial operation had created the contamination and the resulting cleanup cost burdened commerce. *Id.*

Contrary to Defendant’s assertion, *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”) is not dispositive here. *See* MTD at 9. In *SWANCC*, an intrastate abandoned sand and gravel pit was not subject to federal regulation where the alleged connection to interstate commerce was that the “water areas and spoil piles” were

habitat for migratory birds and the birds crossed state lines. *Id.* at 162–64. This case is distinct from *SWANNC* because the waters themselves were not the subject of interstate commerce in *SWANNC*.³ Here, CLF has plead facts showing that the Inland Ponds are the subject of interstate commerce because portions of Inland Ponds themselves form parts of saleable lots and are available to be purchased, often by out-of-state buyers seeking second homes on Cape Cod. Compl. ¶¶ 62, 184, 188, 192. Like the tradeable groundwater in *Sporhase*, the ponds themselves are for sale in an interstate market. The ponds themselves are in the stream of interstate commerce.

Additionally, as advertisements for rentals and travel reporting show, the ponds draw in- and out-of-state tourists. Compl. ¶¶ 60–61. The commercial connections in this case are more akin to *Sporhase*, where the groundwater itself was in interstate commerce, than *SWANNC*, where the activity impacted the habitat which in turn impacted the birds in interstate commerce. The ponds themselves are used in or susceptible to use in interstate commerce and are therefore waters of the United States under the WOTUS Rule.⁴

II. CLF Adequately Alleges Facts Showing That the Defendant is Adding Pollutants Waters of the United States in a Manner Functionally Equivalent to a Direct Discharge.

To determine whether a discharge through groundwater is the functional equivalent of a direct discharge, the Supreme Court enumerated a non-exhaustive list of seven factors. The factors

³ Defendant’s discussion of the adjacency requirement discussed in *SWANNC*, MTD at 13–14, is irrelevant to this case because it involves a different subsection of the WOTUS Rule. CLF alleges the Surface Connected Ponds are waters of the United States under 40 C.F.R. 120.2(a)(5) and the Inland Ponds are waters of the United States under 40 C.F.R. 120.2(a)(1). Neither of those sections has an adjacency requirement. Section 120.2(a)(4) of the WOTUS Rule has an adjacency requirement, but (a) the waterbodies at issue here are not wetlands so the section does not apply, and (b) CLF has made no claims under that subsection.

⁴ CLF does not concede that the Inland Ponds are not navigable-in-fact, *see* MTD at 10, because a waterbody is navigable-in-fact when it can be navigated by watercraft. *See United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 415 (1940) (historical use of boats, including “skiffs and canoes,” is evidence of navigability); *Knott v. FERC*, 386 F.3d 368, 372 (1st Cir. 2004) (“...private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.’ Irregular canoe trips may support a finding of navigability.”). Here, as the map shows, the ponds are large enough to support watercrafts like canoes and kayaks. *See* Compl. ¶ 66. CLF has adequately pled that the ponds at issue are navigable-in-fact. Whether the ponds are used, in fact, for trade is irrelevant. Because they are sufficiently large to support boats, the Inland Ponds are navigable-in-fact.

are:

(1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity.

Maui, 590 U.S. at 184–85. The Court wrote that time and distance would be “the most important factors in most cases, but not necessarily every case.” *Id* at 185. Time and distance alone are not dispositive. The Tenth Circuit determined a district court erred in “effectively ending the analysis” of the *Maui* factors after considering time and distance. *Stone v. High Mt. Mining Co., LLC*, 89 F.4th 1246, 1260 (10th Cir. 2024).

