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Sent via email
Christopher Tingey, David Phillips, and Matthew Martin
Vial Fotheringham LLP
17355 SW Boones Ferry Rd, Suite A
Lake Oswego, OR 97035

Re: HOA Failure to Maintain Storm Drainage and Treatment System

Dear Chris, David, and Matt:

We have prepared this letter in response to the Lacamas Shores Homeowners Association's ("HOA's") continued recalcitrance to repair and restore the failing stormwater drainage and treatment system on property owned by the HOA, Clark County Tax Lot 84839000 (the "HOA Property"). In the two years since we first engaged you on these issues, the HOA has been unwilling to repair and restore this system, and the HOA apparently remains opposed to restoring the system as evidenced by recent developments, including: (1) the HOA's intent to pursue, without coordinating with our client Steven Bang, installation of a new treatment facility that is inconsistent with existing permits for the HOA Property and authoritative agency manuals governing stormwater treatment wetlands; (2) statements made by HOA representatives to The Columbian newspaper attempting to minimize the HOA's admitted neglect of the system and its concomitant pollution of Lacamas Lake; and (3) the HOA's attempt to obtain discretionary review of the Clark County Superior Court's determination that the HOA is in violation of the neighborhood's declaration of covenants, conditions, and restrictions ("CC&Rs") for its failure to maintain the treatment system.

The HOA faces significant liability for its failure to maintain the storm drainage and treatment system on the HOA Property. There are four primary aspects of that liability.

First, the HOA faces liability under the Clean Water Act ("CWA") for discharging pollutants from its stormwater treatment system without authorization. The CWA authorizes penalties up to $64,618 per day for each violation, 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4, and every unauthorized pollutant discharge is a separate violation. Test results demonstrate that the HOA is discharging three pollutants from each of the treatment system's two outlets, for a total of six pollutant discharges, and that it has been discharging these pollutants since at least September 23, 2020—a period of 1057 days as of the date of this letter. This amounts to a maximum, potential penalty of $409,807,356.[1] While it is rare for dischargers to be assessed the maximum penalty, all unpermitted dischargers must receive some

[1] Given earlier testing indicates that the HOA has been discharging pollutants from as early as 2018, this maximum penalty figure is conservative.

penalty. 33 U.S.C. § 1319(d); *Atl. States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1020 (2d Cir. 1993). Courts consider several factors in determining the amount of the penalty, including the seriousness of the violations, the economic benefit from the violation, history of violations, good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. 33 U.S.C. § 1319(d). The Clark County Superior Court's ruling that the HOA's failure to maintain the storm drainage and treatment system is a violation of the express requirements of the CC&Rs will weigh heavily in evaluating the HOA's culpability—as will the HOA's admission that the HOA has neglected the system, acknowledging that it has undertaken no efforts in the last few years to maintain it.[2]

The HOA's primary defense in the CWA case is that the biofilter wetland that is a critical component of the storm treatment system on the HOA Property is a federal jurisdictional wetland, and hence the biofilter cannot be a point source of pollution under the CWA. That issue is the subject of summary judgment motions that are currently pending in federal court; given both federal agencies with authority to administer and enforce the CWA have definitively stated that a feature can qualify as both a point source and a water of the United States, we feel strongly that we will prevail on this issue. Revised Definition of "Waters of the United States", 88 Fed. Reg. 3004-01, 3114 (Jan. 18, 2023).

Nevertheless, even if the HOA prevails on its argument that a federal wetland cannot be a point source, it is now clear that the biofilter is not a federal wetland. While the Corps indicated otherwise years ago (a determination that was wrong then because it failed to consider that the biofilter wetland was constructed as part of a treatment system), the law governing which waterbodies qualify as waters of the United States significantly changed earlier this year with the Supreme Court's decision in *Sackett v. Env't Prot. Agency*, 143 S. Ct. 1322, 215 L. Ed. 2d 579 (2023). In *Sackett*, the Court held that to constitute a water of the United States, "wetlands must qualify as 'waters of the United States' in their own right. In other words, they must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA," i.e. "traditional navigable waters." 143 S. Ct. at 1339, 1340. The only traditionally navigable water in the general vicinity of the HOA Property is Lacamas Lake, and the Biofilter is separate and distinguishable from Lacamas Lake. Therefore, the biofilter is not a water of the United States.[3] Because the biofilter wetland is not a water of the United States, the HOA's primary CWA defense is going to fail. Judge Rothstein clearly recognizes the impact of *Sackett* on the pending Clean Water Act case; she has requested the parties provide supplemental briefing on that issue.

