

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

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CONSERVATION LAW FOUNDATION, et al.,		)	
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Plaintiffs,		)	
		)	
v.		)	Case No. 1:11-cv-11657-MLW
		)	
GINA McCARTHY, et al., <sup>1</sup>		)	
		)	
Defendants.		)	
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**DEFENDANTS’ REPORT REGARDING FUTURE PROCEEDINGS**

On August 23, 2013, the Court, in response to Defendants’ Motion, dismissed Counts I-III of the First Amended Complaint (“Complaint”) and ordered the parties to confer and report to the Court with a proposal(s) on how to proceed with regard to the remaining claim, Count IV. Aug. 23, 2013 Order (Doc. 50). In Count IV (the “SRF claim”), Plaintiffs allege that Defendants, the Administrator and Regional Administrator of the United States Environmental Protection Agency (collectively “EPA”), acted arbitrarily or otherwise not in accordance with the law with regard to EPA’s annual review of the Commonwealth of Massachusetts’ (“Commonwealth”) use of the State Revolving Fund (“SRF”) for wastewater treatment projects in and around Cape Cod.

The parties conferred at least three times in an effort to reach a consensus on how to proceed with regard to the SRF claim but have been unable to reach an agreement. Accordingly, EPA respectfully proposes that the Court stay this litigation with regard to the remaining SRF

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<sup>1</sup> Pursuant to Fed.R.Civ.P. 25(d), the present Administrator of EPA, Gina McCarthy, has been replaced in the caption for former Administrator, Lisa Jackson. The Declarations filed herewith continue to include Ms. Jackson in the caption.

claim.<sup>2</sup> A stay should be issued because litigating the SRF claim at this time would result in a significant waste of judicial resources, given that: (a) the relief Plaintiffs seek (generation of an updated Cape Cod areawide waste treatment plan under Section 208 of the Clean Water Act (“CWA”)) already is in progress; (b) the Court would have no basis to provide the type of injunctive relief against EPA sought by Plaintiffs; and (c) Plaintiffs’ claims are likely to be rendered moot (if they are not *already* moot). As part of the proposed stay, EPA proposes to submit reports to the Court every six months (or at any other interval the Court deems appropriate) regarding the status of state, local, and federal actions being taken in conjunction with the ongoing update of the Cape Cod areawide waste treatment plan.

In support of this request for a stay, EPA submits the following:

1. In conjunction with its August 23, 2013 Order dismissing Counts I-III of the Complaint, the Court on that same day issued an opinion finding, based solely on the allegations in the Complaint, that Count IV could not at that point be dismissed on jurisdictional grounds. Memorandum and Order Concerning Count IV (Doc. 49) (“Op.”).<sup>3</sup>

2. In that same opinion the Court summarized Plaintiffs’ remaining SRF claim as follows: “In Count IV, plaintiffs generally allege that because the § 208 areawide plan for Cape Cod is so outdated, and the 1978 plan states that it will be updated annually, any decisions by EPA to continue to allow Massachusetts to fund SRF projects consistent with that 1978 plan are arbitrary, capricious, or contrary to law.” Op. at 4. See also id. at 2. Plaintiffs seek an order

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<sup>2</sup> The Court’s Order of August 23, 2013 (Doc. 50) ordered the parties to submit a report on future proceedings, rather than a motion to govern future proceedings, and this submission is so styled. The Court’s order does not contemplate any additional briefs or submissions being filed in response to the parties’ respective reports but instead calls for addressing such reports at a scheduling conference set for October 9, 2012 at 4:00 p.m. Doc. 50 ¶ 8.

<sup>3</sup> In proposing a stay, Defendants do not concede that the Court has subject matter jurisdiction with regard to the SRF claim. Defendants reserve all rights to assert lack of jurisdiction as a defense based on a full record, should this action proceed to litigation.

requiring an update of the Section 208 areawide plan for Cape Cod, so that SRF funding decisions can be made consistent with an updated areawide plan. Id. at 3.

3. Regardless of whether Plaintiffs eventually might be able to prove their claim and, upon a full record, establish that they have standing to pursue such a claim or that the Court otherwise has jurisdiction with regard to Count IV, the relief Plaintiffs seek through their SRF claim is already taking place. That is, development of an updated Section 208 areawide plan addressing nitrogen loading in and around Cape Cod bays has been funded and commenced by the Commonwealth and local authorities and is in progress.

