

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

**COMPLAINT R2-2015-1012
ADMINISTRATIVE CIVIL LIABILITY
IN THE MATTER OF**

**MR. FRANK HAMEDI
VIOLATION OF SITE CLEANUP REQUIREMENTS
FORMER VELCON II PROPERTY, 1761 JUNCTION AVENUE
SAN JOSE, SANTA CLARA COUNTY
WDID 2 438510N01**

This Administrative Civil Liability Complaint (Complaint) alleges that Mr. Frank Hamed, also known as Frank Hamed-Fard (Mr. Hamed or Responsible Party), failed to comply with Task C.2 of San Francisco Bay Regional Water Quality Control Board (Regional Water Board) Final Site Cleanup Requirements Order 01-108 (Order). Task C.2 requires the submittal of a technical report of proposed institutional constraints, including a deed restriction. The Regional Water Board 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 \$65,600.

The Assistant Executive Officer of the Regional Water Board hereby gives notice that:

1. Mr. Hamed allegedly violated provisions of law for which the Regional 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 \$65,600 liability for the alleged violation.
2. Unless waived, the Regional Water Board will hold a hearing on this matter on November 18, 2015, in the Elihu M. Harris Building, First Floor Auditorium, 1515 Clay Street, Oakland, 94612. At the hearing, the Regional 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. The Responsible Party or his 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 Regional Water Board. The Responsible Party 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. The Responsible Party must submit all comments and written evidence concerning this Complaint to the Regional Water Board not later than 5 p.m. on October 19, 2015, so that such comments may be considered.
3. The Responsible Party 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 full or by taking other actions as described in the waiver form. If this matter proceeds to hearing, the Regional Water Board's Prosecution Team reserves the right to seek an increase in the administrative civil liability to recover the costs of enforcement incurred subsequent to the issuance of this Complaint through the hearing.

FACTUAL BASIS FOR THE ALLEGED VIOLATION

4. Mr. Hamedi and his wife, Rosemary Hamedi-Fard (Mr. and Mrs. Hamedi), purchased the property at 1761 Junction Avenue, San Jose, Santa Clara County (Former Velcon II Property), from Velcon Filters, Inc. (Velcon) in 1993. Mr. and Mrs. Hamedi are the current owners of Former Velcon II Property.
5. Velcon manufactured and tested aircraft filters at the Former Velcon II Property and at two adjacent properties beginning in the 1960s. Velcon was responsible for at least two spills of jet fuel during its operations in the mid-1970s that resulted in a discharge of petroleum constituents to surface water, soil, and groundwater.
6. Pursuant to Water Code section 13304, the Order names two dischargers (responsible parties), Velcon and Mr. Hamedi, to cleanup and abate the effects of the discharge of wastes or hazardous materials at the Former Velcon II Property.
7. The Order named Velcon the primarily responsible party for the cleanup of the Former Velcon II Property because Velcon owned and/or occupied the property at the time pollution occurred, and through its actions caused the soil and groundwater pollution at the property.
8. The Order named Mr. Hamedi a secondarily responsible party because he is the current owner of the Former Velcon II Property.¹ The Order holds Mr. Hamedi responsible with Order compliance only if the Regional Water Board finds that Velcon has failed to comply with Order requirements.
9. Finding 11 of the Order states that an excessive risk is present at the Former Velcon II Property pending full remediation of the property. Institutional constraints (i.e., deed restrictions) are appropriate to limit on-site exposure to acceptable levels. An acceptable deed restriction will notify future landowners of sub-surface contamination, prohibit the use of groundwater beneath the property as a source of drinking water, and prohibit residential development.
10. Task C.2 of the Order proposes institutional constraints on the Former Velcon II Property. Task C.2 requires the responsible parties to submit a technical report acceptable to the Executive Officer that documents the procedures the responsible parties will use to prevent or minimize human exposure to soil and groundwater contamination prior to meeting cleanup standards. These procedures must include the following institutional constraint:

[A] deed restriction prohibiting the use of shallow groundwater as a source of drinking water. The deed restriction shall also specify any engineering controls implemented to meet cleanup standards in [Order] section B.3 for the protection of groundwater. The deed restriction shall also include a ban on use of the site for residential development.

