

Frequently Asked Questions

June 27, 2008

Notice of Intent to Sue Letter Under Clean Water Act

1. Why was the Notice of Intent (NOI) to sue sent?

The letter is a prerequisite to filing a lawsuit under the federal Clean Water Act (CWA). The CWA gives citizens the right to sue if the government is not doing its job to “restore and maintain” the nation’s waters. It also gives citizens the right to sue polluters to get them to stop polluting. Once the NOI is filed, the government and the polluters have 60 days to comply with the CWA or face a lawsuit.

The letter was sent to the U.S. Environmental Protection Agency (EPA), Massachusetts Department of Environmental Protection (DEP), and the City of Brockton, to seek resolution of Brockton’s longstanding water management issues as well as DEP’s and EPA’s refusal to take the steps necessary to implement a solution that stops environmental degradation. The letter was sent after more than 20 years of attempts by local citizens and environmental groups to work with Brockton and DEP to get Brockton to stop overusing Silver Lake, Monponsett Pond, and Furnace Pond. The letter seeks to stop unlawful diversions and pollution that occur as a result of the city’s water supply operations. Brockton’s misuse causes environmental degradation in the South Coastal and Taunton River watersheds. DEP and EPA have allowed excessively harmful practices to continue for years, and have not required Brockton’s water system to comply with the CWA. For decades, environmental groups have tried to work with Brockton and DEP and EPA, and have participated in every aspect of the public participation process on DEP’s Water Management Act permits for Brockton and other communities, but have been ignored. The environmental groups have proposed solutions to this problem that accommodate Brockton’s water needs and that also leave enough water in the rivers, ponds and lakes to provide for healthy fish and plant populations as well as recreation. DEP and EPA have ignored these solutions.

2. Who is filing the NOI, and why - how are they impacted?

Jones River Watershed Association in Kingston, Massachusetts is working to protect and restore the Jones River and Silver Lake. The upper portion of the Jones River in Kingston is dry eight months of the year due to Brockton’s excessive withdrawals of water from Silver Lake, the source of the river. Pollutants from Forge Pond dam, owned and operated by Brockton, enter the Jones River. The City’s water diversion and management practices discharge pollutants into Silver Lake, including phosphorous, e coli, and coliform bacteria. The dam also prevents fish passage between the river and Silver Lake.

Taunton River Watershed Alliance (TRWA) is working to protect and restore the Taunton River and its tributaries, including Stump Brook and its source, Monponsett Pond. Brockton owns and operates a dam on Stump Brook that prevents fish migration, and reduces, and at times halts, flow in Stump Brook, causing the Brook to become stagnant and filled with noxious aquatic plants. The City discharges pollutants, including water with low dissolved oxygen, over the Stump Brook dam. The Stump Brook dam also prevents the natural flushing of Monponsett Pond, contributing to the concentration of pollutants in the Lake and growth of noxious weeds.

Mass Audubon owns the Stump Brook Wildlife Sanctuary, which borders Stump Brook. The Sanctuary is home to rare species, including a globally uncommon Atlantic white cedar wetland. The Brook and the Sanctuary are degraded by the management of Brockton’s Stump Brook dam and the lack of adequate, clean flow in the Brook.

Save the Bay/Narragansett (STB) is also working with the other groups to protect the Taunton River and is impacted by DEP and EPA’s decisions that allow pollution and water supply diversions that negatively impact Stump Brook, which flows to the Taunton. They have also worked to ensure that the Dighton desalination plant, to be used for Brockton’s water supply, is adequately protective of Taunton River natural resources.

Eel River Watershed Association (ERWA) is impacted by DEP and EPA's decisions to exempt water withdrawals and diversions from the CWA. ERWA is working to protect rare ecosystems in Plymouth County that depend on natural stream flows and unpolluted waters, and is actively engaged in advocating for use of the CWA to protect pristine rivers and streams.

3. What is the environmental harm that has occurred?

Brockton diverts polluted water from Monponsett Pond and Furnace Pond and then discharges it into Silver Lake, a pristine, Class A drinking water supply and natural glacial and cold water lake. This pollution includes excessive phosphorous which causes noxious weed growth and threatens the ecosystem of the lake.

