

February 9, 2022

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

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**Re: Notice of Intent to Sue for Violations of the Clean Water Act and the
Resource Conservation and Recovery Act**

Dear Mr. Rowan, Mr. Diamond, Ms. Scott, 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”) for violations of the Clean Water Act and the Resource Conservation and Recovery Act occurring at its Lumberton site.

AERP is releasing toxic per- and polyfluoroalkyl substances (“PFAS”) into the Lumber River without a permit authorizing the discharge, endangering communities nearby and downstream of the company’s discharge. The company’s PFAS pollution is not only threatening those who live nearby and downstream, and those who fish, paddle, and otherwise enjoy the Lumber River and its tributaries—it is a violation of federal law.

Unless the violations described below are fully addressed, therefore, Winyah Rivers intends to file a lawsuit under section 505(a) of the Clean Water Act, 33 U.S.C. § 1365, and under the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6972, on behalf of itself and its adversely affected members, in the United States District Court for the Eastern

District of North Carolina after the applicable notice periods have expired.¹ Winyah Rivers will seek injunctive relief, civil penalties, fees and costs of litigation, and such other relief as the court deems appropriate to address the ongoing violations described below.

SUMMARY OF VIOLATIONS

AERP is in violation of sections 301(a) and 402² of the Clean Water Act because it is discharging PFAS from wastewater outfall 001, a point source, into the Lumber River without authorization by a National Pollutant Discharge Elimination System (“NPDES”) permit. AERP is further violating the Clean Water Act by discharging PFAS from point sources within the site through groundwater and/or stormwater that flow into surrounding surface waters including Jacob Branch.³ The company is likewise violating provisions of its NPDES permits.

AERP is also liable under RCRA sections 7002(a)(1)(B) and 7002(a)(1)(A).⁴ Specifically, AERP’s handling, storage, treatment, and disposal of PFAS at its industrial site is allowing, causing, or failing to prevent PFAS contamination to accumulate at AERP’s industrial site and enter the groundwater, as well as the Lumber River and its tributary Jacob Branch, in a manner that may present an imminent and substantial endangerment to health or the environment. In addition, AERP is disposing of PFAS in a manner that constitutes open dumping as defined under RCRA.

AERP’s violations have occurred and continue to occur each and every day the company releases PFAS into the Lumber River watershed, or otherwise causes, allows, or fails to prevent this PFAS pollution—including on, but not limited to, October 13 and December 14, 2021, and the dates identified in the company’s discharge monitoring reports, included as Attachment 1.⁵

¹ Notice must be given for 60 days under the Clean Water Act, 33 U.S.C. § 1365(b)(1)(A), and notice is deemed to have been served on the postmark date, 40 C.F.R. § 135.2(c). RCRA requires 90 days’ notice for actions under subsection (a)(1)(B), 42 U.S.C. § 6972(b)(2)(A), and 60 days’ notice for actions under subsection (a)(1)(A), *id.* § 6972(b)(1)(A). Notice under RCRA is deemed served on the date of receipt, 40 C.F.R. § 254.2(c).

² 33 U.S.C. §§ 1311(a), 1342. Parallel citations to the United States Code are provided in footnotes for statutory provisions of the Clean Water Act and RCRA discussed in text.

³ Jacob Branch is also sometimes referred to as “Jacob Swamp,” “Jacob’s Swamp,” “Jacob Swamp Canal,” and “Jacob’s Branch.”

⁴ 42 U.S.C. §§ 6972(a)(1)(B), (a)(1)(A).

⁵ See Compilation of Discharge Monitoring Reports for Lumberton Energy Holdings, LLC (Mar. 2019–Oct. 2021) [hereinafter Combined Discharge Monitoring Reports] (Attachment 1).

I. PERSONS RESPONSIBLE FOR VIOLATIONS

AERP (including Lumberton Energy Holdings, LLC)⁶ is the party responsible for the violations alleged in this Notice Letter, as defined by section 502(5) of the Clean Water Act⁷ and section 7002(a) of RCRA.⁸ AERP is a wholly-owned subsidiary of Active Energy Group, PLC, incorporated in North Carolina in October 2018.

AERP has owned the Lumberton industrial site since March 2019 and has been discharging wastewater from its on-site wastewater treatment plant for the duration of its ownership. AERP has operational control over the day-to-day industrial activities at the site, including operation of the on-site wastewater treatment plant, and is responsible for managing the site, including historical pollution at the site, in compliance with the Clean Water Act and RCRA. AERP is thus identified as the person⁹ responsible for all violations described in this Notice Letter.

II. BACKGROUND

A. AERP's Contaminated Site

AERP's violations alleged in this Notice Letter have occurred and continue to occur at its industrial site located at 1885 Alamac Road, Lumberton, North Carolina. The industrial site includes 415,000 square feet of covered factory space and approximately 151 acres of surrounding land.¹⁰ The site is situated between the Lumber River and Jacob Branch, a tributary that enters the Lumber River southeast of the site. AERP purchased the site from Alamac American Knits in March 2019, with stated plans to construct and operate a wood pellet manufacturing facility and other lumber operations.¹¹

⁶ 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, like Active Energy Renewable Power, is also wholly owned by Active Energy Group, PLC ("AEG"). Mr. Rowan and Mr. Diamond, recipients of this Notice Letter, are also designated managers 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.

⁷ 33 U.S.C. § 1362(5) (defining "person").

⁸ 42 U.S.C. § 6972(a); *see also id.* § 6903(15) (defining "person").

⁹ "Person" includes corporations under the Clean Water Act, 33 U.S.C. § 1362(5), and under RCRA, 42 U.S.C. § 6903(15).

¹⁰ AEG, *Annual Report for the Year Ended 31 December 2018*, at 3 (2019), <https://perma.cc/GUS6-3ZZQ>.

¹¹ *See id.* (stating that the newly purchased Lumberton site "will become the new base for all Active Energy's CoalSwitch™ operations in the US and house the first permanent production facility for CoalSwitch™"); *AEG Acquires 100% Ownership of Lumberton, North Carolina Biomass Facility*, BIOENERGY INSIGHT (Mar. 31, 2020), <https://perma.cc/PEP2-68DY> ("AEG intends to continue all its lumber activities and in the medium term, focus on boosting production and additional capital expenditure, including installing additional sawmill capacity, adjacent to the existing operations and the forthcoming CoalSwitch™ [wood pellet] facility.").

The site has extensive groundwater contamination, believed to have originated from historical textile manufacturing and dry cleaning operations.¹² Alamac American Knits, LLC, (“Alamac”) the previous owner of the site, entered into a Brownfields Agreement with the North Carolina Department of Environment and Natural Resources (now the Department of Environmental Quality, or “DEQ”), to clean up the contamination of industrial solvents at the site.¹³ The agreement required, among other things, the operation of a pump-and-treat system for the contaminated groundwater for at least a two-year period.¹⁴ When AERP purchased the site, it took over obligations of the Brownfields Agreement.¹⁵ AERP therefore continues to operate the pump-and-treat system by (1) pumping out contaminated groundwater from wells at the site, (2) sending the groundwater to an on-site wastewater treatment plant,¹⁶ (3) discharging that wastewater into on-site disposal and holding ponds,¹⁷ and then (4) discharging the wastewater through wastewater outfall 001 into the Lumber River.¹⁸

The most recent publicly available Groundwater Monitoring Report shows that the site remains heavily contaminated with the toxic industrial solvents that gave rise to past cleanup efforts and the Brownfields Agreement.¹⁹ Moreover, the site’s contaminated groundwater has polluted, and is continuing to pollute, surrounding surface waters. Prior investigations at the site

¹² N.C. Division of Waste Management (“DWM”), *Notice of Brownfields Property 06001* (Mar. 1, 2006) [hereinafter *Notice of Brownfields Property*], <https://perma.cc/PH6K-CXSA>. The known groundwater contamination includes benzene, dichloroethene, trichloroethene, tetrachloroethene, and vinyl chloride, and the soil contamination includes tetrachloroethene and benzo(a)pyrene. *Id.*; see also WATER QUALITY MONITORING PLAN PREPARED FOR DYERSBURG CORPORATION RE: GROUNDWATER INCIDENT NO. 18926 (July 1999) [hereinafter 1999 WATER QUALITY MONITORING PLAN], <https://perma.cc/7DHM-3B3V>.

¹³ See *Notice of Brownfields Property*, *supra* note 12.

¹⁴ See DRAPER ARDEN ASSOC., 2019 ANNUAL GROUNDWATER MONITORING REPORT BROWNFIELDS No. 06001-02-78, at 2–3 (2020) [hereinafter 2019 ANNUAL GROUNDWATER MONITORING REPORT], <https://perma.cc/L5GJ-Z3QM>.

¹⁵ See N.C. DWM, *Land Use Restrictions (“LUR”) Update for Project 06001-02-078* (Dec. 17, 2019), <https://perma.cc/7VDE-ZKDK> (acknowledgment of Land Use Restriction signed by Antonio Esposito for Lumberton Energy Holdings, LLC).

¹⁶ See SHIELD ENG’G, INC., 2020 GROUNDWATER MONITORING REPORT – LUMBERTON ENERGY HOLDINGS, LLC (FORMER ALAMAC AMERICAN KNITS SITE) 3 (2021) [hereinafter 2020 ANNUAL GROUNDWATER MONITORING REPORT] (Attachment 2).

¹⁷ Wastewater is stored in these ponds for at least 30 days. See Email from Daphne Jones, Solutions IES, to Kelly Johnson, DEQ re: Alamac Lumberton 2016 GW Monitoring Report (Feb. 10, 2017) (“The industrial waste ponds shown on Figure 1 in the annual report are retention ponds used at the end of the NPDES-permitted wastewater treatment system. After wastewater goes through various treatment steps, the basins are used to hold water for at least 30 days prior to discharge to surface water (the Lumber River).”) (Attachment 3). Recent documents, including AERP’s NPDES permit, indicate AERP’s continuing use of at least one of the two five-acre ponds located on the southeastern part of the property. See N.C. DWR, *Minor Modification of NPDES Permit No. NC0004618*, at PDF 4, 13 (Apr. 10, 2019) [hereinafter *2019 NPDES Modification*], <https://perma.cc/B59B-6HMS> (including “Two (2) 5 acre polishing ponds” as components of the wastewater treatment plant); 2020 ANNUAL GROUNDWATER MONITORING REPORT, *supra* note 16, at 8 (identifying two “Industrial Wastewater Ponds”); see also N.C. DWR, *Lumberton Energy Holdings Site Map – WQ0010563* (describing these ponds as “NPDES basin” and “Old NPDES Basin”) (Attachment 4).

