

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 9

75 Hawthorne Street
San Francisco, CA 94105

FILED

2008 DEC -3 PM 2: 51

U.S. EPA REGION IX
REGIONAL HEARING CLERK

IN THE MATTER OF

American Metal and Iron, Inc.

11665 Berryessa Road
San Jose, CA 95133

and

1045 Commercial Court
San Jose, CA 95133

Respondent

) Docket No. CWA 09-2008-0003

)

) **ANSWER; REQUEST FOR**
) **HEARING**

)

)

) Proceedings Under Section 309(g)(2)(B)
) of the Clean Water Act, as amended,
) 33 U.S.C. § 1319(g)(2)(B)

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AMERICAN METAL AND IRON, INC. ("AMI") herein responds to the Complaint, Notice of Proposed Penalty, and Notice of Opportunity for Hearing ("Complaint") filed by the United States Environmental Protection Agency Region Nine ("EPA") and received by AMI on or about September 30, 2008 as follows:

SPECIFIC RESPONSES TO GENERAL ALLEGATIONS

Statutory Authority

1. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority. AMI further states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 1, and on that basis denies the same.

Statutory and Regulatory Framework

2. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority.

3. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority.

4. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority.

5. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority.

6. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority.

7. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority.

8. AMI states that the General Permit speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the General Permit.

9. AMI states that the General Permit speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the General Permit.

10. AMI states that the General Permit speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the General Permit.

11. AMI states that the General Permit speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the General Permit.

12. AMI states that the General Permit speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the General Permit.

13. AMI states that the General Permit speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the General Permit.

Factual Background

14. AMI admits that it is a California corporation licensed to do business in California. As to the remaining allegations of Paragraph 14, AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority.

15. AMI admits that the Berryessa and Commercial Court Facilities are located at the alleged addresses and are within one mile of each other. AMI admits that the Berryessa Facility is AMI's primary recycling yard. AMI admits that the Commercial Court Facility is used to store scrap and waste materials and for vehicle and equipment maintenance and storage. AMI admits that it began operating at the facility at 11665 Berryessa Road on or about May 1, 1999. AMI admits that it began operating at the Commercial Court Facility on or about March 15, 2006. AMI admits that it is primarily engaged in breaking up, sorting,

and/or wholesale distribution of scrap and waste materials at the Facilities, an industrial activity classified under SIC 5093. AMI denies the remaining allegations of Paragraph 15.

16. AMI states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 16, and on that basis denies the same.

17. AMI admits that historically, storm water runoff at the Berryessa Facility at one time collected and flowed to storm drains near the Berryessa Facility. AMI admits that storm water runoff at the Commercial Court Facility collects and flows to storm drains located on-site. AMI states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 17, and on that basis denies the same.

18. AMI states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 18, and on that basis denies the same.

19. AMI states that EPA staff inspected its Berryessa facility on October 25, 2007 and that both facilities were inspected on December 7, 2007. AMI states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 19, and on that basis denies the same.

20. AMI admits the allegations of Paragraph 20.

21. AMI is informed and believes that the allegations of Paragraph 21 are true.

Findings of Violation

Count 1

(Discharge without an NPDES Permit at the Commercial Court Facility)

22. AMI restates, alleges and incorporates its responses to Paragraphs 1 through 21, as if fully set forth herein.

23. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority.

24. AMI admits that on or about February 4, 2008 it submitted an NOI to the State Board seeking coverage under the General Permit for the Commercial Court Facility, and that on or about February 20, 2008, the San Francisco Bay Regional Water Quality Control Board (“San Francisco Regional Board”) granted AMI coverage under the General Permit and assigned it Waste Discharge Identification (“WDID”) number 243I021149. AMI denies the remaining allegations of Paragraph 24.

25. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA’s legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority.

26. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA’s legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority. AMI denies the remaining allegations of Paragraph 26.

27. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA’s legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority. AMI denies that the storm drains at the Commercial Court Facility or the San Jose MS4 are “point sources.” AMI denies that the Commercial Court Facility creates any point sources. AMI denies that it is responsible for the storm drains at the Commercial Court Facility or the San Jose MS4. AMI denies the remaining allegations of Paragraph 27.

28. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA’s legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority. AMI denies the remaining allegations of Paragraph 28.

29. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA’s legal conclusions, analysis,

interpretation, characterization or application of the aforementioned statutory authority. AMI denies that Coyote Creek is a navigable water or a water of the United States and/or tributary to a navigable water. AMI admits that the San Francisco Bay and the Pacific Ocean are navigable waters and waters of the United States. AMI denies the remaining allegations of Paragraph 29.

30. AMI denies that “127 rainfall events generated storm water associated with industrial activity at the Facility that discharged into and added pollutants to Coyote Creek and San Francisco Bay.” AMI states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 30, and on that basis denies the same.

31. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA’s legal conclusions, analysis, interpretation, characterization or application of the referenced statutory authority. AMI denies the remaining allegations of Paragraph 31.

Count 2

(Failure to Submit an NOI for the Commercial Court Facility)

32. AMI restates, alleges and incorporates its responses to Paragraphs 1 through 31, as if fully set forth herein.

33. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA’s legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority.

34. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA’s legal conclusions, analysis, interpretation, characterization or application of the referenced statutory authority. AMI denies the remaining allegations of Paragraph 34.

Count 3

(Discharge without an NPDES Permit at the Berryessa Facility)

35. AMI restates, alleges and incorporates its responses to Paragraphs 1 through 34, as if fully set forth herein.

36. AMI admits that, on or about October 28, 2005, it submitted an NOI to the State Board seeking coverage under the General Permit for the Berryessa Facility, and that, on or about November 2, 2005, the San Francisco Bay Regional Water Quality Control Board ("San Francisco Regional Board") granted AMI coverage under the General Permit and assigned it Waste Discharge Identification ("WDID") number 243I019895. AMI denies the remaining allegations of Paragraph 36.

37. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority. AMI denies the remaining allegations of Paragraph 37.

38. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority. AMI denies that the storm drains in the vicinity of the Berryessa Facility or the San Jose MS4 are "point sources." AMI denies that the Berryessa Facility creates any point sources. AMI denies that it is responsible for the storm drains adjacent to the Berryessa Facility or the San Jose MS4. AMI denies the remaining allegations of Paragraph 38.

39. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority. AMI denies the remaining allegations of Paragraph 39.

40. AMI denies that “145 rainfall events generated storm water associated with industrial activity at the Facility that discharged into and added pollutants to Coyote Creek and San Francisco Bay.” AMI states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 40, and on that basis denies the same.

41. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA’s legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority. AMI denies that there were 145 days of storm water discharges from the Berryessa Facility between October 1, 2003 and November 2, 2005. AMI denies the remaining allegations of Paragraph 41.

Count 4

(Failure to Submit an NOI for the Berryessa Facility)

42. AMI restates, alleges and incorporates its responses to Paragraphs 1 through 41, as if fully set forth herein.

43. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA’s legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority.

44. AMI states that the referenced statutory authority speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA’s legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority. AMI denies the remaining allegations of Paragraph 44.

Count 5

(Failure to Comply with NPDES Permit Requirements at the Berryessa Facility)

45. AMI restates, alleges and incorporates its responses to Paragraphs 1 through 44, as if fully set forth herein.

46. AMI states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 46 concerning rainfall, and on that basis denies the same. AMI denies the remaining allegations of Paragraph 46.

Failure to Develop and Implement an Adequate SWPPP at the Berryessa Facility

47. AMI states that the General Permit speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the General Permit.

48. AMI admits that it provided EPA with a copy of AMI's SWPPP. AMI states that the General Permit speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the General Permit. AMI denies the remaining allegations of Paragraph 48, and AMI denies the allegations of subparts (a), (b), (c), (d), (e), (f), (g) and (h).

49. AMI is informed and believes that it submitted a SWPPP dated June 29, 2007 to the San Francisco Regional Board. AMI denies the remaining allegations of Paragraph 49.

50. AMI states that the referenced statutory authority and the General Permit speak for themselves and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority and the General Permit. AMI denies the remaining allegations of Paragraph 50.

