

October 4, 2021

**SENT VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Amports, Inc.
CEO Stephen Taylor
10060 Skinner Lake Drive, 2nd Floor
Jacksonville, Florida 32246

Amports, Inc. California Office
Jimmy D. Triplett, Senior Vice President Operations, West Coast
1997 Elm Road
Benicia, California 94510

Amports, Inc.
Agent for Service of Process
C T CORPORATION SYSTEM (C0168406)
330 N Brand Blvd, Suite 700
Glendale, CA 91203

Re: Notice of Ongoing Violations and Intent to File a “Citizen Suit” Under the Clean Water Act

To Whom It May Concern:

I am writing on behalf of San Francisco Baykeeper (“Baykeeper”) regarding violations of the Clean Water Act¹ (“CWA” or “Act”) at the Amports Port of Benicia Terminal, owned and operated by Amports, Inc. (“Amports”) at 1997 Elm Road, Benicia, CA 94510 (“Facility”) and 1007 Bayshore Road, Benicia, CA 94510. The purpose of this letter (“Notice Letter”) is to put Amports on notice that, at the expiration of sixty (60) days from the date the Notice Letter is served, Baykeeper intends to file a “citizen suit” action against Amports in U.S. Federal District Court. The civil action will allege significant, ongoing, and continuous violations of the Act and California’s General Industrial Storm Water Permit² (“General Permit”) at the Facility, including but not limited to, the direct deposition of petroleum coke (“petcoke”) into the water from the conveyance system, equipment, and ship, aerial deposition of petcoke directly to the water from the deck of the ship, and the uncontrolled discharge of polluted storm water to the Carquinez Strait, a part of the San Francisco Bay.

¹ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*

² National Pollution Discharge Elimination System (“NPDES”) General Permit No. CAS000001, Water Quality Order No. 92-12-DWQ, Order No. 97-03-DWQ, as amended by Order No. 2014-0057-DWQ; as amended on November 6, 2018.

To establish liability under § 301 of the Clean Water Act, Baykeeper must only establish that Amports has (i) discharged, i.e., added (ii) a pollutant (iii) to navigable waters (iv) from a point source (v) in violation of, or without, an NPDES permit. *See Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 f.3d 305, 308 (9th Cir. 1993), cert. denied, 513 U.S. 873 (1994); *Nat'l Wildlife Fed. v. Gorsuch*, 693 F. 2d 156, 165 (D.C. Cir. 1982).

As described in detail below, Amports is liable for ongoing violations of the Act as a consequence of the Facility's: (1) direct discharge of petcoke into the Carquinez Strait, both through deck washing and direct aerial deposition; (2) inaccurate use of SIC code designations to avoid coverage for regulated industrial activities under the General Permit; (3) failure to comply with the terms and conditions of the General Permit resulting in unpermitted storm water discharges, including but not limited to the preparation and implementation of a proper Storm Water Pollution Prevention Plan related to Amports' petcoke loading operation, preparation and implementation of a Monitoring Implementation Plan, and compliance with technology-based Effluent Limitations.

The CWA is a strict liability statute. Each violation of any term or condition in the General Permit is an independent violation of the Act. Amports is liable for daily, monthly and annual violations of the Act and General Permit at the Facility since October 4, 2016. 33 U.S.C. §§ 1311(a), 1319(d); 40 C.F.R. § 19.4.

CWA section 505(b) requires that sixty (60) days prior to the initiation of a civil action under CWA section 505(a), a citizen must give notice of their intent to file suit. 33 U.S.C. § 1365(b). Notice must be given to the alleged violator, the U.S. Environmental Protection Agency (EPA), and the State in which the violations occur. As required by section 505(b), this Notice of Violation and Intent to File Suit provides notice to Amports of the violations that have occurred and which continue to occur at the Facility. After the expiration of sixty (60) days from the date of this Notice of Violation and Intent to File Suit, Baykeeper intends to file suit in federal court against Amports under CWA section 505(a) for the violations described more fully below.

During the 60-day notice period, Baykeeper would like to discuss effective remedies for the violations noticed in this letter. We suggest that you contact us as soon as possible so that these discussions may be completed by the conclusion of the 60-day notice period. Please note that it is our policy to file a complaint in federal court as soon as the notice period ends, even if discussions are in progress.

I. BACKGROUND

A. San Francisco Baykeeper

San Francisco Baykeeper ("Baykeeper") is a non-profit public benefit corporation organized under the laws of the State of California with its office located at 1736 Franklin Street, Suite 800, Oakland, California, 94612. Baykeeper acts on behalf of its approximately 3,500 members who live and/or recreate in and around the San Francisco Bay Area. Baykeeper's mission is to defend San Francisco Bay from the biggest threats and hold polluters and government agencies accountable to create healthier communities and help wildlife thrive. Its team of scientists and lawyers investigate pollution via aerial and on-the-water patrols, strengthen regulations through science and policy advocacy, and enforce environmental laws on behalf of the public.

Members of Baykeeper reside in Benicia, California, as well as in many of the surrounding communities. Baykeeper's members and supporters use and enjoy San Francisco Bay and other waters for various recreational, educational, and spiritual purposes. Baykeeper's members' use and enjoyment of these waters are negatively affected by the pollution caused by the Facility's operations.

Specifically, Baykeeper members use the area around the Facility in the Carquinez Strait and nearby San Francisco Bay to bird watch, view wildlife, kayak, sail, boat, stand up paddleboard, wade and swim, hike, bike, walk, run, and sightsee, as well as for aesthetic enjoyment. Additionally, Baykeeper and its members use local waters to engage in educational and scientific study through pollution and habitat monitoring and restoration activities. The Facility's historic and ongoing discharge of pollutants into the Carquinez Strait in violation of the CWA have, are, and continue to adversely affect the interests of Baykeeper and its members.

B. The Owner and/or Operator of the Facility

Amports, Inc. is a dba of APS West Coast Inc. and is identified as the owner and operator of the Benicia Port Terminal Company. All three entities have the same address, CEO, Secretary, CFO, and Controller.

