

SEP 29 PM 12:07
U.S. DIST. COURT, REGION IX
REGIONAL HEARING CLERK

75 Hawthorne Street
San Francisco, California 94105

Respondent

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

Statutory Authority

- ### Statutory and Regulatory Framework

- 1

3. Section 402 of the Act, 33 U.S.C. § 1342, establishes the National Pollutant Discharge Elimination System ("NPDES") program. Under Section 402 of the Act, 33 U.S.C. § 1342, EPA and states with EPA-approved NPDES programs are authorized to issue permits governing the discharge of pollutants from regulated sources.
4. Section 402(p) of the Act, 33 U.S.C. § 1342(p), and EPA's implementing regulations at 40 CFR § 122.26, require NPDES permit authorization for discharges of storm water associated with industrial activity. Facilities engaged in industrial activity, as defined by 40 CFR § 122.26(b)(14), must obtain NPDES permit authorization if they discharge or propose to discharge storm water into waters of the United States. Pursuant to 40 CFR §§ 122.26(a)(1)(ii) and 122.26(c), dischargers of storm water associated with industrial activity are required to apply for an individual permit or seek coverage under a promulgated storm water general permit.
5. Scrap and Waste Materials, Standard Industrial Classification (SIC) 5093, falls under SIC Major Group 50 and, pursuant to 40 CFR § 122.26(b)(14)(vi), is an industrial activity subject to the discharge and permitting requirements under Section 402 of the Act, 33 U.S.C. § 1342.
6. Section 308(a) of the Act, 33 U.S.C. § 1318(a), and its implementing regulations authorize EPA to, inter alia, require the owner or operator of any point source to establish records, make reports, or submit other reasonably required information, including individual and general NPDES permit applications.
7. Pursuant to Section 308(a) of the Act, 33 U.S.C. § 1318(a), and 40 CFR § 122.21, any person who discharges or proposes to discharge storm water associated with industrial activity must submit an application for an NPDES permit 180 days prior to commencing industrial activity.
8. The State of California has an EPA-approved NPDES program, and issues permits, including storm water permits, through its State Water Resources Control Board ("State Board") and nine Regional Water Quality Control Boards ("Regional Boards"). Since 1991, the State Board has adopted two successive statewide NPDES general permits for discharges of storm water associated with industrial activity. The permit that is currently effective, General Permit No. CAS000001/Water Quality Order No. 97-03-DWQ ("General Permit"), was adopted on April 17, 1997.
9. All facility operators seeking coverage under the General Permit must submit a *Notice of Intent to Comply with the Terms of the General Permit for Storm Water Discharges Associated with Industrial Activity* ("NOI") to the State Board fourteen days prior to commencing industrial operations. A facility operator that does not submit an NOI must submit an application for an individual NPDES permit. (General Permit, Order Provision E(1), pg. 6 and Attachment 3 to the General Permit).

10. The General Permit requires facility operators to develop and implement a storm water pollution prevention plan ("SWPPP") prior to commencing industrial operations. (General Permit, Order Section A(1)(a), pg. 11). The purpose of the SWPPP is to identify sources of industrial storm water pollution and to identify site-specific best management practices ("BMPs"). The SWPPP must include, inter alia, a narrative description of the storm water BMPs to be implemented at the facility for each potential pollutant and its source. (General Permit, Order Section A(8), pg. 17).
11. The General Permit requires facility operators to reduce or prevent pollutants associated with industrial activity in their storm water discharges and authorized non-storm water discharges by implementing best available technology economically achievable ("BAT") for toxic and non-conventional pollutants and best conventional pollutant control technology ("BCT") for conventional pollutants. Development and implementation of a SWPPP that complies with the General Permit and that includes BMPs that achieve BAT/BCT constitutes compliance with this requirement. (General Permit, Order Provision B.3, pg. 4).
12. The General Permit requires facility operators to revise the SWPPP "whenever appropriate" and to ensure that it is readily available for review by facility employees or inspectors. (General Permit, Order Section A(2), pg. 12). Information gathered during monitoring and inspections should be used to determine appropriate revisions to the SWPPP. (General Permit, Order Section B(3), (4) pg. 25-26).
13. Facility operators must develop a written monitoring program, and must conduct quarterly visual observations of non-storm water discharges, monthly visual observations of storm water events, and prescribed storm water sampling and analysis. (General Permit, Order Section B(1), (3), (4), and (5), pg. 24-27). In addition, facility operators must submit an annual report to the Regional Board that summarizes visual observations and sampling and provides a comprehensive site compliance evaluation. (General Permit, Order Section B(14), pg. 35). A copy of the written monitoring program as well as records of inspections, steps taken to reduce or prevent discharges, and the annual report must be maintained for at least five years and must be available at the facility for review by facility employees or inspectors. (General Permit, Order Section B(13), pg. 34).

