



California Regional Water Quality Control Board

San Francisco Bay Region



Linda S. Adams
Secretary for
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Arnold Schwarzenegger
Governor

April 2, 2010

S.F Bay Regional Water Quality Control Board
Advisory Team
Attn. Mr. Bruce Wolfe, Executive Officer
1515 Clay Street, Suite 1400
Oakland, CA 94612

Subject: Water Board Prosecution Team Response to Comments for Industrial Stormwater Annual Report Administrative Civil Liability Complaints

Dear Mr. Wolfe:

On February 16, 2010, the Water Board Prosecution Team issued Administrative Civil Liability Complaints (ACLs) to forty-five Dischargers who failed to timely submit their 2008-2009 annual reports required under the NPDES Statewide Industrial Stormwater Permit. The public comment period for these ACLs closed on March 18, 2010. For all cases, we did not receive any comments from a third party or the general public. However, 14 dischargers opted to engage settlement by opting Option 3 of the waiver form. Five of these 14 dischargers provided comment letters to complement their waiver forms.

Enclosed please find the Prosecution Team's response to those comments we received from five dischargers who provided written comments.

The witnesses for the Prosecution Team for the late Annual Report civil liability cases that will be heard before the Board include Thomas E. Mumley, Keith Lichten, Habte Kifle, and Laurent Meillier of the Prosecution Team and Christine Boschen, Cecil Felix, Michelle Rembaum-Fox, and Danny Pham of the Industrial Stormwater Section of the Watershed Management Division.



If you have any questions in this matter, please contact Laurent Meillier at (510) 622-3277, or via e-mail at LMeillier@waterboards.ca.gov.

Sincerely,
Laurent M. Meillier
Engineering Geologist, P.G.

Signed for:
Thomas E. Mumley, P.E.
Assistant Executive Officer

cc (via email):

SWRCB, Office of the Chief Counsel – Dorothy Dickey
SWRCB, Office of Enforcement - Ann Carroll
Sandia Potter, Regional Water Board Advisory Team

SWRCB, Division of Water Quality – Bruce Fujimoto
SWRCB, Office of Enforcement – Reed Sato
Regional Water Board Lyris email list
Discharger mailing list

**Water Board Prosecution Team
Response to Comments**

Discharger: American Auto Dismantler
ACL Complaint No.: R2-2010-0028

Discharger Comment: The Discharger submitted no written comments, except the waiver form with Option 3.

Regional Water Board Staff Response: On March 26, 2010, Prosecution Team Regional Water Board Staff called the Discharger and informed him that there was no additional settlement information submitted to reconsider and reduce the proposed penalty. Because the Discharger did not submit any information or evidence demonstrating that the proposed liability should be reduced, the Prosecution Team is not proposing a change in that liability.

**Water Board Prosecution Team
Response to Comments**

Discharger: Atlanta Auto Dismantler
ACL Complaint No.: R2-2010-0030

Discharger Comment: The Discharger claims that they did not fully understand the requirements outlined in our August 3, 2009, Notice of Non-compliance letter. They thought the letter only required the submittal of the annual industrial stormwater report. The Discharger requested a minimal or reduced penalty.

Regional Water Board Staff Response: The Discharger acknowledged that they received the August 3, 2009, Notice of Non-compliance letter. The August 3 letter provided a waiver form for the Discharger to participate in the expedited payment program. The waiver form specifically provided the Discharger with an option to pay \$1,000 and submit the annual report to avoid any additional enforcement action by the Regional Water Board. The Discharger missed their opportunity at the time.

On March 26, 2010, Regional Water Board Staff from the Prosecution Team telephoned the Discharger and asked for additional information, such as inability to pay, to engage in settlement discussions per the Discharger's request. As a follow up to this contact, Regional Water Board Staff met with the Discharger on March 30, 2010. The Discharger did not provide any additional information for the Prosecution Team to reconsider and reduce the proposed penalty; however, both parties reached a settlement agreement. The Discharger agreed to pay the liability proposed in the Complaint in three equal installment payments of \$1,100, payable over a period of about 60 days. The Discharger paid the first installment on March 30 with the remaining payments to follow on April 30 and June 2, 2010. The Prosecution Team will follow with a settlement agreement to be signed by the two parties and duly public noticed.