¹ The State Water Board has historically recognized that current landowners should be named as dischargers in cleanup orders, regardless of whether the landowner owned at the time of the initial release. (See State Water Board Order WQ 84-6 (*Logsdon*); State Water Board Order 86-2 (*Zoecon*); State Water Board Order 86-18 (*Vallco Park*).)

11. Task C.3 of the Order requires a technical report documenting the recordation of the final deed restriction within 60 days after the Executive Officer approves the draft deed restriction submitted pursuant to Task C.2.

12. Order section D.11 states:

Within 60 days after being notified by the Executive Officer that other named dischargers have failed to comply with this order; Frank Hamedi, as property owner, shall then be responsible for complying with this order for the 1761 Junction Avenue Property . . . Task deadlines [in the Order] will be automatically adjusted to add 60 days.

13. In a letter dated March 17, 2011, the Executive Officer notified Mr. Hamedi of the Regional Water Board's intent to name Mr. Hamedi the primarily responsible party for compliance with Tasks C.2 and C.3. Velcon failed to comply with these tasks due to Mr. Hamedi's reluctance to accept a deed restriction.² Only the current owner can prepare and record the required deed restriction.

14. In a letter dated February 5, 2014, the Executive Officer formally notified Mr. Hamedi that he is primarily responsible for complying with Task C.2 and C.3 of the Order for the Former Velcon II Property. The Executive Officer set deadlines for compliance pursuant to his authority under the Order, section D.11. For Task C.2, Mr. Hamedi was required to submit an acceptable draft deed restriction to the Regional Water Board by April 8, 2014.

15. Mr. Hamedi has not submitted an acceptable deed restriction as required by Task C.2. Recent formal communication since the February 2014 notice include the following:

- a. On August 14, 2014, Regional Water Board staff sent Mr. Hamedi a Notice of Violation (NOV) for failing to submit a technical report with an acceptable deed restriction. The NOV noted that the report was 128 days late and that Mr. Hamedi was subject to fines of up to \$5,000 per day pursuant to Water Code section 13350. On August 28, 2014, Mr. Hamedi submitted a draft deed restriction.
- b. On October 3, 2014, the Executive Officer sent a letter conditionally approving the draft deed restriction submitted on August 28, 2014, and required Mr. Hamedi to record the fully-signed deed restriction by December 2, 2014. The draft deed restriction approval was subject to the following conditions:
 - i. Add a sentence to briefly describe remediation performed at the site;
 - ii. Delete the word "shallow" from shallow groundwater;

²The Executive Officer's letter dated March 17, 2011, documents Mr. Hamedi's disinclination to the deed restriction requirements. Mr. Hamedi commented on the draft Order in writing and at the Regional Water Board hearing, requesting cleanup standards for unrestricted use and removal of the deed restriction tasks. The Board considered these comments, but decided against making the changes requested. Mr. Hamedi did not petition the Board's adoption of the Order.