¹⁸ *2019 NPDES Modification*, *supra* note 17, at PDF 4, 13.

¹⁹ See 2020 ANNUAL GROUNDWATER MONITORING REPORT, *supra* note 16, at 4–5.

have shown that polluted groundwater beneath the historical dry cleaning and chemical containment area migrates downgradient, and that groundwater in the upper portion of the surficial aquifer discharges into Jacob Branch.²⁰

Upon information and belief, the site also has polluted stormwater discharges. Prior industrial activities at the site created hot spots of contamination that likely result in ongoing sources of pollution.²¹ Stormwater at the site continues to be discharged via the same conveyances and discrete stormwater outfalls that were utilized when the site was used as a textile mill.²² For instance, a stormwater drainage ditch that runs near the former perchloroethylene (“PCE”) containment area on the eastern side of the property continues to transport stormwater,²³ and prior soil testing from this drainage ditch documented contamination.²⁴

B. PFAS Harm Human Health and the Environment

PFAS, a group of man-made chemicals that have been used in manufacturing since the 1940s,²⁵ are known to be dangerous to human health. Two of the most commonly studied PFAS—perfluorooctanoic acid (“PFOA”) and perfluorooctane sulfonate (“PFOS”)—have been found to cause developmental effects to fetuses and infants, kidney and testicular cancer, liver malfunction, hypothyroidism, high cholesterol, ulcerative colitis, lower birth weight and size, obesity, decreased immune response to vaccines, reduced hormone levels, and delayed puberty.²⁶

²⁰ See S&ME, INC., PROGRESS REPORT FOR THE PROPOSED REMEDIAL ACTIVITIES AT ALAMAC KNIT FABRICS, INC., GROUNDWATER INCIDENT N. 18926, at 4, 5, 8, 10–12 (Feb. 2000) <https://perma.cc/2LL6-TVYM>. Known contaminants continued to persist in high concentrations in the deep groundwater in the vicinity of Jacob Branch. See SOLUTIONS-IES, INC., 2007 ANNUAL GROUNDWATER MONITORING REPORT BROWNFIELDS NO. 06001-02-78, at 6, tbl. 4-3 (Dec. 2007), <https://perma.cc/ZDQ5-YJF7> (showing contaminants present in deep monitoring well MW-23).

²¹ See TRIGON ENGINEERING CONSULTANTS, INTERIM SUMMARY OF PHASE II ENVIRONMENTAL SITE ASSESSMENT FOR ALAMAC KNIT PRODUCTS, INC. – LUMBERTON, at PDF 10–11 (Feb. 12, 1998), <https://perma.cc/J9S6-EHT2>.

²² See AERP, *NPDES Application for Coverage under General Permit NCG210000*, at PDF 9 (Aug. 17, 2020) [hereinafter *AERP NCG210000 Application*], <https://perma.cc/2D2W-3V82> (map with four permitted stormwater outfalls and GPS coordinates); *id.* at PDF 13 (description of two stormwater pipes and two stormwater swales); see also Email from Michael Lawyer, Div. Energy, Mineral, & Land Res. (“DEMLR”), to Ronald Gaskins, AERP (Aug. 17, 2020) (discussing need to change permit coverage from NCG170000 to NCG210000 and noting no changes to the site) (Attachment 5).

²³ Compare S&ME, INC., PROPOSED REMEDIAL ACTION FOR ALAMAC KNIT FABRICS, INC., GROUNDWATER INCIDENT NO. 18926, at PDF 66 (Apr. 1999), <https://perma.cc/B4DG-YTJC> (map showing draining ditch on eastern side of property leading to Jacob Branch), with *AERP NCG210000 Application*, *supra* note 22, at PDF 9 (map showing the same ditch labeled as Stormwater Outfall 04).

²⁴ N.C. DIV. OF SOLID WASTE MGMT., PHASE II SCREENING SITE INVESTIGATION FOR WEST POINT PEPPERELL – LUMBERTON, at PDF 25 (May 14, 1992), <https://perma.cc/X8TR-35AY>.

²⁵ EPA, *Basic Information on PFAS*, <https://perma.cc/79VB-66ML>.

²⁶ Arlene Blum et al., *The Madrid Statement on Poly- and Perfluoroalkyl Substances (PFASs)*, 123(5) ENVTL. HEALTH PERSPECTIVES A-107 (2015), <https://perma.cc/V5EV-4LQH>; U.S. EPA, FACT SHEET: PFOA & PFOS DRINKING WATER HEALTH ADVISORIES 2 (Nov. 2016) [hereinafter EPA PFOA & PFOS FACT SHEET], <https://perma.cc/CX95-N67K>.

In 2016, EPA established a lifetime health advisory of 70 parts per trillion (“ppt”) for the combined concentrations of PFOA and PFOS in drinking water.²⁷ EPA has since updated toxicity assessments for the chemicals, suggesting that the health values for the chemicals should be magnitudes lower. The updated toxicity assessments would translate to health advisories of .006 ppt for PFOA and .029 ppt for PFOS.²⁸

Epidemiological studies show that other PFAS similarly harm human health at low levels,²⁹ including perfluorobutyric acid (“PFBA”), perfluorodecanoic acid (“PFDA”), perfluoroheptanoic acid (“PFHpA”), perfluorohexanoic acid (“PFHxA”), and perfluorononanoic acid (“PFNA”).³⁰ For instance, PFHxA has been found to be “as persistent as” PFOA and PFOS, “while being mobile in soil and groundwater.”³¹ Exposure to high levels of PFBA “induce[s] increased thyroid and liver weight and cellular changes in both organs, changes in thyroid hormones, decreased cholesterol, and delayed development and decreased red blood cells and hemoglobin.”³² Studies have further indicated that exposure to mixtures of various PFAS can cause more severe health effects.³³ Given these harms, states like Michigan, New York, New Hampshire, New Jersey, and Vermont have acknowledged the dangers of these compounds and have either proposed or finalized drinking water standards for various PFAS at 20 ppt and lower.³⁴

²⁷ EPA PFOA & PFOS FACT SHEET, *supra* note 26, at 2.

²⁸ Garret Ellison, *No Safe PFAS Exposure Level? EPA Toxicity Drafts Point That Way*, MLIVE (Nov. 20, 2021), <https://perma.cc/8FYG-NRJP>; see EPA, PROPOSED APPROACHES TO THE DERIVATION OF A DRAFT MAXIMUM CONTAMINANT LEVEL GOAL FOR PERFLUOROCTANOIC ACID (PFOA) (CASRN 335-67-1) IN DRINKING WATER, External Peer Review Draft (2021), <https://perma.cc/K3DN-7BHU>; EPA, PROPOSED APPROACHES TO THE DERIVATION OF A DRAFT MAXIMUM CONTAMINANT LEVEL GOAL FOR PERFLUOROCTANE SULFONIC ACID (PFOS) (CASRN 1763-23-1) IN DRINKING WATER, External Peer Review Draft (2021), <https://perma.cc/8L5B-YUNA>.

²⁹ U.S. DEP’T OF HEALTH & HUM. SERVS., TOXICOLOGICAL PROFILE FOR PERFLUOROALKYLS 5–7, fig. 2-1, fig. 2-2 (2021), <https://perma.cc/NJ8A-PFP9>; ATSDR, PERFLUOROALKYLS - TOXFAQS™ 1 (Mar. 2020), <https://perma.cc/N948-CHME>.

³⁰ See *supra* note 29; see also MN DEP’T OF HEALTH, TOXICOLOGICAL SUMMARY FOR: PERFLUOROBUTYRATE (PFBA) (Aug. 2017), <https://perma.cc/ZAT7-JDNX>; Memorandum from Mark A. Levine, Comm’r, Vt. Dep’t of Health, to Emily Boedecker 2 (July 10, 2018), <https://perma.cc/85P2-XV68>; MN DEP’T OF HEALTH, TOXICOLOGICAL SUMMARY FOR: PERFLUOROHEXANOATE (Dec. 2021), <https://perma.cc/DBZ5-8KSD>.

³¹ Fan Li et al., *Short-Chain Per- and Polyfluoroalkyl Substances in Aquatic Systems: Occurrence, Impacts and Treatment*, 380 CHEMICAL ENGINEERING J. at 3 (Aug. 2019).

³² *Id.* at 5.

³³ Emma V. Preston et al., *Prenatal Exposure to Per- and Polyfluoroalkyl Substances and Maternal and Neonatal Thyroid Function in the Project Viva Cohort: A Mixtures Approach*, 139 ENV’T INT’L at 1 (2020), <https://perma.cc/DJK3-87SN>.

