

September 10, 2018

VIA CERTIFIED MAIL

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Re: **Clean Water Act Notice of Intent to Sue/60-day Notice Letter
Supplement to May 14, 2018, Notice of Intent Letter
Grand Traverse Senior Living, LLC, d/b/a Cordia at Grand Traverse
Commons**

Dear Administrator Wheeler and others,

Please accept this letter on behalf of The Grand Traverse Bay Watershed Initiative, Inc., d/b/a The Watershed Center Grand Traverse Bay (TWC), and the Grand Traverse **BAYKEEPER**[®] (Baykeeper), regarding new and continuing violations of federal, state, and local law by Grand Traverse Senior Living, LLC, d/b/a Cordia at Grand Traverse Commons (Cordia). This letter constitutes TWC and the Baykeeper's **supplemental** notice of intent to sue for violations of the Clean Water Act, state law, and local

regulations from the facility located at 600 Cottageview Drive in Traverse City, into Tributary AA of Kids Creek in Traverse City, as set forth in detail below.

Since 2015 and continuing still, Cordia discharges its cooling system wastewater that is thermally-polluted and contains excessive levels of chlorine into Tributary AA, a coldwater trout stream located in the City of Traverse City. Cordia's discharge pollutes, impairs, and destroys the water quality and aquatic habitat of Tributary AA. The discharge from Cordia into Tributary AA violates federal, state, and local law.

On information and belief, Cordia currently lacks any permit to discharge its cooling system wastewater into Tributary AA. On information and belief, Cordia currently has no plan that will ensure its cooling system wastewater discharge complies with Michigan's Water Quality Standards for heat load and chlorine addition into a stream that supports coldwater fish.

On May 14, 2018, TWC issued a Clean Water Act Notice of Intent to Sue/60-day Notice letter to the recipients of this letter. Information available at that time indicated Cordia had temporarily shut off its cooling system during the 2017/2018 winter season, and had recently restarted the system and resumed the unlawful discharge on or about May 1, 2018.

After May 2018, Cordia installed an underground storage tank and discharge pipe to pump the cooling system wastewater to a nearby wetland contiguous with Kids Creek. Cordia is in the process of seeking permit approval for that discharge. The newly-installed system to route the discharge to the wetland network maintains an overflow to Tributary AA. TWC observations and data confirm that the cooling system discharge continues to discharge intermittently into Tributary AA. Cordia has no permit authorizing any discharge to Tributary AA, nor is it in the process of seeking permit approval for any such discharge. Cordia's intermittent discharge pollutes, impairs, and destroys the water quality and aquatic habitat of Tributary AA. As such, starting in 2015 and continuing still, the discharge of Cordia's cooling system wastewater, which is thermally-polluted and contains excessive levels of chlorine, continues to violate federal, state, and local law.

Section 505 of the Clean Water Act requires that 60 days prior to the initiation of a citizen's civil lawsuit, a citizen must give notice of the violations and the intent to sue to the violator, the Administrator of the U.S. Environmental Protection Agency (EPA), the Regional Administrator of the EPA, the U.S. Attorney General, and the Chief Administrative Officer of the state in which the violations have occurred. 33 USC § 1365(b)(1)(A). This letter provides notice of Cordia's violations, and TWC and the Baykeeper's intent to sue.

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Prospective Plaintiff and Tributary AA

The Grand Traverse Bay Watershed Initiative, Inc., d/b/a The Watershed Center Grand Traverse Bay (TWC), is a Michigan non-profit organization. The mission of TWC is to advocate for clean water in Grand Traverse Bay and act to protect and preserve its watershed. TWC's Grand Traverse **BAYKEEPER**[®] (Baykeeper) is one of over 300 **WATERKEEPER**[®] organizations representing the international **WATERKEEPER**[®] ALLIANCE. The Baykeeper protects water quality by advocating, educating, monitoring, and patrolling Grand Traverse Bay and its watershed. TWC and the Baykeeper advocate for policies and actions that protect and preserve water quality, including the use of litigation and administrative challenges to ensure wetlands, lakes, rivers, beaches, and streams within the Grand Traverse Bay watershed meet all substantive water quality standards guaranteed by federal, state, and local statutes and regulations. The office of TWC and the Baykeeper is located at 13272 South West Bay Shore Drive, Traverse City, Michigan.

