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13 **UNITED STATES DISTRICT COURT**

14 **NORTHERN DISTRICT OF CALIFORNIA**

15 **SAN FRANCISCO BAYKEEPER**, a  
16 California non-profit corporation,

17 Plaintiff,

18 v.

19 **AMPORTS, INC.**, a Delaware Corporation;  
20 **APS WEST COAST, INC.**, a Delaware  
21 Corporation; **BENICIA PORT TERMINAL  
COMPANY**, a Delaware Corporation; and  
22 **VALERO REFINING COMPANY –  
CALIFORNIA**, a Delaware Corporation

23 Defendants.

24 Civil Case No.:  
25

26 **COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF AND CIVIL  
PENALTIES**

- 27
- 28
- 1. Clean Water Act – Illegal Discharge of Pollutants
  - 2. Clean Water Act -- Failure to apply for NPDES Permit
  - 3. Clean Water Act – Failure to comply with NPDES Permit
  - 4. Clean Water Act – Illegal Storm Water Discharge
  - 5. Clean Water Act – Storm Water Discharges without Complying with Technology Based Effluent Limitations
  - 6. Clean Water Act – Discharges of Storm Water in Violation of Receiving Water Limitations
  - 7. Clean Water Act – Failure to Have a Valid Storm Water Pollution Prevention Plan
  - 8. Clean Water Act – Failure to Conduct Monitoring and Reporting
  - 9. Clean Water Act – Failure to Perform Annual Comprehensive Review of Storm Water Discharges
  - 10. Unfair Competition Law – Unlawful Conduct under Bus. & Prof. Code § 17200

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1        **I. INTRODUCTION**

2        1.        Federal law prohibits the discharge of pollutants into waters of the United States without  
 3 a valid permit, and California law prohibits the discharge of petroleum into its jurisdictional waters.  
 4 Defendants Amports, Inc., APS West Coast, Inc., and Benicia Port Terminal Company (collectively,  
 5 “Amports”), and Defendant Valero Refining Company (“Valero,” and with Amports, “Defendants”)  
 6 directly discharge petroleum coke into the Carquinez Strait at the Port of Benicia. Defendants do so  
 7 without a valid permit under the Clean Water Act and in violation of California law. San Francisco  
 8 Baykeeper brings this lawsuit to put an end to Defendants’ ongoing illegal conduct.

9        2.        Petroleum coke, or petcoke, is a byproduct of petroleum refining. Petcoke dust is small  
 10 particulate matter that is visible in the air, on the ground or other surfaces, and when it enters the water  
 11 appears as an oil-like sheen stretching across the surface. Petcoke is harmful and deleterious to aquatic  
 12 ecosystems, animal and plant species in and around waters, and poses risks to human health.

13        3.        Amports leases the Port of Benicia, including adjacent submerged tidelands, from the  
 14 City of Benicia (the “Port” or “Facility”). Among the activities at the Port is petcoke storage and ship  
 15 loading. When a ship is in the Port to be loaded with petcoke, Amports transports the petcoke from  
 16 storage silos, up a conveyor, into a crane, and then out of a nozzle into the cargo hold of the ship. During  
 17 that process, in addition to entering the ship’s cargo hold, petcoke is discharged: directly into the  
 18 Carquinez Strait as overspray; onto the deck of the ship and the nearby wharf as overspray; indirectly  
 19 into the Carquinez Strait, onto the ship, and onto the wharf from plumes of petcoke that escape from the  
 20 ship’s cargo hold due to remobilization; into the Carquinez Strait nearby the Facility, onto the ship, and  
 21 onto the wharf after travelling in plumes through the air; and onto the Facility and eventually into storm  
 22 water systems and the Bay during rain events. In addition, once full (requiring several iterations of the  
 23 loading process), the ship is hosed down and the petcoke on the ship is washed directly into the  
 24 Carquinez Strait. The Amports Defendants pay the employees who do the loading work, both at the Port  
 25 and on the ship.

26        4.        The discharge of petcoke into the Carquinez Strait causes harm to Baykeeper and its  
 27 members. Baykeeper’s members live near, recreate near, and use the waters of the Carquinez Strait and  
 28 nearby connected San Pablo Bay and Suisun Bay.

5. At the Port, Amports' activities specifically generate discharge of pollutants. These 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 of petcoke and pollutants off the deck of the ship and other loading-related equipment, 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, into jurisdictional waters, including petcoke that initially enters the ship's cargo hold, but is reanimated and escapes into the air and eventually water.

6. The petcoke that does not directly enter and remain in the cargo hold, but instead enters the Carquinez Strait, constitutes the illegal discharge of pollutants under both state and federal law. Baykeeper has documented on video numerous discharges of petcoke into the Carquinez Strait. During loading, petcoke enters the water, accumulates, and drifts away from the Port in the tide.



1       7. Defendants' conduct is ongoing. When a ship is loaded, illegal pollution enters San  
 2 Francisco Bay. Absent declaratory and injunctive relief, Defendants will keep polluting the Carquinez  
 3 Strait with petcoke, Baykeeper and its members will continue to be harmed, and the obvious and visible  
 4 pollution the petcoke loading operation causes will remain.

5       8. Defendants' conduct violates state and federal law, and this Court can and should enjoin  
 6 its illegal deposit and discharge of pollutants into the Bay Area's waters.

7       9. Baykeeper seeks a declaratory judgment, injunctive relief, the imposition of civil  
 8 penalties, and the award of costs, including attorney and expert witness fees, for Defendant's repeated  
 9 and ongoing violations.

10 **II. JURISDICTION AND VENUE**

11       10. This is a civil suit brought under the citizen suit enforcement provision of the Federal  
 12 Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* ("Clean Water Act" or "Act"). *See* 33 U.S.C. §  
 13 1365. This Court has subject matter jurisdiction over the parties and this action pursuant to 33 U.S.C.  
 14 section 1365(a)(1) and 28 U.S.C. sections 1331 and 2201 (an action for declaratory and injunctive relief  
 15 arising under the Constitution and laws of the United States).

16       11. Baykeeper also brings claims under California Business and Professions Code section  
 17 17200 to enjoin Amports' conduct which is unlawful and in violation of California Fish and Game Code  
 18 section 5650. This Court has supplemental jurisdiction over this claim under 28 U.S.C. section 1367.

19       12. On October 4, 2021, Baykeeper sent a 60-day notice letter ("Notice Letter") to Amports.  
 20 The Notice Letter informed Amports of their violations of the Clean Water Act at the Port and of  
 21 Baykeeper's intention to file suit. A copy of the Notice Letter is attached as Exhibit A and is  
 22 incorporated herein by reference. On December 20, 2021, Baykeeper sent a second 60-day notice letter  
 23 ("Second Notice Letter"). The Second Notice Letter was sent to Amports and to Valero. The Second  
 24 Notice Letter informed all Defendants of the ongoing violations of the Clean Water Act at the Port and  
 25 of Baykeeper's intention to file suit. A copy of the Second Notice Letter is attached as Exhibit B and is  
 26 incorporated herein by reference.

27       13. The Notice Letter was sent to the registered agent for Amports, Inc. as well as to  
 28 Amports, Inc.'s Benicia, California and Jacksonville, Florida offices. The Second Notice Letter was sent

1 to all three Amports entities, to their registered agents, to both the Benicia and Jacksonville offices of  
 2 the Amports entities, and to the registered agent of Valero Refining Company – California, to the San  
 3 Antonio headquarters of Valero, and to the refinery’s Director of Health, Safety, Environmental and  
 4 Regulatory Affairs in Benicia.

5       14. In addition, a copy of both the Notice Letter and Second Notice Letter were sent to the  
 6 U.S. Department of Justice, the Administrator of the U.S. Environmental Protection Agency (“EPA”),  
 7 the Regional Administrator of the EPA for Region 9, the State Water Resources Control Board, and the  
 8 San Francisco Bay Regional Water Quality Control Board (together, the “State and Federal Agencies”),  
 9 as required by the Clean Water Act, 33 U.S.C. § 1365(b)(1)(A).

10      15. More than sixty (60) days have passed since the Notice Letter and Second Notice Letter  
 11 were served on Amports, Valero, and the State and Federal agencies.

12      16. Baykeeper is informed and believes, and thereon alleges, that neither the EPA nor the  
 13 State of California has commenced or is diligently prosecuting an action to redress the violations alleged  
 14 in the Notice Letter and in this complaint. No claim in this action is barred by any prior administrative  
 15 action under section 309(g) of the Act, 33 U.S.C. § 1319(g).

16      17. Venue is proper in the Northern District of California pursuant to section 505(c)(1) of the  
 17 Clean Water Act, 33 U.S.C. § 1365(c)(1), because the source of the violations is located within this  
 18 judicial district.

19      18. Intradistrict assignment of this matter to the San Francisco Division or the Oakland  
 20 Division of the Court is appropriate pursuant to Civil Local Rule 3-2(d). The events or omissions which  
 21 give rise to Baykeeper’s claims occurred in Solano County, which is under the jurisdiction of the San  
 22 Francisco or Oakland Divisions of the Northern District of California.

23      **III. PARTIES**

24       **A. Plaintiff San Francisco Baykeeper**

25      19. Baykeeper, d/b/a/ San Francisco Baykeeper is a non-profit public benefit corporation  
 26 organized under the laws of the State of California with its office located at 1736 Franklin Street, Suite  
 27 800, Oakland, California, 94612. Baykeeper acts on behalf of its approximately 3,500 members who live  
 28 and/or recreate in and around the San Francisco Bay Area. Baykeeper’s mission is to defend San

1 Francisco Bay from the biggest threats and hold polluters and government agencies accountable to  
2 create healthier communities and help wildlife thrive. Its team of scientists and lawyers investigate  
3 pollution via aerial and on-the-water patrols, strengthen regulations through science and policy  
4 advocacy, and enforce environmental laws on behalf of the public. To further its mission, Baykeeper  
5 actively seeks federal and state agency implementation of the Clean Water Act, and, where necessary,  
6 directly initiates enforcement actions on behalf of itself and its members.

