

# SOUTHERN ENVIRONMENTAL LAW CENTER

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December 10, 2020

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

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## **Re: Notice of Intent to Sue for Violations of 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”) for violations of the Clean Water Act (or “the Act”).

Unless the violations described below are fully addressed, Winyah Rivers intends to file a lawsuit under section 505(a) of the Clean Water Act,<sup>1</sup> 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 Notice Letter.<sup>2</sup> Winyah Rivers will seek injunctive relief, civil penalties, fees and costs of litigation, and such other relief as the court

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\* In addition to the official mailing and corporate office address, copies of this Notice 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.

<sup>1</sup> 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.

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

deems appropriate to address the ongoing violations described below.

## **SUMMARY OF VIOLATIONS**

AERP is in violation of sections 301(a) and 402 of the Clean Water Act<sup>3</sup> because it is discharging treated wastewater from groundwater remediation and filter backwash wastewater (collectively “wastewater”) from its facility located at 1885 Alamac Road, Lumberton, North Carolina (the “Facility”) to the Lumber River and Jacob Branch<sup>4</sup> without a National Pollutant Discharge Elimination System (“NPDES”) permit or otherwise not in compliance with the terms of a valid NPDES permit. AERP’s ongoing discharges of industrial wastewater, a pollutant under the Clean Water Act,<sup>5</sup> are neither authorized by nor comply with a valid permit issued pursuant to section 402, and therefore violate section 301 of the Act.<sup>6</sup>

AERP’s violations have occurred and continue to occur each and every day there is a discharge from the Facility’s wastewater outfalls, including on but not limited to the dates identified in the company’s discharge monitoring reports, included as Attachment 1.<sup>7</sup> AERP’s illegal discharges of wastewater from its Facility will continue until AERP has stopped discharging wastewater from its Facility or has obtained a modified or new NPDES permit authorizing the discharges.

### **I. PERSONS RESPONSIBLE FOR VIOLATIONS**

AERP (including Lumberton Energy Holdings, LCC)<sup>8</sup> is the party responsible for the violations alleged in this Notice Letter, as defined by section 502(5) of the Clean Water Act.<sup>9</sup> AERP is a wholly-owned subsidiary of Active Energy Group, PLC, incorporated in North Carolina in October 2018.

AERP has owned the Facility 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 Facility, including operation of the on-site wastewater treatment plant, and is responsible for managing the Facility’s discharges

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<sup>3</sup> 33 U.S.C. §§ 1311(a), 1342.

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

<sup>5</sup> 33 U.S.C. § 1362(6).

<sup>6</sup> 33 U.S.C. §§ 1311(a), 1342.

<sup>7</sup> See Compilation of Discharge Monitoring Reports for Lumberton Energy Holdings, LLC (Apr. 2019 – Sept. 2020) [hereinafter Combined Discharge Monitoring Reports] (Attachment 1).

<sup>8</sup> 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. 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.

<sup>9</sup> 33 U.S.C. § 1362(5).

in compliance with the Clean Water Act. Pursuant to 40 C.F.R. § 135.3, AERP is thus identified as the person<sup>10</sup> responsible for all violations described in this Notice Letter.

## II. BACKGROUND

### A. AERP's Facility and Surrounding Community

AERP's violations alleged in this Notice Letter 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.<sup>11</sup> 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.<sup>12</sup> As discussed in more detail below, the Facility is located on a designated Brownfields site where the groundwater and soil have been contaminated for decades by toxic industrial solvents.<sup>13</sup>

Currently, the primary industrial activity occurring at the Facility is a sawmill, which AERP has been operating since at least December 2019, 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.<sup>14</sup> For almost a year, AERP violated the requirements of the Clean Water Act by discharging industrial stormwater pollution from its sawmill and other timber operations without a required NPDES stormwater permit.<sup>15</sup> Following Winyah Rivers' August 11, 2020 notice letter alleging these violations, AERP applied for and received a Certificate of Coverage

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<sup>10</sup> Under the Clean Water Act, "person" includes corporations. 33 U.S.C. § 1362(5).

<sup>11</sup> See Active Energy Group, *AEG Lumberton Manufacturing Hub*, <https://www.aegplc.com/operations/lumberton-manufacturing-hub/> (last visited Dec. 3, 2020) (discussing the March 2019 purchase of the Lumberton site and stating that "[t]he site is intended to 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://www.bioenergy-news.com/news/aeg-acquires-100-ownership-of-lumberton-north-carolina-biomass-facility/> ("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.").

<sup>12</sup> *AEG Lumberton Manufacturing Hub*, *supra* note 11.

<sup>13</sup> N.C. Division of Waste Management ("DWM"), *Notice of Brownfields Property 06001* (Mar. 1, 2006) [hereinafter *Notice of Brownfields Property*] (Attachment 2). The historical groundwater contamination includes benzene, dichloroethene, trichloroethene, tetrachloroethene, and vinyl chloride, and the soil contamination includes tetrachloroethene and benzo(a)pyrene. *Id.*

<sup>14</sup> *Active Energy: Update on JV Lumber Activities at Lumberton*, MARKETSCREENER (Dec. 11, 2019), <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), <https://www.proactiveinvestors.com/LON:AEG/Active-Energy-Group-PLC/rns/801328>; *AEG Lumberton Manufacturing Hub*, *supra* note 11 (stating that "saw logging and saw mill operations creating future feedstock for CoalSwitch™" are already underway at the Facility).

<sup>15</sup> See Winyah Rivers Alliance, *Notice of Violations and Intent to Sue Under the Clean Water Act* (Aug. 11, 2020) [hereinafter Aug. 11, 2020 NOI] (Attachment 3).

under North Carolina's general stormwater permit for the timber products industry.<sup>16</sup> Despite eventually obtaining a stormwater permit, AERP's wastewater discharges from the Facility continue to violate the Clean Water Act.

