TO: Reza Valiyee, 4500 Appian Way, El Sobrante Property Case File
CIWQS Place ID: 824644 (YAN)

FROM: Yan A. Nusinovich, P.E.
Water Resource Control Engineer
Enforcement Section

Marnie Ajello
Staff Counsel
Office of Chief Counsel

DATE: January 5, 2017

SUBJECT: Regional Water Board Staff Communications with Mr. Reza Valiyee about Tentative Cleanup and Abatement Order and Legal Analysis of Notice Requirements

This memorandum documents communications between California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board) staff and Mr. Reza Valiyee concerning pending requirements to clean up the unpermitted installation of a culvert and fill of Appian Creek at 4500 Appian Way, El Sobrante (Site). It is staff's position that Mr. Valiyee received adequate notice of, and opportunity to comment on, a Tentative Cleanup and Abatement Order for the work he did at the Site.

May 11, 2016 Inspection Communication (Yan Nusinovich)

I contacted Mr. Valiyee to meet him at the Site on May 11, 2016, and inspect the unpermitted culvert and soil backfill. The objectives of this inspection were to determine the magnitude and possible impacts of the unpermitted culvert and soil backfill. I found that the culvert had narrowed the channel, modified the channel alignment, and was too high relative to the creek bed. I informed Mr. Valiyee that the culvert would have to be removed and the creek would have to be restored.

Tentative Cleanup and Abatement Order Communications (Yan Nusinovich)

On August 12, 2016, I sent a tentative cleanup and abatement order (CAO) to Mr. Valiyee at rezavaliyee@gmail.com, to Masood Esmaili, Site Maintenance Manager for Mr. Valiyee, at mesma26@yahoo.com, and to the address of the Site. These email addresses had been obtained from Warden Nicole Kozicki of the California Department of Fish and Wildlife. I posted the tentative CAO on the Regional Water Board website at http://www.waterboards.ca.gov/sanfranciscobay/board_decisions/tentative_orders.shtml

for a 30-day public comment period until September 11, 2016. I received no comments from Mr. Valiyee, Mr. Esmaili, or any of Mr. Valiyee's representatives.

Around September 13, 2016, I called Mr. Valiyee as a courtesy to check whether he had any comments about the tentative CAO. Mr. Valiyee initially acknowledged who I was, but then angrily responded that he did not remember me or the Regional Water Board and did not know anything about a tentative CAO. I asked him whether there was a better address to send the tentative CAO, and he said to send it to his home address at 2253 Ward Street, Berkeley, CA 94705.

On November 7, 2016, I sent an amended tentative CAO to Mr. Valiyee at rezavaliyee@gmail.com, to Masood Esmaili, Site Maintenance Manager for Mr. Valiyee, at mesma26@yahoo.com, and to 2253 Ward Street, Berkeley, CA 94705 by certified mail. I posted the amended tentative CAO on the Regional Water Board website at http://www.waterboards.ca.gov/sanfranciscobay/board_decisions/tentative_orders.shtml for a 10-day public comment period until November 17, 2016. I received no comments from Mr. Valiyee, Mr. Esmaili, or any of Mr. Valiyee's representatives.

On November 17, 2016 at 2:15 pm, I called Mr. Valiyee at 510-222-6868 as a courtesy to check whether he had any comments about the amended tentative CAO. We had the following conversation:

- Me: "Hi Reza, this is Yan from the Regional Water Quality Control Board. This is a courtesy call, since today is the last day to submit comments on the order I sent you, and I want to make sure you have an opportunity to submit comments. I sent it by certified mail to the address you gave me- 2253 Ward St."
- Mr. Valiyee, angrily: "I never pick up certified mail, I work twenty four hours a day so I don't have time for that kind of thing! Send it by regular mail!"

Legal Considerations (Marnie Ajello)

The Water Code, its regulations, and the Bagley-Keene Open Meeting Act provide flexibility in issuing cleanup and abatement orders (CAOs) as long as a discharger has notice of the order and the opportunity for comment. (See Machado v. SWRCB (2001) 90 Cal. App. 4th 720, 727.) Thus, CAOs may be issued with or without a hearing. (See Water Code § 13223 [omitting CAOs from board actions that may not be delegated to the executive officer]; San Francisco Bay Regional Water Board Resolutions. No. 70-11 and R2-2008-0055; and Executive Officer Memorandum, "Delegation of Authority; Signature Requirements" [Nov. 23, 2009].) Similarly, there is no minimum comment period for CAOs, nor are there prescribed methods of service. (See Water Code §§ 13304 [no notice period or service requirements specified]; 13167.5 [setting comment periods for board actions other than cleanup and abatement orders]; Gov. Code §11125 [establishing notice requirements for board meetings]; Cal. Code Regs., tit. 23, §§ 647.2, subd. (e), 647.3 [notice and comment provisions for board meetings].). Although not directly applicable to the issuance of the CAO to Mr. Valiyee, the following Water Code provisions, which relate to other parts of the cleanup process, are instructive in determining what type of notice and public participation is reasonable or appropriate:

- Section 13305, which applies to our process of initiating cleanup at non-operating industrial or business sites, requires mailing to property owners, permits the Regional Water Board to post notice at the property, provides that the order be adopted at a hearing, and gives the landowner a minimum of 10 days to respond before a hearing.
- Section 13307.1 applies to the agency's notification process upon receipt of proposed cleanup plans or closure requests. It requires the Regional Water Board to "take all reasonable steps necessary to accommodate responsible landowner participation in the cleanup" and to "consider all input and recommendations from any responsible landowner wishing to participate." (Water Code § 13307.1, subd. (b).)
- Water Code section 13307.5 and 13307.6 prescribe public participation requirements when the agency receives cleanup plans. Section 13307.5 requires a thirty-day comment period for cleanup proposals and allows for public hearings, while section 13307.6lists optional steps the agency may take "to disseminate information and assist the regional board in gathering community input," including: "internet posting or electronic distribution of an electronic copy of a document," and "extension of a public comment period."

Using these Water Code provisions as guidance, we have satisfied our obligation to provide Mr. Valiyee with notice and the opportunity to comment.. As an initial matter, Mr. Valiyee's conversations with Yan belie any claimed lack of notice. Next, we have taken reasonable steps, including multiple mailings, email, and internet posting of the CAO, extension of the comment period, and follow-up calls, to ensure that Mr. Valiyee had the opportunity to participate and respond to the tentative CAO. The adequacy of the combined 40-day comment period is demonstrated by the agency's receipt of five timely comment letters, including three from private citizens.