

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION**

**COMPLAINT R2-2014-1031
ADMINISTRATIVE CIVIL LIABILITY
IN THE MATTER OF**

**ATLANTIC RICHFIELD COMPANY
411 HIGH STREET
OAKLAND, CA 94601**

This Administrative Civil Liability Complaint (Complaint) alleges that Atlantic Richfield Company (hereinafter ARCO) failed to comply with Task 5 of Revised Final Site Cleanup Requirements Order R2-2011-0052, which required the Discharger to “Implement Offsite Remedial Action/Mitigation (441/445 High Street).” The California Regional Water Quality Control Board, San Francisco Bay Region is authorized to impose administrative civil liabilities pursuant to Water Code section 13350 for the alleged violation. This Complaint is issued under the authority of Water Code section 13323. The proposed liability is \$561,800.

The Assistant Executive Officer of the Regional Water Quality Control Board, San Francisco Bay Region (Water Board) hereby gives notice that:

1. ARCO¹ is alleged to have violated provisions of law for which the Water Board may impose administrative civil liability. This Complaint presents the factual basis for the alleged violation, legal and statutory authorities (including citations to applicable Water Code sections), and case-specific factors used to propose a \$561,800 liability for the alleged violation.
2. Unless waived, the Water Board will hold a hearing on this matter on February 11, 2015, in the Elihu M. Harris Building, First Floor Auditorium, 1515 Clay Street, Oakland, 94612. At the hearing, the 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 judicial civil liability. ARCO or its representative(s) will have an opportunity to be heard and to contest the allegations in this complaint and the imposition of civil liability by the Water Board. ARCO will be mailed an agenda approximately ten days before the hearing date. A meeting agenda will also be available at: http://www.waterboards.ca.gov/sanfranciscobay/board_info/agenda.shtml. ARCO must submit all comments and written evidence concerning this Complaint to the Water Board not later than 5 p.m. on January 12, 2014, so that such comments may be considered. Any written evidence submitted to the Water Board after this date and time will not be accepted or responded to in writing.
3. ARCO can waive its right to a hearing to contest the allegations contained in this Complaint by signing and submitting the enclosed waiver and paying the civil liability in

¹ On September 18, 2009, ARCO informed the Water Board that it retained Arcadis US Inc. (Arcadis) to manage remediation at the 411 High Street property and, in accordance with its contract, Arcadis has assumed primary accountability for meeting all applicable regulatory obligations. The Water Board recognizes Arcadis as the primary contact for remediation management, but ARCO remains the responsible discharger.

full or by taking other actions as described in the waiver form. If this matter proceeds to hearing, the Water Board's Prosecution Team reserves the right to seek an increase in the civil liability amount to recover the costs of enforcement incurred subsequent to the issuance of this Complaint through the hearing.

FACTUAL BASIS FOR THE ALLEGED VIOLATION

4. ARCO (formerly known as Richfield Oil Company, currently known as Atlantic Richfield Company c/o BP Amoco P.L.C) owned property at 411 High Street, Oakland, California from 1946 through 1967. From 1967 through 1975, the property was leased to other industrial operators. In 1975, ARCO sold the property to Mr. William Balfrey who immediately sold it to the current owners, the Richard Koch 411 High Street Annuity Trust and Nancy Koch 411 High Street Annuity Trust².
5. ARCO operated a petroleum storage facility in the southern portion of the 411 High Street property from 1946 through 1967. The facility included two large buildings, three above ground storage tanks (ASTs) with capacities greater than 50,000 gallons each, six smaller ASTs with capacities less than 50,000 gallons each, a loading rack and numerous product pipelines and manifolds. Gasoline, diesel, and motor oil were stored in the ASTs. ARCO removed the ASTs and associated aboveground piping from the property by 1975.
6. On July 14, 2011, the Water Board adopted Revised Final Site Cleanup Order R2-2011-0052 (SCR Order) to regulate the cleanup of soil, groundwater, and soil gas contamination caused by former industrial activities at the site. The SCR Order names ARCO as primarily-responsible discharger and is the most recent in a series of cleanup orders issued by the Water Board to regulate cleanup of the property. The SCR Order supersedes the following orders:
 - a. Site Cleanup Requirements Order 90-133 adopted September 19, 1990.
 - b. Site Cleanup Requirements Order 93-025 adopted March 17, 1993. Amendment of site cleanup requirements to allow additional time for interim groundwater treatment and require the submittal of a five-year status report.
 - c. Site Cleanup Requirements Order 98-041 adopted May 20, 1998. Amendment of site cleanup requirements to remove the 301 High Street property from the order.
 - d. Site Cleanup Requirements Order R2-2006-0084 adopted December 13, 2006. Amendment of site cleanup requirements to update the named dischargers and require the submittal of an investigation report, feasibility study and remedial action plan.
7. Task 4 "Implement Offsite Assessment (441/445 High Street)" of the SCR Order required ARCO to submit a report by July 1, 2012, to provide results of a sub-slab soil vapor investigation, recommend corrective measures if necessary (i.e., mitigation, remediation, or both), and provide an implementation schedule for the 441/445 High Street Property.

