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August 11, 2020

Via Email and U.S. Certified Mail - Return Receipt Requested

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Re: Notice of Violations and Intent to Sue Under the Clean Water Act

Dear Mr. Esposito, Ms. Scott, Mr. Rowan, and Mr. Gaskins:

This letter provides notice that the Winyah Rivers Foundation, Inc., d/b/a Winyah Rivers Alliance (“Winyah Rivers”) intends to file suit against Active Energy Renewable Power (“AERP”), pursuant to section 505(a) of the federal Clean Water Act (or “the Act”),¹ for violations of the Act.

Unless the violations described below are fully addressed, Winyah Rivers intends to file a lawsuit, on behalf of itself and its adversely affected members, in the United States District Court for the Eastern District of North Carolina no earlier than 60 days from the postmark date of this letter.² Winyah Rivers will seek appropriate equitable relief, civil penalties, fees and

* In addition to the official mailing and corporate office address, copies of this letter have also been sent via certified mail to Mr. Esposito and Mr. Rowan at the address included on 2019 corporate filings with the North Carolina Secretary of State: P.O. Box 751, Wrightsville Beach, NC 28280.

¹ 33 U.S.C. § 1365(a). Parallel citations to the United States Code are provided in footnotes for statutory provisions of the Clean Water Act discussed in text.

² See 40 C.F.R. § 135.2(c) (notice of intent to file suit is deemed to have been served on the postmark date).

costs of litigation, and such other relief as the court deems appropriate to address and correct the ongoing violations described below.

SUMMARY OF VIOLATIONS

AERP is in violation of sections 301(a) and 402 of the Clean Water Act³ because it is discharging polluted stormwater from sawmill and timber operations at its facility located at 1885 Alamac Road, Lumberton, North Carolina (the “Facility”) to Jacob Branch⁴ and the Lumber River without a permit. AERP has not applied for coverage under an individual National Pollutant Discharge Elimination System (“NPDES”) permit or General Permit No. NCG210000 to Discharge Stormwater Under the National Pollutant Discharge Elimination System for Establishments Primarily Engaged in Lumber and Wood Products (“Lumber and Wood Products General Permit” or “General Permit”)⁵ issued by the North Carolina Department of Environmental Quality, Division of Energy, Mineral, and Land Resources (“DEMLR”). AERP’s failure to apply for an NPDES permit and its ongoing stormwater discharges without a permit violate sections 301(a) and 402 of the Act,⁶ and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

I. PERSONS RESPONSIBLE FOR VIOLATIONS

Active Energy Renewable Power is the party responsible for the violations alleged in this Notice,⁷ as defined by section 502(5) of the Clean Water Act.⁸ AERP is a wholly-owned subsidiary of Active Energy Group, PLC, incorporated in North Carolina in October 2018.

³ 33 U.S.C. §§ 1311(a), 1342.

⁴ Jacob Branch is also sometimes referred to as “Jacob Swamp,” “Jacob’s Swamp,” or “Jacob’s Branch.”

⁵ N.C. Division of Energy, Mineral, and Land Resources (“DEMLR”), General Permit No. NCG210000 to Discharge Stormwater Under the National Pollutant Discharge Elimination System for Establishments Primarily Engaged in Lumber and Wood Products (Aug. 1, 2018) [hereinafter Lumber and Wood Products General Permit] (Attachment 1). The Lumber and Wood Products General Permit became effective on August 1, 2018, and will expire on July 31, 2023.

⁶ 33 U.S.C. §§ 1311(a), 1342; *see* 33 U.S.C. § 1342(p) (requiring the establishment of industrial stormwater NPDES permits and of a permit application process).

⁷ Some permitting documents cited in this Notice Letter are issued to Lumberton Energy Holdings, LLC, which is a real estate holding corporation incorporated in North Carolina in February 2019 that is also wholly owned by Active Energy Group, PLC. Mr. Antonio Esposito, a recipient of this Notice Letter, holds the role of Chief Operating/Operations Officer in both Active Energy Group, PLC and AERP, and is a designated manager of Lumberton Energy Holdings, LLC. As used in this Notice Letter, “AERP” refers to the same corporate entity for which Lumberton Energy Holdings has entered into these transactions and permitting agreements, signed by Mr. Esposito. Renewable Logistics Systems, LLC is a company incorporated in North Carolina in 2015 and owned in part (30%) by Antonio Esposito’s wife, Lisa Esposito. Active Energy Group has described Renewable Logistics Systems as its joint venture partner in saw log operations in Lumberton until it was acquired by Active Energy Group to be consolidated into AERP in March 2020. Therefore, all saw log and sawmill activities are attributed to AERP in this document but should be considered inclusive of joint operations with Renewable Logistics Systems, LLC, as appropriate.

⁸ 33 U.S.C. § 1362(5).

AERP has owned the Facility since March 2019 and has been operating a sawmill on site since at least December 2019.⁹ AERP has operational control over the day-to-day industrial activities at the Facility and is responsible for managing stormwater in compliance with the Clean Water Act. If Winyah Rivers subsequently identifies additional persons as also being responsible for the violations set forth above, Winyah Rivers intends to include those persons in this action.

II. BACKGROUND

A. AERP's Facility and Surrounding Community

AERP's violations alleged in this Notice have occurred and continue to occur at its Facility located at 1885 Alamac Road, Lumberton, North Carolina. AERP purchased the Facility from Alamac American Knits in March 2019, with the intent to construct and operate a wood pellet manufacturing facility as well as other lumber operations. The industrial site on which the Facility is located includes 415,000 square feet of covered factory space and approximately 145 acres of surrounding land.¹⁰ The site, which is located within a 100-year flood zone,¹¹ sustained significant damage as a result of Hurricane Matthew in October 2016 and Hurricane Florence in September 2018,¹² and has otherwise been observed to flood during rainfall events. In fact, Alamac American Knits, which permanently closed operations on July 15, 2017,¹³ cited hurricane damage as one of the reasons for closing.¹⁴ Additionally, the property is a designated brownfields site where the groundwater and soil have been contaminated by toxic industrial solvents and is subject to special land use restrictions to contain these pollutants.¹⁵

The potential impact of this flooding and unpermitted pollution is particularly concerning in light of the location of the Facility. Robeson County, where the Facility is located, is one of

⁹ *Active Energy: Update on JV Lumber Activities at Lumberton*, MARKETSCREENER (Dec. 11, 2019) [hereinafter *Active Energy: Update*], <https://www.marketscreener.com/ACTIVE-ENERGY-GROUP-PLC-4007117/news/Active-Energy-Update-on-JV-Lumber-Activities-at-Lumberton-29711089/>; *Active Energy Group - Acquisition of 100% Interest of Lumber Activities*, RNS (Mar. 31, 2020) [hereinafter *AEG Acquisition*], <https://www.proactiveinvestors.com/LON:AEG/Active-Energy-Group-PLC/rns/801328>.

