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May 11, 2018

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Patricia Thompson, Chair, Town Council
Town of Yarmouth
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Yarmouth, Maine 04096

Nathaniel J. Tupper, Town Manager
Town of Yarmouth
200 Main Street
Yarmouth, Maine 04096

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

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

Mr. Jagger, Mr. Cardente, Ms. Thompson, and Mr. Tupper:

This letter constitutes notice pursuant to 40 C.F.R., Part 135 and 33 U.S.C. § 1365(b) of the Conservation Law Foundation’s (CLF)¹ intention to file suit against Allen Jagger (“Mr. Jagger”), Michael Cardente (“Mr. Cardente”), and the Town of Yarmouth, Maine (“Yarmouth”) (collectively, “Defendants”) in United States District Court for the District of Maine seeking appropriate injunctive and declaratory relief, and other relief no earlier than 60 days from the postmark date of this notice letter. CLF intends to file suit for violations of the Federal Water Pollution Control Act (commonly referred to as the “Clean Water Act”), 33 U.S.C. §§ 1251 *et*

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 Maine for, among other things, fishing, recreation, boating, scenic, aesthetic and scientific purposes. CLF’s members live along or near the Royal River and in or near the Royal River watershed, and use and enjoy the Royal River for recreational, aesthetic, and/or scientific purposes, including fishing and enjoying wildlife in and around the Royal River. The interests of CLF’s members are adversely affected by Defendants’ alleged violations of the Clean Water Act set forth herein.

seq., specified below. CLF will file suit pursuant to Section 505(a) of the Clean Water Act, *id.* § 1365(a).

The subject of this action is a dam located on the Royal River in Yarmouth, Maine, known as the “Bridge Street Dam.” The town of Yarmouth owns both the Bridge Street Dam and its fishway. The Bridge Street Dam is associated with the property located at 81 Bridge Street (known as the “Old Sparhawk Mill”), which Mr. Jagger co-owns, and for which Mr. Cardente is the property manager.

A hydroelectricity generation project (“Hydro Project”) has historically been contained within the basement of the Old Sparhawk Mill, powered by a penstock diverting water from the Bridge Street Dam to turn the turbines. The Hydro Project is permitted by the U.S. Federal Energy Regulatory Commission (“FERC”) pursuant to an Order Granting Exemption from Licensing of a Small Hydroelectric Project of 5 Megawatts or Less issued in 1985 (FERC Project No. P-8417-ME) (“Exemption”). The current holder of the Exemption is Mr. Jagger, and Mr. Cardente is the primary contact for FERC communications regarding the Hydro Project.

As part of the FERC licensing process, pursuant to the Clean Water Act, the Maine Department of Environmental Protection (DEP) issued a water quality certification for the Hydro Project in 1984 (“§ 401 Certification”), attached hereto as Exhibit A. Defendants are not complying with the terms of the § 401 Certification. Specifically, the fishway at the Bridge Street Dam is not operational, in violation of the § 401 Certification. Further, the Bridge Street Dam does not maintain the minimum flow levels required by the § 401 Certification. Under the Clean Water Act, the terms of the water quality certification are also conditions of the Exemption. *See* 33 U.S.C. § 1341(d). As holder of the Exemption and owner of the Hydro Project, Mr. Jagger has violated and continues to be in violation of the Clean Water Act. As manager of the Exemption and the Hydro Project, Mr. Cardente has violated and continues to be in violation of the Clean Water Act. As the owner and operator responsible for the maintenance of the fishway and the Bridge Street Dam which are in violation of the § 401 Certification, the town of Yarmouth, Maine has violated and continues to be in violation of the Clean Water Act.

STATUTORY BACKGROUND

The Clean Water Act protects the nation’s waters by establishing a framework for the regulation of discharges, discharges of pollutants, and quality standards for surface waters. Congress enacted the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Congress established the “national goal” of achieving “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water[.]” *Id.* Thus, the Clean Water Act controls more than just the “discharge of pollutants” into the water; it also addresses “pollution” broadly defined as “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.” *Id.* §§ 1362(19), 1251(a); *see also S.D. Warren*

Co. v. Me. Bd. Of Enviro. Protect., 547 U.S. 370, 384 (2006).

