

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA**

SOUND RIVERS, INC.,)	
)	
Plaintiff,)	
v.)	CIVIL ACTION NO.:
)	
)	
CLAYTON PROPERTIES GROUP,)	
INC.,)	
d/b/a Mungo Homes,)	
)	
Defendant.)	

COMPLAINT

Plaintiff, Sound Rivers, Inc. (“Sound Rivers”), by and through its counsel, hereby files this Complaint and alleges as follows:

I. Nature of the Case

1. This is a citizen suit brought by Sound Rivers against Clayton Properties Group, Inc. doing business as Mungo Homes (“Clayton”) pursuant to Section 505 of the Federal Water Pollution Control Act Amendments of 1972 (the “Clean Water Act”), 33 U.S.C. § 1365.
2. Since at least 2022, Clayton has violated, and continues to violate, numerous requirements of its Clean Water Act National Permit Discharge Elimination System (“NPDES”) permit.
3. Specifically, during the construction of the residential development known as Sweetbrier in Durham, North Carolina (“the Site”), Clayton has violated its Clean Water

Act permit by polluting Martin Branch (also known as Martin Creek) and downstream waterways with harmful sediment.

4. Sediment is solid particulate matter, such as sand and soil, transported by water, air, or gravity from its place of origin into receiving waters. Sediment pollution caused by land-disturbing activities at construction sites can degrade water quality; harm fish, aquatic animals and plants, and surrounding ecosystems; contribute to the growth of harmful algal blooms; and increase the difficulty and cost of treating water for drinking and other uses.

5. More than a year has passed since Clayton's violations began, and more than 60 days have passed since Sound Rivers notified Clayton of those violations. The violations identified in the notice letter have not ceased and are likely to continue in the future, absent a court order for corrective action.

6. Sound Rivers seeks declaratory and injunctive relief and the assessment of penalties to stop and correct Clayton's ongoing violations of its NPDES permit.

II. Jurisdiction and Venue

7. This Court has subject matter jurisdiction over the claims set forth in this Complaint under Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a).

8. Venue is proper within this judicial district because the source of the violations alleged herein is located in this district in Durham County. 33 U.S.C. § 1365(c)(1); 28 U.S.C. § 1391(b)(2), (c).

9. In compliance with 33 U.S.C. § 1365(b)(1)(A) and 40 C.F.R. § 135.2(a)(1), on May 10, 2023, Sound Rivers gave Clayton, the Administrator of the U.S. Environmental

Protection Agency (“EPA”), and the North Carolina Department of Environmental Quality (“DEQ”) notice of the violations specified in this Complaint and of Sound Rivers’ intent to file a citizen suit in federal court against Clayton should these violations continue. The notice was sent by certified mail to Chris Simmering (Vice President of Land Acquisitions and Development at Mungo Homes)¹ and CT Corporation System (Clayton’s registered agent). Copies of the notice were also sent by certified mail to the Administrator of the EPA, the Regional Administrator of EPA - Region 4, and the Secretary of DEQ. Counsel for Clayton acknowledged receipt of the notice on June 1, 2023. A copy of the notice letter is attached as Exhibit 1.

10. Consistent with the requirements of 33 U.S.C. § 1365(b)(1)(B), neither EPA nor DEQ “has commenced [or] is diligently prosecuting” any enforcement action to stop Clayton’s ongoing violations set out in the notice.

III. Parties

A. Plaintiff Sound Rivers and Its Members

11. Plaintiff Sound Rivers is a North Carolina nonprofit membership organization with approximately 2,500 members. Sound Rivers works to protect, restore, and preserve the Neuse and Tar-Pamlico River Basins through public education, advocacy, and pollution prevention. Its territory includes tributaries like Martin Branch and Lick Creek, as well as other waterways throughout the Neuse and Tar-Pamlico River Basins, including Falls

¹ Mr. Simmering has held this role for the past seven years.

Lake. Sound Rivers, the riverkeepers and staff it employs, and its members actively support the effective implementation and enforcement of environmental laws, including the Clean Water Act.

12. Sound Rivers' Neuse Riverkeeper, Samantha Krop, regularly monitors waterways in the Neuse River Basin for environmental issues that impact water quality. She also regularly swims, paddles, camps, and hikes throughout the Neuse River Basin and its tributaries.

13. Members of Sound Rivers rely on waterways in the Neuse River Basin, including Martin Branch, Lick Creek (into which Martin Branch flows), and Falls Lake (into which Lick Creek flows), for a variety of uses including fishing, swimming, boating, wildlife observation, and photography. The violations alleged herein harm these members' uses and enjoyment of Martin Branch, Lick Creek, and Falls Lake.

14. For example, one Sound Rivers member's home abuts Martin Branch near the Site. Her personal enjoyment of her home and natural surroundings, as well as her recreational and aesthetic interests, have been negatively affected by Clayton's sediment pollution in Martin Branch. A second Sound Rivers member owns a business that depends directly on the health of Falls Lake. The sedimentation of Martin Branch and Lick Creek, with effects reaching as far as Falls Lake, has negatively affected this business owner's economic, recreational, and aesthetic interests. A third Sound Rivers member gets his drinking water from Falls Lake and is concerned about his drinking water supply being affected by

sediment pollution of Falls Lake and upstream waterways, including Lick Creek and Martin Branch.

15. An order from this Court enforcing the Clean Water Act by stopping and correcting Clayton's violations, along with the other relief sought in this action, would redress these injuries and allow Sound Rivers members to better enjoy and use these waterways.