Factual Background

14. American Metals and Iron, Inc. ("AMI" or "Respondent") is a California corporation, licensed to do business in California and is thus a "person" under CWA Section 502(5), 33 U.S.C. § 1362(5).
15. AMI owns and operates two facilities within a mile of each other in San Jose, California. The first facility, located at 11665 Berryessa Road, serves as Respondent's primary scrap and waste materials recycling yard (the "Berryessa Facility"). AMI's second facility,

located at 1045 Commercial Court, is used both to store scrap and waste materials and for vehicle and equipment maintenance and storage (the "Commercial Court Facility") (collectively, the Berryessa Facility and the Commercial Court Facility are referred to as the "Facilities"). Respondent has operated at the Berryessa Facility since at least June 1, 1999. Respondent has operated at the Commercial Court Facility since at least March 15, 2006. Respondent is primarily engaged in assembling, breaking up, sorting, and/or wholesale distribution of scrap and waste materials at the Facilities, an industrial activity classified under SIC 5093.

16. Data from the San Jose, Mineta International Airport Weather Monitoring Station, approximately 1 mile from the Facilities, indicate that between October 1, 2003, and November 2, 2005, there were at least 145 days of rain (15 days with a rain event exceeding 0.5 inches in twenty-four hours) at the Berryessa Facility, and that there were at least 163 days of rain (18 days with a rain event exceeding 0.5 inches in twenty-four hours) between November 3, 2005, and April 11, 2008. At the Commercial Court Facility, there were at least 127 days of rain (13 days with a rain event exceeding 0.5 inches in twenty-four hours) between March 15, 2006, and February 20, 2008.
17. Storm water runoff at the Berryessa Facility collects and flows to storm drains in the vicinity of the Berryessa Facility. Storm water runoff at the Commercial Court Facility collects and flows to storm drains located on site. The storm drains adjacent to the Berryessa Facility and the storm drains at the Commercial Court Facility discharge to the City of San Jose's municipal separate sewer system (San Jose MS4). The San Jose MS4 discharges to Coyote Creek, which is a perennial tributary that flows into the San Francisco Bay approximately six miles downstream from the MS4 discharge point. The San Francisco Bay flows into and is tidally influenced by the Pacific Ocean.
18. Coyote Creek has been designated as critical habitat for the threatened California Coast Steelhead Trout. The San Francisco Bay is used for primary contact recreation and provides high quality habitat for endangered species, fish, and other wildlife.
19. On October 25, 2007, staff from EPA Region 9 inspected the Berryessa Facility and on December 7, 2007, staff from EPA Region 9 inspected both Facilities (the "Inspections"). The purpose of the Inspections was to evaluate Respondent's compliance with the General Permit.
20. On January 30, 2008, EPA issued Respondent a Findings of Violation and Order for Compliance at the Berryessa Facility, EPA Docket No. CWA 309(a)-08-025, (the "Berryessa Order") and a Findings of Violation and Order for Compliance at the Commercial Court Facility, EPA Docket No. CWA 309(a)-08-026 (the "Commercial Court Order").