Section 401(a) of the Clean Water Act requires an applicant for a federal license to first obtain a state certification of compliance with applicable water quality standards and effluent limitations. Specifically, any applicant for a federal license or permit to conduct an activity that may result in any discharge into navigable waters must provide the federal licensing or permitting agency with a certification from the state in which the discharge originates. 33 U.S.C. § 1341(a). Certifications under § 401 “shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure” that the applicant’s discharges and other activities will comply with all applicable state water quality standards and effluent limitations. *Id.* § 1341(d). Each of the requirements of the certification under § 401 “shall become a condition on any Federal license or permit subject to the provisions of [section 401].” *Id.*

Violators of the Clean Water Act are subject to enforcement actions initiated by citizens in addition to enforcement actions brought by EPA and states. *Id.* §§ 1319, 1365(a). Section 505(a) of the Clean Water Act authorizes citizen suits “against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter.” *Id.* § 1365(a). Section 505(f) defines “effluent standard or limitation under this chapter” to include, *inter alia*, “certification under section 1341 of [the Clean Water Act].” *Id.* § 1365(f)(5). The Clean Water Act defines “person” to include, *inter alia*, an individual, corporation, partnership, association, or municipality. *Id.* § 1362(5). Citizens are required to provide sixty days’ notice of any alleged violations prior to commencing suit. *Id.* § 1365(b); 40 C.F.R., Part 135.

Under the Federal Power Act, 16 U.S.C. §§ 791-828(c), FERC issues licenses for the construction, operation and maintenance of dams for the development of power from streams and other bodies of water over which FERC has jurisdiction. 16 U.S.C. § 797(e). In certain circumstances, FERC is authorized to provide qualifying dams with exemptions from the licensing requirements instead. *See, e.g., id.* §§ 823a(a) & (b), 2705. Such dams are not wholly exempted from regulation, however. While dams may be exempted from application of Part I of the Federal Power Act, they are still subject to mandatory terms and conditions set by federal and state fish and wildlife agencies and by FERC.

Releases from hydroelectric dams have regularly been interpreted to constitute “discharges” of water under the Clean Water Act. Thus, FERC-jurisdictional dams releasing into waters of the United States are subject to the Clean Water Act § 401 certification provisions. The terms of any applicable § 401 certification become conditions of the FERC license or exemption by operation of law. 33 U.S.C. § 1341(d).

FACTUAL BACKGROUND

The Bridge Street Dam is located on the Royal River within the town of Yarmouth, Maine. The Royal River’s headwaters are in Sabbathday Lake in New Gloucester, Maine, and the river

travels 32 miles to reach the head-of-tide in Yarmouth, over the course of which it drops nearly 300 feet. The Royal River watershed encompasses approximately 140 square miles.

Historically, the Royal River provided spawning habitat for Atlantic salmon, shad, and river herring. Damming of the Royal River began in the second half of the seventeenth century, and by the early 1800s, there were 14 mills located along the Royal River in the town of Yarmouth alone. In 1958, more than ten fish barriers were identified within the Royal River watershed.

Beginning in the 1970s and through the early 1990s, the Maine Department of Marine Resources (“DMR”) engaged in fish restoration efforts within the Royal River. Primary emphasis was placed on restoration of alewife and American shad runs. The stocking and monitoring programs showed some promise but ultimately proved to be of limited success. For instance, although transplanted adult American shad successfully reproduced throughout the Royal River system as evidenced by out-migrating juvenile fish in the fall of 1978, the Bridge Street Dam presented a barrier to adult fish attempting to return to their spawning waters upriver in the spring. Records show that only one adult shad was captured in the Bridge Street Dam fishway trap traveling upstream in 1981. Meanwhile, stocking efforts with respect to alewife were variable -- records indicate that alewife runs initially increased as a result of the stocking efforts to more than 50,000 ascending adults in 1981, but dropped by about half between 1982 and 1983, and significantly decreased to less than 10,000 by 1988. No blueback herring were ever recorded passing through the Bridge Street fishway. DMR has not recently engaged in counting fish returns or in stocking these species in the Royal River.

Today, the Bridge Street Dam is one of only two remaining dams on the main stem of the Royal River in Yarmouth. Constructed in 1894, the Bridge Street Dam is located approximately 2.2 miles upriver from the mouth of the river at Casco Bay and roughly 200 to 250 feet upstream from the Bridge Street bridge. It is a run-of-river type structure, spanning the full width of the Royal River and measuring approximately 275 feet in length. It is constructed of masonry and reinforced concrete and is 10 to 12 feet in structural height. The Dam’s spillway is located at the center of the Dam and is approximately 75 feet long.

The town of Yarmouth has owned the Bridge Street Dam since 1973. In 1974, as part of DMR’s fish restoration efforts, DMR contracted with the town of Yarmouth for construction of a Denil-type fishway on the Bridge Street Dam. DMR maintained a lease to operate and manage the fishway until 1999, when the terms of the 25-year lease expired and were not renewed. The fishway is located on the west side of the Bridge Street Dam. It has a vertical rise of approximately twelve to thirteen feet and is three feet wide. There is a fish screen intended to prevent fish and aquatic life from entering the intake area. Water flow into the fishway is controlled by a vertical lift gate. The gate was severely damaged in 2010, and on information and belief, is not currently operable. The fishway does not appear to be actively managed or maintained, or to have been actively managed or maintained since the expiration of DMR’s lease nearly twenty years ago.

