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pro bono publico

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RE: 60-day Notice of Intent to Sue for Violations of the Clean Water Act (CWA), pursuant to 33 U.S.C. § 1311(a)

60-day Notice of Intent to Sue for Violations of the Resource Conservation and Recovery Act (RCRA), pursuant to 42 U.S.C. § 6945(a)

90-day Notice of Intent to Sue for Violations of the Resource Conservation and Recovery Act (RCRA) pursuant to 42 U.S.C. § 6972(a)(1)(B)

To Whom It May Concern:

The Sierra Club, through its attorneys, Melissa Scanlan and Brent Denzin of Midwest Environmental Advocates, Inc., and David Bender of Garvey, McNeil, & McGillivray, S.C. sends this Notice of Intent to sue you in your official capacities as Chancellor and Vice Chancellor of the University of Wisconsin (UW), Secretary of the State of Wisconsin Department of Administration (DOA), President of University of Wisconsin System, State Heating Plant Engineer, Director of the UW Physical Plant, and supervisor of the University of Wisconsin-Madison's Charter Street Heating Plant ("Charter Street Plant"), for all known past and on-going violations of the federal Clean Water Act ("CWA") and the federal Resource Conservation and Recovery Act ("RCRA") committed at the Charter Street Plant. 33 U.S.C. § 1365; 42 U.S.C. § 6972(a)(1)(A),(B).

The Charter Street Plant is located on, and supplies heat and cooling to, the University of Wisconsin-Madison campus. In your respective capacities, you are responsible for overseeing the Charter Street Plant operations and assuring compliance with the CWA and the RCRA. Consequently, you are responsible for the violations alleged herein. As described below, the Charter Street Plant is discharging coal-contaminated industrial stormwater to Monona Bay without coverage under a Wisconsin Pollutant Discharge Elimination System ("WPDES") Industrial Stormwater Permit and in violation of section 33 U.S.C. § 1311 of the CWA. Pursuant to 33 U.S.C. § 1365, Sierra Club is authorized to file suit in federal court 60 days after serving this Notice of Intent to Sue letter.

Additionally, the Sierra Club reasonably believes that coal-contaminated stormwater discharges from the Charter Street Plant have disposed coal waste into Monona Bay. This coal waste may present an imminent and substantial danger to human health or the environment in Monona Bay. Pursuant to 42 U.S.C. § 6972(a)(1)(B) of RCRA, Sierra Club has the authority, after providing a 90-day notice period, to sue you and to obtain a court order requiring you to remediate illegally-discharged coal waste in Monona Bay. *See also* 42 U.S.C. § 6972(b)(2)(A).

Finally, Sierra Club reasonably believes that coal-contaminated stormwater has contaminated the soil and groundwater underlying the Charter Street Plant coal pile. This constitutes an illegal open dump under RCRA. 42 U.S.C. § 6903(14); 40 C.F.R. § 257.3. Pursuant to 42 U.S.C. § 6972(a)(1)(A), Sierra Club has the authority, after providing a 60-day notice period, to sue you to stop all discharges of coal-contaminated stormwater to groundwater from the Charter Street Plant coal pile. *See also* 42 U.S.C. § 6972(b)(2)(A).

I. CLEAN WATER ACT

A. Background

The federal Clean Water Act prohibits the discharge of pollutants from regulated point sources to waters of the United States, except pursuant to, and in compliance with, a WPDES permit. 33 U.S.C. § 1311(a); Wis. Stat. § 283.31(1). The Act defines "pollutant"

to include solid waste, biological materials, chemical wastes, and agricultural waste discharged into water. 33 U.S.C. § 1362(6). Coal dust and coal-contaminated stormwater are “pollutants” under the CWA. *Id.*

Stormwater discharges associated with industrial activity are subject to permitting requirements in the CWA. 33 U.S.C. § 1342(p)(3)(A); Wis. Stat. § 283.33(1)(a). In Wisconsin, permit requirements for industrial stormwater discharges are set forth in Subchapter II of NR 216, Wis. Adm. Code. Under NR 216, Wis. Admin. Code, bulk storage piles of coal are considered Tier 1 point sources of industrial stormwater. Wis. Admin. Code § NR 216.21(2)(a). Additionally, “steam electric power generating facilities, including coal handing sites” are considered Tier 2 point sources of industrial discharges. *Id.* § NR 216.21(2)(b)(8).

