clf
conservation law foundation

For a thriving New England

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January 27, 2014

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED
Edward J. Dudek, President, Director, and Registered Agent
Dudek Auto Recycling, Inc.
55 Hall Road
Londonderry, NH 03053

RE: Notice of Violations and Intent to File Suit 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 to file suit pursuant to Section 505 of the Federal Water Pollution Control Act (hereinafter "Clean Water Act" "CWA" or "Act"), 33 U.S.C. § 1365(a), for violations of the Act specified below. This letter constitutes notice pursuant to 40 C.F.R., part 135 (the "Notice") to the addressed persons of CLF's intention to file suit in United States District Court of the District of New Hampshire seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this Notice letter.

The subject of this action is two-fold. First, Dudek Auto Recycling, Inc., also doing business under the trade names "Murrays Auto Recycling Center" and "Murrays Auto Recycling," (hereinafter "Dudek Auto"), is discharging stormwater directly associated with the auto salvage site at 55 Hall Road, Londonderry, NH 03053 (the "Facility"), to the waters of the United States without a permit, in violation of 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B). Second, Dudek Auto has failed to obtain coverage under any Clean Water Act permit including the Multi-Sector General Permit[2] ("MSGP") adopted by EPA for industrial sources of polluted stormwater runoff, and failed to comply with the specific requirements of any such permit, in violation of 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

BACKGROUND

The Facility is located on and in a federally-mapped palustrine scrub-shrub broad-leaved deciduous (PSS1E) and palustrine forested needle-leaved evergreen/ broad-leaved deciduous

[1] CLF is a not-for-profit 501(c)(3) organization dedicated to the conservation and protection of New England's environment.
[2] ENVIRONMENTAL PROTECTION AGENCY, MULTI-SECTOR GENERAL PERMIT FOR STORMWATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITY (MSGP) [hereinafter MSGP or "permit"], *available at* http://www.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf (last visited February 13, 2013).

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seasonally flooded/saturated (PFO4/1E) wetland that is directly hydrologically connected to, and shares a continuous surface connection with, Little Cohas Brook. Little Cohas Brook, (Waterbody ID NHRIV700060804-04 and NHRIV700060804-05) is within the Merrimack watershed and confluences with the Merrimack River. The Environmental Protection Agency ("EPA") has designated Segments NHRIV700060804-04 and NHRIV700060804-05 as impaired pursuant to Section 303(d) of the Act for failure to meet minimum water quality standards.[3] Segment NHRIV700060804-04 is impaired for mercury[4] and segment NHRIV700060804-05 is impaired for chlorides, impaired biota, oxygen depletion, metals (other than mercury), mercury ph/acidity/caustic conditions and other causes.[5]

The Little Cohas Brook confluences with the Merrimack River (Waterbody ID NHRIV700060804-11) which is also within the Merrimack watershed and the Environmental Protection Agency ("EPA") has designated the Merrimack River as impaired pursuant to Section 303(d) of the Act for failure to meet minimum water quality standards for a number of pollutants.[6] The Merrimack River is impaired due to organic enrichment/oxygen depletion, mercury and pathogens.[7] Stormwater is a significant contributor to these impairments.

Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt.[8] Industrial activities, such as material handling and storage, processing, reclaiming, and wholesale distribution of used automobile parts and scrap and waste materials or other operations that occur at industrial facilities, may be exposed to stormwater.[9] Stormwater from industrial facilities, contaminated with pollutants, is then conveyed into nearby waterbodies.[10]

Dudek Auto is required to apply for coverage under a Clean Water Act discharge permit such as the MSGP in order to discharge lawfully. Since at least 2007, Dudek Auto has been specifically required to apply for coverage under the MSGP by filing a Notice of Intent ("NOI") within 90

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[3] *See* 33 U.S.C. § 1313(d).
[4] http://ofmpub.epa.gov/tmdl_waters10/attains_waterbody.control?p_au_id=NHRIV700060804-04&p_cycle=2010&p_state=NH&p_report_type= (last visited November 5, 2013).
[5] http://ofmpub.epa.gov/tmdl_waters10/attains_waterbody.control?p_au_id=NHRIV700060804-05&p_cycle=2010&p_state=NH&p_report_type= (last visited November 5, 2013).
[6] *See* 33 U.S.C. § 1313(d).
[7] http://ofmpub.epa.gov/waters10/attains_waterbody.control?p_list_id=NHRIV700060804-11&p_cycle=2010&p_report_type= (last visited November 4, 2013).
[8] *See* 40 C.F.R. § 122.26(b)(13).
[9] *See* 40 C.F.R. § 122.26(b)(14).
[10] *See* 58 Fed. Reg. 61,146, 61,154 (November 19, 1993).

