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SUPER LAW GROUP, LLC

July 19, 2016

Via Certified Mail, Return Receipt Requested

5 Boro Green Services, LLC
55-80 48th Street
Maspeth, NY 11378
(facility address)[1]

54-35 48th Street
Maspeth, NY 11378
(mailing address)

Re: Notice of Violation and Intent to File Suit under the Clean Water Act

Dear All:

We are writing on behalf of Riverkeeper, Inc.[2] ("Riverkeeper") to notify you of Riverkeeper's intent to file suit against 5 Boro Green Services, LLC ("5 Boro"), pursuant to Section 505(a) of the federal Clean Water Act ("CWA")[3] for violations of the CWA.

Riverkeeper intends to file suit, as an organization and on behalf of its adversely affected members, in the United States District Court for the Eastern District of New York seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this letter.[4]

Riverkeeper intends to take legal action because 5 Boro is discharging polluted stormwater, as detailed herein, from its scrap and waste material facility located near Newtown Creek in Queens ("the Facility") to the waters of the United States without a permit. This is a violation of Sections 301(a) and 402(p)(2)(B) of the Clean Water Act.[5] Further, 5 Boro has not applied for coverage under, nor complied with the conditions of, an individual National Pollutant Discharge Elimination System ("NPDES") permit or the General Permit for the Discharge of Stormwater

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[1] Although the site appears to be located on 48th Street, the address painted on a building located at the site indicates that the location is 47th Street, as do other publicly available resources. This notice letter has been sent to number 55-80 on both streets.

[2] Riverkeeper, Inc. is a not-for-profit environmental organization existing under the laws of the state of New York, headquartered in Ossining, New York. Riverkeeper's mission includes safeguarding the environmental, recreational and commercial integrity of the Hudson River and its ecosystem, as well as the watersheds that provide New York City with its drinking water. Riverkeeper achieves its mission through public education, advocacy for sound public policies and participation in legal and administrative forums. Riverkeeper has more than 4,500 members, many of whom reside near to, use and enjoy the Hudson River and the waters and tributaries of New York Harbor, including Newtown Creek, Coney Island Creek, Jamaica Bay, and the Gowanus Canal; waters that are polluted by industrial stormwater runoff.

[3] 33 U.S.C. § 1365(a). We refer to statutory provisions by their section in the Clean Water Act and provide the parallel citation to the United States Code only on first reference.

[4] *See* 40 C.F.R. § 135.2(a)(3)(c) (notice of intent to file suit is deemed to have been served on the postmark date).

[5] 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

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Associated with Industrial Activity ("General Permit")[6] issued by the New York State Department of Environmental Conservation ("DEC"), in violation of Sections 402(p), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

The street address of the Facility is provided in New York City records as 55-80 48th Street, Maspeth, New York, though various other sources indicate that the address is 55-80 47th Street. For clarity, the Facility location can be uniquely identified by tax block and lot numbers as block 2600, lot 80, in Queens County. The waters of the United States that are polluted by the Facility include Newtown Creek and the East River.

I.

BACKGROUND

With every rainfall event, hundreds of millions of gallons of polluted rainwater pour into New York Harbor, Long Island Sound, and other receiving waters. The consensus among agencies and water quality specialists is that stormwater pollution accounts for more than half of the total pollution entering the marine environment each year.[7]

DEC has designated more than 7,000 river miles, 319,000 acres of larger waterbodies, 940 square miles of bays and estuaries, and 592 miles of Great Lakes shoreline in the State as "impaired," or not meeting water quality standards, and unable to support beneficial uses such as fish habitat and water contact recreation.[8] For the overwhelming majority of water bodies listed as impaired, stormwater runoff is cited as a primary source of the pollutants causing the impairment. Contaminated stormwater discharges can and must be controlled in order to improve the quality and health of these waterbodies.

