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pro bono publico

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VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

November 8, 2007

Mr. Robert A. Patch, C.E.O.
Heartland Development Group, Ltd.
309 N. Water Street, Suite 315
Milwaukee, WI 53202

Mr. Edwin J. Majkowski, Jr.
ACT Planning and Development, LLC
912 Cedar Street
P.O. Box 270261
Hartford, WI 53027

**Re: 60-day Notice of Intent to Sue for Violations of WPDES Permit
No. WI-S067831-3 and 33 U.S.C. § 1342.**

Dear Mr. Patch,

Friends of Milwaukee's Rivers ("FMR"), through its attorneys, Midwest Environmental Advocates, Inc., hereby notifies you, pursuant to 33 U.S.C. § 1365(b), of its intent to file a citizen suit against Heartland Development Group, Ltd. and ACT Planning and Development, LLC for violations of the federal Clean Water Act ("CWA" or "the Act"), 33 U.S.C. §§ 1251 *et seq.*, and Wisconsin Pollutant Discharge Elimination System Permit No. WI-S067831-3 (General Permit for Construction Site Storm Water Runoff) (hereinafter "General Permit"), issued pursuant to Wis. Stat. ch. 283 and the CWA. FMR intends to file a lawsuit in federal court 60 days from the postmarked date of this letter.

I. INTRODUCTION

FMR is a non-profit organization whose mission is to protect water quality and wildlife habitat in the river corridors and to advocate for sound land use in the Milwaukee, Menomonee, and Kinnickinnic River Watersheds. FMR is a member of the Waterkeeper Alliance, a national coalition dedicated to protecting and restoring our nation's waterways, and is the

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licensed Riverkeeper® for Milwaukee. FMR members use and enjoy the Milwaukee River for paddling, fishing, and other recreational purposes.

The Clean Water Act violations detailed below result from construction activities at the property located in the Glendale Business Park, off the Deluxe Parkway extended (east of Port Washington Rd., south of Hampton, north of Capitol Dr., and on the west bank of the Milwaukee River), adjacent to Estabrook Park Falls, in Glendale, Wisconsin. (herein "Estabrook Falls Site"). As the owner and the operator, respectively, of the Estabrook Falls Site, Heartland Development Group, Ltd. and ACT Planning and Development, LLC are liable for all Clean Water Act violations associated with construction activities on the site. *See* 33 U.S.C. § 1365(a)(1); 33 U.S.C. § 1362(5).

Storm water discharges associated with land disturbing construction activities over one acre in size (hereinafter "construction activities") are subject to State and federal Clean Water Act regulation. All landowners and/or construction site operators of construction sites over one acre in size are required to obtain coverage under the General Permit before commencing land disturbing activities. Wis. Admin. Code § NR 216.44(1); *See* 40 CFR. §§ 122.26(b)(14)(x);(15)(i). After obtaining permit coverage, landowners and/or operators of construction sites are required to comply with all provisions set forth in the General Permit. Wis. Stat. § 283.33(1)(a); Wis. Admin. Code § NR 216.42(1). Storm water discharges from construction sites that are not covered by, or are in violation of, a valid permit are in violation of the federal Clean Water Act. 33 U.S.C. § 1311(a); 1342(b); *see Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1005 (11th Cir. 2004).

II. VIOLATIONS OF THE FEDERAL CLEAN WATER ACT

Since at least Thursday, October 25, 2007, FMR has observed construction activities affecting greater than one acre of land at the Estabrook Falls Site (approximately 5 acres of disturbance).

As of the date of this letter, we have determined that you have not obtained coverage under the WPDES General Permit for those activities, as required by state and federal law. Each day you operate this construction site without permit coverage constitutes a separate violation of the Clean Water Act. 33 U.S.C. §§ 1319(d); 1365(d); 40 C.F.R. § 19.4. These violations are subject to the citizen suit provision of the Act. 33 U.S.C. § 1365. This letter notifies you that, at the end of the 60-day notice period, FMR intends to file suit against Heartland Development Group, Ltd. and ACT Planning and Development, LLC for all ongoing violations of the Clean Water Act, including unpermitted discharges to the Milwaukee River.

In addition to violating the requirement to obtain a General Permit, you are also violating section 4.4 of the General Permit by not having and complying with an Erosion Control Plan that is designed to prevent the discharge of pollutant(s) of concern to an impaired water body. Your construction site discharges stormwater to the Milwaukee River directly. According to the Wisconsin Department of Natural Resources, the Milwaukee

River is currently impaired for sediment directly downstream from this Site. See <http://www.dnr.state.wi.us/org/water/wm/wqs/303d/303d.html>; 33 U.S.C. § 1313(d).