C. The Facility's Industrial Activities and Discharges of Petcoke and Other Pollutants

The Facility is a roughly 400-acre site which includes marine cargo loading equipment, the petcoke loading equipment and conveyor system, parking for cars, docking area and equipment for ships, silos to store petcoke, train car petcoke offloading area and equipment, vehicle maintenance, equipment cleaning, ship cleaning, ship maintenance, and other facilities. According to Amports' 2015 Notice of Intent to comply with the General Permit under the Clean Water Act, at least 8 acres at the Facility consisted of areas that were exposed to storm water.

The Valero Benicia Refinery processes crude oil by separating it into a range of hydrocarbon components or fractions. Petroleum fractions include heavy oils and residual materials used to make asphalt or petcoke, mid-range materials such as diesel (heating oil), jet fuel, and gasoline, and lighter products, such as butane, propane, and fuel gases.

The petcoke is transported via rail to the Facility and is stored there in silos. Amports transfers the petcoke from the silos to a ship's hold at the Facility's dock by way of a covered conveyor system. During this process, the petcoke may escape in half a dozen or more ways.

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First, petcoke spills off of the conveyor belt system and is deposited onto the wharf and directly into Carquinez Strait. This occurs while the crane boom is in the lowered position, and, as depicted below, continues as the boom is raised while the conveyor continues to operate.



March 2021.

Second, petcoke is deposited onto the deck of the ship and into the water, potentially due to overspray from the loading mechanism or other operations, leaving visible plumes of petcoke that can be seen in the water.



February 2021.

Third, at the conclusion of the loading, longshoremen hose off the deck of the ship, and the related loading equipment on and around the ship, cleaning the equipment and forcing contaminated runoff directly into the Carquinez Strait, again leaving visible plumes of petcoke that can be seen in the water.

Fourth, as the ship is being loaded, large visible clouds of black particulate matter, presumably petcoke dust, drift through the air away from the ship before being directly deposited into the water and/or onto the nearby shoreline.



February 2021.

Additionally, petcoke may escape and be deposited onto the Facility or into the water during: (a) the offload from trains, (b) the movement of petcoke around the Facility, (c) storage at the Facility, (d) from equipment and vehicle cleaning, (e) from equipment and vehicle maintenance or repair, and (f) each time a sufficient rain event occurs due to the Facility's discharge of pollutants from industrial activity in storm water, through direct discharges of industrial pollutants.

The deposition of petcoke and other pollutants into San Francisco Bay is harmful and deleterious to the Bay's wildlife and communities. Petcoke is a petroleum byproduct and is known to contain pollutants including heavy metals such as copper, zinc, nickel, arsenic, mercury, and vanadium, all of which are harmful to aquatic life, including fish and birds. Additionally, people exposed to petcoke pollutants can experience severe health problems like asthma, lung cancer, and heart disease.

Amports is permitted by the Bay Area Air Quality Management District (BAAQMD) to process and load 2 million tons of petcoke onto export ships over a 12-month period. Amports does

not have any permits from the San Francisco Bay Regional Water Quality Control Board (“Regional Board”). Amports is not permitted to discharge petcoke directly into the Carquinez Strait. And Amports is also not permitted to discharge any storm water, directly or indirectly, that is the result of industrial activity, including water that is commingled with industrial discharges.

Baykeeper’s suit will allege that petcoke is deposited on the site with every instance of: petcoke being transported by rail to the site, petcoke offloading from a train at the Facility, and petcoke being handled and transported on the Facility’s premises. Additionally, Baykeeper will allege that petcoke enters the Carquinez Strait with every instance of: petcoke being loaded and/or oversprayed onto a ship docked at the Facility, petcoke-related equipment, including the conveyor systems, cranes, and ships, being maintained and/or cleaned, and each storm event at the Facility in excess of 0.1” of precipitation.

The discharge of pollutants from industrial facilities contributes to the impairment of surface waters and aquatic-dependent wildlife. These contaminated discharges can and must be controlled for ecosystems to regain their health and to protect public health. As part of its investigation of the Facility, Baykeeper observed and documented by video numerous instances of illegal discharges during Amports’ various activities and handling of marine cargo (specifically petcoke) at the Facility between November 2020 and March 2021.

Additionally, with every significant rainfall event, millions of gallons of polluted storm water originating from industrial operations such as the Facility pour into storm drains and local waterways. The consensus among agencies and water quality specialists is that storm water pollution accounts for more than half of the total pollution entering surface waters each year. Such discharges of pollutants from industrial facilities contribute to the impairment of downstream waters and aquatic dependent wildlife. These contaminated discharges can and must be controlled for the ecosystem to regain its health.

The Facility discharges storm water into the Carquinez Strait and San Francisco Bay (collectively, the “Receiving Waters”). The Carquinez Strait and San Francisco Bay are waters of the United States and are protected by the Clean Water Act. San Francisco Bay is an ecologically-sensitive waterbody and a defining feature of Northern California. The Bay is an important and heavily-used resource, with special aesthetic and recreational significance for people living in the surrounding communities. However, the Bay’s water quality is impaired and continues to decline. The Bay’s once-abundant and varied fisheries have been drastically diminished by pollution, and much of the wildlife habitat of the Bay has been degraded.

The Carquinez Strait, into which the Facility discharges storm water, is also a water of the United States and is protected by the Clean Water Act. The Carquinez Strait is a narrow tidal strait that connects the Sacramento and the San Joaquin Rivers as they drain into San Francisco Bay. The Strait is eight miles (13 km) long and connects Suisun Bay, which receives the waters of the combined rivers, with San Pablo Bay, a northern extension of San Francisco Bay. The Carquinez Strait is an ecologically-sensitive and important part of the overall health of the San Francisco Bay ecosystem. It also abuts important regional recreational features such as the Bay Trail and East Bay Regional Park District’s 1,568-acre Carquinez Strait Regional Shoreline, a public boating marina and sailing school, and designated public fishing sites. Additionally, the Strait provides habitat for

many sensitive species, including endangered smelt, sturgeon, and salmon, as well as a unique vegetative ecosystem that includes a large number of species growing at the extreme edge of their range.