**Water Board Prosecution Team
Response to Comments**

Discharger: Cemex Construction Material Pacific LLC
ACL Complaint No.: R2-2010-0052

Discharger Comment: The Discharger argues that the proposed penalty is excessive. The Discharger claims that the facility in question ceased operation on July 31, 2008. The Discharger also argues that the responsibility for Environmental Management of the site was transferred in May 2009. The Dischargers also claims that difficulties with receiving the Board's mailed communications and denial of the Discharger's application for a Notice of Termination for the site's stormwater permit attributed to the annual report delays.

Regional Water Board Staff Response: The Discharger did not provide information that reveals their inability to pay the proposed penalty. Based on the certified mail return receipt, the Discharger received our August 3, 2009, Notice of Non-compliance on August 13, 2009. However, the Discharger neither submitted the required 2008/2009 annual report nor filed a Notice of Termination to end permit coverage at the facility until November 10, 2009. Regional Water Board staff inspected the facility on October 21, 2009, and observed trucks and other equipment on-site, demonstrating the facility still required permit coverage and should be complying with permit requirements, including annual report submittal.

On March 26, 2010, Regional Water Board Staff called the Discharger to initiate settlement discussions. Later that day, Robert Aldenhuisen (Cemex employee) called Regional Water Board staff to confirm Cemex will pay the full proposed liability amount. Mr. Aldenhuisen confirmed this agreement via email on March 26, 2010. To date, full payment has not been received.

The Prosecution Team is not proposing a change in the Discharger's liability, and anticipates the Discharger will pay the proposed liability.

**Water Board Prosecution Team
Response to Comments**

Discharger: E-D Coat, Inc.
ACL Complaint No.: R2-2010-0016

Discharger Comment: On behalf of the Discharger, Karl Morthole, the Discharger's attorney, submitted a signed waiver form to engage in settlement discussions and waive the requirement that a hearing be held within 90 days. Neither the Discharger nor its representative submitted additional comments in response to the issued Complaint.

Regional Water Board Staff Response: To date, the Discharger has still not submitted its 2008/2009 annual report. Our record shows that the Discharger received our August 3, 2009, Notice of Non-compliance letter mailed out via certified mail. On January 13, 2010, Prosecution Team Regional Water Board Staff called the Discharger to find out why they did not submit the required annual report. The Discharger did not response to Regional Water Board staff's call. On various dates, Regional Board staff has observed that the Discharger's facility is still operating.

In response to Mr. Morthole's March 25, 2010, request to engage in settlement discussions, Regional Water Board Prosecution Team staff agreed and asked Mr. Morthole to propose a meeting time. To date, this meeting has not been scheduled.

**Water Board Prosecution Team
Response to Comments**

Discharger: European Auto Wrecking
ACL Complaint No.: R2-2010-0007

Discharger Comment: The Discharger submitted signed waiver form (Option 3) to engage in settlement discussion March 18, 2010.

Regional Water Board Staff Response: The Discharger did not submit any additional comments, except the signed waiver form (Option 3). On March 26, 2010, Regional Water Board Staff called the Discharger and informed Mr. John Srour, the owner, he did not provide new information for the Prosecution Team to reconsider and reduce the proposed penalty.

The Discharger submitted information stating that while the business had significant debt, it generated a 2008 business income of \$11,687 to the owner, paid wages of about \$74,000 to the owner, and had at the end of 2008 inventory valued at about \$41,000. The business' gross sales in 2008 were more than \$580,000. Additionally, according to a telephone call with the Discharger held on 4/1/2010, the Discharger owns the property where European Auto Wrecking is located and owns automotive equipment such as a forklift and a lift. Based on the information submitted, the Prosecution Team believes the Discharger is able to pay the proposed liability and is not proposing to change it at this time.

