



# California Regional Water Quality Control Board

## San Francisco Bay Region



Linda S. Adams  
Secretary for  
Environmental Protection

1515 Clay Street, Suite 1400, Oakland, California 94612  
(510) 622-2300 • Fax (510) 622-2460  
<http://www.waterboards.ca.gov/sanfranciscobay>

Arnold Schwarzenegger  
Governor

June 30, 2009  
CIWQS Place ID: 202466 (GC)

CERTIFIED MAIL  
Receipt of Delivery Requested

Redevelopment Agency of San Jose  
Adobe Phase II Tower 1  
Attn: Lisa Mulvany  
200 East Santa Clara Street, 14<sup>th</sup> Floor  
San Jose, CA 95113

Subject: **Offer to Participate in Expedited Payment Program Relating to Violations of NPDES Permit, Adobe Phase II Tower 1 located at 345 Park Ave in San Jose, Santa Clara County, Order No. R2-2004-0055, NPDES Permit No. CAG912003**

Dear Ms. Mulvany:

This letter is to notify Redevelopment Agency of San Jose (Discharger) of alleged violations of the California Water Code and to allow the Discharger to participate in the Regional Water Board's Expedited Payment Program for Effluent or Reporting Violations (Expedited Payment Program) to address liability (\$3000 in mandatory minimum penalty) which may be assessed pursuant to Water Code sections 13385 and 13385.1.

### **NOTICE OF VIOLATION:**

The Assistant Executive Officer alleges that the Discharger has violated the effluent limitations identified in the Notice of Violation (NOV) attached as Exhibit "A". The Discharger will have the opportunity to address the alleged violations as discussed below.

### **STATUTORY LIABILITY:**

California Water Code Section 13385(h) and (i) require the assessment of a MANDATORY MINIMUM PENALTY of \$3,000 for specified serious and other effluent limit violations. The Discharger is subject to discretionary administrative civil liabilities of up to TEN THOUSAND DOLLARS (\$10,000) for each day in which the violation occurs, plus TEN DOLLARS (\$10) for each gallon discharged but not cleaned up in excess of 1,000 gallons. These mandatory minimum penalties and discretionary administrative civil liabilities may be assessed by a Regional Water Quality Control Board (Regional Water Board) or the State Water Board (collectively "the

Water Boards”), beginning with the date that the violations first occurred<sup>1</sup>. The formal enforcement action which the Water Boards use to assess such liability is an administrative civil liability complaint although the Water Boards may instead refer such matters to the Attorney General’s Office for prosecution. If referred to the Attorney General for prosecution, the Superior Court may assess up to TWENTY-FIVE THOUSAND DOLLARS (\$25,000) per violation. In addition, the Superior Court may assess up to TWENTY FIVE DOLLARS (\$25) per gallon discharged but not cleaned up in excess of 1,000 gallons.

#### **OFFER TO PARTICIPATE IN EXPEDITED PAYMENT PROGRAM:**

The Discharger can avoid the issuance of a formal enforcement action and settle the alleged violations identified in the attached NOV by participating in the Regional Water Board’s Expedited Payment Program. Details of the proposed settlement are described below and addressed in the enclosed documents.

To promote resolution of these violations, the Regional Water Board makes this Conditional Offer. The Discharger may accept this offer, waive the Discharger’s right to a hearing, and pay the mandatory minimum penalty as indicated on Exhibit A, for the violations described in the NOV. If the Discharger elects to do so, subject to the conditions below, the Regional Water Board will accept that payment in settlement of any enforcement action that would otherwise arise out of the violations identified in the Notice of Violation. Accordingly, the Regional Water Board will forego issuance of a formal administrative complaint, will not refer the violations to the Attorney General, and will waive its right to seek additional discretionary civil liabilities for the violations identified in the Notice of Violation. Resolution of these violations by the Regional Water Board will preclude State Water Board action for these same violations.

The Expedited Payment Program does not address liability for any violation that is not specifically identified in the Notice of Violation.

#### **DISCHARGER’S OPTIONS FOR RESPONSE TO OFFER:**

If you accept this offer, please complete and return the enclosed “Acceptance of Conditional Resolution and Waiver of Right to Hearing” (Acceptance and Waiver) on or before **July 30, 2009**. The Acceptance and Waiver will be held, pending a 30-day public notice period, and then will be counter-signed by the Assistant Executive Officer and returned to you for payment.