The potential impact of past, present, and possible future unpermitted pollution from this Facility is particularly concerning given the Facility's location. Robeson County, where the Facility is located, is one of the most racially diverse areas in the state<sup>17</sup> and is home to the Lumbee Tribe—the largest tribe east of the Mississippi River.<sup>18</sup> Within a two-mile radius of the Facility, the population is 56% Black or African American and 13% American Indian. In addition to the AERP Facility, other sources of pollution within that radius include 33 stormwater permits, 6 wastewater treatment facility permits, 2 coal ash structural fills, 2 hazardous waste sites, a poultry litter waste-to-biogas facility, and a coal plant.<sup>19</sup> Throughout Robeson County there are also additional pollution sources, including 20 hazardous waste sites, existing and proposed natural gas infrastructure, and several large concentration animal feeding operations (or “CAFOs”), among many others.<sup>20</sup> The county is ranked as the least healthy in the state,<sup>21</sup> and members of the community have come out strongly in opposition to AERP's proposed pellet mill.<sup>22</sup> AERP's Clean Water Act violations must be remedied to protect this at-risk area and the people who live there against the deleterious water quality effects from AERP's unpermitted discharges.

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<sup>16</sup> AERP, *NPDES Application for Coverage under General Permit NCG210000* (Aug. 17, 2020), <https://edocs.deq.nc.gov/WaterResources/DocView.aspx?id=1274330&dbid=0&repo=WaterResources>; N.C. Division of Energy, Mineral, and Land Resources (“DEMLR”), *Certificate of Coverage No. NCG210485* (Sept. 21, 2020), <https://edocs.deq.nc.gov/WaterResources/DocView.aspx?id=1295033&dbid=0&repo=WaterResources>.

<sup>17</sup> 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://robcocoalition.org/wp-content/uploads/2020/07/Environmental-Health-and-Cumulative-Impact-in-Robeson-County-NC.pdf> (“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://www.homesnacks.net/most-diverse-cities-in-north-carolina-128933/> (ranking Lumberton at second most diverse city in North Carolina).

<sup>18</sup> N.C. DIVISION OF AIR QUALITY (“DAQ”), ACTIVE ENERGY RENEWABLE POWER ENVIRONMENTAL JUSTICE SNAPSHOT 6, 8 (2020) [hereinafter ENVIRONMENTAL JUSTICE SNAPSHOT], <https://files.nc.gov/ncdeq/EJ/Active-ERP-EJ-Snapshot-pdf>. 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.lumbee Tribe.com/tribal-ordinances>.

<sup>19</sup> ENVIRONMENTAL JUSTICE SNAPSHOT, *supra* note 18, at 18.

<sup>20</sup> ROBESON COUNTY CUMULATIVE IMPACTS, *supra* note 17, at 4, 9.

<sup>21</sup> ENVIRONMENTAL JUSTICE SNAPSHOT, *supra* note 18, at 15; see also N.C. Dep't of Commerce, *County Distress Rankings (Tiers)*, <https://www.nccommerce.com/grants-incentives/county-distress-rankings-tiers> (last visited Dec. 5, 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> (last visited Dec. 7, 2020).

<sup>22</sup> N.C. DAQ, HEARING OFFICER'S REPORT AND RECOMMENDATIONS FOR ACTIVE ENERGY RENEWABLE POWER 3 (2020) [hereinafter HEARING OFFICER'S REPORT], <https://deq.nc.gov/about/divisions/air-quality/air-quality-permitting/wood-pellet-industry-permitting-actions-and> (“Of the [1,256] written and [53] oral comments received, more than 90% opposed DAQ granting the [AERP pellet mill] air permit.”).

## B. Historical Groundwater and Soil Contamination

The property is a designated Brownfields site where the groundwater and soil have been contaminated by toxic industrial solvents. The property owners are therefore subject to special land use restrictions to contain these pollutants.<sup>23</sup> After purchasing the contaminated site, AERP acknowledged and agreed to these restrictions, including a provision prohibiting the use of groundwater from the developed half of the property for anything other than textile manufacturing.<sup>24</sup>

The historical groundwater and soil contamination is believed to have originated from textile manufacturing and dry cleaning operations occurring from 1978 to 1997 when the site was owned and operated by WestPoint Stevens, Inc., and its predecessor WestPoint Pepperell.<sup>25</sup> During this time, there were at least two documented spills of tetrachloroethylene (perchloroethylene or “PCE”) and other solvents used in the manufacturing process.<sup>26</sup> The site was purchased by the Dyersburg Corporation in 1997, and in 1999 the site underwent soil remediation and in-situ groundwater bioremediation that continued until 2005 pursuant to a Water Quality Monitoring Plan.<sup>27</sup> Despite these efforts, the site remains contaminated with PCE and related volatile organic compounds, including trichloroethylene (“TCE”), *cis*-1,2-dichloroethylene (“DCE”), vinyl chloride, and benzene.<sup>28</sup>

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<sup>23</sup> *Notice of Brownfields Property*, *supra* note 13; see N.C. Gen. Stat. § 130A-310.35.

<sup>24</sup> See 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 4). The land use restrictions specifically require that “no 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, DEQ] may require and submittal of the analytical results to DENR.” See *Notice of Brownfields Property*, *supra* note 13, 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.

<sup>25</sup> See *Notice of Brownfields Property*, *supra* note 13, at Brownfields Agreement ¶ 9 (summarizing history of site contamination and remediation); see also WATER QUALITY MONITORING PLAN PREPARED FOR DYERSBURG CORPORATION RE: GROUNDWATER INCIDENT NO. 18926 (July 1999) [hereinafter 1999 WATER QUALITY MONITORING PLAN] (Attachment 5).