16. Sound Rivers is a "citizen" within the meaning of Section 505(g) of the Clean Water Act, 33 U.S.C. § 1365(g).

B. Defendant Clayton Properties Group, Inc. d/b/a Mungo Homes

17. Defendant Clayton, a Tennessee corporation with its principal place of business in Maryville, Tennessee, is a division of Clayton Homes, Inc., a subsidiary of Berkshire Hathaway Inc. Clayton Homes, Inc., is a large real estate developer.² As of the end of 2022, Defendant Clayton operated in 18 states and had acquired nine site-builders that owned and controlled approximately 70,000 residential lots.³ In December 2018, Defendant Clayton acquired South Carolina builder Mungo Homes⁴ and registered to do business in North Carolina under the name Mungo Homes.⁵ Defendant Clayton has been developing the Site at Sweetbrier, a residential subdivision in Durham, North Carolina, since late 2020. During Clayton's development of the Site, the company's discharges have caused or

² Clayton Homes, *About Us*, <https://www.claytonhomes.com/about/> (last visited Sept. 6, 2023).

³ Berkshire Hathaway Inc., Annual Report (Form 10-K) (Feb. 25, 2023).

⁴ Clayton Properties Group, *Clayton Properties Group Acquires Mungo Homes* (Dec. 3, 2018), <https://www.claytonpropertiesgroup.com/clayton-properties-group-acquires-mungo-homes>.

⁵ Wake County Register of Deeds, Consolidated Real Property Index, Assumed Business Name Certificate for Clayton Properties Group, Inc. (recording use of name "Mungo Homes" on December 4, 2018).

contributed to sediment pollution in Martin Branch and downstream waterways in violation of the Clean Water Act. That pollution is ongoing.

18. Defendant Clayton is a “person” within the meaning of Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a); *id.* § 1362(5).

IV. Legal Background

19. The objective of the Clean Water Act “is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To accomplish that objective, Congress set “the national goal that the discharge of pollutants into the navigable waters be eliminated.” *Id.* Accordingly, Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant from a point source into navigable waters unless the discharge complies with various enumerated sections of the law.

20. The Clean Water Act defines “navigable waters” as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). By regulation, “waters of the United States” include “relatively permanent, standing or continuously flowing bodies of water,” including tributaries to other waters of the United States. 40 C.F.R. § 120.2(a)(1)–(3).

21. The phrase “discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12)(A).

22. The term “point source” means “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, [or] conduit . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). “[A] point source need not be the original

source of the pollutant; it need only convey the pollutant to ‘navigable waters.’” *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004); accord *W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 168 (4th Cir. 2010) (explaining that NPDES permits are required for discharges from point sources that “merely convey [pollutants] to navigable waters”). “[C]learing, grading, and excavation” of more than five acres of land brings a construction site within the Act’s definition of a point source. See *N.C. Shellfish Growers Ass’n v. Holly Ridge Assocs., LLC.*, 278 F. Supp. 2d 654, 681 (E.D.N.C. 2003) (“[T]he Tract itself qualifies as a point source.”).

23. The Clean Water Act enumerates the following non-exhaustive list of pollutants: “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.” 33 U.S.C. § 1362(6).

A. Clean Water Act Sections 301 and 402

24. Among other things, Clean Water Act Section 301(a) prohibits discharges not authorized by the terms of a NPDES permit issued pursuant to Section 402 of the Clean Water Act, 33 U.S.C. § 1342. A NPDES permit authorizes the discharge of a pollutant to navigable waters only under certain conditions.

25. Discharges of stormwater associated with construction activity (including clearing, grading, and excavation) at a site where five or more acres are disturbed are explicitly

defined as discharges that require a NPDES permit. 33 U.S.C. § 1342(p)(3)(A); 40 C.F.R. § 122.26(b)(14)(x).

26. The EPA possesses authority to issue NPDES permits, but it may delegate that authority to a State. 33 U.S.C. § 1342(b). Since 1975, EPA has delegated to North Carolina the authority to issue NPDES permits. Pursuant to that authority, DEQ issues both individual and general NPDES permits. General NPDES permits, at issue here, apply to categories of point sources with similar operations and similar types of discharges. 40 C.F.R. § 122.28(a)(2).

27. DEQ has issued “General Permit No. NCG010000 to Discharge Stormwater under the National Pollutant Discharge Elimination System for: Construction Activities that are also Subject to the North Carolina Sedimentation Pollution Control Act of 1973” (“General Permit NCG01”). Owners and operators of stormwater point source discharges associated with construction activity that will result in land disturbance of one or more acres must seek coverage under General Permit NCG01.⁶

28. General Permit NCG01 authorizes the discharge of stormwater to surface waters under specific conditions but strictly prohibits discharges that “cause or contribute to violations of North Carolina Water Quality Standards for surface waters” with “[a]ny permit noncompliance constitut[ing] a violation of the Clean Water Act.”

⁶ According to the North Carolina Sedimentation Pollution Control Act of 1973: “No person shall initiate any land-disturbing activity that will disturb more than one acre on a tract unless, 30 or more days prior to initiating the activity, an erosion and sedimentation control plan for the activity is filed with the agency having jurisdiction and approved by the agency.” N.C. Gen. Stat. § 113A-57(4).

29. General Permit NCG01 also requires permit holders to develop a stormwater pollution prevention plan, including an erosion and sediment control plan approved by the applicable state or local authority. An erosion and sediment control plan must provide for the installation of sediment control devices “sufficient to retain the sediment generated by the land-disturbing activity within the boundaries of the tract during construction upon and development of the tract” N.C. Gen. Stat. § 113A-57(3).

