



# California Regional Water Quality Control Board

## San Francisco Bay Region



Linda S. Adams  
Acting Secretary for  
Environmental Protection

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<http://www.waterboards.ca.gov/sanfranciscobay>

Edmund G. Brown, Jr.  
Governor

*Via Certified Mail – Return Receipt Requested*

March 22, 2011  
CIWQS Place ID: 212748

Indian Springs Resort & Spa  
Attn.: Mr. Eric Fair  
1712 Lincoln Avenue  
Calistoga, CA 94515

**SUBJECT: NOTICE OF VIOLATION AND OFFER TO PARTICIPATE IN  
EXPEDITED PAYMENT PROGRAM TO RESOLVE VIOLATIONS OF  
CALIFORNIA WATER CODE SECTION 13268 FOR THE FAILURE TO  
TIMELY SUBMIT A REQUIRED TECHNICAL REPORT**

Dear Mr. Fair:

This letter notifies Indian Springs Resort & Spa (Resort) of alleged violations of the California Water Code (CWC) and allows the Resort to participate in the Regional Water Board's Expedited Payment Program in the amount of \$1,600 for its technical reporting violations (Expedited Payment Program) to address liability that may be assessed pursuant to CWC section 13268.

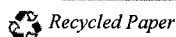
### **NOTICE OF VIOLATION**

Based on the Regional Water Board's records, the Regional Water Board alleges that the Resort failed to timely submit a technical report as required by the 13267 Order issued to the Resort by the Regional Water Board on July 21, 2010. The July 21, 2010, order required the Resort to submit a technical report to the Regional Board by September 20, 2010 (see attached) regarding the Resort's discharge of non-storm water, including hot spring water, into the City of Calistoga's storm drain system and waters of the State. At the Resort's request, Regional Water Board staff extended the due date to October 30, 2010. The Resort did not obtain any further extensions of the October 30th due date from the Regional Water Board staff. The Resort finally submitted the report on January 18, 2011—79 days late. The failure to timely submit the technical report as required by the July 21, 2010, order violates CWC section 13268.

### **STATUTORY LIABILITY**

Pursuant to CWC section 13268, subsections (a)(1) and (b)(1), the Resort is subject to administrative civil liability of up to \$1,000 for each day the Resort failed to submit the technical

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report required by the July 21, 2010, order. The Resort submitted the report 79 days late and is subject to a maximum civil liability of \$79,000.

The formal enforcement action that the Regional Water Board uses to assess such liability is an administrative civil liability complaint, although the Regional Water Board may instead refer such matters to the Office of the Attorney General for prosecution. If referred to the Attorney General for prosecution, the Superior Court, pursuant to CWC section 13268(b)(2), may assess civil liability up to \$5,000 for each day the Resort failed to submit the technical report required by the July 21, 2010, order.

### **PROPOSED ADMINISTRATIVE CIVIL LIABILITY**

The proposed administrative civil liability amount is one thousand six hundred dollars (\$1,600.00). When assessing administrative civil liability under CWC section 13268 the Regional Water Board must consider the factors in CWC section 13327 when determining the amount of discretionary administrative civil liability

On November 17, 2010, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on May 20, 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. Use of the methodology addresses the factors in CWC section 13327.

The proposed administrative civil liability is based on the use of that methodology. (See Attachment A for the analysis).

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

The Resort can avoid a formal enforcement action and settle the late-reporting violation alleged in this Notice of Violation by participating in the Regional Water Board's Expedited Payment Program. Details of the proposed settlement are described below, as well as in the "Acceptance of Conditional Resolution and Waiver of Right to Hearing, Order (Proposed)" (Attachment B – Acceptance and Waiver) enclosed herewith.

To promote resolution of the alleged violation, the Regional Water Board makes the following conditional offer. The Resort may accept this offer, waive its right to a hearing, and pay \$1,600 in administrative civil liability. If the Resort elects to do so, subject to the conditions set forth herein, the Regional Water Board will accept the Resort's payment of the administrative civil liability in settlement of any enforcement action that would otherwise arise out of the late-reporting violation alleged above. Payment of the administrative civil liability by the deadline specified in the Acceptance and Waiver represents a final and binding resolution and settlement of all claims, violations, or causes of action alleged in this Notice of Violation. The Expedited Payment Program does not address liability for any violation that is not specifically identified in this Notice of Violation.