² Details of site boundaries, ownership and use are found in the SCR Order R2-2011-0052.

8. Task 5 “Implement Offsite Remedial Action/Mitigation (441/445 High Street)” of the SCR Order, required ARCO to submit an implementation report 90 days after Water Board Executive Officer approval of Task 4. SCR Order Task 5 required the implementation report to include documentation of the access agreement process, an as-built design of approved additional corrective measures, and the results of initial monitoring and system effectiveness.
9. On August 8, 2012, Arcadis U.S., Inc. (Arcadis) submitted a “Remedial Design Report” on behalf of ARCO to comply with Task 2 and Task 4 requirements of the SCR Order. Following the submission of this report, communications between Arcadis and Water Board staff generally involved discussions of both broader-scale site cleanup or remediation (Task 2³) and corrective measures required to mitigate a more localized threat from soil vapor (Tasks 4 and 5).
10. On June 21, 2013, the Water Board Executive Officer sent ARCO a letter (Executive Officer Letter) approving part of the “Remedial Design Report” related to Task 4. The Executive Officer Letter required a technical report documenting the implementation of offsite remedial action/mitigation (pursuant to Task 5) by September 18, 2013 (90 days after approval of Task 4), and included some additional requirements for implementation, such as a pilot test for the proposed mitigation system.
11. Water Board staff continued discussions with Arcadis about compliance with the SCR Order after issuance of the Executive Officer Letter. Though much of the discussions involved Task 2 requirements, Water Board staff provided clarifications on the actions needed to comply with Task 5 requirements when requested. At a meeting on August 20, 2013, Water Board staff agreed that Arcadis could test the effectiveness of a full-scale mitigation system instead of conducting a smaller pilot test.
12. On September 18, 2013, Arcadis submitted a “Remedial Design Addendum” on ARCO’s behalf. To comply with Task 5 of the SCR Order, this submittal should have documented implementation of the mitigation system. Instead, together with remedial design plans associated with Task 2, the “Remedial Design Addendum” included only a modified plan for implementing the mitigation system, as opposed to including results of implementing the mitigation system.
13. On April 8, 2014, the Water Board issued a notice of violation (NOV) for ARCO’s failure to comply with Task 5 of the SCR Order. ARCO had not implemented the mitigation system within 90 days as approved in the Executive Officer Letter.
14. After issuance of the NOV, Arcadis, on behalf of ARCO, engaged with Water Board staff regarding compliance with Task 5. Arcadis admitted to missing the deadline in the SCR Order, but attempted to argue that it was “misled” by Water Board staff. Although Water Board staff agreed to full-scale testing instead of a pilot test for implementing the mitigation system, at no time did Water Board staff agree to an alternative schedule for compliance with Task 5. Water Board staff made it clear in every communication with

³ Discussion of Task 2 requirements in this Complaint are intended only to add clarity; this Complaint addresses delayed implementation of a mitigation system associated with the Task 4 and 5 requirements of the SCR Order.

Arcadis that the deadlines set forth in the SCR Order were still in effect. After issuance of the NOV, Arcadis was reluctant to implement the approved mitigation system.