- iii. Refer to an attached legal description of the property; and
 - iv. Reformat the signature area to include signature blocks for all the necessary signatures.
- c. On March 27, 2015, the Executive Officer rescinded the October 3, 2014, letter and rejected the August 28, 2014, draft deed restriction because Mr. Hamedi neither amended nor recorded a deed restriction per the October 3, 2014, conditions. The letter notified Mr. Hamedi that the matter would be referred for formal enforcement if an acceptable deed restriction was not submitted by April 7, 2015. The March 2015 letter also included as an attachment a draft deed restriction that needed only a legal description of the property (Draft Deed Restriction).
- d. On April 15, 2015, Mr. Hamedi communicated to Regional Water Board staff by phone that he would agree to the Draft Deed Restriction language and sign it if two changes were made: (1) removal of the word surveillance from an inspection condition, and (2) removal of a requirement to copy TRC Companies, Inc. regarding notices about the deed restriction. Regional Water Board staff agreed to the changes on the same day by email.
- e. On June 16, 2015, Regional Water Board staff notified Mr. Hamedi that his case was referred for formal enforcement because he failed to submit an acceptable signed deed restriction despite the agreed upon changes to the Draft Deed Restriction language.
- f. On June 22, 2015, Mr. Hamedi submitted a signed, notarized deed restriction consistent with the Draft Deed Restriction language and April 2015 agreed upon changes, but added the following language:
- If the Regional Board, pursuant to its Order No. 01-108 and any amendments, modifications, or rescission of Order No. 01-108, replaced by a new Order of the Regional Board concerning the Burdened Property, has the effect of closing the site cleanup and thereafter a new site cleanup plan is opened due to acts or omission of Velcon Filters, Inc., then in such event the Regional Board shall name Velcon Filters, Inc., and its successors and assigns as the primary discharger responsible for all further investigation and remediation of the site.*
- g. On June 25, 2015, Regional Water Board staff informed Mr. Hamedi that he had failed to provide an acceptable deed restriction and was still in violation of Task C.2 of the Order. Regional Water Board staff explained that the language he added (see 15.f above) was unacceptable because it limited the Regional Water Board's legal authority and enforcement discretion.
16. Mr. Hamedi has not submitted a technical report with an acceptable deed restriction as of the date of this Complaint.

17. Soil and groundwater at the property continue to exceed cleanup standards required by the Order. The soil cleanup standard is based on industrial use of the site and the groundwater cleanup standard is based on the maximum contaminant level for drinking water.

ALLEGED VIOLATION

18. Mr. Hamedi violated Task C.2 of Order by not submitting an acceptable technical report by April 8, 2014, as required by the Executive Officer's February 5, 2014, letter. As of the date of this Complaint, the technical report is 513 days late.

LEGAL AUTHORITY

19. Water Code section 13323 authorizes the Regional Water Board to issue a complaint to any person on whom administrative civil liability may be imposed under its statutory authority. This Complaint alleges the Responsible Party'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.
20. There are no statutes of limitation that apply to administrative proceedings. The statutes of limitation that refer to "actions" and "special proceedings" are contained in the Code of Civil Procedure and apply to judicial proceedings, not administrative proceedings. (See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal. App. 4th 29, 48; 3 Witkin, Cal. Proc. 5th (2008) Actions, § 430, p. 546.)
21. There is no possibility that the activity in question may have a significant effect on the environment. (Cal. Code Regs., tit. 14 §§ 15378 and 15061, subd. (b) (3).) This enforcement action is also 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.
22. Notwithstanding the issuance of this Complaint, the Regional Water Board and/or the State Water Board shall retain the authority to assess additional penalties against Mr. Hamedi for other violations of the Order for which a liability has not yet been assessed or for violations that may subsequently occur.

STATUTORY LIABILITY

23. A person who violates a cleanup and abatement order issued by the Regional Water Board shall be civilly liable under Water Code section 13350.
24. The Regional Water Board may impose administrative civil liability for non-discharge violations on a daily basis. The maximum and minimum civil liability for each day of violation is \$5,000 and \$100 respectively. (See Wat. Code, § 13350, subd. (e)(1).)

PROPOSED CIVIL LIABILITY

25. **Minimum Liability:** The minimum administrative civil liability for the violation is \$51,300. This is based on Water Code section 13350(e)(1)(B) which requires a minimum of \$100 penalty per day for non-discharge violations unless the Regional Water Board makes express findings to justify a lesser amount.
26. **Maximum Liability:** The maximum administrative civil liability is \$2,565,000. This is based on the maximum allowed by Water Code section 13350(e)(1), \$5,000 for each day in which the violation occurs, for a total of 513 days.
27. **Proposed Liability:** The Assistant Executive Officer of the Regional Water Board proposes that administrative civil liability be imposed in the amount of \$65,600. 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 Water Code section 13327. The Proposed Liability is within the maximum liability allowed by statute.