7       20. Members of Baykeeper reside in Benicia, California, as well as in many of the  
8 surrounding communities. Members of Baykeeper, including citizens, taxpayers, property owners, and  
9 residents live, work, and travel near San Francisco Bay and its tributaries, into which Amports  
10 discharges pollutants. Baykeeper's members and supporters use and enjoy San Francisco Bay and other  
11 waters for various recreational, educational, and spiritual purposes. Baykeeper's members' use and  
12 enjoyment of these waters are negatively affected by the pollution caused by the Facility's operations.

13       21. Specifically, Baykeeper members use the area around the Facility in the Carquinez Strait  
14 and nearby San Francisco Bay to bird watch, view wildlife, fish, kayak, sail, boat, stand up paddleboard,  
15 wade and swim, hike, bike, walk, run, and sightsee, as well as for aesthetic enjoyment. Additionally,  
16 Baykeeper and its members use local waters to engage in educational and scientific study through  
17 pollution and habitat monitoring and restoration activities.

18       22. The Facility's historic and ongoing discharge of pollutants into the Carquinez Strait in  
19 violation of the Clean Water Act have, are, and continue to adversely affect the interests of Baykeeper  
20 and its members.

21       23. The interests of Baykeeper's members have been, are being, and will continue to be  
22 adversely affected by Defendants' failure to comply with the Clean Water Act and California law. The  
23 relief sought herein will redress the harms to Plaintiff caused by Defendants' activities.

24       24. Baykeeper has one or more members who use, explore, and recreate in areas impacted by  
25 the pollution herein at issue and could sue in their own right.

26       25. Baykeeper brings this action on behalf of itself and its members. None of the claims  
27 brought by Baykeeper nor the relief Baykeeper requests requires the participation of individual  
28 members.

1       26. Baykeeper's injuries-in-fact are fairly traceable to Defendants' conduct and would be  
 2 redressed by the requested relief.

3       27. Baykeeper's work includes a long-term campaign to rid the San Francisco Bay of fossil  
 4 fuel pollution, including working specifically on petcoke related issues for over a decade. Baykeeper's  
 5 mission includes not only litigation, but also investigative work. Baykeeper investigates reports of  
 6 pollution from the public to document problems, identify sources of pollution, and determine how best  
 7 to address them. Baykeeper takes actions on these matters, including referral to regulatory agencies,  
 8 coordination with other non-profit groups, and sometimes litigation. Baykeeper also conducts advocacy  
 9 work related to petcoke, including in Richmond and elsewhere.

10      28. Defendants' petcoke pollution frustrates Baykeeper's mission. Baykeeper has diverted its  
 11 limited resources to investigate, research, gather documents from regulatory agencies, and consult with  
 12 experts in order to understand the causes and consequences of Defendants' ongoing pollution from the  
 13 Port into and around the Carquinez Strait. Baykeeper has dedicated substantial resources and time into  
 14 its work and investigation regarding Amports, Valero, and petcoke pollution at the Port. At the time  
 15 Baykeeper undertook its investigation into the Port, the resources spent were not related to any  
 16 litigation. Baykeeper would have used its limited resources on other matters had it not been for  
 17 Defendants' conduct.

18      29. Continuing commission of the acts and omissions alleged herein will cause irreparable  
 19 harm to Baykeeper and its members, for which there is no adequate remedy at law.

20      **B. Defendants**

21        *1. The Amports Entities*

22      30. Defendant Amports, Inc. is a Delaware corporation headquartered in Jacksonville,  
 23 Florida. Amports, Inc. is registered to do business in California. Amports, Inc. is a holding company that  
 24 owns Defendants APS West Coast, Inc. and Benicia Port Terminal Company. Amports, Inc.'s main  
 25 office is located at 10060 Skinner Lake Drive, Jacksonville, Florida, 32246. Its California office is  
 26 located at 1997 Elm Road, Benicia, California, 94510. Amports, Inc.'s CEO is Stephen Taylor, its  
 27 Secretary and CFO is Jacob Brown, and its Controller is Kimberly Dymond.

1       31.   Defendant APS West Coast, Inc. is a Delaware corporation headquartered in  
 2 Jacksonville, Florida. APS West Coast, Inc. is registered to do business in California. APS West Coast  
 3 Inc. has offices in both Jacksonville, FL and Benicia, CA at the same locations as Amports, Inc. APS  
 4 West Coast, Inc. has the same CEO, CFO, Secretary, and Controller as Amports. Upon information and  
 5 belief, APS West Coast, Inc. does business as “Amports.”

6       32.   Defendant Benicia Port Terminal Company is a Delaware corporation, headquartered in  
 7 Jacksonville, Florida, and registered to do business in California. Amports, Inc. is the owner of the  
 8 Benicia Port Terminal Company. Upon information and belief, Benicia Port Terminal Company  
 9 operates the Port, including hiring and paying the longshoreman who work on the ships. Benicia Port  
 10 Terminal Company has offices in both Jacksonville, FL and Benicia, CA at the same location as  
 11 Amports, Inc. and APS West Coast, Inc. Benicia Port Terminal Company has the same CEO, CFO,  
 12 Secretary, and Controller as Amports, Inc. and APS West Coast, Inc.

13       33.   Upon information and belief, Amports operates the Port of Benicia Terminal as a private  
 14 port. APS West Coast, Inc. leases the Port from the City of Benicia. The lease of the Port includes dry  
 15 lands as well as the tidal and submerged lands. The lease is currently set to continue until after 2030.  
 16 Upon information and belief, Valero has a sublease from APS West Coast, Inc. for a portion of the site,  
 17 which includes the petcoke storage silos and petcoke loading equipment.

18       34.   Generally, operations at the Port consist of unloading of imported vehicles, parking of  
 19 those vehicles, transferring shipments of petcoke from the Valero refinery via railcar into storage silos,  
 20 and a conveyor and crane to load petcoke into cargo ships.

21       35.   The Facility is located along the Carquinez Strait, just west of the Benicia-Martinez  
 22 Bridge on Interstate Highway 680. There are two addresses commonly used for the Facility, 1997 Elm  
 23 Road and 1270 Bayshore Road, both in Benicia, California, 94510.

24       36.   The Facility is a roughly 400-acre site which includes marine cargo loading equipment,  
 25 the petcoke loading equipment and conveyor system, parking for cars, docking area and equipment for  
 26 ships, silos to store petcoke, train car petcoke offloading area and equipment, vehicle maintenance,  
 27 equipment cleaning, ship cleaning, ship maintenance, and other facilities. According to Amports’ 2015  
 28 Notice of Intent to comply with the General Permit under the Clean Water Act, at least eight acres at the

1 Facility consisted of areas that were exposed to storm water. The 2015 Notice of Intent to comply was  
2 terminated by Amports in 2017. Upon information and belief, more than eight of the 400-acres at the  
3 Facility are exposed to storm water.

## 2. Valero

5       37. Defendant Valero Refining Company – California is a Delaware Corporation,  
6 headquartered in San Antonio, Texas, and registered to do business in California. Valero is the owner  
7 and operator of the Valero Refinery, located at 3400 East Second Street, Benicia, California, 94510. The  
8 petcoke being discharged at the Port is manufactured by Valero at the Valero Refinery. Rail cars  
9 transport the petcoke from the Valero Refinery to the Port of Benicia Terminal where the petcoke is  
10 transferred to silos for storage prior to loading.

38. When, in this complaint, reference is made to any act of the Defendants, such allegations  
shall be deemed to mean that the officers, directors, agents, employees, or representatives of said  
defendants did, or authorized such acts, or failed to adequately or properly supervise, control, or direct  
their employees and agents while engaged in the management, direction, operation, or control of the  
affairs of said business organization, and did so while acting in the scope of their employment or  
agency.

#### IV. LEGAL AND REGULATORY BACKGROUND

**A. California Law Prohibits the Deposition and Potential Deposition of Any Petroleum Substance to California's Waters**

20       39. The illegal discharge of petroleum or petroleum products is harmful and deleterious to  
21 water, wildlife, and people. In regulating or legislating around waters of the state of California, the state  
22 has broad authority to protect fishery resources and water quality, and the legislature has used the  
23 broadest possible language to effectuate the purpose of the law to protect wildlife resources from  
24 petroleum pollution.

25        40. For all petroleum and residuary products of petroleum, California Fish and Game Code  
26 section 5650 makes it unlawful to (1) deposit in, (2) permit to pass into, or (3) place where such  
27 products can pass into the waters of the state of California. *See* Fish & Game Code § 5650(a)(1).  
28 Petroleum and its byproducts may only be discharged if it is expressly authorized by and in compliance

1 with a waste discharge requirement, a waiver of a permit, a valid permit under the Clean Water Act or  
 2 state law, or a water quality certification. *See id.* § 5650(b). Section 5650 is a strict liability statute  
 3 designed to protect the waters of California from the deleterious and harmful effects of petroleum and  
 4 other pollution.

5       41.     California's Unfair Competition Law, California Business and Professions Code section  
 6 17200, bars any business activity that is (1) unlawful, (2) unfair, or (3) fraudulent. A business activity is  
 7 "unlawful" under the statute if the conduct violates any other state law. A violation of Fish and Game  
 8 Code section 5650(a) is unlawful conduct under Business and Professions Code section 17200. An  
 9 injured plaintiff, like Baykeeper, may obtain an injunction under section 17200 to stop ongoing unlawful  
 10 conduct.

11           **B.     The Clean Water Act Prohibits Discharges of Pollutants like Petcoke without a**  
 12           **Valid Permit**

13       42.     The Clean Water Act is the primary federal statute protecting surface waters in the United  
 14 States. The Act aims to prevent, reduce, and eliminate pollution in order to "restore and maintain the  
 15 chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

16       43.     In order to accomplish that goal, section 301(a), 33 U.S.C. § 1311(a), prohibits the  
 17 discharge of any pollutant into waters of the United States unless the discharger complies with other  
 18 enumerated sections of the Act, including the prohibition on discharges not authorized by, or in violation  
 19 of, the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant  
 20 to section 402, 33 U.S.C. § 1342(b). *See also* 40 C.F.R. § 122.26(c)(1) and General Permit, § I.A.12.