- a. In a letter to Water Board staff on April 11, 2014, Arcadis stated it would implement a mitigation system, but only under new conditions that Water Board staff found to be unacceptable.
 - b. In a meeting with Water Board staff on April 22, 2014, Arcadis continued to stipulate conditions for implementing a mitigation system that Water Board staff would not agree to, and staff reiterated the Task 5 deadline in the SCR Order.
 - c. In a letter to the Water Board on April 25, 2014, Arcadis committed to implement the mitigation system approved by the Executive Officer Letter.
15. On July 2, 2014, the Water Board received a “Soil Vapor Extraction System Construction and Startup Report” on behalf of ARCO that met the requirements of Task 5. The submittal of this report was 288 days after the September 18, 2013, deadline for Task 5 of the SCR Order.

ALLEGED VIOLATION

16. The Discharger failed to comply with Task 5 of the SCR Order. ARCO failed to timely implement offsite remedial action at 441/445 High Street and to submit the corresponding report as required by Task 5. The report evidencing the work performed, was due on September 18, 2013, and received on July 2, 2014. It was 288 days late.

LEGAL AUTHORITY

17. Water Code section 13323 authorizes the Water Board to issue a complaint to any person on whom administrative civil liability may be imposed under its statutory authority. This Complaint alleges ARCO’s act or failure to act that constitutes a violation of law, the provision of law authorizing administrative civil liability, and the proposed civil liability.
18. There are no statutes of limitation that apply to administrative proceedings. The statutes of limitation that refer to “actions” and “special proceedings” and are contained in the Code of Civil Procedure apply to judicial proceedings, not administrative proceeding. (See *City of Oakland v. Public Employees’ Retirement System* (2002) 95 Cal. App. 4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, Section 405(2), p. 510.)
19. This enforcement action is exempt from the provisions of the California Environmental Quality Act, California Public Resources Code section 21000 et seq., in accordance with California Code of Regulations, Title 14, Section 15321.
20. Notwithstanding the issuance of this Complaint, the Water Board and/or the State Water Board shall retain the authority to assess additional penalties against ARCO for other violations of the Final Site Cleanup Requirements Order R2-2011-0052 for which a liability has not yet been assessed or for violations that may subsequently occur.

STATUTORY LIABILITY

21. Pursuant to Water Code section 13350(a)(1), any person who violates a cleanup and abatement order issued by the Water Board shall be civilly liable under Water Code section 13350(e). Water Code section 13350(e) states that civil liability may be imposed administratively by the Water Board in an amount not to exceed \$5,000 for each day, and not to be less than \$100 for each day, in which the violation occurs.
22. Alternatively, the Water Board may refer such matters to the Office of the Attorney General for prosecution and seek up to \$15,000 per day of violation pursuant to Water Code section 13350(d)(1).

PROPOSED CIVIL LIABILITY

23. **Maximum Liability:** The violation occurred for 288 days. Therefore, the maximum administrative civil liability the Water Board may impose pursuant to CWC section 13350(e)(1) is \$1,440,000.
24. **Minimum Liability:** The Enforcement Policy requires that the minimum civil liability cannot be less than the economic benefit of the violation plus ten percent, and Water Code section 13350(e)(1)(B) specifies a minimum liability of \$100 per day of violation. In this case, the Water Code establishes the minimum liability of \$28,800 as detailed in Exhibit A.
25. **Proposed Liability:** The Assistant Executive Officer of the Water Board proposes that administrative civil liability be imposed in the amount of \$561,800, of which \$7,400 is for the recovery of staff costs incurred thus far. The Exhibit A attachment (incorporated herein by this reference) presents a discussion of the factors considered and the values assessed to calculate the proposed liability in accordance with the Enforcement Policy and WC section 13327. The proposed liability is more than the minimum liability and less than the maximum liability allowed for the alleged violation.

Dyan C. Whyte
Assistant Executive Officer

November 17, 2014

Date

Attachments:

Exhibit A: Factors Considered in Determining Administrative Civil Liability

EXHIBIT A

**Alleged Violation and Factors in Determining
Administrative Civil Liability**

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ADMINISTRATIVE CIVIL LIABILITY
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**ATLANTIC RICHFIELD COMPANY
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The State Water Resources Control Board Water Quality Enforcement Policy (Enforcement Policy) establishes a methodology for assessing administrative civil liability. Use of the methodology addresses the factors required by California Water Code (Water Code) sections 13327 and 13385(e). Each factor in the Enforcement Policy and its corresponding category, adjustment, and amount is presented below.