30. General Permit NCG01 also mandates design and construction standards for erosion and sediment control measures, as well as specific requirements for buffers, ground stabilization, and operation and maintenance. In particular, General Permit NCG01 compels permittees to (1) design and construct erosion and sediment control measures to prevent off-site sedimentation damage, (2) maintain a sufficient buffer to retain visible sedimentation, (3) install ground stabilization measures, (4) install and maintain all temporary and permanent erosion and sediment control measures as required by General Permit NCG01 and the erosion and sediment control plan, (5) prevent diversions of stormwater from erosion and sediment control measures when the design storm has not been exceeded, and (6) “take all reasonable steps to minimize or prevent any discharge in violation of [General Permit NCG01] which has a reasonable likelihood of adversely affecting human health or the environment.”

31. General Permit NCG01 further obligates the permit holders to comply with self-inspection, recordkeeping, and reporting requirements. In relevant part, General Permit NCG01’s self-inspection requirement compels permit holders to inspect (1) erosion and

sediment control measures, (2) stormwater discharge outfalls, and (3) the site perimeter, as well as on- and off-site streams and wetlands, where accessible, at least once every seven calendar days and within 24 hours of a rain event during which one inch of rain falls within 24 hours. General Permit NCG01 permit holders must record and report to DEQ certain occurrences, including visible sediment being deposited in on- and off-site streams, unanticipated bypasses, and any instances of noncompliance with General Permit NCG01 that may endanger health or the environment.

B. North Carolina Water Quality Standards

32. As required by Section 303 of the Clean Water Act, North Carolina has promulgated water quality standards.

33. Water quality standards consist of several components, including the designated best uses of a waterbody and numeric or narrative criteria to protect those designated uses. States establish numeric water quality criteria (or the maximum allowable pollutant concentration levels) to protect a waterbody's designated uses.

34. North Carolina has promulgated water quality standards for fresh surface waters designated as Class C waters. 15A NCAC 02B .0211.⁷

35. Water quality standards for Class C surface waters also apply to surface waters within water supply watersheds classified as WS-IV. 15A NCAC 02B .0216. Martin Branch, Lick Creek, and Falls Lake are WS-IV water sources, which means their best usage

⁷ North Carolina assigns a classification to all surface waters based on that water's designated best uses, with an accompanying set of water quality standards to protect specific uses.

is “as a source of water supply for drinking, culinary, or food-processing purposes . . . and any other best usage specified for Class C waters.” 15A NCAC 02B .0216(1).

36. One of North Carolina’s numeric water quality standards concerns turbidity, “a measure of water clarity.”⁸ Land-disturbing activities that produce or move particulate matter (such as sediment) negatively affect sunlight penetration, ecological health, and recreational value of affected waters.⁹ High turbidity can also reduce the capacity of drinking water reservoirs and promote pathogen growth, leading to outbreaks of waterborne diseases.¹⁰

37. North Carolina’s turbidity standard applicable to Class C waters (and incorporated into the standards for WS-IV waters like Martin Branch, Lick Creek, and Falls Lake) sets a limit of 50 Nephelometric Turbidity Units (“NTU”). 15A NCAC 02B .0211(21).

38. The turbidity standard further provides that “if turbidity exceeds [50 NTU] due to natural background conditions, the existing turbidity level shall not be increased.” *Id.* The turbidity standard is “deemed met when land management activities employ Best Management Practices” as defined by regulation. *Id.*; 15A NCAC 02B .0202(9).

39. The biological integrity standard applicable to Class C waters (and incorporated into the standards for WS-IV waters like Martin Branch, Lick Creek, and Falls Lake) mandates

⁸ N.C. Dep’t of Env’t Quality, *Cape Fear River Basin*, <https://www.deq.nc.gov/water-resources/planning-section/basin-planning/bpcape-fearinformational-flyerjuly2022/open#:~:text=Turbidity%20Turbidity%20is%20a%20measure,reduce%20drinking%20water%20reservoir%20capacity> (last visited Sept. 6, 2023).

⁹ *Id.*

¹⁰ *Id.*

that “[t]he best usage of waters shall be aquatic life propagation, survival, and maintenance of biological integrity (including fishing and fish) All freshwaters shall be classified to protect these uses at a minimum.” 15A NCAC 02B .0211(1). “‘Biological integrity’ means the ability of an aquatic ecosystem to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities, and functional organization similar to that of reference conditions.” 15A NCAC 02B .0202(13). A violation of the biological integrity standard occurs when “[s]ources of water pollution preclude any of the [specified best uses] on either a short-term or long-term basis.” 15A NCAC 02B .0211(2).

40. The settleable solids standard applicable to Class C waters (and incorporated into the standards for WS-IV waters like Martin Branch, Lick Creek, and Falls Lake) permits “only such amounts attributable to sewage, industrial wastes, or other wastes [that] shall not make the water unsafe or unsuitable for aquatic life and wildlife or impair the waters for any designated uses.” 15A NCAC 02B .0211(8).

C. Citizen Enforcement

41. The Clean Water Act authorizes a citizen to file suit when the citizen has an interest that “is or may be adversely affected” by an alleged ongoing violation of an “effluent standard or limitation.” 33 U.S.C. § 1365(a)(1), (g).