21. On March 3, 2008, Respondent provided information to EPA indicating that it had implemented additional BMPs at the Commercial Court Facility. On April 16, 2008, Respondent submitted a SWPPP and monitoring plan to EPA for the Commercial Court Facility. On April 8, 2008, Respondent provided information to EPA confirming that it had implemented additional BMPs at the Berryessa Facility. On April 11, 2008, Respondent submitted an updated SWPPP and a monitoring plan to EPA for the Berryessa Facility.

Findings of Violation

Count 1

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

22. The facts stated in paragraphs 1 through 21 above are incorporated herein.
23. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant from a point source by any person into a water of the United States unless it complies with the Act, including Section 402, 33 U.S.C. § 1342.
24. In or around February 4, 2008, Respondent submitted an NOI to the State Board seeking coverage under the General Permit for the Commercial Court Facility. On February 20, 2008, the San Francisco Bay Regional Water Quality Control Board ("San Francisco Regional Board") granted Respondent coverage under the General Permit and assigned it Waste Discharge Identification ("WDID") Number 2 43I021449 for the Commercial Court Facility. Prior to February 20, 2008, discharges from Respondent's industrial activities at the Commercial Court Facility were not authorized by the General Permit or an individual NPDES permit.
25. Respondent is a "person" as defined by Section 502(5) of the Act, 33 U.S.C. § 1362(5).
26. Storm water runoff and drainage from the Commercial Court Facility contains "pollutants," including garbage and industrial and municipal waste, as defined by Section 502(6) of the Act, 33 U.S.C. § 1362(6).
27. The storm drains at the Commercial Court Facility that empty into the City of San Jose's MS4 are "point sources" as defined by Section 502(14) of the Act, 33 U.S.C. § 1362(14). In the alternative, the San Jose MS4, which connects to Coyote Creek, is a "point source" as defined by Section 502(14) of the Act, 33 U.S.C. § 1362(14).
28. Storm water runoff from the Commercial Court Facility that drains into the City of San Jose's MS4 and flows into Coyote Creek and the San Francisco Bay is storm water discharge associated with an industrial activity as defined by 40 CFR § 122.26(b)(14)(vi).

29. Coyote Creek, the San Francisco Bay, and the Pacific Ocean are each “navigable waters” as defined by Section 502(7) of the Act, 33 U.S.C. § 1362(7), and/or tributaries to navigable waters, and “waters of the United States” as defined in EPA’s regulations at 40 CFR § 122.2.
30. Between March 15, 2006, and February 20, 2008, there were at least 127 days of recorded rainfall at the San Jose, Mineta International Airport Weather Monitoring Station (13 days with at least one 24-hour rainfall event in excess of 0.5 inches). Upon information and belief, each of the 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.
31. Each storm water discharge from the Commercial Court Facility between March 15, 2006, and February 20, 2008, was an unauthorized discharge to waters of the United States and, together, the discharges constitute no fewer than 127 days of violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

Count 2

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

32. The facts stated in paragraphs 1 through 31 above are incorporated herein.
33. Section 308(a) of the Act, 33 U.S.C. § 1318(a), and 40 CFR § 122.21, require dischargers of storm water associated with industrial activity to submit an application for an NPDES permit prior to commencing industrial activity.
34. Respondent’s failure to submit an NOI for coverage under the General Permit before commencing industrial operations at the Commercial Court Facility constitutes a single day of violation of Section 308(a) of the Act, 33 U.S.C. § 1318(a), and 40 CFR § 122.21.

Count 3

(Discharge without an NPDES Permit at the Berryessa Facility)

35. The facts stated in paragraphs 1 through 34 above are incorporated herein.
36. In or around October 28, 2005, Respondent submitted an NOI to the State Board seeking coverage under the General Permit for the Berryessa Facility. On November 2, 2005, the San Francisco Regional Board granted Respondent coverage under the General Permit and assigned it WDID Number 2 43I019895 for the Berryessa Facility. Prior to November 2, 2005, discharges from Respondent’s industrial activities at the Berryessa Facility were not authorized by the General Permit or an individual NPDES permit.