<sup>26</sup> See Interoffice Memorandum from Lee Goodrich, WestPoint Pepperell re: Chemical Spill at Lumberton (Sept. 10, 1981) (documenting a spill of approximately 740 pounds of trichlorobenzene, as well as other components including biphenyl, methyl naphthalene, methyl Toluolate [sic], methyl benzoate, xylene, and various emulsifiers) (Attachment 6); Letter from Richard Flag, WestPoint Pepperell, to Terry Henderson (Sept. 12, 1981) (describing spill occurring on September 10, 1981) (Attachment 7); Letter from Ken McDowell, Envtl. & Chem. Safety Coordinator, WestPoint Pepperell, to Emil Breckling, Div. of Health Servs., Envtl. Health Section, Solid & Hazardous Waste Mgmt. Branch (June 10, 1983) (describing spill of 15 gallons of textile dye carrier and subsequent cleanup efforts) (Attachment 8).

<sup>27</sup> See 1999 WATER QUALITY MONITORING PLAN, *supra* note 25; *Notice of Brownfields Property*, *supra* note 13, at Brownfields Agreement ¶ 9.

<sup>28</sup> See *Notice of Brownfields Property*, *supra* note 13; see also DRAPER ARDEN ASSOC., 2019 ANNUAL GROUNDWATER MONITORING REPORT BROWNFIELDS NO. 06001-02-78, at 2 (2020) (prepared for AERP) [hereinafter 2019 ANNUAL GROUNDWATER MONITORING REPORT] (discussing remediation history) (Attachment 9).

In 2006, Alamac American Knits, LLC, the previous owner of the Facility, entered into a Brownfields Agreement with the North Carolina Department of Environment and Natural Resources (now the Department of Environmental Quality, or “DEQ”).<sup>29</sup> As modified on September 18, 2008, the Brownfields Agreement requires the ongoing operation of a pump and treat system, as well as annual sampling and reporting from three groundwater recovery wells (RW-1, RW-2, and RW-3) and from one offsite residential supply well at 2237 Alamac Road.<sup>30</sup> The groundwater recovered from the three recovery wells is discharged directly to the on-site wastewater treatment plant.<sup>31</sup> Alamac operated the wastewater treatment plant under an NPDES permit and monitored the effluent quality at its wastewater outfalls in accordance with the permit.<sup>32</sup> Effluent samples from the wastewater treatment plant have been monitored and reported to the state since 1999.<sup>33</sup> AERP continues to operate this pump and treat system, and it submitted groundwater monitoring data for the year 2019 to the North Carolina Division of Waste Management in January 2020.<sup>34</sup>

### C. NPDES Permitting History

Alamac American Knits held an NPDES permit (NC0004618) for its industrial wastewater discharges. This permit authorized Alamac American Knits to discharge treated wastewater—including non-contact cooling water, boiler blowdown, remediated groundwater, water softener wastewater, and other process wastewater—to the Lumber River, and discharge filter backwash wastewater to Jacob Branch.<sup>35</sup> On January 7, 2019, Alamac American Knits applied for renewal of this NPDES permit, which was set to expire on July 31, 2019, specifically “requesting to continue with permit NC0004618 until the facility is sold and the transfer of ownership is complete.”<sup>36</sup> On April 10, 2019, the NPDES permit was transferred to Lumberton

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<sup>29</sup> See *Notice of Brownfields Property*, *supra* note 13.

<sup>30</sup> See 2019 ANNUAL GROUNDWATER MONITORING REPORT, *supra* note 28, at 2–3.

<sup>31</sup> See SOLUTIONS-IES, INC. 2016 ANNUAL GROUNDWATER MONITORING REPORT BROWNFIELDS No. 06001-02-78, at 6 (2017) (prepared for Alamac American Knits, LLC), <https://edocs.deq.nc.gov/WasteManagement/DocView.aspx?id=664875&dbid=0&repo=WasteManagement&searchid=be628e50-36a8-466c-bae8-b73b240084d1>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* Most recently, on January 24, 2020, AERP submitted the 2019 Annual Groundwater Monitoring Report, along with wastewater treatment plant effluent data from March 12, June 25, September 24, and December 5, 2019, to N.C. DWM. See 2019 ANNUAL GROUNDWATER MONITORING REPORT, *supra* note 28, at 10.

<sup>34</sup> See 2019 ANNUAL GROUNDWATER MONITORING REPORT, *supra* note 28. This report also contains monitoring data from AERP’s wastewater effluent from Outfall 001. *Id.* at Table 4-3.

<sup>35</sup> See N.C. Division of Water Resources (“DWR”), *Permit No. NC0004618 to Discharge Wastewater Under the National Pollutant Discharge Elimination System, for Alamac American Knits, LLC Industrial WWTP and WTP* (Issued: Feb. 13, 2015, Effective: Mar. 1, 2015 – July 31, 2019), <https://edocs.deq.nc.gov/WaterResources/DocView.aspx?id=1277198&dbid=0&repo=WaterResources&searchid=729baeef-6aa2-452d-b459-b47ce48a525e> (PDF 227 of Historical Document).

<sup>36</sup> Alamac Investors, LLC, *Plant Closing/Renewal Package for Permit Number NC0004618*, at PDF 2 (Jan. 7, 2019), <https://edocs.deq.nc.gov/WaterResources/DocView.aspx?id=806802&dbid=0&repo=WaterResources&searchid=729baeef-6aa2-452d-b459-b47ce48a525e>.