If you contest some but not all of the violations identified in the attached Notice of Violation, the Discharger may elect to reserve the right to address the contested matters and resolve any uncontested violations through the payment of the mandatory minimum penalty for each uncontested violation. If the Discharger chooses this option, please communicate with the staff

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<sup>1</sup> Please note that there are no statutes of limitation that apply to administrative proceedings to assess mandatory minimum penalties. See *City of Oakland v. Public Employees’ Retirement System*, (2002) 95 Cal.App.4th 29, 48; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, §405(2), p. 510.) The Agency has not been substantially prejudiced by the passage of time between the date(s) that Agency reported the violations identified on Exhibit A and the date of this letter. The Agency was aware of the violations at the time it reported them to the Regional Board. Regional Board staff’s limited enforcement resources and competing enforcement priorities provide a rational explanation for the delay. In fact, the delay has actually benefited the Agency because it extended the time before payment of the mandatory minimum penalties is due. For these reasons, any delay is not unreasonable.

contact identified below to discuss the mechanism for memorializing that election on or before the due date.

If the Discharger chooses to contest any of the violations alleged in the Notice of Violation, please identify the specific violation and the basis for the challenge (factual error, affirmative defense, etc.) on or before the due date. The Regional Water Board staff will evaluate the contested violation and take one of two actions:

- 1) The Regional Water Board staff will determine that the violation is not supported, expunge the alleged violation from the CIWQS data base, take no further action against the Discharger for the alleged violation, and notify the Discharger of that determination; or
- 2) The Regional Water Board staff will determine that the alleged violation is meritorious, and will notify the Discharger of that determination. The Discharger will be given thirty (30) days from the date of receipt of the Regional Water Board staff determination, to submit a supplemental Expedited Payment for those violations. If the Discharger chooses not to make a payment in response to the determination, the Discharger should expect to be contacted regarding formal enforcement action that will be initiated with regard to the contested violations. In a formal enforcement action, the liability amount sought and/or imposed may exceed the liability amount set forth in this Conditional Offer. Moreover, the cost of enforcement is a factor which can be considered in assessing the liability amount.

#### **CONDITIONS FOR REGIONAL WATER BOARD ACCEPTANCE OF RESOLUTION:**

Federal regulations require the Regional Water Board to publish and allow the public thirty (30) days to comment on any settlement of an enforcement action addressing NPDES permit violations (40 C.F.R. section 123.27(d)(2)(iii)). Upon receipt of the Discharger's Acceptance and Waiver, the Regional Water Board staff will publish a notice of the proposed resolution of the violations.

If no comments are received within the 30-day period, and unless there are new material facts that become available to the Water Boards, the Assistant Executive Officer will execute the Acceptance and Waiver as a stipulated order assessing the uncontested mandatory minimum penalty amount pursuant to Water Code section 13385.

If, however, significant comments are received in opposition to the settlement, this Offer may be withdrawn. In that case, the Discharger's waiver pursuant to the Acceptance and Waiver will also be treated as withdrawn. In that case, the unresolved violations will be addressed in a liability assessment proceeding. At the liability assessment hearing the Discharger will be free to make arguments as to any of the alleged violations, and the Discharger's agreement to accept this conditional offer will not in any way be binding or used as evidence against the Discharger. The Discharger will be provided with further information on the liability assessment proceeding.

In the event the Acceptance and Waiver is executed by the Assistant Executive Officer, payment of the assessed amount shall be due and payable to the Regional Water Board as specified on the invoice that will accompany the Discharger's receipt of the notice of the Assistant Executive Officer execution. The payment period is thirty (30) days. Failure to pay the penalty within the required time period may subject the Discharger to further liability.

Should you have any questions regarding this matter, please contact George Chin at (510) 622-2409 or [gechin@waterboards.ca.gov](mailto:gechin@waterboards.ca.gov). If you need to fax a copy of the signed waiver, you may send it to the attention of George Chin at fax number (510) 622-2460.

Sincerely,

Thomas E. Mumley  
Assistant Executive Officer

Enclosures: (A) Acceptance of Conditional Resolution  
(B) Exhibit "A" - Notice of Violation

**ACCEPTANCE OF CONDITIONAL RESOLUTION  
AND WAIVER OF RIGHT TO HEARING**

By signing below and returning this Acceptance of Conditional Resolution and Waiver of Right to Hearing (Acceptance and Waiver) to the Regional Water Quality Control Board (Regional Water Board), Redevelopment Agency of San Jose (Discharger) hereby accepts the "Offer to Participate in Expedited Payment Program" and waives the right to a hearing before the Regional Water Board to dispute the allegations of violations described in the Notice of Violation (NOV) which is attached hereto as Exhibit "A" and incorporated herein by reference.

