

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9**

75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF:)	DOCKET NO. CWA-09-2021-0022
)	
Balboa Boatyard of California, Inc.)	
Newport Beach, CA)	COMPLAINT, CONSENT AGREEMENT
)	AND FINAL ORDER
Respondent.)	
)	<i>Class II Administrative Penalty Proceeding</i>
)	<i>under Clean Water Act § 309(g), 33 U.S.C. §</i>
)	<i>1319(g), and 40 C.F.R. §§ 22.13(b) and 22.18</i>
)	

CONSENT AGREEMENT

I. AUTHORITY AND PARTIES

1. This is a Class II civil administrative penalty proceeding under Clean Water Act (CWA) §§ 309(g)(1)(A) and 2(B), 33 U.S.C. § 1319(g)(1)(A) and 2(B), and 40 C.F.R. Part 22 (*Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*).
2. Pursuant to CWA § 309(g), 33 U.S.C. § 1319(g), the Administrator of the United States Environmental Protection Agency (EPA) is authorized to assess administrative penalties against persons who violate CWA § 301(a), 33 U.S.C. § 1311 (a). The Administrator has delegated this authority to the Regional Administrator of the EPA Region 9, who in turn has delegated this authority to the Director of the Enforcement and Compliance Assurance Division, hereinafter “Complainant.”
3. Respondent is Balboa Boatyard of California, Inc.
4. This Consent Agreement and Final Order (CA/FO), which contains the elements of a complaint required by 40 C.F. R. § 22.14(a), simultaneously commences and concludes this penalty proceeding, as authorized by 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

NOW THEREFORE, before the taking of any testimony, without adjudication of any issue of fact

or law, and upon consent by the EPA and Respondent, it is hereby STIPULATED, AGREED, AND ORDERED:

II. STATUTORY AND REGULATORY FRAMEWORK

5. CWA § 301(a), 33 U.S.C. § 1311(a), makes it unlawful for a person to discharge pollutants from a point source into waters of the United States, except as authorized by a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to CWA § 402, 33 U.S.C. § 1342.
6. CWA § 402, 33 U.S.C. § 1342, establishes the NPDES program and authorizes the EPA and authorized states to issue permits governing the discharge of pollutants from point sources into waters of the United States and CWA § 402(p), 33 U.S.C. § 1342(p) requires that NPDES permits be issued for stormwater discharges “associated with industrial activity.”
7. 40 C.F.R. § 122.26(b)(14)(ii) defines stormwater discharges associated with industrial activity to include boat building and repairing classified under SIC Group 3732.
8. Pursuant to CWA § 402(p)(4), dischargers of stormwater associated with industrial activity are required to seek coverage under a promulgated general permit or seek individual permit coverage.
9. The State of California has an EPA-authorized NPDES program and issues permits, including industrial stormwater permits, through its State Water Resources Control Board (SWRCB) and nine (9) Regional Water Quality Control Boards. On April 17, 1997, the SWRCB adopted General Permit No. CAS000001 for Discharges of Stormwater Associated with Industrial Activities Excluding Construction Activities, Water Quality Order No. 97-03-DWQ, which was in effect through June 30, 2015 and subsequently revised by the SWRCB on April 1, 2014, Water Quality Order No. 2014-0057-DWQ, which became effective on July 1, 2015, hereinafter, “General Permit.” The General Permit expired on June 30, 2020, has been administratively continued in accordance with 40 C.F.R. § 122.6, and remains in full force and effect.
10. Entities seeking coverage under the General Permit must submit a Notice of Intent (NOI) to California at least fourteen days prior to commencing discharge. 40 C.F.R. § 122.28(b)(2); 1997 General Permit NOI Instructions.
11. Part X.A. of the General Permit requires Respondent to develop, implement, and revise, as needed, a Storm Water Pollution Prevention Plan (SWPPP), which must be maintained at the facility at all times.
12. The Respondent is required to prepare an accurate Site Map of the facility. *See* General Permit Part X.E.
13. The General Permit at Part X.H. requires the Respondent to design, implement, and maintain certain minimum Best Management Practices (BMPs). The General Permit also requires the

Respondent to evaluate minimum BMPs in the potential pollutant source assessment in the SWPPP. *See* General Permit Part X.G.