Energy Holdings (i.e., AERP), with the same stated expiration date of July 31, 2019.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

To date, AERP has not submitted an updated application or relevant documentation to the Division of Water Resources pursuant to Condition A.(7).<sup>40</sup> Despite Condition A.(7)’s clear prohibition, AERP continues to discharge wastewater from its Facility.<sup>41</sup>

#### **D. 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. The Facility’s wastewater treatment plant discharges wastewater from two outfalls. Treated wastewater is discharged via Outfall 001 into the Lumber River, located at approximately 34° 36’ 32.6”, -79° 0’ 32.2”, and filter backwash wastewater is discharged via Outfall 002 into Jacob Branch, located at approximately 34° 35’ 13.7”, -79° 0’ 12.4”.<sup>42</sup>

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<sup>37</sup> See N.C. DWR, *Minor Modification of NPDES Permit No. NC0004618*, at Permit Cover Sheet (Apr. 10, 2019) [hereinafter *Modification of NPDES Permit No. NC0004618*] (Attachment 10).

<sup>38</sup> 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 11); see also *Modification of NPDES Permit No. NC0004618*, *supra* note 37, 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.”).

<sup>39</sup> See *Modification of NPDES Permit No. NC0004618*, *supra* note 37, at Part I, Condition A.(7).

<sup>40</sup> See Nov. 20, 2020 Email, *supra* note 38.

<sup>41</sup> See Letter from Jennifer D. Scott, Attorney, Shipman & Wright, LLP, to Heather Hillaker, Elizabeth Rasheed, and Kelly Moser, Attorneys, Southern Environmental Law Center at 3 (Oct. 12, 2020) [hereinafter AERP Response Letter] (submitted in response to Winyah Rivers’ August 11, 2020 notice letter) (Attachment 12); Combined Discharge Monitoring Reports, *supra* note 7; see also EPA, *NPDES Monitoring Data Download for NPDES Permit NC0004618*, [https://echo.epa.gov/trends/loading-tool/reports/dmr-pollutant-loading?year=2020&permit\\_id=NC0004618](https://echo.epa.gov/trends/loading-tool/reports/dmr-pollutant-loading?year=2020&permit_id=NC0004618) (last visited Dec. 8, 2020).

<sup>42</sup> *Modification of NPDES Permit No. NC0004618*, *supra* note 37, at PDF 4, 13.

The Division of Water Resources 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; *see also* 15A N.C. Admin. Code 02B .0208. 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* Notice of Approval, 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 North Carolina General Assembly classified the section of the river that flows by the Facility, upstream of the junction of the Lumber River and Jacob Branch as recreational; while it classified the portion downstream of the junction of the Lumber River and Jacob Branch (i.e., the area immediately downstream of the Facility) 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. To the extent AERP's unpermitted industrial discharges disrupt the recreational or natural status of Jacob Branch or the Lumber River on either a short-term or long-term basis, AERP is in violation of the North Carolina Natural and Scenic Rivers Act of 1971 and may be subject to civil or criminal liability. N.C. Gen. Stat. § 143B-135.168; *see* N.C. Gen. Stat. § 143B-135.142.

### **E. Future Wood Pellet Mill**

As noted above, AERP purchased the Facility with the intent to construct a wood pellet mill to manufacture CoalSwitch™, a "black pellet" that will be produced using a "steam explosion" manufacturing process<sup>43</sup> that, upon information and belief, has reportedly not yet been proven to be commercially viable.<sup>44</sup> On August 3, 2020, AERP received a permit from the

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<sup>43</sup> *See* AEG Lumberton Manufacturing Hub, *supra* note 11 (discussing intended pellet mill); N.C. DAQ, *Application Review for Active Energy Renewable Power* at 2 (Aug. 3, 2020), <https://files.nc.gov/ncdeq/Air%20Quality/permits/active-energy/7800242-Final-Permit-R00-Review-20200803.pd.pdf> (describing steam explosion manufacturing process).

<sup>44</sup> *See* Lisa Sorg, *Waiting to Exhale: Controversial Wood Pellet Plant Would Burden Lumberton with More Pollution*, N.C. POLICY WATCH (Apr. 27, 2020), <http://www.ncpolicywatch.com/2020/04/27/waiting-to-exhale->



North Carolina Department of Environmental Quality, Division of Air Quality (“DAQ”) authorizing the construction of this wood pellet mill.<sup>45</sup>

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.<sup>46</sup> The non-contact well water will be discharged to the Facility’s on-site wastewater treatment plant and subsequently discharged into the Lumber River.<sup>47</sup> 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 into either the Lumber River or Jacob Branch.<sup>48</sup>

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,<sup>49</sup> the mill will not stay small for long. AERP has indicated to its investors that it intends to scale up production tenfold soon after the mill 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.<sup>50</sup> As the wood pellet mill expands production, the wastewater streams from the

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[controversial-wood-pellet-plant-would-burden-lumberton-with-more-pollution/](#) (“To make its pellets, Active Energy would use a commercially untested technology called CoalSwitch.”); *see also* HEARING OFFICER’S REPORT, *supra* note 22, 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://files.nc.gov/ncdeq/Air%20Quality/permits/2020\\_public\\_notice\\_documents/public\\_notices/Active-Energy-Permit-Application-20191104.pdf](https://files.nc.gov/ncdeq/Air%20Quality/permits/2020_public_notice_documents/public_notices/Active-Energy-Permit-Application-20191104.pdf) (describing the steam explosion process as “a new process”).

<sup>45</sup> N.C. DAQ, *Air Permit No. 10636R00* (Aug. 3, 2020) [hereinafter *AERP Air Permit*],

<https://files.nc.gov/ncdeq/Air%20Quality/permits/active-energy/7800242-Final-Permit-R00.pdf>.

