Conservation Law Foundation

March 22, 2002

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Phil Garwood
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Terry Hanson
Board of Environmental Protection
Maine Department of Environmental Protection
17 State House Station
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Re: General Alum New England Corporation: Proposed Consent Agreement and Enforcement Order

Dear Mr. Pidot, Mr. Garwood, and Ms. Hanson:

I am writing on behalf of the Conservation Law Foundation (CLF) and its members pursuant to 38 M.R.S.A. § 347-A(6) to offer comments on the Proposed Consent Agreement and Enforcement Order for General Alum New England Corporation (GAC). CLF requests that the Attorney General and the Board of Environmental Protection withhold its consent to the proposed Agreement. It is CLF's opinion that the proposed Agreement is inadequate to remedy the longstanding wastewater discharge violations at the General Alum facility.

The Conservation Law Foundation (CLF) is a regional, not-for-profit conservation organization with over 15,000 members in New England and offices located in Rockland, Maine. CLF has several hundred members in Maine, many of which live near Stockton Harbor and Penobscot Bay. The longstanding pollution and egregious inattention to environmental compliance by GAC has injured the ability of our members to use and enjoy Stockton Harbor. Our members are concerned that the proposed Agreement and penalty does not adequately recapture the economic benefit that GAC has enjoyed due to its environmental noncompliance, will not deter GAC from continuing to pollute in the future, and does adequately remediate the ongoing violations and environmental harm at the facility.

CLF is only commenting on the wastewater discharge portion of the Agreement.

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The Proposed Consent Agreement and $16,800 Penalty Does Not Cover All Past Violations

Waste water pH violations

Paragraph 13 outlines the waste water violations covered by the proposed Agreement. First, this Ageement only covers waste water discharge violations through June 2001. CLF only has data through December of 2001, however, between June and December, 2001GAC has reported violations as follows (Attachment 1):

Outfall 001:	July (2)
	August
	September (4)
	October (5)
	November (6)
	December (3)
Outfall 002:	October (2)

In addition, without explanation, the Agreement fails to include violations for the period beginning December 1998, through December 1999. December 1998 was the date of the latest violation covered by the preceding Consent Agreement with GAC. Although that Agreement was not signed until November 1999, it did not release GAC for all violations occurring during negotiation. Failing to include such violations now not only fails to meet the policy goals of the State's penalty policy, but could also have the absurd effect of encouraging companies to extend penalty negotiations to avoid future liability. CLF only has quarterly data for this period, and in fact has not been able to get a copy of the quarterly report for the 2d quarter of 1999, but at a minimum, for each of the other three quarters GAC reported violations for Outfall 001 (Attachment 2) GAC should also be penalized. The quarters for which CLF knows of violations are as follows, and the Department should investigate the 2d quarter of 1999:

Outfall 001:	1st Quarter 1999
	3rd Quarter 1999
	4th Quarter 1999

CLF also notes that GAC's reporting requirements require quarterly sampling of pH range. Courts regularly hold that where a violation is defined in terms of a time period longer than a day, the maximum penalty assessable for that violation should be defined in terms of the number of days in that time period. (*See e.g.* Chesapeake Bay Foundation v. Gwaltney, 791 F.2d 304, 314, 24 ERC 1417 (4th Cir. 1986), vacated and remanded on other grounds, 484 U.S. 49, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987). Thus, in CLF's opinion, the number of "days of violation" included in this Agreement are vastly understated.

Failure to have a Spill Control and Countermeasure Plan (SPCC Plan)

Although paragraph O. of the Agreement orders GAC to prepare a Spill Prevention Control and Countermeasure Plan as required by 38 M.R.S.A. § 1318-C, the Agreement fails to assess any penalty for operating for years with an SPCC plan. Had an SPCC plan been in plan, a catastrophic spill of sulfuric acid in April of 2001 may have been avoided. In addition, the accumulation and spill of petroleum from Outfall 002 in 1998 may also have been avoided. Failing to include a penalty for years of failure to have an SPCC plan in place fails to deter GAC and other polluters from violating these provisions and, since there is no penalty included to recover GAC's economic benefit of non-compliance, rewards GAC economically for years of noncompliance.

The Proposed Consent Agreement Does Recover The Economic Benefit of Non-Compliance In Violation of The State's Own Penalty Policy

Despite DEP's Penalty Policy which states that calculating penalties based on the economic benefit method is preferred, DEP has failed to do so and therefore is complicit in allowing GAC to benefit economically by its noncompliance. Note that Federal authorities appropriately calculate penalties by including both an economic benefit component to recoup the avoided costs or profit gained by non-compliance, and also a "gravity" component to achieve other policy goals such as deterrence. As described in DEP's penalty policy, either an economic benefit method or a per diem or incident evaluation should be used, and absent extenuating circumstances the highest amount should be used.

Although CLF has not had its experts yet fully determine the economic benefit of GAC's noncompliance, a preliminary and very conservative run using EPA's BEN model (an approved method under DEP's penalty policy) which focused almost exclusively on the avoided costs for only the most obvious violations, indicates that the minimum penalty attributable to economic benefit should be well over $30,000. It is likely that under a full-blown analysis this amount should be more than doubled. This does not even factor any amount for GAC's recalcitrance, as reflected by the 1998 consent agreement and order, for a similar set of violations.

At an absolute minimum, the penalty should recoup the economic benefit of non-compliance.