Brockton also operates three dams that are blocking natural stream flow, at times drying up portions of rivers, and causing pollutants to be concentrated because there is no stream flow to dilute the pollutants. Fish cannot pass up and down the rivers due to the dams and the way they are operated. The Jones River is deprived of flow at least eight months of the year, Furnace Pond is polluted because Brockton's dam prevents flushing of the Pond, and Brockton's Furnace Pond diversion sucks in fish and diverts them to Silver Lake instead of allowing them to migrate to the North River and the ocean. Stump Brook is stagnant and polluted and fish passage on the brook is impaired.

4. What solution do the environmental groups propose?

The environmental groups want Brockton to reduce withdrawals from Silver Lake by using the water from the new desalinization plant in the tidal portion of the Taunton River in Dighton. In fact one of reasons the DEP allowed the desalinization plant to be built was specifically to enable Brockton to reduce the amount of water it uses from the South Coastal and upper Taunton River watershed supplies. If Brockton did reduce the withdrawals, this would allow Jones River and Stump Brook to have stream flow and will enable restoration of fisheries and recreational uses.

The groups want Brockton to end the polluted discharges to Silver Lake by piping the water diverted from Monponsett Pond and Furnace Pond directly to the water filtration plant on Silver Lake and then treating the water in its filtration plant as it does Silver Lake water. They also want Brockton to stop discharging concentrated pollutants over the three dams.

5. Why is a local water supply in Massachusetts of importance to the nation?

The City of Brockton's water supply problems are emblematic of what is happening throughout the United States (U.S.) and around the world. Communities are grappling with how to allocate water among competing uses. On one hand, there are the needs of the rivers and lakes which support and sustain important fisheries and provide for recreation such as swimming and boating. On the other hand there are the human needs for drinking water, agriculture, and then non-essential water use, such as lawn watering. Determining how water is allocated and how water supplies are managed are global issues.

In 2003, the Ipswich River on Massachusetts' North Shore was named one of America's ten most endangered rivers by American Rivers due to overuse by municipal and commercial water users. The Everglades is threatened by saltwater intrusion due to diversions for water supplies and agriculture, and fishermen in the Catskills have successfully sued to end pollutant discharges by New York City's water supply pipes. The Jones River and Stump Brook are additional examples of how EPA unlawfully exempts water suppliers from complying with the CWA. In 1996, the U.S. Supreme Court ruled that the CWA is aimed at protecting water **quantity** as well as quality, in order to protect all designated uses of water resources and in recognition of the fact that fish cannot swim if they have no water.

6. What federal laws and legal precedents are involved?

The environmental groups will also challenge the EPA's "National Pollution Discharge Elimination System (NPDES) Water Transfers Final Rule" issued on June 9, 2008. This rule attempts to rewrite the CWA by exempting an entire category of activities from regulation. EPA contradicts U.S. Supreme Court rulings by

opening a large loophole that exempts water transfers from NPDES permitting, justified by an analysis that is factually inaccurate and logically inconsistent. The rule ignores the fact that water transfers often involve discharges of polluted water from one water body to another. The NPDES permit process is a key regulatory tool which has resulted in significant improvement in river health and better water quality across the country. With this new rule the EPA is establishing an improper precedent for broad exemption to NPDES permitting.

EPA's Water Transfer Rule relies on two lower court rulings from the 1980s that are no longer applicable under more recent U.S. Supreme Court cases (e.g. *S.D. Warren Co. v. Maine Board of Environmental Protection*, 126 S. Ct. 1843 (2006)). The more recent cases hold that the CWA applies to transfers between water bodies even where the transfer only conveys pollutants from one water body to another but does not generate them.

In the leading case of *PUD v. Washington Department of Ecology*, 114 S. Ct. 1900 (1994) the U.S. Supreme Court also ruled that regulation of water uses, including water allocations, that impact stream flow and water quality is within the ambit of the CWA. EPA's rulemaking acknowledges that the Water Transfer rule is "at odds" with rulings by the Supreme Court in a case brought by environmentalist to protect the Everglades and in lower federal court cases brought to protect the rivers in New York's Catskills and New Hampshire's White Mountains.

For more information on the legal basis for the case, contact Meg Sheehan, Esq. at 508-259-9154 or meg@ecolaw.biz.