**RESORT'S OPTIONS AND INSTRUCTIONS FOR RESPONDING TO OFFER****Choice A – ACCEPT OFFER**

If the Resort accepts this offer, **please complete and return the Acceptance and Waiver enclosed herewith on or before April 21, 2011, by certified mail**, return receipt requested addressed as follows:

**San Francisco Bay Regional Water Quality Control Board  
Attn.: Laurie Taul  
1515 Clay Street, Suite 1400  
Oakland, CA 94612**

The Resort must also submit the \$1,600 administrative civil liability by cashier's check or by certified check made payable to "San Francisco Bay Regional Water Quality Control Board," submitted to the Regional Water Board, at the address referenced above, no later than thirty (30) calendar days after the date the Resort receives written notice that the Executive Officer of the Regional Water Board has formally endorsed the "Acceptance and Waiver." Failure to pay the liability within the required time period may subject the Resort to further liability.

**Choice B – CONTEST THE ALLEGED VIOLATION**

**If the Resort wishes to contest the alleged late-reporting violation, the challenge must be received on or by April 21, 2011.** Please identify, in writing and sent by certified mail, return receipt requested to the address above, the basis for the Resort's challenge (e.g., factual error, affirmative defense, etc.). The Regional Water Board staff will evaluate that basis and make one of the following determinations:

- (a) The alleged late-reporting violation is not supported and no further action will be taken against the Resort for that violation. The Resort will be notified of that determination.
- (b) The alleged late-reporting violation is meritorious. Regional Water Board staff will prepare a formal enforcement action and notify the Resort of any deadlines associated with that action.

In a formal enforcement action, the liability amount sought and/or imposed may significantly exceed the liability amount set forth in this Conditional Offer. Regional Water Board staff will propose to recover staff costs incurred during the investigation and preparation of the enforcement action for this matter as "a matter as justice may require".

**Choice C – REJECT OFFER**

If the Resort chooses to reject the Regional Water Board's offer and/or chooses not to complete and return the Acceptance and Waiver, the Resort should expect that a formal enforcement action will be pursued and that it will receive notice of any deadlines associated with that action. As previously stated, in such an action, the liability amount sought and/or imposed may

significantly exceed the liability amount set forth in this Conditional Offer. Moreover, the Regional Water Board's cost of enforcement is a factor that can be considered in assessing the Resort's liability amount.

**CONDITIONS FOR REGIONAL WATER BOARD'S ACCEPTANCE OF RESOLUTION**

Upon the receipt of the Resort's Acceptance and Waiver on or before April 21, 2011, the Regional Water Board staff will publish a Notice of Proposed Settlement on the Water Board's website ([www.swrcb.ca.gov/sanfranciscobay/](http://www.swrcb.ca.gov/sanfranciscobay/)).

If no comments are received within the notice period, the Regional Water Board's Executive Officer will formally endorse the Acceptance and Waiver as a stipulated order assessing the uncontested penalty amount pursuant to CWC section 13268(b)(1), as described under the heading "Statutory Liability" herein.

If, however, significant comments are received in opposition to the settlement, this offer may be withdrawn. If the Regional Water Board's offer is withdrawn, the Resort will be advised of that withdrawal in writing, and the Resort's waiver pursuant to the Acceptance and Waiver will also be treated as withdrawn. After the Regional Water Board's offer and the Resort's waiver are deemed withdrawn, the unresolved violations will be addressed in a formal enforcement action. An administrative civil liability complaint may be issued and the matter may be set for a hearing before the Regional Water Board or the State Water Board. For such a liability hearing, the Resort understands that this Acceptance and Waiver endorsed by the Resort shall be treated as a settlement communication and shall not be used as evidence in that hearing.