42. An “effluent standard or limitation” includes conditions of a NPDES permit issued pursuant to Section 402 of the Clean Water Act. 33 U.S.C. § 1365(f)(7).

43. A citizen suit may enforce the Clean Water Act against a pattern of intermittent violations, even if no violation is occurring when the suit is filed. “Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition.” *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 172 (4th Cir. 1988).

44. Under Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), a civil penalty of \$64,618 can be imposed for each and every actionable violation that occurred after November 2, 2015, and assessed after January 6, 2023, pursuant to 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4.

45. Under Section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), the court “may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.”

V. Facts

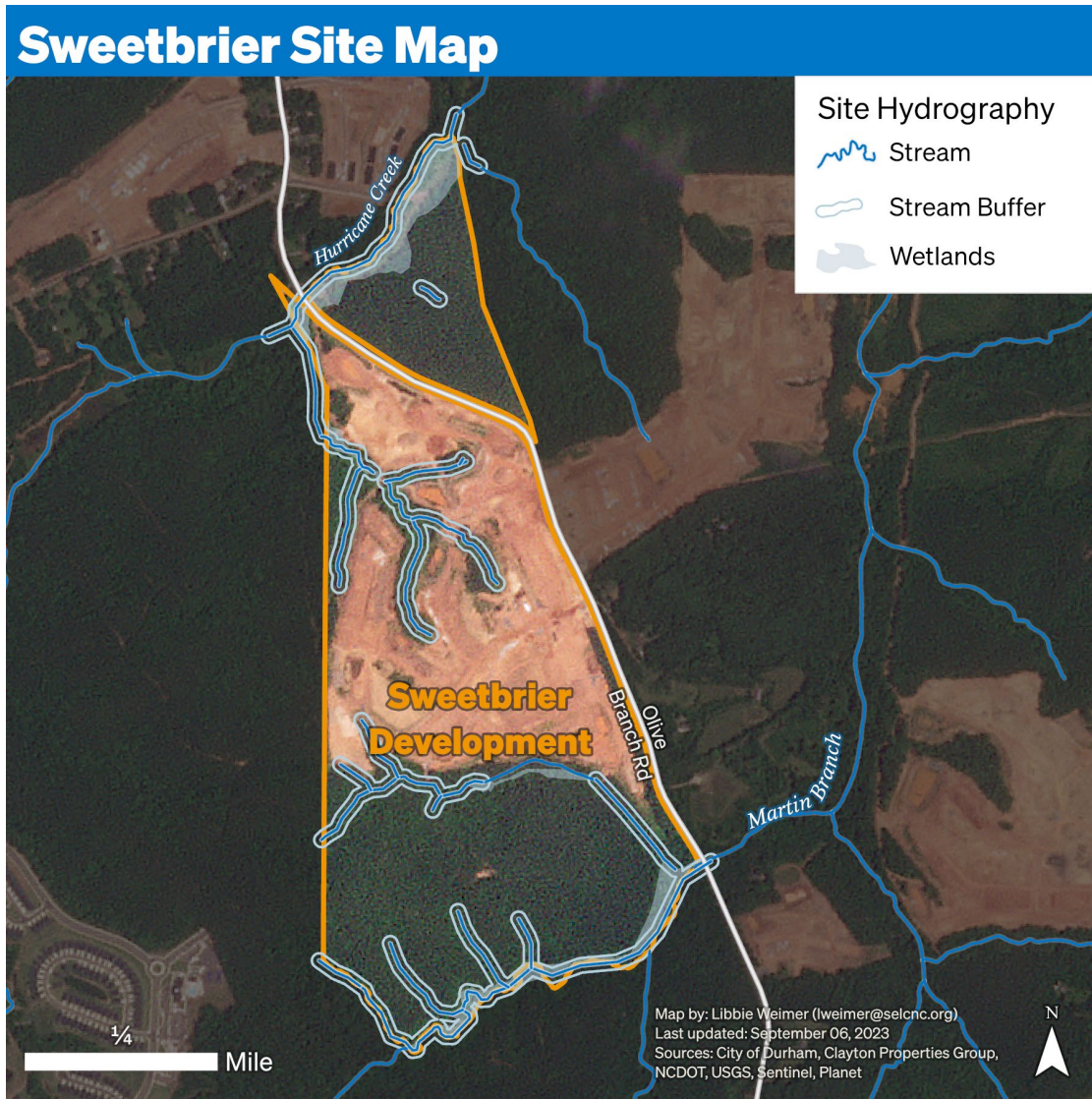
46. Sediment is the leading pollutant (by volume) in North Carolina.¹¹ Erosion can deposit sediment in nearby waterways, and land-disturbing activities associated with construction are the primary cause of erosion.

47. Sediment is solid particulate matter, such as sand and soil, transported by water, air, or gravity from its place of origin into receiving waters. Stormwater runoff from disturbed land at construction sites can transport sediment to nearby waters, causing turbidity that clouds the water.

48. Since late 2020, Clayton has been engaged in the planning, permitting, and development of the Site known as Sweetbrier, which consists of two parcels of land along Olive Branch Road in Durham, North Carolina. Since that time, Clayton has clear-cut much of the Site to build a 216-acre, 616-lot subdivision.

49. This Site is bordered by two tributaries to Lick Creek: Hurricane Creek (also known as Earthquake Creek) to the north and Martin Branch to the south. Both Hurricane Creek and Martin Branch are perennial streams that flow into Lick Creek downstream of the Site. Lick Creek flows into Falls Lake approximately three stream miles northeast of the Site.

