

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R5-2008-0576

MANDATORY PENALTY
IN THE MATTER OF

AAF-McQUAY, INC.
GROUNDWATER REMEDIATION SYSTEM
TULARE COUNTY

This Complaint is issued to AAF-McQuay, Inc. (hereafter Discharger) pursuant to California Water Code (CWC) section 13385, which authorizes the imposition of Administrative Civil Liability (ACL), CWC section 13323, which authorizes the Executive Officer to issue this Complaint, and CWC section 7, which authorizes the delegation of the Executive Officer's authority to a deputy, in this case the Assistant Executive Officer. This Complaint is based on findings that the Discharger violated provisions of Waste Discharge Requirements (WDRs) Order No. R5-2005-0059 (NPDES No. CA0082511).

The Assistant Executive Officer of the Central Valley Regional Water Quality Control Board (Central Valley Water Board) finds the following:

1. The Discharger owns and operates a Groundwater Remediation System (GWRS) at a former manufacturing facility in Visalia, Tulare County. Treated groundwater is discharged to North Branch Mill Creek Ditch, a water of the United States, and to nearby farmland. North Branch Mill Creek Ditch discharges into Cross Creek, which normally flows to the Tule River, a water of the United States, during wet years.
2. The Central Valley Water Board initially imposed NPDES requirements on the discharge of treated groundwater from the GWRS to North Branch Mill Creek Ditch in October 1989, and has renewed the Discharger's NPDES permit four times. Order No. R5-2005-0059 includes effluent limitations and other requirements regarding the waste discharge.
3. CWC sections 13385(h) and (i) require assessment of mandatory penalties and state, in part, the following:

CWC section 13385(h)(1) states:

Notwithstanding any other provision of this division, and except as provided in subdivisions (j), (k), and (l), a mandatory minimum penalty of three thousand dollars (\$3,000) shall be assessed for each serious violation.

CWC section 13385 (h)(2) states:

For the purposes of this section, a 'serious violation' means any waste discharge that violates the effluent limitations contained in the applicable waste discharge requirements for a Group II pollutant, as specified in Appendix A to Section 123.45 of Title 40 of the Code of Federal Regulations, by 20 percent or more or for a Group II pollutant, as specified in Appendix A to Section 123.45 of Title 40 of the Code of Federal Regulations, by 40 percent or more.

4. CWC section 13323 states, in part:

Any executive officer of a regional board may issue a complaint to any person on whom administrative civil liability may be imposed pursuant to this article. The complaint shall allege the act or failure to act that constitutes a violation of law, the provision authorizing civil liability to be imposed pursuant to this article, and the proposed civil liability.

5. WDRs Order No. R5-2005-0059 Effluent Limitation B.4 includes, in part, a maximum daily effluent limitation of less than 0.5 µg/L for trichloroethylene (TCE), a Class II Pollutant.
6. According to the Discharger's self-monitoring reports, the Discharger committed one (1) serious violation of the effluent limitation for TCE during the period from 1 January 2000 through 31 March 2008. On 1 June 2005, the Discharger reported an effluent TCE result of 0.74 µg/L, which is more than 20 percent of the limitation of less than 0.5 µg/L.
7. On 17 July 2008, Central Valley Water Board staff (staff) issued the Discharger a Notice of Violation and draft Record of Violations for the period of 1 January 2000 through 31 March 2008. The Discharger responded by letter dated 31 July 2008. Attachment A to this Complaint is a technical staff memorandum dated 1 October 2008 that details staff's analysis of the Discharger's response, and explains changes made to the draft Record of Violations based on the Discharger's comments.
8. The total amount of the MMPs assessed for the cited violation is **three thousand dollars (\$3,000)**.
9. Issuance of this Administrative Civil Liability Complaint to enforce CWC Division 7, Chapter 5.5 is exempt from the provisions of the California Environmental Quality Act (Public Resources Code section 21000 et seq.), in accordance with California Code of Regulations, title 14, section 15321(a)(2).

