



For a thriving New England

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January 23, 2018

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James E. Chisholm, Board Member
Karen Grasso Courtney, Board Member
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Massachusetts Development Authority
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Patricia Deangelis
Registered Agent
Massachusetts Development Authority
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William P. Marshall, Chairman
William Castro, Board Member
Dix Davis, Board Member
Armen Demerijan, Board Member
James E. DeZutter, Board Member
Melissa Fetterhoff, Board Member
Christopher Lilly, Board Member
John Oelfke, Board Member
Jim Pinard, Board Member
Martin Poutry, Board Member
J. Paul Routhier, Board Member
Eric Stoltzfus, Board Member
Devens Enterprise Commission
33 Andrews Parkway
Devens, MA 01434

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

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

To Whom It May Concern:

Conservation Law Foundation (“CLF”)¹ hereby gives notice to the addressed persons² of its intent to file suit, pursuant to Section 505 of the Federal Water Pollution Control Act (“Clean Water Act,” “CWA,” or “Act”), 33 U.S.C. § 1365, 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 Massachusetts seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this Notice letter. CLF intends to name the Massachusetts Development Authority (“MassDevelopment”), the Devens Enterprise Commission (“DEC”), and the following individuals associated therewith as defendants: Lauren Liss as MassDevelopment President and Chief Executive Officer, Laura L. Canter as MassDevelopment Executive Vice President, Jay Ash as MassDevelopment Chair, Brian Kavoojian as MassDevelopment Vice Chair, James W. Blake as MassDevelopment Board Member, James W. Blake as MassDevelopment Board Member, James E. Chisholm as MassDevelopment Board Member, Karen Grasso Courtney as MassDevelopment Board Member, Grace Fey as MassDevelopment Board Member, Rachel Madden as MassDevelopment Board Member, Patricia McGovern as MassDevelopment Board Member, Juan Carolos Morales as MassDevelopment Board Member, Christopher P. Vincze as MassDevelopment Board Member, William P. Marshall as DEC Chairman, William Castro as DEC Board Member, Dix Davis as DEC Board Member, Armen Demerijan as DEC Board Member, James E. DeZutter as DEC Board Member, Melissa Fetterhoff as DEC Board Member, Christopher Lilly as DEC Board Member, John Oelfke as DEC Board Member, Jim Pinard as DEC Board Member, Martin Poutry as DEC Board Member, J. Paul Routhier as DEC Board, and Eric Stoltzfus as DEC Board Member.

¹ CLF is a not-for-profit 501(C)(3) organization dedicated to the 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 Nashua 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 Nashua River watershed, and use and enjoy the watershed for recreational, aesthetic, and/or scientific purposes. The interests of CLF’s members are adversely affected by the stormwater discharges from Devens to receiving waters without a permit and in violation of the Clean Water Act.

² Pursuant to 40 C.F.R. § 135.2(a)(1), notice of intent to file suit may be served upon a corporation’s registered agent. Neither MassDevelopment nor DEC has identified a “registered agent” in connection with its corporation filings with the Massachusetts Secretary of State. *See* Massachusetts Secretary of State, Corporations Division, Search the Corporate Database, <http://corp.sec.state.ma.us/corpweb/CorpSearch/CorpSearch.aspx> (last visited January 11, 2018). At times Mass Development has identified Patricia Deangelis of the Mass Development Finance Agency as its registered agent. Under 40 C.F.R. § 135.2(a)(2), however, service may also be effected upon the head of a local agency. Under Massachusetts law, MassDevelopment is “constituted a public instrumentality and the exercise by the Agency of the powers conferred by this chapter shall be deemed to be the performance of an essential governmental function.” 1998 Mass. ALS 289. Under Massachusetts law, “the exercise by the [Devens Enterprise] Commission of its powers and the discharge of its duties shall be deemed and held to be the performance of an essential government function.” 1993 Mass. ALS 498. MassDevelopment and the DEC identify the addressed persons as their executive management.

The subject of this action is three-fold. First, MassDevelopment and DEC are discharging stormwater from systems of conveyances, including roadways, storm drains, storm sewers, drainage ditches, and outfalls located throughout Devens, Massachusetts (“Devens”), to the waters of the United States without a permit, in violation of Sections 301(a) and 402 of the CWA, 33 U.S.C. §§ 1311(a) and 1342. Further, MassDevelopment and DEC have failed to obtain coverage under any Clean Water Act National Pollutant Discharge Elimination System (“NPDES”) permit for small municipal separate storm sewer systems (“MS4s”), and have failed to comply with the specific requirements of any such permit, in violation of Section 402 of the CWA, 33 U.S.C. § 1342, and 40 C.F.R. §§ 122.32–122.36.³

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

MassDevelopment, DEC, their Board Members, and their agents with operational control over Devens are the persons, as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5), responsible for the violations alleged in this Notice. MassDevelopment and DEC have owned and/or operated Devens since at least 1996. Accordingly, MassDevelopment and DEC are responsible for managing stormwater at Devens in compliance with the Clean Water Act.