³⁴ *Quarter 2 (April 1 – June 30, 2021)*, MICHIGAN.GOV, <https://perma.cc/9PW7-TP44> (listing maximum contaminant levels (MCLs) for PFAS compounds, including MCLs of 6 ppt for PFNA, 8 ppt for PFOA, and 16 ppt for PFOS); *DEC Releases New Guidance to Regulate PFOA, PFOS, and 1,4-Dioxane in State Waters*, N.Y. DEP’T OF ENV’T CONSERVATION (Oct. 5, 2021), <https://perma.cc/7UMM-F7CK> (“In July 2020, New York formally adopted among the nation’s lowest [MCLs] for drinking water for PFOA and PFOS at 10 [ppt].”); N.H. ADMIN. CODE § 705.06(b) (codifying MCLs for PFHxS at 18 ppt, PFNA at 11 ppt, PFOS at 15 ppt, and PFOA at 12 ppt); 16 VT. CODE R. § 16-3-500:6.12, <https://perma.cc/4LRV-BL3F> (codifying Vermont’s MCL for PFHxS, PFHpA, PFNA, PFOS, and

Moreover, PFAS are extremely resistant to breaking down in the environment, can travel long distances,³⁵ and are not removed by conventional treatment technologies.³⁶ Once PFAS is in the environment, it spreads quickly, harming those living around and downstream of the contamination. As we saw in southeastern North Carolina, when the companies DuPont and Chemours released PFAS from their Fayetteville Works facility, PFAS from the facility reached thousands of nearby drinking water wells³⁷ and drinking water intakes more than 50 miles downstream in the Cape Fear River³⁸—contaminating the drinking water for more than 300,000 people.³⁹

PFAS also harm those that fish in PFAS-polluted streams and rivers because the chemicals readily accumulate in fish tissue once they are released into these waters.⁴⁰ Here in North Carolina, high levels of PFAS have been found in Cape Fear River striped bass.⁴¹ Studies have shown that those who eat PFAS-contaminated fish have higher PFAS concentrations in

PFOA combined at 20 ppt); N.J. ADMIN. CODE 7:10-5.2 (a)(5)(i)–(iii), <https://perma.cc/8GSR-B6Y9> (codifying MCLs for PFNA at 13 ppt, PFOA at 14 ppt, and PFOS at 13 ppt).

³⁵ INTERSTATE TECH. REGULATORY COUNCIL, *5 Environmental Fate and Transport Processes* (last updated May 2021), <https://perma.cc/MGY8-GAXX> (discussing long-range transport of PFAS); see also EPA, TECHNICAL FACT SHEET - PERFLUOROCTANE SULFONATE (PFOS) AND PERFLUOROCTANOIC ACID (PFOA) 3 (2017), <https://perma.cc/JJQ7-ZGE3>.

³⁶ INTERSTATE TECH. REGULATORY COUNCIL, TREATMENT TECHNOLOGIES AND METHODS FOR PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS) 1 (Aug. 2020), <https://perma.cc/3DY3-6VEY> (“[T]he unique chemical properties of PFAS often require new technologies or innovative combinations of existing technologies.”); Phoebe Petrovic, *Wisconsin Takes on PFAS Groundwater Contamination*, WISC. PUB. RADIO (Feb. 11, 2019), <https://perma.cc/VDA7-46F2>.

³⁷ Pioneer Techs. Corp., *Residential Samples Collected Week of December 27th, 2021, Fayetteville Consent Order, Fayetteville, North Carolina*, <https://perma.cc/4YQD-G6VZ>.

³⁸ Vaughn Hagerty, *Toxin Taints CFPUA Drinking Water*, STAR NEWS (June 7, 2017), <https://perma.cc/HBM7-MPHV>.

³⁹ Steve DeVane, *GenX Not the Only Possible Toxin in Cape Fear River*, FAYETTEVILLE OBSERVER (June 15, 2017), <https://perma.cc/3FQF-QNB8>.

⁴⁰ EPA, DRAFT FRAMEWORK FOR ESTIMATING NONCANCER HEALTH RISKS ASSOCIATED WITH MIXTURES OF PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS) 6 (2021), <https://perma.cc/GZ65-MEGN>; Patricia A. Fair et al., *Perfluoroalkyl Substances (PFASs) in Edible Fish Species from Charleston Harbor and Tributaries, South Carolina, United States: Exposure and Risk Assessment*, 171 ENV'T RES. 266 (2019), <https://perma.cc/TR4K-8D8M>; Patricia A. Fair et al., *Associations Between Perfluoroalkyl Compounds and Immune and Clinical Chemistry Parameters in Highly Exposed Bottlenose Dolphins (Tursiops truncatus)*, 32 ENV'T TOXICOLOGY & CHEM. 736 (2013), <https://perma.cc/9WUK-6J8P>; Charlotta Rylander et al., *Dietary Predictors and Plasma Concentrations of Perfluorinated Compounds in a Coastal Population from Northern Norway*, J. Env't & Pub. Health (2009), <https://perma.cc/4SLW-KTNQ>; Jerzy Falandysz et al., *Is Fish a Major Source of Fluorinated Surfactants and Repellents in Humans Living on the Baltic Coast?*, 40 ENV'T SCI. TECH. 748, 750–51 (2006); Line S. Haug et al., *Diet and Particularly Seafood are Major Sources of Perfluorinated Compounds in Humans*, 36 Env't Int'l 772, 776 (2010).

⁴¹ T.C. Guillette et al., *Elevated Levels of Per- and Polyfluoroalkyl Substances in Cape Fear River Striped Bass (Morone saxatilis) are Associated with Biomarkers of Altered Immune and Liver Function*, 136 ENV'T INT'L (2020), <https://perma.cc/5CBW-AMGA>.

their blood,⁴² and that “even low levels of seafood have been associated with elevated PFAS levels.”⁴³ Because the chemicals harm human health, many states have issued fish consumption guidelines, recommending limits on the number of fish that people should eat from PFAS-contaminated waterbodies.⁴⁴

⁴² Falandysz et al., *supra* note 40, at 748; Jürgen Hölzer et al., *Perfluorinated Compounds in Fish and Blood of Anglers at Lake Möhne, Sauerland Area, Germany*, 45 ENV'T SCI. TECH. 8046, 8046 (2011).

⁴³ Fair et al., *Perfluoroalkyl substances (PFAS) in Edible Fish Species*, *supra* note 40; Krista Y. Christensen, *Perfluoroalkyl Substances and Fish Consumption*, 154 ENV'T RSCH. 145 (2017), <https://perma.cc/REJ6-6PP2>.

⁴⁴ Danielle Kaeding, *Fish Consumption Advisory Issued Due to PFAS Contamination in the Yahara Chain of Lakes*, WIS. PUB. RADIO (June 9, 2021), <https://perma.cc/L97G-NS6E>; *Consumption Advisories and PFAS*, WIS. DEP'T OF NAT. RES., <https://perma.cc/E276-TFAQ> (“Jan. 18, 2022: New PFAS fish consumption advisory issues for Bay of Green Bay and Associated Tributaries”); *Consumption Guidelines for Fish with Elevated PFOS Levels*, MICHIGAN.GOV, <https://perma.cc/2MLM-65SK>; Jay Apperson, *Department of Environment Issues First Fish Consumption Advisory for PFAS*, MARYLAND.GOV (Oct. 15, 2021), <https://perma.cc/Z46L-RL2E>; MARC A. NASCARELLA, MASS. DEP'T OF PUB. HEALTH, EMERGING CONTAMINANT SURVEILLANCE: PFAS IN SURFACE WATER AND FISH, at App. I, II (Nov. 1, 2021), <https://perma.cc/C8K8-XYX5> (listing “Changes to Fish Consumption Advisories at 5 Waterbodies” and “DPH PFOS Guidelines for Issuing Recreational Fish Consumption”); MASS. DEP'T OF PUB. HEALTH, FRESHWATER FISH CONSUMPTION ADVISORY LIST (Oct. 2021), <https://perma.cc/GXB6-9NKZ>; *NHDES Issues New Fish Consumption Advisories for 5 Lakes in Southern New Hampshire*, N.H. DEP'T OF ENV'T SERVS. (Nov. 4, 2021), <https://perma.cc/QC2K-67TV>; IND. STATE DEP'T OF HEALTH, PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS) IN FISH (Nov. 2019), <https://perma.cc/DDE3-SCDZ>; *see also* GREAT LAKES CONSORTIUM FOR FISH CONSUMPTION ADVISORIES: BEST PRACTICE FOR PERFLUOROOCTANE SULFONATE (PFOS) GUIDELINES (Nov. 2019), <https://perma.cc/UX67-XP7U>.

Finally, PFAS released into rivers and streams are also harmful to the environment. PFAS have been shown to cause damaging effects in fish,⁴⁵ amphibians,⁴⁶ mollusks,⁴⁷ and other aquatic invertebrates⁴⁸—resulting in developmental and reproductive impacts, behavioral changes, adverse effects to livers, disruption to endocrine systems, and weakened immune systems.⁴⁹

C. AERP's Discharge of PFAS from Wastewater Outfall 001

AERP releases PFAS from wastewater outfall 001 into the Lumber River and its tributaries, endangering the health and safety of those nearby and downstream. Sampling conducted from AERP's wastewater outfall 001 on October 13 and December 14, 2021 detected

⁴⁵ Haihua Huang et al., *Toxicity, Uptake Kinetics and Behavior Assessment in Zebrafish Embryos Following Exposure to Perfluorooctanesulphonicacid (PFOS)*, 98 AQUATIC TOXICOLOGY 139–47 (2010), <https://perma.cc/2FVN-GA3B>; Carrie E Jantzen et al., *PFOS, PFNA, and PFOA Sub-Lethal Exposure to Embryonic Zebrafish have Different Toxicity Profiles in Terms of Morphometrics, Behavior and Gene Expression*, 175 AQUATIC TOXICOLOGY 160–70 (2016), <https://perma.cc/J6Q9-SFDA>; A. Hagenaaers et al., *Structure–Activity Relationship Assessment of Four Perfluorinated Chemicals Using a Prolonged Zebrafish Early Life Stage Test*, 82 CHEMOSPHERE 764, 771 (2011); Yongbing Du et al., *Chronic Effects of Water-Borne PFOS Exposure on Growth, Survival and Hepatotoxicity in Zebrafish: A Partial Life-Cycle Test*, 74 CHEMOSPHERE 723, 726–29 (2009); John Charles Rotondo et al., *Environmental Doses of Perfluorooctanoic Acid Change the Expression of Genes in Target Tissues of Common Carp*, 37 ENVTL. TOXICOLOGY & CHEM. 942, 947 (2018); Yang Liu et al., *The Thyroid-Disrupting Effects of Long-Term Perfluorononanoate Exposure on Zebrafish (Danio rerio)*, 20 ECOTOXICOLOGY 47, 47 (2011); Lianguo Chen et al., *Multigenerational Disruption of the Thyroid Endocrine System in Marine Medaka after a Life-Cycle Exposure to Perfluorobutanesulfonate*, 52 ENVTL. SCI. & TECH. 4432, 4432–39 (2018); Lianguo Chen et al., *Perfluorobutanesulfonate Exposure Causes Durable and Transgenerational Dysbiosis of Gut Microbiota in Marine Medaka*, 5 ENV'T SCI. & TECH. LETTERS 731, 731–38 (2018); Lianguo Chen et al., *Accumulation of Perfluorobutane Sulfonate (PFBS) and Impairment of Visual Function in the Eyes of Marine Medaka after a Life-Cycle Exposure*, 201 AQUATIC TOXICOLOGY 1, 1–10 (2018).