II. THE CLEAN WATER ACT

A. The NPDES Permit Program

The Act is the primary federal statute regulating the protection of the nation's water. The Act aims to prevent, reduce, and eliminate pollution in the nation's water in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In order to accomplish that goal, section 301(a) prohibits the discharge of any pollutant into waters of the United States unless the discharge complies with other enumerated sections of the Act, including the prohibition on discharges not authorized by, or in violation of, the terms of an NPDES permit issued pursuant to section 402(b). 33 U.S.C. §§ 1311, 1342(b); *see also* General Permit, § I.A.12. The Act requires all point source discharges of pollutants to waters of the United States be regulated by an NPDES permit. 33 U.S.C. § 1311(a); *see* 40 C.F.R. § 122.26(c)(1). A person directly discharging pollutants into jurisdictional waters without an NPDES permit is liable under the Act.

The discharge of pollutants and water containing pollutants to waters of the United States is a violation of the Act if, like Amports' discharges, they are completed without complying with all terms and conditions of a valid NPDES permit.

Discharge is broadly defined as addition of any pollutant. *See, e.g., National Mining Assn. v. ACOE*, 145 F.3d 1399 (D.C. Cir. 1998). And the Supreme Court recently confirmed the breadth of the Act's prohibitions, explaining that both direct discharges to jurisdictional water and discharges occurring where there is reasonable certainty that it will reach jurisdictional water require permits. *See Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020). Amports' non-storm water discharges both directly and indirectly reach the water.

"Pollutant" is a similarly broad term. *See* 33 U.S.C. § 1362(6); *Borden Ranch Partnership v. ACOE*, 261 F.3d 810 (9th Cir. 2001). Here, pollutants such as arsenic, copper, lead, mercury, nickel, and zinc, all of which are present in petcoke, qualify as toxic pollutants under 40 C.F.R. § 401.15.

A "point source" is any defined or discrete conveyance, including, in this case, the discharge nozzle which sprays petcoke into the ship and which results in overspray into nearby waters, the conveyor which moves the petcoke from silos to the loading crane, and the hosing off of the equipment and decks into the water all constitute discrete conveyances and therefore point sources. *See* 33 U.S.C. § 1362(14).

"Waters of the United States" (WOTUS) include the Carquinez Strait, regardless of which of the various definitions of WOTUS in effect throughout the country over the last decade are applied. Amports' various activities that discharge petcoke directly into the Carquinez Strait meets the WOTUS requirement.

Because Amports does not have a valid NPDES permit, its direct discharges into the Carquinez Strait are illegal under the CWA, and it is operating the Facility in violation of the Act.

B. California's General Industrial Storm Water Permit

Section 402(p) of the Act establishes a framework for regulating industrial storm water discharges under federal and authorized state NPDES permit programs. 33 U.S.C. § 1342(p). In order to discharge storm water lawfully, industrial discharges to waters of the United States in California must obtain coverage under the General Permit, and comply with all its terms. 33 U.S.C. § 1311(a); *see also* General Permit, § I.A.1, 12; 40 C.F.R. § 122.26(c)(1). “[General] Permit noncompliance constitutes a violation of the Clean Water Act and the [California] Water Code.” General Permit, § XXI.A.

In order to lawfully discharge pollutants associated with industrial activity to waters of the United States in California, all persons (including corporate persons) discharging pollutants and engaging in industrial activities must enroll in, and comply with all terms and conditions of the General Permit. *See* 33 U.S.C. §§ 1311(a), 1342; 40 C.F.R. § 122.26(c)(1); *see also* General Permit, § I.A.8 (“This General Permit authorizes discharges of industrial storm water to waters of the United States, so long as those discharges comply with all requirements, provisions, limitations, and prohibitions in this General Permit”).

The General Permit requires that a discharger file a Notice of Intent to Comply (“NOI”) with the State Water Resources Control Board (“State Board”) prior to discharging storm water associated with industrial activity. The NOI serves as certification to the State of California that the industrial facility owner(s) and agent(s) have read, and will comply with, the General Permit. Once enrolled, the General Permit requires that permittees consistently engage in four independent but mutually-reinforcing actions: 1) executive planning and facility-specific pollution control design; 2) on-the-ground implementation of pollution control technologies; 3) monitoring storm water discharges for evidence of pollution; and 4) annual evaluation of the effectiveness of pollution control strategies, including corrective action where necessary.

The use of outdoor spaces for any industrial activity, including the operation of industrial machinery (e.g., forklifts and cranes), the maintenance of equipment (e.g., conveyors and ships) or storage of industrial materials, are conditions that require compliance with the General Permit through NOI coverage. Facilities with NOI coverage are required to comply with each of the mandates and provisions detailed below.

Information available to Baykeeper indicates that storm water discharges from the Facility have violated several terms of the General Permit and the Act. Amports does not have coverage under the General Permit, and the Facility lacks NPDES permit authorization for any discharges of pollutants into waters of the United States that do not comply with the General Permit.

1. Technology-Based Effluent Limitations

The General Permit requires dischargers comply with technology-based standards established in the Act. 33 U.S.C. § 1311(b); General Permit, § V.A. The General Permit incorporates these technology-based standards as “Effluent Limitations.” The Effluent Limitations require dischargers to reduce or prevent pollutants associated with industrial activity in storm water discharges through the implementation of pollution controls that achieve Best Available Technology Economically

Achievable (“BAT”) for toxic and non-conventional³ pollutants like petcoke, and Best Conventional Pollutant Control Technology (“BCT”) for conventional⁴ pollutants (collectively “BAT/BCT”). *See* General Permit, § V.A. The BAT/BCT requirements apply regardless of the quality of water to which a given facility discharges, and set the floor for storm water pollution prevention. *See* General Permit, § I.D.31.

Compliance with the BAT/BCT standard requires all dischargers implement pollution control measures—called Best Management Practices (“BMPs”)⁵—that reduce or prevent discharges of pollution in their storm water discharge in a manner that reflects best industry practice. EPA developed a set of benchmark pollutant concentrations that are relevant and objective standards for evaluating whether a permittee’s BMPs achieve compliance with the statutory BAT/BCT standard expressed in the General Permit’s technology-based Effluent Limitations.⁶

The Facility’s ongoing and unpermitted discharges of storm water demonstrate that Amports has not developed and implemented BMPs at the Facility sufficient to meet technology-based effluent limits. Proper BMPs could include, but are not limited to, moving certain pollution-generating activities under cover, capturing and retaining or effectively filtering storm water before discharge, treating all storm water prior to discharge, and other similar measures. Amports’ failure to develop and/or implement adequate BMPs to meet BAT/BCT at the Facility violates and will continue to violate the Act and the General Permit each and every day the Facility discharges storm water without meeting BAT/BCT.