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days after the initial issuance of the MSGP.[11] On September 29, 2008, after expiration of the prior permit, the EPA issued a new MSGP requiring all covered facilities to file an NOI for coverage under the 2008 permit by January 5, 2009.[12]

Dudek Auto has failed to obtain coverage under the MSGP or any other valid authorization, at any time. Therefore, Dudek Auto is operating in violation of the Clean Water Act.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

Dudek Auto, also doing business under the trade names "Murrays Auto Recycling Center" and "Murrays Auto Recycling," is the person, as defined by 33 U.S.C. § 1362(5), responsible for the violations alleged in this Notice. Dudek Auto has operated the Facility since at least 2007 and is registered with the New Hampshire Secretary of State Corporation Division as the operator of the Facility.[13] Dudek Auto and its agents and directors, including but not limited to Edward J. Dudek, has 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 Clean Water Act.

LOCATION OF THE ALLEGED VIOLATION

The violations alleged in this Notice have occurred and continue to occur at the automobile salvage yard Facility located at 55 Hall Road, Londonderry, NH 03053.

ACTIVITIES ALLEGED TO BE VIOLATIONS

Dudek Auto has, and continues to, engage in "industrial activities," and its operations fall under SIC Code 5015, within the meaning of 40 C.F.R. § 122.26(b)(14)(vi).[14] Because the Facility has a primary SIC Code of 5015 and stormwater discharges associated with industrial activity, Dudek Auto is required to apply for, obtain coverage, and comply with the requirements of a National Pollutant Discharge Elimination System ("NPDES") permit such as the MSGP. Dudek Auto has failed to take any of these required steps.

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[11] EPA's Final National Pollutant Discharge Elimination System Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP) was first issued in 1995, reissued in 2000, and again in 2008. *See* 60 Fed. Reg. 50,804 (Sept. 29, 1995); 65 Fed. Reg. 64,746 (Oct. 30, 2000); and 73 Fed. Reg. 56,572 (Sept. 29, 2008). *See* MSGP part 1.1 and 1.3.1.

[12] *See* MSGP Table 1-2.

[13] https://www.sos.nh.gov/corporate/soskb/Corp.asp?480554; https://www.sos.nh.gov/corporate/soskb/Corp.asp?868102; https://www.sos.nh.gov/corporate/soskb/Corp.asp?1155670 (last visited November 5, 2013).

[14] *See* MSGP, Appendix D: Activities Covered, at D-4. Automobile salvage yard facilities identified by the SIC Code 5015 are subject to the requirements of the MSGP for stormwater discharges.

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Dudek Auto's activities at the Facility include, but are not limited to: vehicle dismantling, processing, and crushing; used parts storage; outdoor vehicle and equipment storage; vehicle and equipment maintenance; vehicle, equipment, and parts washing; and liquid storage. These activities are associated with a wide variety of pollutants, including but not limited to oil and grease; ethylene glycol; heavy metals; mercury; sulfuric acid; galvanized metals; aluminum; petroleum hydrocarbons; suspended solids; arsenic; organics; pathogens; chlorinated solvents; acid/alkaline wastes; phosphorous; salts; and fuel.

Automobile salvage activities at the Facility are exposed to precipitation and snowmelt. Precipitation falls on and flows over salvage yard and storage areas, picking up pollutants associated with the Facility's operations. The polluted runoff then flows by the operation of gravity via site grading, sloped surfaces, ditches, subsurface hydrological connections, and other collections and conveyances, into the wetland that surrounds the Facility, Little Cohas Brook, and the Merrimack River, all of which are waters of the United States.[15]

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED

The Clean Water Act prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid NPDES permit.[16] Dudek Auto discharges stormwater associated with its industrial activity, as defined by 40 C.F.R. § 122.26(b)(14), from its Facility into waters of the United States. Because Dudek Auto has not obtained coverage for these stormwater discharges under the MSGP or an individual NPDES permit, it is illegally discharging stormwater without a permit, in violation of 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).[17] By failing to apply for and comply with the specific requirements of the MSGP, Murray's Auto is in violation of 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

a. Dudek Auto is discharging stormwater to waters of the United States without a permit.

Dudek Auto is an industrial discharger with a primary SIC Code of 5015 which means that pursuant to Section 402(p) of the Act, Dudek Auto is obligated to apply for coverage under the

[15] *See* 40 C.F.R. § 122.26(c)(i)(E)(6). EPA has determined that precipitation greater than 0.1 inches in a 24-hour period constitutes a measurable precipitation event for the purposes of evaluating stormwater runoff associated with industrial activity.
[16] 33 U.S.C. § 1311(a).
[17] *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").

