



For a thriving New England

CLF Vermont 15 East State Street, Suite 4  
Montpelier, VT 05602  
P: 802.223.5992  
F: 802.223.0060  
www.clf.org

September 7, 2016

David R. Mullen, Executive Director  
George M. Bald, Chairman  
Peter J. Loughlin, Vice Chairman  
Robert A. Allard, Board Member  
Margaret F. Lamson, Board Member  
John Bohenko, Board Member  
Franklin Torr, Board Member  
Robert Preston, Board Member  
Pease Development Authority  
55 International Drive  
Portsmouth, NH 03801

Pease Development Authority  
State House  
Concord, NH 03301

**VIA REGISTERED MAIL, RETURN RECEIPT REQUESTED, TO THE ATTENTION OF DAVID R. MULLEN, EXECUTIVE DIRECTOR, PEASE DEVELOPMENT AUTHORITY**

RE: Notice of Intent to Sue Pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B)

To Whom It May Concern:

The Conservation Law Foundation (“CLF”)<sup>1</sup> hereby gives notice to the addressed persons of its intent to file suit, pursuant to Section 7002 of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6972(a)(1)(B), for violations of the Act specified below. This letter constitutes notice pursuant to 40 C.F.R. Part 254 (the “Notice”) to the addressed persons of CLF’s intention to file suit in the United States District Court for the District of New Hampshire seeking

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<sup>1</sup> CLF is a not-for-profit 501(C)(3) organization dedicated to the conservation and protection of New England’s environment. Its mission includes the conservation and protection of the many uses of the waters in and around the Great Bay watershed for, among other things, fishing, recreation, boating, scenic/aesthetic, and scientific purposes. CLF’s membership includes people who live in or near the Great Bay watershed, and use and enjoy the watershed for recreational, aesthetic, and/or scientific purposes. The interests of CLF’s members are adversely affected by the disposal of solid and hazardous waste, which present an imminent and substantial endangerment to human health and the environment, by Pease Development Authority to receiving waters in violation of Resource Conservation and Recovery Act and other federal environmental statutes, including the Clean Water Act, 33 U.S.C. § 1365.



appropriate equitable relief and other relief as the court determines to be appropriate, including civil penalties, costs, and attorney and expert fees, no earlier than 90 days from the postmark date of this Notice letter. CLF intends to name the Pease Development Authority and the following individuals associated therewith as defendants: David R. Mullen in his official capacity as Executive Director, George M. Bald in his official capacity as Chairman, Peter J. Loughlin in his official capacity as Vice Chairman, Robert A. Allard in his official capacity as Board Member, Margaret F. Lamson in her official capacity as Board Member, John Bohenko in his official capacity as Board Member, Franklin Torr in his official capacity as Board Member, and Robert Preston in his official capacity as Board Member.

The subject of this action is the storage and disposal of perfluorooctanoic acid (“PFOA”) and perfluorooctanesulfonic acid (“PFOS”) by Pease Development Authority. As described below, Pease Development Authority is discharging stormwater from systems of conveyances, including roadways, storm drains, storm sewers, drainage ditches, and outfalls located throughout the Pease International Tradeport and Airport (“Pease International”), to the waters of the United States.<sup>2</sup> These discharges convey discarded PFOA and PFOS stored at Pease Development Authority into waters of the United States, jeopardizing the health of individuals—including CLF’s members—using and enjoying such waters and endangering wildlife and the environment in the vicinity of the waters into which Pease Development Authority has discharged PFOA and PFOS.

The EPA has issued drinking water health advisories for PFOA<sup>3</sup> and PFOS<sup>4</sup> because of the dangers that they pose to human health and the environment. Notably, because PFOA and PFOS have extremely high persistence, they may remain present in the environment, including in drinking water, for many years, presenting a continuous and ongoing danger to human health and the environment.

This notice is in addition to our September 7, 2016, “Notice of Violations and Intent to File Suit under the Clean Water Act” pursuant to Section 505 of the Federal Water Pollution Control Act (“Clean Water Act” or “Act”), 33 U.S.C. § 1365, for violations of the Act specified in that letter.

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<sup>2</sup> As noticed in CLF’s September 7, 2016, “Notice of Violations and Intent to File Suit under the Clean Water Act” pursuant to 33 U.S.C. § 1365, these discharges are occurring without a permit, in violation, *inter alia*, of Sections 301(a) and 402 of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1342.

