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December 11, 2023

BY PERSONAL SERVICE AND CERTIFIED MAIL RETURN RECEIPT REQUESTED

William D. and Rosalind C. Zawistowski
as Trustees of the
Zawistowski Joint Revocable Trust,
6607 North Potato Road
Stone Lake, WI 54876

Re: 60-Day Notice of Intent to Sue under Section 505(a) of the Clean Water Act

Dear Mr. and Mrs. Zawistowski:

On behalf of Courte Oreilles Lakes Association, Inc. ("COLA"), and the Lac Courte Oreilles Band of the Lake Superior Chippewa (the "Tribe"), this letter is to provide you notice that COLA and the Tribe intend to file a citizen lawsuit against the Zawistowski Joint Revocable Trust ("Zawistowski"), which discharges the pollutant phosphorus into Lac Courte Oreilles, a water of the United States, in Sawyer County, Wisconsin, without a permit. This lawsuit will be brought pursuant to Section 505(a)(1)(A) of the Federal Water Pollution Control Act, a/k/a "the Clean Water Act" ("CWA"). Upon the expiration of the sixty (60) day statutory waiting period, COLA and the Tribe intend to file a civil action or actions in federal district court.

I. Legal Background

The goal of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 301(a) of the CWA, 33 U.S.C. §§ 1311(a) and 1362(12), prohibits the discharge of pollutants from a point source into navigable waters of the United States, unless in compliance with certain enumerated sections of the law. Among other things, section 301(a) prohibits point source discharges

not authorized by the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to CWA § 402, 33 U.S.C. § 1342.

Navigable waters are defined as “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). Lakes, including Lac Courte Oreilles, fall within the definition of “waters of the United States.” See 40 C.F.R. § 120.2.

A “pollutant” includes “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6). Phosphorus is a “pollutant.” *E.g.*, *Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta*, 953 F. Supp. 1541, 1545 (N.D. Ga. 1996) (“Phosphorus is one of the pollutants contained in the effluent discharged from the City's treatment plants into the Chattahoochee River and its tributaries.”); see also *Upper Blackstone Water Pollution Abatement Dist. v. U.S. E.P.A.*, 690 F.3d 9, 11 (1st Cir. 2012) (discussing the consequences of phosphorus pollution, i.e. eutrophication, at length).

The CWA defines a point source as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

Although return flows from irrigated agriculture are exempt from the CWA’s permit requirements, 33 U.S.C. § 1362(14), 40 C.F.R. § 122.3(f), the exemption does not apply to Zawistowski because a substantial number of its discharge events, including those described herein, are for non-irrigation purposes. The exemption applies only to “discharges composed entirely of return flows from irrigated agriculture.” 33 U.S.C. § 1342(l)(1) (emphasis added).

The Wisconsin Department of Natural Resources (“WDNR”) administers the NPDES program through Wisconsin Pollution Discharge Elimination System (“WPDES”) permitting in the State of Wisconsin. Wis. Stat. § 283.31. The WDNR requires a point source to obtain a WPDES permit for discharges of pollutants into navigable waters. Wis. Stat. § 283.31(1).

Section 505(a) of the CWA, 33 U.S.C. § 1365(a)(1), authorizes any citizen “to commence a civil action on his own behalf...against any person...who is alleged to be in violation of... an effluent standard or limitation under this chapter.” 33 U.S.C. § 1365(a).

An effluent limitation is “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources,” 33 U.S.C. § 1362(11), which includes the effluent limitations established under the WPDES program at Wis. Stat. ch. 283, subch. III; *see also* Wis. Admin. Code ch. NR 217.

Enforcement under the CWA requires “a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future.” *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57, 108 S. Ct. 376, 381, 98 L. Ed. 2d 306 (1987). Zawistowski’s violations complained of herein are both continuous and intermittent.

Section 505(d) of the CWA, 33 U.S.C. § 1365(d), provides that a court “may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.” In accordance with section 505(a) of the CWA, 33 U.S.C. § 1365(a), a civil penalty of \$64,618 may be assessed for each violation of the CWA alleged herein. 40 C.F.R. § 19.4 tbl.1.