37. Storm water runoff and drainage from the Berryessa Facility contains "pollutants," including garbage and industrial and municipal waste, as defined by Section 502(6) of the Act, 33 U.S.C. § 1362(6).
38. The facility entrance and the storm drains adjacent to the Berryessa Facility that empty into the City of San Jose's MS4 are "point sources" as defined by Section 502(14) of the Act, 33 U.S.C. § 1362(14). In the alternative, the San Jose MS4 itself, which connects to Coyote Creek, is a "point source" as defined by Section 502(14) of the Act, 33 U.S.C. § 1362(14).
39. Storm water runoff from the Berryessa Facility that drains into the City of San Jose's MS4 and flows into Coyote Creek and the San Francisco Bay is storm water discharge associated with an industrial activity as defined by 40 CFR § 122.26(b)(14)(vi).
40. Between October 1, 2003, and November 2, 2005, there were at least 145 days of recorded rainfall at the San Jose, Mineta International Airport Weather Monitoring Station (15 days with at least one 24-hour rainfall event in excess of 0.5 inches). On information and belief, each of the 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.
41. Each storm water discharge from the Berryessa Facility between October 1, 2003, and November 2, 2005, was an unauthorized discharge to waters of the United States and, together, the discharges constitute no fewer than 145 days of violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

Count 4

(Failure to Submit an NOI for the Berryessa Facility)

42. The facts stated in paragraphs 1 through 41 above are incorporated herein.
43. Section 308(a) of the Act, 33 U.S.C. § 1318(a), and 40 CFR § 122.21, require dischargers of storm water associated with industrial activity to submit an application for an NPDES permit prior to commencing industrial activity.
44. Respondent's failure to submit an NOI for coverage under the General Permit before commencing industrial operations at the Berryessa Facility constitutes a single day of violation of Section 308(a) of the Act, 33 U.S.C. § 1318(a), and 40 CFR § 122.21.

Count 5

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

45. The facts stated in paragraphs 1 through 44 above are incorporated herein.

46. Following receipt of permit coverage on November 2, 2005, Respondent discharged storm water associated with industrial activity at the Berryessa Facility in violation of the General Permit until at least April 11, 2008. During this period of noncompliance with the General Permit, there were at least 163 days of recorded rainfall at the San Jose, Mineta International Airport Weather Monitoring Station (18 days with rain fall in excess of 0.5 inches during a twenty-four hour period). Respondent's noncompliance with the General Permit included:

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

47. The General Permit (General Permit, Order Section A(1)(a), pg. 11) requires facility operators to develop and implement an adequate SWPPP prior to commencing industrial operations.
48. During the October 25, 2007 inspection at the Berryessa Facility, Respondent provided EPA with a copy of a SWPPP dated June 4, 2006. EPA noted that the June 4, 2006 SWPPP did not comply with requirements of the General Permit (General Permit, Order Section A, pg. 11-23) and had not been fully implemented. With respect to the June 4, 2006 SWPPP, EPA's Inspections revealed that Respondent:
- a. Failed to develop and include an adequate site map, as required by the General Permit (General Permit, Order Section A(4), pg. 12);
 - b. Failed to include a proper signature of the responsible party, as required by the General Permit (General Permit, Order Section C, pg. 9-10);
 - c. Failed to identify the party responsible for implementing and developing the SWPPP, as required by the General Permit (General Permit, Order Section A(3), pg. 12);
 - d. Failed to identify the receiving waters for storm water discharges from the Berryessa Facility, as required by the General Permit (General Permit, Order Section A(4), pg. 13);
 - e. Failed to identify all potential storm water pollution sources at the Berryessa Facility, as required by the General Permit (General Permit, Order Section A(6), pg. 14);
 - f. Failed to identify BMPs necessary to cover or otherwise protect pollution sources, including batteries, oily parts, metal shavings, debris, waste piles, and metal parts from exposure to precipitation and/or storm water runoff as required by the General Permit (General Permit, Order Section A(8), pg. 21);
 - g. Failed to identify housekeeping measures necessary to ensure that debris and other potential pollutant sources were not exposed to precipitation and/or storm water runoff as required by the General Permit (General Permit, Order Section A(8), pg. 19); and
 - h. Failed to include inspection logs in the SWPPP, as required by the General Permit (General Permit, Order Section A(8), pg. 20).

