



PORTLAND OREGON

JOSEPH A. FIELD*
R. SCOTT JERGER* †
MATTHEW A. ARBAUGH*
JONATHAN C. SMALE
TAKASHI HASHIMOTO* °

* ALSO ADMITTED IN WASHINGTON
† ALSO ADMITTED IN TEXAS
° OF COUNSEL

April 24, 2014

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Mayor Hancock
City and County of Denver
1437 N. Bannock St., Room 350
Denver, CO 80202

City Clerk
City and County of Denver
201 W. Colfax Ave., Dept. 101
Denver, CO 80202

Office of the City Attorney
City and County of Denver
Attention: Shaun Sullivan, Esq.
1437 Bannock St., Room 353
Denver, CO 80202

Re: NOTICE OF INTENT TO FILE SUIT FOR VIOLATIONS OF THE FEDERAL CLEAN WATER ACT

Dear Mr. Hancock, City Clerk, and Mr. Sullivan:

I am writing on behalf of WildEarth Guardians (Guardians) to inform you that Guardians intends to file a citizen suit in federal court against the City and County of Denver for violations of Section 301(a) of the federal Clean Water Act (CWA) relating to illegal pollutant discharges under Section 505(a) of the CWA. 33 U.S.C. § 1311(a); 1365(a) described below.

As discussed in detail below, Guardians believes that the City and County of Denver is jointly and severally liable with IRG Bayaud, LLC (IRG) for all of the alleged violations in this Notice letter. Guardians intends to file suit against you for violations of the CWA that have resulted from illegal discharges from your property located at 1271 W. Bayaud Ave., Denver, CO 80223, the former General Chemical Corporation-Denver Works site (Facility). The Facility discharges pollutants into the South Platte River from a seep along the western bank of the South Platte River and from hydrologically connected groundwater that contains pollutants leached from the soil under the Facility. This constitutes a discharge of pollutants to waters of the United States

under the CWA. On the basis of the facts and law explained below, Guardians intends to file suit in federal court for the District of Colorado against you sixty days from the date of this notice. Guardians is a non-profit, public interest, environmental advocacy and conservation organization with a major office in Denver, Colorado. Guardians' mission is to protect and restore wildlife, wild rivers and wild places in the American West. Guardians has over 40,000 members and activists, many of whom live, work, and recreate in areas affected by the CWA violations described herein.

The intent of this action is to enforce violations of the CWA that have occurred and which are continuing to occur from the Facility and present significant threats to public health and the environment. The Facility for many years has consistently violated effluent limitations and other conditions of its water quality discharge permit and these violations are ongoing.

As you know, the City and County of Denver purchased the Facility from IRG in 2009 after IRG completed a low-cost remediation of the Facility that included the installation of a low permeable soil cap. As part of the clean-up process, IRG assumed ownership of the National Pollutant Discharge Elimination System/Colorado Discharge Permit System Permit No. CO0046329 (NPDES Permit or Permit) that regulates pollutant discharges from the Facility into the South Platte River.

As you also know, IRG, on January 31, 2014, renounced all obligations under the existing Permit stating that it would no longer perform any of its monitoring, sampling, or reporting obligations under the Permit.¹ This includes monthly monitoring and reporting of pollutant discharge concentrations for pH, aluminum, arsenic, cadmium, copper, manganese, and zinc; the submittal of monthly Discharge Monitoring Reports (DMRs) to the Colorado Department of Public Health and the Environment (Division); performance of quarterly Whole Effluent Toxicity (WET) testing to test acute effects on aquatic organisms from exposure to toxic metals; and the performance of Preliminary Toxicity Incident/Toxicity Identification Evaluation investigations or accelerated testing as required by the Permit. By failing to abide by the permit since January 31, 2014, IRG has also failed to properly maintain and operate all pollution treatment and control systems necessary to comply with the Permit. IRG has been out of compliance with its permit since its inception and each day constitutes a separate and distinct violation.

Yesterday, Guardians filed a CWA enforcement lawsuit against IRG and its managing individuals. As an owner and an operator of the facility, the City and County of Denver is jointly and severally liable with IRG for all of the alleged violations in this Notice letter. At the end of 60 days, Guardians intends to join the City and County of Denver in the current litigation against

¹ IRG's legal position is that the discharges from your Facility are no longer covered by an NPDES permit. While Guardians and the Division disagree with IRG's legal opinion, this opinion has significant legal implications for the City and County of Denver as it results in the possibility that the City and County of Denver is now liable for unpermitted discharges from the Facility. Guardians alleges, in the alternative to the allegations described in this letter, that the City and County of Denver is liable for all unpermitted discharges from the Facility (should a court find that there is no NPDES permit in effect).