⁴⁶ Gerland Ankley et al., *Partial Life-Cycle Toxicity and Bioconcentration Modeling of Perfluorooctanesulfonate in the Northern Leopard Frog (Rana pipiens)*, 23 ENVTL. TOXICOLOGY & CHEM. 2745, 2745 (2004); Yan Cheng et al., *Thyroid Disruption Effects of Environmental Level Perfluorooctane Sulfonates (PFOS) in Xenopus laevis*, 20 ECOTOXICOLOGY 2069, 2069–78 (2011); Qin-Qin Lou et al., *Effects of Perfluorooctanesulfonate and Perfluorobutanesulfonate on the Growth and Sexual Development of Xenopus laevis*, 22 ECOTOXICOLOGY 1133, 1133–44 (2013).

⁴⁷ Changhui Liu et al., *Oxidative Toxicity of Perfluorinated Chemicals in Green Mussel and Bioaccumulation Factor Dependent Quantitative Structure-Activity Relationship*, 33 ENVTL. TOXICOLOGY & CHEM. 2323, 2323–32 (2014); Changhui Liu et al., *Immunotoxicity in Green Mussels Under Perfluoroalkyl Substance (PFAS) Exposure: Reversible Response and Response Model Development*, 37 ENVTL. TOXICOLOGY & CHEM. 1138, 1138–45 (2018).

⁴⁸ Kyunghye Ji et al., *Toxicity of Perfluorooctane Sulfonic Acid and Perfluorooctanoic Acid on Freshwater Macroinvertebrates (Daphnia magna and Moina macrocopa) and Fish (Oryzias latipes)*, 27 ENVTL. TOXICOLOGY & CHEM. 2159, 2159 (2008); Magali Houde et al., *Endocrine-Disruption Potential of Perfluoroethylcyclohexane Sulfonate (PFECES) in Chronically Exposed Daphnia magna*, 218 ENVTL. POLLUTION 950, 950–56 (2016); Ruoyu Liang et al., *Effects of Perfluorooctane Sulfonate on Immobilization, Heartbeat, Reproductive and Biochemical Performance of Daphnia magna*, 168 CHEMOSPHERE 1613, 1613–18 (2017); Michelle MacDonald et al., *Toxicity of Perfluorooctane Sulfonic Acid and Perfluorooctanoic Acid to Chironomus tentans*, 23 ENVTL. TOXICOLOGY & CHEM. 2116, 2116 (2004).

⁴⁹ See *supra* notes 45–48.

total PFAS concentrations of nearly 20,000 ppt and nearly 15,000 ppt, respectively—thousands of times higher than standards or health values for the chemicals.

According to AERP, this outfall is only used to discharge contaminated groundwater after it is treated in the on-site wastewater treatment plant.⁵⁰ The contaminated groundwater originates from historical textile manufacturing and dry cleaning operations⁵¹—industries that are widely associated with the use of PFAS⁵²—and AERP’s treatment system is not designed to remove PFAS.⁵³ Therefore, the facts indicate that the PFAS documented in AERP’s discharges comes from the site’s contaminated groundwater.

In October, individual PFAS concentrations exceeded 4,000 ppt. PFAS found included, among others:

- PFOA at over 2,000 ppt,
- PFOS at around 500 ppt,
- PFHxA at over 4,000 ppt,
- PFDA at over 760 ppt,
- PFHpA at over 760 ppt,
- PFBA at over 620 ppt,
- Perfluoropentanoic acid (“PFPeA”) at over 1,800 ppt,
- 2H,2H,3H,3H-Perfluorooctanoic acid (“5:3 FTCA”) at nearly 4,000 ppt, and
- N-Methylperfluorooctane sulfonamide acetic acid (“NMeFOSAA”) at over 3,700 ppt.

In December, individual PFAS concentrations exceeded 2,700 ppt. PFAS found included, among others:

- PFOA at over 1,000 ppt,
- PFOS at over 260 ppt,
- PFHxA at over 1,600 ppt,

⁵⁰ See Letter from Jennifer D. Scott, Attorney, Shipman & Wright, LLP, to Heather Hillaker, Elizabeth Rasheed, and Kelly Moser, Attorneys, Southern Environmental Law Center 2 (Feb. 10, 2021), <https://perma.cc/3CZZ-ZSZS>.

⁵¹ See *Notice of Brownfields Property*, *supra* note 12, at Brownfields Agreement ¶ 9 (summarizing history of site contamination and remediation); see also 1999 WATER QUALITY MONITORING PLAN, *supra* note 12.

⁵² DANISH MINISTRY OF THE ENV’T, ENVIRONMENTAL PROTECTION AGENCY, ALTERNATIVES TO PERFLUOROALKYL AND POLYFLUOROALKYL SUBSTANCES (PFAS) IN TEXTILES 7 (2015), <https://perma.cc/K72U-DHKE>; see also MINISTRY OF ENV’T & FOOD, THE DANISH ENVIRONMENTAL PROTECTION AGENCY POLYFLUOROALKYL SUBSTANCES (PFAS) IN TEXTILES FOR CHILDREN (2015), <https://perma.cc/VZM7-95NY>; INTERSTATE TECH. REGULATORY COUNCIL, HISTORY AND USE OF PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS) 5 (2020), <https://perma.cc/CNF4-2CT5>.

⁵³ According to AERP, it is operating the same pump-and-treat system that was initiated in 1999 by prior owners. 2019 ANNUAL GROUNDWATER MONITORING REPORT, *supra* note 14, at 2. Cleanup documents from 1999 and before clearly indicate that the pump-and-treat system was designed to remove the contamination of toxic industrial solvents. See 1999 WATER QUALITY MONITORING PLAN, *supra* note 12. There is no mention of PFAS, nor is current treatment at the site adequately removing PFAS given the high levels detected in AERP’s wastewater discharge.

- PFDA at 470 ppt or higher,
- PFHpA at over 380 ppt,
- PFBA at nearly 300 ppt,
- PFNA at over 240 ppt,
- 5:3 FTCA at over 2,700 ppt,
- 2-Perfluorohexyl ethanoic acid (“6:2 FTA”) (“FHEA”) at over 1,800 ppt,
- PFPeA at over 690 ppt,
- 2H,2H,3H,3H-Perfluorodecanoic acid (“7:3 FTCA”) at over 590 ppt,
- Perfluoroundecanoic acid (“PFUnDA”) at over 270 ppt, and
- 1H,1H,2H,2H-Perfluorodecane sulfonic acid (“8:2 FTS”) at over 230 ppt.

These PFAS are being released through wastewater outfall 001 directly into the Lumber River and flowing downstream.

D. AERP’s Discharge of PFAS from Other Sources

In addition to AERP’s direct release of PFAS from wastewater outfall 001 into the Lumber River, recent sampling indicates that AERP is releasing PFAS from other sources at the site directly into surrounding surface waters and/or through groundwater into surrounding surface waters. Samples collected in Jacob Branch on October 13 and December 14, 2021 detected total PFAS levels nearly two times higher downstream from AERP’s industrial site as upstream. PFAS found included, among others: PFOA, PFOS, PFBA, PFDA, PFHpA, PFHxA, PFNA and PFPeA.

As discussed above, AERP is currently pumping up contaminated groundwater from on-site wells and processing it through a wastewater treatment plant designed to remove the industrial solvents.⁵⁴ After processing, the wastewater is discharged into on-site disposal ponds where it is held for at least 30 days before being discharged to the Lumber River. Because the groundwater is likely contaminated with PFAS, which AERP’s treatment system is not removing, AERP is discharging PFAS-contaminated water directly into its on-site ponds, which are hydrologically connected to Jacob Branch.⁵⁵ These facts indicate that water is then seeping into the groundwater and traveling to surface waters, including Jacob Branch.

Moreover, historical pollution at the site from industrial textile operations created hot spots of contamination that are likely ongoing sources of PFAS contamination into surface waters. Contamination from prior operations is suspected to have originated from, among other possibilities, the above-ground storage tanks on the east side of the building and ancillary piping

⁵⁴ Section II(A).

⁵⁵ See, e.g., S&ME, INC., PROGRESS REPORT FOR THE PROPOSED REMEDIAL ACTIVITIES AT ALAMAC KNIT FABRICS, INC., GROUNDWATER INCIDENT NO. 18926, at 11 (Feb. 2000), <https://perma.cc/4HUE-6B4P> (“The analytical data and the hydraulic assessment suggest that Jacob Swamp Canal may be acting as a groundwater discharge for the upper portion of the surficial aquifer.”).

to the facility,⁵⁶ and two known spills of a dye carrier called Hipochem ALA that occurred in the vicinity of the boiler room on the south side of the main building in 1981 and 1983.⁵⁷ Drainage ditches adjacent to (or even within) these hot spots of contamination transport stormwater through discrete stormwater outfalls directly into Jacob Branch.⁵⁸ These facts indicate that PFAS is being carried through these on-site drainage ditches, as well as channels, pipes, and other on-site conveyances, through stormwater outfalls 001, 002, 003, and 004 into the river.

Moreover, upon information and belief, AERP is also discharging PFAS from other sources through groundwater into surface waters. These sources include, but are not limited to, on-site ditches, channels, pipes, and other conveyances.

E. The Community Impacted by AERP's PFAS Pollution

AERP's release of PFAS has serious potential consequences for those living near and downstream of the site. Given that EPA's updated toxicity assessments for PFOA and PFOS could translate to health advisories below *one ppt* for the two chemicals,⁵⁹ AERP's release of combined PFOA and PFOS of up to 2,500 ppt, and total PFAS of nearly 20,000 ppt cannot be ignored. Not only are there private wells near the facility,⁶⁰ PFAS can travel extremely long distances and affect drinking water supplies far from a source.