2. Receiving Water Limitations

The General Permit includes additional Receiving Water Limitations that prohibit storm water discharges that cause or threaten to cause pollution, contamination, or nuisance. *See* 1997 Permit, Order Part A.2.; 2015 Permit, Sections III.C., VI.C. The Receiving Water Limitations also prohibit storm water discharges to surface or groundwater that adversely impact human health or the environment. 1997 Permit, Order Part C.1.; 2015 Permit, Section VI.B.

According to the San Francisco Bay Basin (Region 2) Water Quality Control Plan (November 5, 2019) (“Basin Plan”), the Carquinez Strait has existing beneficial uses for industrial service supply (IND); navigation (NAV); commercial and sport fishing (COMM); water contact recreation (REC1); non-contact water recreation (REC2); estuarine habitat (EST); wildlife habitat

³ Toxic pollutants are listed at 40 C.F.R. § 401.15 and include copper, cadmium, chromium, lead, and zinc, among others.

⁴ Conventional pollutants are listed at 40 C.F.R. § 401.16 and include biochemical oxygen demand, TSS, oil and grease, pH, and fecal coliform.

⁵ BMPs are schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States. BMPs include treatment systems, operation procedures, and practices to control and abate the discharge of pollutants from the Facility.

⁶ *See United States Environmental Protection Agency (EPA) National Pollutant Discharge Elimination System (NPDES) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP)*, as modified effective June 4, 2015, reissued and modified effective March 1, 2021 (“Multi-Sector General Permit”), p. 41; *see also*, 80 Federal Register 34403 (June 16, 2015). *See also Baykeeper v. Kramer Metals, Inc.* 619 F. Supp. 2d 914, 921 (C.D. Cal. 2009).

(WILD); rare, threatened, or endangered species (RARE); migration of aquatic organisms (MIGR); and spawning, reproduction and development (SPWN). Basin Plan at Table 2-1 (pdf p. 68). Additionally, the Basin Plan lists water quality objectives that apply to “all surface waters within the region, except the Pacific Ocean.” Basin Plan at 3-3 (pdf p.76). Among those objectives, the Basin Plan lists objectives for bacteria, sets narrative standards for bioaccumulation and biostimulatory substances, states that “waters shall be free of coloration that causes nuisance or adversely affects beneficial uses,” and sets targets for dissolved oxygen, pH, radioactivity, salinity, sediment, temperature, toxicity, turbidity, and un-ionized ammonia. Basin Plan at 3-3 to 3-8 (pdf p. 76-81).

The Basin Plan also provides the following water quality objectives:

- Floating Material – “Waters shall not contain floating material, including solids, liquids, foams, and scum, in concentrations that cause nuisance or adversely affect beneficial uses.” Basin Plan § 3.3.6.
- Oil and Grease – “Waters shall not contain oils, greases, waxes, or other materials in concentrations that result in a visible film or coating on the surface of the water or on objects in the water, that cause nuisance, or that otherwise adversely affect beneficial uses.” Basin Plan § 3.3.7.
- Population and Community Ecology – “All waters shall be maintained free of toxic substances in concentrations that are lethal to or that produce significant alterations in population or community ecology or receiving water biota. In addition, the health and life history characteristics of aquatic organisms in waters affected by controllable water quality factors shall not differ significantly from those for the same waters in areas unaffected by controllable water quality factors.” Basin Plan § 3.3.8.
- Settleable Material – “Waters shall not contain substances in concentrations that result in the deposition of material that cause nuisance or adversely affect beneficial uses.” Basin Plan § 3.3.13.
- Suspended Material – “Waters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses.” Basin Plan § 3.3.14.
- Sulfide – “All water shall be free from dissolved sulfide concentrations above natural background levels. Sulfide occurs in Bay muds as a result of bacterial action on organic matter in an anaerobic environment. Concentrations of only a few hundredths of a milligram per liter can cause a noticeable odor or be toxic to aquatic life. Violation of the sulfide objective will reflect violation of dissolved oxygen objectives as sulfides cannot exist to a significant degree in an oxygenated environment.” Basin Plan § 3.3.15.
- Tastes and Odors – “Waters shall not contain taste- or odor-producing substances in concentrations that impart undesirable tastes or odors to fish flesh or other edible products of aquatic origin, that cause nuisance, or that adversely affect beneficial uses.” Basin Plan § 3.3.16.

Baykeeper’s lawsuit will allege that the Facility’s storm water discharges have caused or contributed to exceedances of the Receiving Water Limitations in the General Permit and applicable water quality objectives. The Facility’s discharges are causing or threatening to cause pollution, contamination, and/or nuisance; adversely impact human health or the environment; and violate applicable water quality objectives. Baykeeper alleges that Amports has discharged storm water

violating Receiving Water Limitations from the Facility to Receiving Waters during at least every significant local rain event over 0.1 inches over the last five (5) years. *See* Attachment 1. Each discharge from the Facility that violates a Receiving Water Limitation constitutes a separate violation of the General Permit and the Act, and Amports is subject to civil penalties for each of these violations.

3. The Storm Water Pollution Prevention Plan

The General Permit requires the preparation and implementation of a Storm Water Pollution Prevention Plan (“SWPPP”) prior to conducting, and in order to lawfully continue, industrial activities. General Permit, § X. To comply with the General Permit, dischargers must have developed and implemented a SWPPP by July 15, 2015, including the description of BMPs that comply with the BAT/BCT standard. *See* General Permit, §§ X.B-C. The objectives of the SWPPP include the identification and evaluation of sources of pollutants associated with industrial activities that may affect the quality of storm water and non-storm water discharges, and to implement site-specific BMPs to reduce or prevent pollutant concentrations in discharges to levels that comply with the General Permit’s technology-based Effluent Limitations and Receiving Water Limitations. *See* General Permit, § X.C.

