

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9**

75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF:)	DOCKET NO. CWA-09-2018-0015
)	
American Cooling, Inc.,)	COMPLAINT, CONSENT AGREEMENT
SEMCO Cooling Facility)	AND FINAL ORDER
20 Harris Place)	
Salinas, CA 93901)	<i>Class I Administrative Penalty Proceeding under</i>
)	<i>Section 309(g) of the Clean Water Act, 33 U.S.C.</i>
)	<i>§ 1319(g), and 40 C.F.R. §§ 22.13(b) and 22.18</i>
<u>Respondent.</u>)	

CONSENT AGREEMENT AND FINAL ORDER

I. AUTHORITY AND PARTIES

1. This is a Class I civil administrative penalty proceeding under Sections 309(g)(1)(A) and 2(A) of the Clean Water Act (CWA), 33 U.S.C. §§ 1319(g)(1)(A) and (2)(A), 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 Section 309(g) of the CWA, 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 Sections 301(a) and 402 of the Act, 33 U.S.C. §§ 1311(a) and 1342. The Administrator has delegated this authority to the Regional Administrator of the EPA Region 9, who in turn has delegated this authority to the Assistant Director of the Enforcement Division, hereinafter “Complainant.”
3. Respondent is American Cooling, Inc. (“American Cooling”).
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 Section 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 Section 402, 33 U.S.C. § 1342.

6. CWA Section 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 Section 402(p), 33 U.S.C. § 1342(p), requires that NPDES permits be issued for storm water discharges “associated with industrial activity.”
7. 40 C.F.R. § 122.26(b)(14)(xi) defines storm water discharges associated with industrial activity to include activities classified under SIC Codes 2099 and 4222 for “Food Preparations, Not Elsewhere Classified” and “Refrigerated Warehousing and Storage” respectively.
8. CWA Section 402(p)(4), 33 U.S.C. § 1342(p)(4), requires dischargers of storm water associated with industrial activity 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 storm water permits, through its State Water Resources Control Board (“State Water Board”) and nine Regional Water Quality Control Boards. On April 17, 1997, the State Water Board adopted General Permit No. CAS000001 for *Discharges of Storm Water 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 State Water Board on April 1, 2014, Water Quality Order No. 2014-0057-DWQ, which became effective on July 1, 2015, hereinafter “General Permit.”
10. New dischargers obtaining coverage under the General Permit on or after July 1, 2015 must submit a Notice of Intent (NOI) to the State Water Board at least seven (7) days prior to commencement of industrial activities. 40 C.F.R. § 122.28(b)(2); 2015 General Permit NOI Instructions.
11. Pursuant to CWA Section 309(g)(2)(A), 33 U.S.C. § 1319(g)(2)(A), and 40 C.F.R. Part 19.4, the EPA may assess a Class I civil administrative penalty of up to \$16,000 per day of violation, not to exceed \$37,500 in total, against a person for CWA Section 301(a) violations that occurred on or after December 6, 2013. For violations that occurred after November 2, 2015, where penalties are assessed on or after January 15, 2018, the EPA may assess a penalty up to \$21,393 per day of violation, not to exceed \$53,484 in total.

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

12. Respondent is a California corporation (California Corporate No. C1738638) and therefore, a person within the meaning of CWA Section 502(5), 33 U.S.C. § 1362(5). Respondent engages in refrigerated warehousing and storage activities at its “SEMCO Cooling” facility located at 20 Harris Street, Salinas, California (referred to in this CA/FO as “the Facility.”)
13. Respondent has operated the Facility since at least 2011, on an exact date best known to Respondent. Respondent’s operations at the Facility fall within activities classified under SIC Codes 2099 (Food Preparations, not elsewhere classified) and 4222 (Refrigerated Warehousing and Storage), and is therefore an “industrial activity” for purposes of CWA Section 402(p), 33 U.S.C. § 1342(p), and 40 C.F.R. § 122.26(b)(14)(xi).
14. Stormwater runoff from the Facility is a “storm water discharge associated with industrial activity” as defined by 40 C.F.R. § 122.26(b)(14)(xi).

15. Stormwater and/or process wastewater runoff from the Facility's outdoor industrial areas along the northern half of the Facility drains toward a single outlet (northern outlet) currently fitted with a mechanical plug, located along the northwest perimeter of the Facility. When the mechanical plug is in place (*i.e.*, during the agricultural growing season in Salinas between approximately April through November annually) stormwater runoff is detained in a sump and then pumped to an inlet that drains to the Monterey One Wastewater Treatment Plant. When the mechanical plug is removed during the off-season, stormwater-only discharges from the Facility to the City's municipal storm sewer system (MS4). The Facility's subsurface connection to the City's MS4 along its northwest perimeter and the City's MS4 are "point sources" within the meaning of CWA Section 502(14), 33 U.S.C. § 1362(14).
16. Stormwater and/or process wastewater generated in the Facility's outdoor industrial areas along the southern half of the Facility drain toward a single outlet (southern outlet), also currently fitted with a mechanical plug,¹ located along the southwest perimeter of the Facility. When the mechanical plug is in place (*i.e.*, during the agricultural growing season in Salinas between approximately April through November annually) process wastewater is directed to the Monterey One Wastewater Treatment Plant. During the off-season, the plug is repositioned so that only stormwater discharges from the Facility to the City's MS4. The Facility's subsurface connection to the City's MS4 along its southwestern perimeter and the City's MS4 are "point sources" within the meaning of CWA Section 502(14), 33 U.S.C. § 1362(14).
17. Discharges of pollutants in stormwater and/or process wastewater associated with cooling activities at the Facility may include calcium hypochlorite, organic peroxide, antimicrobial solution, multipurpose oil, and pollutants associated with used oil and filters, all of which meet the definition of a "pollutant" as either "biological materials" and/or "agricultural waste" under CWA Section 502(6), 33 U.S.C. § 1362(6).
18. Discharges of stormwater and/or process wastewater from the Facility to the City MS4 then discharge to Alisal Creek, a "waters of the United States" within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7).
19. Respondent's discharge of pollutants in stormwater and/or process wastewater into waters of the United States constitutes a "discharge of pollutants" within the meaning of CWA Section 502(12), 33 U.S.C. § 1362(12).
20. On November 18, 2016, EPA Region 9 representatives inspected the Facility to evaluate Respondent's compliance with the CWA. EPA inspectors found that Respondent had not submitted a NOI to the State Water Board for authorization to discharge industrial stormwater under the General Permit. In addition, EPA inspectors observed Respondent was actively discharging process wastewater to the City's MS4 because the southern outlet's diversion valve was not completely closed allowing flows to the MS4 rather than the Monterey One Wastewater Treatment Plant. EPA inspectors also observed that Respondent was not operating the Facility with the functional equivalent of a stormwater pollution prevention plan (SWPPP) and there was improper storage of chemicals and waste materials (one marked hazardous waste) exposed to precipitation without secondary containment, and oil staining on impervious surfaces near the outdoor industrial cooling equipment.

