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For a thriving New England

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December 23, 2013

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VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

RE: Notice of Violations and Intent to Sue under the Clean Water Act

To Whom It May Concern:

The Conservation Law Foundation ("CLF")[1] hereby gives notice to the addressed persons of its intent sue pursuant to Section 505 of the Federal Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1365(a), for violations of the Act specified below. This letter supplements the Notice of Intent to Sue letter that CLF mailed to you on December 3, 2012 (the "Prior Notice Letter"). The Prior Notice Letter was attached as Exhibit A to CLF's Complaint in the pending Clean Water Act citizen suit against Plourde Sand and Gravel Co., Inc. (Case No. 1:13-cv-214-SM) and is incorporated here by reference. The factual and legal allegations set out in the Prior Notice Letter are not set out again in this notice of intent to sue, but are restated here by reference and incorporated in this letter by reference, as if fully set forth herein. You should refer to that Prior Notice Letter and read it in conjunction with this supplemental notice of violations and intent to sue.

[1] CLF is a not-for-profit 501(C)(3) organization dedicated conservation and protection of New England's environment. Its mission includes the conservation and protection of the many uses of the waters in and around the Merrimack River watershed for, among other things, fishing, recreation, boating, scenic/aesthetic, and scientific purposes. CLF's membership includes people who live in or near the Merrimack River watershed, and use and enjoy the Merrimack River and other associated waters in the watershed for recreational, aesthetic, and/or scientific purposes. The interests of CLF's members are adversely affected by the Operators' discharges of pollution to the receiving waters without a permit and in violation of the Clean Water Act.

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In addition to the violations alleged in the Prior Notice Letter, CLF's investigations have revealed that Plourde Sand and Gravel Co., Inc. (hereinafter "Plourde Sand and Gravel" or "you") is discharging process wastewater directly associated with the industrial activity conducted at its construction sand and gravel site at 519 West River Rd., Hooksett, NH 03106 (the "Facility"), to the waters of the United States without a permit, in violation of 33 U.S.C. §§ 1311(a).

BACKGROUND

As set out in the Prior Notice Letter and in CLF's Complaint and CLF's filings relative to Plourde Sand and Gravel's default, Plourde Sand and Gravel discharges stormwater associated with industrial activity into a surface water–wetland complex located in the north-northeasterly portion of the Facility and into a surface water–wetland complex located in the south-southeasterly portion of the Facility. Today's notice letter supplements those documents in order to put you on notice that CLF intends to pursue claims related to Plourde Sand and Gravel's unpermitted discharges of process water to waters of the United States.

Both of the surface water-wetland complexes are connected to the Merrimack River via surface water flows, subsurface hydrological connections, and man-made conduits. The two surface water–wetland complexes (which include the Facility's northerly and southerly ponds) and the Merrimack River are all "waters of the United States" as defined in 40 C.F.R. § 122.2,[2] and, therefore, "navigable waters" as defined in 33 U.S.C. § 1362(7).

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[2] "Navigable waters" are broadly defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). And "Waters of the United States" means, *inter alia*:

> (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce […];
> (b) […]
> (c) All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, <u>wetlands</u>, sloughs, prairie potholes, <u>wet meadows</u>, playa lakes, or <u>natural ponds</u>, the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
> 1. […]
> 2. […]
> 3. <u>Which are used or could be used for industrial purposes by industries in interstate commerce</u>;
> (d) <u>All impoundments of waters</u> otherwise defined as waters of the United States;

The southerly pond has existed in its current location since at least the early 1900's and flowed into the Merrimack River until Plourde Sand and Gravel apparently eliminated the pond's outlet in the early to mid-1960's. The southerly pond was a tributary to the traditionally navigable Merrimack River (if not navigable itself) and therefore was and is a water of the United States. *See, e.g.*, *Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210, 1218 (D. Or. 2009) ("a man-made structure cannot eliminate the CWA's jurisdiction over a water of the United States."); *United States v. Moses*, 496 F.3d 984, 989 (9th Cir. 2007) ("we do not see how a mere man-made diversion, however long ago undertaken, could change Teton Creek from a water of the United States into something else. […] Of course, we recognize that the diversion did take place long before the enactment of the CWA itself. That should not change the analysis.").

Discharges of process wastewater are not covered under the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity. Plourde Sand and Gravel is required to apply for coverage under a Clean Water Act individual discharge permit under the National Pollutant Discharge Elimination System (hereinafter "individual NPDES permit") in order to discharge process water lawfully.

