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VIA CERTIFIED MAIL

August 7, 2020

Keith D. Pierson, Mayor
City of Ranson
312 S. Mildred St.
Ranson, WV 25438
dpierson@ransonwv.us

Re: Notice of Intent to Sue for Clean Water Act Violations at Northport Avenue Extension Construction site in Ranson, West Virginia

Dear Mayor Pierson:

This letter constitutes a Notice of Violation and Intent to File Suit under Section 505 of the federal Clean Water Act (“CWA”), 33 U.S.C. § 1365, for the ongoing unlawful construction of the Northport Avenue Extension project without a valid CWA permit and unlawful discharge of sediment at the Northport Avenue Extension Construction site, located at the northern extent of Northport Avenue (39.371661, -77.874658). These include potential discharges from the Northport Avenue Extension Construction site to ground water via direct infiltration and are conveyed rapidly to surface waters, without a valid CWA permit, in violation of 33 U.S.C. § 1311(a). An unlawful discharge occurred on February 6, 2020 and, on information and belief, are continuing in nature.

As you must know, this project has no valid National Pollution Discharge Elimination System (NPDES) permit. Such permits are required for large construction activity (greater than 5 acres) by 40 C.F.R. §122.26 (a)(1)(ii) and 40 C.F.R. § 122.26 (b)(14)(x), and, therefore any discharge is unpermitted and in violation of the CWA.

Following 60 days from the date of this notice letter, Dr. Christine L Wimer, Ms. Susannah Buckles, Mr. John Gonano, Ms. Natasha Baihly, Ms. Elizabeth Ann Brent, and Jefferson County Foundation (collectively “the Foundation”), intend to file suit against the City of Ranson as the operator of the Northport Avenue Extension Construction site for all illegal discharges. Jefferson County Foundation will ask the Court to grant injunctive relief to halt the illegal discharges and to assess civil penalties, as appropriate.

The Complainants

Dr. Christine Wimer owns real property at 3546 Old Leetown Pike, Ranson, West Virginia, 25438, where her property value and groundwater source may be impacted by the adverse groundwater release impacts from any contamination caused by the construction of the Northport Avenue Extension. She also enjoys both the Shenandoah and the Potomac Rivers. Contamination of either river would affect Dr. Wimer's enjoyment and use of the rivers. Dr. Wimer has standing to bring this suit.

Ms. Susannah Buckles owns Gap View Farm, which is in a farmland protection easement, and is located two miles from the Northport Avenue Extension. Gap View Farm is a historic farm whose principal residence was built in 1750 and which has been listed on the National Register of Historic Places since January 9, 1997. The farm is used to raise cattle. The property is serviced by five wells and contains the headwaters of the Elks Run Watershed, located near Shenandoah Junction Road and Route 9. If the groundwater was contaminated at the Northport Avenue Extension site, it would not only affect her wells but also the headwaters of Elks Run on her farm. Ms. Buckles has made considerable effort to protect the headwaters of the Elks Run on her farm, and contamination of these waters from a groundwater conveyance would defeat that work. Additionally, if the groundwater was contaminated, it would be cost prohibitive to continue to raise cattle on the property. As the land is in a farmland easement, it may only be used and sold for such purposes and therefore the property value would be drastically affected by groundwater contamination. Ms. Buckles has standing to bring this suit.

Mr. John Gonano and his wife, Ms. Natasha Baihly, own and operate River and Trail Outfitters. Natasha's mother, Grace, and her father, Lee (deceased), started the company in 1972 renting bikes and canoes in and around Harpers Ferry. Their business started this economic sector in Jefferson County that contributes to the nearly \$1 billion per year tourism industry in the county. The majority of these tourists come to Jefferson County to enjoy the natural beauty and the 2 rivers that have their confluence at Harpers Ferry. The quality of the water is essential for the survival of this \$1 billion industry generally and this business, in particular. If the groundwater and rivers were contaminated, it would have a substantial negative impact on Mr. Gonano and Ms. Baihly's business. Mr. Gonano and Ms. Baihly live with their family on real property at 47 Morning Calm Lane, Harpers Ferry, WV 25425 where their property value and groundwater source may be impacted by any adverse groundwater release impacts from Northport Avenue Extension. Their family also enjoys personal recreation, including swimming and boating on the river. Mr. Gonano and Ms. Baihly's recreational enjoyment of the rivers and their business would be negatively impacted by contamination of the Potomac and/or Shenandoah Rivers by the Northport Avenue Extension. They have standing to bring this suit.

