



OFFICE OF THE CITY ATTORNEY

March 19, 2021

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Administrator  
U.S. Environmental Protection Agency  
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Washington, D.C. 20460

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Acting Regional Administrator  
U.S. Environmental Protection  
Agency - Region 8  
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Denver, CO 80202-1129

Jill Hunsaker Ryan  
Executive Director  
Colorado Department of Public Health &  
Environment  
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Philip J. Weiser  
Colorado Attorney General  
Ralph L. Carr Judicial Building  
1300 Broadway, 10<sup>th</sup> Floor  
Denver, CO 80203

Donald Austin  
Vice President, Commerce City Refinery  
Suncor Energy (U.S.A.) Inc.  
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Commerce City, CO 80022

Director, Legal Affairs  
Suncor Energy (U.S.A.) Inc.  
717 17<sup>th</sup> Street, 29<sup>th</sup> Floor  
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CT Corporation System  
Registered Agent for Suncor Energy  
7700 E. Arapahoe Road, Suite 220  
Centennial, CO 80112-1268

Re: Notice of Imminent and Substantial Endangerment Pursuant to Section 7002 of RCRA – Suncor Energy Refinery, Commerce City, Colorado

Dear Administrator Regan, Acting Regional Administrator Thomas, Executive Director Ryan, Attorney General Weiser, and Mr. Austin:

This letter is to notify you, on behalf of the City of Commerce City, Colorado, a home-rule city, (“the City”) that the City intends to commence a legal action in federal district court against Suncor Energy (U.S.A.) (“Suncor”) under the citizen suit provisions of Resource Conservation and Recovery Act (“RCRA”). The City will seek injunctive relief, costs, and any other such relief that the court deems appropriate to address the violations described herein.

Suncor is in violation of Section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B), because an imminent and substantial endangerment to health or the environment, within

the meaning of that Section, may exist due to the release into the environment of solid wastes or hazardous wastes from the Suncor's Commerce City Refinery complex (the "facility"). The endangerment is the result of past or present handling, storage, or disposal of those wastes at the facility.

### Background

As discussed below, Suncor is discharging per- and polyfluoroalkyl substances ("PFAS") into Sand Creek, a tributary to the South Platte River. Each release is in violation of 42 U.S.C. § 6972(a)(1)(B) of the RCRA because these releases may present an imminent and substantial endangerment to health and the environment.

PFAS – or "forever chemicals" – are known to be dangerous to human health. The Environmental Protection Agency ("EPA") issued a Lifetime Health Advisory for exposure to PFAS in drinking water in 2009. Updated in 2016, that advisory limit is 70 parts per trillion ("ppt"). Recent analyses from the Agency for Toxic Substances and Disease Registry suggests that the advisory limits are too high, and the Colorado Department of Public Health and Environment ("CDPHE") is currently considering more stringent limits. Two PFAS, perfluorooctanoic acid ("PFOA") and perfluorooctane sulfonate ("PFOS"), are known to cause developmental effects in infants, cancer, liver malfunction, and several other adverse hepatic, cardiovascular, endocrine, immune, reproductive, and developmental consequences.

In response to a Request for Information from the Water Quality Control Division of CDPHE, Suncor began testing effluent from the facility's Outfall 020A for PFOA, PFOS, and other polyfluorinated compounds in June 2019. Outfall 020A discharges to Sand Creek within the city limits of Commerce City. PFAS have been detected in the facility's wastewater each subsequent month. In at least five months, the concentrations exceeded the EPA's current advisory by up to three times. In May 2020 alone, PFAS exceeded 300 ppt. Because these chemicals are persistent, CDPHE has stated that these chemicals in streams can impact drinking water supplies downstream of the releases.

### Statutory Framework

Given these facts, Suncor is liable for injunctive relief in an action brought by the City under Section 7002(a)(1)(B) of RCRA to address the contamination at, and migrating from, the facility. That Section provides that "any person may commence a civil action on his own behalf":

(B) against any person, . . . including any past or present generator, past or present transporter, past or present owner or operator of a treatment, storage, or disposal facility, who has contributed to 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.

42 U.S.C. § 6972(a)(1)(B).

The City has the authority to bring an action under RCRA. The City is a “person” as that term is defined by Section 1004(15) of RCRA, 42 U.S.C. § 6903(15). Commerce City is located in Adams County, Colorado. The Suncor refinery is located within the boundaries of the City.

Suncor is liable for endangerment under RCRA. Suncor is a “person” within the meaning of Sections 1004(15) and 7002(a)(1)(B) of RCRA, 42 U.S.C. §§ 6903(15), 6972(a)(1)(B). Suncor is an “owner” and “operator” of the facility within the meaning of RCRA Section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B). Suncor engaged in and contributed to the “handling,” “storage,” and “disposal” of the contaminants in question, within the meaning of RCRA Sections 1004(3), 1004(33), and 7002(a)(1)(B) of RCRA, 42 U.S.C. §§6903(3), (33), and 6972(a)(1)(B).

Under RCRA, the term “solid waste” means “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, . . . and other discarded material, including solid, liquid, semisolid, . . . from industrial, commercial, mining, and agricultural operations, and from community activities, . . .” 42 U.S.C. §§ 6903(27). RCRA’s definition of “disposal” is “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water.” 42 U.S.C. §§ 6903(3). By discharging wastewater contaminated with PFAS – dangerous and pervasive chemicals – Suncor has disposed of a “solid waste,” and has created an imminent and substantial endangerment to human health.

#### Notice of Intent to Sue

This notice is provided pursuant to Section 7002(a)(2)(A) of RCRA, 42 U.S.C. § 6972(a)(2)(A). Ninety days after your receipt of this notice, the City may commence a legal action in United States District Court against Suncor, seeking injunctive or other relief to address the endangerment under Section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B). As described above, Suncor has been, and continues to be, responsible for recurrent violations of RCRA by discharging PFAS into the environment. Suncor’s actions may be causing an imminent and substantial endangerment to health or the environment. If litigation is necessary, the City will seek redress for the violations described in this letter, including injunctive relief, costs, and attorneys’ fees pursuant to 42 U.S.C. § 6972(a)(1)(B). The City reserves the right to add additional claims to the specific RCRA violations set forth above based on the same or a similar pattern of violations. The City 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.

The City remains willing to discuss effective remedies for the violations noted in this letter. All responses to this letter should be directed to the City Attorney (rsheesley@c3gov.com) and to the Askman Law Firm, LLC, special counsel to the City in this matter. Thank you for your prompt attention to this matter.

Sincerely,



Robert Sheesley  
City Attorney

Cc: City Council, City of Commerce City  
Roger Tinklenberg, Interim City Manager  
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