<sup>46</sup> *See* N.C. DAQ, *Draft Application Review for Draft Permit No. 10636R00 for Active Energy Renewable Power* at 2 (2020) [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](https://files.nc.gov/ncdeq/Air%20Quality/permits/2020_public_notice_documents/draft_reviews/Active-Energy-Permit-Review-7800242--20200115.pdf); *AERP Air Permit Application*, *supra* note 44, at Section 2.0.

<sup>47</sup> *AERP Draft Air Permit Review*, *supra* note 46, 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*, *supra* note 37, at PDF 13 (map).

<sup>48</sup> *See AERP Draft Air Permit Review*, *supra* note 46, 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”).

<sup>49</sup> *See AERP Air Permit Application*, *supra* note 44, at 33.

<sup>50</sup> *See Lumberton Manufacturing Hub*, *supra* note 11; *see also* Active Energy Group, *Developing Next Generation Biomass Fuels Using Sustainable & Waste Resources* at Slide 10 (Sept. 2020), <https://www.aegplc.com/investors/> (download available: Interim Results 2020 Presentation) (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*], <https://www.aegplc.com/download/half-yearly-report-2019/> (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*, *supra*, at 2.

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

### III. CLEAN WATER ACT VIOLATIONS

The Clean Water Act was enacted “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>51</sup> Accordingly, the 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.<sup>52</sup> Section 502 of the Act defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source,”<sup>53</sup> and defines “point source” as “any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged.”<sup>54</sup> 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.”<sup>55</sup> By discharging its industrial wastewater from its Facility’s wastewater outfalls into the Lumber River and Jacob Branch, AERP is unlawfully discharging pollutants into “waters of the United States.”

The only NPDES wastewater permit associated with the Facility is the modified Permit NC0004618 that was transferred from Alamac American Knits to Lumberton Energy Holdings (i.e., AERP) on April 10, 2019. As discussed previously, however, Condition A.(7): “Approval to Resume Discharge Requirements,” was added prohibiting AERP from discharging wastewater from the facility until certain conditions are met:

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 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.<sup>56</sup>

Under the terms of the modified permit, AERP is therefore not authorized to discharge *any* wastewater from the Facility until it provides the Division of Water Resources with an updated

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<sup>51</sup> 33 U.S.C. § 1251(a).

<sup>52</sup> 33 U.S.C. §§ 1311(a), 1342.

<sup>53</sup> 33 U.S.C. § 1362(12).

<sup>54</sup> 33 U.S.C. § 1362(14).

<sup>55</sup> 33 U.S.C. § 1362(6).

<sup>56</sup> *Modification of NPDES Permit No. NC0004618*, supra note 37, at Part I, Condition A.(7) (emphasis added); see *id.* at Permit Cover Page (repeating same language and stating that “Condition A.(7) has been added to require submission of additional information prior to future discharges from the site”); see also *id.* at 2 (revoking all previous NPDES permits issued to the facility and providing that “the exclusive authority to operate and discharge from this facility arises under the permit conditions, requirements, terms, and provisions included herein”).

renewal application and receives an updated NPDES permit that removes Condition A.(7) and authorizes the discharges.<sup>57</sup> Neither has occurred.<sup>58</sup>

AERP has violated and will continue to violate sections 301(a) and 402 of the Clean Water Act,<sup>59</sup> their implementing regulations, and NPDES Permit NC0004618 by: (1) discharging remediated groundwater wastewater from Wastewater Outfall 001 into the Lumber River; and (2) discharging filter backwash wastewater from Wastewater Outfall 002 into Jacob Branch. Because AERP is not authorized to discharge wastewater from its Facility, each discharge is a separate violation of the Clean Water Act.<sup>60</sup>

**A. AERP Is Violating the Clean Water Act by Discharging Remediated Groundwater from Outfall 001 to the Lumber River.**

Since at least March 2019, AERP has operated and continues to operate a wastewater treatment plant to treat the site's contaminated groundwater before discharging the treated wastewater into the Lumber River.<sup>61</sup> As an "industrial waste," the remediated groundwater itself is considered a "pollutant" under the Clean Water Act.<sup>62</sup> Moreover, the specific constituents contained within that industrial wastewater are also pollutants in the form of "chemical wastes," "biological materials," "heat," and other "industrial wastes."<sup>63</sup> The Clean Water Act prohibits discharges of pollutants unless they are authorized by a valid NPDES permit.<sup>64</sup> Because Condition A.(7) of the modified NPDES Permit NC0004618 prohibits all discharges of wastewater (including remediated groundwater) and of any other pollutants from the Facility, AERP's unauthorized wastewater discharges violate the Clean Water Act.

Despite Condition A.(7)'s explicit prohibition, multiple public documents and statements from AERP demonstrate that the company has continued to discharge remediated groundwater from the on-site wastewater treatment plant. Specifically, AERP has been reporting discharges in discharge monitoring reports ("DMRs") to the Division of Water Resources on a regular basis from April 10, 2019, until the present. For example, from Wastewater Outfall 001, which discharges wastewater directly into the Lumber River, AERP reported a total of **498 days** of

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<sup>57</sup> *Id.* at Part I, Condition A.(7); *see also* Nov. 20, 2020 Email, *supra* note 38 (stating that AERP is "not allowed to discharge" under the terms of NC0004618).

<sup>58</sup> Nov. 20, 2020 Email, *supra* note 38 ("[T]he latest change to the permit [NC0004618] required a new owner to submit a request for Major Modification with characterization of the proposed wastewater prior to any discharge. They [i.e., AERP] have not done it yet.").

<sup>59</sup> *See* 33 U.S.C. §§ 1311(a), 1342.

<sup>60</sup> *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 (D. Haw. 2007) (summarizing holdings).

<sup>61</sup> *See* Combined Discharge Monitoring Reports, *supra* note 7.

<sup>62</sup> 33 U.S.C. § 1362(6) (defining "pollutant" to include, amongst other things, "chemical wastes, biological materials, radioactive materials, heat, and industrial . . . waste discharged into water").