21       44.     The Act requires all point source discharges of pollutants to waters of the United States  
 22 be regulated by an NPDES permit. 33 U.S.C. § 1311(a); *see* 40 C.F.R. § 122.26(c)(1).

23       45.     The "discharge of a pollutant" means, among other things, the addition of a pollutant to  
 24 "waters of the United States" from any "point source." 40 C.F.R. § 122.2.

25       46.     The term "pollutant" includes "dredged spoil, solid waste, incinerator residue, sewage,  
 26 garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat,  
 27 wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste  
 28 discharged into water." 33 U.S.C. § 1362(6); 40 C.F.R. § 122.2.

47. The term “point source” means any “discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14); *see* 40 C.F.R. § 122.2.

48. Each discharge of a pollutant without a valid permit is a violation of the Clean Water Act.

49. Section 505(a)(1) of the Act provides for citizen enforcement against any “person” who is alleged to be in violation of an “effluent standard or limitation . . . or an order issued by the Administrator or a State with respect to such a standard or limitation.” 33 U.S.C. §§ 1365(a)(1), 1365(f).

50. A “person” under the Act includes individuals, corporations, partnerships, associations, States, municipalities, commissions, and political subdivisions of a State, or any interstate body. 33 U.S.C. § 1362(5). Defendants are persons under the Act.

51. “Effluent standard or limitation” is defined to include: (a) the prohibition in section 301(a) against unpermitted discharges; and (b) any condition of an NPDES permit such as the General Permit. 33 U.S.C. § 1365(f); *Citizens for a Better Env’t v. Union Oil Co.*, 83 F.3d 1111, 1114 (9th Cir. 1996) (“Private citizens may bring suit pursuant to 33 U.S.C. § 1365 to enforce effluent standards or limitations, which are defined as including violations of 33 U.S.C. § 1311(a). 33 U.S.C. § 1365(f)(1).”).

52. 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 statutory violation 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.

53. Section 505(a) of the Act authorizes third-party enforcement actions for injunctive relief. 33 U.S.C. § 1365(a). Section 505(d) allows a prevailing or substantially prevailing party in an enforcement action to recover litigation costs, including fees for attorneys, experts, and consultants where it finds that such an award is appropriate. 33 U.S.C. § 1365(d).

54. Generally, in California, permits for discharging storm water from industrial operations are issued by the Regional Board either in the form of a site specific NPDES Permit, or through compliance with the statewide Industrial General Permit.

1           **C. Storm Water Pollution Causes Significant Harm**

2       55. With every significant rainfall event, millions of gallons of polluted storm water  
 3 originating from industrial operations, like the Facility, flow into the San Francisco Bay Area's storm  
 4 drains, local waterways, wetlands and estuaries, San Francisco Bay, Carquinez Strait, Suisun Bay, San  
 5 Pablo Bay, and the Pacific Ocean.

6       56. The consensus among agencies and water quality specialists is that storm water pollution  
 7 accounts for more than half of the total pollution entering local creeks, rivers, and coastal waters each  
 8 year.

9       57. The San Francisco Bay, Carquinez Strait, Suisun Bay, San Pablo Bay, and their  
 10 connected surface waters are ecologically sensitive areas and are essential habitat for numerous  
 11 cetacean, fish, bird, and other species.

12      58. These waters also provide recreational activities, including fishing, swimming, surfing,  
 13 kayaking, and boating. They also provide non-contact recreational and aesthetic opportunities such as  
 14 biking, wildlife observation, educational activities, and opportunities for research.

15      59. Industrial facilities like Amports' that discharge storm water contaminated with  
 16 petroleum coke, sediment, particulate matter, dust, heavy metals, and other pollutants contribute to  
 17 impairment of waters and aquatic dependent wildlife, expose the people of Benicia to toxins, and harm  
 18 the special social, economic, and aesthetic benefits San Francisco Bay Area waters have for locals and  
 19 visitors from around the world.

20      60. Controlling polluted storm water and non-storm water discharges is essential to  
 21 protecting the San Francisco Bay Area's surface waters.

22           **D. California's General Permit**

23      61. Section 402(p) of the Act establishes the framework regulating industrial storm water  
 24 discharges under federal, and authorized state, NPDES permit programs. 33 U.S.C. § 1342(p).

25      62. Discharges composed entirely of storm water are exempt from the Act's permitting  
 26 requirements unless those discharges are associated with "industrial activity." *See* 33 U.S.C. §  
 27 1342(p)(1) and (2); *Natural Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1304-05 (9th Cir. 1992)  
 28 (detailing EPA's regulations regarding "industrial activity" sources). EPA's implementing regulations at

1 40 C.F.R. § 122.26 require NPDES permit authorization for facilities engaged in industrial activity that  
 2 discharge to waters of the United States.

3       63.     Section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b), establishes a framework for  
 4 regulating industrial storm water discharges under the NPDES program. States with approved NPDES  
 5 permit programs are authorized by section 402(b) to regulate industrial storm water discharges through  
 6 individual NPDES permits issued to dischargers and/or through the issuance of a single, statewide  
 7 general NPDES permit applicable to all industrial storm water dischargers. *See* 33 U.S.C. § 1342(b).

8       64.     In California, the State Water Resources Control Board (“State Board”) is charged with  
 9 regulating pollutants to protect California’s water resources.

10      65.     The General Permit is a statewide general NPDES permit issued by the State Board  
 11 pursuant to section 402 of the Clean Water Act, 33 U.S.C. § 1342(b), and 40 C.F.R. § 123.25. The  
 12 Industrial General Permit Order 2014-0057-DWQ, as amended in 2015 and 2018, as of July 1, 2020, is  
 13 the currently active General Permit for industrial stormwater discharges applicable in California.

14      66.     In order to discharge storm water lawfully in California, industrial dischargers must  
 15 secure coverage under the General Permit and comply with its terms, or obtain and comply with an  
 16 individual NPDES permit.

17      67.     The State Board elected to issue a statewide general permit for industrial storm water  
 18 discharges. The State Board originally issued the General Permit on or about November 19, 1991. The  
 19 State Board modified the General Permit on or about September 17, 1992. Pertinent to this action, the  
 20 State Board reissued the General Permit on or about April 17, 1997, and again on or about April 1, 2014,  
 21 pursuant to Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p). The current version of the  
 22 General Permit went into effect on July 1, 2015.

23      68.     In order to discharge storm water lawfully in California, industrial facilities must comply  
 24 with the terms of the General Permit or have obtained and complied with an individual NPDES permit.  
 25 33 U.S.C. § 1311(a).

26      69.     The General Permit contains several prohibitions. Effluent Limitation V(A) prohibits  
 27 discharges unless pollutants have been reduced or prevented through implementation of appropriate  
 28 technological measures. Discharge Prohibition III(C) prohibits storm water discharges and authorized

non-storm water discharges that cause or threaten to cause pollution, contamination, or nuisance. Receiving Water Limitation VI(B) prohibits storm water discharges to any surface or ground water that adversely impact human health or the environment. Receiving Water Limitation VI(A) and Discharge Prohibition III(D) prohibit storm water discharges that cause or contribute to an exceedance of any applicable water quality standards contained in Statewide Water Quality Control Plan or the applicable Regional Board's Basin Plan. In addition to absolute prohibitions, the General Permit contains a variety of substantive and procedural requirements that dischargers must meet.

70. Facilities discharging, or having the potential to discharge, storm water associated with industrial activity that have not obtained an individual NPDES permit must apply for coverage under the State's General Permit by filing a Notice of Intent to Comply ("NOI"). Dischargers have been required to file NOIs since March 30, 1992.

71. Compliance with the General Permit constitutes compliance with the Act for purposes of storm water discharges. 33 U.S.C. §§ 1311(b)(2)(A), 1311(b)(2)(E). Conversely, “[General] Permit noncompliance constitutes a violation of the Clean Water Act and the [California] Water Code.” General Permit, § XXI.A.

### *1. Technology-Based Effluent Limitations*

72. The General Permit requires dischargers to 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.”

73. The Effluent Limitations require dischargers to reduce or prevent pollutants associated with industrial activity in storm water discharges through the implementation of pollution controls. For toxic and non-conventional pollutants like petcoke, this requires the Best Available Technology Economically Achievable (“BAT”). *See General Permit, § V.A; see also 40 C.F.R. § 401.15 (listing toxic pollutants, including copper, cadmium, chromium, lead, and zinc).*

74. For conventional pollutants this requires the Best Conventional Pollutant Control Technology (“BCT”) (collectively, the technology based effluent limitations are referred to as “BAT/BCT”). See General Permit, § V.A; see also 40 C.F.R. § 401.16 (listing conventional pollutants, including biochemical oxygen demand, total suspended solids, oil and grease, pH, and fecal coliform).

1 The BAT/BCT requirements apply regardless of the quality of water to which a given facility  
 2 discharges, and set the floor for storm water pollution prevention. *See General Permit, § I.D.31.*

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

9       76. EPA has developed benchmark levels (“Benchmarks”) that are objective guidelines to  
 10 evaluate whether a permittee’s BMPs achieve compliance with the BAT/BCT standards. *See United*  
 11 *States Environmental Protection Agency NPDES Multi-Sector General Permit for Storm Water*  
 12 *Discharges Associated with Industrial Activity*, effective June 4, 2015, reissued and modified effective  
 13 March 1, 2021 (“Multi-Sector General Permit”); *Santa Monica Baykeeper v. Kramer Metals, Inc.*  
 14 (“*Kramer*”), 619 F. Supp. 2nd 914, 921 (C.D. Cal. 2009); *see also* 86 Fed. Reg. 10269 (Feb. 19, 2021);  
 15 80 Fed. Reg. 34403 (June 16, 2015); 73 Fed. Reg. 56572, 56574 (Sept. 29, 2008); 65 Fed. Reg. 64746,  
 16 64766-67 (Oct. 30, 2000).

