

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2009-0512
IN THE MATTER OF

EDDIE DUANE SMITH TRUST
MADERA TRANSPORTATION
305 NORTH 'E' STREET
MADERA, MADERA COUNTY

This Complaint is issued to the Eddie Duane Smith Trust pursuant to California Water Code (CWC) section 13350, which authorizes the imposition of Administrative Civil Liability (ACL), and CWC section 13323, which authorizes the Executive Officer to issue this Complaint. This Complaint is based on findings that the Eddie Duane Smith Trust violated provisions of Cleanup and Abatement Order (CAO) R5-2007-0726.

The Executive Officer of the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) finds, with respect to the Eddie Duane Smith Trust's acts, or failure to act, the following:

DISCHARGER LIABILITY

1. On 19 September 2007, the Executive Officer of the Central Valley Water Board issued CAO R5-2007-0726 to the Eddie Duane Smith Trust, the Mildred R. Smith Trust, and Miguel P. Gonzalez, which required the investigation and cleanup of a release of petroleum hydrocarbon constituents. The release, which was first reported in July 1996, occurred from one underground storage tank (UST) at Madera Transportation, 305 North E Street, Madera, California, APN# 007-075-008 (Site).
2. An unauthorized release form was filed by the Madera County Environmental Health Department as required by CWC section 13272. Mildred Smith was identified as the responsible party. Ms. Smith, as the responsible party, applied for and was accepted into the State Water Resources Control Board's (State Board) UST Cleanup Fund (Cleanup Fund).
3. Mildred R. Smith passed away on 12 April 1999 and Eddie Duane Smith, as Ms. Smith's son and Successor Trustee of the Mildred R. Smith Trust, had the property transferred to the Eddie Duane Smith Trust on 20 May 1999.
4. Eddie Duane Smith as Trustee of the Eddie Duane Smith Trust sold the property to Miguel P. Gonzalez on 16 December 1999. As current owner of the Site which had a release that has not been investigated and cleaned up, Mr. Gonzalez is a responsible party. Mr. Gonzalez never owned or operated USTs at the Site and has expressed his willingness to assume the lead for the cleanup, including becoming responsible for working with the Cleanup Fund. Mr. Gonzalez is not named in this Complaint because his actions are not impeding the cleanup of the Site, unlike the inaction of the Eddie Duane Smith Trust.

BACKGROUND

5. Total petroleum hydrocarbons as gasoline (TPHg), toluene, ethylbenzene, and xylenes were detected as high as 5,100 milligrams per kilogram (mg/kg), 40 mg/kg, 63 mg/kg, and 660 mg/kg, respectively, in soil samples collected at depths of 14 to 18 feet during removal of the UST at the Site.
6. The Madera County Environmental Health Department (MCEHD), by letter dated 15 May 1996, notified Mildred Smith that she must assess the extent of the release. The requested work was not performed, and on 24 March 1997 the MCEHD referred the Site to the Central Valley Water Board for regulatory oversight.
7. Board staff, by letter dated 7 June 1997, requested that Mildred Smith submit a workplan to assess the extent of the release. A workplan to drill a single boring was submitted during June 1997. Board staff correspondence dated 20 November 1997 approved the workplan. The work proposed in the workplan was never performed.
8. Mildred Smith applied for reimbursement of investigative and cleanup costs with the Cleanup Fund. The Cleanup Fund issued a Letter of Commitment to Ms. Smith on 15 July 1997.
9. On 9 January 2001, Central Valley Water Board staff sent a letter to Mr. Gonzalez notifying him that the report of the investigation was overdue. Mr. Gonzalez replied by sending the address of the ED Smith Trust (sic) and indicated that mortgage payments were sent to said Trust (note that ED Smith Trust was misread as E O Smith Trust by Board staff and Board correspondence between January 2001 and March 2007 were addressed to E. O. Smith Trust).
10. On 19 January 2001, Central Valley Water Board staff sent a letter to the E. O. Smith Trust notifying the Trust that the report of the investigation was overdue. The letter also stated that Ms. Smith received a Letter of Commitment from the Cleanup Fund, and that her Estate may be eligible for reimbursement of investigation and cleanup costs. No response was received from Mr. Smith.
11. On 15 March 2001, Central Valley Water Board staff sent the E. O. Smith Trust a letter notifying the Trust that the report of the investigation was still overdue. The letter was sent via certified mail and signed for and received by "Ed Smith."
12. On 10 September 2002, Central Valley Water Board staff issued a letter to the E. O. Smith Trust that noted the report of the investigation was overdue and that failure to respond will result in formal enforcement action against the Estate of Mildred Smith. The letter was sent via certified mail and received by "Smith."
13. On 29 April 2003, Central Valley Water Board staff spoke with Steven R. Mortimer, attorney who represented Mr. Smith in the Estate of Mildred Smith. Mr. Mortimer was informed that the Estate of Mildred Smith was likely eligible for the Cleanup Fund but that the current

owners were not. Mr. Mortimer stated that he would try to contact Mr. Smith. In a follow-up call, Mr. Mortimer indicated that Mr. Smith had not returned his telephone calls.