The SWPPP must include, among other things: a narrative description and assessment of all industrial activity, potential sources of pollutants, and potential pollutants; a site map indicating the storm water conveyance system, associated points of discharge, direction of flow, areas of actual and potential pollutant contact, including the extent of pollution-generating activities, nearby water bodies, and pollutant control measures; a description of the BMPs developed and implemented to reduce or prevent pollutants in storm water discharges and authorized non-storm water discharges necessary to comply with the General Permit; the identification and elimination of non-storm water discharges; the location where significant materials are being shipped, stored, received, and handled, as well as the typical quantities of such materials and the frequency with which they are handled; a description of dust and particulate-generating activities; and the identification of individuals and their current responsibilities for developing and implementing the SWPPP. *See* General Permit, §§ X.A-H.

4. The Monitoring Implementation Plan

Permittees must develop and implement a storm water monitoring and reporting program—called a Monitoring Implementation Plan (“MIP”)—prior to conducting, and in order to lawfully continue, industrial activities. *See* General Permit, §§ X.I, XI.A-D. The MIP must be included in the SWPPP. *See* General Permit, X.A.8. The objective of the MIP is to detect and measure concentrations of pollutants in a facility’s storm water discharges, and to ensure compliance with the General Permit’s Effluent Limitations and Receiving Water Limitations. *See* General Permit, Factsheet § II.J.1. A lawful MIP ensures that BMPs are effectively reducing and/or eliminating pollutants in a facility’s storm water discharges, and is evaluated and revised whenever appropriate to ensure ongoing compliance with the General Permit. *Id.*

Facility operators must complete storm water sampling and analysis. General Permit, § XI.B. The General Permit requires the collection and analysis of two storm water samples from a

Qualifying Storm Event (“QSE”) between July 1 and December 31 of each reporting year, and two samples from a QSE between January 1 and June 30 of each reporting year. Each sample must be collected within four hours of the start of a discharge, or the start of facility operations if the QSE occurs within the previous 12-hour period. General Permit, § XI.B.5.

Permittees must also conduct visual observations at least once a month, and at the same time sampling occurs at each discharge location. General Permit, § XI.A. Observations must document the presence of any floating and suspended material, oil and grease (“O&G”), discolorations, turbidity, or odor, and identify the source of any pollutants. General Permit, § XI.A.2. Dischargers must document and maintain records of observations, observation dates, locations observed, and responses taken to reduce or prevent pollutants observed in storm water discharges. General Permit, § XI.A.3.

The General Permit requires permittees to analyze samples for, among other parameters, total suspended solids and O&G (§ XI.B.6.a); pH (§ XI.B.6.b); additional site-specific parameters identified during the pollutant source assessment (§ XI.B.6.c); parameters based on the facility’s Standard Industrial Classification (“SIC”) Code (§ XI.B.6.d; Table 1); and additional applicable industrial parameters related to receiving waters with 303(d) listed impairments, or approved Total Maximum Daily Loads (§ XI.B.6.e). Permittees must submit all sampling and analytical results for all samples via the State Board’s Stormwater Multiple Application and Report Tracking System (“SMARTS”) database within 30 days of obtaining the results for each sampling event. General Permit § XI.B.11.a.

5. The Annual Comprehensive Facility Compliance Evaluation

Permittees must complete an Annual Comprehensive Facility Compliance Evaluation (“ACFCE”) each reporting year. General Permit, § XV. The goal of the ACFCE is to ensure and certify compliance with each of the General Permit’s other mandates. The ACFCE must include, at a minimum: (i) a review of all sampling, visual observation, and inspection records conducted during the previous year; (ii) an inspection of all areas of industrial activity and associated pollutant sources for evidence of pollutants entering the storm water conveyance system; (iii) an inspection of all drainage areas previously identified as having no exposure to industrial activities; (iv) an inspection of equipment needed to implement BMPs; (v) an inspection of BMPs; (vi) a review and effectiveness assessment of all BMPs to determine if the BMPs are properly designed, implemented, and are adequately reducing/preventing pollutants in storm water discharges; and (vii) an assessment of any other factors needed to comply with the requirements of Section XVI.B (i.e. Annual Report mandates). General Permit, § XV.

C. The Facility’s Permit Enrollment Status

Amports does not have any permit under the Act. Amports does not have an active NOI for coverage under the General Permit. Instead, in 2017, Amports filed a Notice of Termination (“NOT”). In the NOT, Amports stated that “Amports no longer performs marine cargo handling as our current SIC code suggests. A better description of our activities would include 7521 Automobile Parking, 4731 Arrangement of Transportation of Freight and Cargo and 7538 General Automotive Repair. It is our understanding these codes do not require IGP coverage.” See Notice of Termination

filed Dec., 2017. This misidentifies Amports' operations. Compliance with the Act requires that Amports properly identify itself as a Marine Cargo Handling facility under SIC code 4491, and/or any other SIC code applicable to Amports' industrial activities. This is true both with respect to the vehicle loading, unloading and parking that occurs at the Facility and with respect to Amports' petcoke train car offloading, onsite handling via conveyors and other equipment, and ship loading operations.

Industrial facilities that discharge storm water "associated with industrial activity" are required to apply for coverage under the General Permit by submitting a NOI to the State Board to enroll in and obtain coverage under the General Permit. *See* 40 C.F.R. § 122.26(A)(1)(ii); General Permit, § I.A.12. Amports' NOT does not comply, and Amports does not have any valid NPDES permit for its storm water discharges into San Francisco Bay.

III. NAME AND ADDRESS OF NOTICING PARTY

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IV. COUNSEL

Baykeeper is represented by its counsel Eric Buescher and Ben Eichenberg. All communications should be directed to counsel:

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(510) 735-7900

V. VIOLATIONS OF THE ACT AND GENERAL PERMIT

In order to lawfully discharge pollutants to waters of the United States in California, any person who discharges storm water associated with industrial activity must enroll in the General Permit, and then comply with all of its terms and conditions. *See* 33 U.S.C. §§ 1311(a), 1342; 40 C.F.R. § 122.26(c)(1). Based on Baykeeper's investigation, Amports discharges pollutants, including petcoke and its composite materials, into the Carquinez Strait.