14. Respondent is required to describe specific discharge locations in its SWPPP. *See* General Permit Part X.A. through Part X.G.
15. Respondent is required to monitor stormwater discharge during qualifying rain events. *See* General Permit Part XI.
16. Pursuant to CWA § 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19.4, EPA may assess a Class II civil administrative penalty of up to \$16,000 per day of violation, not to exceed \$187,500 in total, against a person for CWA § 301(a) violations that occurred after December 6, 2013 through November 2, 2015. For violations that occurred after November 2, 2015, where penalties are assessed on or after December 23, 2020, EPA may assess a penalty up to \$22,584 per day of violation, not to exceed \$282,293 in total.

III. FINDINGS OF FACT, JURISDICTIONAL ALLEGATIONS, AND CONCLUSIONS OF LAW

17. Respondent is a corporation formed under the laws of the state of California and is a “person” within the meaning of CWA § 502(5), 33 U.S.C. § 1362(5). Respondent operates a boat repair facility located at 2414 Newport Boulevard, Newport Beach, CA 92663 (Balboa Boat Yard or the Facility).
18. Respondent has been engaged in boat building and repairing activities at the Facility since at least the 1990s, on a date best known to Respondent. Respondent’s operations at the Facility fall within activities classified under SIC Code 3732, and is therefore an “industrial activity” for purposes of CWA § 402(p), 33 U.S.C. § 1342(p), and 40 C.F.R. § 122.26(b)(14)(ii).
19. Stormwater runoff from the Facility is a “stormwater discharge associated with industrial activity” as defined by 40 C.F.R. § 122.26(b)(14)(ii).
20. Stormwater runoff from the Facility discharges directly to Newport Bay through a gap between the Facility’s concrete production area and boat lift (the boat lift sits directly above Newport Bay) and via the City of Newport Beach’s municipal separate storm sewer system (MS4) after runoff from the Facility enters the City’s 26th Street MS4 outfall pipe. The gap located between the Facility’s concrete production area and boat lift and the MS4 outfall pipe are each a “point source” within the meaning of CWA § 502(14), 33 U.S.C. § 1362(14).
21. Stormwater discharges from the Facility may include, among other potential pollutants, paint solids, heavy metals, spent solvents, suspended solids, fuel, and oil, and therefore contain “pollutants,” as defined by CWA § 502(6), 33 U.S.C. § 1362(6). *See* U.S. EPA Office of Water’s *Fact Sheet Series, Sector R: Ship and Boat Building or Repair Yards*, EPA-833-F-06-033 (December 2006) at https://www.epa.gov/sites/production/files/2015-10/documents/sector_r_shipbuilding.pdf.

22. Discharges from the Facility enter Newport Bay, which flows to the coast waters of the Pacific Ocean. Newport Bay and the coastal waters of the Pacific Ocean are “navigable waters” and “waters of the United States” within the meaning of CWA § 502(7), 33 U.S.C. § 1362(7), and implementing regulations.
23. Respondent’s discharge of pollutants in stormwater into waters of the United States constitutes a “discharge of pollutants” within the meaning of CWA § 502(12), 33 U.S.C. § 1362(12).
24. Respondent submitted its latest Notice of Intent to continue coverage under the General Permit on March 17, 2015 (WDID 8 30I018669) and is currently shown as an “active” permittee in the SWRCB’s online database.
25. On February 13, 2019, representatives of the EPA performed a wet weather inspection of the Facility to evaluate the Respondent’s compliance with the requirements of CWA §§ 301 and 402(p), 33 U.S.C. §§ 1311 and 1342(p), the regulations promulgated thereunder at 40 C.F.R. § 122.26, and the General Permit. The EPA provided the inspection report to Respondent on April 1, 2019. As described more fully in the inspection report, the EPA inspectors observed the following:
 - a. The Facility did not follow the monitoring requirements of the General Permit. Facility staff could not provide records of stormwater monitoring to the EPA inspectors during the day of inspection. According to SMARTS, the Facility has never submitted stormwater discharge results to the State.
 - b. The Facility’s onsite storm water storage capacity (i.e. two 500-gallon storage tanks or 1,000 gallons) is inadequate to contain the volume of runoff generated during routine, seasonal rain events.
 - c. A copy of the Facility’s current SWPPP, dated February 2019, was not being maintained on-site. In addition, the Facility could not provide records of training or monitoring during the inspection as required by the General Permit.
 - d. The Facility lacked appropriate documentation, via a Site Map, of stormwater conveyances to control stormwater flows through a planned discharge point(s) during a rain event, as required by the General Permit.
 - e. The Facility lacked appropriate minimum BMPs to control stormwater contact with pollutants associated with boat maintenance activities. Specifically, Facility staff were performing boat maintenance activities under tarping, which included sanding, and the inspectors observed accumulated particulates on impervious surfaces outside of the tarped area and exposed to precipitation; the Facility’s covered dumpster was open and trash materials in the dumpster were exposed to stormwater; and industrial materials were stored in built shelving under only partial cover along the southern perimeter of the Facility.