Stormwater discharges flow from the Facility through surface runoff into Maspeth Creek, a branch of Newtown Creek, and ultimately into the East River and New York Harbor. Newtown Creek, which is also a federally-listed Superfund site, consistently fails to meet state water quality standards; illegal stormwater discharges from this Facility contribute to this failure.[9] In the past, DEC has designated Newtown Creek as impaired pursuant to Section 303(d) of the

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[6] New York State Department of Environmental Conservation, *SPDES Multi-Sector General Permit For Stormwater Discharges Associated With Industrial Activity*, Permit No. GP-0-12-001, (hereinafter "General Permit"), *available at* http://www.dec.ny.gov/chemical/9009.html. This General Permit replaces earlier general permits for the discharge of stormwater associated with industrial activity. It became effective on October 1, 2012, and will expire on September 30, 2017.

[7] Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt. *See* 40 C.F.R. § 122.26(b)(13).

[8] *See* EPA, Watershed Assessment, Tracking and Environmental Results, New York Assessment Data for 2012, http://ofmpub.epa.gov/waters10/attains_state.report_control?p_state=NY&p_cycle=2012&p_report_type=A (last visited Aug. 4, 2015).

[9] *See* NY DEC, *Impaired/DeListed Waters NOT Included on the 2014 Section 303(d) List Sept. 2014*, *available at* http://www.dec.ny.gov/docs/water_pdf/303dlistfinal2014.pdf (hereinafter "303(d) List").

Stormwater discharges flow from the Facility through surface runoff into Maspeth Creek, a branch of Newtown Creek, and ultimately into the East River and New York Harbor. Newtown Creek, which is also a federally-listed Superfund site, consistently fails to meet state water quality standards; illegal stormwater discharges from this Facility contribute to this failure.[9] In the past, DEC has designated Newtown Creek as impaired pursuant to Section 303(d) of the CWA[10] for failure to meet minimum water quality standards due to high oxygen demand (low levels of dissolved oxygen) and the presence of floatables (oil, grease, and other debris) attributable in part to urban stormwater runoff.[11] While the Creek has been removed from the list of waterbodies for which a Total Maximum Daily Load ("TMDL") must be developed, the degraded water quality conditions that led to the impaired listing have not been addressed;[12] polluted discharges to Newtown Creek continue to reduce the dissolved oxygen level in the Creek.[13]

For years, Newtown Creek was treated as an industrial dumping ground; businesses along its banks polluted with abandon. In recent decades, New York City has worked to reclaim the quality of New York Harbor and of Newtown Creek. The City and local residents have invested heavily in efforts to rejuvenate the Creek and surrounding neighborhoods. Recently, the U.S. EPA joined the effort by designating Newtown Creek as a Superfund site, setting aside funds for a cleanup, and mobilizing public and private efforts to restore the Creek to a healthier state.[14] It is time for 5 Boro to join fully in this broader effort to restore the biological integrity of Newtown Creek. At a minimum, 5 Boro must stop illegally discharging polluted stormwater and other effluents.

II.

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED AND ACTIVITIES ALLEGED TO BE VIOLATIONS

A. 5 Boro is Discharging Stormwater Associated with Industrial Activity to Waters of the United States without a Permit.

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[9] *See* NY DEC, *Impaired/DeListed Waters NOT Included on the 2014 Section 303(d) List Sept. 2014, available at* http://www.dec.ny.gov/docs/water_pdf/303dlistfinal2014.pdf (hereinafter "303(d) List").

[10] 33 U.S.C. § 1313(d).

[11] *See* 303(d) List.

[12] Newtown Creek is not included on the section 303(d) list, but is included on a list of other impaired waters for which no Total Maximum Daily Load ("TMDL") will be prepared. A TMDL is not necessary because other required control measures are expected to result in restoration in a reasonable period of time. Specifically, Newtown Creek pollution is being addressed through the CSO Consent Order to meet pathogen standards. *See* NYS Dep't of Envtl. Conservation, Impaired/Delisted Waters NOT Included on the 2014 Section 303(d) List, *http://www.dec.ny.gov/docs/water_pdf/303dnotlisted2014.pdf*

[13] *See Id.*

[14] *See* 40 C.F.R. Part 300, App. B.