II. Factual Background

Lac Courte Oreilles is the eighth largest natural drainage lake in Wisconsin, with a surface area of 5,139 acres and approximately 25 miles of shoreline. Its average depth is 34 feet, reaching 95 feet at its deepest point. It is located in Sawyer County, about eight miles south of Hayward, Wisconsin. Lac Courte Oreilles has also been classified as an outstanding resource water under Wis. Admin. Code § NR 102.10(1m)(a)17., meaning it receives the state’s highest protection standards.

Lac Courte Oreilles is at the base of the Upper Couderay River Watershed, and water from Lac Courte Oreilles travels through an outlet to Little Courte Oreilles Lake, then into the Couderay River. The Couderay River empties into the Chippewa River, which eventually flows through Eau Claire, Wisconsin, and into the Mississippi River near Pepin, Wisconsin.

Lac Courte Oreilles is constituted of three main basins: the West, Central, and East basins. Musky Bay is a shallow bay located south of the West basin. Lac Courte Oreilles is a sport fishery, hosting muskellunge, walleye, and northern pike, which feed off cisco and whitefish. Cisco and whitefish require sufficient oxygen and cold temperatures to survive. However, excessive phosphorus causes or contributes to low oxygen levels in the lake, as well as reduced water quality, algal blooms, and rapid growth of aquatic

invasive species, all of which impairs the Lac Courte Oreilles' use for fishing and other recreational purposes like swimming and boating. Lac Courte Oreilles is listed as "impaired" by the Wisconsin Department of Natural Resources ("DNR") due to low dissolved oxygen levels.

The current average ambient phosphorus levels in the lake ranges from approximately 12.7 to 18.8 ppm. These amounts reach levels higher than ambient levels specified in DNR regulations. *See Wis. Admin. Code § NR 102.06(4)(b)1.*

Zawistowski owns and operates two cranberry marshes, totaling 96 acres, which are adjacent to Musky Bay. The marshes intake and discharge significant amounts of water ("Discharge Events") throughout the year for the purposes of frost protection, freeze protection, and harvest of cranberries. The effluent associated with the Discharge Events typically contains residual phosphorus and other nutrients from the cranberry plants, as well as sand, plant debris, and other sediment. The sand and plant debris also typically contain phosphorus.

The first of Zawistowski's two marshes, referred to herein as the East Zawistowski Trust marsh, is located along County Highway E. The second of the two marshes is referred to herein as the West Zawistowski Trust marsh, located along Thors Lane. The East and West marshes are depicted in the following picture:



The East Zawistowski Trust marsh, originally constructed in 1939, is connected to Lac Courte Oreilles through a 20-foot-wide man-made channel (the “East Zawistowski Channel”) that runs alongside the length of the marsh and then extends 75 feet before emptying into Musky Bay. In addition, running east and west approximately 100 feet along the northernmost edge of the east Zawistowski Trust marsh is a man-made ditch (the “Northern Zawistowski Ditch”) that also empties into Musky Bay. The East Zawistowski Channel and the Northern Zawistowski Ditch merge just as they enter Musky Bay. As such, they are “point sources” as that term is defined in the Clean Water Act.



The East Zawistowski Trust Marsh is the source of Discharge Events through the East Zawistowski Channel and the Northern Zawistowski Ditch, as they merge and enter Musky Bay and release water containing excessive phosphorus into Lac Courte Oreilles.¹ Discharge Events over the past five years from the East Zawistowski Channel and the Northern Zawistowski Ditch occurred on or around at least the following dates:

¹ In 2014, the Zawistowski Trust completed construction of a “closed system” on its east marsh that is designed to keep discharge water in a holding pond for future use, instead of being discharged back into Musky Bay. However, the Zawistowski Trust still carries out Discharge Events into Musky Bay from this location.