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MSGP or obtain other legal authorization. Because Dudek Auto has operated and continues to operate without a permit under Section 402(p), Dudek Auto is in violation of Section 301(a) of the Act.

In addition, during storm events, Dudek Auto's "industrial activities" at its Facility have resulted in a "discharge of pollutants" within the meaning of 33 U.S.C. § 1362(12) and "stormwater discharge associated with industrial activity" within the meaning of 40 C.F.R. § 122.26(b)(14), from its Facility on each and every day that there has been a measurable precipitation event of above 0.1 inches. There have been many such storm events since 2007. The Facility is generating and conveying pollutants from at least the following point sources: vehicles, vehicle hulks, and equipment left outdoors, the vehicles driving on and off the Facility, channels, ditches, discrete fissures, containers, subsurface hydrological connections and other conveyances to the surrounding federally-mapped wetland, Little Cohas Brook, and the Merrimack River.[18] The mapped wetland, Little Cohas Brook, and the Merrimack River are all considered "waters of the United States," as defined in 40 C.F.R. § 122.2, and therefore, "navigable waters," as defined in 33 U.S.C. § 1362(7). The Facility is discharging this industrial stormwater without the permit required under Section 402 of the Act, 33 U.S.C. § 1342.

b. <u>Dudek Auto is violating the Clean Water Act by failing to obtain coverage and failing to comply with the requirements of the MSGP.</u>

Dudek Auto is violating 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1), by failing to apply for, obtain coverage, and comply with the requirements of the MSGP.[19] The Facility has a primary SIC Code of 5015 and must obtain coverage under the MSGP for its stormwater discharges and for stormwater discharges from any co-located industrial activities.[20] Dudek Auto's failure to obtain coverage and comply with the permit is a violation of the MSGP and 33 U.S.C. §§ 1311 and 1342(p).[21]

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[18] These discharges constitute "point sources" as defined by 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.2, as interpreted by applicable case law.
[19] MSGP part 1.1 and 1.2.
[20] *See* MSGP part 1.1; MSGP part 8.M.
[21] A thorough search of EPA's Electronic Stormwater Notice of Intent database reveals that Dudek Auto has not filed an NOI for the Facility. EPA's Electronic Stormwater Notice of Intent database, http://cfpub.epa.gov/npdes/stormwater/noi/noisearch.cfm (last visited August 30, 2013).

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1) Dudek Auto Must Develop and Implement a Stormwater Pollution Prevention Plan (SWPPP).

As a prerequisite to obtaining coverage under the MSGP, Dudek Auto must prepare a Stormwater Pollution Prevention Plan ("SWPPP").[22] The SWPPP must include, but is not limited to, the following: information related to a company stormwater pollution prevention team, a site description, a summary of pollutant sources, a description of control measures, and schedules and procedures pertaining to control measures and monitoring.[23] Dudek Auto has failed to develop a SWPPP in accordance with the MSGP requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

2) Dudek Auto Must Submit to EPA a Complete Notice of Intent to be Covered under the MSGP.

To be eligible to discharge under the MSGP, Dudek Auto must submit a complete Notice of Intent ("NOI") to the EPA.[24] To complete the NOI, Dudek Auto is required to determine whether the body of water the stormwater is discharged to is an "impaired" water body, and whether the Facility discharges any specific pollutants listed on the NOI to that water body.[25] Little Cohas Brook and Merrimack River are classified as "impaired" waters.[26] Additionally, as part of preparing the NOI, the covered Facility must make certain verifications such as verifying that no harm is done to a species in violation of the Endangered Species Act.[27] Dudek Auto has failed to prepare and file an NOI meeting all applicable requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

3) Dudek Auto Must Take Control Measures and Meet Water-Quality Effluent Limitations.

To be eligible to discharge under the MSGP, Dudek Auto must select, design, install, and implement control measures (including best management practices) to prevent polluted stormwater discharges from reaching nearby waterbodies. Dudek Auto must address the selection and design considerations in the permit, meet the non-numeric effluent limitations in the permit, and meet limits contained in applicable permit effluent limitations guidelines.[28] These control practices must be in accordance with good engineering practices and manufacturer's

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[22] *See* MSGP part 5.
[23] *See* MSGP part 5.1.
[24] *See* MSGP part 1.3.1.
[25] *See* MSGP part 2.2.2.
[26] *See supra* p. 2.
[27] *See* MSGP part 1.1.4.5 and 2.3.
[28] *See* MSGP part 2.1.