**Water Board Prosecution Team
Response to Comments**

Discharger: Fairvac A T Wrecking
ACL Complaint No.:R2-2010-0051

Discharger Comment: The Discharger submitted a signed waiver form (Option 3) to engage in settlement discussions on March 16, 2010.

Regional Water Board Staff Response: The Discharger has had several verbal contacts with Regional Water Board Staff since our August 3, 2009, Notice of Non-compliance (NNC) was sent to them. Our records show the Discharger received the August 3 NNC letter on August 13, 2009. Regional Water Board staff inspected the facility on October 21, 2009. The Discharger told Regional Water Board staff that the facility's annual report was submitted on July 1, 2009, but was unable to provide evidence of the submittal. The Discharger submitted the annual report via certified mail on November 3, 2009.

The Discharger did not submit any additional written evidence or comments other than the signed waiver form (Option 3) to engage in settlement discussions in response to the proposed liability. Regional Water Board Prosecution Team staff called the Discharger on March 26, 2010, to initiate settlement discussions. The Discharger claimed financial inability to pay the proposed liability. On March 30, 2010, the Discharger submitted confidential financial and tax return documents to support his inability to pay the liability of \$4,725 proposed in Administrative Civil Liability Complaint No. R2-2010-0051. According to our review of this federal tax information, we do not recommend a decrease in this liability.

The 2008 U.S. Individual Income Tax Return filed by Bob E. Bates, business owner of Fairvac Auto & Truck Wrecking, indicates income generated by interest and ordinary dividends (Schedule B) in the amount of \$2,781. Additionally, the 2008 income tax return indicates an adjusted gross income of \$29,910. Additionally, according to Prosecution Team staff's telephone conversation of April 1, 2010, with Ms. Dana Bates, Mr. Bates owns the property where the auto wrecking facility is located since 1969. Additionally, Mr. Bates owns the equipment used in the conduct of his wrecking activities. Thus, we believe the Discharger has the ability to pay the proposed liability.

**Water Board Prosecution Team
Response to Comments**

Discharger: Greg S. Trucking
ACL Complaint No.: R2-2010-0041

Discharger Comment #1: On February 22, 2010, the Discharger submitted a waiver form (Option 3) to engage in settlement discussions. The Discharger also submitted written comments. The Discharger claims that they have been in compliance with the Permit since 1993 and the proposed penalty is too high. The Discharger described issues that limited their ability to comply, including the cost of lab analyses and difficulties obtaining the proper annual report forms from the Water Board's website.

Regional Water Board Staff Response: On February 22, 2010, we received the Discharger's written comments and the signed waiver form (Option 3) to engage in settlement discussions. We note the costs of lab analyses are a result of permit requirements to analyze stormwater runoff samples from two storms each year, and they are borne, with limited exceptions, by all of the dischargers permitted under the NPDES Industrial Stormwater Permit. Similarly, the vast majority of dischargers was able to obtain, complete, and submit their annual reports in a timely manner. The Discharger's facility has been covered under the Permit since 1993, so the Discharger has past experience with preparing and submitting his annual reports. Therefore, Water Board Prosecution Team staff believes the Discharger should have been able to obtain the blank forms for and timely submit his 2008/2009 annual report.

Discharger Comment #2: On August 11, 2009, the Discharger claimed that the annual report was submitted on time by July 1, 2010.

Regional Water Board Staff Response: Regional Water Board Staff received the Discharger's annual report on August 13, 2009, after our August 3, 2009, Notice of Non-compliance letter was mailed to the Discharger. Nonetheless, Regional Water Board staff advised the Discharger to submit any verification that the annual report was sent to our office by July 1, 2009. The Discharger did not submit any written verification to justify his claim.

Subsequent to the submittal of the waiver form to engage in settlement discussions, Regional Water Board staff of the Prosecution Team met with Greg Menna, the owner and operator of the facility, on March 23, 2010. The two parties did not reach a settlement agreement. The Discharger has requested the Water Board hearing to be delayed to the June 9, 2010, Board meeting due to personal commitments scheduled on May 12, 2010. The Prosecution Team agrees with this request.