¹⁰ *Active Energy Group, AEG Lumberton Manufacturing Hub*, <https://www.aegplc.com/operations/lumberton-manufacturing-hub/> [hereinafter *Lumberton Manufacturing Hub*] (last accessed Aug. 5, 2020).

¹¹ See N.C. Floodplain Mapping Program, flood.nc.gov/ncflood/ (interactive mapping tool).

¹² See Lauren Ohnesorge, *N.C. Manufacturers Disclose 200 Layoffs in a Week*, TRIANGLE BUSINESS JOURNAL (May 22, 2017), <https://www.bizjournals.com/triangle/news/2017/05/22/n-c-manufacturers-disclose-200-layoffs-in-a-week.html>; N.C. Division of Water Resources ("DWR"), Minor Modification of NPDES Permit No. NC0004618, at 1 (Apr. 10, 2019) [hereinafter *Modification of NPDES Permit No. NC0004618*] (Attachment 2).

¹³ N.C. DWR, NPDES Permit Renewal Application No. NC0004618 (Jan. 15, 2019) (Attachment 3).

¹⁴ See Ohnesorge, *supra* note 12.

¹⁵ N.C. Division of Waste Management ("DWM"), Notice of Brownfields Property 06001 (Mar. 1, 2006) (Attachment 4). This site is a brownfield with historic groundwater contamination of benzene, dichloroethene, trichloroethene, tetrachloroethene, and vinyl chloride and soil contamination of tetrachloroethene and benzopyrene. *Id.*; see also N.C. DWM, Land Use Restrictions ("LUR") Update for Project 06001-02-078 (Dec. 17, 2019) (acknowledgment of Land Use Restriction signed by Antonio Esposito for Lumberton Energy Holdings, LLC) (Attachment 5).

the most racially diverse areas in the state,¹⁶ and also ranked the worst in the state for overall health outcome and health factors.¹⁷ Within a two-mile radius of the Facility, the population is 56% Black or African American and 13% American Indian, and Robeson County is home to the Lumbee Tribe—the largest tribe east of the Mississippi River.¹⁸ In addition to the AERP Facility, other sources of pollution within a two-mile radius of the Facility include 33 stormwater permits, 6 wastewater treatment facility permits, 2 coal ash structural fills, and 2 hazardous waste sites, among many others.¹⁹ AERP's Clean Water Act violations must be remedied to protect this at-risk area and prevent the people who live there from suffering the deleterious effects on water quality of AERP's unpermitted industrial discharges.

B. Lumber River and Jacob Branch

The Facility is situated between the Lumber River and Jacob Branch, a tributary that enters the Lumber River southeast of the Facility. As detailed more below, stormwater flows from the Facility into a conveyance that discharges into Jacob Branch and subsequently into the Lumber River.²⁰ Upon information and belief, the industrial stormwater is being discharged to Jacob Branch and the Lumber River through at least one discrete outfall, located approximately at the following GPS coordinates: 34.589170, -79.005280.²¹

¹⁶ See Report from Robeson Cnty. Cmty. Org. & Outreach Comm., to N.C. DEQ, Sec'y Envtl. Just. & Equity Bd. re: Cumulative Impacts in Robeson County (Aug. 21, 2019) ("Robeson County is the most racially diverse rural county in the United States[.]") (Attachment 6); Chris Kolmar, *Most Diverse Cities in North Carolina for 2020*, HOMESNACKS (Dec. 27, 2019), <https://www.homesnacks.net/most-diverse-cities-in-north-carolina-128933/> (ranking Lumberton at second most diverse city in North Carolina).

¹⁷ N.C. Division of Air Quality ("DAQ"), Active Energy Renewable Power Environmental Justice Snapshot at 15 [hereinafter Environmental Justice Snapshot], <https://files.nc.gov/ncdeq/EJ/Active-ERP-EJ-Snapshot-.pdf>; see also N.C. Dep't of Commerce, *County Distress Rankings (Tiers)*, <https://www.nccommerce.com/grants-incentives/county-distress-rankings-tiers> (last visited Mar. 24, 2020); ROBERT WOOD JOHNSON FOUND., NORTH CAROLINA COUNTY HEALTH RANKINGS & ROADMAPS: ROBESON COUNTY (2020), <https://www.countyhealthrankings.org/app/north-carolina/2020/rankings/robeson/county/factors/overall/snapshot>.

¹⁸ Environmental Justice Snapshot at 6, 8. The Lumber River (or "Lumbee River"), from which the Lumbee take their name, and the area around the river "are vital to the sustainability of the Lumbee people." Lumbee Tribe of North Carolina, Tribal Ordinance CLLO-2020-0227002 Establishing the Agriculture/Natural Resources Subcommittee (Feb. 27, 2020), <https://www.lumbeetribe.com/tribal-ordinances>.

¹⁹ Environmental Justice Snapshot at 18.

²⁰ See, e.g., N.C. DEMLR, General Permit No. NCG170133 Certificate of Coverage (Nov. 29, 2016) [hereinafter Alamac Certificate of Coverage No. NCG170133] (Attachment 7). The certificate of coverage issued to the site's prior tenant, Alamac American Knits (also, Alamac Investors), under the Textile General Permit (NCG170000) specifically identified that stormwater from the industrial site drains to Jacob Branch. Although this certificate of coverage was transferred from Alamac American Knits to Lumberton Energy Holdings (for AERP), coverage under the North Carolina NPDES stormwater general permit for textile manufacturing facilities does not cover or otherwise authorize discharges from AERP's sawmill and other timber operations. Such operations must be separately authorized by North Carolina's Lumber and Wood Products General Permit, as discussed in more detail below.