Kids Creek and its tributaries, including Tributary AA, are within the Grand Traverse Bay watershed. A four-mile portion of Kids Creek is currently on the State Section 303(d) Impaired Waters List due to the "Other Indigenous Aquatic Life" Designated Use not being met (*i.e.* poor macroinvertebrate community). This is mainly due to sedimentation, flow regime alteration, and other human-caused sources. Although the Michigan Department of Environmental Quality (DEQ) has not yet drafted a Total Maximum Daily Load (TMDL) plan for Kids Creek, it remains on the Section 303(d) non-attainment list as needing a TMDL.

Kids Creek is an important spawning stream, nursery stream, and coldwater contributor to Grand Traverse Bay and has self-sustaining populations of brook trout and brown trout, as well as migratory populations of Chinook salmon, coho salmon, and steelhead. Tributary AA is a coldwater contributor to Kids Creek and provides spawning and nursery habitat for numerous fish species, including self-sustaining brook trout populations documented by TWC. Both Kids Creek and Tributary AA are Michigan Department of Natural Resources-designated coldwater trout streams.

Starting in 2003, TWC has invested over \$5.3 million to improve water quality and restore Kids Creek and its tributaries, including Tributary AA. TWC has received over \$4 million in grants from the DEQ and the Great Lakes Restoration Initiative (GLRI) administered by EPA. In addition, TWC has facilitated more than \$1 million in funding for restoration work from local organizations, businesses, and foundations. In August 2018, TWC was awarded a National Oceanic and Atmospheric Administration grant of approximately \$167,000 to continue restoration in the Kids Creek watershed.

Of particular relevance to the violations at issue here, TWC received more than \$720,000 of EPA-GLRI project funds in March 2015 to improve water quality and reduce stormwater and sediment inputs into Kids Creek. This grant award included the completion of a \$280,000 construction project in July 2017 that restored the natural floodplain, installed a vegetated buffer, replaced two undersized culverts, and improved brook trout and other fish habitat along a 1,200-foot section of Kids Creek Tributary AA in

partnership with local businesses and governmental entities. The overflow discharge from Cordia empties directly into this recently restored section of Tributary AA.

As part of the same EPA grant, TWC completed green infrastructure installations that reduce stormwater inputs into Tributary AA, resulting in less sedimentation and flashiness during storm events. Two rain gardens were completed in October 2017, and a dirt road was paved and dry wells installed for stormwater infiltration in June 2018. The total cost of these projects was \$317,000. Together, the installed improvement projects will improve water quality and help lead to the removal of Kids Creek from the Impaired Waters List.

As a result of this investment in restoring Kids Creek in general, and the recent restoration of Tributary AA in particular, TWC and the Baykeeper have a substantial, unique, and special interest in the discharge discussed herein.

The Discharge from Cordia to Tributary AA

Information available to TWC indicates that Cordia is a senior living facility located at the Grand Traverse Commons. After some period of disrepair, the operators of Cordia rehabilitated the subject building, becoming an operational senior living facility in or about 2015. Information available to TWC indicates that the rehabilitation of Cordia was a brownfield project and that the facility is subject to a brownfield redevelopment plan and agreement administered by the Grand Traverse County Brownfield Redevelopment Authority.

Part of the rehabilitation of the building included the installation of a cooling system. Information available to TWC indicates that when the cooling system is operating during warmer months, it uses municipal water from the City of Traverse City to cool the facility. The temperature of the municipal cooling water increases as a result of heat exchange in the cooling system. After it is warmed, the municipal cooling water is discharged to a stormwater pipe that daylight into a concrete-lined channel approximately 150 feet from Cordia. The concrete-lined channel extends about 30 feet before entering a culvert approximately 20 feet long before it discharges directly into Tributary AA.