The CWA prohibits stormwater discharges from Tier 1 or Tier 2 facilities that have been exposed to “industrial activit[ies]”, unless authorized by a WPDES permit. 33 U.S.C. § 1342(p)(3)(A); Wis. Stat. §§ 283.33(1)(a); 283.31(1). Industrial materials or activities include “material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products or waste products.” Wis. Admin. Code § NR 216.21(3)(a). Material handling activities include the “storage, loading and unloading, transportation or conveyance of any raw material, intermediate product, final product or waste product.” *Id.*

The Charter Street Plant’s coal storage pile is regulated as either a Tier 1 or Tier 2 point source for industrial stormwater. Coal is an industrial material and its use and storage at the Charter Street Plant is considered an industrial activity. Therefore, the Charter Street Plant is prohibited from discharging stormwater that has been exposed to coal without obtaining and complying with a WPDES Industrial Stormwater permit. Wis. Admin. Code § NR 216.22(1).

The Charter Street Plant has not obtained a WPDES permit for stormwater discharges. Consequently, all discharges of exposed industrial stormwater from the Charter Street Plant are in violation of 33 U.S.C. § 1311(a) of the CWA.

It has been alleged that the Charter Street Plant may have been theoretically designed to contain all industrial stormwater discharges on-site and pump coal-exposed stormwater to the City of Madison’s sanitary sewer treatment facilities. If such a design could effectively eliminate all coal-exposed discharges, the Charter Street Plant would fall within an NR 216, Wis. Admin. Code, exception and would not require WPDES permit coverage. Wis. Admin. Code § NR 216.21(5)(h).

However, as detailed below, the Charter Street Plant’s design has not prevented stormwater from contacting coal dust nor has it contained stormwater discharges on site. As a result, coal-exposed stormwater has discharged, and continues to discharge, from the Charter Street Plant’s coal storage area to off-site storm drains. Additionally, DNR now believes a “substantial amount of coal pile runoff is being discharged to the storm

sewer” instead of the sanitary sewer system.¹ Again, without a permit, these coal-contaminated stormwater discharges violate the CWA. 33 U.S.C. §§ 1311, 1342(p)(3)(A); Wis. Admin. Code § NR 216.22(1).

B. Violations

On multiple occasions, including but not limited to July 20, 2006, July 27, 2006, August 9, 2006, and April 23, 2007, Midwest Environmental Advocates, Inc. (“MEA”) staff witnessed black stormwater running from the Charter Street Plant into storm drains outside the Charter Street Plant grounds. Specifically, MEA staff tracked the stormwater flow from the Charter Street Plant to the storm drain inlets on Mills Street and Spring Street. All stormwater that is discharged into the Mills Street and Spring Street storm sewer inlets is discharged, without treatment, into Monona Bay.

On July 27, 2006, during a 0.84-inch storm event², MEA collected samples of stormwater discharging from the Charter Street Plant’s property. Sampling areas included: 1) the Charter Street Plant’s Spring Street driveway, above the railroad tracks; and 2) the Mills Street sidewalk next to the Charter Street Plant’s coal yard. All of these areas are outside the Charter Street Plant’s property and directly bordering its large, uncovered coal storage pile. The stormwater samples are black with what appears to be suspended particles of coal.

On August 9, 2006, during a 0.04-inch storm event, MEA staff again collected samples of stormwater runoff coming from the above listed locations. Like the July 27, 2006 samples, the August 9, 2006 samples were black with what appears to be suspended particles of coal.

Both the July 27, 2006 and August 9, 2006 samples were collected using methods approved by the City of Madison Department of Public Health. The samples were subsequently submitted to the Department for testing. These tests confirmed high levels of zinc, iron, arsenic, manganese, aluminum, and other metals that are commonly associated with coal pile runoff.³ These metals, and other pollutants associated with coal pile runoff, have been shown to harm aquatic life in receiving waters.⁴

Most concerning, some coal pile runoff pollutants, like arsenic, are human carcinogens.⁵ Results from the City of Madison Department of Public Health’s tests on the Charter Street Plant’s stormwater samples, taken on July 27 and August 9, 2006, consistently

¹ Letter from Ken Johnson (DNR) to Phil Michalski (DOA), June 21, 2007; Attached as Exhibit 1.