²¹ See N.C. DEMLR, *NPDES Stormwater Permit Summary for Permit No. NCG170133* (last accessed Aug. 2, 2020) [hereinafter NPDES NCG170133 Permit Summary] (providing this GPS location for the Facility's stormwater discharges under the Textile General Permit) (Attachment 8). The Facility also has two wastewater outfalls identified in a NPDES wastewater discharge permit for Alamac American Knits: one outfall that discharges directly

The North Carolina Department of Environmental Quality, Division of Water Resources (“DWR”) classifies the Lumber River and Jacob Branch in the area near the Facility as Class C surface waters and Swamp Waters. Class C surface waters are protected by state water quality standards and must remain in a condition suitable for aquatic life propagation and maintenance of biological integrity, wildlife, fishing, and secondary recreation, which includes wading, boating, and other uses not involving frequent human body contact with water. 15A N.C. Admin. Code 02B .0211(1); 15A N.C. Admin. Code 02B .0202. To the extent AERP’s unpermitted industrial discharges preclude any of these uses of Jacob Branch or the Lumber River on either a short-term or long-term basis, AERP is also causing a violation of the water quality standards. 15A N.C. Admin. Code 02B .0211(2).

Moreover, in 1998, the Lumber River was federally designated as a Wild and Scenic River, and the portion of the river into which AERP’s discharges flow is designated as recreational. *See* 63 Fed. Reg. 53,695 (Oct. 6, 1998) (Wild and Scenic Rivers Approval for Lumber River). The Lumber River is also included in the North Carolina Natural and Scenic River System, meaning that the North Carolina General Assembly has deemed it to “possess outstanding natural, scenic, educational, geological, recreational, historic, fish and wildlife, scientific and cultural values of great present and future benefit to the people.” N.C. Gen. Stat. § 143B-135.142. The section of the river that flows by the Facility, upstream of the junction of the Lumber River and Jacob Branch is classified as recreational; while the portion downstream of the junction of the Lumber River and Jacob Branch (i.e., the area immediately downstream of AERP’s stormwater discharges) is classified as natural. N.C. Gen. Stat. § 143B-135.154. Natural river areas “are free of man-made impoundments and generally inaccessible except by trail, with the lands within the boundaries essentially primitive and the waters essentially unpolluted.” N.C. Gen. Stat. § 143B-135.148. It is the policy of the State that the Lumber River’s natural condition be maintained. N.C. Gen. Stat. § 143B-135.142.

C. Sawmill Operations

AERP is currently operating a sawmill at the Facility to produce lumber and railroad ties for sale and to compile feedstock materials, such as wood chips, bark, and sawdust, for its future pellet manufacturing.²² As illustrated in Figure 1 below, the lumber and other raw feedstock

into the Lumber River, and a second outfall that discharges into Jacob Branch. *See* Modification of NPDES Permit No. NC0004618 at PDF 13 (map). Beyond the GPS coordinates provided in the *NPDES Stormwater Permit Summary*, the exact locations of any additional existing stormwater discharges from the Facility are known only to AERP. This letter provides notice of industrial stormwater being discharged through the identified outfall, as well as any other Facility outfalls not currently known to Winyah Rivers.

²² *Lumberton Manufacturing Hub*, *supra* note 10 (stating that “saw logging and saw mill operations creating future feedstock for CoalSwitch™” are already underway at the Facility); *see also* Email from Heather Carter, Regional Supervisor, N.C. DAQ, to Heather Hillaker, Attorney, Southern Environmental Law Center (Mar. 24, 2020) (confirming that AERP has commenced operations of sawmill, wood chipping, and board manufacturing at the Facility, and that AERP plans to store up to 1,000 tons of woodchips in piles outside the Facility) (Attachment 9); SP Angel, *Spec Sits Research: Active Energy Group Plc Lumber Operations Potential* (June 17, 2020), <https://www.aegplc.com/wp-content/uploads/2020/06/SP-Angel-180620.pdf>. The presence of whole logs and large

materials, including reduced-sized woody materials, are stored in open piles on site, exposing them to rain fall and other precipitation.²³

Figure 1: Storage of Woody Materials at the Facility²⁴



Sawmill operations at the Facility reportedly commenced by at least December 11, 2019,²⁵ and the sawmill remains fully operational today. As of June 22, 2020, production at the Facility was at 70% to 80% of sawmill capacity over the prior 60 days.²⁶ AERP has indicated that the sawmill is meeting weekly production targets—which range at between 850 and 950 rail

feedstock piles on site has also been visually confirmed by Winyah Rivers and, on May 9, 2020, by Elizabeth Rasheed (Attorney at the Southern Environmental Law Center).

²³ See *Lumberton Manufacturing Hub*, *supra* note 10.

²⁴ *Id.* Screenshots of photographs of AERP's sawmill operations and storage of feedstock materials provided on Active Energy Group's webpage are attached to this letter as Attachment 10.

²⁵ *Active Energy: Update*, *supra* note 9 (stating that sawmill operations have commenced as of the date of the article, December 11, 2019); see *AEG Acquisition*, *supra* note 9 (stating that sawmill operations "commenced in late 2019").