Starting in 2015 and continuing until late August 2018, whenever Cordia's cooling system was operating, warm chlorinated municipal water was discharged to Tributary AA. The discharge increases in volume and temperature as Cordia increases its use of the cooling system in warmer months.

TWC staff discovered the chlorinated, hot water discharge to Tributary AA in August 2015 during a site visit to prepare for the Tributary AA restoration described above. At that time, TWC staff observed the discharge was noticeably warm to the touch and was obviously and significantly warmer than the water in Tributary AA upstream from the discharge. TWC staff thereafter notified Cordia's representatives of concerns related to the discharge, and representatives from TWC and Cordia met onsite to identify and discuss the discharge. In September 2015, Cordia's representatives indicated that cooler fall temperatures would be expected to minimize the volume and temperature of the

discharge, but acknowledged the urgency of the issue and indicated updates would be forthcoming. TWC also notified DEQ staff of the observed discharge in late 2015.

TWC again contacted DEQ about the discharge in 2016 as TWC staff observed continued chlorinated, warm water discharges from Cordia’s cooling system during the summer. In July and September 2016, staff from TWC manually measured water temperature upstream of where the discharge enters Tributary AA, at the point where the stormwater pipe daylights, and approximately 30 feet downstream of the discharge into Tributary AA. The discharge water raised the water temperature downstream of the discharge location by 9 degrees Fahrenheit on July 27, 2016 and by 8 degrees Fahrenheit on September 16, 2016.

Information available to TWC indicates that Cordia continued to discharge warm, chlorinated water throughout the remainder of 2016, for the majority of 2017, and continuing until late August 2018. In July 2017, TWC installed Onset HOBO automated temperature monitoring devices where the drain daylights, 50 feet upstream of the discharge into Tributary AA, and 30 feet downstream of the discharge into Tributary AA. These automated devices record water temperature every hour and have been installed nearly continuously in those three locations from July 1, 2017 until August 1, 2018.

On May 9, 2018, TWC visited Tributary AA and reviewed the data from the temperature monitoring devices that were previously installed where the drain daylights, 50 feet upstream of the discharge into Tributary AA, and 30 feet downstream of the discharge into Tributary AA. The data confirmed that the discharge from Cordia’s cooling system had resumed on or about May 1, 2018, and documents that Cordia’s discharge temperatures continued to warm Tributary AA as far as 30 feet downstream of the discharge.

Subsets of the results that are representative of the complete data set are in Table 1 and described further below. The complete data set has previously been provided to Cordia and DEQ.

Table 1: Water temperature in degrees Fahrenheit (°F) in Tributary AA and the storm drain collected by TWC in July 2017, June 2018, and July 2018.

Date and Time	Air temperature	Tributary AA 50 feet upstream of discharge	At daylight of storm drain	Tributary AA 30 feet downstream of discharge	Difference between upstream and downstream temperatures
July 2, 2017 2:30 am	64°F	57°F	63°F	59°F	2°F
July 13, 2017 9:30 am	68°F	59°F	90°F	71°F	12°F
July 14, 2017 11:30 am	63°F	58°F	83°F	65°F	7°F

July 20, 2017 12:30 pm	79°F	62°F	84°F	75°F	13°F
July 21, 2017 2:30 pm	85°F	64°F	85°F	75°F	11°F
June 28, 2018 1:03 pm	83°F	64°F	88°F	81°F	17°F
June 30, 2018 5:03 pm	97°F	71°F	92°F	78°F	7°F
July 5, 2018 5:03 am	74°F	60°F	87°F	70°F	10°F
July 13, 2018 8:03 pm	79°F	63°F	87°F	72°F	9°F

The 2017 and 2018 data show that even on the cooler summer days, Cordia’s discharge temperatures significantly warmed Tributary AA. On days with warmer ambient temperatures, water downstream of Cordia’s discharge reached alarmingly high temperatures. Even relatively modest warm discharge temperatures significantly warmed the receiving waters of Tributary AA. The data further show significant variability in Tributary AA temperatures across days and weeks, and within a 24-hour period. Further, the data shows significant variability in Cordia’s discharge within a 24-hour period.