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specifications.[29] If the control measures are not achieving their intended effect of minimizing pollutant discharges, the permittee must modify these control measures as expeditiously as practicable.[30] Dudek Auto has failed to cover the materials and operations that may result in polluted stormwater runoff. Dudek Auto has not implemented the required control measures in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

4) Dudek Auto Must Conduct Routine Facility Inspections.

To be eligible to discharge under the MSGP, Dudek Auto must conduct routine inspections of all areas of the Facility where industrial materials or activities are exposed to precipitation, and must ensure that all stormwater control measures comply with the effluent limits contained in the MSGP.[31] Routine inspections must be conducted at least quarterly but in many instances monthly inspections are most appropriate.[32] These inspections must occur when the Facility is in operation.[33] The schedule of these inspections must be included in the Facility's SWPPP and be performed by qualified personnel.[34] Dudek Auto has failed to conduct the required routine inspections in accordance with the MSGP requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

5) Dudek Auto Must Comply with the Required Monitoring and Sampling Procedures.

To be eligible to discharge under the MSGP, Dudek Auto must collect and analyze stormwater samples and document monitoring activities consistent with the procedures in the MSGP.[35] The MSGP requires five types of analytical monitoring (one or more of which may apply) including quarterly benchmark monitoring, annual effluent limitations guidelines monitoring, State or Tribal-specific monitoring, impaired waters monitoring, and other monitoring as required by the EPA.[36] An operator must monitor each outfall identified in the SWPPP covered by a numeric effluent limit.[37] Required monitoring must be performed after stormwater events that result in an actual discharge on a required schedule.[38] All monitoring data collected under the MSGP must be reported to EPA. Furthermore, because the receiving waters are "impaired waters" under 33

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[29] *Id.*
[30] *Id.*
[31] *See* MSGP part 4.1.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *See* MSGP part 6.
[36] *See* MSGP part 6.2.
[37] *See* MSGP part 6.1.1.
[38] *See* MSGP part 6.1.3.

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U.S.C. § 1313(d), Dudek Auto must monitor for all pollutants for which they are impaired.[39] Dudek has failed to conduct the required monitoring under the MSGP and has failed to submit the required monitoring reports to EPA in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

6) Dudek Auto Must Carry out the Required Reporting and Recordkeeping.

Dudek Auto must maintain and submit any and all required monitoring data.[40] Such monitoring data includes the following: an annual report to EPA which includes the Facility's findings from the annual comprehensive site inspection and any documentation of correction actions;[41] an Exceedance Report to the EPA if any of the follow-up monitoring shows any exceedances of a numeric effluent limit;[42] and any other required reports under the MSGP.[43] Dudek Auto has failed to maintain the required records and failed to submit all required monitoring data under the MSGP in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

7) Dudek Auto Must Comply with the Requirement of MSGP Subpart M.

Dudek Auto must also comply with the sector-specific requirements contained in Subpart M of the MSGP.[44] Subpart M requires automobile salvage yard facilities to implement additional technology-based effluent limits,[45] meet additional SWPPP and inspection requirements,[46] and monitor stormwater discharges for compliance with the benchmark limitations applicable specifically to automobile salvage yard facilities.[47] Dudek Auto has failed to comply with the requirements of Subpart M of the MSGP in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

DATES OF VIOLATION

Each day on which Dudek Auto operates its Facility without permit coverage or discharges stormwater without a permit from the Facility is a separate and distinct violation of Section 301(a) and 402(p)(2)(B) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

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[39] *See* MSGP part 6.2.4.
[40] *See* MSGP part 7.1
[41] *See* MSGP part 7.2.
[42] *See* MSGP part 7.3.
[43] *See* MSGP part 7.4.
[44] *See* MSGP, Appendix D, Table D-1, Sector M.
[45] *See* MSGP part 8.M.2.
[46] *See* MSGP part 8.M.3 and 8.M.4.
[47] *See* MSGP 8.M.5.

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Dudek Auto has discharged stormwater without a permit in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), on every day since at least 2007 on which there has been a measurable precipitation event.

Every day, since at least 2007, on which Dudek Auto has failed and continues to fail to apply for, obtain coverage, and comply with the requirements of the MSGP is a violation of Section 402(p)(3)(A) and (p)(4)(A) of the CWA, 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A).

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

RELIEF REQUESTED

Dudek Auto 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 Dudek Auto to a penalty of 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.[48] 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 Dudek Auto 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 matter.

CONCLUSION

During the 60-day notice period, CLF is 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 such discussions, please have your attorney contact Zachary Griefen within the next 20 days so that

[48] 40 C.F.R. § 19.2

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negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing at the conclusion of the 60 days.

Sincerely,

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