The Proposed Penalty is Inadequate to Deter
Future Wastewater Violations

Sulfuric Acid Spill

It should also be noted that Paragraph 13 states that the water enforcement action does not include the violations for discharging some 765 gallons of 93 percent pure sulfuric acid through Outfall 001. Upon information and belief, CLF understands that this spill was considered a "major" penalty under the Department's hazardous material penalty policy, however, it was scored in about the middle of the range of possible penalties, and then GAC was given a $5,000 reduction for promptly reporting the spill. The total penalty was $10,000 out of a possible range of $10,000 to $25,000.

Official records and reports from the time of the spill do not indicate that GAC was in any way prepared to deal with the spill despite handling sulfuric acid and other hazardous materials on a daily basis (Attachment 3). Reports also indicate that, in fact, "tens of thousands of gallons of sulfuric acid solution [were] discharged with a pH of between 0 and 1 and later under a pH of 2." It is CLF's belief that discharging this large quantity of sulfuric acid solution registering in the 0 to 2.0 pH (S.U.) range over an extended time period to a shallow and fragile marine ecosystem is an extremely serious violation. Moreover, rewarding the company for promptly reporting the spill, already a legal requirement, when records indicate the company was not at all prepared for the spill despite it being plainly foreseeable that a spill could occur and reach the Harbor (Attachment 3), does not appropriately penalizes GAC for the environmental harm of the spill, does not recoup the economic benefit gained by not being prepared for such a spill, and does not serve as a deterrent from future such violations.

As discussed, the proposed Agreement and penalty do not cover all of GAC's reported violations, nor do they recover the economic benefit of GAC's non-compliance. The total penalty amount for the waste water violations is $16,800. As recently as 1999, GAC and DEP entered into a consent agreement for a similar set of violations, that actually called for a higher penalty; $17,900. Clearly, the prior Agreement did not successfully deter GAC from continuing to violate the law. It is unfathomable how the new Agreement can be considered adequate to deter GAC and other similarly situated polluters from continuing to violate the law.

The Proposed Consent Agreement Does Not Include Remedial Measures
That Will Prevent Future Violations

GAC has a long and egregious history of environmental law violations, including waste water discharge license violations from Outfall 002 that continue to this day. In addition, GAC recently initiated production of bleach for which backwash waters from a process

water softening unit will be discharged to Outfall 002. To this day, Outfall 002 does not have a treatment system for its discharges. In addition, as noted, GAC had a substantial build-up and

spill of petroleum in Outfall 002 in 1998, and on information and belief petroleum is again building up in the outfall. CLF believes that the Department needs to know more about what appears to be a maze of pipes under the GAC facility that were used for various industrial processes in the past, and that may contain petroleum and possibly other pollutants that could be discharged from the facility through Outfall 002. CLF also believes that an adequate waste water treament system needs to be installed for Outfall 002 to prevent further unlawful discharges. GAC should be ordered to address these issues.

In addition, GAC has a long history of violations from Outfall 001, and as noted above, these include violations occurring even after the recent installation of the single stage treatment system referred to in paragraph Q of the agreement. On information and belief, this system does not currently provide for the treatment of waste waters that are too alkaline, despite recent violation that exceed the upper limit for pH range. This system also does not contain a second stage of containment that would actually prevent an unlawful discharge, such as those in December occurring due to a system failure, from reaching Stockton Harbor. GAC should be ordered to install or activate equipment for treatment of waste water that is too alkaline, and establish a second stage of treatment and containment that will ensure unlawful discharges from the first stage do not reach Stockton Harbor.

In addition, although the Agreement requires that GAC conduct a storm water flow study for Outfall 001, it does not require any similar analysis for Outfall 002 despite continued violations there, nor does it prevent GAC from discharging storm water from unpermitted point sources, such as the eroded channels running down the banks of the facility to the shore of Stockton Harbor. GAC should be ordered to take measures to comprehensively address storm water issues.

The Proposed Consent Agreement Does Not Even Order GAC to Comply With State and Federal Law

Unlike that portion of the Agreement dealing with hazardous waste, the Agreement fails to even order GAC to cease its unlawful wastewater discharges. GAC should be ordered to cease all discharges except those in compliance with the law, and the Agreement should include stipulated penalties for failing to do so.

In addition, because GAC has historically never complied with the monitoring requirements of its federal storm water permit, we have little knowledge of the pollutants contained in its storm water. Owing to pressure from CLF, we were recently advised by

an attorney for GAC that the company has finally, after over five years of non-compliance, completed and had certified a storm water pollution prevention plan (SWPPP) for the facility. CLF was also advised that GAC will begin to monitor its storm water as required by federal law. CLF, however, remains concerned that GAC will once again fail to comply with its federal storm water permit requirements and its SWPPP. For example, based on information and belief, the company has failed to implement best management practices that

would prevent illegal storm water discharges down the eroded banks of excavated material to the shore of Stockton Harbor. Such discharges can cause harmful sedimentation and the possible discharge of unknown contaminants to the water. Because Maine does not yet have an industrial storm water program, GAC should be ordered to comply with its federal permit.

Finally, CLF is concerned about other impacts from the facility including the discharge of roofing materials to the harbor from at least one abandoned building. These materials have been found in the Harbor flats where they smother benthic life or prevent marine organisms such as clams and worms from flourishing. CLF is also concerned about the erosion of the excavated material from the banks of GAC's facility. GAC should be ordered to prevent this environmental harm from continuing.

For these reasons, CLF on behalf of its members requests that you withhold your consent on this Agreement so that the Department of Environmental Protection, with the assistance of the Attorney General's office, can undertake a full and fair investigation and enforcement action that will bring GAC into compliance with the law and protect the public from the environmental harm caused by GAC's facility.

Sincerely,

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cc Sean Mahoney, Verrill & Dana
Ken Moraff, Enforcement Chief, EPA-New England