14. Central Valley Water Board staff contacted Mr. Smith via telephone on 25 September 2003 and explained to him that the property at 305 E Street, Madera, formerly owned by his mother, his mother's Trust, and his Trust, had a gasoline release that needed to be investigated and remediated. Board staff explained that Mildred Smith's Estate is still a responsible party, and is likely still eligible for the Cleanup Fund. Mr. Smith claimed ignorance of the release. Board staff sent Mr. Smith copies of case related documents to the address provided by Mr. Smith, which was the same address previously used by Board staff to send documents to Mr. Smith. Mr. Smith was to contact Board staff after reviewing the documents, but did not.
15. On 9 August 2004, Central Valley Water Board staff sent the E. O. Smith Trust a letter noting that the report of the investigation of the release at the Site was overdue. The letter noted that Ms. Smith was accepted into the Cleanup Fund and her Estate should be eligible. The letter noted that the Cleanup Fund had started allowing the eligibility for funding to be assigned. A guidance document for assigning eligibility was attached to the letter. The letter required that Mr. Smith contact Board staff and inform it if he planned to investigate and cleanup the Site or assign eligibility to the Cleanup Fund to the new property owners. Mr. Smith did not respond.
16. On 16 March 2007, Central Valley Water Board staff sent to Mr. Eddie D. Smith, Successor Trustee, Mildred R. Smith Trust, and Mr. Miguel Gonzalez, a letter notifying them that the report of the investigation was overdue. The letter was sent via certified mail. The letter was received by a representative of Mr. Gonzalez. No confirmation of receipt of the letter was received from Mr. Smith. Neither party responded to the letter.
17. A Draft Cleanup and Abatement Order was mailed to Mr. Eddie D. Smith and Mr. Miguel Gonzalez on 22 August 2007. The Draft Order identified the Mildred R. Smith Trust, the Eddie Duane Smith Trust, and Miguel P. Gonzalez as responsible parties. Neither party responded to the Draft Order.
18. CAO R5-2007-0726 (Order) was issued by the Executive Officer and sent to the responsible parties on 19 September 2007. The Order was sent via certified mail to Mr. Gonzalez and was signed for by a representative of Mr. Gonzalez on 20 September 2007. The Order was sent via Federal Express to Mr. Smith. Federal Express documents that the Order was delivered to the addressed residence on 20 September 2007. The Order requires submittal of a Water Supply Well Survey and a Site Assessment Workplan by 26 November 2007, and a Site Assessment Report summarizing the investigation performed in accordance with the approved Workplan by 26 March 2008.
19. Central Valley Water Board staff contacted Mr. Smith via telephone on 2 October 2007. Mr. Smith claimed to have not received the Order, and that Mr. Gonzalez was to have taken care of the problem. Board staff explained to Mr. Smith that the problem had not been taken care of and that he (Mr. Smith) should have access to the Cleanup Fund but that the current owner did not. Mr. Smith agreed to sign for and accept a copy of the Order if we

would send him another copy. Board staff sent Mr. Smith a copy of the Order via certified mail on 2 October 2007. The copy of the Order was signed for and received by Mr. Smith on 9 October 2007.

20. Central Valley Water Board staff sent Mr. Smith and Mr. Gonzalez correspondence on 11 February 2008 notifying them that the Site Assessment Workplan and Water Supply Well Survey were overdue. Neither party responded.
21. Central Valley Water Board staff sent Mr. Gonzalez and Mr. Smith a letter dated 29 April 2008. The letter noted that three submittals required by the Order were overdue and requested that they submit any information they believe relevant to determining an appropriate administrative civil liability. The letter was received by a representative of Mr. Gonzalez on 1 May 2008 and by Mr. Smith on 2 May 2008. Neither party responded.