Given the HOA's recent press communications, the HOA appears to believe it will be able to reduce, or perhaps avoid, Clean Water Act penalties by arguing that its actions here are the result of "benign neglect." When there is an affirmative duty to take an action, like the HOA's maintenance obligation under the CC&Rs, the failure to properly undertake that action (the neglect, which the HOA has acknowledged) is by definition not benign. That is particularly the case here, given that the HOA was expressly created to maintain this system so that it does not imperil the quality of Lacamas Lake and public health. And there is nothing externally "benign" about the HOA's neglect. The HOA's stormwater discharges are harmful to the lake, aquatic life, and all citizens of the community who have a

[2] We note that Mr. Bang and the HOA do not have exclusive control over the amount of penalties in this case; the U.S. Department of Justice would have to approve any settlement to ensure a penalty is sufficient given the circumstances.
[3] Even the HOA appears to acknowledge this result of *Sackett*, as HOA representatives noted in a recent Board meeting that a permit would not be required from the U.S. Army Corps of Engineers to install a new storm treatment system in the biofilter wetland.

right to enjoy this cherished resource. The HOA's admitted neglect of the system will weigh heavily in assessing the penalties, as will the HOA's ongoing refusal to repair the stormwater treatment system while instead focusing on actions such as installing a gate to limit access to the community and other neighborhood amenities. *See, e.g., Idaho Conservation League v. Atlanta Gold Corp.*, 879 F. Supp. 2d 1148, 1168 (D. Idaho 2012) (holding a discharger's neglect to undertake actions to improve water quality and reduce pollutant discharges did not constitute good faith and militated against a downward adjustment of the CWA penalty; the court imposed a partial penalty of $2,000,000 and reserved ruling an imposing additional penalties).

Second, the HOA faces liability for damages, along with prejudgment interest. These damages include diminution in the value of Mr. Bang's property, which is estimated to be at least $150,000. Damages also include Mr. Bang's personal loss of enjoyment and use of his property for the last several years, along with his loss of enjoyment of the HOA Property, over which he enjoys an access easement. While the HOA Property was previously maintained in an attractive manner and supported wildlife such as waterfowl that Mr. Bang enjoyed viewing, it is now an aesthetic blight, does not support waterfowl, and has been labeled a dead zone by local citizens. As noted earlier, the Clark County Superior Court has already determined the HOA is liable for violation the CC&Rs, so the only question is how much money the HOA must pay to compensate Mr. Bang for the damages he has incurred as a result of the HOA's maintenance failures.

The third element of the HOA's liability is injunctive relief. The HOA appears to be moving toward a remedy that will not fix the fundamental issue with the biofilter—it is dominated by large trees (many of which are dead, decaying, or otherwise unhealthy and pollutant-laden) rather than the low-lying vegetation that most effectively removes pollutants from the incoming stormwater. Constructing a new treatment system is also inconsistent with the HOA's obligations under the CC&Rs, which require that the HOA maintain the current storm drainage and treatment system, the underlying shoreline permit for the Lacamas Shores development, and numerous authoritative agency manuals that make clear that, to properly function, treatment wetlands must be characterized by high-filtering grasses and similar vegetation. *See e.g.*, CC&Rs at § 2.7 ("The owners, by and through the Homeowners Association, are responsible for maintaining the wetlands of the Lacamas Shores Development), § 5.18 ("The Lacamas Shores Homeowners Association . . . shall comply with . . . any substantial development permit and/or conditional use permit issued in connection with the Lacamas Shores Development"); City of Camas Substantial Development Permit and Conditional Use Permit, Applicatioion NO. C-2-86 (requiring "[c]reation of [the HOA] which will be responsible for monitoring and maintaining the storm drainage system when the developer's responsibility has been completed"); Dep't of Ecology 2019 Stormwater Management Manual for Western Washington at 902 (stormwater treatment wetlands "treat stormwater through the biological processes associated with emergent aquatic plants"), 907 (treatment wetlands "shall be planted with emergent wetland plants"), Table V-8.1 (listing emergent wetland plants including grasses, sedges, etc.); Clark County Stormwater Manual 2015 at 67 (stating treatment wetlands are "designed to treat stormwater through the biological processes associated with emergent aquatic plants"); EPA Stormwater Wet Pond and Wetland Management Guidebook (February 2009) at 12 (listing grasses as the most common choice in stormwater wetlands). Finally, our expert will