The CWA prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid NPDES permit.[15] 5 Boro's industrial activity at the Facility has caused and continues to cause a "discharge of pollutants" within the meaning of Section 502(12) of the CWA[16] and a "stormwater discharge associated with industrial activity" within the meaning of 40 C.F.R. § 122.26(b)(14) from the Facility on at least each and every day that there has been a rain event of more than 0.1 inches.[17] The Facility has exposed and continues to expose industrial pollutants to stormwater by, at a minimum, receiving, processing, and transporting recyclables outside or otherwise exposing them to the elements. During precipitation events (including runoff from rainfall and snow or ice melt events), pollutants are carried away from the Facility in stormwater discharges into Newtown Creek.

5 Boro's activities at the Facility include but are not limited to the collection, processing, storage, reshipment and resale of recyclable wastes, including glass and plastic bottles and aluminum cans. Some of this activity is conducted outdoors. Further, some processing activities that are conducted indoors allow recyclables and related debris to migrate outdoors onto the public street. In carrying out these activities at the Facility, 5 Boro engages in storing and handling materials in a manner that exposes pollutants to precipitation and snowmelt. The stormwater discharged into Newtown Creek can bring solids that suspend or dissolve in stormwater, such as plastics and metals.[18]

Riverkeeper has observed the release of polluted stormwater at the Facility. Stormwater runs along 48th Street and discharges directly into Newtown Creek. The stormwater that runs off the Facility contains debris from the recyclable materials processed on site. Riverkeeper believes that organic residues from the processed bottles and cans are also discharged in stormwater.

Trucks and other vehicles driving on and off the property are also point sources of pollution. The Facility uses heavy vehicles and other machinery outdoors. Besides the wastes they carry, vehicles and industrial equipment at the Facility may expose many other pollutants to the elements, including gasoline, diesel fuel, anti-freeze, and hydraulic fluids.

All of these pollution sources are exposed to precipitation and snowmelt. In addition to waste residues, these pollution sources also may release fuel, oil, lubricants, PCBs, PAHs, an array of metals, pH-affecting substances and chemical residues. These toxic pollutants are often generated in the form of small particulate matter, which settles on the ground and other surfaces that are exposed to stormwater and non-stormwater flows.

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[15] *See* CWA §§ 301(a) and 402.

[16] 33 U.S.C. § 1362(12).

[17] 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. *See, e.g.*, 40 C.F.R. § 122.26(c)(i)(E)(6) (using 0.1 inches as the distinguishing threshold of a storm event).

[18] *See* EPA, "Industrial Stormwater Fact Sheet Series, Sector N: Scrap Recycling and Waste Recycling Facilities." *available at* http://water.epa.gov/polwaste/npdes/stormwater/upload/sector_n_scraprecycling.pdf.

Because 5 Boro fails to adequately shelter and otherwise contain materials and equipment to prevent the release of pollutants to the environment, precipitation falls on and flows over exposed materials, fluids, and particulates. Polluted stormwater discharges then flow from the Facility along 48th street, directly into Newtown Creek.

Newtown Creek is a "water[] of the United States," as defined in 40 C.F.R. § 122.2 and a "navigable waters" as defined in Section 502(7) of the CWA. 5 Boro does not have a NPDES permit for these discharges of pollutants. Thus, 5 Boro is discharging polluted industrial stormwater into navigable waters of the United States without the permit required under Sections 301 and 402 of the CWA.

B. 5 Boro is Violating the Clean Water Act by Failing to Apply for NPDES Permit Coverage.

5 Boro accepts, sorts, processes and distributes recyclable materials. Accordingly, 5 Boro is an industrial discharger engaged in scrap recycling under Standard Industrial Classification ("SIC") Code 5093, which is an industrial activity included in Sector N of the General Permit.

To be eligible to discharge under the General Permit, 5 Boro must submit to DEC a registration form called a "Notice of Intent."[19] Notice of Intent forms are available online from DEC.[20] To register, 5 Boro is required, among other things, to list all stormwater discharges, including descriptions of the industrial activities taking place in the drainage area of each discharge and the acreage of industrial activity exposed to stormwater, the separate storm sewer system or immediate surface water body or wetland to which site runoff discharges, and the name of the watershed and nearest waterbody to which the site ultimately discharges and information about whether the receiving waters are impaired.[21] 5 Boro has failed to prepare and file a Notice of Intent or an application for an individual permit.[22]