<sup>63</sup> 33 U.S.C. § 1362(6).

<sup>64</sup> 33 U.S.C. § 1311(a).

effluent discharge (flow) from April 10, 2019, to September 31, 2020.<sup>65</sup> These discharges contained at least **15 different identified pollutants**, but may also include additional pollutants not specifically monitored for. This letter provides notice for the unlawful discharge of remediated groundwater, as well as the unlawful discharge of any other pollutant contained within the Outfall 001 discharge, including but not limited to:

- Temperature
- pH
- Dissolved Oxygen (DO)
- Chemical Oxygen Demand (COD)
- Biological Oxygen Demand (BOD)
- Total Suspended Solids (TSS)
- Conductivity
- Total Nitrogen
- Total Kjeldahl Nitrogen
- Nitrite (NO<sub>2</sub>) & Nitrate (NO<sub>3</sub>)
- Sulfide
- Zinc
- Copper
- Phenol
- Total Chromium

Upon information and belief, AERP's Outfall 001 discharge may also contain traces of the industrial solvents that contaminate the site's groundwater, including but not limited to, PCE, TCE, DCE, vinyl chloride, and benzene.<sup>66</sup> Notice is provided herein of any such discharges, which each constitute separate violations of the Clean Water Act.

In addition to the DMRs, the continuing discharge of remediated groundwater is also documented in an October 12, 2020, letter from AERP, in which counsel for AERP states that

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<sup>65</sup> While SELC has attached DMRs submitted through September 31, 2020, to this Notice Letter, *see* Combined Discharge Monitoring Reports, *supra* note 7, these reports establish a pattern of conduct that, upon information and belief, is continuous and ongoing to date. SELC alleges that these illegal wastewater discharges are ongoing through the date of this Notice Letter and has reason to believe that they will continue in the future. Each wastewater discharge and/or discharge of a pollutant that AERP has made since at least April 10, 2019, and will make in the future, unless and until a new NPDES permit is issued, is a separate violation of the Clean Water Act. *See* 33 U.S.C. §§ 1311, 1342.

<sup>66</sup> Prior samples of the wastewater effluent from Outfall 001 show that discharges of these chemicals are possible even after being treated in the wastewater treatment plant, specifically, *cis*-1,2-dichloroethylene exceeded detection limits on December 7, 2004, and December 13, 2016. *See* 2019 ANNUAL GROUNDWATER MONITORING REPORT, *supra* note 28, at Table 4-3. As shown in the DMRs, AERP has only been monitoring and sampling for tetrachloroethylene, trichloroethylene, and vinyl chloride (not for *cis*-1,2-dichloroethylene or benzene), and only monitoring for those constituents on a quarterly basis. *See* Combined Discharge Monitoring Reports, *supra* note 7. Therefore, the potential exists for the discharge of these and other volatile constituents outside of the quarterly monitoring events.

“[t]he Facility continues to discharge water from the wastewater treatment plant[.]”<sup>67</sup> Likewise, such discharges are documented in the 2019 Groundwater Monitoring Report that AERP submitted to the North Carolina Division of Waste Management, in which AERP self-reported results of effluent sampling from Wastewater Outfall 001.<sup>68</sup>

The remediated groundwater is being released from a point source (Wastewater Outfall 001) directly into the Lumber River. AERP is therefore discharging pollutants, within the meaning of Section 502 of the Clean Water Act,<sup>69</sup> into “waters of the United States.” Because AERP does not have an NPDES permit authorizing these discharges, AERP has violated, and continues to violate, sections 301(a) and 402 of the Act.<sup>70</sup> AERP’s discharges also violate the terms of NPDES Permit NC0004618, in violation of the Clean Water Act.<sup>71</sup> Finally, to the extent AERP’s unpermitted industrial discharges preclude any of the designated uses of the Lumber River, AERP is also causing a violation of North Carolina’s water quality standards. 15A N.C. Admin. Code 02B .0211(2).

**B. AERP Is Violating the Clean Water Act by Discharging Filter Backwash from Outfall 002 to Jacob Branch.**

As part of AERP’s operation of its on-site wastewater treatment plant, the company has been and continues to discharge filter backwash wastewater into Jacob Branch.<sup>72</sup> The filter backwash constitutes a “pollutant” under the Clean Water Act because the wastewater itself is an “industrial waste,” and the specific constituents contained within the wastewater are otherwise considered “chemical wastes,” “biological wastes,” or other “industrial wastes.”<sup>73</sup> Like the remediated groundwater, discussed above, these discharges are prohibited unless made in compliance with a valid NPDES permit; the modified NPDES Permit NC0004618, however, explicitly prohibits any wastewater discharges.<sup>74</sup>

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<sup>67</sup> AERP Response Letter, *supra* note 41, at 3.

<sup>68</sup> See 2019 ANNUAL GROUNDWATER MONITORING REPORT, *supra* note 28, at Table 4-3. Since the groundwater monitoring at issue in this report was conducted in accordance with the 2006 Brownfields Agreement, the wastewater effluent was only sampled for the specific industrial solvents contained in the contaminated groundwater. Although those solvents were not detected in 2019, this document is nonetheless evidence of the discharge of industrial wastewater from Wastewater Outfall 001 from March to December of 2019.

<sup>69</sup> 33 U.S.C. § 1362(6).

<sup>70</sup> 33 U.S.C. §§ 1311(a), 1342.

<sup>71</sup> 33 U.S.C. §§ 1311(a), 1342; see also *Modification of NPDES Permit No. NC0004618*, *supra* note 37, at Part II, Condition B.(1) (“The Permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the CWA and is grounds for enforcement action[.]”).