49. Upon information and belief, EPA alleges that Respondent failed to develop and implement an adequate SWPPP for operations at the Berryessa Facility between November 2, 2005, and April 11, 2008. On information and belief, EPA alleges that Respondent submitted a SWPPP dated June 29, 2007, to the San Francisco Regional Board that had many of the same deficiencies identified in paragraph 48, above. On April 11, 2008 Respondent submitted an updated SWPPP to EPA.
50. Respondent's failure to develop and implement an adequate SWPPP while engaged in industrial activity at the Berryessa Facility between November 2, 2005, and April 11, 2008, and its failure to provide a copy of an adequate SWPPP at the Berryessa Facility at the time of the Inspections constitutes no fewer than 890 days of violation of the General Permit (General Permit, Order Section A(1)(a), pg. 11 and A(10), pg. 22), which was issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342. Each violation of the General Permit is a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

Failure to Update and Revise the Berryessa Facility SWPPP as Necessary

51. The General Permit requires facility operators to revise the SWPPP "whenever appropriate." (General Permit, Order Section A(2), pg. 12).
52. At the time of the Inspections, Respondent had not updated its SWPPP for the Berryessa Facility to reflect the fact that certain BMPs identified in the SWPPP had not been implemented, including construction of the masonry wall around the Berryessa Facility's perimeter.
53. Respondent's failure to update its SWPPP for the Berryessa Facility constitutes a single violation of the General Permit (General Permit, Order Section A(2), pg. 12), which was issued pursuant to Section 402(p) of the Act, 33 U.S.C. § 1342(p). Each violation of the General Permit is a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

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

54. The General Permit (General Permit, Order Section B(1)(a), pg. 24, 25) requires facility operators to develop a site-specific written monitoring program prior to commencing industrial operations and to have the written monitoring program readily available for review by inspectors and employees.
55. During the Inspections and pursuant to the Berryessa Order, EPA requested that Respondent provide it with copies of all documents or reports related to inspections, visual observations of storm water and non storm water events, and sampling events at the Berryessa Facility.

56. At the time of the Inspections, Respondent did not have an adequate written monitoring program available for review by EPA. Pursuant to the Berryessa Order, Respondent provided EPA with a copy of a written monitoring program for the Berryessa Facility on April 11, 2008. The written monitoring program Respondent provided, however, only applied to future storm water monitoring activities. Upon information and belief, EPA alleges that Respondent failed to develop an adequate written monitoring plan for operations at the Berryessa Facility between November 2, 2005 and April 11, 2008.
57. Respondent's failure to develop an adequate written monitoring program while engaged in industrial activity at the Facility between November 2, 2005, and April 11, 2008, and its failure to have a copy of an adequate written monitoring program available for review by EPA inspectors constitutes 890 days of violation of the General Permit (General Permit, Order Section B(1)(a), pg. 24, 25), which was issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342. Each violation of the General Permit is a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

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

58. Facility operators must conduct quarterly visual observations of non-storm water discharges, monthly visual observations of storm water events, and prescribed storm water sampling and analysis. (General Permit, Order Section B(3), (4), and (5), pg. 25-27). Records of inspections and steps taken to reduce or prevent discharges must be maintained for at least five years and must be available at the facility for review by facility employees or inspectors. (General Permit, Order Section B(13), pg. 34).
59. During the Inspections and pursuant to the Berryessa Order, EPA requested that Respondent provide EPA with copies of its records, including its records of sampling, inspections, and storm water and non-storm water visual observations dating back to November 2, 2005.
60. In response to EPA's request for copies of the Berryessa Facility's sampling and inspection records, Respondent failed to provide EPA with records of sampling activities at all storm water discharge locations or records of storm water and non-storm water visual observations.
61. Between November 2, 2005, and April 11, 2008, there were ten quarters for which Respondent was obligated to keep a report of visual observations of non-storm water discharges; twenty one months for which, on information and belief, Respondent was obligated to keep records of monthly storm water observations; and six bi-annual sampling events Respondent was obligated to perform.