**Water Board Prosecution Team
Response to Comments**

Discharger: Hornblower Yacht, Inc.
ACL Complaint No.: R2-2010-0040

Discharger Comment: On March 18, 2010, the Discharger's General Counsel, Richard C. Jacobs, submitted a signed waiver form (Option 3) to engage in settlement discussions. The Discharger also proposed to pay \$2,000 of the proposed \$3,925 liability. The Discharger stated the annual report was submitted late in part because the person who was responsible to oversee the implementation of the permit was no longer employed by Hornblower Yacht, Inc.

Regional Water Board Staff Response: On March 26, 2010, Regional Water Board staff called Mr. Jacobs to engage in settlement discussions. Regional Water Board staff explained to Mr. Jacobs that the material that he submitted on March 22, 2010, on behalf of Hornblower Yacht, Inc., does not constitute new information and that Hornblower Yacht, Inc. still remains responsible to comply with its permit requirements regardless of personnel changes. The same day, March 26, 2010, Mr. Jacobs called Prosecution Team Regional Water Board Staff and confirmed by email that Hornblower Yacht, Inc. will pay the full proposed liability amount and waive its right to come to the May 12, 2010, Board Hearing. To date, the full liability payment has not been received.

The Prosecution Team is not proposing a change in the proposed liability, but anticipates the Discharger will pay the proposed liability shortly.

**Water Board Prosecution Team
Response to Comments**

Discharger: JT Truck Center
ACL Complaint No.: R2-2010-0045

Discharger Comment: On March 16, 2010, the Discharger submitted a signed waiver form with Option 3 to engage in settlement discussions. The Discharger also enclosed with its waiver form a previous letter dated August 11, 2009.

Regional Water Board Staff Response: Regional Water Board Prosecution Team staff contacted the Discharger in response to its signed waiver form (Option 3) to initiate settlement discussions. The Discharger's August 11, 2009, letter addressed how the facility has been in compliance since 1995. The letter stated the facility's 2008/2009 annual report was prepared by the Discharger's consultant (NEST), but it was overlooked and not sent to the Water Board.

No new information was submitted by the Discharger for the Prosecution Team to decrease the proposed liability. On March 30, 2010, the Discharger signed and submitted a waiver form (Option 1) to pay the proposed liability in three installments along with the first installment payment of \$985. The Prosecution Team will prepare a settlement agreement to be signed by both parties, and duly public noticed.

**Water Board Prosecution Team
Response to Comments**

Discharger: Kendyl Coast Corporation
ACL Complaint No.: R2-2010-0043

Discharger Comment #1: On March 18, 2010, the Discharger submitted a signed waiver form (Option 3) to engage in settlement discussions. The Discharger also submitted financial records intended to demonstrate an inability to pay the proposed liability of \$4,025.

Regional Water Board Staff Response: The Water Board Prosecution Team does not recommend a change in the proposed liability, based on Prosecution Team staff's review of the federal and state tax information submitted by the Discharger on March 18, 2010.

The submitted U.S. Corporate Income Tax Returns show negative income ranging between \$89,464 and \$91,489 reported over the 2006-2009 time period. Net income reported to the State's Board of Equalization was also negative ranging between \$40,071 and \$82,522 over the 2007-2009 time period. However, the corporate bank account showed a positive cash flow over the February 2010 time period with a minimum balance of \$13,555.89. Based on the information submitted, the Discharger has cash on hand sufficient to pay the proposed liability.

In addition, according to our April 1, 2010, phone call with the Discharger, the Discharger has assets in the form of equipment (e.g., barrels and forklifts) and wine inventory. The Discharger rents the property where the business is located and does not hold any real estate assets.