<sup>72</sup> See Combined Discharge Monitoring Reports, *supra* note 7. This discharge is “the backwash water that contains the residue that is filtered from the well water by the anthracite sand,” as well as the addition of sodium carbonate (soda ash). Memorandum from Dale Lopez, Envtl. Specialist, to Dina Sprinkle, Point Source Branch, NPDES Unit, DWR re: Staff Report and Recommendation for NPDES Permit NC0004618, at 3 (Mar. 5, 2009), <https://edocs.deq.nc.gov/WaterResources/DocView.aspx?id=1277198&dbid=0&repo=WaterResources&searchid=729baeef-6aa2-452d-b459-b47ce48a525e> (PDF 195 of Historical Document).

<sup>73</sup> 33 U.S.C. § 1362(6).

<sup>74</sup> See *Modification of NPDES Permit No. NC0004618*, *supra* note 37, at Part I, Condition A.(7).

The DMRs that AERP has submitted to the Division of Water Resources also report discharges of the filter backwash wastewater from Wastewater Outfall 002 from April 10, 2019, until the present. From April 10, 2019, to September 31, 2020, AERP reported a total of **479 days** of discharge (flow) of effluent from Wastewater Outfall 002 into Jacob Branch.<sup>75</sup> These discharges contained at least **9 different pollutants**, but may also include additional pollutants not specifically monitored for. This letter provides notice for the illegal discharge of filter backwash wastewater, as well as the illegal discharge of any pollutant contained within the filter backwash wastewater, including but not limited to:

- pH
- Total Suspended Solids (TSS)
- Turbidity
- Total Nitrogen
- Total Phosphorus
- Iron
- Manganese
- Aluminum
- Zinc

The filter backwash wastewater is being released from a point source (Wastewater Outfall 002) into Jacob Branch and then into the Lumber River. AERP is therefore discharging pollutants, within the meaning of Section 502 of the Clean Water Act,<sup>76</sup> into “waters of the United States.” Because AERP does not have an NPDES permit authorizing these discharges, AERP has violated, and continues to violate, sections 301(a) and 402 of the Clean Water Act.<sup>77</sup> Because Condition A.(7) to NPDES Permit NC0004618 does not authorize *any* wastewater discharges by AERP, these filter backwash discharges from Wastewater Outfall 002 also violate the permit terms and sections 301(a) and 402 of the Clean Water Act.<sup>78</sup> And to the extent AERP’s unpermitted industrial discharges preclude any of Jacob Branch’s or the Lumber River’s designated uses on either a short-term or long-term basis, AERP is also causing a violation of North Carolina’s water quality standards. 15A N.C. Admin. Code 02B .0211(2).

**C. These Violations Have Occurred at Least Since April 10, 2019, and Are Ongoing.**

Each day on which AERP operates its wastewater treatment plant and discharges remediated groundwater, filter backwash, or other industrial wastewater without an NPDES permit or in violation of NPDES Permit NC0004618 is a separate and distinct violation of

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<sup>75</sup> See Combined Discharge Monitoring Reports, *supra* note 7.

<sup>76</sup> 33 U.S.C. § 1362(6).

<sup>77</sup> 33 U.S.C. §§ 1311(a), 1342.

<sup>78</sup> 33 U.S.C. §§ 1311(a), 1342; *see also Modification of NPDES Permit No. NC0004618, supra* note 37, at Part II, Condition B.(1) (“The Permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the CWA and is grounds for enforcement action[.]”).



sections 301(a) and 402 of the Clean Water Act and their implementing regulations.<sup>79</sup> Winyah Rivers alleges that a violation has occurred and continues to occur each and every day AERP discharges wastewater from either Outfall 001 or Outfall 002 since April 10, 2019 (the date of the NPDES permit modification), including but not limited to the dates identified in the DMRs included in Attachment 1.

AERP is liable for the above-described violations occurring prior to the date of this Notice Letter, at least since April 10, 2019,<sup>80</sup> and for every day that these violations continue after the date of this Notice Letter. In addition, 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, these violations will continue.

**IV. TO AVOID ADDITIONAL CLEAN WATER ACT VIOLATIONS RELATED TO ITS WASTEWATER, AERP MUST OBTAIN AN NPDES PERMIT FOR ITS WASTEWATER DISCHARGES ASSOCIATED WITH ITS PELLET MILL.**

Winyah Rivers remains concerned about AERP's intended wood pellet mill operations and associated compliance with the Clean Water Act, an issue originally raised in the August 11, 2020, notice letter. Although AERP appears to intend to begin wood pellet manufacturing,<sup>81</sup> it has not applied for or obtained coverage under an NPDES permit for the wastewater discharges that will result from the mill. As discussed above, the modified NPDES Permit NC0004618 does not authorize *any* wastewater discharges, including any discharges resulting from operation of the wood pellet mill. AERP is also not authorized under the existing Brownfields Agreement to use groundwater from the developed half of the property for anything other than textile manufacturing.<sup>82</sup> AERP must obtain an NPDES permit for its pellet mill wastewater discharges and revise its Brownfields Agreement with the state prior to commencing manufacturing operations.

As noted, the Clean Water Act prohibits the discharge of a pollutant into the waters of the United States without an NPDES permit.<sup>83</sup> Based on AERP's descriptions of its steam explosion

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<sup>79</sup> 33 U.S.C. §§ 1311(a), 1342; *see* 33 U.S.C. § 1319 (civil penalties assessed per day per violation).