Analyzing the factors is a fact-intensive inquiry. And that fact-intensive inquiry is best left to the jury. *Peconic Baykeeper, Inc. v. Harvey*, No. 13CV6261 (JMA) (SIL), 2021 WL 4472645, at *2 (E.D.N.Y. Sep. 30, 2021) (finding “triable issues of fact” which precluded cross motions for summary judgment where *Maui* factors governed plaintiff’s claim); *Inland Empire Waterkeeper v. Corona Clay Co.*, No. SA CV 18-00333-DOC-DFM, 2022 WL 3574444, at *4 (C.D. Cal. Aug. 4, 2022) (where both parties presented evidence on the *Maui* factors, “the balance of the evidence presented by both parties is an issue of fact best resolved by the jury.”). Here, at most, the *Maui* factors are in dispute, thereby requiring Defendant’s motion be denied.

A. The time and distance factors weigh against dismissal.

Applying the *Maui* factors, travel time weighs in CLF’s favor. Travel time weighs in favor of a finding of the functional equivalent of a direct discharge when the travel time is a few years or less. In *Maui*, the Supreme Court said that when—with a combination of other factors also weighing against such a finding—pollutants “end up in navigable waters only many years later, the permitting requirements likely do not apply.” *Maui*, 590 U.S. at 184. Setting aside the multiple

qualifiers at play in the Court’s example (the other negative factors, the term “likely”), the rule on time boils down to the meaning of the term “many.”

While the Supreme Court does not define “many years,” it says that 100 years would plainly be too long to be the functional equivalent of a direct discharge. *Maui*, 590 U.S. at 166. On remand in *Maui*, the average travel time from the point source to the ocean was 14 to 16 months. *Hawai’i Wildlife Fund v. Cnty. of Maui*, 550 F. Supp. 3d 871, 886 (D. Haw. 2021) (“*Maui Remand*”). Noting that the Supreme Court “set its extreme at ‘many years,’ not at ‘many months,’ and not even at one year or two years,” the district court found that the time factor weighed in favor of requiring a permit. *Id.* at 886–87. Indeed, in *Parris v. 3M Co.*, the court denied a motion to dismiss where the time at issue was 28 years. 595 F. Supp. 3d 1288, 1321 (N.D. Ga. 2022) (summarizing one paragraph and a few other facts alleged in the complaint, the court determined that “[f]or now, nothing more is required to avoid dismissal”).

While “many years” may mean something less than 100 years, the handful of years at issue here is not “many”: when 100 guests are expected and 70 show up, “many” guests still came. But when a student takes a test with 100 questions and only answers 10 correctly, the student did not get “many” right answers. Defendant argues that even 4.9 years constitutes “many years,” MTD at 15. In the context of the Supreme Court’s hypothetical, it is not many at all.⁵

CLF alleges, based on expert analysis from hydrogeologist Dr. Robert Roseen, that ground-water travels toward the coast in the area between the Facility and Lewis Bay at a rate of 2.5 feet per day. Additionally, the waters in this interconnected system also travel through surface waters, which move much more quickly, thus increase the velocity and reducing travel time. Compl. ¶¶ 84–

⁵ While Defendant’s invention of an 8.88-year time of travel requires ignoring CLF’s allegations about rate of speed and travel through surface waters as well as relying on Defendant’s asserted distance, MTD at 14–15, CLF would contend that even that timeframe would meet the Court’s test in *Maui*.

85; see ECF 1-16 at 17; ECF 1-1 at 1, 25. To calculate transit time, Dr. Roseen considered the horizontal groundwater flow, groundwater velocity, hydraulic conductivity of the soil, hydraulic gradient, cross-sectional area, length of the aquifer, and the depth of the groundwater. ECF 1-16 at 21. Dr. Roseen determined that the times of travel for four representative waterbodies are: 92 days to Duck Pond; 4.9 years to Fawcetts Pond; 5.96 years to Stewart's Creek; and 5.96 years to Lewis Bay, as transit into Lewis Bay from Stewart's Creek takes only a matter of hours. ECF 1-16 at 22. It takes less than 100 to qualify as "many," but it is reasonable to find that a time 95.04 years short of the Court's "too long" example is in bounds.