17       77. The General Permit’s Numeric Action Levels (“NALs”), which are derived from EPA  
 18 Benchmark values published in the 2008 Multi-Sector General Permit, are objective numeric standards  
 19 relevant to evaluating whether BMPs designed and implemented at a facility achieve the statutory  
 20 BAT/BCT standard.

21       78. The discharge of storm water containing pollutant concentrations exceeding EPA  
 22 Benchmark targets and/or NALs evidence a failure to develop and implement pollution control  
 23 strategies that achieve pollutant reductions consistent with the BAT/BCT standard. *Kramer*, 619 F.  
 24 Supp. 2nd at 921-25; *see also* 80 Fed. Reg. 34403, 34405 (June 16, 2015).

25       79. EPA’s Industrial Stormwater Fact Sheet presents benchmark thresholds for pollutants that  
 26 may be present at the Facility. 2021 Permit, Fact Sheet Section VII Part 4.2.2.2 (2015 and 2021 MSGP  
 27 Benchmark Values and Sources). Such pollutants include Polycyclic Aromatic Hydrocarbons (PAHs),

Chemical Oxygen Demand (COD), Total Suspended Solids (TSS), pH, aluminum, lead, and zinc. See, e.g., 2021 Permit, Permit Part 8, Subparts C and Q.

## 2. Receiving Water Limitations

80. Section 303 of the Act, 33 U.S.C. § 1313, requires states to adopt Water Quality Standards, including water quality objectives and beneficial uses for navigable waters of the United States. The Act prohibits discharges from causing or contributing to a violation of such state Water Quality Standards. *See* 33 U.S.C. § 1311(b)(1)(c); 40 C.F.R. §§ 122.4(a), (d); 40 C.F.R. § 122.44(d)(1).

81. The State of California regulates water quality through the State Board and nine Regional Boards, and each Regional Board maintains a separate Water Quality Control Plan, which contains Water Quality Standards for water bodies within its geographic area.

82. The San Francisco Bay Regional Water Quality Control Board has adopted the “San Francisco Bay Basin (Region 2) Water Quality Control Plan” (“Basin Plan”), as amended by Resolution No. R2-2010-0100, which sets forth the Water Quality Standards and beneficial uses for San Francisco Bay and its tributaries. The Basin Plan is the “master water quality control planning document. It designates beneficial uses and water quality objectives for waters of the State, including surface waters and groundwater” as well as “programs of implementation to achieve water quality objectives.” See [https://www.waterboards.ca.gov/sanfranciscobay/basin\\_planning.html](https://www.waterboards.ca.gov/sanfranciscobay/basin_planning.html).

83. 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. 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).

84. The Basin Plan also provides the following water quality objectives:

a. 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.

b. 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.

c. 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.

d. 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.

e. Suspended Material – “Waters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses.” Basin Plan § 3.3.14.

f. 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.

g. 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.

85. The Basin Plan also defines beneficial uses. In the Basin Plan, the Carquinez Strait has beneficial uses for: (a) industrial service supply (IND); (b) navigation (NAV); (c) commercial and sport fishing (COMM); (d) water contact recreation (REC1); (e) non-contact water recreation (REC2); (f) estuarine habitat (EST); (g) wildlife habitat (WILD); (h) rare, threatened, or endangered species

(RARE); (i) migration of aquatic organisms (MIGR); and (j) spawning, reproduction and development (SPWN). *See* Basin Plan at Table 2-1.

86. Non-contact use is defined as “[u]ses of water for recreational activities involving proximity to water, but not normally involving contact with water where water ingestion is reasonably possible. These uses include, but are not limited to, picnicking, sunbathing, hiking, beachcombing, camping, boating, tide pool and marine life study, hunting, sightseeing, or aesthetic enjoyment in conjunction with the above activities. Water quality considerations relevant to non-contact water recreation, such as hiking, camping, or boating, and those activities related to tide pool or other nature studies require protection of habitats and aesthetic features.” Basin Plan at 2.1.16. Visible pollution impairs people’s use of the Carquinez Strait water contact recreation and noncontact water recreation.

87. The General Permit also includes additional Receiving Water Limitations that prohibit storm water discharges that cause or threaten to cause pollution, contamination, or nuisance. *See* 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. *See* 2015 Permit, Section VI.B.

88. The Carquinez Strait is also an impaired water under section 303(d), 33 U.S.C. § 1313(d), for Mercury. Mercury is a component of petcoke and is included in discharges from the Port, both of polluted storm water and directly from loading.

89. Storm Water Discharges from industrial facilities like Defendants' which cause or contribute to exceedances of Receiving Water Limitations in the General Permit and applicable water quality objectives must comply with the General Permit, or they violate the Clean Water Act.

### **3. The Storm Water Pollution Prevention Plan**

90. 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.

1       91. The objectives of the SWPPP include the identification and evaluation of sources of  
 2 pollutants associated with industrial activities that may affect the quality of storm water and non-storm  
 3 water discharges, and to implement site-specific BMPs to reduce or prevent pollutant concentrations in  
 4 discharges to levels that comply with the General Permit's technology-based Effluent Limitations and  
 5 Receiving Water Limitations. *See* General Permit, § X.C.

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

17       93. One important element of any SWPPP is the description of each industrial process  
 18 occurring at a facility, and the assessment of potential pollutant sources ("Source Evaluation and  
 19 Pollutant Assessment"). *See* General Permit, §§ X.C, X.F, X.G.

20       94. Each of the industrial processes and all industrial activities undertaken at the Facility are  
 21 pollutant sources that must be described and assessed for their potential contribution of pollutants in  
 22 storm water discharges in the SWPPP's Source Evaluation and Pollutant Assessment.

23       95. The SWPPP must be evaluated and revised at least annually to ensure ongoing  
 24 compliance. General Permit, § X.B. Any failure to develop, implement, or revise a comprehensive  
 25 SWPPP that contains all required elements is a violation of the General Permit, and creates liability  
 26 under the Act. General Permit, § X.B; *see also* General Permit, Fact Sheet § II.I.1.

27                  4. *The Monitoring Implementation Plan*

28       96. Permittees must develop and implement a storm water monitoring and reporting

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

9       97. Facility operators must complete storm water sampling and analysis. General Permit, §  
 10 XI.B. The General Permit requires the collection and analysis of two storm water samples from a  
 11 Qualifying Storm Event (“QSE”) between July 1 and December 31 of each reporting year, and two  
 12 samples from a QSE between January 1 and June 30 of each reporting year. Each sample must be  
 13 collected within four hours of the start of a discharge, or the start of facility operations if the QSE occurs  
 14 within the previous 12-hour period. General Permit, § XI.B.5.

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

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

1 XI.B.11.a.

2       100. Permittees that fail to develop and implement an adequate MIP that includes both visual  
 3 observations and sampling and analysis are in violation of the General Permit, and consequently the  
 4 Clean Water Act. General Permit, § II.J.3.

5                 *5. The Annual Comprehensive Facility Compliance Evaluation*

6       101. Permittees must complete an Annual Comprehensive Facility Compliance Evaluation  
 7 each reporting year. General Permit, § XV. The goal of the Compliance Evaluation is to ensure and  
 8 certify compliance with each of the General Permit's other mandates.

9       102. The Compliance Evaluation must include, at a minimum: (i) a review of all sampling,  
 10 visual observation, and inspection records conducted during the previous year; (ii) an inspection of all  
 11 areas of industrial activity and associated pollutant sources for evidence of pollutants entering the storm  
 12 water conveyance system; (iii) an inspection of all drainage areas previously identified as having no  
 13 exposure to industrial activities; (iv) an inspection of equipment needed to implement BMPs; (v) an  
 14 inspection of BMPs; (vi) a review and effectiveness assessment of all BMPs to determine if the BMPs  
 15 are properly designed, implemented, and are adequately reducing/preventing pollutants in storm water  
 16 discharges; and (vii) an assessment of any other factors needed to comply with the requirements of  
 17 Section XVI.B (i.e. Annual Report mandates). General Permit, § XV.

18       **V. FACTUAL ALLEGATIONS**

19                 **A. The Facility**

20       103. Amports runs the Port of Benicia Terminal. Amports' operations at the Facility consist of  
 21 a vehicle loading and offloading Facility, including parking, as well as the receipt, storage, and eventual  
 22 loading onto ships of petcoke, where it is generally transported to Asia for use in fuel power plants.

23       104. Near the terminal, there is a public access point to the Bay, a fishing pier, a public boat  
 24 marina, and a port, a wide variety of bird and fish species, and other potential recreational or  
 25 environmental uses that may be impacted by Amports' pollution.

26       105. The Valero Benicia Refinery processes domestic crude from the San Joaquin Valley in  
 27 California and the Alaska North Slope, along with foreign sour crudes. The refinery processes crude oil  
 28 by separating it into a range of hydrocarbon components or fractions. Petroleum fractions include heavy

1 oils and residual materials used to make asphalt or petroleum coke, mid-range materials such as diesel  
 2 (heating oil), jet fuel and gasoline, and lighter products, such as butane, propane, and fuel gases.

3       106. The petroleum coke from Valero's refinery is transported via railcar to silos at the  
 4 Amports Facility where it is stored. Amports then transfers the petcoke from the silos to a ship's hold by  
 5 way of a conveyor belt. Amports is permitted by the Bay Area Air Quality Management District  
 6 (BAAQMD) to process or deliver 2 million tons of petcoke to ships in any 12-month period. Upon  
 7 information and belief, between twelve and eighteen ships are loaded with petcoke by Amports in any  
 8 given year.

9           **B. The Petcoke Operation at the Facility Causes Direct Discharges of Pollutants into  
 10 the Carquinez Strait**

11       107. When Amports loads a ship with petcoke it causes discharges of petcoke directly into the  
 12 Carquinez Strait. Depending on the size of the ship, the number of active work shifts, and the rate at  
 13 which petcoke is sprayed from the conveyor system, it takes Amports several days and several separate  
 14 work shifts to load a ship. Amports loads as many as eighteen ships in a given year.