Dyan C. Whyte
Assistant Executive Officer

September 2, 2015

Date

Attachments:

Exhibit A: Factors Considered in Determining Administrative Civil Liability

EXHIBIT A

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

**MR. FRANK HAMEDÍ
VIOLATION OF SITE CLEANUP REQUIREMENTS
FORMER VELCON II PROPERTY, 1761 JUNCTION AVENUE
SAN JOSE, SANTA CLARA COUNTY
WDID 2 438510N01**

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 Water Code sections 13327 and 13385(e).

Each factor in the Enforcement Policy and its corresponding category, adjustment, and amount for the violation is presented below.

ALLEGED VIOLATION

Violation of Final Site Cleanup Requirements Order 01-108

Mr. Frank Hamedí, also known as Frank Hamedí-Fard (Mr. Hamedí), allegedly violated Task C.2 of Regional Water Board Order 01-108 Final Site Cleanup Requirements (Order). Task C.2 requires the submittal of a technical report of proposed institutional constraints, including a deed restriction. Mr. Hamedí and his wife, Rosemary Hamedí-Fard, are the current owners of 1761 Junction Avenue, San Jose, Santa Clara County (Former Velcon II Property). On February 5, 2014, the Executive Officer of the Regional Water Board designated Mr. Hamedí as the primary responsible party for completing Task C.2, and established a compliance date of April 8, 2014, for the deed restriction on the Former Velcon II Property. An acceptable deed restriction has not been recorded and is 513 days late. Mr. Hamedí is subject to administrative liabilities pursuant to Water Code section 13350(a).

**ADMINISTRATIVE CIVIL LIABILITY
CALCULATION STEPS**

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

These steps are not applicable because the violation is a non-discharge violation.

STEP 3 – PER DAY ASSESSMENT FOR NON-DISCHARGE VIOLATIONS

The Enforcement Policy specifies that for non-discharge violations, an 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 corresponding to an appropriate Potential for Harm and Deviation from Requirement. The Potential for Harm reflects the characteristics and/or the circumstances of the violation and its threat to beneficial uses.

Deviation from Requirement reflects the extent to which a violation deviates from the specific requirement.

Potential for Harm

The Potential for Harm is minor. A “minor” Potential for Harm applies to violations that “present a minor threat to beneficial uses, and/or the circumstances of the violation indicate a minor potential for harm.” The failure to submit an acceptable deed restriction presents a minor potential for harm to the health of users of the property. Although shallow groundwater at the property contains contaminants that exceed residential use standards, the property is not used for residential purposes at this time and the groundwater is not currently used as drinking water.

Deviation from Requirement

The Deviation from Requirement is major. A “major” Deviation from Requirement is one where “the requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).” Task C.2 of the Order requires Mr. Hamedí to submit a draft deed restriction that is acceptable to the Executive Officer of the Regional Water Board. Mr. Hamedí has failed to submit a draft deed restriction that is acceptable to the Executive Officer and thereby has rendered this requirement ineffective.

The resulting per day factor is 0.3 based on the above Potential for Harm and Deviation from Requirement from the matrix in Table 3 of the Enforcement Policy.

Initial Liability Amount

For violations lasting more than 30 days, the Enforcement Policy allows adjustment of the per-day basis.

A multiday adjustment is appropriate because this violation did not result in an economic benefit on a daily basis. For this adjustment, the Enforcement Policy provides that an initial liability shall be assessed for the first day of the violation, plus each five-day period until the 30th day, plus each 30 days of violation thereafter. Thus, the total 513 days of violation is adjusted to 23 days for assessment purposes.

$$\text{Initial Liability: } \$5,000/\text{day} \times (0.30) \times (23 \text{ days}) = \$34,500$$

STEP 4 – ADJUSTMENTS TO INITIAL LIABILITY

The Enforcement Policy specifies that three additional factors should be considered for modification of the amount of initial liability: the violator’s culpability, efforts to clean up or cooperate with regulatory authority, and the violator’s compliance history.

Culpability

The Enforcement Policy specifies that higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is used.