The distance factor weighs in CLF's favor. Distances of a few miles or less weigh in favor of a finding of a functional equivalent direct discharge. While *Maui* does not specify a maximum distance, it says that if a pipe were to end 50 miles from a navigable water, permit requirements "likely do not apply." *Maui*, 590 U.S. at 184. On remand from the *Maui* case, the district court found that a distance of 0.3 to 1.3 miles weighed in favor of a functional equivalence. *Maui* Remand, 550 F. Supp. 3d at 876. The court noted that the distance range "does not come close to the Supreme Court's reference to the 50-mile extreme," adding: "[e]ven . . . if the average distance were triple that high end, that distance would still be less than a tenth of the 50-mile extreme." *Maui* Remand, 550 F. Supp. 3d at 888.

Here, the distance varies for each of the waterbodies at issue, but all are comfortably within *Maui*'s standard. The thirteen waterbodies at issue range from approximately 230 feet to 1.77 miles away from the Facility. Stewart's Creek, Halls Creek, and Snows Creek, which Defendant does not dispute are waters of the United States, are approximately 4,472 feet (0.85 miles), 1.11 miles, and 1.4 miles from the Facility, respectively. ECF 1-16 at 22; Compl. ¶¶ 195, 216. Hyannis Inner Harbor and the coastal waters of Lewis Bay, which Defendant does not dispute are waters of the

United States, are approximately 1.45 and 1.6 miles from the Facility. Compl. ¶¶ 229, 233. Defendant does not argue that the nearer waters, ranging from approximately 230 feet to 4,000 feet, are too far from the Facility to find in CLF's favor. The only distances that Defendant even tries to argue weigh in its favor are distances greater than 1.5 miles. *See* MTD at 15. The distances of the undisputed waters of the United States fall well within the acceptable distance range, and as in *Maui* on remand, all fall more than 48 miles from the Supreme Court's stated extreme of 50 miles. For the nearer waters, Defendant disputes their status as waters of the United States but appears to concede their proximity favors CLF.

B. The remaining *Maui* factors also weigh against dismissal.

The “amount of the pollutant entering the navigable waters” factor weighs heavily against dismissal. The Facility discharges high volumes of nitrogen into the waterbodies at issue here. Compl. ¶¶ 143–45, 264; ECF No. 1-3 at 34. MassDEP concluded that 14% of the nitrogen in Lewis Bay comes from the Facility. ECF No. 1-5 at 7, 19; *see also* Compl. ¶ 87, 94. The annual nitrogen load directly attributable to the Facility was over 12,000 kilograms per year.⁶ Compl. ¶ 264; ECF No. 1-3 at 34. MassDEP identified the Facility as not only a clear source of a substantial share of the nitrogen pollution in the Lewis Bay watershed system, but the second largest controllable source of nitrogen pollution. ECF No. 1-7 at 19; *see also* Compl. ¶¶ 93–96.

The “specific identity” factor weighs against dismissal. On remand in *Maui*, the Court found that “[e]ven if the wastewater that reaches the ocean from the wells contains lesser levels of pollutants than at the start of the wastewater's journey from the wells, that wastewater maintains its specific identity as polluted water emanating from the wells.” *Maui* Remand, 550 F. Supp. 3d

⁶ In a consideration the court added in *Maui* on remand, the court found that the “raw volume” of pollutants reaching the water was “so high that it is difficult to imagine why it should be allowed to continue without an NPDES permit.” *Maui* Remand, 550 F. Supp. 3d at 892.

at 890. Here, the character of the Facility’s pollutants is unchanged when they reach the waters at issue. As discussed above, there is no question that high volumes of pollution attributable to the Facility are reaching the waters at issue.

