

**STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION**

STAFF REPORT

To: Loretta K. Barsamian
Executive Officer

From: Carmen R. Fewless, ESI

Date: January 18, 2002

Subject: ACL Complaint No. R2-2002-0003; The Cosentino Winery, Napa County;
Violation of California Water Code Section 13376, Failure to Obtain Coverage and
Comply with the State's NPDES General Permit for Discharges of Storm Water
Associated with Industrial Activities

SUMMARY

The Cosentino Winery (hereinafter referred to as the discharger) is a commercial winery located at 7415 St. Helena Highway (State Highway 29), in Napa County. The Cosentino Winery is owned by Vintage Grapevine, Inc. Under the federal Clean Water Act (CWA) and California Water Code (CWC), facilities, such as the discharger's, that have storm water discharges associated with industrial activities are subject to National Pollutant Discharge Elimination System (NPDES) permit regulations and are required to submit a Notice of Intent (NOI) to comply with and obtain coverage under the State's NPDES General Permit to Discharge Storm Water Associated with Industrial Activity (General Permit), adopted by the State Water Resources Control Board (SWRCB) on November 19, 1991 and revised in 1997. The discharger did not have General Permit coverage nor comply with the General Permit, as required, during the period beginning March 30, 1992, through October 16, 1999, despite having been notified of this requirement on several occasions during this period. After the discharger obtained General Permit coverage in October 1999, the discharger continued to violate the General Permit by failing to prepare and implement an adequate Storm Water Pollution Prevention Plan (SWPPP) and Monitoring Program until late December 2000. Failure to obtain General Permit coverage, to comply with the General Permit, and to implement an adequate SWPPP resulted in illicit discharges of pollutants in storm water and wastewater associated with the discharger's operations, for more than eight years, in violation of the CWA and CWC.

This Staff Report discusses in detail the circumstances concerning General Permit non-compliance by the discharger. As discussed below, staff recommends issuance of Administrative Civil Liability in the amount of \$ 98,000 pursuant to CWC Sections 113385(a)(1) and (a)(2) for violations of CWC Section 133376 and discharger's General Permit.

CHRONOLOGY – COSENTINO WINERY

1987 - The discharger begins operations, which involves discharges of storm water associated with industrial activities.

1991 - SWRCB mails wineries in Napa County, including the discharger, notification of the State's Industrial Storm Water General Permit requirements.

1992 - SWRCB provides outreach to Napa County wineries through a winery trade association concerning General Permit requirements.

March 30, 1992 - Facilities, such as the discharger's, that have storm water discharges associated with industrial activities are required to submit a Notice of Intent (NOI) to comply with and obtain coverage under the SWRCB's General Permit.

Oct. 14, 1994 - RWQCB issues Administrative Civil Liability – Citation No. 94-137 to the Cosentino Winery for the illicit discharge of winery process water to a storm drain, tributary to the Napa River.

July 20, 1998 - SWRCB requires Cosentino Winery to either obtain General Permit coverage or submit a Notice of (*General Permit*) Non-Applicability. The Cosentino Winery submitted neither an application for General Permit coverage, nor a Notice of Non-Applicability in response to the SWRCB request.

July 30, 1999 - RWQCB staff inspection in response to neighbor complaints. Staff determine that Cosentino Winery does not yet have General Permit coverage, nor a SWPPP for the facility, for its stormwater discharges.

Aug. 17, 1999 - RWQCB staff issues a Notice to Comply requiring the discharger to file an Notice of Intent (NOI) to secure General Permit coverage no later than September 16, 1999.

Sept. 16, 1999 - The discharger fails to meet the Notice to Comply deadline for filing an NOI with the SWRCB.

Oct. 16, 1999 - SWRCB receives an NOI from the discharger.

1999-2000 Wet Season – Cosentino Winery continues to violate the General Permit by failing to implement General Permit storm water monitoring program requirements, including failure to conduct visual observations and storm water quality sampling and failing to implement an adequate Stormwater Pollution Prevention Plan (SWPPP).