ACTIVITIES ALLEGED TO BE VIOLATIONS

Devens is a regulated small MS4, pursuant to 40 CFR §§ 122.26(b)(8) and 122.26(b)(16). Specifically, Devens constitutes a system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains) which are: (1) designed or used for collecting or conveying stormwater that is not a combined sewer or publicly owned treatment works, and (2) owned or operated by a public body created pursuant to state law and having jurisdictional authority over stormwater. In accordance with 40 CFR § 122.32, Devens is located in an urbanized area as determined by the latest Decennial Census by the Bureau of Census.

Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt.⁴ Stormwater runoff picks up pollutants, including chemicals, toxins, pathogens, nutrients, heavy metals, oils, and sediment that harm waterways.⁵ Stormwater runoff transported through MS4s and discharged into water bodies elevates the pollutant concentrations and loadings in these waters, as well as changes their natural hydrologic patterns.⁶

Devens transports stormwater runoff and discharges it into waters of the United States described below.

³ The U.S. Environmental Protection Agency promulgated 40 C.F.R. §§ 122.30 – 122.37, requiring small MS4s to obtain NPDES permit coverage for their stormwater discharges, pursuant to the statutory mandate set forth in Section 402(p)(6) of the CWA, 33 U.S.C. § 1342(p)(6).

⁴ See 40 C.F.R. § 122.26(b)(13).

⁵ See 40 C.F.R. § 122.30.

⁶ *Id.*

Devens discharges directly or indirectly into the main stem of the Nashua River⁷ (Waterbody ID MA81-05), the North Nashua River⁸ (Waterbody ID MA81-04), Nonacoicus Brook⁹ (Waterbody ID MA81-17), Mirror Lake¹⁰ (Waterbody ID MA81085), Grove Pond¹¹ (Waterbody ID MA81053), Plow Shop Pond¹² (Waterbody ID MA81103), Robbins Pond¹³ (Waterbody ID MA81111), Spectacle Pond¹⁴ (Waterbody ID MA81132), Catacoonamug Brook¹⁵ (Waterbody ID MA81-16), Mulpus Brook¹⁶ (Waterbody ID MA81-37), the following waterbodies located within a subwatershed that drains into the Nashua River: Bowers Brook, Willow Brook (sometimes referred to as Willow Branch), Cold Spring Brook, and Little Mirror Lake, and Spectacle Brook and Ponakin Brook, which both “drain through the western part of [the] South Post to the North Nashua River”¹⁷ (collectively, the “Receiving Waterbodies”). The above Receiving Waterbodies are all within the Nashua River watershed. EPA has designated these waterbodies variously as habitats for “fish, shellfish, and wildlife protection and propagation,” “aquatic life harvesting,” and recreation.

Pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), EPA has designated the Receiving Waterbodies as impaired for failure to meet minimum water quality standards. The Receiving Waterbodies are variously impaired for pesticides (including DEHP, or Di-sec octyl phthalate), pathogens (including *Escherichia coli*, or *E. coli*), total toxics (including polycyclic aromatic

⁷ See 2014 Waterbody Report for the Nashua River *at* https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_auid=MA81-05&p_list_id=MA81-05&p_cycle=2014 (last visited January 11, 2018).

⁸ See 2014 Waterbody Report for the North Nashua River *at* https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_auid=MA81-04&p_cycle=2014&p_state=MA&p_report_type= (last visited January 11, 2018).

⁹ See 2014 Waterbody Report for Nonacoicus Brook *at* https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_auid=MA81-17&p_list_id=MA81-17&p_cycle=2014 (last visited January 11, 2018).

¹⁰ See 2014 Waterbody Report for Mirror Lake *at* https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_auid=MA81085&p_list_id=MA81085&p_cycle=2014 (last visited January 11, 2018).

¹¹ See 2014 Waterbody Report for Grove Pond *at* https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_auid=MA81053&p_list_id=MA81053&p_cycle=2014 (last visited January 11, 2018).

¹² See 2014 Waterbody Report for Plow Shop Pond *at* https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_auid=MA81103&p_list_id=MA81103&p_cycle=2014 (last visited January 11, 2018).

¹³ See 2014 Waterbody Report for Robbins Pond *at* https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_auid=MA81111&p_cycle=2014 (last visited January 11, 2018).

¹⁴ See 2014 Waterbody Report for Spectacle Pond *at* https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_auid=MA81132&p_cycle=2014 (last visited January 11, 2018).

¹⁵ See 2014 Waterbody Report for Catacoonamug Brook *at* https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_auid=MA81-16&p_cycle=2014 (last visited January 11, 2018).

¹⁶ See 2014 Waterbody Report for Mulpus Brook *at* https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_auid=MA81-37&p_list_id=MA81-37&p_cycle=2014 (last visited January 11, 2018).

¹⁷ EARLE C. RICHARDSON, FORT DEVENS, DISPOSAL REUSE: ENVIRONMENTAL IMPACT STATEMENT 4-104, 4-107 (1994).

hydrocarbons (PAHs) in aquatic ecosystems and sediment bioassays for acute freshwater toxicity), nuisance exotic species (non-native aquatic plants), and noxious aquatic plants.