Ms. Elizabeth Ann Brent has been a resident of Elks Run Watershed for over 14 years. Elks Run passes above ground less than 1,000 feet from her home. Working with the WVDEP, she founded an Elks Run Watershed Group aimed at caring for and improving the health of the

watershed. From 2014-2017 she served in a volunteer capacity organizing community engagement with Elks Run issues. During this time, she and her group planted hundreds of trees along the Route 9 bike path, in Sam Michael's park, and at TA Lowery Elementary School in the watershed. They also regularly monitored water quality in the Run, organized annual clean ups, restored sections of the stream bank, planted rain gardens, educated children on the importance of watersheds and managed the septic tank clean up project. She has invested hundreds of hours into caring for Elks Run and connecting the community with its watershed. Elks Run provides the municipal water source to Harpers Ferry. Ms. Brent is a member of a pottery studio in municipal Harpers Ferry any contamination of Elks Run affecting either the water treatment plant or the water quality would negatively affect the studio threatening this business and the livelihood of those who rely on clean water to produce their wares. Ms. Brent also regularly uses the Potomac River for recreation including natural appreciation, kayaking and swimming. Contamination of the river would negatively affect these activities and her ability to use the river. Therefore, Ms. Brent has standing to bring this suit.

Jefferson County Foundation is a West Virginia based nonprofit 501(c)(3) corporation, formed for the purpose of preserving and protecting the quality of life in Jefferson County, West Virginia for all county residents. JCF educates and advocates for effective and accountable government, sustainable development, and the protection of health, heritage, and the environment. This includes protecting the waters resources of Jefferson County and preventing the contamination of the waterways that flow into the Potomac River and into the Chesapeake Bay. Each of the Board members of the Foundation have real property with wells that provide drinking water for both humans and/or animals, which would be irreparably harmed by the contamination of the ground water.

The Foundation has standing to bring this action because its Board members all have well water for drinking water on their property, and use both the Shenandoah and Potomac Rivers and other surface streams for natural appreciations, and could each bring an action in their own right. *See Friends of the Earth v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 181 (2000) ("An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interest at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.") If the surface streams, including but not limited to the Elks Run and Town Run, or the Shenandoah or Potomac Rivers were contaminated it would negatively affect the board members recreation and natural appreciation of these two water bodies.

The Clean Water Act

The Clean Water Act prohibits the discharge of pollutants from a point source to waters of the United States, except in compliance with a NPDES permit. 33 U.S.C. §§ 1311,1342. The CWA defines "pollutant" to include "dredged spoil" "rock, sand, cellar dirt" and "industrial...waste," among other things. 42 U.S.C. § 1362(6). "Point source" is defined as "any

discernible, confined and discrete conveyance, including but not limited to any pipe ... channel, tunnel, conduit” “well,” or “discrete fissure ... from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). Permits are required for all discharges “associated with industrial activity” and this includes construction projects greater than 5 acres. 40 C.F.R. §122.26 (a)(1)(ii) and 40 C.F.R. § 122.26 (b)(14)(x). All discharges from this construction site or project are unpermitted as this construction project is not covered by a valid NPDES permit.

This project is in an area of well-developed karst hydrogeology, and high sinkhole probability.¹ Therefore, discharges to the groundwater via direct infiltration are possible at any point in the construction project due to development or progression of karst features such as sink holes or wells (Sink holes are defined as Class V injection wells by 47 C.S.R.13 (4)(5)(k)) in the construction site.)

The ground water in this location has been shown to rapidly communicate with surface water structures in the area, all of which are tributaries of the Potomac River. A USGS dye test performed near the project site found that contaminants in the groundwater traveled 4 miles to surface water structures in less than 2 weeks². This is both a short conveyance distance and a short conveyance time. Thus, discharge to the ground water in this location constitutes a discharge to navigable waters (See, *Rapanos v. United States*, 547 U. S. 715 (2006) and *County Of Maui, Hawaii V. Hawaii Wildlife Fund, Et. Al.* , 590 U. S. _ (2020)).