The town of Yarmouth also owns the right-of-way and flowage rights associated with the Bridge Street Dam. In the 1980s, Yarmouth leased flowage rights to the owners/managers of the Old Sparhawk Mill to enable generation of electricity in the lower level of the building. The site was rehabbed with new turbine-generators, a new penstock to divert water from the dam and to the Hydro Project, and other repairs. At the time of development of the Hydro Project, Thomas L. Yale and P. Andre LeMaistre filed an application to FERC seeking an exemption. On May 24, 1985, FERC issued the Exemption, subject to certain conditions. The Exemption was subsequently transferred to Mr. Allen Jagger. Mr. Jagger is the current holder of the Exemption and is the co-owner of the Old Sparhawk Mill and of the Hydro Project. Mr. Cardente, property manager of the Old Sparhawk Mill, is the primary contact for FERC regarding the Exemption and the Hydro Project.

Yarmouth no longer maintains a lease agreement with the owners or managers of the Old Sparhawk Mill regarding rights associated with the Bridge Street Dam. Although the penstock is still present, it is not clear whether the Old Sparhawk Mill still contains generating equipment, and if so, to what extent the Hydro Project remains operational.

STANDARDS OR LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED

Section 401 of the Clean Water Act required the Hydro Project to receive a water quality certification from DEP ensuring that the Hydro Project would comply with Maine's water quality standards, effluent limitations and other limitations before the Hydro Project could receive its FERC Exemption. 33 U.S.C. § 1341. DEP issued the § 401 Certification on November 28, 1984. The § 401 Certification sets forth ten mandatory conditions necessary to ensure compliance with Maine water quality standards. Each term and condition of the § 401 Certification is a condition of the Exemption by operation of law. *Id.* § 1341(d).

The § 401 Certification acknowledges that the Hydro Project “could result in significant harm to fish and wildlife resources unless a) water levels and flows are adequate to maintain the aquatic environment, b) adequate upstream and downstream fish passage facilities are provided, and c) adequate measures are taken to control erosion and sedimentation during and following project construction.” To ensure that the Hydro Project did not result in significant harm to fish resources, DEP approved the application for the Hydro Project subject to the following conditions, *inter alia*:

Except as irreconcilably limited by order of state, local or federal authorities, and commencing with project construction, an instantaneous minimum flow of 50 cfs, or a flow equal to inflow when such inflow is less than 50 cfs, shall be maintained from the dam at all times, except that for the periods from May 1 to July 15 and September 1 to November 30 annually, an instantaneous minimum flow of 70 cfs,

or a flow equal to inflow when such inflow is less than 70 cfs, shall be maintained from the dam. First priority to a flow of 13 cfs shall be provided to the fishway. . .

Fish passage facilities for screening downstream migrating fish from the intake structure and for excluding upstream migrating fish from the tailrace channel shall be constructed and shall be operational with the commencement of project operation . . .

Defendants are in violation of the Clean Water Act because the fishway associated with the Bridge Street Dam is not “operational,” as required by the § 401 Certification. Defendants have also violated, and continue to violate, the minimum flow requirements set forth in the § 401 Certification, in violation of the Clean Water Act.

ACTIVITY ALLEGED TO CONSTITUTE VIOLATIONS

Defendants have repeatedly violated and are reasonably likely to continue to violate the § 401 Certification and the Clean Water Act by failing to maintain an operational fishway associated with the Bridge Street Dam. The fishway is not “operational” as required by the § 401 Certification and the Exemption due to Defendants’ failure to maintain and actively manage the fishway.

The Bridge Street Dam fishway requires regular maintenance and management to ensure effective performance. Flow levels must be managed by manual operation of control gates that control the release of water through the fishway. Debris like rocks, branches and accumulated trash must be removed. The Denil baffles in the fishpass require regular upkeep.

Defendants are failing to actively manage, operate or maintain the fishway. Inadequate operation as well as the need for maintenance have been documented since at least 2008, and have rendered the fishpass entirely inoperable during some migratory seasons. It is not presently known whether the headgate, which was damaged by flooding in 2010, is now fully operational. Nor is it known whether reported broken and missing boards in the fishway have been fixed. The current condition of the fishway does not facilitate effective fish passage. As a result of Defendants’ failure to manage or maintain the fishway, it is not operational as required by the § 401 Certification and the Exemption.