- f. The direct discharge of industrial stormwater entering Newport Bay through a gap between the Facility's concrete production area and its wooden platform.
26. Between February 28, 2015 and February 28, 2020, at least 23 days with rainfall in excess of 0.5 inches were recorded by the National Oceanic and Atmospheric Administration (NOAA) at its Newport Beach Harbor weather station, including a 0.15-inch rain event on the day of the EPA inspection of the Facility on February 13, 2019. Upon information and belief, each of these rain events resulted in the discharge of stormwater from the Facility.

IV. ALLEGED VIOLATIONS

27. Between February 28, 2015 and February 28, 2020, Respondent violated CWA §§ 301(a) and 402, 33 U.S.C. § 1311(a) and 1342, by discharging pollutants in stormwater to Newport Bay not in compliance with the General Permit.

V. ADMINISTRATIVE PENALTY

28. In consideration of the penalty factors of CWA § 309(g), 33 U.S.C. § 1319(g), Respondent shall pay to the United States a civil administrative penalty in the amount of \$59,908 within thirty (30) calendar days of the Effective Date, as defined in Section XIII below, of this CA/FO.

29. Respondent shall make penalty payment by one of the options listed below:

- a. Check Payment. Payment by a cashier's or certified check shall be made payable to "Treasurer, United States of America" and be mailed as follows:

- i. *If by regular U.S. Postal Service Mail:*

U.S. Environmental Protection Agency
Fines and Penalties
PO BOX 979077
St. Louis, MO 63197-9000

- ii. *If by overnight mail:*

U.S. Environmental Protection Agency
Government Lockbox 979077
USEPA Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

- b. Automated Clearinghouse Payment: Payment by Automated Clearinghouse (ACH) via Vendor Express shall be made through the U.S. Treasury as follows:

U.S. Treasury REX/Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 – checking

- c. Fedwire: Payment by wire transfer to the EPA shall be made through the Federal Reserve Bank of New York as follows:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
(Field Tag 4200 of the Fedwire message should read: D 68010727
Environmental Protection Agency)

- d. Online Payment: This payment option can be accessed from the information below:

Go to www.pay.gov
Enter “SFO Form Number 1.1.” in the search field
Open “EPA Miscellaneous Payments – Cincinnati Finance Center” form
and complete required fields.

Payment instructions are available at: <http://www2.epa.gov/financial/makepayment>. If clarification regarding a particular method of payment remittance is needed, contact the EPA Cincinnati Finance Center at (513) 487-2091.

30. To ensure proper credit, Respondent shall include the following transmittal information with the penalty payment: (i) Respondent’s name (as appeared on the CA/FO), complete address, contact person, and phone number; (ii) the EPA case docket number; (iii) the EPA contact person; and (iv) the reason for payment.
31. Concurrent with the payment, Respondent shall send a true and correct copy of the payment and accompanying transmittal information to the following addresses and via email to Lawrence Torres:

Regional Hearing Clerk
Office of Regional Counsel (ORC-1)
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Lawrence Torres, Life Scientist

Enforcement and Compliance Assurance Division (ECAD) 3-2
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105
Torres.Lawrence@epa.gov