Based on the data that Devens has collected, the Nashua River is listed under Water Quality Assessment Category 5: “impaired or threatened and requiring a TMDL [Total Maximum Daily Load].”¹⁸ It is “impaired due to metals, pathogens, nutrients, organic enrichment/low dissolved oxygen, and turbidity and other unknown causes.”¹⁹ Devens’ stormwater discharges into the Receiving Waters include petroleum hydrocarbons, nitrogen, total suspended solids, perfluorooctanesulfonate, perfluorooctanoate, zinc, metals and other pollutants. These discharges occur, at a minimum, every time there is a 0.6-inch or greater precipitation or snow and ice melt event. These discharges are non-exclusive examples of the violations occurring at Devens, and represent a non-exclusive list of the pollutants discharged and the sites at which discharges occur.

Given that MassDevelopment and DEC constitute the owners and/or operators of a regulated small MS4, they are required to apply for, obtain, and comply with the requirements of an NPDES permit for small MS4s in order to discharge stormwater lawfully. Since MassDevelopment and DEC have failed to take any of these required steps, they are operating in violation of the Clean Water Act.

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED

The Clean Water Act prohibits the discharge of pollutants to waters of the United States, except in accordance with a valid NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.²⁰ MassDevelopment and DEC discharge stormwater from systems of conveyances located throughout Devens into waters of the United States. Because MassDevelopment and DEC have not obtained coverage for these stormwater discharges under an NPDES permit for small MS4s, they are illegally discharging stormwater without a permit, in violation of Sections 301(a) and 402 of the CWA, 33 U.S.C. §§ 1311(a) and 1342. Pursuant to Section 402(p)(6) of the CWA, 33 U.S.C. § 1342(p)(6), EPA promulgated regulations at 40 C.F.R. Part 122 setting forth NPDES permitting requirements for small MS4s.

In accordance with 40 C.F.R. § 122.34, NPDES permits for regulated small MS4s require permittees, at a minimum, to develop, implement, and enforce a stormwater management program, which must detail the stormwater control practices that will be implemented consistent with permit requirements to minimize the discharge of pollutants from the MS4. By failing to apply for and comply with the specific requirements of an NPDES permit for small MS4s, MassDevelopment and DEC are in violation of Section 402 of the CWA, 33 U.S.C. § 1342, and 40 C.F.R. §§ 122.32–122.36. Additional information, including information in Devens’ possession, may reveal additional violations. CLF intends to sue for all violations, including those yet to be uncovered and those committed after the date of this notice letter. This notice letter covers all such violations to the full extent permitted by law.

¹⁸ NASHUA RIVER WATERSHED ASS’N, QUALITY ASSURANCE PROJECT PLAN 14 (2012).

¹⁹ *Id.*

²⁰ 33 U.S.C. § 1311(a).

DATES OF VIOLATION

Each day on which MassDevelopment and DEC operate Devens without NPDES permit coverage is a separate and distinct violation of Sections 301(a) and 402 of the CWA, 33 U.S.C. §§ 1311(a) and 1342. Since at least 2012, MassDevelopment and DEC have discharged stormwater from Devens without a permit, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), at a minimum, every time there is a 0.6-inch or greater precipitation or snow and ice melt event. In addition, since at least 2012, MassDevelopment and DEC have on a continuing and ongoing basis failed to apply for, obtain, and comply with the requirements of an NPDES permit, in violation of Section 402 of the CWA, 33 U.S.C. § 1342, and 40 C.F.R. §§ 122.32–122.36.

These violations are ongoing and continuous, and barring full compliance with the permitting requirements of the Clean Water Act, these violations will continue indefinitely.

PENDANT STATE LAW CLAIMS

The violations of federal law alleged herein also support pendant state law claims sounding in tort including, but not necessarily limited to, negligence and public and private nuisance. You are specifically put on notice that CLF intends to pursue such claims to the fullest extent permitted by law.

RELIEF REQUESTED

MassDevelopment and DEC are 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 MassDevelopment and DEC to a penalty of up to \$37,500 per day per day per violation for all Clean Water Act violations occurring between January 12, 2009 and November 2, 2015; up to \$51,570 per day per violation for all CWA violations occurring after November 2, 2015 and assessed on or after August 1, 2016 but before January 15, 2017; and up to \$52,414 per day per violation for all Clean Water Act violations occurring after November 2, 2015 and assessed on or after January 15, 2017, pursuant to § 309(d) of the CWA, 33 U.S.C. § 1319(d), and the regulations governing the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. §§ 19.2, 19.4.²¹ 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 MassDevelopment and DEC to correct all identified violations through direct implementation of the NPDES permitting requirements, including implementation of the requisite stormwater management program, 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.

²¹ See 33 U.S.C. §§ 1319(d), 1365(a); 40 C.F.R. §§ 19.1–19.4.

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 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,

A handwritten signature in blue ink, appearing to read 'Zachary K. Griefen', with a stylized flourish at the end.

Zachary K. Griefen, Esq.
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