4. In this regard, the attached Declarations of Paul Niedzwiecki, Executive Director of the Cape Cod Commission (“Commission”), the local planning body designated under 33 U.S.C. § 1288 (Section 208) to conduct areawide waste treatments plans for Cape Cod, and Kenneth L. Kimmell, Commissioner of the Massachusetts Department of Environmental Protection (“MassDEP”), along with the schedules, contracts and other documents attached thereto, establish the following:

A. Over the past decade, MassDEP, working in conjunction with the Commission, has funded various scientific studies and analyses regarding water quality issues on Cape Cod, particularly those associated with nitrogen loading. Kimmel Dec. ¶ 2. Based on these studies, which have cost the Commonwealth and local communities over \$10 million, MassDEP concluded that nitrogen loading is a Cape Cod-wide issue that can be best addressed through a regional approach. Kimmel Dec. ¶¶ 2-3. Accordingly, on or around January 30, 2013, Commissioner Kimmel directed the Cape Cod Commission to prepare an update of the 1978 Section 208 Cape Cod areawide plan with regard to the effects of nitrogen in and around Cape Cod’s bays. Kimmel Dec. ¶ 4 and Ex. 1; Niedzwiecki Dec. ¶ 6 and Ex. A.

B. On or around February 6, 2013, the Board of the Massachusetts Water Pollution Abatement Trust (“Trust”), which is an instrumentality of the Commonwealth that, along with MassDEP, administers the SRF pursuant to Title VI of the CWA (Kimmel Dec. p.2, FN 1), voted to provide up to \$3.35 million to the Commission for funding for the Section 208 areawide plan update. Kimmel Dec. ¶ 5 and Ex. 2. The funding was contingent on a Memorandum of Understanding (“MOU”) being executed by MassDEP, the Commission, and the Trust which outlines the scope of services, project plan, and budget for the update. Id.

C. On or around March 21, 2013, MassDEP, the Commission, and the Trust entered into the MOU, under which Mass DEP “directed the Commission to prepare an update to the 1978 Water Quality Management Plan for Cape Cod (the ‘Project’) in accordance with § 208 and 40 C.F.R. Part 130.” Kimmel Dec. ¶ 6 and Ex. 3 at 1; Niedzwiecki Dec. Ex. B. The study is to be funded through SRF monies from the Administrative Expense Fund managed by the Trust and DEP, with these Commonwealth entities committing to provide the Commission up to \$3,350,000 to fund the update. MOU ¶ 2; Niedzwiecki Dec. ¶ 9. Under the terms of the MOU, the Commission is to provide a draft of the Section 208 plan update to MassDEP not more than twelve months after MassDEP’s approval of a revised scope of work and execution of a contract between MassDEP and the Commission, which will result in delivery of the draft plan on or before May 7, 2014. MOU ¶ 3F; Niedzwiecki Dec. ¶¶ 10, 31.

D. On or around April 22, 2013, the Commission submitted to MassDEP for approval its “Area-Wide 208 Water Quality Management Plan Update: Program Work Plan” (“Work Plan”). Kimmel Dec. ¶ 7 and Ex. 4. The Work Plan details how the Commission intends to organize the 53 main watersheds on Cape Cod, including embayment watersheds that have not been studied by the Massachusetts Estuaries Project (“MEP”), which developed the

analyses that formed the groundwork for Cape Cod TMDLs, and to create a Cape Cod-wide plan update of the Section 208 areawide plan. Work Plan at 11-12. The Work Plan contains schedules, charts, maps, outlines, staffing assignments, budgets, methodologies, deliverables and narratives describing, inter alia: the reports, studies and materials to be conducted or otherwise relied upon; the many tasks to be conducted in formulating the updated plan; the process for defining baseline conditions and impairments; the process for defining water quality requirements; financial and affordability assessments; development of management alternatives; integration with other planning; consideration of climate change, sea level rise and storm surge; and proposals on how to implement the plan, including technology development and pilot projects. Id. at 10-35 (and attachments thereto). The public will be fully involved in the process to develop a draft update, through, inter alia: publication of the minutes of various work groups; use of a 7-person § 208 Plan Advisory Board, at least three members of which will be community members; a communications strategy and campaign, including the potential use of social media to keep the public regularly informed; watershed-specific workshops; use of a professional facilitation team to provide a structure for stakeholder communications; and watershed stakeholder working groups, which will include persons from various constituencies. Id. at 13-16.