On July 6, 2017, TWC collected a sample of the discharge water and submitted it to the Great Lakes Water Quality Lab in Lake Ann, Michigan. Discharge water yielded a chlorine residual of 0.5mg/L and chlorine total of 0.6 mg/L. On May 9, 2018, TWC collected another sample of the discharge water and submitted it to the same lab, and the results indicate a chlorine residual of 0.40 mg/L and chlorine total of 0.75 mg/L. These values far exceed Michigan’s Aquatic Maximum Value criteria for Total Residual Chlorine of 0.019 mg/L and the General Permit’s Water Quality Standard Maximum Daily Limit for Total Residual Chlorine of 0.038 mg/L.

Cordia’s 2018 System Modification

Information available to TWC shows that Cordia recently relocated its cooling system wastewater discharge to a wetland network contiguous to Kids Creek. In summer 2018, Cordia installed a system that diverts its cooling system discharge to an underground storage tank, after it comingles with stormwater and a diverted stream. Once water levels in the storage tank reach a certain level, the comingled discharge, stormwater, and stream are pumped to the City of Traverse City’s stormwater system on Eleventh Street, which ultimately outlets to the wetland. Based on engineering documents provided by Apollo Engineering, LLC (engineering firm retained by Cordia to design this system), if the tank exceeds its capacity, the system is designed to overflow back into the concrete channel and ultimately into Tributary AA. Cordia’s wetland discharge system has been operational since August 21, 2018.

Because the pump system is designed to pump only slightly more than the capacity of Cordia’s cooling system wastewater discharge, there is the likelihood that the addition of stormwater during a rain event will overwhelm the system and overflow comingled water

into Tributary AA. TWC is unaware of any calculations for the volume of stormwater that may enter the tank during a rain event based on the catchment area of the stormwater system, nor whether the system is designed to handle stormwater from a particular sized storm event.

Observations by TWC staff confirm that recent rains (e.g., 0.63 inches on August 27, 2018) continually overwhelmed the modified system and led to overflows of combined discharge into Tributary AA. In addition, the grate on the intake pipe to the tank has been regularly clogged with leaves and debris, which may cause or contribute to overflow occurrences. On information and belief, Cordia’s cooling system will continue to overflow into Tributary AA until it is designed to prevent clogging and is properly modified to eliminate stormwater and stream inflows into the storage tank, among other modifications.

TWC staff placed Onset HOB0 automated temperature monitoring devices in Tributary AA 50 feet upstream of where the overflow discharge enters the creek and four feet downstream of the overflow discharge. Temperature data collected August 21- 27, 2018 when discharge was being pumped to the wetland, revealed that the system routinely overflowed hot water into Tributary AA. Stream temperatures immediately downstream of the discharge were up to 22 degrees Fahrenheit warmer than upstream temperatures during this time. Subsets of the results that are representative of the complete data set are in Table 2. The complete data set has been provided to the DEQ.

Table 2: Water temperature in degrees Fahrenheit (°F) in Tributary AA and collected by TWC in August 2018.