The Discharger agrees that the NOV shall serve as a complaint pursuant to Article 2.5 of the Water Code and that no separate complaint is required for the Regional Water Board to assert jurisdiction over the alleged violations through its Assistant Executive Officer. The Discharger agrees to pay the penalties authorized by California Water Code section 13385, which shall be deemed payment in full of any civil liability pursuant to the Water Code sections 13385 and 13385.1 that otherwise might be assessed for the violations described in the NOV.

The Discharger understands that this Acceptance and Waiver does not address or resolve liability for any violation that is not specifically identified in the Notice of Violation.

Upon execution by the Discharger, the Acceptance and Waiver shall be returned to:

Expedited Payment Program  
California Regional Water Quality Control Board  
San Francisco Bay Region  
Attn: George Chin  
1515 Clay Street, Suite 1400  
Oakland, California 94612

The Discharger understands that federal regulations set forth at title 40, Code of Federal Regulations, section 123.27(d)(2)(iii) require the Regional Water Board to publish notice of and provide at least 30 days for public comment on any proposed resolution of an enforcement action. Accordingly, this Acceptance and Waiver, prior to execution by the Assistant Executive Officer of the Regional Water Board, will be published as required by law for public comment.

If no comments are received within the notice period which causes the Assistant Executive Officer of the Regional Water Board to reconsider the Expedited Payment Amount, the Executive Director will execute the Acceptance and Waiver. Resolution of these violations by the Regional Water Board will preclude State Water Board action for these same violations.

The Discharger understands that if significant comments are received in opposition to the Expedited Payment Amount, the offer on behalf of the Regional Water Board to resolve the violations set forth in the NOV may be withdrawn. In that circumstance, the Discharger will be advised of the withdrawal and an administrative civil liability complaint may be issued and the matter may be set for a hearing before the Regional Water Quality Control Board or the State Water Board. For such a liability hearing, the Discharger understands that this Acceptance and Waiver executed by the Discharger will be treated as a settlement communication and will not be used as evidence in that hearing.

The Discharger understands that once the Acceptance and Waiver is executed by the Assistant Executive Officer of the Regional Water Board, payment of the amount in full no later than 30 days after the date of the Assistant Executive Officer’s signature is a condition of this Acceptance and Waiver. The Discharger must submit its payment in full by check made out to “California Regional Water Quality Control Board” and sent to the address indicated above, together with a copy of this Acceptance and Waiver after execution by the Assistant Executive Officer.

I hereby affirm that I am duly authorized to act on behalf of and to bind the Discharger in the making and giving of this Acceptance and Waiver.

\_\_\_\_\_  
Redevelopment Agency of San Jose

By: \_\_\_\_\_  
(Signed Name)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Printed or typed name)

\_\_\_\_\_  
(Title)

IT IS SO ORDERED PURSUANT TO WATER CODE SECTION 13385

By: \_\_\_\_\_  
Thomas E. Mumley  
Assistant Executive Officer  
Regional Water Quality Control Board

**Note to Discharger: Please return the signed waiver and Exhibit “A”, together**

**Exhibit "A"**  
Redevelopment Agency of San Jose  
Adobe Tower I-Phase II Site  
345 Park Avenue, San Jose, Santa Clara County

NOTICE OF VIOLATION (October 24, 2006)  
MANDATORY MINIMUM PENALTIES WITHOUT ENFORCEMENT

The following table lists this facility's alleged violations of California Water Code (CWC) Sections 13385(h) and (i) on October 24, 2006, which have not been assessed a mandatory minimum penalty (MMP) by the Regional Water Board. Final calculations of MMP amounts owed, and descriptions of the abbreviations that appear in the table are also listed in the table below.

No	Occurred Date	Effluent Limit Description	Effluent Limit (ug/L)	Reported Effluent (ug/L)	Percent a Group I or Group II Pollutant is over Permit Limit	Type of Violation	CIQWS Violation Number	CWC Sections 13385(h) or (i) Required MMP
1	10/24/2006	Tetrachloroethylene	5	8.5	70%	S, C1	640940	\$3,000
<b>Total</b>								<b>\$3,000</b>
<b>Legend for Table 1:</b>								
C = Count - The number that follows represents the number of violations the Discharger has had in the past 180 days, including this violation. A count higher than C3 means that a penalty under Water Code Section 13385(i) applies.								
S = Serious, which means that a penalty under Water Code Section 13385(h) applies when an effluent limitation is exceeded 40% or more for a Group I or 20% or more for a Group II pollutant.								