² All precipitation data were obtained from the National Oceanic and Atmospheric Administration (NOAA) National Weather Service Forecast Office website, <http://www.weather.gov/climate/index.php?wfo=mkx> (last visited July 5, 2007).

³ See Charter Street Coal Storage Runoff Data, City of Madison Department of Health, February 2007, Attached as Exhibit 2.

⁴ Center for Disease Control, Final Report, Savannah River Site Environmental Dose Reconstruction Project, Ch. 18, p. 10, RAC Report No. 1-CDC-SRS-1999-Final (2001), www.cdc.gov/nceh/radiation/brochure/profile_savannah.htm (last visited July 5, 2007).

⁵ *Id.*

show levels of arsenic that exceed the “human cancer criteria” for surface water quality standards in Wisconsin.⁶ For example, the August 9, 2006, sample showed arsenic levels as high as 94 ug/L, nearly two times greater than the human cancer criteria for surface waters.⁷

On July 21, 2006, MEA staff contacted the Wisconsin Department of Natural Resources (“DNR”) staff regarding the Charter Street Plant’s stormwater discharges. In response to MEA’s letter, on August 7, 2006, Jim Bertolacini (DNR Stormwater Specialist), Brent Denzin (MEA Attorney), Melissa Scanlan (MEA Executive Director and Attorney), Carla Klein (Sierra Club John Muir Chapter Executive Director), and UW representatives took a tour of the Charter Street Plant.

The tour revealed design, operational, and maintenance flaws near the Charter Street Plant’s coal storage and driveway area. In a follow-up letter to UW, DNR Stormwater Specialist Jim Bertolacini documented the design and maintenance flaws that have led to consistent, unpermitted stormwater discharges from the Charter Street Plant.⁸

Among the concerns DNR documented, the Charter Street Plant’s driveway is graded to allow stormwater that has either contacted the coal pile directly, or coal residue on the driveway to discharge from the Plant’s coal yard onto Spring Street.⁹ Another documented problem was the practice of storing coal adjacent to a two-foot concrete wall and chain link fence near the Spring Street bicycle path and Mills Street sidewalk, which allows stormwater to contact the coal pile and flow off site. In fact, coal and tire-derived fuel regularly spilled over the two-foot retaining wall onto the sidewalk and yard outside of the Charter Street Plant. DNR photographs taken on August 7, 2006, and MEA photographs, taken on July 9, 2006, July 20, 2006, July 27, 2006, and April 23, 2007, show piles of coal and tire-derived fuel outside the Plant and fully exposed to stormwater, which results in illegal pollution discharges.¹⁰ Finally, the height of the coal pile and lack of any cover allows coal dust to blow onto the driveway, sidewalks, and roadways that drain directly to the storm sewer inlet.

DNR’s letter explained that these design failures have led to stormwater discharges that violate the CWA. DNR concluded that “prompt” site remediation was needed to avoid CWA prosecution. Required actions included regrading the Spring Street driveway and maintaining a two-foot buffer between the coal pile and detention wall at all times.¹¹

Over the months following the site visit, MEA visited the Charter Street Plant on multiple occasions and found that the driveway had not been regraded. Additionally, coal

⁶ Charter Street Coal Storage Runoff Data, City of Madison Department of Health, February 2007; *see also* Wis. Admin. Code § NR 105.09.

⁷ *Id.*

⁸ *See* Letter from Jim Bertolacini (DNR) to Gary Guitzkow (UW) and Sally Rowe (UW), August 14, 2006, Attached as Exhibit 3.

⁹ *Id.*

¹⁰ *See Id.*

¹¹ *Id.*

remained piled to the top of the two-foot wall and was spilling from the Charter Street Plant grounds onto the sidewalk and street.