The dilution/chemical change factor weighs against dismissal. In Cape Cod’s sandy soil, the nitrogen pollution from the Facility is not chemically changed after Defendant discharges it into sand beds, and nitrogen pollution does not attenuate in groundwater. Compl. ¶¶ 87–90, 95 (“Nearly all of the nitrogen in the Facility’s sewage reaches surface waters without any chemical changes.”). The minimal degree of nitrogen attenuation that occurs when the groundwater surfaces on its journey to some of the waterbodies, *see* Compl. ¶ 87, does not shift this factor in the Defendant’s favor, particularly at the motion to dismiss stage. *See Maui Remand*, 550 F. Supp. 3d at 890 (finding, even where as much as 86% of nitrogen might be attenuated, that the “specific identity” factor weighed in favor of a permit requirement). To the extent that the Court finds that the limited attenuation could weigh against a permit requirement, the degree of attenuation would be different for each waterbody receiving the pollutants and is a subject for further fact development and expert analysis. It is plain from the materials supporting the Complaint that the attenuation is minimal, and as Dr. Roseen points out, it is clear from the harm to the waters that high levels of the pollutants are reaching the waters. ECF 1-16 at 22.

The overlapping factors “the nature of the material through which the pollutant travels” and “the manner by or area in which the pollutant enters the navigable waters” both weigh against dismissal. The soil that the groundwater travels through is so porous, so hydraulically conductive, that it is essentially a sieve. Compl. ¶¶ 79–83, 86–87. The sandy soil does not provide natural filtration for nitrogen—it allows nitrogen to pass right through. Compl. ¶ 87. Contrary to Defendant’s assertion that the pollutants’ straightforward movement from the Facility toward the coast is

“hydrologically complex,” MTD at 16, the pollutants simply move with the water table, whether it is above or below ground, out toward the ocean. Indeed, MassDEP did not struggle to attribute specific volumes of pollution in the waterbodies to the Facility. Compl. ¶¶ 143–45. The Facility’s pollutant-bearing wastewater drains through sandy soil and into surface waters, inevitably discharging into the interconnected waters of the United States in the Lewis Bay Watershed. Compl. ¶¶ 87–90.

III. These Discharges Are Appropriate for Federal Regulation Because They Are the Functional Equivalent of a Direct Discharge and Therefore Within the Ambit of the Clean Water Act.

Regulating the Facility under the Clean Water Act is appropriate and does not unreasonably encroach on state authority because the discharge is precisely the kind of diffuse-but-still-identifiable discharge that *Maui* held requires permitting. Discussing why groundwater pollution is left to state regulation, *Maui* refers to non-point source pollution, saying, “[m]uch water pollution does not come from a readily identifiable source.” *Maui*, 590 U.S. at 174. Here, there is a clear source of these pollutants, and as analysis of the *Maui* factors shows, it is clearly attributable to the Facility. *See, e.g.*, Compl. ¶¶ 4–7, 87–90, 143–45. This is what *Maui* allows citizens, regulated entities, and courts to do: distinguish between difficult to regulate non-point source pollution of groundwater that should be regulated by states and instances where point sources contribute specific pollutants to waters of the United States in clearly identifiable ways, which should be regulated by the federal Clean Water Act. That is what CLF has alleged here, and the Court should allow CLF the opportunity to further develop its facts and persuade the Court at trial or summary judgment that it is precisely what is occurring here.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss should be denied.

DATED: October 23, 2024

Respectfully Submitted,

CONSERVATION LAW FOUNDATION, INC.

/s/ Margaret Nivison

Margaret M. A. Nivison, BBO# 699047

Conservation Law Foundation

62 Summer St.

Boston, MA 02110

(617) 850-1712

nivisonm@clf.org

CERTIFICATE OF SERVICE

I, Margaret M. A. Nivison, hereby certify that on October 23, 2024, the foregoing document was filed through the Court's electronic filing system ("ECF"), by which means a copy will be sent electronically to all parties registered with the ECF system.

/s/ Margaret Nivison
Margaret M. A. Nivison