VIOLATIONS OF CLEANUP AND ABATEMENT ORDER R5-2007-0726

22. To date, the Eddie Duane Smith Trust has not complied with CAO R5-2007-0726 or any previous Central Valley Water Board staff directive, despite eligibility for reimbursement from the Cleanup Fund. As of 2 March 2009, the Eddie Duane Smith Trust has failed to perform the following tasks required in CAO R5-2007-0726.

- Required Action 2. ***“By 26 November 2007, submit the results of a water supply well survey within one-quarter mile of the Site and a sampling plan and time schedule subject to Executive Officer approval to sample any water supply well(s) threatened to be polluted by waste originating from the Site.”***

The water supply well survey has not been submitted.

- Required Action 5. ***“By 26 November 2007, submit a Site Assessment Workplan with the intent to collect a sufficient number of soil and groundwater samples to define the lateral and vertical extent of waste constituents in soil and groundwater and to better define their origin.”***

The workplan has not been submitted.

- Required Action 6. ***“By 26 March 2008, submit a Site Assessment Report (SAR) acceptable to the Executive Officer that summarizes the findings of the soil and groundwater investigation conducted in accordance with the approved workplan.”***

The report was to include recommendations and, if needed, a second work plan for additional investigation. If additional investigation was necessary, the second work plan was to include a time schedule for completing the work and submitting the results. The report has not been submitted.

23. In violation of CAO R5-2007-0726, the Eddie Duane Smith Trust has failed to and continues to fail to characterize the lateral and vertical extent of petroleum hydrocarbon impacts to soil

and groundwater, and has failed to and continues to fail to implement corrective action measures.

REGULATORY CONSIDERATIONS

24. By the acts and omissions cited above, the Eddie Duane Smith Trust has violated CAO R5-2007-0726, issued pursuant to CWC section 13304. CWC section 13304(a) states, in part::

Any person who has discharged or discharges waste into waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.

25. CWC section 13350(a) states:

Any person who (1) violates any cease and desist order or cleanup and abatement order hereafter issued, reissued, or amended by a regional board or the state board... shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e).

26. CWC section 13350(e) states, in part::

The state board or a regional board may impose civil liability administratively pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 either on a daily basis or on a per gallon basis, but not both.

(1) The civil liability on a daily basis may not exceed five thousand dollars (\$5,000) for each day the violation occurs.

(B) When there is no discharge, but an order issued by the regional board is violated, except as provided in subdivision (f), the civil liability shall not be less than one hundred dollars (\$100) for each day in which the violation occurs.

27. CWC section 13350(f) states:

A regional board may not administratively impose civil liability in accordance with paragraph (1) of subdivision (e) in an amount less than the minimum amount specified, unless the regional board makes express findings setting forth the reasons for its action based upon specific factors required to be considered pursuant to Section 13327.

28. CWC section 13327 states:

In determining the amount of civil liability, the regional board . . . shall take into consideration the nature, circumstance, extent, and gravity of the violation or

violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters as justice may require.

29. As described in Finding 24, the Eddie Duane Smith Trust is in violation of requirements of CAO R5-2007-0726. As of 2 March 2009, the Eddie Duane Smith Trust has accrued, and is continuing to accrue, penalties for the following violations:
 - a. Required Action 2, Submittal of Well Survey by 26 November 2007: 462 days late;
 - b. Required Action 5, Submittal of the Workplan by 26 November 2007: 462 days late; and
 - c. Required Action 6, Submittal of the Site Assessment Report by 26 March 2008: 341 days late.

30. As of 2 March 2009, the Eddie Duane Smith trust has accrued 1,265 days of violations for failing to perform separate and distinct required actions under CAO R5-2007-0726. Based on a statutory maximum penalty of \$5,000 per day per violation, the maximum liability for these 1,265 violations is six million, three hundred and twenty-five thousand dollars (\$6,325,000). Absent the Central Valley Water Board making express findings under CWC section 13350(f), the minimum liability under CWC section 13350 is one hundred twenty-six thousand five hundred dollars (\$126,500), calculated at \$100 per day per violation, multiplied by 1,265 days of violations.

31. The following was considered, pursuant to CWC section 13327, in determining the penalty amount charged in this Complaint:

Consideration	Evaluation
Nature, circumstance, extent, and gravity of the violation	The Discharger has totally disregarded the Central Valley Water Board's directives, which has resulted in a continuing threat to human health and the environment.
Whether the discharge is susceptible to cleanup or abatement	The violations of the Cleanup and Abatement Order allow a contamination plume to grow, complicating cleanup.
Degree of toxicity	The constituents mentioned in Finding 5 are highly toxic
Discharger's Ability to Pay	The Discharger has not demonstrated an inability to pay the assessed liability.
Effect of this Complaint on the Discharger's ability to stay in business	n/a
Voluntary Cleanup Efforts	The Discharger did not voluntarily participate in the cleanup of the Site, which was one of the primary reasons the Cleanup and Abatement Order was issued.