Date	Total Phosphorous (ppb)
10/14/2019	150
10/15/2019	130
10/16/2019	99
10/17/2019	130
5/12/2020	40
9/29/2020	280
10/5/2020	50
10/6/2020	25
10/7/2020	34
10/8/2020	56
10/9/2020	27
10/5/2021	120
10/11/2022	190
10/12/2022	40
10/13/2022	34
10/6/2023	300
10/10/2023	440
10/11/2023	430

The West Zawistowski Trust Marsh is connected to Lac Courte Oreilles by a series of canals and ditches that run alongside the individual marshes and empty into a 30-foot-wide man-made channel (the “West Zawistowski Channel”) that extends approximately 400 feet before emptying into Musky Bay. The West Zawistowski Channel is a “point source” as that term is defined in the Clean Water Act.

In addition, running parallel to the West Zawistowski Channel is a ditch (the “West Zawistowski Wetland Ditch”) that runs through a culvert under Thors Lane and continues through a tag alder wetland before emptying into Musky Bay. The West Zawistowski Wetland Ditch is a “point source” as that term is defined in the Clean Water Act.



Discharge Events over the past five years from the West Zawistowski Wetland Ditch have occurred on or around at least the following dates:

Date	Total Phosphorus (ppb)
4/20/2019	59
5/5/2019	58
10/12/2019	95
10/14/2019	82
10/15/2019	74
10/16/2019	340
10/17/2019	160
5/12/2020	50
9/19/2020	110
10/5/2020	79
10/6/2020	88
10/7/2020	160
10/8/2020	150
10/9/2020	150
3/24/2021	65

10/11/2021	210
10/12/2021	390
10/14/2021	470
10/15/2021	110
4/29/2022	220
10/20/2022	190
10/22/2022	110
10/20/2023	450

COLA and the Tribe believe and allege that discharges have continued from the East Zawistowski Marsh and the West Zawistowski Marsh from at least 2018 and that discharges are presently ongoing and continuous. These discharges have occurred, are occurring, and will continue to occur on a regular basis as long as cranberries are produced in the marshes, requiring several Discharge Events per year.² At the time of the Discharge Events described above, Zawistowski did not have a WPDES permit which permitted the discharges.

III. CWA Violations

Section 301 of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant from a point source into waters of the United States unless such discharge is authorized pursuant to a NPDES permit issued under Section 402 of the Act.

² In fact, Discharge Events have been continuous for years prior to 2018. In 2005, the State of Wisconsin and 12 property owners on Lac Courte Oreilles brought a public nuisance action against Zawistowski for degrading Musky Bay with phosphorus-laden water during discharges. *See State v. Zawistowski*, No. 04CV75, 2006 WL 6622279 (Wis. Cir. Ct. Sawyer Cnty. Apr. 05, 2006). The circuit court ultimately did not declare a public nuisance, finding that there must be 100 percent loss of use and enjoyment of Musky Bay in order to establish a public nuisance, but the court did find a partial loss of use and enjoyment due to Zawistowski's discharges. The court further found that Zawistowski discharges are made through "distinct ditches"; that, "[e]ach ditch or canal is manmade and [] connected to Musky Bay"; and that these ditches and canals "...now act as the *point source* for much of the phosphorus discharged into Musky Bay." *Id.* at 3, 16. The court further warned that the interference in use was "likely expanding in size and duration" and, if found to be a nuisance, would constitute a "substantial threat to the public health or safety" under Wisconsin's Right-to-Farm law. *Id.* at 26, 35. Because of this, the court put Zawistowski on notice that he "can no longer hide behind the veil of self-imposed ignorance to the effects his cranberry operation is having on Musky Bay," and if he continues to discharge, "...he does so at his own risk." *Id.* at 36.