¹¹ N.C. Dep't of Env't Quality, Div. of Energy, Min. & Land Res., Land Quality Section, *The North Carolina Sedimentation Erosion Control Program: Soil Erosion Facts*, <https://www.deq.nc.gov/energy-mineral-and-land-resources/erosion-and-sediment-control/esc-education/erosion-facts/download> (last visited Sept. 6, 2023).



50. Falls Lake serves as the primary drinking water source for the city of Raleigh and other nearby municipalities, and it provides recreational opportunities, including fishing, swimming, boating, and paddling, for surrounding communities as well as for Sound Rivers and its members.

51. DEQ's Division of Water Resources and the United States Army Corps of Engineers have identified multiple streams and wetlands on the Site as "waters of the United States," or "jurisdictional" under the Clean Water Act.

52. Clayton has obtained the requisite approvals from the City and County of Durham for the installation of stormwater infrastructure on the Site, including for its erosion and sediment control plan.

53. Clayton has obtained authorization to discharge stormwater associated with construction activities under General Permit NCG01. Clayton received such authorization on February 10, 2022, and its coverage and obligations under General Permit NCG01 remain effective as of the date of this Complaint.

A. Inspections Show Failures of Erosion and Sediment Control Measures at the Site

54. Clayton hired a third-party erosion control firm ("Third-Party Inspector") to perform an inspection of the Site on February 7, 2022. The Third-Party Inspector documented the erosion and sediment control measures required under Clayton's erosion and sediment control plan, which included designated construction entrances, tree protection fences, silt fences, silt fence outlets, diversion ditches or swales, check dams, stockpiles, slope drains, debris bins or dumpsters, fuel containment, and material storage, as well as seven sediment basins. These measures are intended to prevent sediment pollution from leaving the Site.

55. During another Site inspection on April 18, 2022, the Third-Party Inspector observed the presence of “[t]urbid water . . . leaving the [S]ite at the outfalls.”

56. On April 26, 2022, an inspection by the Stormwater and Erosion Control Division of the Durham County Department of Engineering and Environmental Services (“Durham County Inspection”) revealed a failure by Clayton to provide reasonable or additional erosion and sediment control measures as required by Clayton’s approved erosion and sediment control plan and the Durham City/County Unified Development Ordinance. The inspector identified problems related to diversion ditches, berms (raised embankments), and groundcover and further noted the need to maintain check dams (structures to control water flow) and sumps (structures used to collect water).

57. On May 31, 2022, the Third-Party Inspector noted “sediment and other pollutants . . . beyond the approved or permitted limits of disturbance” and documented areas of the Site “releasing sediment or other pollutants into receiving waters.”

58. On September 8, 2022, a Durham County Inspection uncovered several instances of noncompliance, including the presence of inadequate buffer zones alongside natural watercourses, excessively steep graded slopes, overwhelmed silt fences, the absence of groundcover, and the need to clean and reinstall several sediment basins.

59. Many of these problems persisted during subsequent Durham County Inspections, including one on October 4, 2022, when the inspector recorded additional problems with the Site’s stormwater management infrastructure, including diversion ditches, berms, rip rap, velocity dissipators, sediment basins, and groundcover.

60. During another Durham County Inspection on January 26, 2023, the inspector again documented a failure by Clayton to maintain reasonable or additional erosion and sediment control measures as required by Clayton's approved erosion and sediment control plan and the Durham City/County Unified Development Ordinance. This inspection also revealed problems with the Site's diversion ditches, berms, and groundcover. The inspector directed Clayton to correct those deficiencies by February 17, 2023.

61. On February 16, 2023, the day before the County-imposed deadline to correct the above deficiencies, another Durham County Inspection documented multiple ongoing issues at the Site. Clayton was found to be non-compliant with its erosion and sediment control plan and again failed to provide adequate erosion and sediment control measures as required by the Durham City/County Unified Development Ordinance. The inspector also recorded problems with the Site's graded slopes, rip rap, velocity dissipators, groundcover, silt fences, silt fence outlets, sediment basins, and skimmer devices.

62. On February 17, 2023, an erosion control supervisor with the Stormwater and Erosion Control Division of the Durham County Department of Engineering and Environmental Services emailed Clayton and its contractors, documenting 68 separate instances of continued failures of erosion and sediment control measures that would warrant the issuance of a notice of violation.¹²

¹² Email from Chris Fody, Project Manager, Iron Horse Contractors, LLC, to Jonathan B. McNeill, Erosion Control Supervisor, Durham Cnty. Gov't (Feb. 17, 2023, 18:24 EST), <https://perma.cc/URK5-WZRG>.

63. On March 28, 2023, during a Durham County Inspection, the inspector deemed Clayton's erosion and sediment control measures insufficient to retain sediment on site, noting that diversion ditches, berms, rip rap, velocity dissipators, groundcover, and sediment basins remained out of compliance with Clayton's erosion and sediment control plan and the Durham City/County Unified Development Ordinance.