E. On or around May 7, 2013, the Commonwealth issued to the Commission a “Notice to Proceed” letter, authorizing the Commission to commence the Section 208 areawide plan update. Kimmel Dec. ¶ 8 and Ex. 5. That letter attached an original of the final, binding contract calling for the Commission’s generation of an updated Section 208 areawide waste treatment plan for all of Cape Cod. Id.

F. Based on the MOU and the Work Plan, the Commission has entered into no fewer than six contracts for services necessary to carry out its responsibilities to update the Section 208 Cape Cod areawide plan. These contracts, all of which have been approved by MassDEP through Notice to Proceed letters, include services for or relating to, inter alia: a project management consultant; alternative wastewater treatment technologies; education and public outreach programs; public stakeholder engagement; engineering; and computer programs relating to the cost and efficacy of various wastewater technologies. Niedzwiecki Dec. ¶¶ 11-23. In addition, the Commission's chosen engineering firm has hired five subcontractors to support its work in developing the Section 208 update and MassDEP issued a contract extension to Cape-Wide Wastewater Solutions, which will allow for the linking of land use data with newly developed scientific and financial planning data to create a comprehensive model designed to identify environmentally appropriate and affordable wastewater infrastructure solutions. Niedzwiecki Dec. ¶¶ 26-28.

G. Beginning with the execution of the MOU in March 2013, the Commission has submitted to MassDEP monthly progress reports which outline the status of the tasks being undertaken. Niedzwiecki Dec. ¶ 30 and Ex. U.

H. Pursuant to the provisions of the MOU, the Commission also has already taken substantial steps to ensure the involvement and participation of local governments, other governmental authorities, stakeholders, and the public at large. For example, the Commission has:

1. Held meetings and discussions with elected and appointed representatives of all Cape Cod towns and other local governmental authorities, outlining the entire Section 208 update process. (Niedzwiecki Dec. ¶¶ 35-36 and Ex. V);

2. Conducted four days of public meetings in July 2013 to discuss existing water quality management planning and the development of the Section 208 update. (Niedzwiecki Dec. ¶ 37 and Ex. W);
3. Sent updates regarding the Section 208 planning process to town and local government officials. (Niedzwiecki Dec. ¶ 39 and Ex. Y);
4. Conducted four days of public meetings on affordability and financing issues as they relate the Section 208 plan update. (Niedzwiecki Dec. ¶ 40 and Ex. Z);
5. Established and held meetings in June, July, August and September 2013 of the Advisory Board for the Section 208 Cape Cod areawide plan update, which includes members of the public. (Niedzwiecki Dec. ¶¶ 41-42 and Ex. AA);
6. Established and held meetings of the Finance Subcommittee, the Technical Advisory Committee, and the Panel on Technologies. (Niedzwiecki Dec. ¶¶ 43-48 and Exs. BB, CC, and DD).
7. Established a Regulatory, Legal and Institutional work group to coordinate local, state and federal regulatory requirements, evaluate the need for regulatory reform, and address planning and implementation challenges associated with the achievement of water quality goals. This work group, which includes representatives from MassDEP, the Commission, and EPA, has met every month since June 2013 and intends to continue to meet on a monthly basis. (Niedzwiecki Dec. ¶ 49 and Ex. EE);
8. Scheduled meetings for eleven separate watershed stakeholder groups to discuss various issues, including baseline conditions, technologies, and approaches. Each watershed stakeholder group will have ten to twenty participants, drawn from local elected and appointed government officials, environmental and public interest groups, civic groups,

alternative technology experts, development and real estate representatives, business representatives, and a separate group designated for unaffiliated interested citizens. Meeting schedules, agendas, and participant lists have been published, which evidence that numerous environmental groups are represented in these stakeholder groups, including Plaintiff Buzzards Bay Coalition, represented by both its President and Senior Counsel (Upper Cape watershed). (Niedzwiecki Dec. ¶ 51 and Ex. FF).

I. In addition to the activities of MassDEP outlined above regarding its involvement in the Section 208 Cape Cod areawide update being conducted by the Commission, MassDEP has committed to: conduct oversight of the use of the funds for planning activities; review and comment on all preliminary deliverables within thirty (30) days of receipt; and hold weekly meetings with the Commission at the senior management level to ensure timely completion of the Section 208 plan update. Kimmel Dec. ¶ 9.

