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Via Registered Mail (Return Receipt Requested) & Certified Mail (Return Receipt Requested)

Robert Boucher Jr., President & CEO
Wheelabrator Saugus, Inc.
Wheelabrator Technologies, Inc.
100 Arboretum Drive, Suite 310
Portsmouth, NH 03801

Peter Kendrigan, Plant Manager
Wheelabrator Saugus, Inc.
100 Salem Turnpike
Saugus, MA 01906

Re: Notice of Intent to File Suit for Violations of the Resource Conservation and Recovery Act and the Clean Water Act at Wheelabrator Saugus, Inc.'s Ash Landfill in Saugus, Massachusetts

Dear Mr. Boucher and Mr. Kendrigan:

Conservation Law Foundation ("CLF") hereby notifies Wheelabrator Saugus, Inc. and Wheelabrator Technologies, Inc. (collectively, "Wheelabrator") of its intent to commence a civil action under Section 7002 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972, and Section 505 of the Clean Water Act ("CWA"), 33 U.S.C. § 1365, for violations of RCRA, 42 U.S.C. § 6901 *et seq.*, and the CWA, 33 U.S.C. § 1251 *et seq.*, at Wheelabrator's ash landfill in Saugus, Massachusetts. CLF intends to file suit against Wheelabrator in federal court to secure appropriate relief under federal law for the violations of RCRA and the CWA described herein.

Wheelabrator's approximately 140-acre ash landfill is located at the confluence of the Saugus and Pines Rivers and within the boundaries of the Rumney Marshes Area of Critical Environmental Concern ("ACEC").¹ "The Saugus and Pines Estuary, situated landward of the barrier beach of Revere, contains one of the most extensive salt marsh systems in the greater Boston metropolitan area," and according to the U.S. Fish and Wildlife Service, is "one of the most biologically significant estuaries in Massachusetts north of Boston." *Designation of Portions*

¹ "Area of Critical Environmental Concern" is a state designation for "those areas within the Commonwealth [of Massachusetts] where unique clusters of natural and human resource values exist and which are worthy of a high level of concern and protection." 301 CMR 12.02.

of the Cities of Boston, Lynn, and Revere, and the Towns of Saugus and Winthrop as the Rumney Marshes Area of Critical Environmental Concern with Supporting Findings at 6-7 (Aug. 22, 1988), available at <http://www.mass.gov/eea/docs/dcr/stewardship/acec/acecs/rm-des.pdf>. In the decision document designating the Rumney Marshes ACEC, the state Secretary of Environmental Affairs stated the following:

I . . . hereby find that the coastal wetland resource areas included in the Rumney Marshes ACEC . . . are significant to flood control, the prevention of storm damage, the protection of land containing shellfish, and fisheries; the prevention of pollution, the protection of wildlife habitat, the protection of public and private water supplies; public interests defined in the Wetlands Protection Act (MGL c. 131, s. 40; 310 CMR 10.00).

Id. at 1.

The site where Wheelabrator's ash landfill now sits was historically a tidal salt marsh. Environmental Notification Form for the Continuation of Use of the Saugus Ash Monofill (hereafter, "ENF") at 2-1 (May 2016), available at <http://www.saugusriver.org/documents/FinalENFforDistribution05272016Wheelabrator.pdf>. Beginning in about 1950, and continuing until 1975, the salt marsh was filled with solid waste from surrounding communities. ENF at 1-1. The solid waste "landfill," which did not adhere to sanitary landfill practices and was actually an open dump, is the base upon which the ash landfill now sits. ENF at 1-1. Across the site, there is an average of approximately 20 feet of solid waste, and then another 30 feet of ash above it. ENF at 2-1. Under the terms of an administrative consent order with the state, the landfill was scheduled to close permanently on December 31, 1996. However, since that time, Wheelabrator has applied for, and been granted, approvals to expand the capacity and life of the landfill numerous times, and is currently applying for a permit to expand the landfill once again.