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

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

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

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

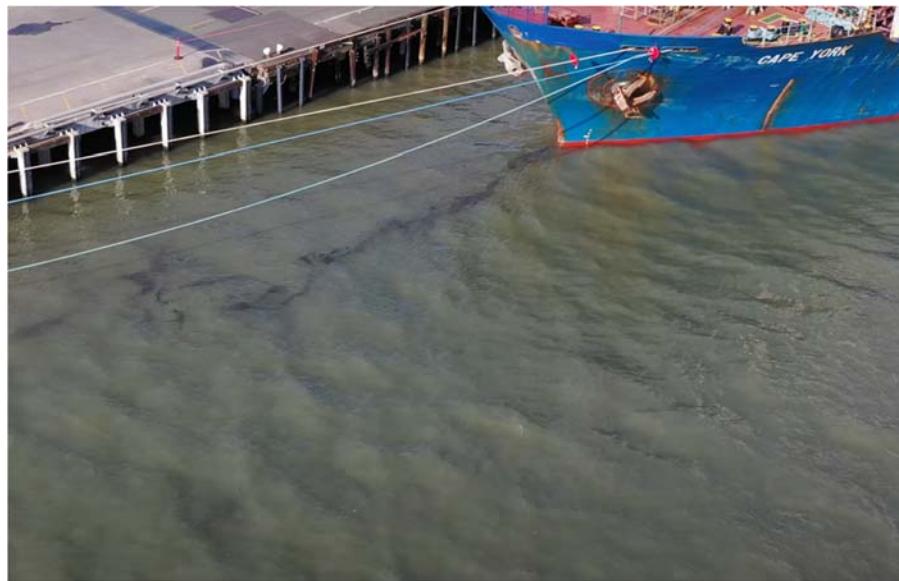
1       112. The below photos were obtained by Baykeeper through use of its drone showing petcoke  
 2 overspray, escape of particulate matter during petcoke loading, and petcoke in the water.



13 March 2021.



13 February 2021.



23 February 2021.

24       113. Fifth, depending on operational variables during loading (e.g., the product pore velocity  
 25 of the petcoke loading operations, BMP implementation), petcoke that has been loaded into the ship hull  
 26 is remobilized as aerial emissions that reenter the immediately surrounding atmosphere and then  
 27 discharges into the Carquinez Strait, and onto the ship, wharf, and Facility.

28       114. The discharged petcoke contains pollutants such as copper, zinc, nickel, arsenic, mercury,

and heavy metals which are harmful to aquatic life. The deposition of petcoke into San Francisco Bay is harmful and deleterious to the Bay.

115. The petcoke is discharged through a discrete conveyance system. 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 are point sources.

116. The Carquinez Strait is a water of the United States and a water of the state of California.

117. Amports does not have an NPDES permit authorizing its point source discharges of pollutants into the waters of the United States.

118. Amports' conduct is ongoing. Amports continues to load ships with petcoke despite receiving Baykeeper's Notice Letter. Upon information and belief, Amports is attempting to conceal its conduct by operating in part at night to prevent anyone from seeing the particulate matter pollution it generates and deposits into the water.

119. Upon information and belief, Amports continues to receive petcoke from Valero and will continue to do so, necessitating storage, loading, and pollution at the Facility and in the Carquinez Strait.

120. Absent injunctive relief requiring Amports to cease its unpermitted discharges, it will continue to discharge.

## C. Defendants Discharge Petcoke Laden Stormwater Associated with Industrial Activities

122. In addition to the direct discharges identified above, including direct discharges onto the wharf and ship, petcoke escapes and can be deposited onto the Facility or into the water during: (a) the offloading from train cars, (b) the movement of petcoke around the Facility, (c) storage at the Facility, (d) from equipment and vehicle cleaning, and (e) from equipment and vehicle maintenance or repair.

123. Once the petcoke is deposited on ships, docks, premises, and other nearby areas, it is mobilized and washed into the water during storm events with more than 0.1 inches of rain at the Port. For each qualifying storm event since October 2016, Defendants have illegally discharged polluted

1 storm water into waters of the United States. As a result, each time a sufficient rain event occurs,  
 2 Defendants discharge pollutants from industrial activity in storm water.

3       124. The petcoke pollution commingles with pollution from other industrial activities at the  
 4 Facility, all of which is discharged either into storm water systems or via sheet flow and eventually  
 5 reaches the Carquinez Strait.

6       125. Amports also has registered its storage of petcoke with the California Environmental  
 7 Protection Agency (“CalEPA”). Under CalEPA’s regulated site portal,  
 8 <https://siteportal.calepa.ca.gov/nsite/map/help/detail/5653/profile>, Amports’ Facility is registered as a  
 9 Chemical Storage Facility, operating under Standard Industrial Classification (“SIC”) code 4491  
 10 (Marine Cargo Handling). It also lists the hazardous material stored at the site as “tons” of petcoke,  
 11 along with smaller amounts of used lubricating oil, surfactant blend, petroleum lubricating oil, and  
 12 “Rando 15.” *Id.* at “Chemicals” tab (reproduced below).

Name	Max Daily Amount / Unit	Avg Daily Amount / Unit	Days Onsite	Physical State
used lubricating oil	120-599 Gallons	12-59 Gallons	365	Liquid
Surfactant blend	3000-5999 Gallons	1200-2999 Gallons	365	Liquid, Mi
Rando 15	12-59 Gallons	12-59 Gallons	365	Liquid, Mi
Petroleum Coke	Tons	Tons	365	Solid, Pur
petroleum lubricating oil	120-599 Gallons	60-119 Gallons	365	Liquid, Mi
oil sorbent pads	0-99 Pounds	0-99 Pounds	365	Solid
Multifak EP 2	0-11 Gallons	0-11 Gallons	365	Solid, Mix
Havoline Conventional Antifreeze/Coolant - concentrate	12-59 Gallons	12-59 Gallons	365	Liquid, Pu
Chevron Rando 46	0-11 Gallons	0-11 Gallons	365	Liquid, Mi
Chevron Meropa 220	120-599 Gallons	120-599 Gallons	0	Liquid, Mi
Chevron Automatic Transmission Fluid MD-3	0-11 Gallons	0-11 Gallons	365	Liquid, Mi

21       126. Amports’ operations at the Port are industrial activity under the Clean Water Act.

22 Amports’ industrial operations, activities, and locations at the Facility include, but are not limited to:  
 23 vehicle and equipment maintenance; vehicle and equipment cleaning; bulk material storage; material  
 24 storage and disposal areas; vehicle and equipment storage areas; shipping and receiving areas; loading  
 25 and unloading areas; driveway areas; maintenance areas; and the on-site material handling equipment  
 26 such as conveyors, forklifts, cranes, trucks, and vessels. The Facility also stores materials associated  
 27 with vehicle maintenance and equipment cleaning operations at the Facility.

1       127. The petcoke loading operation is a separate economic activity from the vehicle import,  
 2 export, and parking operation. Petcoke dust and pollutants associated with the petcoke operation at the  
 3 Facility spread throughout the site, including onto the vehicles that are loaded, unloaded, and stored. The  
 4 rail system associated with the petcoke operation also causes petcoke dust to be distributed on the tracks  
 5 and throughout the site.

6       128. Other facilities in the Bay Area that similarly store, load, or unload petcoke from railcars,  
 7 trucks, and ships, include the Levin Richmond Terminal Corp. facility in Richmond and the Koch  
 8 Carbon facility in Pittsburgh. Both of these facilities have classified themselves as industrial facilities  
 9 under the Clean Water Act and General Permit, using SIC Code 4491 – Marine Cargo Handling.

10      129. Prior to 2017, when describing its activities at the Facility to the San Francisco Bay  
 11 Regional Water Quality Control Board, Amports also classified its operations using SIC Code 4491 for  
 12 Marine Cargo Handling. This classification triggers compliance with the General Permit in California  
 13 for storm water discharges associated with industrial activity. In 2017, Amports filed a “Notice of  
 14 Termination” of its coverage under the General Permit. In the Notice of Termination, Amports stated to  
 15 the State Board that, “Amports no longer performs marine cargo handling as our current SIC code  
 16 suggests. A better description of our activities would include 7521 Automobile Parking, 4731  
 17 Arrangement of Transportation of Freight and Cargo and 7538 General Automotive Repair. It is our  
 18 understanding these codes do not require IGP [Industrial General Permit] coverage.” Notice of  
 19 Termination filed Dec., 2017.

20      130. This characterization of Amports’ activities was and remains incorrect due to Amports’  
 21 industrial activities at the Facility related to its handling of marine cargo, including automobiles and  
 22 petcoke. Because Amports is discharging storm water related to industrial activity, it is required to  
 23 comply with the General Permit. Its decision to terminate coverage makes its ongoing storm water  
 24 pollution illegal.

25      131. The discharge of pollutants from industrial facilities contributes to the impairment of  
 26 surface waters and aquatic-dependent wildlife. These contaminated discharges can and must be  
 27 controlled for ecosystems to regain their health and to protect public health.

28      132. A list of storm events generating more than 0.1” of rain at the Facility for the five years

1 leading to October 2021 was included with Baykeeper’s Notice Letter, and is incorporated herein. See  
 2 Exhibit A at p. 19 of 20.

3       133. The discharge of polluted storm water from the Facility causes or contributes to the  
 4 impairment of receiving waters.

5           **D. Amports Does Not Have any Valid NPDES Permit for its Direct and Indirect**  
 6           **Discharges, is not Covered by the General Permit, and Does not Comply with the**  
 7           **General Permit’s Requirements**

8       134. Amports does not currently have an NPDES permit authorizing discharges of petcoke  
 9 into the Carquinez Strait.

10      135. Amports’ 2015 Notice of Intent to Comply with the General Permit was Terminated by  
 11 Amports in 2017. Since its termination, Amports has not filed a Notice of Intent to comply with the  
 12 General Permit for its industrial storm water discharges.

13      136. Amports does not use BAT/BCT practices at the Facility to avoid or mitigate storm water  
 14 discharges.