Consideration	Evaluation
Prior history of violations	The Discharger has disregarded almost all directives and requests issued by the Central Valley Water Board, despite numerous warnings.
Degree of culpability	Under the commitment from the State Board's Cleanup Fund, the Discharger has access to funds to cleanup the Site. By failing to utilize these available resources, the Discharger has increased its culpability.
Economic benefit or savings resulting from the violation	Minimal – due to the fact that costs could have been reimbursed.
Other matters as justice may require	Failure to comply with the Cleanup and Abatement Order has frustrated efforts by the current landowner to remediate the Site.

32. A \$126,500 Administrative Civil Liability is appropriate based upon the determinations in Findings 22, 29, 30 and 31, and is consistent with the State Board's Enforcement Policy.
33. Issuance of this Complaint is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.), in accordance with California Code of Regulations, title 14, section 15321.

THE EDDIE DUANE SMITH TRUST IS HEREBY GIVEN NOTICE THAT:

1. The Executive Officer of the Central Valley Water Board proposes that the Eddie Duane Smith Trust be assessed an Administrative Civil Liability in the amount of **one hundred twenty-six thousand five hundred dollars (\$126,500)**. The amount of the liability proposed is based upon a review of the factors set forth in CWC section 13327, and includes consideration of the economic benefit or savings resulting from the violations.
2. A hearing on this matter will be held at the Central Valley Water Board meeting scheduled on **11/12 June 2009**, unless the Eddie Duane Smith Trust agrees to either of the following by **22 April 2009**:
 - a. Waives the hearing by completing the attached form (checking off the box next to item #4) and returning it to the Central Valley Water Board, along with payment for the proposed civil liability of **one hundred twenty-six thousand five hundred dollars (\$126,500)**; or
 - b. Agrees to enter into settlement discussions with the Central Valley Water Board and requests that any hearing on the matter be delayed by signing the enclosed waiver (checking off the box next to item #5) and returning it to the Central Valley Water Board along with a letter describing the issues to be discussed. Accepting this waiver is a discretionary action of the Central Valley Water Board.

3. If a hearing on this matter is held, the Central Valley Water Board will consider whether to affirm, reject, or modify the proposed Administrative Civil Liability, or whether to refer the matter to the Attorney General for recovery of judicial civil liability.

*Original signed by: Lonnie M. Wass
for*

Pamela C. Creedon, Executive Officer

23 March 2009

**WAIVER OF 90-DAY HEARING REQUIREMENT FOR
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

By signing this waiver, I affirm and acknowledge the following:

1. I am duly authorized to represent the **Eddie Duane Smith Trust** (hereinafter "Discharger") in connection with Administrative Civil Liability Complaint R5-2009-0512 (hereinafter the "Complaint");
2. I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served" with the Complaint;
3. I hereby waive any right the Discharger may have to a hearing before the Central Valley Regional Water Quality Control Board (Central Valley Water Board) within ninety (90) days of service of the Complaint; and
4. ***(Check here if the Discharger will waive the hearing requirement and will pay the fine)***
 - a. I certify that the Discharger will remit payment for the civil liability imposed in the amount of **one hundred twenty-six thousand five hundred dollars (\$126,500)** by check that contains a reference to "ACL Complaint R5-2009-512" made payable to the "State Water Pollution Cleanup and Abatement Account." Payment must be received by the Central Valley Water Board by **22 April 2009** or this matter will be placed on the Central Valley Water Board's agenda for adoption as initially proposed in the Complaint.
 - b. I understand the payment of the above amount constitutes a settlement of the Complaint, and that any settlement will not become final until after the 30-day public notice and comment period mandated by Federal regulations (40 CFR 123.27) expires. Should the Central Valley Water Board receive new information or comments during this comment period, the Central Valley Water Board's Executive Officer may withdraw the complaint, return payment, and issue a new complaint. New information or comments include those submitted by personnel of the Central Valley Water Board who are not associated with the enforcement team's issuance of the Complaint.
 - c. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.