The company's pollution further affects those who fish, swim, paddle, and otherwise use and enjoy the watershed, including Winyah Rivers' members. People come to the watershed for many reasons. The river immediately downstream of AERP is federally designated as a Wild and Scenic River and state-designated as a Natural and Scenic River in order to protect the river's unique qualities that make it a home to diverse plants and wildlife, a beloved spot for recreation, and a site for cultural and archaeological resources.⁶¹ In particular, the Lumber River is a popular fishing spot and people travel from across North Carolina to fish in the river and its tributaries for various sunfish (including bluegill, warmouth, and redbreast), largemouth bass, catfish, chain pickerel, yellow perch, and other species.⁶² The North Carolina Wildlife Resources Commission has categorized the river as a high-quality fishery.⁶³ Winyah Rivers' members live near and fish

⁵⁶ See 2019 ANNUAL GROUNDWATER MONITORING REPORT, *supra* note 14, at PDF 2.

⁵⁷ See ATLANTA ENVTL. MGMT., INC., PHASE I ENVIRONMENTAL SITE ASSESSMENT 19 (May 13, 1997), <https://perma.cc/3WWA-76HL>.

⁵⁸ See Section II(A).

⁵⁹ Ellison, *supra* note 28.

⁶⁰ See NUUS CORP., SCREENING SITE INSPECTION, PHASE I, WEST POINT PEPPERELL 3 (Aug. 6, 1990), <https://perma.cc/9232-UGC2> (“The nearest private well is 1,200 feet south of the facility Based on a house count from topographic maps of the area, there are 339 residences using private wells within 3 miles of the facility, and an additional 350 residences use private wells between 3 and 4 miles from the facility.”).

⁶¹ See Wild and Scenic Rivers Approval for Lumber River, 63 Fed. Reg. 53,695 (Oct. 6, 1998); N.C. Gen. Stat. § 143B-135.142.

⁶² Nat'l Wild and Scenic Rivers System, *Lumber River, North Carolina*, RIVERS.GOV, <https://perma.cc/AHN8-MLAQ>.

⁶³ *Id.*

in the Lumber River and the broader watershed, consuming many of the fish that they catch. Citizens of the Lumbee Tribe of North Carolina have deep ancestral connections with the watershed and rely on the health of the watershed for historical, cultural, and spiritual reasons, and for subsistence fishing. AERP's PFAS pollution builds up in fish and aquatic life in the watershed, threatening the health and safety of members that fish, as well as the aquatic life exposed to the pollution.⁶⁴

The toxic PFAS pollution from this site is particularly concerning given its location. Robeson County, where the industrial site is located, is one of the most racially diverse areas in the state⁶⁵ and is home to the Lumbee Tribe—the largest tribe east of the Mississippi River.⁶⁶ Within a two-mile radius of the site, the population is 56% Black or African American and 13% American Indian.⁶⁷ In addition to AERP, other sources of pollution within that radius include at least 33 stormwater permits, six wastewater treatment facility permits, two coal ash structural fills, two hazardous waste sites, a poultry litter waste-to-biogas facility, and a coal plant.⁶⁸ Throughout Robeson County there are also additional pollution sources, including twenty hazardous waste sites, existing and proposed natural gas infrastructure, and several large concentration animal feeding operations, among many others.⁶⁹ The county is already ranked as the least healthy in the state.⁷⁰ Because the community is concerned about additional pollution in the area, many members of the community have strongly opposed AERP's planned use of the site for wood pellet manufacturing.⁷¹ This opposition has only intensified over the last two years as AERP has repeatedly violated state and federal environmental laws.⁷² AERP's ongoing

⁶⁴ The consumption of PFAS-contaminated fish is a major pathway of exposure to PFAS. *See* Section II(B).

⁶⁵ *See* JUHI MODI, STEPHEN MARSON & MAC LEGERTON, ENVIRONMENTAL HEALTH AND CUMULATIVE IMPACT IN ROBESON COUNTY, NC (published by Robeson County Cooperative for Sustainable Development 2020) [hereinafter ROBESON COUNTY CUMULATIVE IMPACTS], <https://perma.cc/N7GL-J62P> (“Robeson County is the most racially diverse rural county in the whole country[.]”); Chris Kolmar, *Most Diverse Cities in North Carolina for 2020*, HOMESNACKS (Dec. 27, 2019), <https://perma.cc/5GJV-DJJ6> (ranking Lumberton at second most diverse city in North Carolina).

⁶⁶ N.C. DIV. OF AIR QUALITY (“DAQ”), ACTIVE ENERGY RENEWABLE POWER ENVIRONMENTAL JUSTICE SNAPSHOT 6, 8 (2020) [hereinafter ENVIRONMENTAL JUSTICE SNAPSHOT], <https://perma.cc/GDD2-FY5S>. 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://perma.cc/UY42-YTJZ>.

⁶⁷ ENVIRONMENTAL JUSTICE SNAPSHOT, *supra* note 66, at 8.

⁶⁸ *Id.* at 18.

⁶⁹ ROBESON COUNTY CUMULATIVE IMPACTS, *supra* note 65, at 4, 9.

⁷⁰ ENVIRONMENTAL JUSTICE SNAPSHOT, *supra* note 66, at 15; *see also* N.C. Dep’t of Commerce, *County Distress Rankings (Tiers)*, <https://perma.cc/9562-ZGHS>; Robert Wood Johnson Found., *North Carolina County Health Rankings & Roadmaps: Robeson County 2021*, <https://perma.cc/YSJ5-CK4P>.

⁷¹ N.C. DAQ, HEARING OFFICER’S REPORT AND RECOMMENDATIONS FOR ACTIVE ENERGY RENEWABLE POWER 3 (2020) [hereinafter HEARING OFFICER’S REPORT], <https://perma.cc/D3Q5-FRSR> (“Of the [1,256] written and [53] oral comments received, more than 90% opposed DAQ granting the [AERP pellet mill] air permit.”).

⁷² Jefferson Currie II, Opinion, *Active Energy Must Comply with the Law, Like Everyone Else*, THE ROBESONIAN (June 8, 2021), <https://perma.cc/J2J2-5Z7Q>. AERP’s environmental violations include: (1) unpermitted stormwater discharges, which lasted almost a year before being resolved subsequent to a prior notice letter from Winyah Rivers, *see* Letter from Winyah Rivers Alliance, to AERP et al. re: Notice of Violations and Intent to Sue Under the Clean

violations must be remedied to protect these communities from the harmful impacts of its discharges.

Moreover, AERP's planned future use of the site for wood pellet manufacturing will cause additional harm to the surrounding communities and the environment. AERP's pellet mill will manufacture CoalSwitch™, a "black pellet" that will be produced using a "steam explosion" manufacturing process⁷³ that has not yet been proven to be commercially viable.⁷⁴ According to AERP's description of the manufacturing process, this process includes the use of non-contact cooling water taken from on-site wells, water which will then be discharged into the Lumber River.⁷⁵ Without resolution of the ongoing releases of PFAS and remediation of the contamination at the site, operation of the planned pellet mill will cause more PFAS-contaminated water to be pumped up and discharged into the Lumber River—further endangering surrounding communities.

III. AERP'S PFAS POLLUTION VIOLATES THE CLEAN WATER ACT.

Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁷⁶ To that end, section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source to waters of the United States except in compliance with, among other conditions, an NPDES permit issued pursuant to section 402 of the Clean Water Act, 33 U.S.C. § 1342. Notably, each violation of a permit—and each discharge that is not authorized by a permit—is a separate violation of the Act.⁷⁷ If an NPDES permit applicant does not adequately disclose its release of a pollutant from a point source, the applicant does not have approval to discharge the pollutant.⁷⁸ Disclosure is

Water Act (Aug. 11, 2020), <https://southernenvironment.sharefile.com/d-sb0487595518943d28d0c56dd2893695f>; (2) unpermitted wastewater discharges, which are the subject of ongoing litigation in the Eastern District of North Carolina, *Winyah Rivers Alliance v. Active Energy Renewable Power, LLC et al.*, 7:21-cv-00043-D (E.D.N.C.); and (3) unpermitted construction of air pollution emissions devices in violation of AERP's air quality permit, N.C. DAQ, *Notice of Violation* (May 5, 2021), <https://perma.cc/HT8W-ZGUK>.

⁷³ See N.C. DAQ, *Application Review for Active Energy Renewable Power 2* (Aug. 3, 2020), <https://perma.cc/ADV9-T92A> (describing steam explosion manufacturing process).

⁷⁴ See Lisa Sorg, *Waiting to Exhale: Controversial Wood Pellet Plant Would Burden Lumberton with More Pollution*, N.C. POLICY WATCH (Apr. 27, 2020), <https://perma.cc/9FNG-6DAN> ("To make its pellets, Active Energy would use a commercially untested technology called CoalSwitch."); see also HEARING OFFICER'S REPORT, *supra* note 71, at 8 (stating that AERP would only expand its wood pellet mill "if the technology works"); AERP, *Air Permit Request for all the Proposed Air Emission Sources*, at PDF 3 (Oct. 31, 2019) [hereinafter *AERP Air Permit Application*], <https://perma.cc/GQ52-HLCA> (describing the steam explosion process as "a new process").

⁷⁵ See N.C. DAQ, *Draft Application Review for Draft Permit No. 1063R00 for Active Energy Renewable Power 2* (2020), <https://perma.cc/A3P2-TU5N>; *AERP Air Permit Application*, *supra* note 74, at Section 2.0.

⁷⁶ 33 U.S.C. § 1251(a).

⁷⁷ See 33 U.S.C. § 1319(d) ("penalty . . . per day for each violation"); *Sierra Club, Haw. Chapter v. City & Cnty. of Honolulu*, 486 F. Supp. 2d 1185, 1190–91 (D. Haw. 2007) (summarizing holdings).