Amports' loading of ships causes petcoke to escape from the ship loading processes, causes petcoke to be oversprayed by the conveyance system, and/or causes petcoke to be discharged in the wash water from ship and equipment cleaning are all activities that require permitting under the Act. *See* 33 U.S.C. § 1362(12). These direct discharges have long been held to require NPDES permitting under the Act. Regardless of whether the pollutants are washed off the deck, enter the water directly,

or travel through the air and into the water, they are discharges that require permits. *See, e.g., Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502 (9th Cir. 2013); *Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180, 188-89 (2d Cir. 2010); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1185 (9th Cir. 2002).

Amports also discharges storm water contaminated with pollutants. Amports has not enrolled in the General Permit, does not have any other valid permit, and has not and does not comply with the General Permit's terms and conditions for discharging pollutants into waters of the United States. Amports' violations of the Act and General Permit are ongoing and continuous. Amports is separately liable for each daily, monthly, and/or annual violation of the General Permit over the last five (5) years.

A. Amports' Direct, Non-Storm Water Discharges Without an NPDES Permit

Amports' procedures for loading petcoke onto ships causes petcoke to spill into the Carquinez Strait in violation of the Act. *See* 33 U.S.C. § 1311(a) (illegality of pollutant discharges except in compliance with law). Baykeeper's lawsuit will allege that Amports' petcoke loading operations meet each of the statutory and legal criteria for a violation of the Act. Amports is (1) discharging (2) a pollutant (3) from a point source (4) into waters of the United States (5) without a permit.

Some of the activities which specifically generate such discharge of pollutants include, but are not limited to: (1) loading of ships at the Facility during standard operating processes; (2) direct spray from the conveyance system when the crane boom is being disengaged and raised while petcoke and pollutants continue to be discharged causing overspray onto the water, wharf, and ship deck; (3) the washing petcoke and pollutants off the deck of the ship, off of the loading-related equipment, and directly into the Bay; (4) direct aerial deposition of particulate matter into the water from Amports' conveyance system and operations; (5) offloading of train cars at the Facility; (6) moving petcoke around the Facility; (7) equipment and vehicle cleaning, maintenance, and repair at the Facility, and (8) by deposition of particulate matter that travels from the loading facility, equipment, and machinery, through the air, and into jurisdictional waters.⁷

As discussed above, Amports has neither an NPDES permit or coverage under the General Permit in violation of the Act.

Baykeeper's suit will allege that Amports has discharged pollutants from the Facility to the Receiving Waters without a permit every time Amports has loaded petcoke from the silos into a ship in the last five years, and that the discharges continue and will continue to occur on each occasion when Amports will load a ship in the future. Amports is subject to civil penalties for each of these violations.

⁷ Some of these activities also cause pollutants to be discharged in storm water from the Facility, both directly, and commingled with storm water discharged related to other activities. These storm water discharges are separately described below.

B. Amports' Illegal Indirect Discharges Without An NPDES Permit

Amports' industrial activities also result in indirect discharges of petcoke to the Carquinez Strait in violation of the Act. Depending on operational variables (i.e., the product pore velocity of the petcoke loading operations, BMP implementation), petcoke that has been loaded into the ship hull is remobilized as aerial emissions that reenter the immediately surrounding atmosphere and then discharges into Carquinez Strait. Baykeeper believes this is a direct discharge as described above, but Baykeeper's suit will allege, in the alternative, that Amports has indirectly discharged pollutants from the Facility to the Receiving Waters without a permit every time Amports' operations remobilize pollutants in aerial emissions. Amports is subject to civil penalties for each of these violations.

C. Amports' Illegal Storm Water Discharges

Baykeeper's suit will also allege that Amports' various activities allow storm water runoff to carry petcoke and other pollutants into the water. Storm water is a *de facto* point source when there is industrial activity, which includes Amports' marine cargo handling of petcoke and automobiles. *See Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003).

During the offloading of petcoke from the train cars, the movement and storage of petcoke at the facility, the maintenance, repair and cleaning of petcoke handling equipment, and the loading operations, petcoke is deposited on ships, docks, facility premises, and other nearby areas such that it is washed into the water during rain events with more than 0.1 inches of rain. Congress established the permitting process for storm water discharge in 1987. Most discharges composed entirely of storm water are exempt from the Act's permitting requirements, but permits are required for discharges associated with "industrial activity." *See* 33 U.S.C. § 1342(p)(1) and (2); *Natural Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1304-05 (9th Cir. 1992) (detailing EPA's regulations regarding "industrial activity" sources). EPA's implementing regulations at 40 C.F.R. § 122.26 require NPDES permit authorization for facilities engaged in industrial activity to discharge to waters of the United States.

Amports does not have an NPDES permit for storm water discharges. The company decided in 2017 to terminate coverage under the General Permit. And regardless of its permit status, it has failed to implement BAT/BCT to reduce storm water pollution as required by the General Permit.

According to submissions made to the State Board, "Amports no longer performs marine cargo handling as our current SIC code suggests. A better description of our activities would include 7521 Automobile Parking, 4731 Arrangement of Transportation of Freight and Cargo and 7538 General Automotive Repair. It is our understanding these codes do not require IGP coverage." Notice of Termination filed Dec., 2017.

This characterization of Amports' various activities was and remains incorrect due to Amports' handling of marine cargo, including automobiles and petcoke. Amports' petcoke loading operation requires its own SIC designation because it is a separate economic activity from its other operations. Where separate activities occur at the same location, they are subject to separate SIC codes. Thus, even were Amports' NOT claims accurate for the Facility as a whole with regard to

automobile handling, and they are not, the petcoke operation remains a primary and separate function of the Facility that is subject to the General Permit.

Additionally, even if portions of the Facility are not subject to the General Permit, because no BMPs or appropriate controls exist at the Facility to separate storm water flows from any portions of the Facility where non-regulated activities may occur from storm water flows from the regulated industrial activities, storm water at the Facility commingles and thus, all storm water discharges from the Facility are regulated under the General Permit. Amports' industrial operations include, but are not limited to, activities and locations at the Facility such as: vehicle and equipment maintenance; vehicle and equipment cleaning; bulk material storage; material storage and disposal areas; vehicle and equipment storage areas; shipping and receiving areas; loading and unloading areas; driveway areas; maintenance areas; and the on-site material handling equipment such as conveyors, forklifts, cranes, trucks, and vessels. The Facility also stores materials associated with vehicle maintenance and equipment cleaning operations at the Facility.