June 1, 2000 - RWQCB staff inspection identifies numerous General Permit violations including: deficient Storm Water Pollution Prevention Plan, deficient monitoring program, failure to keep records of facility inspections, and failure to adequately train the facility staff responsible for implementing the SWPPP.

June 1, 2000 - RWQCB staff give the Cosentino Winery Vice-President of Operations an Inspection Report Form identifying corrective actions necessary to bring the facility into compliance with General Permit requirements. The Vice-President of Operations agrees to implement the specified corrective actions within five days, and to submit documentation of corrective action completion and a revised SWPPP no later than July 2, 2000, as specified in the Inspection Report Form.

July 1, 2000 - Cosentino Winery fails to submit the 1999-2000 Storm Water Monitoring Program Annual Report as required by the General Permit.

July 2, 2000 - Cosentino Winery fails to meet the deadlines for implementing and documenting corrective actions, and for submitting a revised SWPPP. Repeated telephone communications from RWQCB staff (mid-July through late-October 2000) requesting corrective actions and a revised SWPPP receive no response from the discharger.

October 4, 2000 - Staff receive written complaint from neighbors containing photographs which document an illicit discharge to the storm drain on September 24, 2000. Based on subsequent discussions with the discharger, the September 24, 2000, illicit discharge appears to have resulted from the types of SWPPP deficiencies identified by Regional Board staff on June 1, 2000, for which the discharger failed to implement corrective actions as requested.

November 3, 2000 - RWQCB Executive Officer issues Cleanup and Abatement Order (CAO) No. 00-119 to the discharger for the illicit discharge of Industrial Storm Water and the failure to submit and implement a revised SWPPP and Monitoring Program. CAO No. 00-119 required that a revised SWPPP and Monitoring Program be submitted to the Regional Board no later than November 30, 2000.

December 1, 2000 - The discharger requested (and staff allowed) that the November 30, 2000, deadline for submittal of a revised SWPPP and Monitoring Program be extended until December 15, 2000.

December 15, 2000 - Cosentino Winery fails to meet the CAO extended deadline for submittal of a revised SWPPP and Monitoring Program.

December 22, 2000 – The discharger submits an acceptable SWPPP and Monitoring Program for its facility.

Spring 2001 - During two staff inspections during the spring of 2001, the Cosentino Winery failed to have its SWPPP available on site. The General Permit requires that an up-to-date SWPPP be maintained on site, and available to facility personnel responsible for implementing the SWPPP and for review by Regional Board staff during site inspections.

DISCUSSION

The discharger has operated its Cosentino Winery facility (facility) since 1987. The SWRCB notified the discharger by mail in 1991, and through a trade association in 1992, of the General Permit and its requirements, and the discharger's obligation to obtain General Permit coverage.

The SWRCB timely received responses to these notifications from many Napa County winery owners but not from the discharger.

On October 14, 1994, in response to the illicit discharge of wastewater from the facility to waters of the State via a storm water collection system, the discharger was issued Administrative Civil Liability – Citation No. 94-137 by the Board’s Executive Officer. Citation No. 94-137 imposed a penalty of \$200.00.

On July 20, 1998, the SWRCB notified the discharger that an application to obtain General Permit coverage, as required by State and federal laws, had not been filed for the facility. The SWRCB instructed the discharger to either submit a Notice of Intent (NOI) to comply with the General Permit and obtain General Permit coverage, or to fill out and submit a Notice of Non-Applicability documenting why the facility did not require General Permit coverage. The discharger did not submit either an NOI or a Notice of Non- Applicability in response to the SWRCB’s request.

On July 30, 1999, Board staff inspected the facility in response to complaints of illicit discharges from the facility to an on-site storm water collection system (stormdrain) which discharges to a tributary to the Napa River. Staff found that the facility did not have General Permit coverage at the time of this inspection. While no discharges were observed during this inspection, staff identified the potential for illicit discharges resulting from grape processing and barrel washing activities, and from polluted storm water contacting the facility’s industrial areas. In response, staff sent a Notice to Comply (NTC) dated August 17, 1999, requiring the discharger to submit an NOI to comply with the General Permit and obtain General Permit coverage. The NTC also required development and implementation, within 30 days, of a SWPPP in accordance with General Permit specifications. Although the NTC required the submittal of the NOI no later than September 16, 1999, the SWRCB did not receive the discharger’s NOI until October 16, 1999.