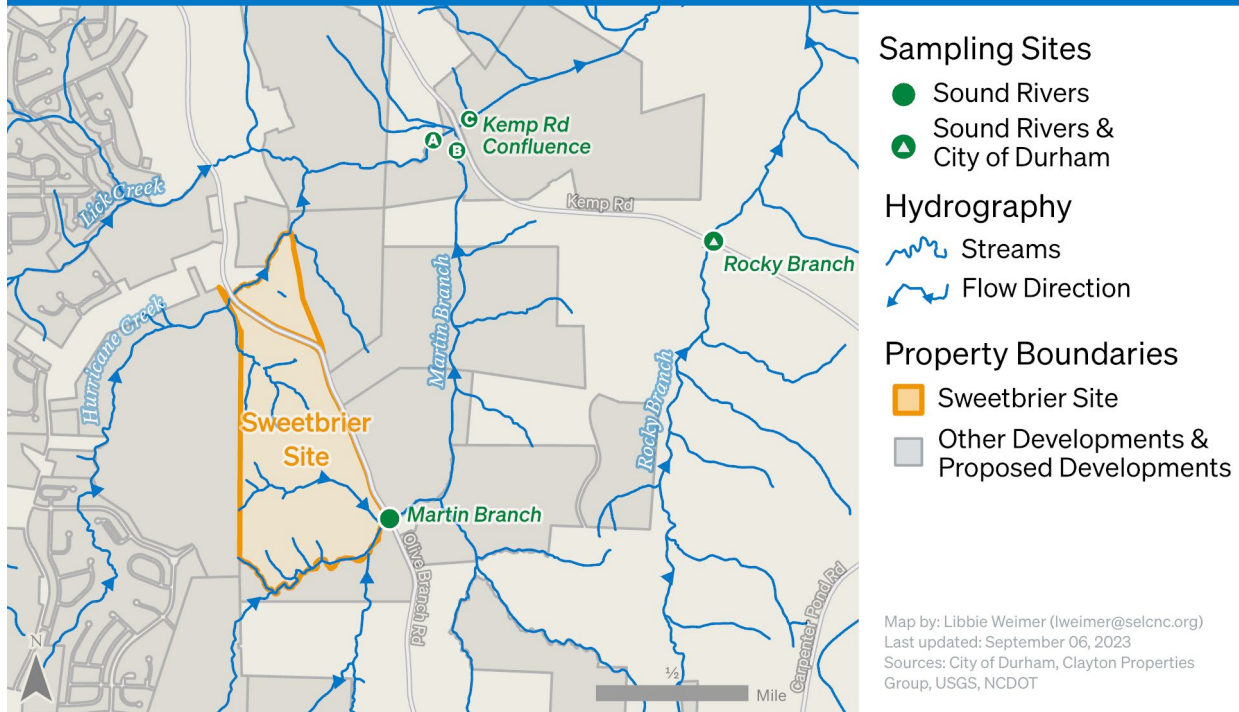
B. Sound Rivers Confirms Sediment Pollution Downstream of the Site

64. Sound Rivers began monitoring the ongoing sediment pollution and turbidity around Lick Creek in October 2022, with the most recent water sampling conducted on August 31, 2023.

65. The map below depicts Sound Rivers' water sampling sites for Martin Branch, Lick Creek, and Rocky Branch.¹³ At Martin Branch downstream of the Site, Sound Rivers sampled near where the water flows through a culvert under Olive Branch Road, at the southeastern corner of the Site. At Kemp Confluence, also downstream of the Site, Sound Rivers sampled three locations: (a) in Lick Creek before its confluence with Martin Branch, (b) in Martin Branch before its confluence with Lick Creek, and (c) in Lick Creek after its confluence with Martin Branch. Sound Rivers also monitored Rocky Branch to assess baseline conditions in a stream largely unaffected by construction activities associated with residential development.

¹³ After Sound Rivers gave Clayton notice of the violations described herein, it also began to conduct turbidity sampling in Hurricane Creek, the perennial stream that forms the northern boundary of the Site. To date, Sound Rivers has documented exceedances of the state turbidity standard in Hurricane Creek on June 2, 2023; July 14, 2023; August 2, 2023; and August 31, 2023.

Sweetbrier Site Map with Sampling Locations



66. Since November 2022, every time that Sound Rivers has conducted turbidity sampling at Martin Branch, it has documented exceedances of the North Carolina turbidity standard. Upon information and belief, large amounts of sediment from the Site are deposited into downstream waterways when it rains. On August 31, 2023, Clayton caused the turbidity level in Martin Branch to exceed 1,100 NTU, the maximum amount one of Sound Rivers' measuring devices can record. The state turbidity limit is 50 NTU.

67. The photographs below, taken on March 30, 2023, show sediment pollution leaving the Site and flowing into Martin Branch (left), which remains loaded with sediment when it meets the main stem of Lick Creek downstream of the Site (right).



68. The photographs below, taken on August 2, 2023, show the deposition of sediment at Kemp Confluence, downstream of the Site.



69. Sampling conducted by DEQ confirms these findings, with two of DEQ's sampling sites aligning with Sound Rivers' at Martin Branch and Kemp Confluence.¹⁴

70. For instance, on January 6, 2023, DEQ recorded a measurement of 210 NTU at Martin Branch and 450 NTU at Kemp Confluence, far above the applicable standard of 50 NTU.

71. On January 23, 2023, DEQ recorded a measurement of 75 NTU at Martin Branch and 200 NTU at Kemp Confluence.

72. During a flyover of Falls Lake on June 14, 2023, Sound Rivers documented sediment pollution, which Clayton has caused and/or contributed to, particularly in the area where Lick Creek flows into Falls Lake. Lick Creek (left), carrying sediment, flows into Falls Lake (right), causing noticeable discoloration of the water well beyond the confluence.



¹⁴ At Kemp Confluence, DEQ sampled for turbidity in Lick Creek after its confluence with Martin Branch.