The ash disposed of at the landfill is generated at Wheelabrator's adjacent municipal solid waste incinerator. The incineration process produces two types of ash: fly ash from the air pollution control equipment, and bottom ash, which is the non-combustible residue remaining after combustion. Michelle Allsopp, Pat Costner & Paul Johnston, *Incineration and Human Health: State of Knowledge of the Impacts of Waste Incinerators on Human Health* at 12 (2001) (hereafter, "*Incineration and Human Health*"). These ash deposits contain high concentrations of harmful compounds, including dioxins, which have been described as the most toxic chemicals known to mankind and are recognized human carcinogens. *Id.* at 43, 53, 72-73. Heavy metals such as lead, which is known to cause cognitive and behavioral development in children, and mercury, which is known for impacts to the central nervous system, kidneys, and developing fetus, are also present in the ash. *Id.* at 54, 75-76. Other compounds and metals such as polychlorinated biphenyls ("PCBs"), polychlorinated naphthalenes ("PCNs"), cadmium, and arsenic have also been discovered in bottom and fly ash, all of which are known to be toxic to humans and animals. *Id.* at 53-54.

Fly ash in particular has a high concentration of toxic compounds, and over the years has become more contaminated as improved air filtration equipment effectively removes more

pollutants prior to emission. The U.S. Supreme Court has recognized that ash generated by municipal solid waste incinerators constitutes hazardous waste, *see City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994), but EPA allows for the highly toxic fly ash to be mixed with lime and bottom ash prior to toxicity testing. *See* Memorandum from Elliot P. Laws, Assistant Administrator for Solid Waste and Emergency Response and Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance to Regional Administrators (Regions I–X) entitled “Revised Implementation Strategy for City of Chicago v. EDF Municipal Waste Combustion (MWC) Ash Supreme Court Decision” (Mar. 22, 1995), available at <https://www.epa.gov/sites/production/files/documents/impstr-laws-mem.pdf>; *Guidance for the Sampling and Analysis of Municipal Waste Combustion Ash for the Toxicity Characteristic*, Office of Solid Waste, U.S. EPA (June 1995), available at <https://www.epa.gov/sites/production/files/2015-10/documents/msw-samp6-95.pdf>. Diluting the fly ash allows incinerators to avoid hazardous waste regulations, but the ash itself is no less dangerous – the same toxic chemicals are merely spread out over a larger volume of combined ash. Further, incineration increases the mobility and bioavailability of toxic metals compared with raw municipal waste. *Incineration and Human Health* at 53. The potential for leaching is also greatest under acidic conditions, which occur when solid waste breaks down into organic acids. *Id.* at 55. Given that the Saugus landfill was originally used for solid waste, soil acidification has likely already taken place and may continue to take place, increasing the risk of leaching.

Despite the high likelihood of contamination leaching from the landfill, and unlike other landfills in the state, Wheelabrator’s ash landfill is unlined. The only potentially protective systems that are in place are a “slurry wall” surrounding the landfill and a leachate collection system. Upon information and belief, Wheelabrator is not conducting *any* groundwater monitoring at the Saugus ash landfill to determine whether contamination from the landfill is leaching into the surrounding environment.

In addition, the landfill’s coastal location makes it extremely vulnerable to climate change impacts such as sea level rise and damaging storm surge, creating a significant risk of toxic contamination from the landfill washing into the surrounding rivers and coastal wetlands. *See Massachusetts v. EPA*, 549 U.S. 497, 521-22 (2007) (“The harms associated with climate change are serious and well recognized.”; “According to petitioners’ unchallenged affidavits, global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming. [] These rising seas have already begun to swallow Massachusetts’ coastal land.”).

Therefore, upon information and belief, the following categories of violations of federal law are occurring at Wheelabrator’s ash landfill: 1) Wheelabrator is violating RCRA by failing to conduct required groundwater monitoring; 2) Wheelabrator is violating RCRA by contributing to an imminent and substantial endangerment to health or the environment because the landfill is leaching pollutants into the surrounding environment and because contamination from the landfill will be exacerbated by climate change impacts such as storm surge and sea level rise; and 3) Wheelabrator is violating RCRA and the CWA by discharging contaminated groundwater, leachate, and stormwater into nearby surface waters without a National Pollutant Discharge Elimination System (“NPDES”) permit.

I. Citizen Suits

“RCRA’s primary purpose . . . is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, ‘so as to minimize the present and future threat to human health and the environment.’” *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996) (quoting 42 U.S.C. § 6902(b)).

Under the RCRA citizen suit provision, “any person may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter.” 42 U.S.C. § 6972(a)(1)(A). Further, “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 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.” *Id.* at § 6972(a)(1)(B).

The purpose of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251. Under the CWA citizen suit provision, “any citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter.” *Id.* at § 1365(a).