²⁶ Anna Farley, *Active Energy Raises GBP800,000 to Develop Lumberton Sawmill*, ALLIANCE NEWS (June 22, 2020), https://www.morningstar.co.uk/uk/news/AN_1592820197760946900/active-energy-raises-gbp800000-to-develop-lumberton-sawmill.aspx.

ties, as well as between 25,000 and 30,000 board feet of lumber, plus more than 200 metric tons of sawmill chips and residuals.²⁷

D. Future Wood Pellet Mill

As noted above, AERP purchased the Facility with the intent to construct a wood pellet mill to manufacture CoalSwitchTM, a “black pellet” that will be produced using a “steam explosion” manufacturing process that has not yet been proven to be commercially viable. On August 3, 2020, AERP received a permit from the North Carolina Department of Environmental Quality, Division of Air Quality (“DAQ”) authorizing the construction of this wood pellet mill.²⁸

According to AERP’s description of the steam explosion process, AERP plans to use well water in a water-cooled tube and shell condenser to condense and capture the water vapor and volatile organic compounds that result from the wood pellet manufacturing process.²⁹ The non-contact well water will be discharged to the Facility’s on-site wastewater treatment plant and subsequently discharged into the Lumber River and/or Jacob Branch.³⁰ In addition to non-contact well water discharges, AERP also indicated that wastewater separated from the volatile organic compound condensate may also be discharged via the facility’s wastewater treatment plant.³¹

While AERP has represented to DAQ that the pellet mill will be relatively small, with a maximum throughput capacity of 43,800 tons per year, it will not stay that way for long. AERP has indicated to its investors, that it intends to scale up production tenfold soon after the facility is operational, targeting a production of 400,000 metric tons of pellets per year; indeed, the company has already secured future feedstock contracts to make that high level of production possible.³² As the wood pellet mill expands production, the wastewater streams from the

²⁷ *Id.*

²⁸ N.C. DAQ, Air Permit No. 10636R00 (Aug. 3, 2020), <https://files.nc.gov/ncdeq/Air%20Quality/permits/active-energy/7800242-Final-Permit-R00.pdf>.

²⁹ See N.C. DAQ, Draft Application Review for Draft Permit No. 10636R00 for Active Energy Renewable Power at 2 [hereinafter AERP Draft Air Permit Review], https://files.nc.gov/ncdeq/Air%20Quality/permits/2020_public_notice_documents/draft_reviews/Active-Energy-Permit-Review-7800242--20200115.pdf; AERP, Air Permit Request for all the Proposed Air Emission Sources at Section 2.0 (Oct. 31, 2019), https://files.nc.gov/ncdeq/Air%20Quality/permits/2020_public_notice_documents/public_notices/Active-Energy-Permit-Application-20191104.pdf.

³⁰ AERP Draft Air Permit Review at 2. The AERP Draft Air Permit Review erroneously identifies the wastewater as discharging into the Cape Fear River when the industrial outfalls for the Facility actually discharge into the Lumber River and Jacob Branch. See Modification of NPDES Permit No. NC0004618 at PDF 13 (map).

³¹ See AERP Draft Air Permit Review at 2 (stating that “the condensed organic liquids [can be] separated and sold, with the separated water processed through the facility’s wastewater treatment plant, then discharged”).

³² See *Lumberton Manufacturing Hub*, *supra* note 10; see also Active Energy Group, Transforming Low-Cost Biomass into High-Value Efficient Fuel at Slide 10 (Apr. 2019), <https://www.aegplc.com/investors/corporate-documents/> (download available: Corporate Presentation April 2019) (setting 2021 target date for achieving 400,000 metric tons per year production); Active Energy Group PLC, Interim Report and Unaudited Condensed Financial Statements for the Six Months Ended 30 June 2019, at 3 (Sept. 25, 2019) [hereinafter AEG Interim Report],

manufacturing process will also increase, discharging even more pollutants into Jacob Branch and the Lumber River.

III. CLEAN WATER ACT VIOLATIONS: DISCHARGES OF INDUSTRIAL STORMWATER WITHOUT AN NPDES PERMIT

The Clean Water Act prohibits the discharge of pollutants to the “waters of the United States” except in accordance with a valid NPDES permit issued by the U.S. Environmental Protection Agency (“EPA”) or an authorized state.³³ Section 502 of the Act defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source,”³⁴ and defines “point source” as “any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged.”³⁵ The Act defines “pollutant” to include “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 . . . waste discharged into water.”³⁶

Section 301(a) of the Clean Water Act, in combination with section 402(p), prohibits “stormwater discharges” “associated with industrial activity” that are not authorized by an NPDES permit.³⁷ EPA defines “storm water associated with industrial activity” to include stormwater discharges associated with industries categorized within Standard Industrial Classification (“SIC”) Code prefix 24. 40 C.F.R. § 122.26 (b)(14)(ii). SIC Code prefix 24 covers sawmills and other facilities like AERP’s Facility that handle, store, process, or otherwise manufacture timber products.³⁸ Stormwater discharges associated with sawmills and other facilities like AERP’s Facility must therefore be covered by either an individual NPDES permit or an appropriate NPDES general permit covering the specific industrial discharges. In North

<https://www.aegplc.com/investors/corporate-documents/> (download available: Half-Yearly Report 2019). AERP already has contracts in place to obtain 800,000 metric tons of feedstock per year for the next five years once pellet production commences. AEG Interim Report at 2.

³³ See 33 U.S.C. §§ 1311(a), 1342.

³⁴ 33 U.S.C. § 1362(12).

³⁵ 33 U.S.C. § 1362(14).

³⁶ 33 U.S.C. § 1362(6).

³⁷ 33 U.S.C. §§ 1311(a), 1342(p).

³⁸ The applicable SIC code for sawmills and planing mills is 2421. Wood pellet manufacturing facilities are also covered under the Lumber and Wood Products General Permit, with SIC Code 2499. See, e.g., N.C. DEMLR, Notice of Permit Coverage Renewal Letter for NCG 210000 for Enviva Pellets Sampson (No. 210450) (Mar. 23, 2017); N.C. DEMLR, Notice of Permit Coverage Renewal Letter for NCG 210000 for Enviva Pellets Ahoskie, LLC (No. 210420) (June 1, 2018); N.C. DEMLR, Notice of Permit Coverage Renewal Letter for NCG 210000 for Enviva Pellets Northampton (No. 210428) (June 1, 2018). These documents may be accessed at:

<https://edocs.deq.nc.gov/WaterResources/Browse.aspx?id=265693&repo=WaterResources>. Accordingly, both AERP’s current operations and proposed future operations fall within the scope of industrial activities for which associated stormwater is regulated under the Clean Water Act and an NPDES permit is required. See 33 U.S.C. §§ 1311, 1342(p); 40 C.F.R. § 122.26(b)(14)(ii).