15      137. Amports does not have a valid SWPPP, nor does it have any of the components of a  
 16 SWPPP that are necessary to comply with the General Permit.

17      138. Amports does not engage in reporting or monitoring of industrial storm water discharges  
 18 as required by the General Permit.

19      139. Amports does not conduct comprehensive evaluations related to industrial storm water  
 20 discharges from the Facility as required by the General Permit.

21      140. Amports’ Clean Air Act permits issued by BAAQMD do not relieve it of the  
 22 responsibility for complying with the Clean Water Act.

23           **E. Valero’s NPDES Permit for its Refinery Operations Does Not Allow the Discharge**  
 24           **of Petcoke into the Water**

25      141. For more than fifteen years, Valero has had an individual NPDES Permit associated with  
 26 its operation of the Valero Refinery. *See* NPDES CA0005550; *see also* Order R2-2020-0033 (adopting  
 27 permit , effective January 1, 2021) and Order No. R2-2015-0037 (adopting permit, effective October 1,  
 28 2015) (the “Refinery NPDES Permit”). Valero’s Refinery NPDES Permit does not cover the direct

discharge of petcoke into the Carquinez Strait that occurs during petcoke loading. Valero's Refinery NPDES Permit also does not cover storm water discharges originating from either the petcoke loading operation or the commingled storm water discharges containing petcoke pollution that occur from throughout the Facility. The storm water discharges occur throughout both the portion of the Facility leased by Amports, as well as the areas subleased from Amports to Valero. Valero's Refinery NPDES Permit does not allow for discharges of petcoke in storm water from the storage silos, loading operation, or on ship conduct or discharges, nor does it allow direct discharges of petcoke into the Carquinez Strait.

142. The area of storm water collection and discharge covered by Valero's Refinery NPDES Permit does not include the (1) automobile parking, (2) automobile washing and maintenance, (3) automobile offloading, or (4) any commingled petcoke discharge that results from the storage and loading of petcoke at the Port.

143. As part of Valero's SWPPP in connection with its Refinery NPDES Permit, Valero included limited management practices that were putatively intended to prevent petcoke from distributing throughout the Facility, entering the storm water, and entering the Carquinez Strait Directly. The existing management practices are not adequate BMPs to either prevent discharges or comply with the Clean Water Act.

144. Upon information and belief, the management practices described in the SWPPP (1) are not being implemented and/or (2) are being implemented improperly. As a result, the current and ongoing practices at the Facility allow for unauthorized discharges of petcoke into waters of the United States.

## **VI. CLAIMS FOR RELIEF**

## FIRST CAUSE OF ACTION

**Discharges of Pollutants to Waters of the United States without NPDES Permit Coverage in  
Violation of the Clean Water Act, 33 U.S.C. §§ 1311(a), 1365(a), and 1365(f)**

145. Baykeeper incorporates the allegations contained in the above paragraphs as though fully set forth herein.

146. Defendants discharged and continue to discharge pollutants from the Port of Benicia Terminal into waters of the United States without NPDES Permit coverage, in violation of Clean Water

Act section 301(a), 33 U.S.C. § 1311(a). When Defendants load a ship with petcoke, pollutants and petcoke dust are discharged from a point source into waters of the United States without a permit.

147. Defendants' violations of Clean Water Act section 301(a), 33 U.S.C. § 1311(a) are ongoing.

148. Defendants will continue to be in violation of the Clean Water Act each and every time pollutants are discharged directly into waters of the United States in violation of section 301(a) of the Act during ship loading. Each discharge is a separate and distinct violation of the Act.

149. By committing the acts and omissions alleged above, Defendants are subject to an assessment of civil penalties for each and every violation of the Clean Water Act occurring after October 2016 of up to \$56,460 per day.

150. An action for injunctive relief under the Clean Water Act is authorized by 33 U.S.C. § 1365(a). Continuing commission of the acts and omissions alleged above would irreparably harm Baykeeper and the citizens of the State of California, for which harm Baykeeper has no plain, speedy, or adequate remedy at law.

WHEREFORE, Plaintiff prays for judgment against Defendants as set forth below.

## **SECOND CAUSE OF ACTION**

## **Failure to Apply for NPDES Permit Coverage**

**(Violations of CWA Sections 301(a) and 402, 33 U.S.C. §§ 1311 and 1342)**

151. Baykeeper incorporates the allegations contained in the above paragraphs as though fully set forth herein.

152. CWA Section 402(p)(4)(A), 33 U.S.C. § 1342(p)(4)(A) and the implementing regulation found at 40 C.F.R. § 122.26(a)(1)(i), (c)(1), and (e)(1), require facilities discharging stormwater associated with industrial activity to obtain a NPDES permit.

153. 40 C.F.R. § 122.26(e)(1) and 122.26(e)(1) require dischargers of stormwater associated with industrial activity to apply for an individual permit or seek coverage under a promulgated stormwater general permit by October 1, 1992.

154. For at least the last five years, Defendants have operated and continue to operate a facility that engages in “industrial activity” as that term is defined in 40 C.F.R. § 122.26(b)(14).

155. During that time, Defendants have routinely discharged polluted stormwater and process wastewater associated with industrial activity from the Facilities to waters of the United States.

156. Therefore, since that time, Defendants have been obligated to apply for coverage under an individual or general NPDES permit.

157. As set forth above, Valero's Refinery NPDES Permit does not cover storm water discharges originating from either the petcoke loading operation or the commingled storm water discharges containing petcoke pollution that occur from throughout the Facility.

158. Once Defendants began discharging polluted stormwater associated with industrial activity to waters of the United States, each and every subsequent day on which Defendants failed to apply for permit coverage constitutes a separate and distinct violation of CWA Sections 301(a) and 402, 33 U.S.C. §§ 1311(a) and 1342.

WHEREFORE, Plaintiff prays for judgment against Defendants as set forth hereafter.

## **THIRD CAUSE OF ACTION**

## **Failure to Comply with the Terms of an NPDES Permit**

**(Violations of CWA Sections 301(a) and 402, 33 U.S.C. §§ 1311 and 1342)**

159. Baykeeper incorporates the allegations contained in the above paragraphs as though fully set forth herein.

160. When Defendants load a ship with petcoke, pollutants and petcoke dust are discharged from a point source into waters of the United States in violation of Valero's Refinery NPDES permit.

161. The pollutants that cause or threaten to cause pollution, contamination, or nuisance, in violation of Valero's Refinery NPDES Permit, discharge during and/or after every significant rain event or any other storm water discharge from the Facility in the last five years.

162. Examples of such violations include:

a. The discharge of wash water or other process wastewater to the Carquinez Straight in violation of the Refinery NPDES Permit's prohibition of “[t]he bypass of untreated or partially-treated wastewater to waters of the United States is prohibited, except as provided for in the conditions stated in Attachment D section I.G.” (Refinery NPDES Permit at III.C; 2015 Order at p. 7; 2020 Order at p. 6);

1                   b.         The failure to implement reasonable BMPs in violation of the Refinery NPDES  
 2 Permit's requirement that “[t]he Discharger shall take all reasonable steps to minimize or prevent any  
 3 discharge or sludge use or disposal in violation of this Order that has a reasonable likelihood of  
 4 adversely affecting human health or the environment. (40 C.F.R. § 122.41(d).)” (Refinery NPDES  
 5 Permit, Attachment D, at I.C; 2015 Order at D-1; 2020 Order at D-1); and,

6                   c.         The violation of Receiving Water Limitations that include floating material,  
 7 alteration of suspended sediment, suspended material in concentrations that cause nuisance or adversely  
 8 affect beneficial uses, bottom deposits, temperature, turbidity, coloration, visible, floating, suspended, or  
 9 deposited oil or other products of petroleum origin, and toxic substances (Refinery NPDES at V.A; 2015  
 10 Order at 10, 2020 Order at 9-10); the discharge of pollutants that cause a violation of “water quality  
 11 standard[s] for receiving waters adopted by the Regional Water Board or the State Water Resources  
 12 Control Board (State Water Board) as required by the CWA and regulations adopted thereunder”  
 13 (Refinery NPDES Permit at V.C; 2015 Order at 11; 2020 Order at 10).

14                  163. Defendants' discharges of contaminated storm water and its violations of Valero's  
 15 Refinery NPDES Permit and the Clean Water Act are ongoing. Defendants will continue to be in  
 16 violation of the Refinery NPDES Permit and the Clean Water Act each and every time contaminated  
 17 storm water discharges from the Facility. Each discharge occurring without complying with the Refinery  
 18 NPDES Permit is a separate and distinct violation of section 301(a) of the Clean Water Act, 33 U.S.C. §  
 19 1311(a).

20                  164. Defendants are not in compliance with the Clean Water Act's disclosure requirements for  
 21 NPDES permit applications with regard to pollutants discharged in relation to Defendants' petcoke  
 22 loading operations.

23                  165. By committing the acts and omissions alleged above, Defendants are subject to an  
 24 assessment of civil penalties for each and every violation of the Clean Water Act occurring after October  
 25 2016 of up to \$56,460 per day.

26                  166. An action for injunctive relief under the Clean Water Act is authorized by 33 U.S.C. §  
 27 1365(a). Continuing commission of the acts and omissions alleged above would irreparably harm  
 28 Baykeeper and the citizens of the State of California, for which harm Baykeeper has no plain, speedy, or

1 adequate remedy at law.

2 WHEREFORE, Plaintiff prays for judgment against Defendants as set forth hereafter.

3 **FOURTH CAUSE OF ACTION**

4 **Discharges of Storm Water from Industrial Activity to Waters of the United States without  
5 Complying with the General Permit in Violation of the Clean Water Act, 33 U.S.C. §§ 1311(a),  
6 1342, 1365(a), and 1365(f)**

7 167. Baykeeper incorporates the allegations contained in the above paragraphs as though fully  
8 set forth herein.

9 168. Defendants discharged and continue to discharge storm water from the Port of Benicia  
10 Terminal that contains pollutants associated with industrial activity.