62. Respondent's failure to maintain records of and/or conduct sampling activities at storm water discharge locations and its failure to maintain records of and/or conduct storm water and non-storm water visual observations while engaged in industrial activity at the Facility between November 2, 2005, and April 11, 2008, constitute thirty seven days of violations of the General Permit (General Permit, Order Section B(3), pg. 25; B(4), pg. 25; B(5)(a), pg. 26; and Section B(13), pg. 34), which was issued pursuant to Section 402(p) of the Act, 33 U.S.C. § 1342(p). Each violation of the General Permit is a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

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

63. The General Permit (General Permit, Order Section A(9), pg. 21, 22) requires facility operators to conduct annual comprehensive site compliance evaluations and retain copies of evaluation reports for five years.
64. During the Inspections and pursuant to the Berryessa Order, EPA requested that Respondent provide it with copies of Respondent's annual comprehensive site compliance evaluations covering Respondent's operations since November 2, 2005.
65. In response to EPA's request, Respondent failed to provide copies of any annual comprehensive site compliance evaluations for the period during which it was conducting industrial activities at the Berryessa Facility.
66. Upon information and belief, EPA alleges that Respondent failed to conduct an annual comprehensive site compliance evaluation at the Berryessa Facility for the period of industrial activity between November 2, 2005 and April 11, 2008.
67. Respondent's failure to conduct an annual comprehensive site compliance evaluation for the period between November 2, 2005 and April 11, 2008, and its failure to retain a copy of each evaluation report for that period in its records or have a copy available for review by EPA inspectors constitutes three days of violation of the General Permit (General Permit, Order Section A(9), pg. 21, 22), which was issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342. Each violation of the General Permit is a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

Failure to Submit Annual Reports to the San Francisco Regional Board

68. The General Permit (General Permit, Order Section B(14), pg. 35) requires facility operators to submit an annual report by July 1 of each year to the appropriate Regional Board. The General Permit (General Permit, Order Section B(13), pg. 34) also requires facility operators to retain copies of all annual reports for five years.

69. During the Inspections and pursuant to the Berryessa Order, EPA requested that Respondent provide it with copies of all reports and documents related to, among other things, sampling and inspections at the Berryessa Facility.
70. In response to EPA's request for copies of all reports and documents related to sampling and inspections, Respondent did not provide any annual reports. On information and belief, EPA alleges that Respondent submitted an annual report to the San Francisco Regional Board for the 2006/2007 and 2007/2008 reporting periods.
71. Upon information and belief, EPA alleges that Respondent failed to prepare or submit an annual report to the San Francisco Regional Board for the Berryessa Facility for the period of industrial operations between November 2, 2005 and June 30, 2006.
72. Respondent's failure to prepare and submit an annual report for the period between November 2, 2005 and June 30, 2006, and its failure to retain a copy of its annual reports in its records or have a copy available for review by EPA inspectors constitutes one day of violation of the General Permit (General Permit, Order Section B(14), pg. 35 and Order Section B(13), pg. 34), which was issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342. Each violation of the General Permit is a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