On June 1, 2000, staff inspected the facility again in response to complaints from neighbors who alleged illicit discharges of wastewater and polluted storm water associated with facility operation into the storm drain and onto a neighbor’s property during the period January through March 2000. As this inspection was made during the dry season and at a time crushing operations were not in progress, staff did not observe any illicit discharges. However, during the inspection, staff identified inadequacies with the facility SWPPP constituting non-compliance with the General Permit. Staff found that the discharger did not have an adequate Monitoring Program in place, had failed to keep a record of inspections, had not adequately trained its staff responsible for implementing the SWPPP, and had not updated the SWPPP to include structural changes made at the facility. The discharger was given an Inspection Report Form identifying corrective actions required to bring the facility into compliance with General Permit requirements. Staff discussed the required corrective actions with the Vice President of Operations, Ms. Julie Weinstock, who agreed to implement the corrective actions within five days, and to submit a revised SWPPP, including documentation of completion of the corrective actions by July 2, 2000.

Despite repeated prompting by staff (mid-July through late October 2000), the discharger failed to implement the required corrective actions or submit an acceptable SWPPP and Monitoring Program, as discussed below.

On July 1, 2000, the discharger failed to submit the 1999-2000 Annual Report as required by the General Permit. In mid-July, staff contacted the Vice President of Operations, Ms. Julie Weinstock, inquiring about the failure to submit an Annual Report, implement the required corrective actions, and submit the revised SWPPP and Monitoring Program. Ms. Weinstock stated she would contact the consultant in charge of preparing these documents and would mail them to the Board as soon as they were ready. On August 2, 2000, staff again advised Ms. Weinstock that the updated SWPPP and Monitoring Plan were long past due and that Annual Report was needed immediately. Ms. Weinstock faxed the Annual Report the following day, and told staff that a new consultant was being hired to update the facility's SWPPP and Monitoring Plan.

On October 16, 2000, staff received a written complaint from neighbors of the facility, which included photographs reportedly taken on September 24, 2000. The photographs displayed a discharge from the facility crush area (industrial area) to an on-site stormdrain inlet which discharged to a tributary of the Napa River. The discharger acknowledged that such a discharge had taken place. This discharger indicated that the discharge was apparently caused by either an equipment maintenance problem (a plugged wastewater collection system pipe or inlet) or delinquent operational practices (facility staff not operating the wastewater collection system properly). This discharge was the result of the same types of deficiencies identified by staff in the June 1, 2000, Inspection Report Form and for which the discharger had failed to make the required corrective actions. Staff contacted the discharger on October 17, 2000, and requested the immediate termination of any washwater, wastewater, or industrial storm water discharges from the facility, and submittal of the revised SWPPP. In response, the discharger faxed a revised SWPPP to the Board the same afternoon. This revised SWPPP did not address the specified inadequacies in an effective manner.

On November 3, 2000, the Regional Board Executive Officer issued Cleanup and Abatement Order (CAO) No. 00-119 to the discharger for the illicit discharge of wastewater and polluted stormwater from the facility, and for failing to submit the overdue revised SWPPP and Monitoring Program. CAO No. 00-119 required that a revised SWPPP and Monitoring Program be submitted to the Regional Board no later than November 30, 2000. On December 1, 2000, discharger requested, and staff allowed, that this deadline be extended until December 15, 2000. On December 22, 2000 Regional Board staff received and approved the submittal of the revised SWPPP and Monitoring Program proposal from the discharger.