Under federal and West Virginia law, no person may discharge pollutants to waters of the United States or the waters of West Virginia without a NPDES permit. 33 U.S.C. § 1311(a). W.Va. §22-11-8 (2020) require that Ranson, as the constructor of the Northport Avenue Extension, must have a valid NPDES permit. Although the CWA is a federal law, each state may, upon approval by the U.S. Environmental Protection Agency (“EPA”) pursuant to 42 U.S.C. § 1342(b) and 40 C.F.R. § 123.61, receive delegated authority to administer the NPDES permit program. The precursor state agency of the West Virginia Department of Environmental Protection (“DEP”) was approved to administer the NPDES program by EPA on May 10, 1982.

The City of Ranson has applied for registration under the Construction Stormwater General Permit 3 times for this project. The final application was incomplete and lacked required elements

¹ Doctor DH, Doctor KZ. Spatial analysis of geologic and hydrologic features relating to sinkhole occurrence in Jefferson County, West Virginia. Carbonates and evaporites. 2012 Jun 1;27(2):143-52.

Doctor DH, Weary DJ, Brezinski DK, Orndorff RC, Spangler LE. Karst of the Mid-Atlantic region in Maryland, West Virginia, and Virginia. Field Guides. 2015 Sep 1;40:425-84.

Doctor DH, Weary DJ, Orndorff RC, Harlow, Jr GE, Kozar MD, Nelms DL. Bedrock structural controls on the occurrence of sinkholes and springs in the northern Great Valley karst, Virginia and West Virginia. In Sinkholes and the engineering and environmental impacts of karst 2008 (pp. 12-22).

² Kozar MD, Hobba WA, Macy JA, Geohydrology, water availability, and water quality of Jefferson County, West Virginia with emphasis on the carbonate area, US GEOLOGICAL SURVEY, 1991.

as set forth in the February 9, 2019 Construction Stormwater General Permit that is currently in effect. Therefore, the City of Ranson is operating this construction project without a valid permit.

The City of Ranson is administering construction of the Northport Avenue Extension construction project on behalf of the West Virginia Division of Highways. The first application for registration of this project under the Construction Stormwater General Permit was submitted on July 23, 2018 under the 2012 general permit. This application was terminated on December 14, 2018 because, as stated by the “Info not received after multiple attempts made to obtain.”³

The City of Ranson started a second Construction Stormwater General Permit Registration application on January 9, 2019. The permit was issued on February 6, 2019. This application stated that construction would start on February 1, 2019 and end by December 31, 2019. As this was less than one year, no public comment or public notice was required. Nevertheless, after issuance of the permit registration on February 6, 2019, construction of the project was not started in February, as initially planned.

An application for reissuance of the Construction Stormwater General Permit Registration was initiated by the City of Ranson on June 7, 2019. In this application only sections 1-7 and the signature page were completed. The only substantive change to the application materials that were submitted was the timeline, which had changed from less than one year to greater than one year. Under 47 CSR 10-9.2 and 47 CSR 10-9.2.b.2 this change should have required public notice and public comment on the new application. This new application did not fulfill the requirements of the February 9, 2019 General Permit including, but not limited to, a missing site specific Groundwater Protection Plan (GPP), and a Karst Mitigation Plan (KMP).

The signature page for this application states:

“By completing and submitting this application, I have reviewed and understand and agree to the terms and conditions of the general permit issued on January 10, 2019. ...”

There were no comments on the application from either the reviewer or the applicant. In the application “Application Milestones” there were only two of eleven milestones filled out and those were the date the application was started and the date the public viewing started. As noted above there were only 5 attachments to the application and only 7 out of 20 sections of the application were completed. The application is listed as “closed – issued 9-11-2019” on the “search results page” of the DEP website though there is no final decision listed in the “Application Milestones” of the actual application.