11 169. The pollutants that cause or threaten to cause pollution, contamination, or nuisance, in  
12 violation of the General Permit, discharge during and/or after every significant rain event or any other  
13 storm water discharge from the Facility in the last five years.

14 170. Defendants' discharges of contaminated storm water and its violations of the General  
15 Permit and the Clean Water Act are ongoing. Defendants will continue to be in violation of the General  
16 Permit and the Clean Water Act each and every time contaminated storm water discharges from the  
17 Facility absent compliance with the General Permit. Each discharge occurring without complying with  
18 the General Permit is a separate and distinct violation of section 301(a) of the Clean Water Act, 33  
19 U.S.C. § 1311(a).

20 171. By committing the acts and omissions alleged above, Defendants are subject to an  
21 assessment of civil penalties for each and every violation of the Clean Water Act occurring after October  
22 2016 of up to \$56,460 per day.

23 172. An action for injunctive relief under the Clean Water Act is authorized by 33 U.S.C. §  
24 1365(a). Continuing commission of the acts and omissions alleged above would irreparably harm  
25 Baykeeper and the citizens of the State of California, for which harm Baykeeper has no plain, speedy, or  
26 adequate remedy at law.

27 WHEREFORE, Plaintiff prays for judgment against Defendants as set forth hereafter.

## **FIFTH CAUSE OF ACTION**

**Discharges of Contaminated Storm Water to Waters of the United States without Complying with Technology Based Effluent Limitations in Violation of the General Permit and the Clean Water Act, 33 U.S.C. §§ 1311(a), 1342, 1365(a), and 1365(f)**

173. Baykeeper incorporates the allegations contained in the above paragraphs as though fully set forth herein.

174. Baykeeper is informed and believes, and thereon alleges, that Defendants failed and continue to fail to implement BAT/BCT at the Facility.

175. Upon information and belief, the storm water discharged from the Facility contains pollutants above effluent limitations. Defendants failed and continue to fail to implement BAT/BCT at the Facility in violation of the General Permit.

176. Defendants will continue to be in violation of the General Permit and the Clean Water Act each and every time contaminated storm water discharges from the Facility in the absence of proper BAT/BCT practices as required by the General Permit. Each discharge is a separate and distinct violation of section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

177. Defendants have been in violation of the BAT/BCT requirements in the General Permit each day from October 2016 to present.

178. By committing the acts and omissions alleged above, Defendants are subject to an assessment of civil penalties for each and every violation of the Clean Water Act occurring after October 2016 of up to \$56,460 per day.

179. An action for injunctive relief under the Clean Water Act is authorized by 33 U.S.C. § 1365(a). Continuing commission of the acts and omissions alleged above would irreparably harm Baykeeper and the citizens of the State of California, for which harm Baykeeper has no plain, speedy, or adequate remedy at law.

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1 WHEREFORE, Plaintiff prays for judgment against Defendants as set forth hereafter.

2 **SIXTH CAUSE OF ACTION**

3 **Discharges of Contaminated Storm Water in Violation of the General Permit's Receiving Water  
4 Limitations and the Clean Water Act, 33 U.S.C. §§ 1311(a), 1342, 1365(a), and 1365(f)**

5 180. Baykeeper incorporates the allegations contained in the above paragraphs as though fully  
6 set forth herein.

7 181. Upon information and belief, Defendants have discharged and continue to discharge  
8 storm water from the Facility containing levels of pollutants that adversely impact human health and/or  
9 the environment in violation of Receiving Water Limitation (C)(1) of the General Permit during and/or  
10 after every significant rain event or any other storm water discharge from the Facility. These violations  
11 are ongoing.

12 182. Upon information and belief Defendants have discharged and continue to discharge storm  
13 water from the Facility containing levels of pollutants that cause or contribute to exceedances of water  
14 quality standards in violation of Receiving Water Limitation (C)(2) of the General Permit, during and/or  
15 after every significant rain event or other storm water discharge from the Facility. These violations are  
16 ongoing.

17 183. Defendants will continue to be in violation of the General Permit and the Clean Water  
18 Act each and every time storm water containing pollutants at levels that violate Receiving Water  
19 Limitation (C)(1) of the General Permit discharges from the Facility.

20 184. Defendants will continue to be in violation of the General Permit and the Clean Water  
21 Act each and every time storm water containing pollutants at levels in violation of Receiving Water  
22 Limitation (C)(2) of the General Permit discharges from the Facility.

23 185. Each and every violation of Receiving Water Limitation (C)(1) of the General Permit is a  
24 separate and distinct violation of section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

25 186. Each and every violation of Receiving Water Limitation (C)(2) of the General Permit is a  
26 separate and distinct violation of section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

27 187. By committing the acts and omissions alleged above, Defendants are subject to an  
28 assessment of civil penalties for each and every violation of the Clean Water Act occurring after October

2016 of up to \$56,460 per day.

188. An action for injunctive relief under the Clean Water Act is authorized by 33 U.S.C. § 1365(a). Continuing commission of the acts and omissions alleged above would irreparably harm Baykeeper and the citizens of the State of California, for which harm Baykeeper has no plain, speedy, or adequate remedy at law.

WHEREFORE, Plaintiff prays for judgment against Defendants as set forth hereafter.

## **SEVENTH CAUSE OF ACTION**

**Failure to Adequately Develop, Implement, and/or Revise a Storm Water Pollution Prevention Plan in Violation of the General Permit and Clean Water Act, 33 U.S.C. §§ 1311(a), 1342, 1365(a), and 1365(f)**

189. Baykeeper incorporates the allegations contained in the above paragraphs as though fully set forth herein.

190. Defendants have failed and continue to fail to adequately develop, implement, or revise a proper and appropriate SWPPP for the Facility in violation of the General Permit. This failure includes the lack of BMPs for the Facility to reduce pollutants in storm water discharges.

191. Defendants' violation of the General Permit based on Defendants' lack of a SWPPP constitutes a violation of the General Permit for every day from October 2016 to the present. Defendants' violation is ongoing, and Defendants will continue to violate the Clean Water Act for each day they do not develop, implement, and revise a qualifying SWPPP.

192. The SWPPP that is part of Valero's Refinery NPDES Permit does not relieve Amports of its obligations under the Clean Water Act, does not cover all of the industrial activity area at the Facility, and does not constitute a properly developed or implemented SWPPP.

193. Each and every violation of the General Permit's SWPPP requirements at the Facility is a separate and distinct violation of the Clean Water Act.

194. By committing the acts and omissions alleged above, Defendants are subject to an assessment of civil penalties for each and every violation of the Clean Water Act occurring after October 2016 of up to \$56,460 per day.

<sup>195.</sup> An action for injunctive relief under the Clean Water Act is authorized by 33 U.S.C. §

1 1365(a). Continuing commission of the acts and omissions alleged above would irreparably harm  
 2 Baykeeper and the citizens of the State of California, for which harm Baykeeper has no plain, speedy, or  
 3 adequate remedy at law.

4 WHEREFORE, Plaintiff prays for judgment against the Defendants as set forth hereafter.

5 **EIGHTH CAUSE OF ACTION**

6 **Failure to Adequately Develop, Implement, and/or Revise a Monitoring Implementation Program**  
 7 **in Violation of the General Permit and the Clean Water Act, 33 U.S.C. §§ 1311(a), 1342, 1365(a),**  
 8 **and 1365(f)**

9 196. Baykeeper incorporates the allegations contained in the above paragraphs as though fully  
 10 set forth herein.

11 197. Defendants have failed and continue to fail to adequately develop, implement, or revise a  
 12 qualifying and adequate Monitoring Implementation Program for the Facility in violation of the General  
 13 Permit and Clean Water Act.

14 198. Defendants' violation of the General Permit based on their lack of a qualifying and  
 15 adequate Monitoring Implementation Program constitutes a violation of the General Permit for every  
 16 day from October 2016 to the present. Defendants' violation is ongoing, and Defendants will continue to  
 17 violate the Clean Water Act for each day they do not develop, implement, and revise a qualifying  
 18 Monitoring and Reporting Program.

19 199. The Monitoring Implementation Program contained in Valero's Refinery NPDES Permit  
 20 does not relieve Amports of its obligations under the Clean Water Act, does not cover all of the  
 21 industrial activity area at the Facility, and does not constitute a properly developed or implemented  
 22 Monitoring Implementation Program.

23 200. Each and every violation of the General Permit's Monitoring Implementation Program  
 24 requirements at the Facility is a separate and distinct violation of the Clean Water Act.

25 201. By committing the acts and omissions alleged above, Defendants are subject to an  
 26 assessment of civil penalties for each and every violation of the Clean Water Act occurring after October  
 27 2016 of up to \$56,460 per day.

28 202. An action for injunctive relief under the Clean Water Act is authorized by 33 U.S.C. §

1 1365(a). Continuing commission of the acts and omissions alleged above would irreparably harm  
2 Baykeeper and the citizens of the State of California, for which harm Baykeeper has no plain, speedy, or  
3 adequate remedy at law.

4 WHEREFORE, Plaintiff prays judgment against the Defendants as set forth hereafter.

5 **NINTH CAUSE OF ACTION**

6 **Failure to Complete Annual Compliance Evaluations as Required by the General Permit in**  
7 **Violation of the General Permit and the Clean Water Act, 33 U.S.C. §§ 1311(a), 1342, 1365(a), and**  
8 **1365(f)**

9 203. Baykeeper incorporates the allegations contained in the above paragraphs as though fully  
10 set forth herein.

11 204. Baykeeper is informed and believes, and thereon alleges, that Defendants have failed to  
12 conduct or submit complete Annual Comprehensive Facility Compliance Evaluations to the Regional  
13 Board in violation of the General Permit.

14 205. Defendants have been in violation of the reporting requirements of the General Permit  
15 each day the Facility has operated without reporting. Defendants' violations of the Reporting  
16 Requirements of the General Permit and the Clean Water Act are ongoing.

17 206. Defendants have been in daily and continuous violation every day since at least October  
18 2016.