demonstrate that the HOA's proposed, new system will not effectively remove stormwater pollutants when compared to properly repairing and maintaining the existing system.[4]

The only appropriate solution for addressing the HOA's discharges of pollution to Lacamas Lake is for the HOA to repair and restore the storm treatment system, including the biofilter wetland, to its original condition as permitted and constructed, and to then maintain that system into the future. This is a relatively easy fix, and it is more cost effective and certain than installing a new system. This solution is also allowed under current law, which, as explained in our code interpretation request to the City of Camas, allows maintenance of permitted treatment systems without the need for additional permits.[5] In contrast, the HOA's apparently preferred approach of installing a new, ineffective, treatment system will indisputably require new permits, mitigation, and consultant costs, likely costing hundreds of thousands of dollars and not addressing the actual problem that is causing the discharge of pollutants.

Even if new permits were required to restore and repair the system to its original condition, that would not prevent the HOA from conducting those repairs. The HOA would simply need to complete the permitting process. Wetland permits are routinely granted for development and restoration projects. While obtaining new permits might require additional mitigation, that would simply be the price the HOA has to pay for its admitted "neglect" of its fundamental obligation under the CC&Rs. Moving forward with an alternative solution that is noncompliant with the CC&Rs, fails to solve the fundamental problems associated with the HOA's neglect, and is likely to generate additional lawsuits or other challenges is just flushing more money down the drain.

The fourth element of the HOA's liability is attorneys' fees. Mr. Bang's attorneys' fees are recoverable in both state and federal court. As of the last billing cycle, fees and expenses associated with Mr. Bang's federal and state court actions were approximately $389,000 and $220,000, respectively. While both figures are significant, they are reasonable. Indeed, each amount is substantially lower than the amount of attorney fees that have been granted in other environmental cases. *E.g.*, *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Engineers*, 625 F. Supp. 3d 1116, 1129 (W.D. Wash. 2022) (awarding the plaintiff $710,143.91 in attorneys' fees in a record-review case that did not require discovery and was limited to briefing and oral argument rather than trial); *Earth Island Inst., Inc. v. S. California Edison Co.*, 838 F. Supp. 458, 467 (S.D. Cal. 1993) (awarding citizen plaintiffs $1,408.594.94 in attorneys' fees in CWA enforcement action). Mr. Bang's attorneys' fees are continuing to mount as we prepare for trial, including retaining final experts and preparing all witnesses. And they will further increase as we respond to the HOA's request for discretionary review of the Superior Court's determination that the HOA is in violation of the CC&Rs—a request that does not meet the plain requirements of RAP 2.3(b) (the Superior Court's summary judgment order is not (1) an obvious

[4] Plaintiff has retained Stan Geiger as an expert witness. As the HOA is aware, Mr. Geiger is an expert in stormwater wetland treatment systems and has extensive experience with the design, construction, maintenance, and monitoring of the storm drainage and treatment system on the HOA Property. Mr. Geiger agrees that the biofilter wetland on the HOA Property is a stormwater treatment wetland and should be maintained as such, and extensive tree growth within the wetland is incompatible with its authorized and designed function.