7. Why is DEP being targeted under a federal law?

DEP must comply with the federal CWA when it allocates water to municipal and private water suppliers. DEP is failing to implement the law in the way it allows Brockton to use its water supply, and so the environmental groups are seeking to ensure that DEP follows the CWA, which says that EPA and DEP have an obligation to "protect and restore" our nation's waters when water allocation decisions are made. In addition, DEP is in violation of the CWA by allowing Brockton to pollute Silver Lake, the Jones River, and Stump Brook by the manner in which Brockton operates its water supply system.

DEP has not ordered Brockton to get a federal National Pollution Discharge Elimination System (NPDES) permit for its discharges, as required by the CWA. Massachusetts is one of only six states that do not have authority to implement the CWA NPDES permitting program, which is the linchpin of the Act's pollution control mechanisms (<http://cfpub.epa.gov/npdes/statestribes/astatus.cfm>). The CWA does not exempt Brockton or any other water supplier from compliance. The environmental groups are seeking a solution that would require EPA and DEP to act in compliance with the CWA, which says that state and federal governments must work in concert to meet the goals and objectives of the CWA. This part of the CWA has been upheld by the Supreme Court as proper and not a violation of states rights or "grandfathered" water allocation rights (see *PUD v. Washington Department of Ecology*, 114 S. Ct. 1900 (1994)).

8. What effect will a potential lawsuit have on the City of Brockton and its economy?

The environmental groups have tried to work cooperatively with Brockton for decades, and continue to believe that the City's water problems can be resolved in an economical way. The City is under an order from DEP to develop a new long term water supply source and to reduce its overuse of its existing water supplies. Another source has been developed, the Aquaria desalinization plant in Dighton. The plant is nearly ready to deliver the water, and the City, in turn, should purchase this water and reduce its withdrawals from the Silver Lake system. This alternative source will allow the City the water it needs to sustain economic growth while protecting important resources that are significant to the region's quality of life and economic foundation.

9. Why is desalinization of water from the Taunton River a better option than relying on Silver Lake as the main water supply for Brockton?

Desalinization is used throughout the world and involves removing salt from sea water to make it drinkable. In the case of the Dighton facility, water in the tidal portion of the Taunton River containing lower concentrations of salt than pure sea water will be filtered or desalinated as necessary.

The level of environmental impact of the desalinization plant is proportionally smaller on the Taunton River than continuing the existing impacts from diverting headwater streams, including Silver Lake, Monponsett Pond, the Jones River, Stump Brook, Furnace Pond, and Herring Brook. The environmental groups worked cooperatively with Aquaria, the desalinization plant owner and operator, to conclude a lengthy design and permitting process. Design modifications were secured that will reduce impingement¹ of fish larvae, and ensure that waste water discharges from the plant are not harmful to the environment. All aspects of the Aquaria plant's operating conditions were extensively reviewed and negotiated through Massachusetts' various regulatory processes, including the Massachusetts Environmental Policy Act, the Interbasin Transfer Act, and the Wetlands Protection Act. Operating conditions agreed to by Aquaria were approved by federal, state, and local environmental agencies. In addition, Aquaria has funded a river stewardship program and committed funding to ensure an increase in environmental stewardship of the Taunton River. In contrast, Brockton's withdrawals from the Silver Lake system for the past four decades have never been properly reviewed or conditioned to protect ecosystem resources.

10. Are there alternatives to a court action in order to address environmental concerns while meeting Brockton's water supply needs?

Unfortunately, at this point there is no alternative to obtaining compliance with the law. The environmental groups filing the NOI have exhausted every other avenue throughout the decades-long effort to remediate this problem and have tried to work with DEP and Brockton to stop the environmental destruction. An alternative supply will soon be available when the Aquaria plant comes on line, but if EPA and DEP do not require Brockton to use this source to reduce impacts on the other sources, then unacceptable impacts will continue.

The environmental groups have met repeatedly with the agencies and administrators at all levels to work out a solution. The groups have been involved in every aspect of the process, including four administrative appeals of permits and approvals issued by DEP to Brockton. They have advocated at the highest levels, including petitions at the state level to the Secretary of Energy and Environmental Affairs and the Water Resources Commission. Nevertheless, Brockton continues to be allowed to operate its water supply system in violation of the law.

The groups hope the letter will help the agencies understand the gravity of the situation and work out a solution before the 60-day grace period expires and the groups are left with no option to address the longstanding problems but to proceed to litigation in court.

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¹ Impingement occurs when fish larvae and other small organisms are trapped and killed when drawn into a facilities' water intake system.