⁷⁸ See *In re Ketchikan Pulp Co.*, 7 E.A.D. 605 (EPA EAB) (1998); *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., Md.*, 268 F.3d 255, 268 (4th Cir. 2001); *S. Appalachian Mountain Stewards v. A & G Coal Corp.*, 758 F.3d 560, 563 (4th Cir. 2014).

considered adequate when the applicant provides enough information for a permitting agency to “be[] able to judge whether the discharge of a particular pollutant constitutes a significant threat to the environment.”⁷⁹

Under the Clean Water Act, the phrase “discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.”⁸⁰ The term “pollutant” includes “solid waste, . . . sewage, garbage, sewage sludge, . . . chemical wastes, biological materials . . . and industrial, municipal, and agricultural waste.”⁸¹ The term “point source” includes any “discernible, confined and discrete conveyance” from which pollutants may be discharged, including pipes, ditches, channels, tunnels, conduits, wells, discrete fissures, and containers.⁸² The point source need not be the original source of the pollution; all that is required is that it conveys the pollution to a water of the United States.⁸³

AERP has violated and continues to violate the Clean Water Act and its implementing regulations by: (1) discharging PFAS from wastewater outfall 001 into the Lumber River; (2) discharging PFAS from other sources at the site directly and/or through groundwater into surrounding surface waters; and (3) violating provisions within its NPDES permits.⁸⁴

A. AERP is Violating the Clean Water Act by Discharging PFAS from Wastewater Outfall 001 into the Lumber River.

AERP is violating the Clean Water Act through its unpermitted discharges of PFAS from wastewater outfall 001. Under the Clean Water Act, AERP’s wastewater outfall 001 is a point source, PFAS are pollutants, and the Lumber River is a water of the United States. Accordingly, the Clean Water Act requires AERP to have an NPDES permit authorizing it to discharge any PFAS from wastewater outfall 001 into the Lumber River. AERP does not have the required permit.

The former owner of the facility, Alamac American Knits, LLC (“Alamac”), discharged from wastewater outfall 001 under NPDES permit NC0004618.⁸⁵ On January 7, 2019, Alamac requested renewal of this NPDES permit, which was set to expire on July 31, 2019, specifically

⁷⁹ *Piney Run*, 268 F.3d at 268 (“Because the permitting scheme is dependent on the permitting authority being able to judge whether the discharge of a particular pollutant constitutes a significant threat to the environment, discharges not within the reasonable contemplation of the permitting authority during the permit application process, whether spills or otherwise, do not come within the protection of the permit shield.”).

⁸⁰ 33 U.S.C. § 1362(12)(A).

⁸¹ *Id.* § 1362(6).

⁸² *Id.* § 1362(14).

⁸³ *Id.* § 1362(7).

⁸⁴ To the extent that the Clean Water Act does not apply, AERP is violating RCRA based on the same/similar facts alleged in Section III.

⁸⁵ Alamac Investors, LLC, *Plant Closing/Renewal Package for Permit Number NC0004618*, at PDF 2 (Jan. 7, 2019), <https://perma.cc/Z5W8-BCY8>.

“requesting to continue with permit NC0004618 until the facility is sold and the transfer of ownership is complete.”⁸⁶ On April 10, 2019, the NPDES permit was transferred to AERP with the same stated expiration date of July 31, 2019.⁸⁷ Because the renewal application was submitted more than six months prior to the expiration of the permit, the permit coverage under NC0004618 was reportedly considered to be administratively extended.⁸⁸ However, when the permit was transferred to AERP, a new condition—Condition A.(7): “Approval to Resume Discharge Requirements”—was added to the modified permit. Condition A.(7) states:

The former Alamac Knits facility covered by permit NC0004618 is currently inactive, and does not discharge wastewater. Prior to any resumption of discharge, the permittee [i.e., AERP] must provide the Division [of Water Resources] with an updated renewal application to document the change in wastewater characteristics, as well as an updated analysis of alternatives to wastewater discharge.⁸⁹

AERP has not submitted an updated renewal application pursuant to Condition A.(7) disclosing its discharges of PFAS from wastewater outfall 001.⁹⁰ Nor did Alamac’s 2019 or 2014 permit renewal applications disclose any discharges of PFAS into the Lumber River.⁹¹ Because AERP is releasing PFAS from wastewater outfall 001 into the Lumber River, but does not have a permit authorizing these discharges, AERP has violated, and continues to violate, section 301(a) of the Clean Water Act.

B. AERP is Violating the Clean Water Act by Discharging PFAS from Other Sources into Surrounding Surface Waters.

AERP is violating the Clean Water Act through its discharges of PFAS from other sources at the site directly and/or through groundwater into surrounding surface waters, including Jacob Branch.

⁸⁶ *Id.*

⁸⁷ See 2019 NPDES Modification, *supra* note 17, at Permit Cover Sheet, PDF 3.

⁸⁸ See Email from Sergei Chernikov, Acting Supervisor, NPDES Industrial Permitting, DWR, to Elizabeth Rasheed, Attorney, Southern Environmental Law Center (Nov. 20, 2020) [hereinafter Nov. 20, 2020 Email] (Attachment 6); see also 2019 NPDES Modification, *supra* note 17, at Part II, Condition B.(10) (“In order to receive automatic authorization to discharge beyond the expiration date, the Permittee shall submit such information, forms, and fees as are required by the agency authorized to issue permits no later than 180 days prior to the expiration date unless permission for a later date has been granted by the Director.”).

⁸⁹ See 2019 NPDES Modification, *supra* note 17, at Part I, Condition A.(7).

⁹⁰ See Nov. 20, 2020 Email, *supra* note 88.

⁹¹ See Alamac American Knits, *Renewal Package for Permit Number NC0004618* (Jan. 07, 2019), <https://perma.cc/Q7N9-NKNX>; Alamac American Knits, *Renewal Package NPDES Permit NC0004618* (Jan. 10, 2014), <https://perma.cc/KV9Q-ZAZ4>.

i. Direct Stormwater Discharges

Section 301(a) of the Clean Water Act, in combination with section 402(p), prohibits point source discharges of stormwater “associated with industrial activity” that are not authorized by either an individual NPDES permit or an NPDES general permit that specifically covers the pollutants found in the facility’s runoff.⁹² From December 2019 until sometime in 2021, AERP operated a sawmill at the site to produce lumber and railroad ties for sale and to compile feedstock materials, such as wood chips, bark, and sawdust, to use at its planned pellet manufacturing facility,⁹³ and the company continues to store feedstock materials outside at the site.⁹⁴ Although AERP has coverage under North Carolina’s Lumber and Wood Products General Permit (NCG210000)⁹⁵ for its stormwater runoff containing pollutants associated with those materials,⁹⁶ this permit does not cover any discharges of PFAS-polluted stormwater—nor does AERP have any other permit that authorizes its PFAS runoff. As the General Permit specifically states, “[a]ny other point source discharge to surface waters of the state is prohibited unless it is an allowable non-stormwater discharge or is covered by another permit, authorization, or approval.”⁹⁷

Upon information and belief, AERP is discharging PFAS-polluted stormwater from numerous point sources into surrounding surface waters. PFAS-polluted stormwater is likely being released into Jacob Branch via ditches, channels, pipes and other conveyances that lead to AERP’s stormwater outfalls 001, 002, 003, and 004.⁹⁸ These ditches, channels, pipes, and other conveyances are likely transporting PFAS because they were designed and put in place for the site’s prior operations as an industrial textile mill.⁹⁹ Even more, at least one of the site’s drainage ditches runs directly adjacent to the former chemical storage tanks, which are suspected sources

⁹² 33 U.S.C. §§ 1311(a), 1342(p). 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 facilities like AERP that handle, store, process, or otherwise manufacture timber products. *Id.*

⁹³ *Active Energy: Update on JV Lumber Activities at Lumberton*, MARKETSCREENER (Dec. 11, 2019), <https://perma.cc/K4LE-2BLH> (discussing current sawmill activity); AEG, *Unaudited Interim Condensed Consolidated Financial Statements: For the Six Months to 30 June 2021*, at 6–7, <https://perma.cc/4M4Z-C23Z> (discussing closure of sawmill).

⁹⁴ Allenby Capital, *Company Note: Active Energy Group Plc 4* (May 20, 2021), <https://perma.cc/575Z-7UGE> (“[T]he lumber mill has successfully produced the requisite feedstock and currently, over 5,000 tonnes of material is now ready for use when CoalSwitch™ production at Lumberton commences.”).

⁹⁵ See N.C. DEMLR, *Certificate of Coverage for NCG210000 for Active Energy Renewable Power (No. NCG210485)* (Sept. 21, 2020), <https://perma.cc/9232-UGC2>.

⁹⁶ N.C. DEMLR, *Draft Fact Sheet on General Permit No. NCG210000*, at 2 (Apr. 13, 2018), <https://perma.cc/DDF9-KXLA>.

⁹⁷ N.C. DEMLR, *General Permit No. NCG210000 to Discharge Stormwater Under the National Pollutant Discharge Elimination System for Establishments Primarily Engaged in Lumber and Wood Products*, at pt. I, p. 2 (Aug. 1, 2018), <https://perma.cc/7N9X-9L8T>.

⁹⁸ See Sections II(A), (D).

⁹⁹ See Section II(C).

of on-site contamination, as well as two known chemical spills, before directing stormwater toward Jacob Branch.¹⁰⁰

Because AERP is discharging PFAS from point sources through its stormwater into Jacob Branch, and does not have a permit authorizing such discharge, AERP is violating the Clean Water Act.