Carolina, the Lumber and Wood Products General Permit (NCG210000) applies to owners and operators of stormwater discharges with operations under SIC Code prefix 24 like AERP.³⁹

AERP has violated and is violating sections 301(a) and 402 of the Clean Water Act and their implementing regulations by: (1) discharging pollutants and stormwater associated with industrial activity from point sources at the Facility without authorization of an NPDES permit; and (2) failing to apply for coverage under an individual or general NPDES permit for such discharges.

A. AERP Is Violating the Clean Water Act by Discharging Industrial Stormwater to Waters of the United States without a Permit.

Since at least December 11, 2019, AERP has operated and continues to operate a sawmill at the Facility. These operations fall under SIC Code prefix 24, meaning that AERP's operations constitute industrial activities that require coverage under an NPDES individual or general permit for stormwater discharges.⁴⁰ AERP does not have an individual permit or coverage under North Carolina's Lumber and Wood Products General Permit for the Facility's industrial stormwater discharges associated with its sawmill and timber operations.

As part of its sawmill and timber operations, AERP stores raw wood and other feedstock materials in open piles outside. The Facility is therefore generating and exposing industrial pollutants to stormwater by, at a minimum: receiving, storing, processing, and transporting logs, wood, mulch, woodchips, sawdust, bark, and other woody materials outside or otherwise exposing them to the elements.⁴¹ The Facility is also exposing industrial pollutants to stormwater through equipment left outdoors and from vehicles driving on and off the Facility. During precipitation events, these pollutants are conveyed to at least one discrete outfall that discharges to Jacob Branch, then into the Lumber River.⁴² AERP is therefore discharging industrial stormwater into "waters of the United States" without a permit required under section 402 of the Clean Water Act.⁴³

AERP's sawmill activities caused and continue to cause the discharge of pollutants, within the meaning of section 502(12),⁴⁴ and its stormwater discharges are "associated with industrial activity," within the meaning of 40 C.F.R. § 122.26(b)(14). Because these discharges

³⁹ See Lumber and Wood Products General Permit at 1. The only exceptions to coverage under the General Permit for SIC Code 24 are facilities primarily engaged in Logging - SIC 2411, manufacturing Wood Kitchen Cabinets - SIC 2434, and Wood Preserving - SIC 2491. *Id.*

⁴⁰ See 33 U.S.C. §§ 1311, 1342(p); 40 C.F.R. § 122.26(b)(14)(ii).

⁴¹ This constitutes "raw materials, intermediate products, final products, by-products, or waste products" within the meaning of the Lumber and Wood Products General Permit. Lumber and Wood Products General Permit at 1.

⁴² The stormwater outfall for the Facility has previously been documented by former owners, Alamac American Knits. See, e.g., Alamac Certificate of Coverage No. NCG170133; NPDES NCG107133 Permit Summary.

⁴³ 33 U.S.C. § 1342.

⁴⁴ 33 U.S.C. § 1342(12).

have and continue to occur without a permit under section 402,⁴⁵ AERP is violating section 301(a) of the Clean Water Act.⁴⁶

B. AERP Is Violating the Clean Water Act by Failing to Apply for NPDES Permit Coverage.

As discussed in more detail above, AERP is engaged in sawmill and other timber operations at the Facility that fall within SIC Code prefix 24. Several ongoing activities at the AERP Facility contribute to stormwater pollution, including the storage of whole logs, woodchips, and sawdust piles outside. AERP is therefore engaged in industrial activity requiring coverage by either an NPDES individual permit or relevant general permit for its industrial stormwater discharges, pursuant to section 402 of the Clean Water Act.⁴⁷

In North Carolina, if a sawmill, wood chipping, or wood pellet mill facility does not have an individual NPDES permit, then it must be covered under the Stormwater General Permit for Lumber and Wood Products before discharging industrial stormwater.⁴⁸ The Lumber and Wood Products General Permit limits the levels of pollutants in stormwater that can be discharged from facilities that have wood chipping operations and large sawdust piles, including oxygen-consuming pollutants, suspended solids, toxic metals, and dissolved solids.⁴⁹

To be eligible to discharge its Facility's stormwater, AERP must submit a "notice of intent" for coverage under the Lumber and Wood Products General Permit to discharge pursuant to the general permit to DEMLR. 40 C.F.R. § 122.28(b)(2); 15A N.C. Admin. Code 02H.0127(h). The notice of intent must provide, among other things, a "description of the type of discharge and its characteristics," outfall locations, identification and classification of the receiving waters, and "other information . . . necessary to determine the impacts of the discharge and its eligibility for the general permit." 15A N.C. Admin. Code 02H .0127(i). In North Carolina, discharging can only commence after DEMLR has reviewed the notice of intent and issued a certificate of coverage to the permittee. *See* 15A N.C. Admin. Code 02H .0127(k).⁵⁰ AERP has failed to file a notice of intent and therefore is not covered by the Lumber and Wood Products General Permit, nor has AERP applied for an individual NPDES permit for its industrial stormwater discharges.⁵¹

⁴⁵ 33 U.S.C. § 1342.

⁴⁶ 33 U.S.C. § 1311(a).

⁴⁷ 33 U.S.C. § 1342.

⁴⁸ *See* Lumber and Wood Products General Permit at 1.

⁴⁹ N.C. DEMLR, Fact Sheet: General Permit NCG210000, at 1 (Apr. 13, 2018) (Attachment 11).

⁵⁰ DEMLR can require a discharger seeking a certificate of coverage to instead apply for an individual permit for a variety of reasons, and any interested person can petition DEMLR to take action to require an individual NPDES permit. 40 C.F.R. § 122.28(b)(3); 15A N.C. Admin. Code 02H .0127(o), (p).

⁵¹ A thorough search of DEMLR's online permitting database revealed no evidence that AERP has submitted a notice of intent or an application for an individual permit. Conversations with DEMLR staff also confirmed that AERP has not submitted a notice of intent or application. *See* Email from Robert Johnson, Public Records Officer, DEMLR, to Elizabeth Rasheed, Attorney, Southern Environmental Law Center (June 10, 2020) (Attachment 12);

AERP has therefore violated and continues to violate sections 301(a) and 402,⁵² and 40 C.F.R. §§ 122.26(c)(1) and (e)(1), by failing to apply for and obtain coverage under an individual NPDES permit or the Lumber and Wood Products General Permit for its industrial stormwater discharges from its sawmill and related activities.