AAF McQUAY, INC. IS HEREBY GIVEN NOTICE THAT:

1. The Assistant Executive Officer of the Central Valley Water Board proposes that the Discharger be assessed an Administrative Civil Liability in the amount of **three thousand dollars (\$3,000)**.
2. A hearing on this matter will be held at the Central Valley Water Board meeting scheduled on **4/5 December 2008**, unless the Discharger does either of the following by **7 November 2008**:
 - 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 **three thousand dollars (\$3,000)**; 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.
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.

LOREN J. HARLOW, Assistant Executive Officer

7 October 2008

Attachment A: Technical Staff Memorandum dated 1 October 2008

**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 AAF-McQuay, Inc. (hereinafter "Discharger") in connection with Administrative Civil Liability Complaint No. R5-2008-0576 (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 California Regional Water Quality Control Board, Central Valley Region (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 **three thousand dollars (\$3,000)** by check, which contains a reference to "ACL Complaint No. R5-2008-0576." made payable to the "State Water Pollution Cleanup and Abatement Account." Payment must be received by the Central Valley Water Board by **7 November 2008** 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 Assistant 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)



California Regional Water Quality Control Board Central Valley Region

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

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Arnold
Schwarzenegger
Governor

Linda S. Adams
Secretary for
Environmental Protection

TO: Jo Anne Kipps
Senior Engineer
Compliance and Enforcement Unit

FROM: Jeff Hannel
Engineering Geologist
Compliance and Enforcement Unit

DATE: 1 October 2008

SIGNATURE: _____

***SUBJECT: AAF-McQUAY, INC., ET AL. GROUNDWATER TREATMENT SYSTEM,
TULARE COUNTY, RESPONSE TO NOV AND ASSESSMENT OF MMPS***

On 17 July 2008, Central Valley Water Board staff (staff) issued AAF-McQuay, Inc. (Discharger) a Notice of Violation and draft Record of Violations for the period of 1 January 2000 through 31 March 2008. The Discharger responded by letter dated 31 July 2008. The following discusses the Discharger's comments and changes made to the draft Record of Violations based on the Discharger's comments.

Discharge of Group II Pollutant Trichloroethylene (TCE)

Waste Discharge Requirements (WDRs) Order No. R5-2005-0059 (NPDES Permit No. CA0082511) prescribes, in part, an effluent limitation for TCE, a Group II pollutant. The exceedance of the effluent limitation for TCE on 1 June 2005 occurred immediately after the lead carbon vessel was changed out. The Discharger indicates that Calgon Carbon Corporation (Calgon), which provided the carbon, never admitted that it delivered a faulty batch of carbon and attributes the exceedance to carbon found trapped in strainers in effluent collection piping. The Discharger does not dispute that the discharge of TCE occurred and the above statements do not support dismissal of the violation.

The Discharger states that effluent discharges to North Branch Mill Creek Ditch "normally do not flow further downstream than about 1 mile before evaporating and/or percolating into the ground" and that the discharges from its groundwater treatment system "should therefore be considered de-facto discharges to land."

The Discharger refers to the United States Supreme Court's decision in *Rapanos v. United States* and *Carabell v. United States* (*Rapanos*) and the Discharger states that "the Supreme Court concluded that agencies regulatory authority should extend only to 'relatively permanent, standing or continuously flowing bodies of water' connected to traditional navigable water and to 'wetlands with a continuous surface connection to such relatively permanent waters.'"

Rapanos applies to Clean Water Act (CWA) § 404 *Permits for Dredged or Fill Material*. The discharge is regulated under CWA § 402 *National Pollutant Discharge Elimination System* (NPDES Permit No. CA0082511). The United States Environmental Protection Agency (USEPA) Guidance Document for *Rapanos* notes that:

...because this guidance is issued by both the Corps [of Engineers] and EPA, which jointly administer CWA § 404, it does not discuss other provisions of the CWA, including §§ 311 and 402, that differ in certain respects from § 404, but share the definition of “waters of the United States.”

The Guidance Document also states the following:

The agencies will assert jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries flow year round or have continuous flow at least seasonally (e.g., typically three months).

The agencies will assert jurisdiction over non-navigable, not relatively permanent tributaries and their adjacent wetlands where such tributaries and their wetlands have a significant nexus to a traditional navigable water.