II. Failure to Conduct Groundwater Monitoring

Under RCRA, a landfill such as Wheelabrator’s Saugus ash landfill must have a groundwater monitoring system installed. This is true whether the landfill is regulated under RCRA’s hazardous waste section, Subtitle C, or RCRA’s solid waste section, Subtitle D.

Under Subtitles C & D, landfills are required to conduct groundwater monitoring “that consists of a sufficient number of wells, installed at appropriate locations and depths, to yield ground-water samples from the uppermost aquifer.” 40 C.F.R. § 258.51; 40 C.F.R. § 264.97. “The ground-water monitoring program must include consistent sampling and analysis procedures that are designed to ensure monitoring results that provide an accurate representation of ground-water quality.” 40 C.F.R. § 258.53; 40 C.F.R. § 264.97. Further, “[t]he ground-water monitoring program must include sampling and analytical methods that are appropriate for ground-water sampling and that accurately measure hazardous constituents . . . and other monitoring parameters in ground-water samples.” 40 C.F.R. § 258.53; 40 C.F.R. § 264.97. The methods used “must be protective of human health and the environment.” 40 C.F.R. § 258.53; 40 C.F.R. § 264.97.

Massachusetts’ hazardous and solid waste programs have been approved by EPA pursuant to RCRA. The requirement to conduct groundwater monitoring and corresponding regulations are found in Massachusetts’ hazardous waste program at 310 CMR 30.660 *et seq.*, and in Massachusetts’ solid waste program at 310 CMR 19.118.

Upon information and belief, Wheelabrator is not conducting *any* groundwater monitoring at the Saugus ash landfill, in violation of RCRA regulations and the state permitting programs

implementing RCRA regulations. Wheelabrator has operated and expanded, and continues to operate and expand, the ash landfill without any information whatsoever about which pollutants, and in what quantities, are leaching into the surrounding environment and posing a threat to surrounding communities. Because it is not conducting required groundwater monitoring, the ash landfill is an “open dump,” which is prohibited under RCRA, 42 U.S.C. § 6945(a).

These violations are continuous and ongoing, and are enforceable through the RCRA citizen suit provision. *See Ashoff v. City of Ukiah*, 130 F.3d 409, 411 (9th Cir. 1997). CLF intends to seek a civil injunction, as provided for under section 7002 of RCRA, requiring Wheelabrator to install, operate, and maintain a ground water monitoring system and prohibiting any additional disposal of ash at, or expansion of, the landfill unless and until a groundwater monitoring system is installed and a sufficient amount of data is collected to determine whether there is contamination leaching from the landfill. CLF also intends to seek declaratory relief, civil penalties, and an award of the costs of litigation, including attorney and expert witness fees, under section 7002 of RCRA.

III. Contributing to an Imminent and Substantial Endangerment

The imminent and substantial endangerment citizen suit provision “allows citizen suits when there is a reasonable prospect that a serious, near-term threat to human health or the environment exists.” *Maine People’s Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 279 (1st Cir. 2006). “This is ‘expansive language’, which is ‘intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes.’” *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991), *rev’d in part on other grounds*, 505 U.S. 557 (1992) (quoting *United States v. Price*, 688 F.2d 204, 213-14 (3d Cir. 1982)).

Wheelabrator is contributing to an imminent and substantial endangerment in two distinct, but related, ways. As the owner and operator of an unlined landfill containing solid waste and ash that is leaching pollutants – including, but not limited to, dioxins, lead, mercury, PCBs, PCNs, cadmium, and arsenic – Wheelabrator is contributing to the endangerment of surrounding communities and the environment.

Additionally, the hazardous and solid waste at the landfill is located at, near, or in some cases below sea level in close proximity to major human population centers in Saugus, Revere, and Lynn, and Rumney Marsh, the Saugus and Pines Rivers, and the Atlantic Ocean. The first significant storm surge that makes landfall at the Saugus landfill is going to further flush hazardous and solid waste into the surrounding water bodies and through those communities, and sea level rise will result in even more of the landfill sitting directly in the tidal marsh.

Despite these certain risks, Wheelabrator has continued to operate and expand the landfill and has not taken appropriate steps to protect the public and the environment. Wheelabrator’s violations of RCRA are ongoing and continuous. CLF intends to seek a civil injunction, as provided under section 7002 of RCRA, ordering Wheelabrator to perform and pay for such work, including closure of the landfill, as may be required to abate the imminent and substantial endangerment caused by the landfill and restraining Wheelabrator from further violating RCRA.