-or-

5. ***(Check here if the Discharger will waive the 90-day hearing requirement, but will not pay at the current time. The Central Valley Water Board must receive information from the Discharger indicating a controversy regarding the assessed penalty at the time this waiver is submitted, or the waiver may not be accepted.)*** I certify that the Discharger will promptly engage the Central Valley Water Board staff in discussions to resolve the outstanding violation(s). By checking this box, the Discharger is *not* waiving its right to a hearing on this matter. By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing so that the Discharger and Central Valley Water Board staff can discuss settlement. It remains within the discretion of the Central Valley Water Board to agree to delay the hearing. A hearing on the matter may be held before the Central Valley Water Board if these discussions do not resolve the liability proposed in the Complaint. The Discharger agrees that this hearing may be held after the 90-day period referenced in California Water Code section 13323 has elapsed.
6. If a hearing on this matter is held, the Central Valley Water Board will consider whether to issue, reject, or modify the proposed Administrative Civil Liability Order, or whether to refer the matter to the Attorney General for recovery of judicial civil liability. Modification of the proposed Administrative Civil Liability Order may include increasing the dollar amount of the assessed civil liability.

(Print Name and Title)

(Signature)

(Date)

Central Valley Regional Water Quality Control Board

PROPOSED DRAFT HEARING PROCEDURE
FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

R5-2009-0512

ISSUED TO

EDDIE DUANE SMITH TRUST
MADERA TRANSPORTATION
MADERA COUNTY

SCHEDULED FOR 11/12 JUNE 2009

PLEASE READ THIS HEARING PROCEDURE CAREFULLY. FAILURE TO COMPLY WITH THE DEADLINES AND OTHER REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF YOUR DOCUMENTS AND/OR TESTIMONY.

Background

The Executive Officer has issued an Administrative Civil Liability (ACL) Complaint pursuant to California Water Code (CWC) section 13323 to Eddie Duane Smith Trust ("Discharger") alleging that it has violated CWC section 13350 by violating the terms of Cleanup and Abatement Order R5-2007-0726. The Complaint proposes that an administrative civil liability in the amount of \$126,500 be imposed. A hearing is currently scheduled to be held before the Central Valley Water Board during its 11/12 June 2009 meeting.

Purpose of Hearing

The purpose of the hearing is to consider relevant evidence and testimony regarding the ACL Complaint. At the hearing, the Central Valley Water Board will consider whether to issue an administrative civil liability order assessing the proposed liability, or a higher or lower amount, or reject the proposed liability. The public hearing on 11/12 June 2009 will commence at 8:30 a.m. or as soon thereafter as practical, or as announced in the Central Valley Water Board meeting agenda. The meeting will be held at 11020 Sun Center Dr #200 in Rancho Cordova, California. An agenda for the meeting will be issued at least ten days before the meeting and posted on the Central Valley Water Board's web page at:

http://www.waterboards.ca.gov/centralvalley/board_info/meetings

Hearing Procedures

The hearing will be conducted in accordance with this Hearing Procedure. This proposed draft version of the Hearing Procedure has been prepared by the Prosecution Team, and is subject to revision and approval by the Central Valley Water Board's Advisory Team. A copy of the general procedures governing adjudicatory hearings before the Central Valley Water Board may be found at California Code of Regulations, title 23, section 648 et seq., and is available at <http://www.waterboards.ca.gov> or upon request. In accordance with Section 648, subdivision (d), any procedure not provided by this Hearing Procedure is deemed waived. Except as provided in Section 648 and herein, subdivision (b), Chapter 5 of the Administrative Procedures Act (commencing with Gov't Code § 11500) does not apply to this hearing.

THE PROCEDURES AND DEADLINES HEREIN MAY BE AMENDED BY THE ADVISORY TEAM IN ITS DISCRETION. **ANY OBJECTIONS TO THE HEARING PROCEDURE MUST BE RECEIVED BY THE CENTRAL VALLEY WATER BOARD'S ADVISORY TEAM NO LATER THAN 7 APRIL 2009, OR THEY WILL BE WAIVED.** FAILURE TO COMPLY WITH THE DEADLINES AND REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF DOCUMENTS AND/OR TESTIMONY.

Hearing Participants

Participants in this proceeding are designated as either "parties" or "interested persons." Designated parties to the hearing may present evidence and cross-examine witnesses and are subject to cross-examination. Interested persons may present non-evidentiary policy statements, but may not cross-examine witnesses and are not subject to cross-examination. Interested persons generally may not present evidence (e.g., photographs, eye-witness testimony, monitoring data). Both designated parties and interested persons may be asked to respond to clarifying questions from the Central Valley Water Board, staff or others, at the discretion of the Central Valley Water Board.