Date and Time	Air temperature	Tributary AA 50 feet upstream of discharge	Tributary AA 4 feet downstream of discharge	Difference between upstream and downstream temperatures
August 23, 2018 3:06 pm	84°F	63°F	84°F	21°F
August 24, 2018 4:06 pm	77°F	60°F	78°F	18°F
August 25, 2018 5:06 am	65°F	57°F	80°F	23°F
August 27, 2018 12:06 pm	75°F	61°F	67°F	6°F
August 28, 2018 6:06 pm	75°F	62°F	70°F	8°F

A draft NPDES permit released by DEQ for public comment outlines water quality standards for Cordia’s discharge into the wetland network. The draft permit does not incorporate the discharge to Tributary AA. A direct discharge of non-contact cooling water into Tributary AA not only requires a NPDES permit, but continues to raise

concerns the discharge will cause harmful impacts to aquatic resources from elevated temperature and chlorine levels.

Violations of Clean Water Act (Federal and State Law)

The Clean Water Act is a federal regulatory statute that is designed “to restore and maintain the chemical, physical, and biological integrity of [the] Nation’s waters.” 33 USC 1251(a). The Clean Water Act prohibits the “discharge of any pollutant” into “navigable waters” from any “point source,” except when authorized by a permit issued under the National Pollutant Discharge Elimination System (NPDES). 33 USC 1311(a), 1342, 1362(12). The EPA or the states, pursuant to federally approved permit systems within their jurisdictions, issue NPDES permits for discharges into navigable waters. 33 USC 1342, 1370.

In 1973, EPA delegated authority to Michigan to administer its own NPDES program. Michigan administers the NPDES program through the Michigan Department of Environmental Quality (DEQ) and through Part 31 of the Natural Resources and Environmental Protection Act (NREPA). MCL 324.3101 *et seq.*

Section 3112 of Part 31 requires wastewater discharges to waters of the state be authorized by a permit from the DEQ. MCL 324.3112. Cordia’s unpermitted discharge to Tributary AA is a wastewater discharge into waters of the state that violates Part 31.

In addition, Section 3109(1) of Part 31 provides:

A person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious to any of the following:

- a) To the public health, safety, or welfare.
- b) To domestic, commercial, industrial, agricultural, recreational, or other uses that are being made or may be made of such waters.
- c) To the value or utility of riparian lands.
- d) To livestock, wild animals, birds, fish, aquatic life, or plants or to their growth or propagation.
- e) To the value of fish and game.

The specific standards for issuance of a permit are found in DEQ’s Part 4 Rules, the Water Quality Standards. The Water Quality Standard applicable to rivers and streams that are naturally capable of supporting coldwater fish states as follows:

R 323.1075 Temperature of rivers, streams, and impoundments.

Rule 75. (1) Rivers, streams, and impoundments naturally capable of supporting coldwater fish shall not receive a heat load which would do either of the following:

- (a) Increase the temperature of the receiving waters at the edge of the mixing zone more than 2 degrees Fahrenheit above the existing natural water temperature.
- (b) Increase the temperature of the receiving waters at the edge of the mixing zone to temperatures greater than the following monthly maximum temperatures:

J	F	M	A	M	J	J	A	S	O	N	D
38	38	43	54	65	68	68	68	63	56	48	40

The "mixing zone" means the portion of a water body in which a discharge is mixed with the receiving water. DEQ R 323.1044 (b). DEQ Rule 82 requires that "The mixing zone shall not prevent the passage of fish or fish food organisms in a manner that would result in adverse impacts on the immediate or future populations of the fish or fish food organisms." DEQ R 323.1082(1). The Rule further provides that, "The area of mixing zones shall be minimized." *Id.* On information and belief, neither DEQ nor Cordia have determined the "mixing zone" for Tributary AA.

Under Michigan law, a person who discharges once-through noncontact cooling water and other "uncontaminated wastewaters" may meet NPDES requirements by obtaining an individual Certificate of Coverage issued under Michigan's general NPDES Permit No. MIG250000, or an individual permit issued by DEQ under Part 31. Information available to TWC indicates that DEQ has not issued an individual Certificate of Coverage or any other NPDES permit or authorization for Cordia's discharge of warmed municipal water into Tributary AA.