Failure to Update and Revise the Berryessa Facility SWPPP as Necessary

51. AMI states that the General Permit speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the General Permit.

52. AMI denies the allegations of Paragraph 52.

53. AMI states that the referenced statutory authority and the General Permit speak for themselves and therefore no response is required. To the extent a response is required, AMI denies EPA's

legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority and the General Permit. AMI denies the remaining allegations of Paragraph 53.

Failure to Develop an Adequate Written Monitoring Program at the Berryessa Facility

54. AMI states that the General Permit speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the General Permit.

55. AMI states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 55, and on that basis denies the same.

56. AMI admits that it provided EPA with a copy of written monitoring program for the Berryessa Facility on April 11, 2008. AMI denies the remaining allegations of Paragraph 56.

57. AMI states that the referenced statutory authority and the General Permit speak for themselves and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority and the General Permit. AMI denies the remaining allegations of Paragraph 57.

Failure to Maintain Records of and/or Conduct Facility Inspections at the Berryessa Facility

58. AMI states that the General Permit speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the General Permit.

59. AMI states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 59, and on that basis denies the same.

60. AMI states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 60, and on that basis denies the same.

61. AMI states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 61, and on that basis denies the same.

62. AMI states that the referenced statutory authority and the General Permit speak for themselves and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority and the General Permit. AMI denies the remaining allegations of Paragraph 62.

Failure to Conduct Annual Comprehensive Site Compliance Evaluations at the Berryessa Facility

63. AMI states that the General Permit speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the General Permit.

64. AMI states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 64, and on that basis denies the same.

65. AMI states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 65, and on that basis denies the same.

66. AMI states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 66, and on that basis denies the same.

67. AMI states that the referenced statutory authority and the General Permit speak for themselves and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority and the General Permit. AMI denies the remaining allegations of Paragraph 67.

Failure to Submit Annual Reports to the San Francisco Regional Board

68. AMI states that the General Permit speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the General Permit.

69. AMI states that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 69, and on that basis denies the same.

70. AMI admits that it submitted annual reports to the San Francisco Regional Board. AMI denies the remaining allegations of Paragraph 70.

71. AMI denies the allegations of Paragraph 71.

72. AMI states that the referenced statutory authority and the General Permit speak for themselves and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority and the General Permit. AMI denies the remaining allegations of Paragraph 72.

Failure to Implement BMPs at the Berryessa Facility

73. AMI states that the General Permit speaks for itself and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the General Permit.

74. AMI denies the allegations of Paragraph 74, and AMI denies the allegations of subparts (a), (b), (c) and (d).

75. AMI denies the allegations of Paragraph 75, and AMI denies the allegations of subparts (a) and (b).

76. AMI admits that it finished the secondary containment wall around the Berryessa Facility site and installed a grate system to collect rain water and debris exiting the site. AMI is informed and believes that the remaining allegations of Paragraph 76 are true.

77. AMI states that the referenced statutory authority and the General Permit speak for themselves and therefore no response is required. To the extent a response is required, AMI denies EPA's legal conclusions, analysis, interpretation, characterization or application of the aforementioned statutory authority and the General Permit. AMI denies that there were "166 days of violation" of the General Permit from October 25, 2007 to April 8, 2008. AMI denies the remaining allegations of Paragraph 77.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

The Complaint has failed to state any cause of action or claim upon which relief may be granted.

SECOND DEFENSE

EPA's claims are barred by the applicable statutes of limitations and repose.

THIRD DEFENSE

EPA's claims are barred by the doctrines of unclean hands and/or laches.

FOURTH DEFENSE

EPA has not alleged, and cannot prove, any facts showing that AMI's conduct was a cause in fact of any storm water discharge as alleged in the Complaint, or caused any impact to any regulatory scheme.

FIFTH DEFENSE

EPA's claims are barred because at all times relevant to the claims AMI was not required to obtain a National Pollutant Discharge System Permit.

SIXTH DEFENSE

EPA's claims are barred because at all times relevant to the claims AMI was not required to submit a Notice of Intent to Comply with the Terms of the General Permit for Storm Water Discharges Associated with Industrial Activity.

SEVENTH DEFENSE

EPA's claims are barred because AMI did not owe any legal duty, or, if AMI owed a legal duty, AMI did not breach that duty.