C. Even If AERP Were Covered by the Lumber and Wood Products General Permit, It Would Be Violating the Permit Terms.

As a discharger of stormwater associated with industrial activity, AERP was required to obtain coverage under an NPDES permit prior to discharging its stormwater. It did not, which is a violation of the Clean Water Act. However, even if the Facility were covered under the North Carolina Lumber and Wood Products General Permit, AERP is violating several of its terms.⁵³

i. AERP has not produced or implemented a Stormwater Pollution Prevention Plan for the Facility.

As a prerequisite to obtaining coverage under the Lumber and Wood Products General Permit, AERP's sawmill must prepare, make available, and implement a Stormwater Pollution Prevention Plan ("SPPP").⁵⁴ The SPPP must contain, among other things, a general site description, including a general location map identifying the location of the Facility and all receiving waters; a site map depicting the stormwater outfalls; a narrative description of potential pollution sources; a stormwater management strategy describing control measures and best management practices; and schedules and procedures for implementation of control measures, monitoring, preventative maintenance, and inspections.⁵⁵ The SPPP must identify potential sources of pollution that may be expected to contribute to contamination of stormwater discharges, and must describe and ensure implementation of a stormwater management strategy using best practices to minimize the discharge of pollutants in industrial stormwater associated with the Facility and that assure compliance with the other terms and conditions of the General Permit.⁵⁶

In addition to obtaining coverage under an NPDES permit, and assuming it does so by seeking coverage under the Lumber and Wood Products General Permit, AERP must develop

see also Email from Sarah Bilski, Public Records Officer, DWR, to Heather Hillaker, Attorney, Southern Environmental Law Center (Mar. 6, 2020) (stating that "address, 1885 Alamac Road, has one active permit associated with it: NCG170133") (Attachment 13).

⁵² 33 U.S.C. §§ 1311, 1342.

⁵³ As an industrial stormwater discharger, AERP must either comply with an individual NPDES permit or a general permit. This section discusses the compliance requirements of the Lumber and Wood Products General Permit. If AERP elects to seek coverage under an individual NPDES permit instead, the conditions of that individual permit would be at least as strict as those of the General Permit, thus AERP would still be required to comply with all of the following.

⁵⁴ *See* Lumber and Wood Products General Permit at Part II.A. The SPPP is public information. *Id.*

⁵⁵ *See id.*

⁵⁶ *See id.*

and implement an SPPP in accordance with the Clean Water Act, its regulations, and the General Permit requirements.⁵⁷

ii. AERP is not complying with the General Permit's qualitative and analytical monitoring and reporting requirements.

The Lumber and Wood Products General permit requires industrial discharges to comply with a number of monitoring, recordkeeping, and reporting requirements to ensure that the facility's industrial stormwater discharges do not cause or contribute to violations of North Carolina Water Quality Standards, and that the discharges authorized by the General Permit meet applicable water quality certification requirements as outlined in 15A N.C. Admin. Code 02H .0500.⁵⁸ Specifically, the General Permit requires the industrial discharger to conduct semi-annual qualitative and analytical monitoring, retain monitoring data, and, for analytical monitoring, submit a Discharge Monitoring Report to DWR.⁵⁹ Upon information and belief, AERP has not completed this monitoring.

Under the General Permit, industrial dischargers must perform qualitative monitoring semi-annually.⁶⁰ Such monitoring includes a visual inspection of the stormwater outfalls in order to evaluate the effectiveness of the SPPP and evaluate any new sources of stormwater pollution.⁶¹ The relevant qualitative monitoring parameters include: color, odor, clarity, floating and suspended solids, foam, oil sheen, erosion or deposition at the outfall, and other obvious indicators of stormwater pollution.⁶²

The General Permit also requires semi-annual analytical monitoring for facilities with accumulations of reduced-size woody materials, such as sawdust, wood chips, bark, or mulch, that remain exposed for more than seven days.⁶³ Analytical monitoring is conducted to determine compliance with specific benchmark values for chemical oxygen demand, total suspended solids, and total rainfall.⁶⁴ Under the analytical monitoring requirement, the industrial discharger must: perform analytical monitoring on stormwater discharges; respond to exceedances of numerical benchmark values; keep records of the monitoring results and its response actions; and report the monitoring results.⁶⁵ The results of this monitoring must be timely reported to both DEMLR and DWR using the Discharge Monitoring Report forms available on the DEMLR website.⁶⁶

⁵⁷ See 33 U.S.C. §§ 1331(a), 1342(p); Lumber and Wood Products General Permit at Part II.A.

⁵⁸ See Lumber and Wood Products General Permit at Part I.B.

⁵⁹ See *id.* at Parts II.B (analytical monitoring), II.C (qualitative monitoring), III.D (monitoring and recordkeeping), III.E (reporting requirements).

⁶⁰ *Id.* at II.C.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at II.B.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at Part III.E.

Though AERP stores accumulations of reduced-size woody materials in open piles for more than seven days, it has conducted no analytical monitoring as required under the Lumber and Wood Products General Permit. Moreover, upon information and belief, AERP has also failed to conduct the required semi-annual qualitative monitoring, and has otherwise failed to submit monitoring reports to DEMLR and DWR as required by Parts II and III of the General Permit. Accordingly, even if AERP were covered by the General Permit, it would not be in compliance with the permit terms. AERP must promptly obtain coverage under an NPDES permit and comply with its terms to avoid further Clean Water Act violations.

D. These Stormwater Violations Have Occurred at Least Since December 11, 2019, and Are Ongoing.

Each day on which AERP operates its sawmill without NPDES permit coverage and discharges stormwater without an NPDES permit is a separate and distinct violation of sections 301(a) and 402 of the Clean Water Act and their implementing regulations.⁶⁷

Since AERP commenced sawmill operations at the Facility, AERP has illegally discharged stormwater without a permit at least on each and every day there has been a measurable precipitation event over 0.1 inches.⁶⁸ The Rainfall Tables provided in Appendix A list the dates on which there was measurable precipitation of over 0.1 inches since AERP commenced its sawmill operations at the Facility. Because AERP has been operating its sawmill since at least December 11, 2019, it has been discharging stormwater without permit coverage for a total of at least 81 days⁶⁹ in violation of sections 301(a) and 402.⁷⁰

If AERP obtains permit coverage after receiving this letter but fails to fully comply with the requirements of the Lumber and Wood Products General Permit (or an individual permit)—including failing to produce or implement an SPPP and failing to meet the permit’s qualitative and analytical monitoring and reporting requirements—each day that the Facility fails to comply with its permit will constitute a separate day of violation with respect to each unmet condition of that permit.