C. 5 Boro is Violating the Clean Water Act by Failing to Comply with the General Permit.

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[19] *See* General Permit, Part I.E.3. In notifying 5 Boro that the Clean Water Act requires coverage under and compliance with a valid NPDES permit in order to lawfully discharge, and that submission of a Notice of Intent to DEC is required in order to obtain coverage under the General Permit, Riverkeeper does not concede that all of the activities conducted at the Facility are necessarily eligible for coverage under that permit. For example, if the Facility is discharging process wastewater, such as wash water, or has any other polluted non-stormwater discharge that is not authorized by the General Permit, then an individual NPDES permit is required and the failure to obtain and comply with an individual NPDES permit for such discharges also violates CWA §§ 301(a) and 402(p). The conditions for eligibility to discharge under the General Permit are provided in Part I.C of the permit.

[20] *See* http://www.dec.ny.gov/docs/water_pdf/gpnoi.pdf.

[21] *See* Division of Water, NY DEC, *Notice of Intent For Stormwater Discharges Associated with Industrial Activity under the State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit GP-0-12-001 (MSGP)* (2012), *available at* http://www.dec.ny.gov/docs/water_pdf/gpnoi.pdf.

[22] A thorough search of EPA's Enforcement & Compliance History Online ("ECHO") database and DEC's records reveals that no Notice of Intent has been submitted for the Facility.

As a discharger of stormwater associated with industrial activity, 5 Boro must comply at all times with the requirements of the General Permit (or an individual permit).[23] By discharging stormwater associated with industrial activity without complying with the General Permit, 5 Boro is violating CWA Sections 301(a) and 402(a) and (p).[24] The main General Permit requirements that 5 Boro has failed and continues to fail to meet are explained further below.

1. **5 Boro has not developed and implemented a Stormwater Pollution Prevention Plan.**

Before submitting a registration form, 5 Boro must prepare, make available, and implement a Stormwater Pollution Prevention Plan ("SWPPP") in accordance with schedules established in the General Permit.[25] The SWPPP must identify potential sources of pollution that may affect the quality of stormwater discharges associated with industrial activity. Further, the SWPPP must describe and ensure the implementation of practices that minimize the discharge of pollutants in these discharges and that assure compliance with the other terms and conditions of the General Permit, including achievement of effluent limitations.[26]

Among other things, the SWPPP must include: a general site description, a general location map identifying the location of the facility and all receiving waters to which stormwater discharges, information related to a company stormwater pollution prevention team, a summary of potential pollutant sources, a description of control measures and best management practices, and schedules and procedures for implementation of control measures, monitoring and inspections.[27]

5 Boro has not developed and implemented a legally compliant SWPPP, as required by Part III of the General Permit.[28]

2. **5 Boro has not implemented control measures and Best Management Practices that are selected to meet best available technology standards.**

5 Boro cannot legally discharge stormwater under the General Permit until 5 Boro implements mandatory general and sector-specific control measures called Best Management Practices ("BMPs") in order to minimize the discharge of pollutants from the Facility.[29] The selected measures must reduce the discharge of pollution from the Facility to the extent practicable through use of the best available technology for the industry.

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[23] This section discusses the compliance requirements of the General Permit. If 5 Boro elects to seek coverage under an individual NPDES permit instead, the conditions of that individual permit will be at least as strict as those of the General Permit, thus 5 Boro will still be required to comply with all of the following.

[24] Sections 301(a) and 402(a) and (p) make it unlawful for 5 Boro to discharge stormwater associated with industrial activity without first complying with all of the conditions established in a NPDES permit.

[25] *See* General Permit Part III.B.

[26] *See* General Permit Part III.A.

[27] *See* General Permit Part III.C.

[28] Riverkeeper believes no SWPPP exists. If a SWPPP exists, then it is either facially inadequate or has not been fully and adequately implemented.

[29] *See* General Permit Part I.B.1, *see also* Part VII (setting forth sector-specific control measures and practices).