<sup>80</sup> Upon information and belief, AERP's unpermitted discharges of industrial wastewater began prior to the April 10, 2019, NPDES permit modification. The March 2019 DMR for the Facility lists Lumberton Energy Holdings, LLC (i.e., AERP) as the owner of the facility and shows discharges of wastewater from Outfall 001 and Outfall 002 beginning on March 1. Lumberton Energy Holdings, Discharge Monitoring Report for NPDES Permit NC0004618 (March 2019) (Attachment 13). At the time of these discharges, NPDES Permit NC0004618 had not been transferred to AERP. *See Modification of NPDES Permit No. NC0004618, supra* note 37 (transferring ownership on April 10, 2019). Because AERP did not have an NPDES permit authorizing its March 2019 discharges, AERP violated sections 301(a) and 402 of the Clean Water Act. 33 U.S.C. § 1311(a), 1342.

<sup>81</sup> *See AERP Air Permit, supra* note 45.

<sup>82</sup> *Notice of Brownfields Property, supra* note 13, at 4–5.

<sup>83</sup> 33 U.S.C. §§ 1311(a), 1342.

manufacturing process, the wood pellet mill is expected to discharge non-contact cooling water into the nearby Jacob Branch and Lumber River through the two discrete wastewater outfalls.<sup>84</sup> 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.<sup>85</sup> AERP must therefore apply for an NPDES permit prior to discharging its pellet mill wastewater and will be in further violation of the Clean Water Act if it fails to do so.

Additionally, the well water that will be used as non-contact cooling water presumably contains the same contaminants found in the recovery wells on site, including benzene, DCE, TCE, PCE, and vinyl chloride.<sup>86</sup> It is unclear whether the Facility’s wastewater treatment plant is capable of safely processing this additional pollutant load such that these harmful industrial solvents will not be discharged into the Lumber River or Jacob Branch.

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,<sup>87</sup> with a start date currently projected for spring 2021.<sup>88</sup> The final air permit was issued on August

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<sup>84</sup> Wastewater Outfall 001 and Wastewater Outfall 002. *See Modification for NPDES Permit No. NC0004618, supra* note 37, at PDF 13 (map).

<sup>85</sup> 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”).

<sup>86</sup> *Notice of Brownfields Property, supra* note 13, 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 land use restrictions prohibit any use of groundwater from the developed portion of the property except for use in textile manufacturing. *See Notice of Brownfields Property, supra* note 13, at 4–5. If AERP intends to use groundwater in the wood pellet manufacturing process, as previously indicated, then AERP must first seek approval from DEQ and a modification to the land use restrictions. *Id.*

<sup>87</sup> *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](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”).

<sup>88</sup> *See* Allenby Capital, *Company Note Update: Active Energy Group plc* at 1 (Dec. 3, 2020), <https://www.aegplc.com/investors/research/> (download available: Allenby Capital Research) (stating that “construction work [is] expected to commence in early January 2021” and “commissioning of the plant to commence in Q2 2021”). Despite this and other statements made to investors, *see supra* note 87, AERP’s construction schedule and operational timeline for the new pellet mill remains somewhat unclear. In mid-September, AERP told DEMLR staff that the pellet mill would be operational “within the next several months.” N.C. DEMLR, COMPLIANCE INSPECTION REPORT: ACTIVE ENERGY RENEWABLE POWER (2020), available at <https://edocs.deq.nc.gov/WaterResources/DocView.aspx?id=1289526&dbid=0&repo=WaterResources>. Meanwhile,

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. 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 authorizing its wastewater discharge and receiving a modification to the Brownfields Agreement authorizing use of the site's groundwater in the pellet mill manufacturing process. Winyah Rivers urges AERP to immediately take steps to obtain a valid NPDES permit and the necessary revisions to the Brownfields Agreement to prevent these future violations of the Clean Water Act and state law.

#### **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, 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 where necessary.

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 the Facility. The water quality in 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:

Tina Christensen, Executive Director  
Winyah Rivers Alliance  
P.O. Box 554  
Conway, SC 29528

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AERP later told DAQ staff that construction of the pellet mill would not even start until the beginning of 2021. N.C. DAQ, *Presentation: Introduction to Air Quality Permitting and Review of the Active Energy Permit* at Slide 26 (Nov. 23, 2020), <https://deq.nc.gov/outreach-education/environmental-justice/secretarys-environmental-justice-and-equity-board#past-meetings> (download available within "Past Meetings" tab).

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:

Heather Hillaker  
Elizabeth Rasheed  
Kelly Moser  
Southern Environmental Law Center  
601 West Rosemary Street, Suite 220  
Chapel Hill, NC 27516-2356  
919-967-1450  
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[kmoser@selcnc.org](mailto:kmoser@selcnc.org)

## 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 industrial wastewater, including remediated groundwater and filter backwash and associated pollutants, into surface waters without a valid NPDES permit, and otherwise not in compliance with the conditions of NPDES Permit NC0004618. Unless the violations described above are fully redressed, Winyah Rivers intends to initiate a citizen suit against AERP following the 60-day notice period.

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 civil penalties pursuant to 33 U.S.C. § 1319(d). 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.<sup>89</sup> 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)<sup>90</sup> to prevent further violations of the Clean Water Act 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.

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<sup>89</sup> 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4.

<sup>90</sup> 33 U.S.C. §§ 1365(a), (d)

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 Notice 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 Notice Letter should be directed to the undersigned counsel.

Thank you for your prompt attention to this matter.

Sincerely,



Heather Hillaker  
Staff Attorney



Elizabeth Rasheed  
Associate Attorney



Kelly Moser  
Senior Attorney

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Notice of Intent to Sue  
December 10, 2020  
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Enclosures: Attachments 1-13

**cc (via certified mail, with enclosures):**

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Mary S. Walker, Acting Administrator  
U.S. Environmental Protection Agency,  
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Michael S. Regan, Secretary  
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Brian Wrenn, Director  
Division of Energy, Mineral, and Land  
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Danny Smith, Director  
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**cc (via email and certified mail, without enclosures):**

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