AERP is liable for the above-described violations occurring prior to the date of this letter and for every day that these violations continue after the date of this letter. In addition, to the extent Winyah Rivers obtains evidence after the date of this letter of additional violations based on the same or similar pattern as the violations set forth above, this letter provides notice. These

⁶⁷ 33 U.S.C. §§ 1311(a), 1342; *see* 33 U.S.C. § 1319 (civil penalties assessed per day per violation).

⁶⁸ EPA has determined that precipitation greater than 0.1 inches in a 24-hour period constitutes a measurable precipitation event for the purposes of evaluating stormwater runoff associated with industrial activity. *See, e.g.*, 40 C.F.R. § 122.26(c)(1)(i)(E)(6) (using 0.1 inches as the distinguishing threshold of a storm event).

⁶⁹ The rain dates in the table are all the days when over 0.1 inch rain was observed at the nearest weather stations to 1885 Alamac Road. Rain data was accessed from the National Oceanic and Atmospheric Administration. *Climate Data Online Search*, Nat’l Oceanic & Atmospheric Admin., <https://www.ncdc.noaa.gov/cdo-web/search> (last visited Aug. 10, 2020) (Appendix A). The rain gauges used are located in Lumberton, North Carolina.

⁷⁰ 33 U.S.C. §§ 1311(a), 1342.

violations are ongoing and continuous, and unless AERP obtains coverage under and complies with an NPDES permit, these violations will continue.

IV. TO AVOID DISTINCT CLEAN WATER ACT VIOLATIONS RELATED TO ITS WASTEWATER, AERP MUST OBTAIN AN NPDES PERMIT FOR ITS WASTEWATER DISCHARGES.

An additional issue of concern relates to AERP's intended operations of a wood pellet manufacturing facility and its compliance with the Clean Water Act. Although AERP appears to intend to begin wood pellet manufacturing,⁷¹ it has not applied for or obtained coverage under an NPDES permit for the wastewater discharges that will result from the wood pellet mill. AERP must obtain an NPDES permit for its wastewater discharges prior to commencing manufacturing operations. Winyah Rivers urges AERP to immediately apply for an NPDES wastewater discharge permit in order to avoid additional Clean Water Act violations once the wood pellet mill commences operations.

As noted, the Clean Water Act prohibits the discharge of a pollutant into the waters of the United States without an NPDES permit.⁷² Based on AERP's descriptions of its steam explosion manufacturing process, the wood pellet mill is expected to at least discharge non-contact cooling water into the nearby Jacob Branch and Lumber River through two discrete wastewater outfalls.⁷³ Additional wastewater discharge is also possible in the form of the volatile organic compound condensate or water extracted from such condensate, which is produced during the steam explosion process. Each of these constitutes the discharge of a "pollutant" within the meaning of section 502 of the Act.⁷⁴ AERP must therefore apply for an NPDES permit prior to discharging its wastewater and will be in further violation of the Clean Water Act if it fails to do so.

The well water at the Facility, which according to AERP will be the source of the non-contact cooling water, is heavily contaminated by chemical pollutants. As stated in the 2006 Notice of Brownfields Property, the groundwater at the Facility is contaminated with chlorinated solvents and volatile organic compounds from former dry cleaning operations at the site, including benzene, dichloroethene, trichloroethene, tetrachloroethene, and vinyl chloride.⁷⁵

⁷¹ See Air Permit No. 10636R00.

⁷² 33 U.S.C. §§ 1311(a), 1342.

⁷³ Two wastewater outfalls for the Facility have been identified in a NPDES permit for Alamac American Knits, the prior owner of the industrial site. Those permitting documents identify the wastewater outfalls at the following GPS coordinates: Outfall 001 to the Lumber River, located at approximately 34° 36' 32.6", -79° 0' 32.2"; Outfall 002 to Jacob Swamp, located at approximately 34° 35' 13.7", -79° 0' 12.4". See Modification for NPDES Permit No. NC0004618 at PDF 13 (map).

⁷⁴ 33 U.S.C. § 1362(6) (defining "pollutant" to include "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 . . . waste discharged into water").

⁷⁵ Notice of Brownfields Property 06001, at 2-3. Because AERP has failed to apply for an NPDES permit for its wastewater discharges, it is unclear exactly where the well water will come from on the site. Regardless, because the site has been designated as a Brownfield, AERP must comply with the additional land-use restrictions imposed on the property under N.C. Gen. Stat. § 130A-310.35. These Brownfields restrictions specifically require that "no

Statements made by AERP to its investors indicate that AERP intends to commence operation of the wood pellet mill shortly after receiving a final air quality permit from DAQ.⁷⁶ The final air permit was issued on August 3, 2020. Despite the fact that AERP intends to discharge polluted wastewater into Jacob Branch and the Lumber River in the apparent near future, AERP has not applied for nor is covered by an NPDES permit as required by the Clean Water Act for its wood pellet manufacturing wastewater discharges.⁷⁷ Before AERP can obtain an NPDES permit for its wastewater, the Division of Water Resources must complete the permitting process including at least a 45-day notice period and the opportunity for the public to request a public hearing. *See* N.C. Gen. Stat. § 143-215.1. AERP must not begin its wood pellet operations prior to obtaining an NPDES permit. Winyah Rivers urges AERP to immediately take steps to obtain a valid NPDES permit and prevent these future Clean Water Act violations.