The General Permit requires that "[t]he owner or operator must select, design, install, and implement control measures (including best management practices)," in accordance with good engineering practices, to meet the effluent limits contained in the permit.[30] The General Permit's effluent limits include both numeric limits specific to certain sectors[31] and non-numeric technology-based effluent limits that apply to all facilities.[32] These non-numeric technology-based restrictions include minimizing the exposure of pollutants to stormwater[33] and minimizing the discharge of pollutants in stormwater[34] "to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry practice."[35]

5 Boro has not minimized the discharge of pollution to the extent achievable by implementing control measures or BMPs that are technologically achievable and economically practicable and achievable in light of best industry practice, as required by Parts I.B.1 and VIII of the General Permit.

3. 5 Boro has not conducted routine site inspections or complied with monitoring, recordkeeping, and reporting requirements.

5 Boro must conduct an annual comprehensive site inspection and evaluation of areas where industrial materials or activities are exposed to precipitation or where spills and leaks have occurred within the past three years.[36] The inspection must ensure that all stormwater discharges are adequately controlled and that all BMPs are functioning as expected.[37] Records of this inspection must be kept for five years.[38]

In addition, qualified facility personnel must carry out routine inspections at least quarterly.[39] During these inspections, personnel must evaluate conditions and maintenance needs of stormwater management devices, detect leaks and ensure the good condition of containers, evaluate the performance of the existing stormwater BMPs described in the SWPPP, and

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[30] General Permit Part I.B.1.a. *See also* Part III.C.7 ("The SWPPP must document the location and type of BMPs installed and implemented at the facility to achieve the non-numeric effluent limits in Part I.B.1.a.(2) and where applicable in Part VIII, and the sector specific numeric effluent limitations in Part VIII.").
[31] *See* General Permit, Part VIII.
[32] *See* General Permit, Part I.B.1.a.2.
[33] *See* General Permit, Part I.B.1.a.2.a.
[34] *See* General Permit, Part I.B.1.a.2.f.
[35] See General Permit, Part I.B.1 ("In the technology-based limits included below and in Part VIII, the term 'minimize' means reduce and/or eliminate to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry practice.").
[36] *See* General Permit, Part IV.A.1.
[37] *See* General Permit, Part IV.A.1.
[38] *See* General Permit, Part IV.A.2.
[39] *See* General Permit, Part III.C.7.b.2.

document any deficiencies in the implementation and/or adequacy of the SWPPP.[40] Such deficiencies must then be addressed through corrective actions.

The General Permit requires that all covered facilities conduct multiple types of analytical monitoring, and DEC may require additional individualized monitoring as well.[41] In particular, all facilities authorized under the General Permit must:

- collect and analyze stormwater samples for each outfall at least annually;[42]
- conduct visual monitoring of stormwater discharges at least quarterly;[43]
- perform an annual dry weather inspection to detect non-stormwater discharges;[44]
- inspect, sample and monitor discharges from coal pile runoff;[45]
- inspect, sample and monitor discharges from secondary containment structures and transfer areas;[46]
- document storm events during which any samples are taken;[47]
- document all of these monitoring activities;[48]
- keep records of the monitoring with the Facility's SWPPP;[49] and
- submit an annual report to DEC accompanied by a Discharge Monitoring Report detailing the results of all required stormwater samples, as well as reports that documents any instance of non-compliance with benchmarks or numeric effluent limitations.[50]

Because 5 Boro engages in industrial activities associated under Sector N, sampling is required for:

- Total Suspended Solids;
- Chemical Demand Oxygen;
- Oil and Grease;
- Total Recoverable Aluminum;
- Total Recoverable Cadmium;
- Total Chromium;
- Total Recoverable Copper;
- Total Recoverable Iron;
- Total Recoverable Lead;

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[40] *See* General Permit, Part III.C.7.b.1 and b.3.
[41] *See* General Permit, Part IV.B.3.
[42] *See* General Permit, Part IV.B.1.c (requiring at least annual collection and analysis of stormwater samples). *See* General Permit, Part IV.B.1.d, e, f, and g for obligations to sample more frequently.
[43] *See* General Permit, Part IV.B.1.a.
[44] *See* General Permit, Part IV.B.1.b.
[45] *See* General Permit, Part IV.B.1.d.
[46] *See* General Permit, Part IV.B.1.f.
[47] *See* General Permit, Part IV.B.2.c.
[48] *See, e.g.*, General Permit, Parts IV.B.1.a.8, IV.B.1.b.4, IV.B.1.c.9, *see generally* Part IV.E.
[49] *See* General Permit, Part IV.E.
[50] *See* General Permit, Part IV.B.1 and 2 and Part IV.C.