Failure to Implement BMPs at the Berryessa Facility

73. The General Permit (General Permit, Order Provision B.3, pg. 4) requires facility operators to reduce or prevent pollutants associated with industrial activity from discharging from their facilities through implementation of BAT for toxic and non-conventional pollutants and BCT for conventional pollutants. Implementation of all appropriate BMPs can satisfy this requirement.
74. During the Inspections, EPA staff observed that Respondent had not implemented the following BMPs at the Berryessa Facility that are identified in its SWPPP dated June 4, 2006:
 - a. Failed to effectively operate and maintain the Facility's trenching and tank system for storm water collection and containment;
 - b. Failed to construct the masonry wall around the Facility perimeter to contain storm water;
 - c. Failed to conduct adequate housekeeping to ensure that debris and other potential pollutant sources were not subject to vehicle track-out;
 - d. Failed to conduct good housekeeping practices to eliminate oily stains on the pavement, and debris in the yard.
75. In addition to the fact that Respondent had not fully implemented all BMPs identified in its SWPPP at the time of the Inspections, EPA staff also determined that additional BMPs

(other than those identified in the SWPPP) were necessary in order for Respondent to achieve BAT and BCT at the Berryessa Facility. Respondent failed to implement BMPs not identified in the SWPPP that are necessary to achieve BAT and BCT at the Berryessa Facility, including but not limited to:

- a. Failed to adequately cover batteries, oily parts, metal shavings, debris, waste piles, and metal parts in order to protect them from exposure to precipitation and/or storm water runoff; and
 - b. Failed to conduct adequate housekeeping to ensure that debris and other potential pollutant sources were not exposed to precipitation and/or storm water runoff.
76. On April 8, 2008, Respondent notified EPA that it had installed additional BMPs at the Berryessa Facility.
77. Respondent's failure to implement all BMPs necessary to achieve BAT and BCT while engaged in industrial activity at the Berryessa Facility from at least October 25, 2007, to April 8, 2008, constitutes at least 166 days of violation of the General Permit (General Permit, Order Provision B.3, pg. 4), which was issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342. Each violation of the General Permit is a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

NOTICE OF PROPOSED ORDER ASSESSING PENALTIES

78. Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum penalty of \$125,000. Pursuant to the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and 40 CFR Part 19, violations that occurred between January 30, 1997, and March 15, 2004, are subject to a penalty of up to \$11,000 per day of violation, up to a maximum penalty of \$137,500. Violations that occurred after March 15, 2004 are subject to a penalty of up to \$11,000 per day of violation, up to a maximum penalty of \$157,500.
79. The proposed penalty is based upon the facts stated in this Complaint, the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, its ability to pay, any prior history of such violation, its degree of culpability, its economic benefit or savings resulting from the violation, and such other matters as justice may require.
80. The nature, circumstances, extent, and gravity of the violations described above are significant. Respondent has not maintained adequate storm water controls at the Facilities during its period of operations. The absence of adequate storm water controls resulted in the discharge of storm water to waters of the United States. Storm water discharges from scrap and waste materials recycling operations, SIC 5093, are known to

contain the following pollutants: chemical oxygen demand, total suspended solids, nitrate and nitrite, nitrogen, lead, copper, zinc, iron, and aluminum. During the Inspections, EPA observed materials and storm water pollutant sources at the Facilities that would generally be expected to generate the types of pollutants typically associated with facilities operating under SIC 5093. The presence of the above-listed pollutants in storm water is harmful to aquatic species. These pollutants can adversely impact many species of fish found in both Coyote Creek and the San Francisco Bay, including the endangered California Central Coast Steelhead trout.

81. By avoiding or delaying the costs necessary to comply with the Act, Respondent has realized economic benefit as a result of the violations alleged above.
82. Based on the foregoing Findings of Violations, and pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), EPA Region 9 hereby proposes to issue a Final Order assessing a civil administrative penalty against Respondent in an amount not to exceed the statutory maximum penalty allowed under 33 U.S.C. § 1319(g)(2)(B), as amended by the Civil Monetary Penalty Inflation Act, and as reflected in 40 CFR § 19.4.
83. EPA has consulted with the State of California regarding this Complaint and its intention to seek civil administrative penalties against Respondent.
84. Neither assessment nor payment of a civil administrative penalty pursuant to Section 309 of the Act shall affect Respondent's continuing obligation to comply with the CWA, and with any separate compliance order issued under Section 309(a) of the Act, 33 U.S.C. § 1319(a), for the violations alleged herein.