IRG in federal district court. The City and County of Denver has been intimately involved in the clean-up of the Facility, the management of the Facility, and the supervision of IRG's activities at the Facility. Specifically, and in regard to the renunciation of the Permit, the City and IRG agreed that the Permit should be terminated and that the City and County of Denver and IRG shall consult with each other before taking any action relating to the Permit. See Post Closing Agreement Article 1, Section 1.1. An entity is the operator of a facility under the CWA where it has the power or capacity to (1) make timely discovery of discharges, (2) direct the activities of persons who control the mechanisms causing the pollution, and (3) prevent an abate damage. See *Apex Oil Co. v. US*, 530 F.2d 1291, 1293 (8th Cir. 1976); see also *Resurrection Bay Conservation Alliance v. City of Seward*, 2008 WL 508499 (D. Alaska 2008) (applying the *Apex Oil* test for operator liability to landowners in the CWA context). Here, the City and County of Denver's contractual agreements with IRG as well as its past course of conduct evidence that the City and County of Denver has knowledge of the Permit violations at the Facility, has directed IRG's remedial activities (or lack thereof), and has the ability to abate pollution from the Facility.

Guardians specifically intends to file suit against you for discharging acidic wastewater at levels that have exceeded and continue to exceed the legally binding effluent limitations for pH in the Permit; for failing to perform WET testing and the follow up investigations triggered by failed WET tests as required by the Permit; and for failing to properly operate and maintain the Facility since 2009 but also especially by renouncing all Permit obligations on January 31, 2014. These violations are described in more detail below.

These violations are also described in the discharge monitoring reports (DMRs) and related documentation, data and correspondence that IRG has filed with the Division. The information below comes from IRG's DMRs as well as documents contained in the Division's files for the Facility. These files should be consulted if there is any question regarding the violations that are the subject of this notice.

The lawsuit will allege that these violations described herein violate Section 301(a) of the CWA, 33 U.S.C. § 1311 and its implementing regulations, which prohibit discharges in violation of an NPDES permit. This notice is a legally required pre-requisite to suit under Section 505 of the CWA, 33 U.S.C. § 505(b)(1)(A). Guardians alleges that the City and County of Denver is responsible and liable for the violations described here.

Guardians intends to seek civil penalties for each of the violations described below. As authorized under Section 309(d) of the CWA, 33 U.S.C. § 1319(d), as adjusted by 40 C.F.R. § 19.4, each of the violations listed below subjects the violator to a penalty of up to \$32,500 per day for violation days on or before January 12, 2009, and up to \$37,500 per day for violation days after January 12, 2009. In addition to seeking maximum civil penalties, Guardians plans to seek injunctive and declaratory relief to prevent further violations under Sections 505(a) and (d) of the CWA, 33 U.S.C. § 1365(a) and (d), and such other relief as is permitted by law. Guardians also intends to seek attorney fees and costs as prevailing parties are authorized to do under the CWA, 33 U.S.C. § 1365(d).

I. REPORTED EFFLUENT VIOLATIONS:

1. Numeric pH effluent limitations violations

The Facility has discharged acidic wastewater in violation of its permit effluent limitations for pH every month since IRG assumed ownership of the Permit. Discharges from the Facility have repeatedly and continuously exceeded allowable pollution permit limits for pH. The dates of these violations, the applicable permit limits and the reported discharges in excess of these limits are described below going back five (5) years (data is not available for 2014 since IRG stopped submitting DMRs):

Outfall 001-A pH: Daily maximum and minimum limit of 6.5 – 9 standard units

Discharge Dates (End of reporting period)	pH of reported discharges
12/31/13	5.13
11/30/13	5
10/31/13	5.43
9/30/13	5.68
8/31/13	4.89
7/31/13	5.39
6/30/13	4.41
5/31/13	4.33
4/30/13	4.67
3/31/13	4.69
2/28/13	4.92
1/31/13	4.61
12/31/12	4.25
11/30/12	3.77
10/31/12	3.85
9/30/12	4.25
8/31/12	4.18
7/31/12	4.13
12/31/11	4.58
11/30/11	6.11
10/31/11	6.11
9/30/11	5.76
8/31/11	4.83

7/31/11	4.54
6/30/11	4.52
5/31/11	4.86
4/30/11	5.81
3/31/11	5.72
2/28/11	5.68
1/31/11	5.85
12/31/10	6.21
11/30/10	5.13
10/31/10	5.09
9/30/10	5.01
8/31/10	4.49
7/31/10	4.2
6/30/10	4.34
5/31/10	3.97
4/30/10	4.08
3/31/10	4.28
2/28/10	4.48
1/31/10	4.59
12/31/09	4.65
11/30/09	5.67
10/31/09	5.27
9/30/09	4.52
8/31/09	4.26
7/31/09	3.84
6/30/09	3.06
5/31/09	6.24
4/30/09	6.14

2. Failure to comply with requirement for Whole Effluent Toxicity testing

The Permit requires Whole Effluent Toxicity (WET) testing on a quarterly basis. Permit at Part I.A.2(a) and at Part I.B.1. IRG has only performed WET testing in the 4th quarter 2013 in the last five (5) years. Additionally, on January 31, 2014 IRG stated that it will no longer perform the required quarterly WET testing (that it was not performing anyway). Guardians will assert that the Facility is in violation of this requirement since April 2009 (five years from the date of this notice letter) and continued to be in violation each and every day up through the date of this notice except for the 4th quarter 2013. Each quarter without a WET test is a separate and discrete violation.