We became aware that some erosion control practices were installed on Monday, October 29th at the Estabrook Falls Site, after calls from FMR as well as other concerned citizens to the Wisconsin Department of Natural Resources (WDNR). WDNR staff notified Heartland and the City of Glendale staff about our concerns. These calls were not returned. The silt fence installed on October 29th was insufficient to control erosion from the site, which had been removed of all riparian vegetation via mechanized equipment. WDNR staff visited the site on Tuesday, October 30th and ordered erosion controls. Subsequently, Heartland did seed the site as was noted in the Milwaukee Journal Sentinel article on Friday, November 2, 2007; however, the existing controls still do not adequately protect this site from erosion. Furthermore, given the time of year, it is very unlikely that the seeding undertaken by Heartland will stabilize this site.

Additionally, section 3.1.2 of the General Permit requires that you develop a site-specific Erosion Control Plan that meets the applicable performance standards in NR 151.11. Among other requirements, the Erosion Control Plan must be designed to reduce 80% of the sediment load carried in runoff as compared to no sediment erosion controls. Wis. Admin. Code § NR 151.11. Section 3.1.1 of the General Permit requires that you implement and maintain all BMPs contained in the Erosion Control Plan from the start of land disturbing construction activities until final stabilization of the site. We are not aware that an Erosion Control Plan has been created for this site, which will adequately protect the Milwaukee River from sediment.

Each day you operate this construction site in violation of the requirement to obtain a General Permit and the requirements contained within the General Permit constitutes a separate violation of the Clean Water Act. 33 U.S.C. §§ 1319(d); 1365(d); 40 C.F.R. § 19.4. This letter notifies you that, should the above violations continue at the end of the 60-day notice period, FMR intends to file suit against you in federal court for all past and ongoing violations of the General Permit.

III. CONCLUSION

During the 60-day notice period, FMR welcomes discussion that would resolve this matter without litigation. Additionally, we request that you share any information that is relevant but not included in this notice, and any information that may be inconsistent with the facts stated in this notice. If you wish to pursue such discussions in the absence of litigation, we suggest that you initiate those discussions within the next 10 days so that they may be completed before the end of the 60-day notice period.

If the violations described in this letter persist at the end of the 60-day notice period, you may be liable for a civil penalty of up to \$32,500 per day, for each violation. 33 U.S.C. §1319(d). 40 C.F.R. §19.4, Table 1. If FMR files suit, it will seek the imposition of the highest statutory civil penalties for all past and ongoing violations; injunctive relief barring further unlawful discharges and/or further unpermitted construction activities;

injunctive relief requiring restoration and remediation of damage which resulted to the waters of the State or to waters of the United States; and attorneys fees and costs as allowed by law.

In addition, FMR is very concerned about the impacts of this deforestation and subsequent development project on the ability of paddlers to portage around Estabrook Falls, which is a hazard in the Milwaukee River. State law allows for members of the public to use the exposed shore area of a stream without permission if it is necessary to exit a body of water to bypass an obstruction. Wis. Stat. § 30.134(2). The future design of this site must protect this portage, which is required to safely paddle the Milwaukee River in Estabrook Park. Furthermore, FMR is concerned about the loss of a fishing access adjacent to the Estabrook Falls Site, which has been used by fisherman for decades. FMR has already received complaints from fishermen that they are being harassed and denied access to their historic fishing grounds. FMR welcomes a settlement of this case that protects this time-honored tradition, which is a significant part of our quality of life in the Milwaukee area.

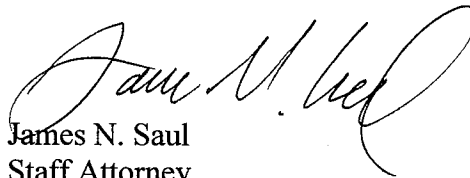
FMR's address and phone number is as follows: Cheryl Nenn, Milwaukee Riverkeeper, 1845 N. Farwell Avenue, Suite 100, Milwaukee WI 53202, (414) 287-0207 ext. 29. FMR can be contacted through its attorneys as follows: Melissa K. Scanlan and James Saul, Midwest Environmental Advocates, 551 W. Main Street, Suite 200, Madison, Wisconsin 53703, (414) 688-4171.

Sincerely,

MIDWEST ENVIRONMENTAL ADVOCATES, INC.



Melissa K. Scanlan
Senior Counsel



James N. Saul
Staff Attorney

CC: Stephen L. Johnson, Administrator, United States Environmental Protection Agency
Mary A. Gade, Regional Administrator, EPA Region V
Matthew Frank, Secretary, Wisconsin Department of Natural Resources
Todd Ambs, Water Division Administrator, Wisconsin Department of Natural Resources