Any questions about this Notice of Violation and Conditional Offer and/or the Acceptance and Waiver, should be directed to Laurie Taul at (510) 622-2508 or by email to [ltaul@waterboards.ca.gov](mailto:ltaul@waterboards.ca.gov).

Sincerely,



Thomas E. Mumley  
Assistant Executive Officer

Attachments:

- A- Civil Liability Factor Explanation
- B- Acceptance and Waiver Form

**Attachment A****Specific Factors Considered to Determine Administrative Civil Liability  
For Indian Springs Resort and Spa**

Each factor in the Enforcement Policy and its corresponding category, adjustment, or amount for the Resort's non-discharge violation is presented below:

**1. Violation:**

In violation of CWC section 13268, the Resort failed to timely submit a technical report to the Regional Water Board in accordance with the Regional Water Board's 13267 Order issued on July 21, 2010. The report, regarding the Resort's discharge of non-storm water (including hot spring water) into the City of Calistoga's storm drain system and waters of the State, was eventually submitted 79 days late.

**2. Per day Assessments for Non-Discharge Violations:**

An initial liability factor is calculated for each non-discharge violation, considering Potential for Harm and the extent of deviation from applicable requirements. This factor is then multiplied by the maximum per day amount allowed under the California Water Code.

**a) Specific Factor: Potential for Harm**

**Category:** Minor

**Discussion:** The characteristics of the violation present a minor threat to beneficial uses and the circumstances indicate a minor potential for harm. The purpose of the required technical report was to determine the potential for pollutants to come in contact, mix with and be discharged with the Resort's non-storm water into the storm drain system. The presence of pollutants had not yet been determined; however, information to date indicates that the discharge does not contain a significant level of pollutants.

**b) Specific Factor: Deviation from Requirement**

**Category:** Moderate

**Discussion:** The requirement was partially compromised by the Resort's failure to timely submit the required technical report. Although the report was eventually submitted, the fact that it was 79 days late undermines the effectiveness of the State's pollution prevention regulatory programs.

**Based on the above determinations, the per day penalty factor is 0.20.**

**c) Specific Factor: Adjustment Factor for Multiple Day Violations**

**Adjustment:** The number of violation days was reduced from 79 days to 8 days.

**Discussion:** Pursuant to the Enforcement Policy, if the number of days of violation exceeds 30 days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the

violation. In addition, Water Board staff has determined that the violation did not result in an economic benefit that can be measured on a daily basis, therefore, the alternate approach to penalty calculation, as outlined in the Enforcement Policy may be used. This approach states that the liability shall not be less than that calculated for the first day of violation, plus an assessment for each five day period of violation until the 30<sup>th</sup> day, plus an assessment for each thirty days of violation thereafter. Thus, the Resort's violation lasting 79 days accrued a total of 8 days worth of violation, based on a per day assessment for day 1, 5, 10, 15, 20, 25, 30, and 60.

- d) **Initial Amount of Liability based on above per day factors:** The initial liability is calculated as follows: Per day factor (0.20), multiplied by the maximum per day amount of liability allowed (\$1,000), multiplied by the number of adjusted days of violation (8), which equals **\$1,600**.

3. **Adjustment Factors:**

There are three additional factors that should be considered for modification of the amount of the initial liability. Each applicable factor, relating to the discharger's conduct, is multiplied by the initial liability amount for each violation to determine the Total Base Liability Amount. Not all factors will apply in every assessment and therefore will not affect the liability amount.

a) **Specific Factor:** Culpability

**Adjustment:** No adjustment; factor is 1.0

**Discussion:** The Resort is fully culpable for failure to submit the report on time; however, these actions do not warrant an adjustment.

b) **Specific Factor:** Cleanup and Cooperation

**Adjustment:** Factor is 1

**Discussion:** Although the Resort did not initially cooperate, the report was eventually submitted.

c) **Specific Factor:** History of Violations

**Adjustment:** No adjustment; factor is 1.0

**Discussion:** No prior history of violations.

**Total Base Liability: \$1,600**

4. **Final Liability Amount:**

The final liability is determined from the base liability and again adjusted for the following considerations: a) Ability to Pay and Continue in Business, b) Other factors as justice may require including the addition of Water Board staff costs and c) Economic Benefit from the violation (if any).