Available water quality data indicate that Cordia's discharge cannot meet the applicable Water Quality Standards in DEQ's Part 4 Rules adopted under Part 31. Information available to TWC indicates that the discharge from Cordia would exceed temperature and chlorine parameters in the noncontact cooling water General Permit (Permit No. MIG250000, Part I, Sec. A.1.h, p. 5) and would exceed the Water Quality Standard in DEQ Rule 75. The data from Tributary AA show that the discharge from the Cordia cooling system to Tributary AA increases the temperature of the receiving water by more than 2 degrees Fahrenheit above existing natural water temperatures for a distance at least 30 feet from the discharge location, which is well beyond the area where the discharge is mixed with the receiving water in Tributary AA. In addition, the data shows that Cordia's discharge raises the temperature in Tributary AA above the allowable monthly maximum temperatures in May, June, July, August, September, October, and November. The data further confirms that recent system modifications did not remedy the violations; intermittent pulses of comingled discharge have been released, providing sudden infusions of hot chlorinated water into Tributary AA. Along with the elevated

levels of chlorine in the discharge, the discharge does not presently meet the requirements of the Water Quality Standards.

Moreover, the discharge from Cordia has likely had, and will continue to have, adverse impacts on water quality and aquatic habitat at the receiving location in Tributary AA and downstream. During July 2017 restoration activities on Tributary AA, TWC contractors found numerous brook trout, a cherished fish native to coldwater streams and the state fish of Michigan. Brook trout have a narrow thermal tolerance; according to the DNR, brook trout prefer temperatures ranging from 43 to 53 degrees Fahrenheit. Long-term exposure to temperatures warmer than this tolerance range can result in brook trout movement to seek a coldwater refuge or mortality. Furthermore, chlorine can cause chronic effects and is poisonous to fish and invertebrates at very low levels. Even if chlorine toxicity does not cause mortality, chlorine may cause behavioral, reproduction, and growth issues at low concentrations. In July 2018, TWC staff observed a dead brook trout in Tributary AA just downstream of the discharge location; a DNR fish biologist indicated environmental conditions as the cause of death. The discharge from Cordia is producing a section of Tributary AA that is unfavorable for aquatic life.

Information available to TWC indicates that DEQ staff observed the discharge of cooling water from Cordia on August 8, 2016, and concluded it constituted an unlawful non-contact cooling water discharge. August 19, 2016, Violation Notice – Unlawful Discharge at Cordia, Grand Traverse Commons, VN-006695. The Violation Notice required Cordia to complete a Certificate of Entry Administrative Consent Order to achieve and maintain compliance with Part 31. *Id.*

On October 27, 2016, Cordia's representative and DEQ entered into Administrative Consent Order (ACO) UCO-UD07-100-000331, which imposed a \$150 civil fine on Cordia. The ACO required Cordia to submit a NPDES permit application to DEQ within 60 days of DEQ's receipt of the form (*Id.*). The ACO indicates the application was due December 26, 2016. A complete NPDES permit application was submitted by Cordia to DEQ on July 19, 2017, and has since been amended numerous times.

Information available to TWC indicates that DEQ provided Cordia a draft NPDES permit on September 29, 2017, which requested comments on the terms and conditions of the draft permit to be submitted by Cordia prior to October 20, 2017. TWC and the Baykeeper understand that Cordia decided to withhold actively pursuing this NPDES permit in November 2017. Email correspondences among DEQ staff in November 2017 indicate that DEQ would place Cordia's NPDES permit application on hold as long as Cordia had a "temporary solution in place by the end of December [2017]" and a "permanent solution next spring [2018]." An email from a Cordia representative to DEQ on November 1, 2017, indicates Cordia intended to have a final design complete for the discharge alternative by December 31, 2017 with an anticipated date for the alternative system to be operational by May 15, 2018. Information available to TWC shows that Cordia developed proposed cooling system modifications in or about late March 2018 and entered discussions to consider alternative discharge locations in early May 2018.