5. Upon submission of the draft revised Section 208 areawide plan to MassDEP on or around May 7, 2014, the Commission intends to solicit feedback from MassDEP and EPA through July 31, 2014. The Commission then intends to conduct a comprehensive public comment process for a period of at least ninety (90) days, to begin on or around August 1, 2014. After considering these reviews and comments (and generating a Response to Comments documents for public review), on or around December 31, 2014, the Commission intends to submit to MassDEP for its review and approval its final version of the Section 208 Cape Cod areawide plan update. Niedzwiecki Dec. ¶ 31.

6. Assuming the schedule outlined above is conformed to, MassDEP expects to review the Commission's final Section 208 plan update and submit it to the Governor or his



designee for certification on or around January 7, 2015. Kimmel Dec. ¶ 9. Following such certification, the Section 208 plan update will be formally submitted to EPA for approval. Id.

7. Region 1 of EPA (which covers the Cape Cod area and the rest of New England) has identified the completion of the Section 208 Cape Cod areawide update as a priority because it is designed to help address critical water quality challenges on the Cape. Moraff Dec. ¶ 9. Accordingly, EPA Region 1 is providing both the Commission and the Commonwealth with technical and policy guidance and assistance so as to facilitate the completion of the areawide plan update and to help ensure that such update will meet applicable statutory and regulatory requirements. Id. In this regard, officials of EPA already have provided technical and policy advice to the Commission and the Commonwealth. Id. In addition, EPA officials plan to attend public forums and technical review meetings during the ongoing update process. Moraff Dec. ¶ 10. EPA assistance will continue until the areawide plan update is finalized and submitted to EPA for its approval. Moraff Dec. ¶ 11.

8. Once an updated Section 208 Cape Cod areawide plan is completed, certified by the Commonwealth, and presented to EPA for its approval pursuant to 33 U.S.C. § 1288, and approval is issued, Massachusetts would be required to ensure that its funding of SRF-funded projects on Cape Cod is consistent with that updated Section 208 Cape Cod areawide plan. 33 U.S.C. § 1383(f). There is no factual basis to conclude that the Commonwealth will fail to ensure that SRF-funded projects are consistent with the updated plan and provide certification or other appropriate documentation of that determination to EPA. In its annual review of SRF-funded projects conducted under Title VI of the CWA (the SRF program), EPA will consider the Commonwealth's intended use plan, annual report, and other materials it considers necessary or appropriate in carrying out the purposes of the SRF program. 33 U.S.C. § 1386(e). In

conducting its oversight review under 33 U.S.C. § 1386(e), EPA would not consider the 1978 Cape Cod Section 208 areawide plan if superseded and inoperative by virtue of updates to the plan. Id.; Moraff Dec. ¶ 12.

9. Count IV of the Complaint is, in light of the actions of the Commission and the Commonwealth, both moot and otherwise not actionable, because there is no evidence – nor any allegations or other basis to conclude – that the *alleged* illegal actions of EPA (reviewing Commonwealth use of SRF funds for consistency with the 1978 areawide plan, which itself calls for updates but has not been updated since 1978) would or could continue upon completion and approval of the updated Section 208 Cape Cod areawide plan. See, e.g., Farmer v. Brennan, 511 U.S. 825 (1994) (plaintiff must establish that allegedly illegal conduct will continue and defendants may rely on post-complaint and post-motion developments to establish such conduct will not occur); Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1528 (2013), quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997) (“[A]n actual case or controversy must be extant at all stages of review, not merely at the time the complaint is filed,” noting that intervening events can deprive a plaintiff of jurisdiction); Redfern v Napolitano, No. 11-1805, 2013 WL 3470495 at \*5 (1<sup>st</sup> Cir. July 11, 2013) (where allegedly illegal actions are no longer to occur, action is moot); Barr v. Galvin, 626 F.3d 99, 104 (1<sup>st</sup> Cir. 2010), quoting ConnectU LLC v. Zuckerberg, 522 F.3d 82, 88 (1<sup>st</sup> Cir. 2008) (“The rule is that ‘when an intervening event strips the parties of any legally cognizable interest in the outcome,’ a case, once live, is rendered moot (and thus, non-justiciable).”); The Gulf of Maine Fishermen’s Alliance v. Daley, 292 F.3d 84, 88 (1<sup>st</sup> Cir. 2002), quoting Church of Scientology v. United States, 506 U.S. 9, 12 (1992) (“[I]f an event occurs while a case is pending . . . that makes it

impossible for the court to grant any effectual relief whatever to a prevailing party, the [action] must be dismissed.”).