On April 23, 2007, nearly nine months after the first site visit, MEA staff visited the Charter Street Plant after a 0.57-inch storm overnight. The driveway had not been regraded. Large pieces of coal and tire-derived fuel were found outside of the perimeter wall, on the bicycle path and Mills Street sidewalk, and stuck in the clogged storm sewer inlet covers on both Mills and Spring Streets.

MEA staff collected samples of sediment found next to the Mills Street and Spring Street storm drains. In addition to large pieces of coal and tire-derived fuel, the samples clearly contain an abundance of coal particles. This coal-contaminated stormwater was flowing directly into the storm sewer inlet, which drains into Monona Bay.

On April 26, 2007, MEA staff visited the Charter Street Plant after 0.48-inches of rain and collected samples from the Spring Street driveway above the railroad tracks. Like the 2006 samples, the stormwater was black and had been exposed to coal from the Charter Street Plant. Again, because the Charter Street Plant does not have a WPDES permit for industrial stormwater discharges, these discharges violate the CWA.

Under the CWA, every day that the Charter Street Plant discharges coal-contaminated stormwater without complying with a WPDES Industrial Stormwater permit is a separate violation. 33 U.S.C. § 1319(d). As the August 9, 2006, sample shows, coal-contaminated stormwater with high levels of arsenic and zinc is discharged from the Plant during or after as little as 0.04 inches of rain. Given the Charter Street Plant's failure to correct the design flaws that allow these stormwater discharges, Sierra Club can reasonably assume that coal-contaminated stormwater illegally discharges from the Charter Street Plant after every storm event involving 0.04 inches or more of precipitation. Data from the National Oceanic and Atmospheric Administration (NOAA) identifies the number of days in which Madison received 0.1 inches of rain since July 1, 2002.¹² The 0.1-inch threshold provides a conservative indication of the number of days in which stormwater was illegally discharged from the Charter Street Plant.

According to NOAA precipitation data, Madison has received over 0.1 inches or more of precipitation on at least 333 days since July 1, 2002.¹³ One can reasonably assume that the Charter Street Plant has discharged coal-exposed stormwater without a WPDES Industrial Stormwater Permit and in violation of the CWA on each of those 333 days. Each day that the Charter Street Plant discharges coal-exposed stormwater without a permit is a separate CWA violation. 33 U.S.C. §§ 1319(d); 1365(d); 40 C.F.R. § 19.4. Sierra Club has a cause of action to obtain a court order prohibiting you from violating the CWA, compelling actions required by the CWA, and for its costs and fees.

¹² All precipitation data were obtained from the National Oceanic and Atmospheric Administration (NOAA) National Weather Service Forecast Office website, <http://www.weather.gov/climate/index.php?wfo=mkx> (last visited July 5, 2007).

¹³ *Id.*

Recently, on June 21, 2007, DNR indicated UW's earlier claim that the Charter Street Plant is designed to capture and treat stormwater using the sanitary sewer system, is untrue.¹⁴ This follows a June 7, 2007, admission of the same by the DOA.¹⁵ Instead, the Charter Street Plant appears to be discharging coal-contaminated stormwater directly to Monona Bay via the municipal storm sewer system.¹⁶ Given DNR's assertion that stormwater is not reaching the sanitary sewer system, Sierra Club reasonably believes that a significant portion of the stormwater captured on-site is discharging directly to Monona Bay without treatment and without a WPDES permit.

The direct connection between the coal pile and storm drain further supports Sierra Club's reasonable belief that the Charter Street Plant discharged industrial stormwater on each of the 333 days in which Madison received over 0.1 inches of rain. All of these discharges were unpermitted and in violation of the CWA. Therefore, 60 days after this notice, Sierra Club intends to sue you to prohibit further, un-permitted stormwater discharges via the storm sewer system and to compel actions necessary to ensure compliance with the CWA. As part of this suit, Sierra Club will seek a court order compelling the removal of coal sediment from Monona Bay that was and continues to be discharged illegally, resulting in pollution to Monona Bay in violation of the CWA.