Zawistowski has never obtained a WPDES permit to discharge phosphorus into Lac Courte Oreilles, including for the dates identified above. Zawistowski has violated and is violating section 301(a) of the CWA, 33 U.S.C. §§ 1311(a) and 1342, and Wis. Stat. § 283.31, which prohibit discharges of pollutants without a NPDES permit, by intermittently and continuously discharging phosphorus and other pollutants from point sources into Lac Courte Oreilles without a permit. As Zawistowski plans to continue to operate its marshes and discharge phosphorus, Zawistowski is continuing, and will continue, to illegally discharge pollutants into waters of the United States unless and until Zawistowski obtains and complies with a NPDES permit for its discharges. 33 U.S.C. §§ 1311(a), 1342. The Discharge Events have also led to phosphorus levels that exceed current allowed ambient concentrations in Lac Courte Oreilles.

Each day of a Discharge Event without an NPDES permit constitutes a distinct and separate violation subject to civil penalties. *See* 33 U.S.C. §§ 1311(a), 1362(12), 1319(d). All violations not specifically set forth in this letter are violations that are or should be known to Zawistowski and may be included in any future legal actions by COLA and the Tribe. All specific discharges discovered subsequent to the sending of this notice, of similar type and nature, whether occurring prior or subsequent to this notice, shall be included in the action in this case without the need for further notice under 33 U.S.C. § 1365(b).

Absent cessation of the discharges by Zawistowski, COLA and the Tribe intend, at the close of the sixty (60) day notice period, to file a citizen lawsuit under Section 505 of the CWA against Zawistowski, seeking injunctive relief, remedial relief, declaratory relief, and civil penalties for each day of each violation over the past five (5) years and sixty (60) days from the date of this notice relating to the illegal discharges through the date of this letter and all violations that occur subsequent to the date of this letter, plus costs, attorney and expert witness fees, and such other relief as may be appropriate.

IV. Identification of the Noticing Party and their Legal Counsel

The names, addresses, and phone numbers of the persons giving this Notice of Intent to File a Citizen Lawsuit under the Clean Water Act are:

Courte Oreilles Lakes Association, Inc. (COLA)
Mailing address: P.O. Box 702
Hayward, WI 54843

Physical address: 14703W Highland Road
Hayward, WI 54843

Phone number: 612-810-1949

Lac Courte Oreilles Band of the Lake Superior Chippewa
13394 W. Trepania Road
Hayward, WI 54843,
Phone number: 715-634-0102

COLA represents the interests of more than 600 members and property owners on Lac Courte Oreilles. COLA was formed to protect, preserve, and enhance the quality of Lac Courte Oreilles, its shorelands, and surrounding areas, while respecting the interests of property owners and the public. Members of COLA use the waters of Lac Courte Oreilles for fishing, swimming, boating, and enjoyment of the lake's scenic beauty, among other uses.

The Tribe is one of six bands of the Lake Superior Chippewa Indians. The Tribe represents its approximately 7,600 members' interests in the exceptional spiritual, cultural, and subsistence importance of Lac Courte Oreilles, the eastern one-third of which is located within the Tribe's reservation boundaries, and all of which is located within an area covered by the 1837 Treaty Territory in which the Tribe has reserved fishing, hunting, and gathering rights. The actions of Zawistowski at issue in this matter contribute to harmful water pollution in Lac Courte Oreilles, which negatively impacts the Tribe and its members' property, fishing, hunting, subsistence, and recreational interests.

The names, addresses, and phone numbers of counsel for COLA are:

Christa Westerberg
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608/251-0101

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651/778-0575

During the sixty (60) day notice period, we will be available to discuss effective remedies and actions which will assure Zawistowski's future compliance with the Clean Water Act and all applicable state water pollution control laws. In addition, we welcome discussion about whatever facts you believe are relevant which are not itemized in this notice letter. If you wish to avail yourself of this opportunity, please contact the undersigned. COLA and the Tribe request that any person receiving this notice direct all inquiries to the undersigned legal counsel.

Sincerely,

PINES BACH LLP

A handwritten signature in black ink, appearing to read "Christa O. Westerberg". The signature is fluid and cursive, with a large loop at the end.

Christa O. Westerberg

cc:

Michael S. Regan, Administrator
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Office of the Administrator, Mail Code 1101A
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