The following participants are hereby designated as parties in this proceeding:

- (1) Central Valley Water Board Prosecution Team
- (2) The Eddie Duane Smith Trust, referred to as the Discharger

Requesting Designated Party Status

Persons who wish to participate in the hearing as a designated party must request party status by submitting a request in writing (with copies to the existing designated parties) so that it is received no later than 5 p.m. on 14 April 2009 to Lori Okun (contact information listed below). The request shall include an explanation of the basis for status as a designated party (e.g., how the issues to be addressed in the hearing and the potential actions by the Central Valley Water Board affect the person), the information required of designated parties as provided below, and a statement explaining why the party or parties designated above do not adequately represent the person's interest. Any opposition to the request must be received by the Advisory Team, the person requesting party status, and all other parties by 5 p.m. on 22 April 2009. The parties will be notified by 5 p.m. on 28 April 2009 whether the request has been granted or denied.

Primary Contacts

Advisory Team:

Ken Landau, Assistant Executive Officer
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670
Phone: (916) 464-4726; fax: (916) 464-4758
klandau@waterboards.ca.gov

Lori Okun, Senior Staff Counsel
State Water Resources Control Board, Office of Chief Counsel
1001 I Street
Sacramento, CA 95814
Phone: (916) 341-5165; fax: (916) 341-5199
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Prosecution Team:

Pamela Creedon, Executive Officer
11020 Sun Center Drive, Suite 200
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Patrick Pulupa, Staff Counsel
State Water Resources Control Board, Office of Chief Counsel
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ppulupa@waterboards.ca.gov

Discharger:

Eddie Duane Smith Trust referred to as Discharger
c/o Eddie Duane Smith
3772 Minniear Avenue
Modesto, Ca 95357
Phone (209) 652-1577

Separation of Functions

To help ensure the fairness and impartiality of this proceeding, the functions of those who will act in a prosecutorial role by presenting evidence for consideration by the Central Valley Water Board (Prosecution Team) have been separated from those who will provide advice to the Central Valley Water Board (Advisory Team). Members of the Advisory Team are: Ken Landau, Assistant Executive Officer, and Lori T. Okun, Senior Staff Council. Members of the Prosecution Team are: Pamela Creedon, Executive Officer; Lonnie Wass, Supervising WRC Engineer; John Noonan, Senior WRC Engineer; Jeff Hannel, Engineering Geologist; and Patrick Palupa, Staff Counsel. Any members of the Advisory Team who normally supervise any members of the Prosecution Team are not acting as their supervisors in this proceeding, and vice versa. Members of the Prosecution Team may have acted as advisors to the Central Valley Water Board in other, unrelated matters, but they are not advising the Central Valley Water Board in this proceeding. Members of the Prosecution Team have not had any ex parte communications with the members of the Central Valley Water Board or the Advisory Team regarding this proceeding.

Ex Parte Communications

The designated parties and interested persons are forbidden from engaging in ex parte communications regarding this matter with members of the Advisory Team or members of the Central Valley Water Board. An ex parte contact is any written or verbal communication pertaining to the investigation, preparation or prosecution of the ACL Complaint between a member of a designated party or interested person on the one hand, and a Central Valley Water Board member or an Advisory Team member on the other hand, unless the communication is copied to all other designated parties (if written) or made in a manner open to all other designated parties (if verbal). Communications regarding non-controversial procedural matters are not ex parte contacts and are not restricted. Communications among one or more designated parties and interested persons themselves are not ex parte contacts.

Hearing Time Limits

To ensure that all participants have an opportunity to participate in the hearing, the following time limits shall apply: each designated party shall have a combined 25 minutes to present evidence, cross-examine witnesses (if warranted), and provide a closing statement; and each interested person shall have 3 minutes to present a non-evidentiary policy statement. Participants with similar interests or comments are requested to make joint presentations, and participants are requested to avoid redundant comments. Participants who would like additional time must submit their request to the Advisory Team so that it is received no later than ten days after all of the evidence has been received. Additional time may be provided at the discretion of the Advisory Team (prior to the hearing) or the Central Valley Water Board Chair (at the hearing) upon a showing that additional time is necessary.

Submission of Evidence and Policy Statements

The following information must be submitted in advance of the hearing:

1. All evidence (other than witness testimony to be presented orally at the hearing) that the Designated Party would like the Central Valley Water Board to consider.

Evidence and exhibits already in the public files of the Central Valley Board may be submitted by reference as long as the exhibits and their location are clearly identified in accordance with California Code of Regulations, title 23, section 648.3.