- Total Recoverable Zinc.[51]

Riverkeeper is not necessarily aware of all industrial activities taking place at the Facility. To the extent that industrial activities other than the above are carried out at the Facility, other sampling may be required as well.[52] This notice provides 5 Boro with sufficient information to identify the standards and limitations that apply to all categories of industrial activity.

5 Boro has failed to conduct the required annual and other routine inspections, monitoring, and testing, as required by, at least, Parts III, IV, and VIII of the General Permit. 5 Boro also has failed to retain records and submit monitoring reports to DEC, as required by, at least, Parts IV and VIII of the General Permit.

4. 5 Boro has failed to comply with additional requirements located in Part VIII of the General Permit.

As noted above, the General Permit contains various requirements specific to Sector N. These requirements, some of which are referenced above, are collected in Part VIII of the General Permit. They include:

- A requirement that the SWPPP include a program to control materials received for processing:
    - Notifying suppliers/public which scrap materials will not be accepted at the facility or are only accepted under certain conditions;
    - Develop and implement procedures to inspect inbound shipments of recyclable materials;
    - Develop and distribute educational material targeting the public and/or commercial drivers of inbound vehicles; and
    - Training targeted for personnel engaged in the inspection and acceptance of inbound recyclable materials.

- A requirement that the SWPPP address BMPs to minimize contact of particulate matter from materials stored indoors or under cover from coming in contact with surface runoff. The SWPPP shall document considerations of the following BMPS (or their equivalents):
    - Good housekeeping measures, including frequent sweeping of haul and access roads and the use of dry absorbent or wet vacuum clean up methods, to contain or dispose/recycle residual liquids originating from recyclable containers; and
    - Good housekeeping measures to prevent the accumulation of particulate matter and fluids, particularly in high traffic areas.

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[51] *See* General Permit, Pat VIII, Sector N.
[52] *See* General Permit, Part VIII.

- A requirement that the SWPPP describe BMPs to minimize contact of stormwater runoff with stockpiled materials, processed materials and non-recyclable wastes. The SWPPP shall document considerations of the following BMPs (or their equivalents):
    - Store the equivalent one day's volume of recyclable materials indoors;
    - Containment or diversion structures such as dikes, berms, culverts, trenches, elevated concrete pads, and grading installed where appropriate to minimize contact of stormwater runoff with outdoor processing equipment or stored materials;
    - Diversion of runoff away from storage areas via dikes, berms, containment trenches, culverts and surface grading;
    - Cover containment bins, dumpsters, roll off boxes;
    - Permanent or semi permanent covers over areas where materials are transferred, stored or stockpiled;
    - Install a sump/pump with each containment pit, and discharge collected fluids to a sanitary sewer system; and
    - Sediment traps, vegetated swales and strips, catch basin filters and sand filters to facilitate settling or filtering of sediments.

- A requirement that the SWPPP address BMPs to minimize contact of residual liquids and particulate matter from materials stored indoors or under cover from coming in contact with surface runoff. The SWPPP shall document consideration of the following BMPs (or their equivalents):
    - Prohibit the practice of allowing washwater from tipping floors or other processing areas from discharging to the storm sewer system;
    - Disconnect or seal off all floor drains connected to the storm sewer system;
    - Drums containing liquids, especially oil and lubricants, should be stored: indoors; in a bermed area; in overpack containers or spill pallets; or in similar containment devices;
    - Drip pans or equivalent measures shall be placed under any leaking piece of stationary equipment until the leak is repaired. The drip pans shall be inspected for leaks and potential overflows and all liquids properly disposed of in accordance with RCRA requirements; and
    - Liquid wastes, including used oil, shall be stored in materially compatible and non leaking containers, and be disposed or recycled in accordance with all requirements under the RCRA, and State or local requirements.[53]

5 Boro's activities are included in the definition of industrial activity to which the CWA applies. Therefore, 5 Boro must obtain coverage under and comply with the requirements of the General Permit, including those specific to 5 Boro's industrial activities, as described in Part VIII and outlined above. 5 Boro has failed to obtain coverage under the General Permit and comply with these additional requirements.