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### Attachment B

#### ACCEPTANCE OF CONDITIONAL RESOLUTION AND WAIVER OF RIGHT TO HEARING; ORDER (Proposed)

By signing below and returning this Acceptance of Conditional Resolution and Waiver of Right to Hearing (Acceptance and Waiver) to the San Francisco Bay Regional Water Quality Control Board (Regional Water Board), Indian Springs Resort & Spa (Resort) hereby accepts the Expedited Payment Program for its technical reporting (Expedited Payment Program) and waives the right to a hearing before the Water Board to dispute the allegation of violation.

The Resort agrees that the Notice of Violation shall serve as a complaint pursuant to Article 2.5 of the California Water Code (CWC) 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 Resort agrees to pay **discretionary penalties** authorized by CWC section 13268(a)(1) and (b)(1), **in the sum of \$1,600** (Expedited Payment Amount) by cashier's check or by certified check made payable to the San Francisco Bay Regional Water Quality Control Board for deposit in the State Water Board Waste Discharge Permit Fund, which shall be deemed payment in full of any civil liability pursuant to CWC section 13268 that otherwise might be assessed for the violations described in the Notice of Violation.

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

**Expedited Payment Program  
San Francisco Bay Regional Water Quality Control Board  
Attn: Laurie Taul  
1515 Clay Street, Suite 1400  
Oakland, CA 94612**

The Resort understands that pursuant to the State Water Resources Control Board's Water Quality Enforcement Policy, the Regional Water Board will publish notice of and provide at least thirty (30) days for public comment on any proposed resolution of an enforcement action. Accordingly, this Acceptance and Waiver, prior to being formally endorsed by the Executive Officer of the Regional Water Board, will be published on the Water Board's website, [www.swrcb.ca.gov/sanfranciscobay/](http://www.swrcb.ca.gov/sanfranciscobay/), as required by law for public comment.

If no comments are received within the notice period that cause the Executive Officer of the Regional Water Board to reconsider the Expedited Payment Amount, the Executive Officer will formally endorse this Acceptance and Waiver.

The Resort 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 Notice of Violation may be withdrawn. If the Regional Water Board's offer is withdrawn, the Resort will be advised of that withdrawal in writing, and the Resort's waiver pursuant to the Acceptance and Waiver will also be treated as withdrawn. After the Regional Water Board's offer and the Resort's waiver are deemed withdrawn, the unresolved violations will be addressed in a formal enforcement action. An administrative civil liability complaint may be issued and the matter may be set for a hearing before the Regional Water Board or the State Water Board. For such a liability hearing, the Resort understands that this Acceptance and Waiver endorsed by the Resort shall be treated as a settlement communication and shall not be used as evidence in that hearing.

The Resort understands that once this Acceptance and Waiver is formally endorsed by the Executive Officer of the Regional Water Board, the full payment required by the deadline set forth below is a condition of this Acceptance and Waiver. The Resort shall pay the **Expedited Payment Amount of \$1,600 by a cashier's check or certified check for the full amount made payable to the San Francisco Bay Regional Water Quality Control Board** for deposit into the "State Water Board Waste Discharge Permit Fund." The payment will be submitted to the Regional Water Board's Expedited Payment Program, at the address listed above no later than sixty (60) calendar days after the date the Resort receives written notice of that the Executive Officer of the Regional Water Board has formally endorsed this "Acceptance and Waiver."

I hereby affirm that I am duly authorized to act on behalf of and to bind the Indian Springs Resort & Spa in the making and giving of this Acceptance and Waiver.

By: \_\_\_\_\_ (Date)  
      (Signed Name) \_\_\_\_\_  
\_\_\_\_\_  
(Printed or typed name)  
\_\_\_\_\_  
(Title)

IT IS SO ORDERED PURSUANT TO CALIFORNIA WATER CODE SECTION 13268

By: \_\_\_\_\_ (Date)  
      Bruce H. Wolfe  
      Executive Officer  
      San Francisco Bay Regional Water Quality Control Board