Additionally, if the WET test fails, the NPDES Permit requires IRG to perform a Preliminary Toxicity Incident/Toxicity Identification Evaluation (PTI/TIE) investigation or an accelerated

testing using a single species found to be more sensitive. IRG has never performed PTI/TIE investigations or testing. Based on the Facility's consistent WET test failures, had IRG performed all required WET testing, these tests would have triggered the requirement to perform a PTI/TIE investigation or an accelerated testing using a single species found to be more sensitive. Each failure to perform PTI/TIE or accelerated testing constitutes a separate and distinct violation since April 2009 (including the failed WET test from 4th quarter 2013).

II. MONITORING AND REPORTING VIOLATIONS

IRG has failed to comply with multiple permit conditions that require reporting of the pH violations from the Facility listed in Section I above. First, IRG has not complied with permit condition in Part II.A.4(c) to provide notice to the Division containing information regarding the description and cause of noncompliance, period of noncompliance, and steps being taken to reduce and eliminate the non-compliance as described in Part II.A.4(a). A review of the Division's files support that no such reports were filed for any of the pH violations at issue.

Each day IRG failed to report the pH violations listed in Paragraph I above constitutes a separate and distinct violation of its permit and Section 301(a) of the CWA. The reporting violations under Part II.A.4(a) began at the time IRG submitted its DMRs for April 2009. All of these violations continued to occur each and every day since they began. Additional violations have occurred following each additional pH violation identified in Section I. All of these violations are ongoing and will continue after the date of this notice.

III. FAILURE TO PROPERLY OPERATE AND MAINTAIN

The applicable NPDES permit requires that IRG properly operate and maintain all pollution treatment and control facilities and systems that are necessary to comply with the effluent limits in the applicable NPDES permit. The fact that the Facility continues to regularly exceed allowable permit limits strongly supports that the facility is not being properly operated and maintained in violation of the Permit. Guardians believes this failure to properly operate and maintain is a consistent and ongoing violation, especially given the fact that IRG has renounced all permit obligations as of January 31, 2014. As a result, Guardians intends to file suit against you for each day that discharges have occurred from the Facility including each and every day during the time period from April 30, 2009 through the date of this notice.

IV. CONTACT INFORMATION

The full name, address, and telephone number of the party providing this notice is:

WildEarth Guardians
1536 Wynkoop Street, Suite 301
Denver, CO 80202
303-884-2702

The attorneys representing Guardians in this matter are:

Ashley Wilmes
WildEarth Guardians
1536 Wynkoop Street, Suite 301
Denver, CO 80202
859-312-4162

R. Scott Jerger
Field Jerger LLP
621 SW Morrison Street, Suite 1225
Portland, Oregon 97205
(503) 228-9115

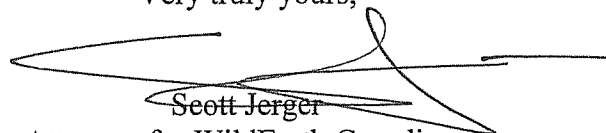
IV. CONCLUSION

The above-described violations are based upon the best information currently available to Guardians. The violations alleged above are ongoing, and we expect that discovery will identify additional violations. Discharges from the Facility have consistently violated and continue to violate the CWA and present a direct and substantial threat to the South Platte River. Guardians intends to sue for all violations, including those yet to be uncovered and those committed after the date of this notice. Due to the chronic and persistent nature of this Facility's violations, there is more than a reasonable likelihood of ongoing violations in the future.

All pollutant permit limits described above are described in Facility's Permit. Data regarding violations primarily came from the DMRs submitted for discharges from the Facility. If there is any information in this notice that you believe is inaccurate we would encourage you to bring this to our attention.

If you wish to discuss any aspect of this notice or the discuss options for resolving the illegal discharges described in this notice, please contact the undersigned. Because Guardians does not presently intend to delay amending the complaint past the end of the 60-day period, even if settlement negotiations are in progress at that time, any interest in such discussions should be expressed at your earliest possible convenience.

Very truly yours,



Scott Jerger
Attorney for WildEarth Guardians

Letter to City and County of Denver
April 24, 2014
Page 8

COPIES TO:

Hon. Gina McCarthy
Administrator, U.S. EPA
Ariel Rios Bldg.
1200 Pennsylvania Ave NW
Washington, D.C. 20460

Shaun McGrath
Regional Administrator
U.S. EPA Region 8
8OC-EISC
1595 Wynkoop Street
Denver, CO 80202-1129

Steven H. Gunderson, Division Director
Water Quality Control Division,
Colorado Department of Public Health and the Environment
4300 Cherry Creek Drive South
Denver, CO 80246