[5] The HOA previously supported the City's argument that Mr. Bang could not submit a code interpretation request to resolve any outstanding uncertainties regarding permitting requirements for maintaining the storm treatment system. The HOA's opposition to Mr. Bang's attempt to resolve this issue—and failure to seek its own code interpretation so it could move forward with the repair of its stormwater treatment system—is baffling and suggests the HOA is more focused on arguing that it has a right to continue to pollute Lacamas Lake than maintaining its stormwater treatment system as required under the CC&Rs and shoreline permit.

error which would render further proceedings useless; (2) a probable error that substantially alter the status quo or substantially limits the freedom of a party to act; (3) a departure from the accepted and usual course of judicial procedures; or (4) a decision involving a controlling question of law as to which there is substantial ground for difference of opinion and requiring immediate appellate review).

Mr. Bang was willing to resolve these disputes before the current lawsuits were filed for a comparatively small amount of attorneys' fees (less than one-tenth of the current fee total) and simply returning the system to its original condition. The HOA rejected that proposal. The HOA's liability is now significantly greater with respect to every element discussed above – potential CWA penalties have continued to accumulate, Mr. Bang's damages have increased, the HOA has been found liable for violating the CC&Rs, and the amount of Mr. Bang's attorney fees have increased more than ten-fold. The quantum of the HOA's liability is only going to increase the longer the HOA continues to fight this losing battle. Should both the federal and state court cases proceed to trial, attorneys' fees on both sides will collectively exceed $1,000,000, and penalties and damages will further accumulate.

Finally, the HOA's attempt to dismiss the pollution that it is pumping into Lacamas Lake as "small" is without merit and completely misses the point. The HOA has conducted no studies of its own to quantify this pollution. Others have, however, and these tests show that the failing system is regularly discharging pollutants to Lacamas Lake in violation of water quality standards established for the system. And even if the amount of pollution that the HOA is adding is relatively small, that would not excuse the HOA's maintenance failures. Lacamas Lake is a very sensitive resource. This is why the City and Department of Ecology carefully evaluated the stormwater treatment system during permitting of the Lacamas Shores development. These agencies required that the system effectively remove all pollutants from stormwater so that the quality and quantity of runoff would not exceed predevelopment conditions. As such, any added pollutants from the development have already been determined to be an unacceptable, added stress on Lacamas Lake.

The HOA's defense that its pollutant discharges are small compared to the size of the receiving water has been invoked by virtually every polluter that has been accused of violating the Clean Water Act, including BP, which claimed in response to the Deepwater Horizon oil spill: "The Gulf of Mexico is a very big ocean. The volume of oil and dispersant we are putting into it is tiny in relation to the total water volume." That argument was soundly rejected, and BP was subsequently fined the highest penalty ever assessed under the CWA: over $5,000,000,000.

A similar argument was also eloquently rejected by the United States District Court for the Western District of Washington (the same court presiding over the pending CWA case between Mr. Bang and the HOA) in the case of a gravel mine in Puget Sound: "'Which raindrop caused the flood?' . . . No single project or human activity has caused the depletion of the salmon runs, the near-extinction of the SR Orca, or the general degradation of the marine environment of Puget Sound. Yet every project has the potential to incrementally increase the burden upon the species and the Sound." *Pres. Our Island v. U.S. Army Corps of Engineers*, 2009 WL 2511953, at *20 (W.D. Wash. Aug. 13, 2009). The same logic applies to Lacamas lake, which is in a downward spiral of deteriorating water quality caused largely by human activity. The HOA's failure to maintain the stormwater treatment system on its property is a contributing cause of the lake's unhealthy condition, and the law requires that the HOA remedy this failure by repairing and restoring the system to its original, functioning condition.

We will continue to aggressively litigate these cases if that is the only way to obtain effective relief. And while we do that, the amount of civil penalties, damages and attorneys' fees will continue to

increase. If and when the HOA is ready to discuss trading those continually increasing costs for an investment in repairing the storm drainage and treatment system on the HOA Property so that the HOA stops polluting Lacamas Lake, we are ready to engage in that conversation.

Respectfully,

Samuel W. (Billy) Plauché

Jesse DeNike