II. RESOURCE CONSERVATION AND RECOVERY ACT (RCRA)

Sierra Club intends to sue you in your capacity as UW and DOA officials to compel the remediation of coal-contaminated sediments in Monona Bay and contaminated groundwater caused by the Charter Street Plant's coal pile runoff. Under RCRA:

[A]ny person may commence a civil action on his own behalf . . . against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. § 6972(a)(1)(B).

"Solid Waste" is defined in RCRA as:

[An]y garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community

¹⁴ See Letter from Ken Johnson (DNR) to Phil Michalski (DOA), June 21, 2007, Attached as Exhibit 1.

¹⁵ See Letter from Tim Coughlin (DNR) to John Harrod (UW) and Phil Michalski (DOA), June 20, 2007, Attached as Exhibit 4.

¹⁶ *Id.*

activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act [or CWA].

42 U.S.C. § 6903(27).

Coal sediment and coal-contaminated stormwater from the Charter Street Plant are considered “solid waste” under the RCRA definitions. Coal sediment and coal-contaminated stormwater are both “discarded materials” from “industrial” activity. 42 U.S.C. §§ 6903 (27). Coal sediment and coal-contaminated stormwater have the potential to endanger human health or the environment, including but not limited to aquatic life. Coal sediment and coal-contaminated stormwater contain arsenic, chromium, polyaromatic hydrocarbons, and other pollutants that have been shown to threaten aquatic life.¹⁷

Under RCRA, the Charter Street Plant is a “generator,” and an operator of a “storage” and “disposal” facility that has “contributed” to the disposal of “solid waste” into Monona Bay. 42 U.S.C. § 6972(a)(1)(B); 40 C.F.R. § 257.2. The years of contaminated stormwater discharges from the Charter Street Plant “may present an imminent and substantial endangerment to health or the environment” in Monona Bay and, therefore, require clean up under RCRA. *Id.* § 6972(a)(1)(B). If, after 90 days, all coal-contaminated sediment is not remediated to the extent necessary to alleviate any potential threat to human health or the environment, Sierra Club intends to sue you in your capacity as officials for UW and DOA to compel such remediation. *Id.* § 6972(b)(2)(A).

Additionally, all coal-contaminated stormwater discharges from the Charter Street Plant coal pile to groundwater constitute illegal open dumping under RCRA. 42 U.S.C. §§ 6903(14); 6945(a); 40 C.F.R. § 257.3-4. After 60-days, Sierra Club intends to sue you to compel remediation of all groundwater contamination resulting from the ongoing open dumping of coal-contaminated stormwater.

III. CONCLUSION

Sierra Club, through its attorneys listed below, intends to sue you, pursuant to 33 U.S.C. § 1365, for all past and ongoing violations of the Clean Water Act, and pursuant to 42 U.S.C. § 6972, for all RCRA violations created by the discharge of industrial stormwater from the Charter Street Plant.

¹⁷ Centers for Disease Control, *Savannah River Site Environmental Dose Reconstruction Project, Phase II* (April 2001), Chapter 18, p. 10, http://www.cdc.gov/nceh/radiation/savannah/Chapter_18.pdf, (last visited July 5, 2007); Agency for Toxic Substances and Disease Registry, *Toxicological Profile for Polycyclic Aromatic Hydrocarbons (PAHs)*, 1995, p. 241.

The Sierra Club can be contacted through its attorneys Melissa Scanlan and Brent Denzin of Midwest Environmental Advocates, Inc., and David Bender of Garvey, McNeil, & McGillivray, S.C., at the following addresses and phone numbers:

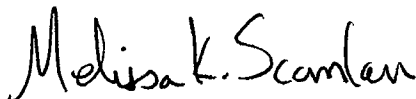
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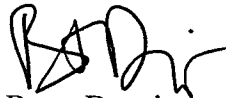
During the 60-day CWA and RCRA (open dumping) notice period and 90-day RCRA (imminent and substantial endangerment) notice period, Sierra Club is available to discuss the possibility of resolving this matter without litigation, as well as any facts you believe are incorrectly set forth in this notice.

Sincerely,

MIDWEST ENVIRONMENTAL ADVOCATES, INC.



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Attorney, Executive Director



Brent Denzin
Attorney, Equal Justice Works Fellow

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