Further, Defendants have repeatedly violated and are reasonably likely to continue to violate the § 401 Certification and the Exemption by failing to maintain an instantaneous minimum flow of 50 cfs, or a flow equal to inflow when such inflow is less than 50 cfs, at all times, and by failing to maintain an instantaneous minimum flow of 70 cfs for the periods from May 1 to July 15 and September 1 to November 30, with first priority to providing a flow of 13 cfs to the fishway, in violation of the Clean Water Act.

It is not clear whether anyone is currently managing flow levels over the Bridge Street Dam. Yarmouth no longer maintains a lease with the owners or managers of the Old Sparhawk Mill regarding flowage rights associated with the Bridge Street Dam, yet Yarmouth does not appear to have assumed management responsibilities. It is critical that the flow levels are actively managed to ensure compliance with the § 401 Certification. The Bridge Street Dam substantially impacts the hydrology of the Royal River downstream when the penstock diverts water from the spillway, impacting the velocity, quantity, and location of flow below the Bridge Street Dam.

The flow into the fishway itself is also critical to successful passage of fish. The flow into the fishway must be managed by a manually-operated lift gate that was rendered inoperable due to flooding in 2010. The current status of the lift gate is not known; however, it does not appear that any of Defendants have been regularly operating it to ensure proper flow levels are maintained. Flows that are too high can result in impassable conditions, while flows that are too low can also prevent effective fish passage.

Defendants have violated the minimum flow levels on numerous occasions. These violations have occurred both before and after the installation of automated flow management equipment in 2012. Unless Defendants take action to actively manage flow levels, there is a continuing likelihood of recurrence of these violations, intermittently or sporadically.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

Mr. Jagger and Mr. Cardente are persons, as defined by 33 U.S.C. § 1362(5), responsible for the violations alleged in this Notice. By operation of law, the terms and conditions of the § 401 Certification are conditions of the FERC Exemption. Mr. Jagger holds the Exemption and owns the Hydro Project. Mr. Cardente is the primary contact regarding the Exemption and on information and belief, manages the Exemption and the Hydro Project. Mr. Jagger and Mr. Cardente are therefore responsible for ensuring compliance with the Exemption and the § 401 Certification, which includes the requirements for operational fish passage and maintenance of minimum flow levels. Mr. Jagger and Mr. Cardente are responsible for the violations of the Clean Water Act alleged herein.

The town of Yarmouth, Maine is a person, as defined by 33 U.S.C. § 1362(5), responsible for the violations alleged in this Notice. The town of Yarmouth owns the Bridge Street Dam, the associated water and flow rights, and the associated fishway. The § 401 Certification requires the fishway to be operational. Yarmouth bears responsibility for ensuring that the fishway it owns and controls is actively managed and maintained in order to be operational. Yarmouth also bears responsibility for ensuring that the Bridge Street Dam, which it owns and controls, complies with minimum flow requirements. Yarmouth is responsible for the violations of the Clean Water Act alleged herein.

LOCATION OF THE ALLEGED VIOLATIONS

The violations alleged herein have occurred and continue to occur at the Bridge Street Dam and fishway on the Royal River associated with the Hydro Project located at the Old Sparhawk Mill, 81 Bridge Street, Yarmouth, Maine, 04096.

DATES OF VIOLATIONS

As outlined above, Defendants have repeatedly failed to comply with the terms of the § 401 Certification since at least 2008. Each instance of the Bridge Street Dam or fishway failing to comply with the terms and conditions of the § 401 Certification is a separate and distinct violation of Section 401 of the CWA, 33 U.S.C. § 1341.

These violations are ongoing and continuous, and barring a change, these violations will continue indefinitely.

RELIEF REQUESTED

Defendants are liable for the above-described violations occurring prior to the date of this letter, and for every day that these violations continue. CLF will seek declaratory and injunctive relief to prevent further violations of the Clean Water Act and such other relief as permitted by law. CLF will seek an order from the Court requiring Defendants to correct all identified violations and to demonstrate full compliance. Lastly, pursuant to Section 505(d) of the Act, 33 U.S.C. § 1365(d), CLF will seek recovery of costs and fees associated with this matter.

CONCLUSION

As detailed above, Defendants have repeatedly violated the express conditions of the § 401 Certification and are reasonably likely to continue to do so. If Defendants do not take remedial action to halt the serious violations of the § 401 Certification described herein, CLF anticipates filing suit 60 days from the date of this notice in the U.S. District Court for the District of Maine, requesting declarative and injunctive relief and the award of costs. 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. To pursue such discussions, please contact Sean Mahoney, Esq. and Emily K. Green, Esq. at the contact information set forth below within the next 20 days so that negotiations may be completed before the end of the 60-day notice period. CLF does not intend to delay the filing of a complaint in federal court if discussions are continuing at the conclusion of the 60 days.



For a thriving New England

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Sincerely,

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