EIGHTH DEFENSE

If violations occurred, which violations are denied, the violations were caused, solely or in combination, by pre-existing conditions, by intervening or superseding causes, and/or by other persons, entities, forces, conditions and/or things over which AMI had no control and for which AMI is not responsible. EPA is therefore either barred from recovering any penalty, or any recoverable penalty must be reduced in proportion to the violations attributable to causes for which AMI is not responsible.

NINTH DEFENSE

EPA's claims are barred because the alleged conduct of AMI was undertaken in good faith for a valid business purpose.

TENTH DEFENSE

If violations occurred as alleged, the same were not due or caused by the fault, lack of care, negligence, or breach of duty on the part of AMI.

ELEVENTH DEFENSE

EPA's claims are barred because AMI lacked intent to violate the referenced statutes, regulations and General Permit.

TWELFTH DEFENSE

If any pollutants were discharged from AMI's facilities, which AMI denies, then the amount of, and/or harm attributable to, such pollutants is *de minimis* both in absolute terms and relative to the contributions of other storm water dischargers within EPA Region 9, and therefore insufficient as a matter of law under the due process and equal protection rights guaranteed by the United States Constitution and pursuant to the *de minimis non curat lex* doctrine to give rise to any liability.

THIRTEENTH DEFENSE

Any storm water discharges by AMI, which are denied, were *de minimis* and therefore do not justify the imposition of penalties under the circumstances.

FOURTEENTH DEFENSE

AMI is not liable for any acts or omissions undertaken by or at the direction of sufferance of local, state or federal authority, including without limitations, acts or omissions made in accordance with said authorities' permits, rules, regulations; or other permits, rules, regulations, ordinances, statutes, and laws applicable at the time of the act or omission in question.

FIFTEENTH DEFENSE

EPA's claims are barred because, if any pollutants were discharged from AMI's facilities, which AMI denies, such pollutants were not discharged from a point source, as defined by 33 U.S.C. § 1362(14).

SIXTEENTH DEFENSE

EPA's claims are barred because if any pollutants were discharged from AMI's facilities, which AMI denies, such pollutants never entered navigable waters, as defined by 13 U.S.C. § 1362(7), or waters of the United States, as defined by 40 C.F.R. § 122.2.

SEVENTEENTH DEFENSE

EPA's claims are barred because there was at all times relevant to this action no hydrologic connection between AMI's facilities and either navigable waters or waters of the United States.

EIGHTEENTH DEFENSE

EPA's claims are barred because Coyote Creek is not a navigable water or a water of the United States.

NINETEENTH DEFENSE

EPA's proposed penalty cannot be sustained. Any such penalty would violate AMI's due process and equal protection rights guaranteed by the provisions of the United States Constitution and constitutional privileges incorporated in the Constitution of the State of California.

TWENTIETH DEFENSE

AMI hereby gives notice that it intends to rely upon any other defenses that may become available or appear during discovery in this case or otherwise, and hereby reserves the right to amend this Answer to assert any such defenses.

REQUEST FOR HEARING

Pursuant to 40 C.F.R. § 22.15(b), AMI requests a hearing of this matter and will contest the material facts contained in the Complaint and the appropriateness of the proposed penalty amount.

PRAYER

WHEREFORE, AMI prays for entry of judgment in its favor and against EPA as follows:

- (1) That the Complaint be dismissed in its entirety and with prejudice;
- (2) That no penalty be imposed;
- (3) That AMI recover its costs, attorneys' fees and disbursements in this action; and
- (4) For such further relief as this Court deems just and proper.

DATED: December 3, 2008

SEDGWICK, DETERT, MORAN & ARNOLD LLP

By: Peter Messrobian
Keith M. Casto
Peter J. Messrobian
Attorneys for Respondent
AMERICAN METAL AND IRON, INC.

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing Answer to Complaint; Request for Hearing was filed with the Regional Hearing Clerk, Region 9, and that a copy was sent by U.S. Mail to:

Michael Massey
Assistant Regional Counsel (ORC-3)
U.S. EPA Region 9
75 Hawthorne Street
San Francisco, California 94105

12/3/2008

Date



William H. Morris