**Water Board Prosecution Team
Response to Comments**

Discharger: Larson Family Winery, Inc.
ACL Complaint No.: R2-2010-0013

Discharger Comment: On March 18, 2010, the Discharger submitted a signed waiver form (Option 3) to engage in settlement discussions. The Discharger also submitted written comments, including Declaration of Michael Doyle and Maureen Daggett. In its written comments, including the declarations, the Discharger argues that the facility's annual report was submitted to the Water Board office by mail on June 30, 2009, and requests that the Prosecution Team withdraw the Complaint. The Discharger further argues that the Water Board should not assess a penalty for late submittal even if the Water Board concluded the annual report was not mailed on June 30, 2009, since a copy of the report was re-sent on September 8, 2009, about 60 days late. The Discharger also stated that Regional Water Board staff did not respond to his telephone call of August 12, 2009.

Regional Water Board Staff Response: The Discharger did not submit any verification that it mailed the annual report by June 30, 2009. Since the annual report was not submitted to our office by July 1, 2009, the Discharger received the August 3, 2009, Notice of Non-compliance. Subsequently, the Discharger called on August 12, 2009, to complain that the annual report was mailed to our office by June 30, 2009. Our records show that Regional Water Board Staff returned the Discharger's call on August 20, 2009. The Discharger sent a contest letter in response to the Water Board's Notice of Non-compliance, and submitted the annual report on September 8, 2009.

According to our records, the Discharger's annual report was not submitted to our office by the due date. It was submitted 68 days late, and the proposed liability has been assessed accordingly. Regional Water Board Staff from the Prosecution Team called the Discharger on March 26, 2010, to engage in settlement discussions. The Discharger indicated an interest in setting a meeting with the Prosecution Team. Regional Water Board Prosecution Team staff accepted his request. However, as of April 2, 2010, a meeting date and time have not been finalized.

**Water Board Prosecution Team
Response to Comments**

Discharger: Nor-Cal Metal Fabricators
ACL Complaint No.: R2-2010-0008

Discharger Comment: On February 26, 2010, the Discharger submitted a signed waiver form (Option 3) to engage in settlement discussions. The Discharger submitted a separate written comment. The Discharger's main argument was that the Regional Water Board Staff was not responsive to its No Exposure Certification (NEC) request dated January 14, 2009, leading it to not submit its annual report.

Regional Water Board Staff Response: As indicated on the NEC form, a Discharger remains required to submit its annual report regardless of the status of its application for NEC. Approval of an NEC exempts a Discharger from analyzing stormwater runoff samples at its facility, but it is still required to meet all other permit requirements, including submittal of the annual report. Such information was conveyed to the Discharger in telephone calls by Water Board staff on August 27 and December 16 and 17, 2009. The Discharger acknowledged its past mistakes and submitted the annual report after the issuance of the Complaint on February 16, 2010.

On March 25, 2010, Regional Water Board staff from the Prosecution Team met with the Discharger and his consultant. The two parties came to a settlement agreement. The Prosecution Team recognized the Discharger's late submittal of the annual report. Based on miscommunications and other extenuating circumstances discussed during the meeting, Regional Water Board Prosecution Team staff agreed to reduce the liability to \$7,550 from the originally proposed \$13,300. The Discharger agreed to settle the matter for the reduced amount, and the Prosecution Team will prepare and public notice the settlement agreement to document it.

**Water Board Prosecution Team
Response to Comments**

Discharger: Quality Carriers, Inc.

ACL Complaint No.: R2-2010-0037

Except for a signed waiver form (Option 3) to engage in settlement discussion, the Discharger did not submit any other written comment.

Regional Water Board Staff Response: Because the Discharger did not submit any information or evidence demonstrating that the proposed liability should be reduced, the Prosecution Team is not proposing a change in that liability.

**Water Board Prosecution Team
Response to Comments**

Discharger: Rutherford Hill Winery

ACL Complaint No.: R2-2010-0025

Except for a signed waiver form (Option 3) to engage in settlement agreement, the Discharger did not submit any written comments.

Regional Water Board Staff Response: Because the Discharger did not submit any information or evidence demonstrating that the proposed liability should be reduced, the Prosecution Team is not proposing a change in that liability.