V. PERSONS GIVING NOTICE

Winyah Rivers Alliance is a not-for-profit environmental organization headquartered in Conway, South Carolina. The mission of Winyah Rivers Alliance is to protect, preserve, monitor and revitalize the health of the lands and waters of the greater Winyah Bay Watershed (encompassing the watersheds of the Lumber, Pee Dee, Lynches, Black, and Waccamaw Rivers). Winyah Rivers encompasses the Lumber Riverkeeper® Program, and it works to protect the Lumber River basin, as well as the entire Winyah Bay Watershed, so that swimmers, fishers,

activities that encounter, expose, remove or use groundwater” on the developed half of the property may occur “without such prior sampling and analysis of groundwater as DENR [now, Department of Environmental Quality (“DEQ”)] may require and submittal of the analytical results to DENR.” Notice of Brownfields Property 06001, at 4-5. If the results reveal “contamination in excess of North Carolina’s groundwater quality standards,” then the proposed activities cannot occur without DEQ’s approval, subject to conditions that DEQ may impose. *Id.* at 5. Currently, the only approved use for any groundwater at the developed half of the property is only for process wastewater in the manufacture of textiles. *Id.* at 4.

⁷⁶ *See, e.g.,* SP Angel, *Spec Sits Research: Active Energy Group Plc, NC DAQ Air Permit 10636R00 Issued* (Aug. 4, 2020), https://www.aegplc.com/wp-content/uploads/2020/08/AEG_04082020_Note.pdf (“The target is to produce CoalSwitch™ biomass black pellets by year-end 2020.”); Michael Rowan, *Active Energy Group – Full Year Results* at 04:23 (June 1, 2020), <https://www.brrmedia.co.uk/broadcasts-embed/5e611a7a9672d83b987776d1/event/?livelink=true&popup=true> (stating that Active Energy Group expects to have the CoalSwitch plant “up and running this year”); Allenby Capital, *Company Note: Active Energy Group plc* at 10 (June 1, 2020), <https://www.aegplc.com/investors/research/> (download available: Allenby Capital Research) (stating that construction of the pellet plant “is expected to take around three to four months to complete”).

⁷⁷ Alamac American Knits, the prior owner of the Facility, held an NPDES permit (NC0004618) for its wastewater discharges. Although this NPDES permit was transferred to Lumberton Energy Holdings (i.e., AERP) in April 2019, the transfer document explicitly states that the permit does not cover wastewater discharges that will result from AERP’s wood pellet manufacturing operations. *See* Modification of NPDES Permit No. NC0004618 at Permit Cover Sheet. At the time the permit was transferred to AERP, a new condition was added to specifically require that: “Prior to any resumption of discharge, the permittee must provide the Division with an updated renewal application to document the change in wastewater characteristics, as well as an updated analysis of alternatives to wastewater discharge.” *Id.* at Part I, p. 10. A thorough review of DWR’s electronic database indicates that AERP has not submitted an updated application or relevant documentation to DWR. This was also confirmed by DEQ staff on August 5, 2020. *See* Email from Elizabeth Rasheed, Attorney, Southern Environmental Law Center, to Sergei Chernikov, Acting Supervisor, NPDES Industrial Permitting, DWR (Aug. 5, 2020) (memorializing phone conversation) (Attachment 14).

boaters, and other people can enjoy and use the watershed and its rivers and streams. Winyah Rivers achieves its mission by educating the public, advocating for sound public policies, and participating, where necessary, in legal and administrative proceedings.

Winyah Rivers has approximately 400 members throughout the Winyah Bay Watershed, including members who reside near or otherwise use and enjoy the Lumber River downstream of the Facility. The quality of the Lumber River and its tributary Jacob Branch affect the recreational, aesthetic, cultural, and environmental interests of Winyah Rivers' members, and the violations identified above have negatively impacted these interests.

As required by 40 C.F.R. § 135.3(a), the name, address, and telephone number of the person giving notice of intent to sue are:

Christine Ellis, Executive Director
Winyah Rivers Alliance
P.O. Box 554 (301 Allied Drive)
Conway, SC 29528
843-349-4007

VI. IDENTIFICATION OF LEGAL COUNSEL

Winyah Rivers is represented by legal counsel in this matter. Pursuant to 40 C.F.R. § 135.3(c), the contact information for those providing legal counsel at the Southern Environmental Law Center are as follows:

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VII. NOTICE OF INTENT TO SUE

As described above, AERP has been, and continues to be, responsible for recurrent violations of the Clean Water Act by discharging stormwater into surface waters without an NPDES permit. Under section 505 of the Clean Water Act, Winyah Rivers will initiate a citizen suit against AERP once the 60-day notice period has expired or soon thereafter, unless the violations described above are fully redressed.

If litigation is necessary, Winyah Rivers will seek redress for the violations described in this letter, including injunctive relief, costs, and attorneys' fees pursuant to 33 U.S.C. § 1365(a) and civil penalties pursuant to 33 U.S.C. § 1319(d). Pursuant to section 309(d) of the Clean Water Act,⁷⁸ and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4, each separate violation of the Clean Water Act subjects the violator to a penalty of up to **\$55,800.00 per day per violation** for all violations that occurred after November 2, 2015 where penalties are assessed after January 13, 2020. Winyah Rivers will seek the full penalties allowed by law.

In addition to civil penalties, Winyah Rivers will seek declaratory and injunctive relief preventing further violations of the Clean Water Act pursuant to sections 505(a) and (d),⁷⁹ and other such relief as is permitted by law. Winyah Rivers will seek an order from the Court requiring AERP to obtain NPDES permit coverage and to correct all other identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Winyah Rivers reserves the right to add additional claims to the specific Clean Water Act violations set forth above based on the same or a similar pattern of violations. Winyah Rivers also reserves the right to seek additional remedies under state and federal law and does not intend, by giving this notice, to waive any other rights or remedies.

During the relevant notice period, Winyah Rivers is willing to discuss effective remedies for the violations noted in this letter. If you wish to pursue negotiations in the absence of litigation, you should initiate such negotiations within the next twenty (20) days so that they may be completed prior to completion of the notice period. Winyah Rivers has retained the assistance of the counsel listed below, and all responses to this letter should be directed to the undersigned counsel.

Thank you for your prompt attention to this matter.

Sincerely,



Heather Hillaker
Staff Attorney

⁷⁸ 33 U.S.C. § 1319(d).

⁷⁹ 33 U.S.C. §§ 1365(a), (d).



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Enclosures: Appendix, Attachments 1-14

cc (via certified mail, with enclosures):

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