The pollutants associated with these activities are commingled with other discharges of storm water from the Facility. These include petcoke, and other pollutants such as sediment, dirt, oil and grease, metal particles, and others.

Baykeeper's suit will allege that Amports' misidentified its operations and misused the SIC codes to attempt to shield itself from its required coverage under the General Permit. Baykeeper will allege that Amports has failed to implement BMPs that constitute BAT/BCT as required under the General Permit. Baykeeper's suit will allege that Amports has discharged storm water from the Facility to the Receiving Waters with a permit during at least every significant local rain event over 0.1 inches in the last five years.⁸ And Baykeeper will allege the discharges cause or contribute to exceedances of Receiving Water Limitations. Attachment 1 compiles all dates in the last five years when a significant rain event occurred at the Facility. Amports is subject to civil penalties for each of these violations. Furthermore, Amports' misclassification is an effort to avoid permitting requirements, including for Amports' petcoke operations.

D. Violations of the Act and General Permit Reporting and Monitoring Rules

Baykeeper will also allege violations of reporting and monitoring requirements under the General Permit. These requirements would have to be met if Amports was properly complying with the Act. Baykeeper's investigation confirms that Amports has violated and continues to violate the General Permit's MIP requirements as Amports has neither developed nor implemented an MIP. Amports is therefore liable for ongoing, daily violations of the Act and General Permit's MIP requirements for the last five (5) years, and civil penalties and injunctive relief are available remedies. *See* 33 U.S.C. §§ 1311, 1342.

Baykeeper's investigation also confirms that Amports has violated and continues to violate the General Permit's Annual Comprehensive Facility Compliance Evaluation requirements. Amports does not conduct any ACFCE related to its petcoke operations. Amports is therefore liable for an

⁸ Significant local rain events are reflected in the rain gauge data available at: <http://www.ncdc.noaa.gov/cdo-web/search>.

annual violation of the Act and General Permit's ACFCE requirements over the last five (5) years, and civil penalties and injunctive relief are available remedies. 33 U.S.C. §§ 1311, 1342.

E. Violations of the General Permit's SWPPP Requirements

Baykeeper's investigation also confirmed that Amports is violating the General Permit's SWPPP requirements. Amports' inactive SWPPP does not mention the fact that they offload, move, store, and load petcoke at the facility, and it does not include any of the detailed information, descriptions, and plans that a compliant SWPPP should include. Indeed, Amports appears to be ignoring the existence of both car and petcoke loading operations, facilities, and equipment simply because it also happens to park cars (which are unloaded/loaded from vessels). But Amports must meet the Act's requirements, which begin with a SWPPP that reflects the reality of Amports' operations at the Facility, including its petcoke offloading, handling, loading, and related pollution, as well as its marine cargo handling of imported automobiles.

Amports has violated and continues to violate the General Permit's SWPPP requirements. Amports has failed to develop or implement a lawful SWPPP. Accordingly, Amports is liable for ongoing, daily violations of the Act and General Permit's SWPPP requirements over the last five (5) years, and civil penalties and injunctive relief are available remedies. 33 U.S.C. §§ 1311, 1342.

VI. RELIEF SOUGHT FOR VIOLATIONS OF THE CLEAN WATER ACT

Pursuant to section 309(d) of the Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4, each separate violation of the Act subjects the violator to penalties of up to \$56,460 per day per violation for violations occurring after November 2, 2015, where penalties are assessed on or after December 23, 2020. In determining the amount of civil penalty to award, a court shall consider (1) the seriousness of the violations; (2) any economic benefit gained from the violations; (3) the history of such violations; (4) any good-faith efforts to comply with applicable requirements; (5) the economic impact of the penalty on the violator; and (6) any other matters that justice may require. 33 U.S.C. § 1319(d).

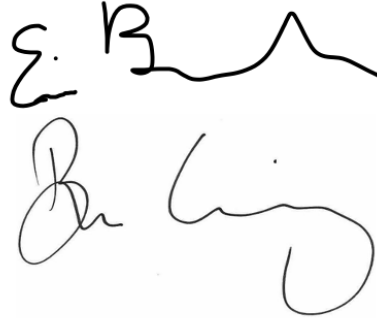
In addition to civil penalties, Baykeeper will seek injunctive relief preventing further violations of the Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), declaratory relief, and such other relief as permitted by law.

Lastly, pursuant to Section 505(d) of the Act, 33 U.S.C. § 1365(d), Baykeeper will seek to recover its costs, including attorneys' and expert fees, associated with this enforcement action.

VII. CONCLUSION

Baykeeper is willing to discuss effective remedies for the violations described in this Notice Letter. However, upon expiration of the 60-day notice period, Baykeeper intends to file a citizen suit under Section 505(a) of the Act against Amports for its ongoing and extensive violations of the law. Please contact Baykeeper's legal counsel to initiate these discussions.

Sincerely,

Two handwritten signatures in black ink. The top signature is 'E. Buescher' and the bottom signature is 'Ben Eichenberg'.

San Francisco Baykeeper

Eric J. Buescher

Ben Eichenberg

**ATTACHMENT 1: DATES OF ALLEGED EXCEEDANCES BY AMPORTS FROM
 OCTOBER 4, 2016 TO OCTOBER 4, 2021**

Days with precipitation one-tenth of an inch or greater, as reported by NOAA’s National Climatic Data Center for Station: BENICIA 1.3 W, CA US US1CASO0003, when a storm water discharge from the Facility is likely to have occurred.