ALLEGED VIOLATION

Atlantic Richfield Company (hereinafter ARCO)⁴ failed to timely comply with Task 5 “Implement Offsite Remedial Action/Mitigation (441/445 High Street)” of the Revised Final Site Cleanup Requirements Order R2-2011-0052 (SCR Order). Task 5 required implementation of offsite remediation and mitigation measures, to be documented in an implementation report due on September 18, 2013; ARCO submitted the required report on July 2, 2014. ARCO therefore was in violation of Task 5 for 288 days.

ADMINISTRATIVE CIVIL LIABILITY

CALCULATION STEPS

STEPS 1 AND 2 – POTENTIAL FOR HARM AND ASSESSMENTS FOR DISCHARGE VIOLATIONS

This alleged violation is for a non-discharge violation. Steps 1 and 2 only apply to discharge violations only.

STEP 3 – PER DAY ASSESSMENT FOR NON-DISCHARGE VIOLATIONS

For non-discharge violations, the initial liability is determined from the maximum per day liability multiplied by the number of days in violation and a per-day factor using a matrix that ranges from 0.1 to 1. The Regional Water Quality Control Board, San Francisco Bay Region

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(Water Board) considers Potential for Harm and the extent of Deviation from Requirements to select the per-day factor.

Potential for Harm

For the violation, the potential for harm is **Moderate**.

Pollutants in soil gas at the property exceed the cleanup standards established by the SCR Order and threaten to cause exceedances of acceptable levels for breathing indoor air in the building at 441/445 High Street. Because the Discharger failed to mitigate indoor air threats in a timely manner, it was not able to satisfactorily comply with Task 5 of the SCR Order. This delay in mitigation harmed potential use of the property, specifically a building at 441/445 High Street. The business that occupied that building (High Street Auto Center) reportedly vacated the premises in part due to the threat to indoor air quality. The building is currently not being used pending soil remediation or mitigation of the soil gas threat to indoor air.

Soil gas measurements under the 441/445 High Street building concrete slab that exceed cleanup standards include the following:

- Benzene at concentrations of up to 3,600 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) exceeding the cleanup standard in the SCR Order ($280 \mu\text{g}/\text{m}^3$) and the Water Board environmental screening level (ESL) for indoor air ($420 \mu\text{g}/\text{m}^3$).
- Total petroleum hydrocarbons (quantified as gasoline) at concentrations up to 22,000,000 $\mu\text{g}/\text{m}^3$ exceeding the cleanup standard in the SCR Order ($29,000 \mu\text{g}/\text{m}^3$) and the Water Board environmental screening level (ESL) for indoor air ($29,000 \mu\text{g}/\text{m}^3$).

Methane and carbon dioxide also pose a risk at the property. The soil gas measurements under 441/445 High Street building concrete slab include the following:

- Methane at concentrations up to 5% of sub-slab soil gas, exceeding the lower explosive limit for that gas in air.
- Carbon dioxide at concentrations up to and exceeding exceed 4%, which constitutes a threat to cleanup workers in confined spaces based on guidance from the National Institute for Occupational Safety and Health.

Deviation from Requirement

For the violation, the extent of deviation is **Moderate**.

The delay in implementing Task 5 of the SCR Order (Task 5) compromised the requirement for mitigation of the indoor air threat at the 441/445 High Street properties. Although ARCO did ultimately complete the action, it was performed after the deadline, thus hindering cleanup of the site.

The resulting per day factor is **0.35** based on the above Potential Harm and extent of Deviation from Requirement from the lower range of the matrix in Table 3 of the Enforcement Policy.

Initial Liability Amount

For violations lasting more than 30 days, the Enforcement Policy allows for the Water Board to adjust the per-day basis.

A multiday adjustment is **not** appropriate for this violation. Environmental impacts resulted in a daily detrimental impact to the environment, and applying the adjustment would result in an inappropriately small penalty.

Initial Liability: \$5,000/day x (0.35) x (288 days) = \$504,000

STEP 4 – ADJUSTMENTS TO INITIAL LIABILITY

There are three additional factors to be considered for modification of the amount of initial liability: the violator's culpability, efforts to clean up or cooperate with regulatory authorities, and the violator's compliance history.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is used, with a higher multiplier for negligent behavior.

There is no adjustment for culpability (multiplier of **1.0**). ARCO did not comply with the requirements of Task 5, in spite of written and verbal guidance by Water Board staff. An acceptable report was submitted 288 days late in response to an NOV.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is used, with a higher multiplier when there is a lack of cooperation.