Moreover, AERP is violating the Lumber and Wood Products General Permit, which mandates that discharges “shall not cause or contribute to violations of Water Quality Standards.”¹⁰¹ AERP’s PFAS discharges violate North Carolina’s toxic substances standard, which requires that:

the concentration of toxic substances, either alone or in combination with other wastes, in surface waters shall not render waters injurious to aquatic life or wildlife, recreational activities, public health, nor shall it impair the waters for any designated uses.¹⁰²

Because PFAS have “the potential to cause death, disease . . . , [and] cancer,”¹⁰³ and other harms,¹⁰⁴ they are toxic substances under state law. Due to the chemicals’ toxicity, persistence, and mobility,¹⁰⁵ even low levels of PFAS violate the toxic substances standard by “render[ing] waters injurious” to aquatic life and public health, and impairing Jacob Branch and the Lumber River for their designated uses, including fishing.¹⁰⁶ At discharges of nearly 20,000 ppt (or possibly more), AERP’s discharges of PFAS-polluted stormwater violate the General Permit’s mandate to comply with water quality standards.

ii. Groundwater Discharges

AERP is further violating the Clean Water Act through its unpermitted discharges of PFAS that are seeping from on-site ponds (and likely other conveyances, including on-site ditches, pipes, and channels) and then being transported through the groundwater to waters of the United States, including Jacob Branch.¹⁰⁷ The Clean Water Act prohibits the unpermitted discharge of pollutants “when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*,” which includes

¹⁰⁰ Section II(D).

¹⁰¹ *Id.*; *General Permit No. NCG210000*, *supra* note 97, at pt. I, p. 2.

¹⁰² 15A N.C. Admin. Code 2B.0208(a).

¹⁰³ 15A N.C. Admin. Code 2B.0202(54).

¹⁰⁴ Section II(B).

¹⁰⁵ Section II(B).

¹⁰⁶ 15A N.C. Admin. Code 2B .011(12). 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.

¹⁰⁷ *See* Section II(D).

discharges that enter navigable waters through groundwater.¹⁰⁸ AERP's on-site ditches, channels, and ponds are point sources, and their conveyance of PFAS through groundwater into surface waters, including Jacob Branch, is prohibited without authorization. Because AERP is not authorized to discharge PFAS, these discharges violate the Clean Water Act.

C. AERP is Violating its NPDES Permit Provisions.

AERP's NPDES permit contains several permit conditions that the company has violated as a result of its PFAS pollution, including the Removed Substances and Duty to Mitigate provisions.¹⁰⁹

First, the Removed Substances provision in AERP's permit requires that:

Solids, sludges, filter backwash, or other pollutants removed in the course of treatment or control of wastewaters shall be utilized/disposed of . . . in a manner such as to prevent any pollutant from such materials from entering waters of the State or navigable waters of the United States¹¹⁰

The Removed Substances provision ensures that “measures shall be taken to assure that pollutants [and] materials removed from the process water and waste streams will be retained in storage areas and not discharged or released”¹¹¹ This provision aims to “ensure the integrity” of such systems so that pollution does not escape into the environment.¹¹²

In the course of AERP's processing of its groundwater, it “remove[s]” some PFAS—those that accumulate in the company's on-site disposal ponds. The Removed Substances provision requires that AERP handles that process in a manner that “prevent[s] any pollutant from such materials from entering waters of the State or navigable waters of the United States.”¹¹³ AERP violates the Removed Substances provision of its NPDES permit every time it dumps PFAS into its disposal ponds in a manner that allows those pollutants to end up in groundwater, a water of the state, or in a manner that allows them to enter surface waters such as Jacob Branch or the Lumber River.¹¹⁴

AERP is also in violation of the Duty to Mitigate provision of its permit, which requires that:

¹⁰⁸ *Cnty. of Maui v. Hawai'i Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020) (emphasis in original).

¹⁰⁹ 40 C.F.R. § 122.41 (“The following conditions apply to all NPDES permits. . . . All conditions applicable to NPDES permits shall be incorporated into the permits either expressly or by reference.”); N.C. DEQ, *Part II: Standard Conditions for NPDES Permits* (Oct. 31, 2011), <https://perma.cc/8J7R-SKF4>.

¹¹⁰ *2019 NPDES Modification*, *supra* note 17, at pt. II, § C.(6); *see also* 40 C.F.R. § 122.41(d).

¹¹¹ *In re: 539 Alaska Placer Miners*, 1085-06-14-402C, 1990 WL 324284, at *8 (EPA Mar. 26, 1990).

¹¹² *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 446–47 (M.D.N.C. 2015).

¹¹³ *See supra* note 110.

¹¹⁴ *See* Sections II(A), (D).

The Permittee shall take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit with a reasonable likelihood of adversely affecting human health or the environment.¹¹⁵

As discussed in this letter, PFAS “adversely affect[.]” human health.¹¹⁶ AERP’s releases of PFAS into the Lumber River watershed harm those living near and downstream of the facility whose drinking water supplies could be affected by the chemicals, as well as those who fish within the watershed. Every time AERP illegally discharges PFAS, AERP fails to “take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of [its NPDES permits] with a reasonable likelihood of adversely affecting human health or the environment,” as required by the Duty to Mitigate provision in its permit.

IV. AERP’S PFAS POLLUTION VIOLATES THE RESOURCE CONSERVATION AND RECOVERY ACT.

The Resource Conservation and Recovery Act (“RCRA”) is designed to “promote the protection of health and the environment”¹¹⁷ by regulating “the treatment, storage, and disposal of solid and hazardous waste.”¹¹⁸ Under RCRA, “storage” is defined as the temporary or long-term containment of solid waste,¹¹⁹ whereas “disposal” is defined as “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.”¹²⁰ “Treatment” of solid waste under RCRA includes “any method, technique, or process objectively designed to change the physical, chemical, or biological character or composition of any solid waste so as to render it safer for transport, amenable for recovery, amenable for storage, or reduced in volume.”¹²¹

RCRA defines “solid waste” to mean “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities”¹²²

¹¹⁵ 2019 NPDES Modification, *supra* note 17, at pt. II, § B.(2); *see also* 40 C.F.R. § 122.41(d).

¹¹⁶ *See* Section II(B).

¹¹⁷ 42 U.S.C. § 6902(a).

¹¹⁸ *See Chicago v. Env’t. Def. Fund*, 511 U.S. 328, 331–32 (1994).

¹¹⁹ 42 U.S.C. § 6903(33); *see* EPA OFFICE OF ENF’T & COMPLIANCE ASSURANCE, GUIDANCE ON THE USE OF SECTION 7003 OF RCRA 13 (Oct. 1997) [hereinafter EPA RCRA GUIDANCE], <https://p2infohouse.org/ref/03/02645.pdf> (“Although [the statutory] definition refers to hazardous waste only, the Regions may apply an analogous definition when addressing the possible storage of solid waste.”).

¹²⁰ 42 U.S.C. § 6903(3).

¹²¹ EPA RCRA GUIDANCE, *supra* note 119, at 13 (defining “treatment” based on the statutory definition applicable to hazardous waste).

¹²² 42 U.S.C. § 6903(27). Although RCRA excludes industrial point source discharges subject to permits under section 402 of the Clean Water Act, 33 U.S.C. § 1342, from the definition of solid waste, *id.*; 40 C.F.R.

AERP's treatment, handling,¹²³ storage, and disposal of PFAS, a solid waste, violates RCRA by presenting an imminent and substantial endangerment to health or the environment. In addition, AERP is violating RCRA by disposing solid waste in a manner that constitutes open dumping.¹²⁴

A. AERP is causing an imminent and substantial endangerment to human health and the environment.

Section 7002(a)(1)(B) of RCRA allows affected citizens to bring suit against:

any person, . . . including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.¹²⁵

A citizen suit under this section of RCRA “may be predicated on a [qualifying] *past [or present]* violation.”¹²⁶ Under RCRA, AERP has contributed to, and continues to contribute to, the handling, storage, treatment, and disposal of PFAS—a solid waste—in a manner that may present an imminent and substantial endangerment to health or the environment. AERP is therefore subject to citizen enforcement under section 7002(a)(1)(B).

As described above, AERP's industrial site is heavily contaminated with PFAS and toxic industrial solvents associated with historical textile manufacturing and dry cleaning operations.¹²⁷ These pollutants are reaching surface waters and threatening the health of nearby communities and the environment. First, this occurs through AERP's operation of its groundwater treatment and disposal system. Part of AERP's groundwater pump-and-treat system includes attempting to treat the groundwater, then handling and storing inadequately treated groundwater in disposal ponds before disposing it through wastewater outfall 001 into the Lumber River. The facts stated throughout this letter indicate that the groundwater under AERP's site is contaminated with PFAS, which is not being removed by AERP's existing treatment system, and PFAS is therefore being released directly into the Lumber River and

§ 261.4(a)(2), this exclusion “applies only to the actual point source discharge” and does not apply to “industrial wastewaters while they are being collected, stored or treated before discharge . . .” 40 C.F.R. § 261.4 [comment].

¹²³ Although “handling” is not defined by statute, “EPA agrees with at least one court that has applied a dictionary definition of ‘handle’ as ‘to deal with or have responsibility’ for something.” EPA RCRA GUIDANCE, *supra* note 119, at 13 (quoting *Lincoln Props. v. Higgins*, 23 Env'tl. L. Rep. (Env'tl. L. Inst.) 20665 (E.D. Cal. Jan. 18, 1993)).

¹²⁴ To the extent that RCRA does not apply, AERP is violating the Clean Water Act based on the same/similar facts alleged in Section IV.

¹²⁵ 42 U.S.C. § 6972(a)(1)(B).

¹²⁶ *Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 504 (4th Cir. 2015) (quoting *Sanchez v. Esso Standard Oil Co.*, 572 F.3d 1, 7 (1st Cir. 2009)).

¹²⁷ See Section II(A).

leaking from the ponds into surrounding surface waters.¹²⁸ AERP is therefore causing, allowing, or otherwise failing to prevent PFAS from endangering human health and the environment.

AERP also handles, stores, and disposes of PFAS in a manner that threatens human health and the environment by allowing PFAS to run through its drainage ditches, channels, pipes, stormwater outfalls, and other conveyances into surface waters and/or groundwater that eventually seeps into surface waters.¹²⁹

Because PFAS are highly toxic chemicals that do not degrade in the environment and instead bioaccumulate in human bodies and aquatic life, AERP's activities present an imminent and substantial endangerment to health or the environment, in violation of RCRA.