2. All legal and technical arguments or analysis.
3. The name of each witness, if any, whom the designated party intends to call at the hearing, the subject of each witness' proposed testimony, and the estimated time required by each witness to present direct testimony.
4. The qualifications of each expert witness, if any.

The evidence upon which the Complaint is based will have been entered into the administrative file at the time the Complaint is issued. However, the Prosecution Team may submit additional evidence into the administrative file until 5 p.m. on 28 April 2009. The Board's Advisory Team, all other Designated Parties, and all Interested Parties will be notified if additional evidence is added to the file, and will be provided with copies of the additional evidence. Should the Prosecution Team require witnesses to provide direct testimony at the Hearing, the Prosecution Team will provide the Board's Advisory Team, all other Designated Parties, and all Interested Parties with the information contained in items 3 and 4, above, by 5 p.m. on 28 April 2009.

The remaining designated parties shall submit 11 hard copies and one electronic copy of the information to Ken Landau so that they are received no later than 5 p.m. on 11 May 2009.

If the total amount of information submitted by any party is less than 15 pages, that party may submit the information by email, rather than in writing. In addition to the foregoing, each designated party shall send (1) one copy of the above information to each of the other designated parties by 5 p.m. on the deadline specified above.

Interested persons who would like to submit written non-evidentiary policy statements are encouraged to submit them to the Advisory Team as early as possible. Interested persons do not need to submit written comments in order to speak at the hearing.

In accordance with California Code of Regulations, title 23, section 648.4, the Central Valley Water Board endeavors to avoid surprise testimony or evidence. Absent a showing of good cause and lack of prejudice to the parties, the Central Valley Water Board may exclude evidence and testimony that is not submitted in accordance with this Hearing Procedure. Excluded evidence and testimony will not be considered by the Central Valley Water Board and will not be included in the administrative record for this proceeding. Power Point and other visual presentations may be used at the hearing, but their content may not exceed the scope of other submitted written material. Additionally, any witness who has submitted written testimony for the hearing shall appear at the hearing and affirm that the written testimony is true and correct, and shall be available for cross-examination.

Evidentiary Documents and File

The Complaint and related evidentiary documents are on file and may be inspected or copied at the Central Valley Water Board office at 1685 E Street, Fresno, Ca 93706. This file shall be

considered part of the official administrative record for this hearing. Other submittals received for this proceeding will be added to this file and will become a part of the administrative record absent a contrary ruling by the Central Valley Water Board's Chair. Many of these documents are also posted on-line at:

<http://www.waterboards.ca.gov/centralvalley/>.

Although the web page is updated regularly, to assure access to the latest information, you may contact Jeff Hannel at (559) 445-6193 or John Noonan at (559) 445-5550.

Questions

Questions concerning this proceeding may be addressed to Lori Okun at (916) 341-5165.

IMPORTANT DEADLINES

(Note: the Central Valley Water Board is required to provide a hearing within 90 days of issuance of the Complaint (CWC § 13323). The Advisory Team will generally adhere to this schedule unless the Discharger waives that requirement.)

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| 23 March 2009 | Prosecution Team issues ACL Complaint to Discharger and Advisory Team, sends proposed Hearing Procedure to Discharger and Advisory Team, and publishes Public Notice. |
| 7 April 2009 | Objections due on proposed Hearing Procedure. |
| 14 April 2009 | Deadline for submission of request for designated party status. |
| 22 April 2009 | Deadline for opposition to request for designated party status. |
| 22 April 2009 | Discharger's deadline for waiving right to hearing. |
| 28 April 2009 | Prosecution Team's deadline for submission of all information required under "Evidence and Policy Statements," above. |
| 28 April 2009 | Advisory Team issues decision on requests for designated party status, if any. |
| 11 May 2009 | Remaining Designated Parties' (including the Discharger) Deadline for submission of all information required under "Evidence and Policy Statements," above. |
| 1 June 2009 | All Designated Parties' deadline for submission of rebuttal evidence (if any) and evidentiary objections. |
| 11/12 June 2009 | Hearing. |



California Regional Water Quality Control Board Central Valley Region

Karl E. Longley, ScD, P.E., Chair

1685 E Street, Fresno, California 93706
(559) 445-5116 • Fax (559) 445-5910
<http://www.waterboards.ca.gov/centralvalley>



Arnold
Schwarzenegger
Governor

Linda S. Adams
Secretary for
Environmental Protection

23 March 2009

Eddie Duane Smith, Trustee
Eddie Duane Smith Trust, and
Successor Trustee, Mildred R. Smith Trust
3772 Minniear Avenue
Modesto, California 95357