There is no adjustment for cleanup and cooperation (multiplier of **1.0**). Arcadis, on behalf of ARCO, had engaged with Water Board staff regarding the Task 5 mitigation and report. Arcadis eventually implemented mitigation and delivered a report, albeit late.

History of Violations

This factor is used to increase the liability when there is a history of repeat violations using a minimum multiplier of 1.1.

Herein a **1.1** multiplier for history of violations is warranted. ARCO failed to meet the Water Board requirements in Site Cleanup Requirements Order R2-2006-0084 and paid \$71,626.50 to settle an administrative civil liability complaint in 2011 (Board Order R2-2011-0043). In that case, ARCO submitted a report (draft Remedial Action Plan) on time, but the report did not meet the requirement for acceptability to the Executive Officer. Water Board staff has also served ARCO's consultant with two NOVs for failing to submit an adequate report as required by Task

2 of the SCR Order. NOVs are the most significant level of informal enforcement issued by Water Boards to put dischargers on notice that the Water Board is serious about compliance with its orders.

STEP 5 – DETERMINATION OF TOTAL BASE LIABILITY AMOUNT

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 2 for discharge violations and in Step 3 for non-discharge violations.

Total Base Liability = \$504,000 (Initial Liability) x 1.0 (Culpability Multiplier) x 1.0 (Cleanup and Cooperation Multiplier) x 1.1 (History of Violations Multiplier)

Total Base Liability = \$554,400

STEP 6 – ABILITY TO PAY AND TO CONTINUE IN BUSINESS

The Enforcement Policy provides that if a Water Board has sufficient financial information to assess the violator's ability to pay the Total Base Liability, or to assess the effect of the Total Base Liability on the violator's to continue in business, then the Total Base Liability amount may be adjusted downward if warranted.

ARCO has the ability to pay the proposed liability. ARCO is a large, multi-national company worth billions of dollars. In 2013, BP (British Petroleum) sold the ARCO brand and its Carson Refinery to Tesoro Oil for \$2.5 Billion.

STEP 7 – OTHER FACTORS AS JUSTICE MAY REQUIRE

There is an increase to the total base liability for staff costs.

Water Board prosecution staff incurred \$7,400 to investigate this case and prepare this analysis and supporting information. This consists of time spent by all members of the prosecution team based on the low end of the salary range for each classification. The Assistant Executive Officer intends to seek additional liability for staff costs incurred in bringing the matter to settlement or hearing. Although the final amount for such costs cannot be determined until completion of the matter, such costs could be quite substantial when additional investigation and analysis is required or if there is a hearing on this matter before the Water Board.

The Total Base Liability after adjusting for a reduction in the days of violations and staff costs is **\$561,800**

STEP 8 – ECONOMIC BENEFIT

The Enforcement Policy directs the Water Board to determine any economic benefit associated with the violations and to recover the economic benefit gained plus at least 10 percent in the liability assessment based on the requirements of Water Code section 13327.

ARCO may have realized economic savings of about \$22,200 by delaying the installation of the SVE system until May 23, 2014. This savings was estimated using the USEPA BEN model based on assumptions that the mitigation system cost around \$500,000 and annual operational costs would be about \$30,000.

The adjusted Total Base Liability from Step 7 is unchanged because it is more than ten percent higher than the estimated economic benefit.

STEP 9 – MAXIMUM AND MINIMUM LIABILITY AMOUNTS

a) *Minimum Liability Amount*

There are two applicable methods to calculate the minimum liability for this violation. The Enforcement Policy requires that the minimum civil liability cannot be less than the economic benefit of the violation plus ten percent (\$24,400) and Water Code section 13350(e)(1)(B) specifies a minimum liability of \$100 per day of violation for non-discharge violations (\$100 per day times 288 days or \$28,800). Therefore, consistent with the Enforcement Policy and the Water Code, the minimum liability cannot be less than \$28,800.

b) *Maximum Liability Amount*

The maximum administrative civil liability amount applicable is the maximum amount allowed by Water Code section 13350(e)(1) of \$5,000 per day times 288 days, resulting in \$1,440,000.

STEP 10 – FINAL LIABILITY AMOUNT

The final liability amount proposed is \$561,800 based on consideration of the penalty factors discussed above. It is within the minimum and maximum liabilities.