¹ Respondent installed the mechanical plug currently used to control discharge at the southern outlet following EPA's November 18, 2016 inspection (see paragraph 20, *infra*). At the time of EPA's inspection, Respondent was utilizing a diversion valve to control discharge.

21. On June 22, 2017, Respondent informed EPA that it had installed a pneumatic plug (and ceased relying on the diversion valve) behind the southern outlet to ensure all discharges of process wastewater were properly directed to the Monterey One Wastewater Treatment Plant when industrial activities occurred at the Facility. Respondent indicated it would deflate the pneumatic plug when the Facility was not in operation so that any stormwater discharges from the Facility would then flow to the City's MS4.
22. On June 27, 2017, the City issued an NOV/Order to Respondent for its failure to properly operate *i.e.*, adequately inflate, a second pneumatic plug at the northern outlet (already installed prior to EPA's November 18, 2016 inspection), which allowed for an illicit discharge of process wastewater to the MS4 that was observed during a City inspection of the Facility on June 21, 2017.
23. On May 17, 2018, the City issued another NOV/Order to Respondent for its failure to properly operate *i.e.*, adequately inflate, the pneumatic plugs at the southern and northern outlets, which allowed for an illicit discharge of process wastewater to the MS4 that was observed during a City inspection of the Facility on April 18, 2018. The May 17, 2018 NOV/Order also required the removal and replacement of both pneumatic plugs with the mechanical plugs that now exist at the southern and northern outlets (*see* paragraphs 15 and 16 above).
24. On June 15, 2018, Respondent submitted a NOI, SWPPP, Site Map, and permit fee, among other information, to the State Board to obtain authorization to discharge stormwater associated with industrial activities from the Facility. The State Board issued a receipt letter acknowledging Respondent's complete application and assigned Waste Discharge Identification Number 3 27I027761 to the Facility.
25. Between August 31, 2013, and June 15, 2018, at least twenty-nine (29) days with rainfall in excess of 0.5 inches were recorded at the Salinas Airport. Upon information and belief, each of these twenty-nine (29) rainfall events resulted in a discharge of stormwater from the Facility.

IV. ALLEGED VIOLATIONS

26. Between August 31, 2013 and June 15, 2018, Respondent violated CWA Section 301(a), 33 U.S.C. § 1311(a), on at least twenty-nine (29) days by discharging pollutants in stormwater from a point source into waters of the United States without NPDES permit authorization, and by discharging process wastewater from a point source without NPDES permit authorization on at least three (3) occasions on November 18, 2016, June 21, 2017 and April 18, 2018.

V. ADMINISTRATIVE PENALTY

27. In consideration of the penalty factors of CWA Section 309(g), 33 U.S.C. § 1319(g), Respondent shall pay to the United States a civil administrative penalty in the amount of twenty-eight thousand, nine hundred dollars (**\$28,900**) within thirty (30) calendar days of the Effective Date, as defined in Section X below, of this CA/FO.
28. 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 the 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.

29. To ensure proper credit, Respondent shall include the following transmittal information with the

penalty payment: (i) Respondent's name (as it appears in 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.

30. Concurrent with the payment, Respondent shall send a true and correct copy of the payment and accompanying transmittal information to the following addresses:

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

Rich Campbell, Attorney-Advisor
Office of Regional Counsel (ORC-2)
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

31. 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.
32. Pursuant to CWA Section 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 CA/FO's Effective Date. 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.

VI. APPLICABILITY

33. 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.

VII. RESPONDENT'S ADMISSIONS AND WAIVERS

34. 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. admits the facts stipulated in the consent agreement;

- 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.

VIII. RESERVATION OF RIGHTS

- 35. 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.
- 36. 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.

IX. ATTORNEY FEES AND COSTS

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

X. EFFECTIVE DATE AND TERMINATION

- 38. 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 the Final Order, as signed by the Regional Judicial Officer, is filed with the Regional Hearing Clerk. This CA/FO shall terminate when Respondent has complied with the CA/FO's requirements in full.

XI. PUBLIC NOTICE

- 39. Pursuant to CWA Section 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.
- 40. Pursuant to CWA Section 309(g)(1), 33 U.S.C. § 1319(g)(1), the EPA has consulted with the State of California regarding this penalty action.

For Respondent American Cooling, Inc.:

Michael Azzopardi /s/
Name

08/30/2018
Date

President
Title