Information available to TWC indicates that on May 22, 2018, DEQ issued a Second Violation Notice, SVN-00746. The Violation Notice required Cordia “shall take immediate action to achieve and maintain compliance with the terms and conditions of Part 31 of the NREPA.” Information available to TWC indicates that Cordia requested the DEQ delay the issuance of a NPDES permit for Tributary AA discharge until it installed the system modifications discussed above.

On August 13, 2018, DEQ issued NPDES Draft Permit No. MI0060211 for public comment, which proposes to authorize the discharge of Cordia’s noncontact cooling water to a nearby wetland. The permit would not authorize any discharge to Tributary AA.

For these reasons, TWC and the Baykeeper believe that the discharge from Cordia is in violation of the Clean Water Act. The violation is ongoing and has not yet been cured. Unless the discharge is successfully and completely relocated to an alternative location out of Tributary AA, the discharge will remain in violation of the Water Quality Standards. This is so regardless of Cordia’s recent system modifications or if DEQ issues a permit that implements the Water Quality Standards.

Violations of Michigan Environmental Protection Act

In addition to the obligation to comply with the Clean Water Act and Part 31 of the Natural Resources and Environmental Protection Act (NREPA), Cordia is also required to comply with the Michigan Environmental Protection Act (MEPA), MCL 324.1701 *et seq.*

Section 1701 of MEPA states:

- (1) The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.
- (2) In granting relief provided by subsection (1), if there is a standard for pollution or for an antipollution device or procedure, fixed by rule or otherwise, by the state or an instrumentality, agency, or political subdivision of the state, the court may:
 - (a) Determine the validity, applicability, and reasonableness of the standard.
 - (b) If a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court. MCL 324.1701.

Section 1703 of MEPA states in part:

- (1) When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that his or her conduct is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts apply to actions brought under this part.

* * *

- (3) Costs may be apportioned to the parties if the interests of justice require.

MEPA further provides that its requirements are supplementary to existing administrative and regulatory procedures. MCL 324.1706. Consistent with these provisions, Michigan courts have long held that MEPA is to be read *in pari materia* with any other statutes that relate to natural resources. *Michigan Oil Co v Natural Resources Comm'n*, 406 Mich 1, 33 (1979). In other words, even if a relevant or applicable permitting statute does not directly adopt the requirements of MEPA, state agencies are nevertheless required to follow its mandate and to read the statute in concert with MEPA. *State Highway Comm'n v Vanderkloot* 392 Mich 159, 182-83 (1974).

The threshold question under MEPA is whether proposed action is likely to pollute, impair, or destroy the environment. *Ray v Mason County Drain Comm'r*, 393 Mich 294, 309 (1975). "Such a showing is not restricted to actual environmental degradation but also encompasses probable damage to the environment as well." *Id.* Michigan courts have defined "impair" to mean "to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." *Whittaker Gooding Co v Scio Twp Zoning Bd of Appeals*, 117 MichApp 18, 22 (1982), citing *Michigan United Conservation Clubs v Anthony*, 90 MichApp 99, 105-106 (1979). When a *prima facie* case of harm or potential harm is established, the entity emitting the pollution must demonstrate that there is "no feasible and prudent alternative" that would achieve the objective of the proposed action. MCL 324.1703(1). See also *Ray*, 393 Mich at 310-12.

The discharge from Cordia's cooling system to Tributary AA increases the temperature of the receiving water in the creek and contains elevated levels of chlorine, which is likely to pollute, impair, or destroy water quality and habitat in Tributary AA. Even after the cooling system was modified as discussed above, the discharge results in increased temperatures in Tributary AA, which pollutes, impairs, and destroys water quality and habitat in the receiving waters. Cordia has not demonstrated that there is no feasible and prudent alternative available. As such, Cordia's discharge constitutes a violation of MEPA.