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[53] *See* General Permit, Part VIII, Sector N.

5. 5 Boro is Clearly Violating the Clean Water Act.

In sum, 5 Boro's discharge of stormwater associated with industrial activities without a permit, 5 Boro's failure to apply for permit coverage, and 5 Boro's failure to comply with the above-listed conditions of the General Permit (or an individual NPDES permit) constitute violations of the General Permit and of Sections 301(a) and 402(p) of the Clean Water Act.

III.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

5 Boro Green Services, LLC is the persons (as defined by Section 502(5) of the CWA) responsible for the violations alleged in this Notice. Riverkeeper believes that 5 Boro has operated the Facility since 2011.[54] 5 Boro has operational control over the day-to-day industrial activities at this Facility. Therefore, 5 Boro is responsible for managing stormwater at the Facility in compliance with the CWA. Riverkeeper hereby puts 5 Boro on notice that if Riverkeeper subsequently identifies additional persons as also being responsible for the violations set forth above, Riverkeeper intends to include those persons in this action.

IV.

LOCATION OF THE ALLEGED VIOLATION

The violations alleged in this Notice have occurred and continue to occur at the Facility located at 55-80 48th Street, Maspeth, New York. For clarity, the Facility location can be uniquely identified by tax block and lot numbers as block 2600, lot 80, in Queens County. Stormwater flows from the Facility into a separate sewer system that discharges directly into Newtown Creek. The failure to develop and implement pollution prevention plans and take the other required measures are violations occurring at the Facility in general and in the inadequate documents themselves.[55]

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[54] 5 Boro incorporated in New York in 2011.

[55] The federal courts have held that a reasonably specific indication of the area where violations occurred, such as the name of the facility, is sufficient and that more precise locations need not be included in the notice. *See, e.g.*, *Natural Resources Defense Council v. Southwest Marine, Inc.*, 945 F. Supp. 1330, 1333 (S.D. Cal. 1996), aff'd 236 F.3d 985, 996 (9th Cir. 2000); *City of New York v. Anglebrook Ltd. Partnership*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995); *Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433, 439 (D. Md. 2010); *United Anglers v. Kaiser Sand & Gravel Co.*, No. C 95-2066 CW, 1995 U.S. Dist. LEXIS 22449 at *4 (N.D. Cal. Sept. 27, 1995).

V.

DATES OF VIOLATION

Every day upon which 5 Boro has failed to apply for permit coverage since 5 Boro first commenced operations at the Facility and discharged polluted stormwater is a separate violation of Sections 301(a) of the CWA and EPA's regulations implementing the CWA.[56] These days of violation have continued consecutively since 2011, when Riverkeeper believes 5 Boro commenced operation at the Facility.

Additionally, 5 Boro has discharged without a permit in violation of Section 301(a) of the CWA on every day since 5 Boro commenced operations at the Facility on which there has been a measurable precipitation event or discharge of previously accumulated precipitation (i.e., snowmelt) over 0.1 inches.

Finally, if 5 Boro seeks permit coverage after receiving this letter but fails to fully comply with the requirements of the General Permit (or an individual permit), each day upon which 5 Boro claims coverage under a NPDES permit but fails to comply with that permit will constitute a separate day of violation with respect to each unmet condition of that permit.

5 Boro is liable for the above-described violations occurring prior to the date of this letter and for every day after the date of this letter that these violations continue. In addition to the violations set forth above, this Notice covers all violations of the CWA evidenced by information that becomes available after the date of this Notice of Intent to File Suit.[57] These violations are ongoing, and barring full compliance with the permitting requirements of the Clean Water Act, these violations will continue.

VI.

RELIEF REQUESTED

Riverkeeper will ask the court to order 5 Boro to comply with the Clean Water Act, to pay penalties, and to pay Riverkeeper's costs and legal fees.

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[56] *See* 33 U.S.C. §§ 402(p)(3)(A) and (p)(4)(A) (requiring the establishment of industrial stormwater NPDES permits and of a permit application process).