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2009-0512, ASSESSMENT OF PENALTIES FOR CONTINUING VIOLATIONS OF CLEANUP AND ABATEMENT ORDER R5-2007-0726, MADERA TRANSPORTATION, 305 NORTH E STREET, MADERA, MADERA COUNTY

Enclosed is an Administrative Civil Liability Complaint (Complaint), issued pursuant to California Water Code (CWC) section 13350, for violations of Cleanup and Abatement Order R5-2007-0726 by the Eddie Duane Smith Trust (hereafter "Discharger"). The Complaint charges the Discharger with administrative civil liability in the amount of **one hundred twenty-six thousand five hundred dollars (\$126,500)**, a figure arrived at by the California Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board or Board) after a full consideration of the factors set forth in CWC section 13327.

Pursuant to CWC section 13323, the Discharger may:

- Pay the assessed civil liability and waive its right to a hearing before the Central Valley Water Board by signing the enclosed waiver (checking off the box next to item #4) and submitting it to this office by **5 p.m. on 22 April 2009**, along with payment for the full amount;
- Agree to enter into settlement discussions with the Central Valley Water Board and request that any hearing on the matter be delayed by signing the enclosed waiver (checking off the box next to item #5) and submitting both the waiver and a letter describing the issues to be discussed to this office by **5 p.m. on 22 April 2009**; or
- Contest the Complaint and/or enter into settlement discussions with the Central Valley Water Board without signing the enclosed waiver.

If the Discharger chooses to sign the waiver and pay the assessed civil liability, this will be considered a tentative settlement of the violations in the Complaint. This settlement will be considered final pending a 30-day period, starting from the date of this Complaint, during which time interested parties may comment on this proposed settlement by submitting information to this office, attention Jeff Hannel. Should the Central Valley Water Board receive new information or comments during this comment period, the Central Valley Water Board's Executive Officer may withdraw the complaint, return payment, and issue a new complaint.

California Environmental Protection Agency

If the Central Valley Water Board does not hold a hearing on the matter, and if the terms of the final settlement are not significantly different from those proposed in the enclosed Complaint, then there will not be additional opportunities for public comment on the proposed settlement.

If the Central Valley Water Board does not receive a signed waiver by 22 April 2009, then a hearing will be scheduled for the 11/12 June 2009 Central Valley Water Board meeting in Rancho Cordova. The Central Valley Water Board's Prosecution Team has proposed the enclosed draft Hearing Procedures to govern the conduct of such a hearing. Any objections to these draft Hearing Procedures must be received by Lori Okun, whose contact information is listed in the enclosed draft Hearing Procedures, by **5 p.m. on 7 April March 2009**.

Any comments or evidence concerning the enclosed Complaint must be submitted in accordance with the deadlines contained in the enclosed draft Hearing Procedures, unless these deadlines are changed by the Central Valley Water Board's Advisory Team, either on their own accord or upon request.

In order to conserve resources, this letter transmits paper copies of the documents to the Discharger only. Interested persons may download the documents from the Central Valley Water Board's Internet website at:

http://www.waterboards.ca.gov/centralvalley/tentative_orders/.

Copies of these documents can also be obtained by contacting or visiting the Central Valley Water Board's office weekdays between 8:00 a.m. and 5:00 p.m.

If you have any questions or comments regarding the Administrative Civil Liability Complaint, please contact Jeff Hannel at (559) 445-6193 or John Noonan at (559) 445-5550.

To claim an inability to pay this Administrative Civil Liability Complaint, the Eddie Duane Smith Trust must submit a statement of financial conditions by **22 April 2009** that substantiates this claim.

Original signed by:

LONNIE M. WASS
Supervising Engineer

Enclosure: ACL Complaint R5-2009-0512 and draft Hearing Procedures

cc w/ encl: Pamela Creedon, Central Valley Water Board, Rancho Cordova
Brian Newman, Central Valley Water Board, Rancho Cordova
Kenneth Greenberg, USEPA, Region 9, San Francisco
Reed Sato, Office of Enforcement, SWRCB, Sacramento
Patrick Pulupa, Office of Chief Counsel, SWRCB, Sacramento
Lori Okun, Office of Chief Counsel, SWRCB, Sacramento
Emel Wadhvani, Office of Chief Counsel, SWRCB, Sacramento
Ann Rolan, Madera County Department of Environmental Health, Madera
Miguel Gonzalez, Gonzalez Farm Labor, Madera