32. Respondent shall not, and shall not allow any other person to, deduct any penalties and interest paid under this CA/FO from federal, state, or local taxes.
33. Pursuant to CWA § 309(g)(9), 33 U.S.C. § 1319(g)(9), if Respondent fails to pay the assessed penalty on time, the EPA may request the U.S. Department of Justice to bring a civil action to recover the overdue amount, plus interest at currently prevailing rates from the Effective Date of this CA/FO. In such an action, the validity, amount, or appropriateness of the assessed penalty shall not be subject to review. In addition to any assessed penalty and interest, Respondent shall pay attorney fees, costs for collection proceedings, and a quarterly nonpayment penalty, which shall equal 20% of the aggregate amount of Respondent's penalties and nonpayment penalties that are unpaid as of the beginning of such quarter, for each quarter during which such failure to pay persists. The EPA may also take other debt collection actions as authorized by law, including, but not limited to, the Debt Collection Act, 33 U.S.C. § 3711, and 33 C.F.R. Part 13.

IX. APPLICABILITY

34. This CA/FO shall apply to and be binding on Respondent, Respondent's officers, directors, partners, agents, employees, contractors, successors and assigns. Action or inaction of any persons, firms, contractors, employees, agents, or corporations acting under, through, or for Respondent shall not excuse any failure of Respondent to fully perform its obligations under this CA/FO. Changes in ownership, real property interest, or transfer of personal assets shall not alter Respondent's obligations under this CA/FO.

VIII. RESPONDENT'S ADMISSIONS AND WAIVERS

35. In accordance with 40 C.F.R. § 22.18(b), for the purpose of this proceeding, Respondent:
- a. admits the jurisdictional allegations of the complaint;
 - b. neither admits nor denies specific factual allegations contained in the complaint;
 - c. consents to all conditions specified in this CA/FO and to the assessment of the civil administrative penalty set forth in Section V above;
 - d. waives any right to contest the allegations set forth in this CA/FO; and
 - e. waives its right to appeal this proposed Final Order.

X. RESERVATION OF RIGHTS

36. In accordance with 40 C.F.R. § 22.18(c), full payment of the penalty set forth in this CA/FO only resolves Respondent's CWA civil penalty liabilities for the violations specifically alleged herein and does not in any case affect the right of the EPA to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.
37. This CA/FO is not a permit or modification of any existing permit issued pursuant to any federal, state, or local laws or regulations, and shall in no way relieve or affect Respondent's obligations under any applicable federal, state or local laws, regulations, or permits.

XI. ATTORNEY FEES AND COSTS

38. Unless otherwise specified, each party shall bear its own attorney fees and costs.

XIII. EFFECTIVE DATE AND TERMINATION

39. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), the Effective Date of this CA/FO is the date that the Final Order, having been signed by the Regional Judicial Officer, is filed with the Regional Hearing Clerk. This CA/FO shall terminate when Respondent has complied with the requirements of this CA/FO in full.

XIV. PUBLIC NOTICE

40. Pursuant to CWA § 309(g)(4), 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45(b), this Consent Agreement is subject to public notice and comment prior to issuance of the proposed Final Order. Complainant reserves the right to withhold or withdraw consent to this Consent Agreement if public comments disclose relevant and material information that was not considered by Complainant in entering into this Consent Agreement. Respondent may withdraw from this Consent Agreement only upon receipt of written notice from the EPA that it no longer supports entry of this Consent Agreement.
41. Pursuant to CWA § 309(g)(1), 33 U.S.C. § 1319(g)(1), the EPA has consulted with the State of California regarding this penalty action.

For Complainant the U.S. Environmental Protection Agency, Region 9

//s//

February 9, 2021

Amy C. Miller-Bowen
Director
Enforcement and Compliance Assurance Division

Date

For Respondent Balboa Boatyard of California, Inc.

//s//

02/01/2021

Patrick S. Werner, Jr.
Owner/President, Balboa Boatyard of California, Inc.

Date

FINAL ORDER

It is Hereby Ordered that this Consent Agreement and Final Order (U.S. EPA Docket No. CWA-09-2021-0022) be entered and that Respondent shall pay a civil penalty in the amount of \$59,908 in accordance with the terms of this Consent Agreement and Final Order.

Date

Steven L. Jawgiel
Regional Judicial Officer
U.S. EPA, Region 9