C. Clayton Fails to Comply with General Permit NCG01 Reporting Obligations

73. Eighty-two weeks have elapsed since February 2022, when Clayton obtained coverage under General Permit NCG01. During this period, there have been seventeen storms in Durham, North Carolina with more than one inch of precipitation.¹⁵

74. Since February 2022, General Permit NCG01 has obligated Clayton to inspect the Site—on a weekly basis and after such rain events—and report visible sediment being deposited in adjacent streams, unanticipated bypasses, and instances of noncompliance with General Permit NCG01 that may endanger health or the environment.

75. Upon information and belief, Clayton has failed to comply with its obligation to report such occurrences to DEQ.¹⁶

CLAIMS FOR RELIEF

First Claim for Relief

(Violations of Sections 301 and 402 of the Clean Water Act through Violation of NPDES Permit – Water Quality Standard Violations)

76. Sound Rivers incorporates paragraphs 1 through 75 by reference.

77. Clayton owns and operates the Site.

78. Martin Branch, Lick Creek, and Falls Lake are waters of the United States.

79. Sediment is a pollutant.

¹⁵ This Complaint relies on publicly available data collected by a governmental entity, which captures the frequency and intensity of rainfall events.

¹⁶ A Clayton representative publicly denied the occurrence of events triggering Clayton's reporting obligation.

80. Many of the Site's erosion and sediment control measures, such as diversion ditches and sediment basins, as well as the Site itself, qualify as point sources.

81. Clayton's activities in developing the Site require a NPDES permit.

82. Since at least 2022, Clayton has discharged sediment-laden stormwater from the Site into Martin Branch, which flows into Lick Creek and, ultimately, Falls Lake.

83. Clayton's addition of sediment to Martin Branch constitutes a discharge of a pollutant from a point source to a water of the United States, which is prohibited by the Clean Water Act except in compliance with the terms of a NPDES permit.

84. Clayton's NPDES permit, General Permit NCG01, prohibits discharges of pollutants "that cause or contribute to violations of North Carolina water quality standards for surface waters or wetlands." Violations of the standards set out below constitute violations of Clayton's NPDES permit and the Clean Water Act.

A. Violations of Turbidity Standard

85. A North Carolina water quality standard limits the allowable turbidity level in receiving waters to 50 NTU. 15A NCAC 02B .0211(21).

86. On sixteen occasions, each time Sound Rivers sampled downstream of the Site over the past ten months, it measured significant exceedances of the North Carolina turbidity standard.

87. Exceedances of the turbidity standard occurred on November 28, 2022; December 16, 2022; January 31, 2023; February 21, 2023; March 14, 2023; March 30, 2023; April

18, 2023; May 2, 2023; May 15, 2023; June 2, 2023; June 19, 2023; June 30, 2023; July 14, 2023; August 2, 2023; August 22, 2023; and August 31, 2023.

88. On several occasions, the turbidity in Martin Branch and Lick Creek exceeded 1,100 NTU, the measurement limit of one device used by Sound Rivers. When Sound Rivers used another device capable of measuring higher turbidity, it captured readings from Martin Branch that far exceeded the state standard of 50 NTU.¹⁷

89. When Sound Rivers sampled at the baseline location in Rocky Branch, the turbidity was near or under the state standard of 50 NTU. For example, on August 31, 2023, while the turbidity in Martin Branch exceeded the state standard by a factor of eighty, the turbidity in Rocky Branch was 25 NTU.

90. Given the series of inspections revealing numerous failures of Clayton’s erosion and sediment control plan, Clayton’s violations of the numeric turbidity standard cannot be excused by any employment of best management practices.

B. Violations of the Biological Integrity Standard

91. North Carolina’s biological integrity standard is a water quality standard that protects receiving waters from pollution that would preclude “the ability of [the] aquatic ecosystem to support and maintain a balanced and indigenous community of organisms

¹⁷ When the turbidity in Martin Branch or Lick Creek exceeded 1,100 NTU, Sound Rivers obtained additional samples measured in Formazin Nephelometric Units (“FNU”), a measurement similar (though not directly comparable) to NTU. See U.S. Geological Surv., Or. Water Sci. Ctr., *Turbidity – Units of Measurement*, <https://or.water.usgs.gov/grapher/fnu.html#:~:text=For%20example%2C%20a%20Formazin%20Nephelometric,measured%20with%20a%20white%20light> (last modified June 17, 2022).

having species composition, diversity, population densities, and functional organization similar to that of reference conditions.” 15A NCAC 02B .0202(13).

92. Clayton’s discharges of sediment have resulted in the deposition of sediment in the streambed, which destroys habitat for indigenous aquatic organisms. The impacts of sediment pollution can occur quickly and persist in the long-term.

93. The sediment pollution that Clayton has caused and/or contributed to precludes the use of the receiving waters as habitat for a balanced, indigenous community of aquatic organisms in a manner “similar to that of reference conditions.” 15A NCAC 02B .0202(13).

C. Violations of the Settleable Solids Standard

94. Another North Carolina water quality standard prohibits sewage and industrial or other wastes from “mak[ing] the water unsafe or unsuitable for aquatic life and wildlife or [from] impair[ing] the waters for any designated uses.”. 15A NCAC 02B .0211(8).

95. North Carolina law defines “other waste” to include suspended solids and sediment. N.C. Gen. Stat. § 143-213(18)(c).

96. Clayton’s discharges of sediment have polluted Martin Branch, with effects reaching Lick Creek and Falls Lake. The deposition of sediment destroys habitat for aquatic insects (a basic fish food source) and contributes to a decline in fish populations.