Plourde Sand and Gravel has failed to obtain coverage for its process wastewater discharges under any valid authorization, at any time. Therefore, Plourde Sand and Gravel has operated, and is continuing to operate, in violation of the Clean Water Act.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

Plourde Sand and Gravel Co., Inc. is the person, as defined by 33 U.S.C. § 1362(5), responsible for the violations alleged in this Notice. Plourde Sand and Gravel has operated the Facility since at least 2007 and currently advertises as the operator of the Facility. Plourde Sand and Gravel and its agents and directors, including but not limited to Oscar P. Plourde, have operational control over the day-to-day industrial activities at this Facility. Therefore, they are responsible for managing stormwater at the Facility in compliance with the CWA.

LOCATION OF THE ALLEGED VIOLATION

The violations alleged in this Notice have occurred and continue to occur at the construction sand and gravel Facility located at 519 West River Rd., Hooksett, NH 03106.

> (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition[.]

40 C.F.R. 122.2 (emphasis added).

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ACTIVITIES ALLEGED TO BE VIOLATIONS

Plourde Sand and Gravel pumps water from the southerly pond uphill and uses that water in its industrial processes, included but not limited to washing gravel and crushed stone and spraying on rock crushing and sorting machinery. Once used in this way, the water becomes "process wastewater" (also referred to as "process water") as defined in 40 C.F.R. § 122.2.[3] This process wastewater is collected and channeled into a constructed pond located near the center of the facility (hereinafter, the "central pond"). It is then discharged through a rushing flow of process wastewater running downhill and easterly from the central pond in a defined channel through at least two culverts or pipes, and then southerly through another culvert or pipe before flowing into the southerly pond. In addition, CLF believes that at some times and under some conditions process wastewater may be (or may have been, during the limitations period) discharged to the northerly pond. The foregoing constitutes an unpermitted discharge of process wastewater from and through point sources into a water of the United States in violation of the Clean Water Act.

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED

The CWA prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid NPDES permit.[4] Plourde Sand and Gravel discharges process wastewater from its Facility into waters of the United States. Because Plourde Sand and Gravel has not obtained coverage for these process wastewater discharges under an individual NPDES permit, it is illegally discharging process wastewater without a permit, in violation of 33 U.S.C. §§ 1311(a).[5]

DATES OF VIOLATION

Each day on which Plourde Sand and Gravel operates its Facility without permit coverage or discharges process wastewater to waters of the United States without a permit is a separate and distinct violation of Section 301(a) of the Clean Water Act, 33 U.S.C. §§ 1311(a).

Plourde Sand and Gravel has discharged process wastewater without a permit in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), on a continuous and ongoing basis

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[3] Defining "Process wastewater" as "any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product."

[4] 33 U.S.C. § 1311(a).

[5] *See* 33 U.S.C. § 1362(12); 40 C.F.R. § 122.2; MSGP, Appendix A: Definitions, Abbreviations, and Acronyms (defining the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source").

since at least 2007. Plourde Sand and Gravel is in a better position than CLF to know on which specific dates it discharged process wastewater to waters of the United States including to the southerly and northerly ponds.

Every day, since at least 2007, on which Plourde Sand and Gravel has failed and continues to fail to apply for, obtain coverage, and comply with the requirements of an individual NPDES permit for its process wastewater discharges is a violation of Section 301(a) of the Clean Water Act, 33 U.S.C. §§ 1311(a).

These violations are ongoing and continuous, and barring a change in the operations at the Facility and full compliance with the permitting requirements of the Clean Water Act, these violations will continue indefinitely.

RELIEF REQUESTED

Plourde Sand and Gravel is liable for the above-described violations occurring prior to the date of this letter, and for every day that these violations continue. Pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4, each separate violation of the Act subjects Plourde Sand and Gravel to a penalty up to $32,500 per day for each violation which occurred between March 15, 2004 and January 12, 2009, and up to $37,500 per day for each violation that occurred after January 12, 2009.[6] CLF will seek the full penalties allowed by law.

In addition to civil penalties, CLF will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), and such other relief as permitted by law. CLF will seek an order from the Court requiring Plourde Sand and Gravel to correct all identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Lastly, pursuant to Section 505(d) of the Act, 33 U.S.C. § 1365(d), CLF will seek recovery of costs and fees associated with this matter.

CONCLUSION

CLF remains willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of further litigation. If you wish to pursue or re-initiate such discussions, please have your attorney contact Zachary Griefen.

[6] 40 C.F.R. § 19.2

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Sincerely,

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