In sum, the discharger was given adequate notice of its obligation to comply with the General Permit and obtain General Permit coverage through the SWRCB and RWQCB several times between 1991 and 1999. Despite these notifications, the discharger operated without coverage under the General Permit from March 30, 1992, until October 16, 1999, thereby violating, for 2755 days, Section 13376 of the CWC. In addition, after it obtained coverage under the General Permit, it failed to comply with its terms from October 17, 1999, until December 22, 2000, (432 days) as discharger failed to develop and implement an adequate SWPPP and Monitoring Program. The total number of days of violation is 3187. By not obtaining General Permit coverage, and failing to comply with General Permit requirements, the discharger realized significant economic savings at the expense of the environment, as discussed below.

REGULATORY FRAMEWORK

Federal Clean Water Act – The discharger’s failure to have NPDES General Permit coverage and concurrent General Permit violations constitute violations of the federal Clean Water Act. Under the federal Clean Water Act, facilities like the discharger’s that have storm water discharges associated with industrial activities are subject to National Pollutant Discharge Elimination System (NPDES) permit regulations. In the State of California, in accordance with the CWC, the SWRCB and the RWQCB are authorized to implement Federal NPDES permit regulations. The SWRCB has issued the General Permit for discharges of storm water associated with industrial activities. Owners of facilities with industrial activities subject to this General Permit must file a permit application in the form of a NOI stating their intention to comply with terms of the General Permit. The General Permit serves as a Waste Discharge Requirement order (WDRs) for discharges of storm water associated with industrial activities. The General Permit requires that an effective SWPPP and Monitoring Program be developed and implemented at the facility at the time of NOI filing to assure the use of appropriate storm water Best Management Practices (BMPs) at a facility.

California Water Code – The discharger’s failure to have coverage under the General Permit and its General Permit violations constitute violations of the California Water Code. Specifically, the discharger violated Water Code Section 13376 for 2755 days (March 30, 1992 through October 16, 1999) by failing to obtain coverage under the General Permit for the discharge of stormwater associated with industrial activities. Additionally, discharger violated the terms of the General Permit for 432 days (March 30, 1992, through December 22, 2000) by failing to develop and implement an adequate SWPPP and Monitoring Program.

LEGAL BASIS FOR ACTION

CWC Section 13376 requires any person discharging pollutants or proposing to discharge pollutants into navigable waters of the United States to file a report of waste discharge (or NOIs in the case of general permits) and prohibits discharges except as authorized by a permit. Discharger violated Section 13376 of the CWC by failing to submit a NOI for its stormwater discharges for 2755 days (March 30, 1992, to October 16, 1999), for which the Board may impose administrative civil liability pursuant to California Water Code Section 13385 (a)(1). The discharger also violated the General Permit requirements for 432 days (October 16, 1999, to December 22, 2000) for which the Board may impose administrative civil liability pursuant to CWC Section 13385(a)(2). The maximum amount of liability for these violations is the sum of \$10,000 for each day in which the violation occurs and where there is a discharge, \$10 per gallon of discharge in excess of 1,000 gallons that is not cleaned up. Accordingly, the maximum liability for 3187 days of violation (2755 days plus 432 days) is \$31,660,000 (\$10,000/day for 3187 days). The amount of gallons of discharge in excess of 1,000 gallons that was not cleaned up is unknown; therefore, the Board staff is not proposing any civil liability on a per gallon of discharge basis.

ENFORCEMENT CONSIDERATIONS

Pursuant to California Water Code Section 13385(e), the Board shall take the following into account in determining the amount of liability imposed under that section: nature, circumstances, extent and gravity of the violation, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability of the discharger to pay the proposed liability, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, degree of culpability, economic benefit or savings resulting from the violation, and any other matters that justice may require. In addition, 13385(e) states, "At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation."

Nature, Circumstances, Extent, and Gravity of the Violation - The discharger was adequately notified of the requirement to obtain General Permit coverage through the SWRCB and RWQCB several times between 1991-1999. Yet it failed to comply. In addition, after obtaining General Permit coverage, pollution prevention elements of the General Permit were not implemented between October 1999 and December 2000, resulting in polluted storm water discharges and causing a significant threat to the beneficial uses of the Napa River. Noncompliance with the General Permit is a violation of the federal Clean Water Act and the California Water Code.