ANSWER AND NOTICE OF OPPORTUNITY TO REQUEST A HEARING

85. To avoid being found in default, which constitutes an admission of all facts alleged in the Complaint and a waiver of the right to hearing, Respondent must file a written answer within thirty (30) days of service of this Complaint. The answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with respect to which Respondent has any knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in this Complaint. The answer shall also state (a) the circumstances or arguments which are alleged to constitute the grounds of defense; (b) the facts that Respondent disputes; (c) the basis for opposing any proposed relief; and (d) whether a hearing is requested. The answer shall be filed with the following:

Danielle Carr
Regional Hearing Clerk (ORC-1)
U.S. EPA Region 9
75 Hawthorne Street
San Francisco, California 94105

86. In accordance with Section 309(g)(2) of the Act, 33 U.S.C. § 1319(g)(2), Respondent may request, within thirty (30) days of receipt of this Complaint, a hearing to contest any material fact contained in the Complaint or to contest the appropriateness of the proposed penalty set forth herein. Such a hearing will be held and conducted in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 CFR Part 22, a copy of which is enclosed herein.
87. If Respondent requests a hearing, members of the public, to whom EPA is obligated to give notice of this proposed action, will have a right under Section 309(g)(4)(B) of the CWA, 33 U.S.C. § 1319(g)(4)(B), and 40 CFR § 22.45 to be heard and to present evidence on the appropriateness of the penalty assessment.
88. A copy of the Answer and request for hearing and copies of all other documents relating to these proceedings filed with the Regional Hearing Clerk should be sent to:

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

OPPORTUNITY FOR INFORMAL SETTLEMENT

89. Whether or not Respondent requests a hearing, Respondent may confer informally with EPA to discuss the alleged facts, violations, and amount of the penalty. An informal conference does not, however, affect Respondent's obligation to file a written Answer within thirty (30) days of the Effective Date of the Complaint. The informal conference procedure may be pursued simultaneously with the adjudicatory hearing procedure.
90. Any settlement reached as a result of an informal conference will be embodied in a written Consent Agreement and Final Order. The issuance of the Consent Agreement and Final Order will constitute waiver of Respondent's right to a hearing on any matter to which Respondent stipulated.

91. If a settlement cannot be reached through an informal conference, the filing of a written Answer within thirty (30) days of the Effective Date of this Complaint will preserve Respondent's right to a hearing.
92. EPA encourages all parties against whom a penalty is proposed to explore the possibility of settlement. To request an informal conference, Respondent should contact Michael Massey, Assistant Regional Counsel, at (415) 972-3034 or at the following address:


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

PUBLIC NOTICE

93. Section 309(g)(4) of the Act, 33 U.S.C. §1319(g)(4), and 40 CFR § 22.45(b), require EPA to provide public notice of and a reasonable opportunity for comment before finalizing a civil penalty action.

EFFECTIVE DATE

94. This proceeding is initiated by the filing of this Complaint with the Regional Hearing Clerk. For calculation of time frames provided herein, the "Effective Date" of this Complaint is the date of service. Service is complete when the return mail receipt is signed by the Respondent or a duly authorized representative of the Respondent, in accordance with the provisions of 40 CFR §§ 22.5(b) and 22.7(c).


Alexis Strauss
Director
Water Division

24 September 2008
Date

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing Complaint, Notice of Proposed Penalty, and Notice of Opportunity For Hearing was filed with the Regional Hearing Clerk, Region 9, and that a copy was sent, along with a copy of 40 CFR Part 22 Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, certified mail, return receipt requested, to:

Mr. Keith Casto
Sedgwick, Detert, Moran & Arnold LLP
One Market Plaza, Steuart Tower, 8th Floor
San Francisco, California, 94105

Sep 29 '05

Date

Bernard R. [Signature]

Water Division