The culpability multiplier is 1.3. Mr. Hamedí has disregarded the requirements set forth in Task C.2 of the Order. Mr. Hamedí was put on notice of the Order requirements at the time of its adoption. Beyond this, the Executive Officer and/or Regional Water Board staff has notified Mr. Hamedí of his obligations under the Order on at least eight occasions starting in 2011. Mr. Hamedí has repeatedly submitted signed deed restrictions that are inconsistent with the deed language approved or conditionally approved by the Executive Officer. He has failed to act as a reasonable and prudent landowner of an active cleanup site. A reasonable and prudent landowner under these circumstances would do as the other secondarily responsible parties named in the Order did: record an acceptable deed restriction in compliance with Tasks C.2 and C.3 of the Order.

Cleanup and Cooperation

The Enforcement Policy provides for an adjustment to reflect the extent to which a violator voluntarily cooperated in returning to compliance and correcting environmental damage. The adjustment is a multiplier between 0.75 and 1.5, with a higher multiplier where there is a lack of cooperation.

The cleanup and cooperation multiplier is 1.4. Mr. Hamedí has not been cooperative and has instead responded to Regional Water Board staff sporadically with draft deed restrictions in 2011, 2014, and 2015, which do not adequately restrict land and groundwater use at this property, or that inappropriately constrain future decisions of the Regional Water Board. Moreover, Mr. Hamedí misled the Regional Water Board. On April 15, 2015, Mr. Hamedí told Regional Water Board staff he would agree to submit a draft deed restriction if the Board agreed to specified changes. Despite the Board's approval to these changes, Mr. Hamedí submitted another signed deed restriction that added additional terms and demands from the Board.

History of Violations

The Enforcement Policy provides that where there is a history of repeat violations, a minimum multiplier of 1.1 should be used.

The history multiplier is 1.0 because the Regional Water Board has no record of past violation by Mr. Hamedí.

STEP 5 – DETERMINATION OF TOTAL BASE LIABILITY

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 = \$34,500 (Initial Liability) x 1.3 (Culpability Multiplier) x 1.4 (Cleanup and Cooperation Multiplier) x 1.0 (History of Violations Multiplier)

Total Base Liability = \$62,800

STEP 6 – ABILITY TO PAY AND TO CONTINUE IN BUSINESS

The Enforcement Policy provides that if there is 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 ability to continue in business, then the Total Base Liability amount may be adjusted downward if warranted.

In this case, Regional Water Board Prosecution Staff has sufficient information to suggest Mr. Hamedí has the ability to pay the proposed liability based on the current assessed value of 1761 Junction Avenue at \$408,000.

STEP 7 – OTHER FACTORS AS JUSTICE MAY REQUIRE

Regional Water Board prosecution staff incurred \$2,800 in staff costs 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. Costs will continue to accrue during any settlement and/or hearing. Staff costs should be considered in relation to the total administrative civil liability. Although the final amount for such costs cannot be determined until completion of the matter, such costs are usually quite substantial when additional investigation and analysis is required or if there is a hearing on matters before the Regional Water Board.

STEP 8 – ECONOMIC BENEFIT

The Enforcement Policy requires recovery of the economic benefit gained associated plus 10 percent. Economic benefit is any savings or monetary gain derived from the act or omission that constitutes the violation.

Staff has not identified an economic benefit from the delay in submitting the required report. Mr. Hamedí has engaged in the process to secure a deed restriction and submitted draft reports that were not accepted, incurring costs of equal or higher value than what compliance with the Order would have required.

The adjusted Total Base Liability from Step 7 is unchanged because it is more than 10 percent higher than any estimated economic benefit.

STEP 9 – MAXIMUM AND MINIMUM LIABILITY

a) *Minimum Liability*

The minimum administrative civil liability for the violation is \$51,300. This is based on Water Code section 13350(e)(1)(B) that requires \$100 per day for non-discharge violations. There were 513 days of violation.

b) *Maximum Liability*

The maximum administrative civil liability is \$2,565,000. This is based on the maximum allowed by Water Code section 13350(e)(1): \$5,000 for each day in which the violation occurs. The total days of violation is 513.

STEP 10 – FINAL LIABILITY

The final liability proposed is **\$65,600** (rounded), based on consideration of the penalty factors discussed above. It is within the minimum and maximum liabilities.