Ability To Pay The Proposed Liability - In determining the amount of civil liability, the Regional Board shall take into consideration, with respect to the violator, the ability to pay and the effect on the ability to continue in business. The Cosentino Winery is a privately owned and operated winery. It consists of a vineyard(s), a wine processing building, and a visitor center. The discharger employs approximately 12 full-time and 4 part-time employees, and has a permit to produce 30,000 gallons of wine per year. The discharger is considered a leader among the producers of premium wine, and currently produces more than 30 award-winning wines. In the last two years the discharger has expanded its vineyard acreage to other areas of the State and it plans to establish additional production facilities at the newly acquired properties. The recommended penalty amount of \$98,000 is based on recovery of the conservatively estimated \$77,424 in cost savings accrued by the discharger through the violations described herein. Based on these facts, the recommended penalty amount would not hinder the discharger's ability to continue in business.

Prior History of Violations – In October 1994, the discharger was issued Administrative Civil Liability – Citation No. 94-137, in response to the illicit discharge of wastewater from the winery to waters of the State, via a storm water collection system tributary to the Napa River. On November 3, 2000, the Regional Board Executive Officer issued CAO No. 00-120 in response to chronic violations of Waste Discharge Requirements Order No. 89-072, regulating operation of a wastewater treatment system shared by the discharger and the Mustards Grill Restaurant.

Degree of Culpability - It is the property owner's responsibility to obtain General Permit coverage and to ensure compliance with all permit conditions. The SWRCB and Regional Board staff notified the discharger of this responsibility both verbally and through several written correspondences, including two notification letters from the SWRCB, and RWQCB staff's Notice to Comply (1999) and Inspection Report Form (2000). The discharger was given sufficient time to respond to the Notice to Comply and to the Inspection Report Form corrective action requirements,

but failed to do so. The discharger failed to comply despite repeated phone call reminders from staff. Accordingly, the discharger was aware of State requirements, but knowingly avoided them. Therefore the discharger is fully culpable for the cited violations.

Economic Benefit or Savings Resulting from the Violation - By failing to submit an NOI and fee, to properly prepare and fully implement a SWPPP, and to conduct and record required monitoring activities, the discharger was able to delay or minimize expenditures that would have been necessary to comply with the General Permit. Preparation of the SWPPP requires technical evaluation of the site. Implementation of a SWPPP usually includes deployment of both structural and non-structural best management practices (BMPs), development and implementation of a Monitoring Program, personnel training, and any other measures deemed necessary to insure the control of pollutants in storm water runoff to the maximum extent practicable. Since necessary control measures and other aspects of compliance vary depending upon site conditions, the actual costs are difficult to estimate. However, based upon typical expenditures at other wineries, staff conservatively estimates that the discharger realized an economic savings of approximately \$77,424. This amount includes a \$500 General Permit filing fee, \$4,000 in General Permit annual fees (1992-1999), approximately \$5,000 for developing and implementing a SWPPP and Monitoring Program; an estimate of \$15,000 in additional costs of developing both structural and non-structural BMPs; \$2,400 in sampling analyses (1992-2000); and approximately \$72,000 in wages to coordinate the Industrial Stormwater Program at the winery (20 days a year at \$50.00/hr).

RECOMMENDATION

After consideration of the above factors and discussion, staff recommends that civil liability be imposed for a total of \$93,000, plus recovery of \$5,000 in staff costs, for a total of \$98,000.

This recommended penalty amount of \$98,000 includes recovery of the estimated \$77,424 in cost savings accrued by the discharger through the violations described herein. The recommended assessment represents less than one percent (0.29%) of the total maximum liability of \$31,870,000. Staff believes this penalty is fair given the discharger's degree of culpability, the cost savings associated with the violations, the potential adverse impacts to water quality resulting from the violations and the need for the liability to serve as an effective deterrent from future violations at this winery and other industrial facilities.

Concur: _____
William B. Hurley, Section Leader

Concur: _____
Bruce Wolfe, Division Chief