If Rapanos applies to CWA § 402, the above guidance would have to be followed. To achieve this, the Discharger would have to find and substantiate, at a minimum, that North Branch Mill Creek: (1) does not meet the criteria of a non-navigable tributary of a traditional navigable water with at least seasonal continuous flow and (2) does not have a nexus to a traditional navigable water. The Discharger would need to submit its argument to the USEPA. The Central Valley Water Board does not have the authority to designate or de-designate waters of the United States. However, footnotes within the Guidance Document state the following:

Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and EPA and/or Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on statutes, regulations, and case law.

The Discharger may contact the USEPA and Corps and attempt to have Rapanos apply to North Branch Mill Creek Ditch. Precedence in the Central Valley Region for a discharger having a water of the United States de-designated exists. For example, following renewal of the NPDES permit for the City of Taft Wastewater Treatment Facility (WDRs Order No. 5-00-080, NPDES Permit No. CA0080161), the City of Taft raised the issue of whether the receiving water (Sandy Creek) is a water of the United States subject to NPDES requirements. After a lengthy review process lasting several years, the USEPA found that Sandy Creek was not a water of the United States and, in April 2005, the Central Valley Water Board amended WDRs Order No. 5-00-080 to acknowledge the de-designation of the receiving water as a water of the United States and rescind the Order's NPDES permit terms and conditions.

The Discharger submitted a Report of Waste Discharge and NPDES permit renewal application for renewal of its NPDES permit and waste discharge requirements on 4 April 2003. On 2 February 2005, staff transmitted to the Discharger a Notice of Public Hearing for the NPDES permit renewal that stated, in part, that:

Groundwater contaminated with volatile organic compounds is treated...and discharged to North Branch Mill Creek Ditch, which terminates at Cross Creek, a tributary of the Tule River, and a water of the United States.

Finding 2 of WDRs Order No. R5-2005-0059 states, in part, the following:

Waste Discharge Requirements Order No. 98-200, adopted by this Regional Board on 23 October 1998, regulates the discharge of treated groundwater to North Branch Mill Creek Ditch, a water of the United States, and to nearby farmland.

During the last NPDES permit renewal process, the Discharger did not submit documentation or otherwise notify staff that it disputed the statement in the Notice of Public Hearing or Finding 2 of WDRs Order No. R5-2005-0059 that North Branch Mill Creek Ditch is a water of the United States.

In summary, the Corps has not de-designated North Branch Mill Creek Ditch as a water of the United States. The Discharger has not provided evidence to the Corps, USEPA, or the Central Valley Water Board, that it should be. The Discharger did not dispute the Central Valley Water Board's finding that North Branch Mill Creek Ditch is a water of the United States during the permit renewal process. The Discharger does not dispute that a serious violation of the effluent limitation for TCE occurred on 1 June 2005. Therefore, under provisions of CWC § 13385, the serious violation is subject to MMP.

Late Report, Second Quarter 2004

The Discharger's Second Quarter 2004 self-monitoring report (report) was due by 20 July 2004. The report is dated 13 August 2004 and displays a date receipt stamp of 27 August 2004, but was not entered by Central Valley Water Board administrative staff into the Fresno Office's mail log database. The Discharger claims it mailed the report on 18 August 2004 and contends the Fresno Office should have received the report on 19 August 2004. Since I cannot confirm the receipt date of 27 August 2004 in the Fresno Office's mail log database, and because the Discharger has a history of submitting timely reports, it is appropriate to dismiss the late reporting violation.

Summary

The Discharger challenges staff's determination that the serious violation of the effluent limitation for TCE, which occurred 1 June 2005, is subject to MMP because the Discharger claims the receiving water (North Branch Mill Creek Ditch) is not a water of the United States. Staff determined that the Discharger had not raised this argument during or after the issuance of its NPDES permit and that, unless the USEPA de-designates the North Branch Mill Creek Ditch as a water of the United States, the serious violation is subject to MMP. The violation for the late report should be dismissed. This results in one MMP for a total of \$3,000.