The OWR permit details on the DEP website currently show the obvious inaccuracy of:

³ Quoted directly from the Application Milestones page of the application RANSON, CITY OF New NPDES/State Storm Water Construction #1 WVR110004.

ISSUE/REISSUE DATE 09/11/2019

EXPIRATION DATE 09/11/2020

The 2019 Construction Stormwater General Permit requires a site-specific Groundwater Protection Plan and Karst Mitigation Plan in Jefferson County. However, as this project does not have an approved site specific Groundwater Protection Plan or a Karst Mitigation Plan, this application did not meet the requirements of the February 9, 2019 Construction Stormwater General Permit. Therefore, this project has no valid NPDES permit and any resulting discharge violates the Clean Water Act.

On February 6, 2020, the DEP performed a site inspection for this project. Fourteen of the twenty-four site evaluation criteria were found to be unsatisfactory. Several of these documented sediment laden water leaving the property. Two examples are listed here:

“8. Section G.4.e.2.A.ii.b.: City of Ranson failed to properly operate sediment basin. Sediment basin is not being operated correctly and is allowing sediment laden water to leave the site without going through an appropriate erosion control device. Sediment basin should be set up to 50% percent wet/dry compacity. At time of inspection it is set up for stormwater retention with the orifices at bottom grade of basin. This is not allowing any settling time for sediment.”

“11. Section G.4.e.2.A.ii.j: City of Ranson failed to prevent sediment-laden water from leaving the site without going through an appropriate device. Sediment laden water can leave the site at multiple location via by-passes in perimeter controls where silt fence was not toed in correctly, conjoined correctly or laid over construction entrances that were not rocked along the LOD of the permitted site. Below the sediment basin, sediment laden water is able to leave the LOD and create sediment deposit on the Ran 5 Project where no perimeter controls were installed along the LOD.”

There are several sinkholes beyond the Limits of Disturbance (LOD) of this property. This included, at the time of this violation, two active sinkholes on the Ran 5 project site where the sediment-laden water from the Northport Avenue Extension traveled.

Sinkholes are known to provide direct infiltration of surface water into the ground water aquifer, i.e., a direct connection between surface water and any contamination it contains and the ground water. This location is known to have large amounts of water in the epikarst and that water is known to communicate readily with several surface water structures via springs and headwaters. The surface water structures are tributaries of the Potomac River and this communication is known to be relatively rapid.⁴ In fact, when a dye test was performed in a location very near to the site

⁴ Kozar MD, Hobba WA, Macy JA, Geohydrology, water availability, and water quality of Jefferson County, West Virginia with emphasis on the carbonate area, US GEOLOGICAL SURVEY, 1991.

dye was detected 4 miles from the injection site within two weeks in a spring fed stream. This stream is a tributary of the Potomac River.

Federal Law Authorizes These Persons and Entities to File Suit Against the City of Ranson

The CWA has a “citizen suit” provision, which authorizes “any citizen” to file suit against any other person that violates the CWA. 33 U.S.C. § 1365(a)(1). The City of Ranson is a “person” within the meaning of the CWA. This letter serves to comply with the CWA notice requirements under 33 U.S.C. § 1365(b)(1)(A) and EPA’s implementing regulations.

The names of each person giving notice in this letter are:

Dr. Christine Wimer, President of Jefferson County Foundation, on behalf of herself and the Foundation Board Members, Billie Garde and Diane Blust;

Mr. John Gonano and his wife, Ms. Natasha Baihly, on behalf of themselves and their business, River and Trail Outfitters;

Ms. Susannah Buckles, on behalf of herself and Gap View Farm;

Ms. Elizabeth Ann Brent on behalf of herself.

Please address all communications to the Foundation's counsel as follow:

Christopher P. Stroeck, Esq.
Arnold & Bailey, PLLC
208 N. George St.
Charles Town, WV 25414

We intend, following the 60-day notice period, to file a citizen suit in federal court against the defendant under Section 505(a) of the CWA for the violations outlined above. The entities and persons identified herein also reserves their respective rights to assert any other applicable cause of action under state and federal laws in addition to the CWA.

Please do not hesitate to contact me if you wish to discuss this notice letter.

Respectfully,



Christopher P. Stroeck, Esq.

cc:
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