97. The sediment pollution that Clayton has caused and/or contributed to impairs the receiving waters and makes the water unsuitable for aquatic life and wildlife.

98. Because Clayton's discharges of sediment violate North Carolina water quality standards, they are not in compliance with Clayton's NPDES permit, General Permit NCG01. The above-stated conduct, therefore, violates the Clean Water Act, 33 U.S.C. § 1311(a).

99. Based on the ongoing development of the Site and latest sampling, as well as Clayton's history of non-compliance with North Carolina water quality standards, the foregoing violations are likely ongoing.

Second Claim for Relief
(Violations of Sections 301 and 402 of the Clean Water Act through Violation of NPDES Permit – Erosion and Sediment Control Plan Violations)

100. General Permit NCG01 mandates that Clayton design and construct erosion and sediment control measures, as laid out in its County-approved erosion and sediment control plan, to prevent off-site sedimentation damage. General Permit NCG01, Part II, Section B(1).

101. Clayton's erosion and sediment control measures have failed to prevent off-site sedimentation damage, as evidenced by the inspection reports, sampling, and photographs referenced above.

102. General Permit NCG01 mandates that Clayton maintain a sufficient buffer to retain visible sedimentation. General Permit NCG01, Part II, Section D(1).

103. Clayton has failed to maintain a sufficient buffer to retain visible sedimentation. Instead, visible sedimentation is regularly deposited into surrounding surface waters, causing it to turn turbid and orange, as shown in the photographs above.

104. General Permit NCG01 includes requirements to install ground stabilization measures. General Permit NCG01, Part II, Section E.

105. Clayton has failed to establish groundcover in required areas, including on April 26, 2022; September 8, 2022; October 4, 2022; January 26, 2023; February 16, 2023; and March 28, 2023.

106. General Permit NCG01 mandates that Clayton install and maintain all temporary and permanent erosion and sediment control measures as required by General Permit NCG01 and the erosion and sediment control plan. General Permit NCG01, Part II, Section G(2).

107. Clayton has failed to install and maintain the erosion and sediment control measures required by its erosion and sediment control plan. For example, inspections have regularly noted that Clayton has failed to properly maintain its sedimentation basins, including on September 8, 2022; October 4, 2022; February 16, 2023; and March 28, 2023, allowing them to become clogged with sediment and reducing their capacity to manage stormwater.

108. General Permit NCG01 mandates that Clayton “take all reasonable steps to minimize or prevent any discharge in violation of [General Permit NCG01] which has a reasonable likelihood of adversely affecting human health or the environment.” General Permit NCG01, Part IV, Section A(6).

109. Clayton's failure to comply with its erosion and sediment control plan cause sediment to be deposited into Martin Branch, with sedimentation and other impacts on human health or the environment extending downstream into Lick Creek and Falls Lake.

110. Because Clayton has failed to control its sediment as required by its erosion and sediment control plan, with which General Permit NCG01 mandates compliance, the above-stated conduct violates the Clean Water Act, 33 U.S.C. § 1311(a).

111. Based on the ongoing development of the Site, as well as Clayton's history of non-compliance with its erosion and sediment control plan, the foregoing violations are likely ongoing.

Third Claim for Relief
(Violations of Sections 301 and 402 of the Clean Water Act through Violation of NPDES Permit – Inspection and Reporting Violations)

112. General Permit NCG01 also compels Clayton to conduct self-inspections and record and report (1) visible sediment deposition in a stream or wetland, (2) unanticipated bypasses, and (3) any noncompliance with General Permit NCG01 that may endanger health or the environment. General Permit NCG01, Part III, Sections A–C.

113. Among other things, General Permit NCG01 required Clayton to inspect on- and off-site streams and wetlands after the seventeen qualifying storms that have occurred since February 2022, as well as weekly (for a total of 82 weeks) since that time.

114. While Clayton had coverage under General Permit NCG01 and was discharging sediment into the surrounding waterways, it failed to report instances of visible sediment

being deposited in on- or off-site streams, unanticipated bypasses, or other instances of noncompliance that harm the environment.

115. Because Clayton has failed to comply with its reporting obligations under General Permit NCG01, the above-stated conduct violates the Clean Water Act, 33 U.S.C. § 1311(a).

116. Based on the ongoing development of the Site, as well as Clayton's history of non-compliance with its erosion and sediment control measures, the foregoing violations are likely ongoing.

PRAYER FOR RELIEF

Sound Rivers respectfully requests that this Court grant the following relief:

A. Enter a declaratory judgment stating that Clayton is violating the Clean Water Act by failing to comply with its NPDES permit;

B. Issue an injunction ordering Clayton to immediately cease its ongoing and continuing Clean Water Act violations, remove the sediment pollution it has caused and/or contributed to in Martin Branch and downstream waterways, restore and remediate those waters, and immediately take all necessary steps to come into permanent and consistent compliance with the Clean Water Act;

C. Impose civil penalties of up to \$64,618 per day per violation of the Clean Water Act in accordance with 33 U.S.C. § 1365(a), 33 U.S.C. § 1319(d), and 40 C.F.R. § 19.4;

D. Award Sound Rivers' reasonable attorneys' fees and costs of litigation (including expert witness fees) under 33 U.S.C. § 1365(d); and

E. Grant Sound Rivers such other relief as this Court deems just and proper.

Respectfully submitted this 7th day of September, 2023.

/s/ Irena Como

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