<sup>3</sup> U.S. ENVTL. PROTECTION AGENCY, DRINKING WATER HEALTH ADVISORY FOR PERFLUOROCTANOIC ACID (PFOA), EPA DOCUMENT NUMBER: 822-R-16-005 (May 2016), [https://www.epa.gov/sites/production/files/2016-05/documents/pfoa\\_health\\_advisory\\_final-plain.pdf](https://www.epa.gov/sites/production/files/2016-05/documents/pfoa_health_advisory_final-plain.pdf).

<sup>4</sup> U.S. ENVTL. PROTECTION AGENCY, DRINKING WATER HEALTH ADVISORY FOR PERFLUOROCTANE SULFONATE (PFOS), EPA DOCUMENT NUMBER: 822-R-16-004 (May 2016), [https://www.epa.gov/sites/production/files/2016-05/documents/pfos\\_health\\_advisory\\_final-plain.pdf](https://www.epa.gov/sites/production/files/2016-05/documents/pfos_health_advisory_final-plain.pdf).

## **PERSON RESPONSIBLE FOR ALLEGED VIOLATIONS**

Pease Development Authority and its agents with operational control over Pease International are the persons, as defined by Section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B), responsible for the violations alleged in this Notice. Pease Development Authority has owned and operated Pease International since at least 1997. Accordingly, Pease Development Authority is responsible for past and present handling, storage, treatment, transportation, and/or disposal of PFOA and PFOS at Pease International in compliance with RCRA.

## **ACTIVITIES ALLEGED TO BE VIOLATIONS**

Pease Development Authority's past and present handling, storage, treatment, transportation, and/or disposal of solid and hazardous wastes at Pease International—namely, PFOA and PFOS—are contaminating the environment both on and off-site, causing PFOA and PFOS contamination to surface water and groundwater, including drinking water, within the vicinity of Pease International. This contamination presents an imminent and substantial endangerment to human health and the environment.

Section 7002(a)(1)(B) of RCRA provides, in relevant part:

Any person may commence a civil action on his own behalf ... 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 ... to restrain any [such] person ... to order such person to take other action as may be necessary, or both.

RCRA's definition of "disposal" expressly includes "discharge." 42 U.S.C. § 6903(3).<sup>5</sup> In addition, the PFOA and PFOS that have discharged, leaked, spilled, dripped, or otherwise contaminated stormwater and groundwater in and around Pease International are a "solid waste" under RCRA. *See Zands v. Nelson*, 779 F. Supp. 1254, 1262 (S.D. Ca. 1991) (stating "solid waste is defined very broadly"). As the party responsible for storing, transporting, or discarding PFOA and PFOS, and as the owner and operator of Pease International, Pease Development Authority "has contributed to" and "is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste" under RCRA. 42 U.S.C.

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<sup>5</sup> 42 U.S.C. § 6903(3) reads, in full: "The term 'disposal' means 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."



§ 6972(a)(1)(B). Pease Development Authority acknowledges that PFOA and PFOS are present on-site at Pease International, and are stored in such a way as to come into ready contact with stormwater and groundwater, which then is conveyed to waters in and around Pease International, including Newfields Ditch, Upper Hodgson Brook, Lower Hodgson Brook, North Mill Pond, the Lower Piscataqua River–South, Pickering Brook and Flagstone Brook, Lower Little Bay General Sullivan Bridge, Lower Little Bay Marina, Lower Piscataqua River–North, McIntyre Brook, Fabyan Point, Great Bay, Lower Grafton Brook, “Unnamed Brook–to Unnamed Marsh” (Waterbody ID NHRIV600030904-07), Kennard Dam, “Unnamed Brook–through Unnamed Marsh to Great Bay” (Waterbody NHRIV600030904-08), Pickering Brook, Peverly Brook, and Peverly Brook Pond (collectively, the “Receiving Waterbodies”).

As set forth in CLF’s September 7, 2016, “Notice of Violations and Intent to File Suit under the Clean Water Act” pursuant to 33 U.S.C. § 1365, Pease International is a regulated small municipal separate storm sewer system (“MS4”), pursuant to 40 CFR §§ 122.26(b)(8) and 122.26(b)(16). Specifically, it constitutes a system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains), owned or operated by a public body created pursuant to state law and having jurisdictional authority over stormwater, designed or used for collecting or conveying stormwater that is not a combined sewer or publicly owned treatment works. In accordance with 40 CFR § 122.32, Pease International is located in an urbanized area as determined by the latest Decennial Census by the Bureau of Census.

Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt. Stormwater runoff picks up pollutants, including PFOA and PFOS, that harm waterways. Stormwater runoff transported through MS4s and discharged into water bodies elevates pollutant concentrations and loadings in these waters and changes their natural hydrologic patterns. Pease Development Authority transports stormwater runoff and discharges it into the waters of the United States

Pease International discharges directly or indirectly into the Receiving Waterbodies, which are all waterbodies within the Piscataqua–Salmon Falls watershed. EPA has designated these waterbodies variously as habitats for “fish, shellfish, and wildlife protection and propagation,” “aquatic life harvesting,” the “public water supply,” and recreation. Pease Development Authority and others have identified outfalls that discharge stormwater contaminated with pollutants from Pease International, including, but not limited to, outfalls identified as “001-A”, “002-A”, “003-A”, and “004-A”, which discharge into the Receiving Waterbodies, including directly into Hodgson Brook (alternatively, “Hodgkins Brook”), Flagstone Creek, McIntyre Brook, Newfield Ditch, and Grafton Ditch (alternatively, “Grafton Brook”, “Grafton Creek”, or “Harvey’s Creek”). These discharges occur every time there is a one inch or greater precipitation or snow and ice melt event. These discharges are non-exclusive examples of the violations occurring at Pease International,



and represent a non-exclusive list of the pollutants discharged and the sites at which discharges occur.

PFOA and PFOS discharged via stormwater runoff or groundwater contamination present an “imminent and substantial endangerment to health or the environment” under RCRA for four reasons: (1) the toxicity of PFOA and PFOS; (2) the persistence of PFOA and PFOS in the environment; (3) Pease Development Authority’s contribution of PFOA and PFOS to stormwater runoff and groundwater; and (4) Pease Development Authority’s conveyance of PFOA and PFOS to waters used by individuals and wildlife. There may be additional reasons that Pease Development Authority’s past and present handling, storage, treatment, transportation, and/or disposal of solid and hazardous wastes present an imminent and substantial endangerment to human health and the environment, which may be discovered in the course of further investigation and through post-complaint discovery. These may form the basis for additional claims under RCRA without further notice to Pease Development Authority.

Neither EPA nor the State of New Hampshire is diligently prosecuting Pease Development Authority under RCRA for their violations described herein. *See* 42 U.S.C. § 6972(b)(2)(B)(i).

### **DATES OF VIOLATION**

Since at least 2011, Pease Development Authority has discharged stormwater from Pease International during every precipitation event—including snow and ice melt events—of one inch or more since at least 2011, continuing to the present. These discharges convey pollutants, which include PFOA and PFOS, from their place of storage at Pease International to the waters described above.

### **RELIEF REQUESTED**

In its complaint, CLF will seek injunctive relief to remediate the effects of PFOA and PFOS leakage and spillage in and around Pease International, so that the presence of these substances in stormwater runoff and groundwater no longer poses an imminent and substantial endangerment to human health or the environment. Such remedial action may include: (1) removal of PFOA and PFOS from the site owned and operated by Pease Development Authority; (2) containment of PFOA and PFOS present on-site such that stormwater runoff and groundwater cannot be contaminated with PFOA and PFOS; and (3) any and all other legal and equitable relief that may be necessary to terminate the imminent and substantial endangerment to human health or the environment posed by the PFOA and PFOS at Pease International. Lastly, pursuant to 42 U.S.C.A. § 6972, CLF will seek recovery of costs and fees (including reasonable attorney and expert witness fees) associated with this matter.

**CONCLUSION**

During the ninety-day notice period, CLF is willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of further litigation. If you wish to pursue such discussions, please have your attorney contact Zachary Griefen within the next twenty days so that negotiations may be completed before the end of the 90-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing at the conclusion of the 90 days. Moreover, the claims set forth are not exclusive. This notice of intent to sue is sent without waiver or prejudice to the rights of CLF to advance any additional or further legal and/or federal and state common law claims based upon information or facts that are now known or may be known in the future.

Sincerely,



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Zachary K. Griefen, Esq.  
15 East State Street, Suite 4  
Montpelier, VT 05602  
802.223.5992 x4011  
zgriefen@clf.org

cc:

Gina McCarthy  
Administrator  
Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

H. Curtis Spalding  
Environmental Protection Agency  
EPA Region 1 Administrator  
5 Post Office Square - Suite 100  
Boston, MA 02109-3912



Thomas S. Burack  
New Hampshire Department of Environmental Services  
29 Hazen Drive  
PO Box 95  
Concord, NH 03302-0095

Seth Kerschner  
White & Case LLP  
1155 Avenue of the Americas  
New York, NY 10036

Matt Wisnieff  
White & Case LLP  
1155 Avenue of the Americas  
New York, NY 10036