<http://www.ncdc.noaa.gov/cdo-web/search>

| 2016 | 2017 | 2018 | 2019 | 2020 | 2021 |
|------------------------------|------------------------------|-----------------------------|------------------------------|------------------------------|-----------------------------|
| Saturday, October 15, 2016 | Tuesday, January 3, 2017 | Thursday, January 4, 2018 | Sunday, January 6, 2019 | Thursday, January 9, 2020 | Tuesday, January 5, 2021 |
| Sunday, October 16, 2016 | Wednesday, January 4, 2017 | Friday, January 5, 2018 | Monday, January 7, 2019 | Friday, January 17, 2020 | Monday, January 25, 2021 |
| Friday, October 28, 2016 | Thursday, January 5, 2017 | Saturday, January 6, 2018 | Wednesday, January 9, 2019 | Sunday, January 26, 2020 | Wednesday, January 27, 2021 |
| Monday, October 31, 2016 | Saturday, January 7, 2017 | Monday, January 8, 2018 | Wednesday, January 16, 2019 | Sunday, March 8, 2020 | Thursday, January 28, 2021 |
| Sunday, November 20, 2016 | Sunday, January 8, 2017 | Tuesday, January 9, 2018 | Thursday, January 17, 2019 | Sunday, March 15, 2020 | Friday, January 29, 2021 |
| Monday, November 21, 2016 | Monday, January 9, 2017 | Friday, January 19, 2018 | Monday, January 21, 2019 | Monday, March 16, 2020 | Tuesday, February 2, 2021 |
| Wednesday, November 23, 2016 | Tuesday, January 10, 2017 | Monday, January 22, 2018 | Thursday, January 31, 2019 | Thursday, March 19, 2020 | Friday, February 12, 2021 |
| Saturday, November 26, 2016 | Wednesday, January 11, 2017 | Thursday, January 25, 2018 | Saturday, February 2, 2019 | Wednesday, March 25, 2020 | Monday, February 15, 2021 |
| Sunday, November 27, 2016 | Thursday, January 12, 2017 | Friday, February 23, 2018 | Monday, February 4, 2019 | Sunday, April 5, 2020 | Tuesday, February 16, 2021 |
| Thursday, December 8, 2016 | Wednesday, January 18, 2017 | Monday, February 26, 2018 | Tuesday, February 5, 2019 | Monday, April 6, 2020 | Saturday, March 6, 2021 |
| Friday, December 9, 2016 | Thursday, January 19, 2017 | Thursday, March 1, 2018 | Saturday, February 9, 2019 | Tuesday, May 12, 2020 | Wednesday, March 10, 2021 |
| Sunday, December 11, 2016 | Friday, January 20, 2017 | Friday, March 2, 2018 | Sunday, February 10, 2019 | Sunday, May 17, 2020 | Monday, March 15, 2021 |
| Friday, December 16, 2016 | Saturday, January 21, 2017 | Saturday, March 3, 2018 | Wednesday, February 13, 2019 | Monday, May 18, 2020 | Friday, March 19, 2021 |
| Friday, December 23, 2016 | Sunday, January 22, 2017 | Sunday, March 4, 2018 | Thursday, February 14, 2019 | Wednesday, November 18, 2020 | |
| Saturday, December 24, 2016 | Monday, January 23, 2017 | Tuesday, March 13, 2018 | Friday, February 15, 2019 | Saturday, December 12, 2020 | |
| | Thursday, February 2, 2017 | Wednesday, March 14, 2018 | Saturday, February 16, 2019 | Sunday, December 13, 2020 | |
| | Friday, February 3, 2017 | Thursday, March 15, 2018 | Thursday, February 21, 2019 | Monday, December 14, 2020 | |
| | Saturday, February 4, 2017 | Friday, March 16, 2018 | Tuesday, February 26, 2019 | Thursday, December 17, 2020 | |
| | Monday, February 6, 2017 | Wednesday, March 21, 2018 | Wednesday, February 27, 2019 | | |
| | Tuesday, February 7, 2017 | Thursday, March 22, 2018 | Thursday, February 28, 2019 | | |
| | Wednesday, February 8, 2017 | Friday, March 23, 2018 | Saturday, March 2, 2019 | | |
| | Thursday, February 9, 2017 | Saturday, March 24, 2018 | Wednesday, March 6, 2019 | | |
| | Friday, February 10, 2017 | Friday, April 6, 2018 | Thursday, March 7, 2019 | | |
| | Friday, February 17, 2017 | Saturday, April 7, 2018 | Sunday, March 10, 2019 | | |
| | Saturday, February 18, 2017 | Thursday, April 12, 2018 | Monday, March 11, 2019 | | |
| | Monday, February 20, 2017 | Tuesday, April 17, 2018 | Wednesday, March 20, 2019 | | |
| | Tuesday, February 21, 2017 | Thursday, November 22, 2018 | Saturday, March 23, 2019 | | |
| | Wednesday, February 22, 2017 | Friday, November 23, 2018 | Tuesday, March 26, 2019 | | |
| | Sunday, March 5, 2017 | Saturday, November 24, 2018 | Wednesday, March 27, 2019 | | |
| | Monday, March 6, 2017 | Tuesday, November 27, 2018 | Friday, March 29, 2019 | | |
| | Tuesday, March 21, 2017 | Thursday, November 29, 2018 | Tuesday, April 16, 2019 | | |
| | Wednesday, March 22, 2017 | Friday, November 30, 2018 | Thursday, May 16, 2019 | | |
| | Saturday, March 25, 2017 | Saturday, December 1, 2018 | Friday, May 17, 2019 | | |
| | Friday, April 7, 2017 | Wednesday, December 5, 2018 | Sunday, May 19, 2019 | | |
| | Saturday, April 8, 2017 | Monday, December 17, 2018 | Monday, May 20, 2019 | | |
| | Monday, April 17, 2017 | Tuesday, December 25, 2018 | Wednesday, November 27, 2019 | | |
| | Wednesday, April 19, 2017 | | Sunday, December 1, 2019 | | |
| | Friday, October 20, 2017 | | Monday, December 2, 2019 | | |
| | Thursday, November 9, 2017 | | Thursday, December 5, 2019 | | |
| | Saturday, November 11, 2017 | | Saturday, December 7, 2019 | | |
| | Thursday, November 16, 2017 | | Sunday, December 8, 2019 | | |
| | Friday, November 17, 2017 | | Wednesday, December 18, 2019 | | |
| | Monday, November 27, 2017 | | Monday, December 23, 2019 | | |
| | | | Wednesday, December 25, 2019 | | |
| | | | Monday, December 30, 2019 | | |

ATTACHMENT 2: SERVICE LIST

VIA U.S. MAIL

Merrick Garland, U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-001

Michael Regan, Administrator
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Deborah Jordan, Acting Regional Administrator
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Eileen Sobeck, Executive Director
State Water Resources Control Board
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Sacramento, California 95812-0100

Michael Montgomery, Executive Officer
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, California 94612