[57] *See, e.g. Public Interest Research Grp. v. Hercules, Inc.*, 50 F.3d 1239, 1248-49 (3d Cir.1995) (a notice that adequately identifies specific violations to a potential defendant also covers repeated and related violations that the plaintiff learns of later. "For example, if a permit holder has discharged pollutant 'x' in excess of the permitted effluent limit five times in a month but the citizen has learned only of four violations, the citizen will give notice of the four violations of which the citizen then has knowledge but should be able to include the fifth violation in the suit when it is discovered.").

First, Riverkeeper will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d), and such other relief as permitted by law. Riverkeeper will seek an order from the Court requiring 5 Boro to obtain NPDES permit coverage and to correct all other identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Second, pursuant to Section 309(d) of the CWA,[58] each separate violation of the CWA subjects 5 Boro to a penalty not to exceed $37,500 per day for each violation that occurred. Riverkeeper will seek the full penalties allowed by law.

Third and lastly, pursuant to Section 505(d) of the CWA, Riverkeeper will seek recovery of litigation fees and costs (including reasonable attorney and expert witness fees) associated with this matter.

VII.

PERSONS GIVING NOTICE

The full name, address, and telephone number of the persons giving notice are as follows:

Riverkeeper, Inc.
20 Secor Road
Ossining, NY 10562
(914) 478-4501
Attn.: John Parker

VIII.

IDENTIFICATION OF COUNSEL

Riverkeeper is represented by legal counsel in this matter. The name, address, and telephone number of Riverkeeper's attorneys are:

Edan Rotenberg
Nicholas Tapert
Super Law Group, LLC
180 Maiden Lane, Suite 603
New York, New York 10038
(212) 242-2355

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[58] 33 U.S.C. § 1319(d); *see also* 40 C.F.R. § 19.4 (Adjustment of Civil Monetary Penalties for Inflation).

IX.

CONCLUSION

The foregoing provides more than sufficient information to permit 5 Boro to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.[59]

If 5 Boro has developed a SWPPP, Riverkeeper requests that 5 Boro send a copy to the undersigned attorney.[60] Otherwise, Riverkeeper encourages 5 Boro to begin developing a SWPPP immediately after receiving this letter and asks that 5 Boro please inform the undersigned attorney of 5 Boro's efforts so Riverkeeper can work with 5 Boro to avoid disputes over the contents of the SWPPP.[61]

During the sixty-day notice period, Riverkeeper is willing to discuss effective remedies for the violations noted in this letter that may avoid protracted litigation. If 5 Boro wishes to pursue such discussions, please contact the undersigned attorney immediately so that negotiations may be completed before the end of the sixty-day notice period. We do not intend to delay the filing of a complaint in federal court, regardless of whether discussions are continuing at the conclusion of the sixty days.

Very truly yours,

Edan Rotenberg
Nicholas Tapert
Super Law Group, LLC
180 Maiden Lane, Suite 603

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[59] 40 C.F.R. § 135.3(a).

[60] Note that under Part III.D.2 of the General Permit, the owner or operator of a facility "must make a copy of the SWPPP available to the public within 14 days of receipt of a written request."

[61] Riverkeeper will not send a new notice letter in response to any effort 5 Boro makes to come into compliance with the Clean Water Act after receiving this letter, for example, by developing a SWPPP. The federal courts have held that citizens sending a notice letter are not required to identify inadequacies in compliance documents that do not yet exist and are "not required to send a second notice letter in order to pursue specific claims regarding the inadequacies of [a defendant's] post-notice compliance efforts." *WaterKeepers N. Cal. v. AG Indus. Mfg.*, 375 F.3d 913, 920 (9th Cir. 2004). *See also Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 997 (9th Cir. 2000) ("subject matter jurisdiction is established by providing a notice that is adequate on the date it is given to the defendant. The defendant's later changes . . . do not retroactively divest a district court of jurisdiction under 33 U.S.C. § 1365(b)."); *City of New York v. Anglebrook L.P.*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995) (plaintiff's notice letter based on inadequacies of defendant's original SWPPP held sufficient to establish court's jurisdiction, even though defendant later prepared a revised SWPPP).

New York, New York 10038
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cc:

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