CLF also intends to seek civil penalties and an award of the costs of litigation, including attorney and expert witness fees, under section 7002 of RCRA.

IV. Discharge Without a Permit

The Saugus ash landfill is continuously discharging contaminated groundwater and/or leachate containing pollutants – including, but not limited to, dioxins, lead, mercury, PCBs, PCNs, cadmium, and arsenic – into the wetlands surrounding the landfill through a direct hydrological connection. These pollutants flow through the wetlands into Rumney Marsh and the Saugus and Pines Rivers.

The CWA prohibits the discharge of any pollutant into the navigable waters of the United States without a NPDES permit authorizing such discharge. *See* Sections 301(a) and 402 of the CWA, 33 U.S.C. §§ 1311(a), 1342. Wheelabrator does not have a NPDES permit that authorizes the discharge of contaminated groundwater or leachate from the ash landfill into surrounding wetlands, Rumney Marsh, or the Saugus and Pines Rivers. Thus, the ash landfill’s ongoing discharge of pollutants into the wetlands, Rumney Marsh, and the Saugus and Pines Rivers is a violation of Section 301(a) of the CWA.

Wheelabrator also does not have a NPDES permit to discharge stormwater from the ash landfill, despite the fact that its activities at the landfill generate stormwater pollution that is collected, channeled, and conveyed into adjacent wetlands, Rumney Marsh, and the Saugus and Pines Rivers – all waters of the United States. EPA’s NPDES program includes the Multi-Sector General Permit (“MSGP”) that covers 29 categories of industrial activity. Wheelabrator’s ash landfill falls within “Sector K – Hazardous Waste Treatment, Storage, or Disposal Facilities” and/or “Sector L – Landfills, Land Application Sites, and Open Dumps;” however, Wheelabrator has not applied for coverage under either Sector.² Thus, Wheelabrator’s ongoing discharges of stormwater associated with its industrial activities at the ash landfill are unpermitted and violate Section 301(a) of the CWA.

RCRA regulations similarly prohibit the “discharge of pollutants into waters of the United States, including wetlands, that violates any requirements of the Clean Water Act, including, but not limited to, the [NPDES] requirements, pursuant to section 402.” 40 C.F.R. § 258.27.

² Wheelabrator does have coverage under “Sector O – Steam Electric Generating Facilities” for stormwater discharges from its waste incinerator, but that does not cover its industrial activities at the ash landfill. Sector O does not address activities associated with landfills, and specifically states that “[y]ou must comply with Part 8 sector-specific requirements associated with your primary industrial activity and any co-located industrial activities, as defined in Appendix A.” MSGP Part 8 Subpart O (emphasis in original). Appendix A defines “Co-located Industrial Activities” as “any industrial activities, excluding your primary industrial activity(ies), located on-site that are defined by the stormwater regulations at 122.26(b)(14)(i)- (ix) and (xi).” MSGP Appendix A. Landfills are included in the categories of industrial activities defined by the relevant stormwater regulations, *see* 40 C.F.R. § 122.26(b)(14), meaning that the ash landfill is a co-located industrial activity requiring compliance with the Part 8 sector-specific requirements of Sectors K and/or L.

Wheelabrator's discharge of contaminated groundwater or leachate from the ash landfill into surrounding wetlands, Rumney Marsh, or the Saugus or Pines Rivers without a NPDES permit is a violation of the RCRA regulations.

Wheelabrator's violations of the CWA and RCRA are ongoing and continuous. CLF intends to seek a civil injunction ordering Wheelabrator to cease its unpermitted discharge and/or obtain appropriate permit coverage under the CWA. CLF also intends to seek civil penalties and an award of the costs of litigation, including attorney and expert witness fees.

V. Conclusion

Additional information, including information in Wheelabrator's possession, may reveal further details about the RCRA and CWA violations described above. This letter covers all such violations and endangerments, including those revealed by additional information. CLF 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.

If Wheelabrator has any reason to believe that its ash landfill is exempt from the legal requirements described above, has complied with all such requirements, or otherwise has a defense to liability, please advise us of the specific basis for your exemption, compliance, or defense. During the notice period, we will be available to discuss effective remedies, actions, and the possibility of resolving this matter without litigation. However, if you wish to pursue negotiations in the absence of litigation, you should initiate such negotiations within the next twenty days so that they may be completed prior to the close of the notice period. I can be reached at (617) 850-1716 or hmurray@clf.org.

Sincerely,



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