10. Notwithstanding the authorities outlined above under which the SRF claim may already be deemed to be moot, Defendants propose that this action (i.e., the remaining Count IV) be stayed so that the process of revising the Section 208 areawide plan can continue to completion. It would be Defendants’ intent to move for dismissal of Count IV (and hence, this action) upon EPA’s approval of an updated Section 208 Cape Cod areawide plan.

11. The time necessary to complete the revised Section 208 areawide plan will continue for one or more additional annual funding cycles under the Commonwealth’s SRF program. To the extent any Cape Cod wastewater treatment projects are funded through the SRF program during this interim period, any such projects are only likely to lead to the mitigation of any alleged harm to Plaintiffs resulting from nitrogen loading or other contaminants from wastewater. For example, as outlined in the MOU, the SRF funding program is being utilized to support the funding of the Section 208 Cape Cod areawide update itself. See ¶ 4.C supra, citing the MOU. Accordingly, there is no basis to take any action to enjoin the use of SRF funds for qualified projects during this interim period. Defendants have no objection to Plaintiffs reserving the right to seek to amend their Complaint to include in their SRF claim allegations related to EPA reviews in intervening years between the filing of their Complaint in 2011 and the completion of the update of the Section 208 areawide plan. Should Plaintiffs exercise that right then SRF-funded projects initiated during these years could be considered by the Court should the stay be lifted and the litigation reinstated.

WHEREFORE, the Court should:

A. Stay all aspects of this litigation; and

B. Require Defendants to submit to the Court a status report every six months regarding the progress of the Section 208 areawide update and actions of the Commission, the Commonwealth and EPA with regard to such update.

**ALTERANTIVE LITIGATION SCHEDULE**

As outlined above, Defendants believe that due to intervening circumstances, i.e., the Commonwealth and Commission funding and conducting a revision of the Cape Cod Section 208 areawide plan, continued litigation of this action is unnecessary and inappropriate and would be hugely wasteful of the resources of the Court and all parties. Indeed, at least with regard to EPA, its already limited resources and manpower that presently is directed to assisting the Commission and the Commonwealth in expeditiously producing a Section 208 areawide plan update, would have to be re-directed to litigation, assisting in its defense of Count IV, beginning with compilation and organization of the administrative records for EPA's SRF reviews for an undetermined number of years. Currently, these same EPA officials must re-direct their time, efforts and energies from assisting the Commission and the Commonwealth to preparation of a response to an extensive Freedom of Information Act request recently submitted by Plaintiff Conservation Law Foundation seeking agency records related to, among other things, EPA's administration of the SRF program and many other CWA planning programs throughout the Commonwealth. Moraff Dec. ¶ 13 and Ex. 2.

Notwithstanding EPA's strongly held views regarding the wisdom of staying this action, should the Court determine that continued active litigation is the proper course, Defendants alternatively propose the following schedule for further proceedings, which takes into account that Count IV, the only remaining claim in this case, seeks judicial review of agency action or inaction under the Administrative Procedure Act ("APA"):

DEADLINE	ACTION
30 days from Court's Order <sup>4</sup>	Motions to Intervene (Opposition and Reply briefing to be due in accordance with the deadlines set forth in the Courts' rules).
60 days from Court's Order	Defendants' Response to the First Amended Complaint.
75 days from Court's Order	Defendants' index of the administrative record.
125 days from Court's Order	Cross-Motions for summary judgment on the merits, with supporting briefs no greater than 30 pages length. All Plaintiffs shall file a single, consolidated brief.
175 days from Court's Order	Briefs in opposition of the opposing parties' motion for summary judgment and in further support of their opening briefs of no greater than 25 pages in length. All Plaintiffs shall file a single, consolidated brief.
	Reply briefs in support of motions for summary judgment not to be permitted in the absence of leave of Court.

Respectfully submitted this 27th day of September 2013, by

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<sup>4</sup> All dates set forth in the alternative schedule run from the date of the Court's Order issuing a litigation schedule with regard to Count IV of the Complaint.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Defendants' Report Regarding Future Proceedings, was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of said document to the attorneys of record/parties who have registered as CM/ECF participants.

Date: September 27, 2013

/s/ Perry M. Rosen  
Perry M. Rosen