B. AERP is engaging in open dumping, in violation of RCRA.

AERP is also violating the open dumping provision of RCRA through its practice of holding PFAS-contaminated water in disposal ponds on site. A civil action may be brought against "any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective" under RCRA.¹³⁰ RCRA prohibits "any solid waste management practice or disposal of solid waste . . . which constitutes the open dumping of solid waste."¹³¹ In turn, RCRA defines "open dump" as "any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 6944 of this title and which is not a facility for disposal of hazardous waste."¹³²

The EPA promulgated criteria to clarify what practices may violate RCRA's open dumping prohibition.¹³³ The regulations state that a facility cannot "cause a discharge of pollutants into waters of the United States that is in violation of the requirements of the [NPDES] under section 402 of the Clean Water Act."¹³⁴ As explained, AERP is violating section 402 of the Act through its unpermitted discharges of PFAS that are seeping from on-site ponds (and likely other conveyances, including on-site ditches, pipes, and channels) and then being transported to navigable waters.¹³⁵ AERP's practice of holding PFAS-contaminated water in these wastewater disposal ponds and allowing it to enter the surface water from those ponds (and

¹²⁸ See Sections II(A), (C), (D).

¹²⁹ See Sections II(A), (D).

¹³⁰ 42 U.S.C. § 6972(a)(1)(A).

¹³¹ *Id.* § 6945(a).

¹³² *Id.* § 6903(14).

¹³³ 40 C.F.R. pt. 257.

¹³⁴ *Id.* § 257.3-3(a).

¹³⁵ See Sections III(B), (C).

from other possible conveyances) constitutes open dumping of solid waste, in violation of RCRA.¹³⁶

The EPA criteria additionally require that “[f]acilities or practices in floodplains shall not restrict the flow of the base flood, reduce the temporary water storage capacity of the floodplain, or result in washout of solid waste, so as to pose a hazard to human life, wildlife, or land or water resources.”¹³⁷ AERP’s practice of utilizing the waste disposal ponds additionally constitutes open dumping because it is in violation of these flood plain criteria. The site and its disposal ponds are in a FEMA AE flood zone, meaning there is at least a 1% annual chance of flooding.¹³⁸ The facility is bordered by two identified floodways—the Lumber River to the east and Jacob Branch to the south.¹³⁹ The facility has recently been inundated by 100-year flood waters during Hurricanes Matthew in 2016 and Florence in 2018.¹⁴⁰ AERP’s ongoing use of the disposal ponds therefore constitute open dumping because they continue to pose a risk of PFAS-laden washouts, and thus pose a hazard to human and aquatic life and surrounding land and water resources.

V. AERP’S VIOLATIONS HAVE OCCURRED AT LEAST SINCE MARCH 2019 AND ARE ONGOING.

AERP’s violations are longstanding and continuing. AERP has released water contaminated with PFAS, or otherwise caused, allowed, or failed to prevent PFAS-contaminated water from entering the Lumber River watershed, since the date it took over operational control of the industrial site, in March 2019,¹⁴¹ and continues to do so. Each day that these activities occur is a separate and distinct violation of the Clean Water Act and RCRA.¹⁴² Moreover, PFAS are persistent in the environment; therefore, they remain present in rivers, streams, and soil long

¹³⁶ *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1012 (11th Cir. 2004) (“[T]o prove that [a site] qualifies as an open dump, [plaintiffs] must show: (1) solid waste, (2) is disposed at [the site], (3) that [the site] does not qualify as a landfill . . . , and (4) that [the site] does not qualify as a facility for the disposal of hazardous waste.”); *see also* 40 C.F.R. § 257.3 (“Solid waste disposal facilities or practices which violate any of the following criteria pose a reasonable probability of adverse effects on health or the environment.”).

¹³⁷ 40 C.F.R. § 257.3-1(a). As used in this section, “[b]ased [sic] flood means a flood that has a 1 percent or greater chance of recurring in any year or a flood of a magnitude equalled [sic] or exceeded once in 100 years on the average over a significantly long period,” and “[w]ashout means the carrying away of solid waste by waters of the base flood.” *Id.* § 257.3-1(b)(1), (3).

¹³⁸ *See* North Carolina Flood Risk Information System, *Floodplain Mapping Tool*, <https://fris.nc.gov/fris/Index.aspx?FIPS=155&ST=NC&user=General%20Public#>.

¹³⁹ *Id.*

¹⁴⁰ *See, e.g.*, N.C. DWM, *Aerial Photo of Alamac Lumberton* (Oct. 11, 2016) (showing catastrophic flooding after Hurricane Matthew), <https://perma.cc/J4G3-KU9H>.

¹⁴¹ Upon information and belief, AERP’s releases began prior to the April 10, 2019, NPDES permit transfer and modification. AERP purchased the facility sometime in March, and the March 2019 discharge monitoring report for NPDES Permit NC0004618 lists Lumberton Energy Holdings, LLC (i.e., AERP) as the owner of the facility and shows discharges of wastewater from outfall 001 beginning on March 1. *See* Combined Discharge Monitoring Reports (Attachment 1).

¹⁴² 33 U.S.C. §§ 1311(a), 1342; *see* 33 U.S.C. § 1319(d) (civil penalties assessed per day per violation); 42 U.S.C. § 6928 (“Each day of such violation shall, for purposes of this subsection, constitute a separate violation.”).

after AERP releases them into the environment. AERP's violations will thus continue after the date of this letter and the subsequent filing of a lawsuit.

Winyah Rivers alleges that a violation has occurred and continues to occur each and every day AERP discharges PFAS from wastewater outfall 001, discharges PFAS from other point sources directly and/or through groundwater into nearby surface waters, or otherwise causes, allows, or fails to prevent PFAS-contaminated water from entering the Lumber River and Jacob Branch since March 1, 2019. This includes, but is not limited to, October 13 and December 14, 2021, and the dates identified in the discharge monitoring reports included in Attachment 1,¹⁴³ and for every day that these violations continue after the date of this Notice Letter.

To the extent Winyah Rivers obtains evidence after the date of this Notice Letter of additional violations based on the same or similar pattern as the violations set forth above, this letter provides notice. These violations are ongoing and continuous, and unless AERP obtains coverage under and complies with an NPDES permit and remediates PFAS contamination at the site, these violations will continue.

VI. 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, 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 swim, boat, or fish in; live near; or otherwise use and enjoy the Lumber River downstream of AERP's site. The water quality in the Lumber River and its tributary Jacob Branch threatens the health and safety of Winyah Rivers' members and harms their recreational, aesthetic, cultural, and environmental interests.

As required by 40 C.F.R. § 135.3(a) and 40 C.F.R. § 254.3(a), the name, address, and telephone number of the person giving notice of intent to sue are:

¹⁴³ Sampling conducted on October 13 and December 14, 2021, detected PFAS coming out of AERP's wastewater discharges via wastewater outfall 001. Upon information and belief, the only source of this PFAS is the contaminated groundwater being pumped up at the site and therefore every discharge of wastewater from AERP also contains PFAS, including, but not limited to, the dates identified in the discharge monitoring reports in Attachment 1.

Christine Ellis, Deputy Director
Winyah Rivers Alliance
P.O. Box 554
Conway, SC 29528
843-349-4007

VII. IDENTIFICATION OF LEGAL COUNSEL

Winyah Rivers is represented by legal counsel in this matter. Pursuant to 40 C.F.R. § 135.3(c) and 40 C.F.R. § 254.3(c), the contact information for those providing legal counsel at the Southern Environmental Law Center are as follows:

Heather Hillaker
Jean Zhuang
Elizabeth Rasheed
Southern Environmental Law Center
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Chapel Hill, NC 27516-2356
919-967-1450
hhillaker@selcnc.org
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VIII. NOTICE OF INTENT TO SUE

As described above, AERP has been, and continues to be, responsible for recurrent violations of the Clean Water Act and RCRA by (1) discharging PFAS into surface waters without an NPDES permit authorizing the discharge; (2) violating its NPDES permits; (3) handling, storing, treating, and disposing of PFAS in a manner that may cause an imminent and substantial endangerment to health or the environment; and (4) disposing of PFAS in a manner that constitutes open dumping. Unless the violations described above are fully redressed, Winyah Rivers intends to initiate a citizen suit against AERP following the relevant notice periods, or move to amend the complaint in the existing litigation between the parties to add claims noticed in this letter.

If litigation is necessary, Winyah Rivers will seek redress for the violations described in this Notice Letter, including injunctive relief, costs, and attorneys' fees pursuant to 33 U.S.C. § 1365(a) and 42 U.S.C. § 6972(e), as well as civil penalties pursuant to 33 U.S.C. § 1319(d) and 42 U.S.C. § 6928(g). Each separate violation of the Clean Water Act subjects the violator to a penalty of up to **\$59,973.00 per day per violation** for all violations that occurred after November 2, 2015, where penalties are assessed after January 12, 2022.¹⁴⁴ Each separate violation of RCRA subjects the violator to a penalty of up to **\$81,540.00 per day per violation**

¹⁴⁴ 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4.

for all violations that occurred after November 2, 2015, where penalties are assessed after January 12, 2022.¹⁴⁵ Winyah Rivers will seek the full penalties allowed by law.

In addition to civil penalties, Winyah Rivers will seek declaratory and injunctive relief pursuant to sections 505(a) and (d)¹⁴⁶ of the Clean Water Act and section 7002(a)¹⁴⁷ of RCRA to address or remediate past violations and prevent further violations and other such relief as is permitted by law. Winyah Rivers will seek an order from the Court requiring AERP to obtain proper 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 and RCRA 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 the factual assertions set forth in this letter as well as effective remedies for the violations noted above. **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 Notice Letter should be directed to the undersigned counsel.

Thank you for your prompt attention to this matter.

Sincerely,



Heather Hillaker
Staff Attorney



Jean Zhuang
Staff Attorney



Elizabeth Rasheed
Senior Associate Attorney

¹⁴⁵ 42 U.S.C. § 6928(g); 40 C.F.R. § 19.4.

¹⁴⁶ 33 U.S.C. §§ 1365(a), (d).

¹⁴⁷ 42 U.S.C. § 6972(a).

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Enclosures: Attachments 1-6

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