Violation of City Ordinances

The City of Traverse City regulates wastewater and drainage water discharges within the City limits, including discharges to natural outlets within the City of Traverse City, through the Streets, Utilities, and Public Services Code, Chapter 1042, Sewer Construction and Maintenance, of the City's Codified Ordinances.

Under the Streets, Utilities, and Public Services Code, a sewer means "a pipe or conduit that carries wastewater or drainage water," and a sanitary sewer means "a sewer that carries liquid and water carried wastes from residences, commercial buildings, industrial plants and institutions, together with minor quantities of ground, storm and surface waters that are not admitted intentionally." TC City Ord., Sec. 1042.02(12). Thus, the pipe that carries wastewater discharged from the Cordia cooling system is a sewer and sanitary sewer subject to Chapter 1042.

A natural outlet is defined as "any outlet into a watercourse, pond, ditch, lake or other body of surface or ground water." TC City Ord., Sec. 1042.02(6). Thus, Tributary AA constitutes a natural outlet in the City of Traverse City.

Section 1042.07, titled General Discharge Restrictions, provides as follows:

- (a) No person shall discharge or cause to be discharged any storm water, surface water, ground water, roof run-off, footing drainage, subsurface drainage, *uncontaminated cooling water* or unpolluted industrial process water directly or indirectly to any sanitary sewer, except as specifically allowed herein.
- (b) Storm water and unpolluted drainage shall be discharged into such sewers as are specifically designed as storm sewers or to a natural outlet. Unpolluted process waters shall be discharged into a storm sewer or natural outlet *subject to the approval of the City and all applicable governmental agencies*. TC Ord. 1042.07.

Since Cordia's cooling system discharge appears to constitute "unpolluted process water" under the City's Streets, Utilities, and Public Services Code, Cordia may not discharge such wastewater into Tributary AA without approval from the City. Information available to TWC indicates that the City of Traverse City has not approved the discharge of cooling water from Cordia to Tributary AA.

Remedy

Information available to TWC indicates that Cordia may resolve the violations in multiple ways. For example, the discharge location may be completely redirected to a location where it will meet Water Quality Standards to protect the receiving water and habitat. This may require additional storage holding tanks to accommodate the entire commingled discharge, even during rain events. Alternatively, Cordia may pump the discharge directly from its cooling system to an alternate location. Alternatively, Cordia

may reduce thermal and chlorine content in the discharge. There may be other resolutions available.

Upon expiration of the 60-day period, The Watershed Center Grand Traverse Bay and the Grand Traverse **BAYKEEPER**[®] will file a citizen suit under Section 505(a) of the Clean Water Act, state law, MEPA, and local regulations, for its prior, current, and anticipated continued and future violations of the Clean Water Act, state law, and local ordinances. TWC and the Baykeeper will seek all remedies available under the Clean Water Act, state law, and local regulations. TWC and the Baykeeper will seek the maximum penalty available under the law, which is \$37,500 per day. TWC and the Baykeeper will further seek a court order to prevent Cordia from discharging pollutants into Tributary AA. A strong or substantial likelihood of success on the merits of these claims exists, and irreparable injuries to the public, public trust resources, and the environment will result if Cordia further discharges pollutants into Tributary AA. TWC and the Baykeeper will also seek to recover costs, including attorneys' and experts' fees, under Section 1365(d) of the Clean Water Act.

During the 60-day notice period, however, TWC and the Baykeeper are willing to discuss effective remedies for the violations noted in this letter. If you wish to pursue such discussions in the absence of litigation, please initiate those discussions immediately.

All inquiries and responses to the issues raised in this letter should be directed to Tracy Jane (TJ) Andrews, The Watershed Center Legal Counsel, at the address and phone number listed below.

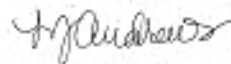
Sincerely,



Christine Crissman
Executive Director



Heather Smith
Grand Traverse **BAYKEEPER**[®]



Tracy Jane (TJ) Andrews
Legal Counsel

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