19 207. By committing the acts and omissions alleged above, Defendants are subject to an  
20 assessment of civil penalties for each and every violation of the Clean Water Act occurring after October  
21 2016 of up to \$56,460 per day.

22 208. An action for injunctive relief under the Clean Water Act is authorized by 33 U.S.C. §  
23 1365(a). Continuing commission of the acts and omissions alleged above would irreparably harm  
24 Baykeeper and the citizens of the State of California, for which harm Baykeeper has no plain, speedy, or  
25 adequate remedy at law.

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1 WHEREFORE, Plaintiff prays judgment against the Defendants as set forth hereafter.

2 **TENTH CAUSE OF ACTION**

3 **Violation of Unfair Competition Law, Cal. Bus. & Prof. Code § 17200**

4 209. Baykeeper incorporates the allegations contained in the above paragraphs as though fully  
5 set forth herein.

6 210. When petcoke is loaded onto a ship at the Facility, petcoke is deposited into the  
7 Carquinez Strait.

8 211. Defendants' method of transporting petcoke around and at the Facility, and then onto  
9 ships, places petcoke in locations where it can pass into the Carquinez Strait.

10 212. Defendants permit petcoke to pass into waters of the Carquinez Strait during loading and  
11 via storm water discharges from the Facility.

12 213. Depositing, allowing to pass into, or placing in a way that permits passage of petroleum  
13 or its residuary products like petcoke into waters of the state is illegal and unlawful in California under  
14 Fish and Game Code section 5650(a)(1).

15 214. Petcoke is a residuary product of petroleum. The petcoke loaded at the Port that illegally  
16 enters the Carquinez Strait comes from the Valero Refinery's petroleum processing operations.

17 215. The Carquinez Strait is a water of the State of California in addition to being a water of  
18 the United States.

19 216. Defendants' violations of Fish and Game Code section 5650, the General Permit,  
20 Valero's Refinery NPDES Permit, and the Clean Water Act each constitute unlawful conduct under  
21 section 17200.

22 217. Each Defendant is a person. See Bus. & Prof. Code § 17201.

23 218. Baykeeper and its members have been and will continue to suffer injury and harm as a  
24 result of Defendants' unlawful conduct. Baykeeper has suffered injury in fact and monetary harm  
25 because it has dedicated resources to investigating and stopping Defendants' conduct that would not  
26 have been necessary but for Defendants' illegal actions and which could have been used on other  
27 matters.

28 219. Defendants' ongoing pollution of petcoke into the Carquinez Strait frustrates Baykeeper's

1 mission.

2 220. This Court has jurisdiction to enjoin Defendants' unlawful conduct that violates Fish and  
3 Game Code section 5650(a)(1) under Business and Professions Code section 17203.

4 WHEREFORE, Plaintiff prays judgment against the Defendants as set forth hereafter.

5 **VII. PRAYER FOR RELIEF**

6 Plaintiff respectfully requests that this Court grant the following relief:

7 1. Judgment for Plaintiff in this matter enjoining Defendants' illegal conduct.

8 2. An order declaring

9 i. Defendants to have violated and to be in violation of the Clean Water Act for  
10 their unpermitted discharges of petcoke into the Carquinez Strait;

11 ii. Defendants to have violated and to be in violation of the Clean Water Act for  
12 their failure to obtain coverage under and comply with the General Permit;

13 iii. Defendants to have violated and be in violation of the Clean Water Act for their  
14 failure to have BAT/BCT pollution controls in effect;

15 iv. Defendants to have violated and be in violation of the Clean Water Act for their  
16 failure to develop, implement, or revise a valid SWPPP under the General Permit;

17 v. Defendants to have violated and be in violation of the Clean Water Act for their  
18 failure to develop, implement, and revise a compliant Monitoring Implementation  
19 Program;

20 vi. Defendants to have violated and be in violation of the Clean Water Act for their  
21 failure to conduct comprehensive annual compliance reviews of their Facility and  
22 storm water discharges; and

23 vii. A Court order declaring Defendants have violated and continue to violate  
24 California Fish and Game Code section 5650(a)(1).

25 3. A Court order enjoining Defendants from violating the substantive and procedural  
26 requirements of the General Permit and Sections 301(a) and 402 of the Clean Water Act, 33 U.S.C.  
27 §§ 1311(a), 1342.

28 4. A Court order enjoining Defendants from continuing their violations of Fish and Game

Code section 5650 pursuant to Business and Professions Code section 17203.

5. A Court order assessing civil monetary penalties for each violation of the Clean Water Act in the amount of \$56,460 per day per violation.

6. A Court order awarding Plaintiff its reasonable costs of suit, including attorney, witness, expert, and consultant fees, as permitted by Section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), and California Code of Civil Procedure section 1021.5.

7. And any other relief as this Court may deem just and appropriate.

DATED: March 1, 2022

SAN FRANCISCO BAYKEEPER

By: /s/ M. Benjamin Eisenberg  
M. BENJAMIN EISENBERG

DATED: March 1, 2022

SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Robert S. Perlmutter  
**ROBERT S. PERLMUTTER**

Attorneys for Plaintiff  
SAN FRANCISCO BAYKEEPER

1477941.1

# **EXHIBIT**

**A**



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 Act<sup>1</sup> (“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 Permit<sup>2</sup> (“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.

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

<sup>2</sup> 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.



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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.

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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.



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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

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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

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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. ACQE*, 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. ACQE*, 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.

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## 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

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Achievable (“BAT”) for toxic and non-conventional<sup>3</sup> pollutants like petcoke, and Best Conventional Pollutant Control Technology (“BCT”) for conventional<sup>4</sup> 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”)<sup>5</sup>—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.<sup>6</sup>

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

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

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

<sup>5</sup> 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.

<sup>6</sup> *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).

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(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

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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

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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

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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**

San Francisco Baykeeper  
1736 Franklin Street, Suite 800  
Oakland, California 94612  
(510) 735-9700

**IV. COUNSEL**

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

Eric Buescher, Senior Staff Attorney  
[eric@baykeeper.org](mailto:eric@baykeeper.org)

Ben Eichenberg, Staff Attorney  
[ben@baykeeper.org](mailto:ben@baykeeper.org)

**SAN FRANCISCO BAYKEEPER**  
1736 Franklin Street, Suite 800  
Oakland, California 94612  
(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,

## Notice of Violation and Intent to File Suit

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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.<sup>7</sup>

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.

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<sup>7</sup> 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.

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**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

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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.<sup>8</sup> 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

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

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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.

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Notice of Violation and Intent to File Suit

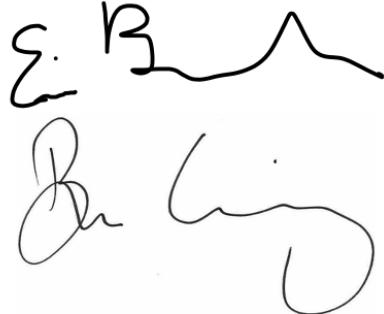
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## VII. CONCLUSION

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,

The image shows two handwritten signatures stacked vertically. The top signature is "E. B." followed by a stylized surname. The bottom signature is "Ben Eichenberg".

**San Francisco Baykeeper**

Eric J. Buescher

Ben Eichenberg

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**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		

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**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  
U.S. Environmental Protection Agency  
William Jefferson Clinton Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Deborah Jordan, Acting Regional Administrator  
U.S. Environmental Protection Agency, Region IX  
75 Hawthorne Street  
San Francisco, California 94105

Eileen Sobeck, Executive Director  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, California 95812-0100

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

# **EXHIBIT B**

**SHUTE MIHALY  
& WEINBERGER LLP**

396 HAYES STREET, SAN FRANCISCO, CA 94102  
 T: (415) 552-7272 F: (415) 552-5816  
[www.smwlaw.com](http://www.smwlaw.com)

ROBERT "PERL" PERLMUTTER  
 Attorney  
[Perlmutter@smwlaw.com](mailto:Perlmutter@smwlaw.com)

December 20, 2021

**Via Certified Mail / Return Receipt Requested**

<p><b><u>APS West Coast, Inc.</u></b></p> <p>CEO Stephen Taylor          10060 Skinner Lake Drive, 2nd Floor          Jacksonville, Florida 32246</p> <p>Jimmy D. Triplett          1997 Elm Road          Benicia, California 94510</p> <p>Agent for Service of Process          C T CORPORATION SYSTEM          (C0168406)          330 N Brand Blvd, Suite 700          Glendale, CA 91203</p>	<p><b><u>Amports, Inc.</u></b></p> <p>CEO Stephen Taylor          10060 Skinner Lake Drive, 2nd Floor          Jacksonville, Florida 32246</p> <p>Jimmy D. Triplett, Senior Vice President          Operations, West Coast          1997 Elm Road          Benicia, California 94510</p> <p>Agent for Service of Process          C T CORPORATION SYSTEM          (C0168406)          330 N Brand Blvd, Suite 700          Glendale, CA 91203</p>
<p><b><u>Benicia Port Terminal Company</u></b></p> <p>CEO Stephen Taylor          10060 Skinner Lake Drive, 2nd Floor          Jacksonville, Florida 32246</p> <p>Jimmy D. Triplett          1997 Elm Road          Benicia, California 94510</p> <p>Agent for Service of Process          C T CORPORATION SYSTEM          (C0168406)          330 N Brand Blvd, Suite 700          Glendale, CA 91203</p>	<p><b><u>Valero Refining Company – California</u></b></p> <p>CEO Joseph W. Gorder          One Valero Way          San Antonio, TX 78249-1616</p> <p>Donald Cuffel, Director of Health, Safety,          Environmental and Regulatory Affairs          3400 East 2nd Street          Benicia, CA 94510</p> <p>Agent for Service of Process          C T CORPORATION SYSTEM          (C0168406)          330 N Brand Blvd, Suite 700          Glendale, CA 91203</p>

APS West Coast, Inc.  
Amports, Inc.  
Benicia Port Terminal Company  
Valero Refining Company – California  
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**Re: Notice and Supplemental 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 Act<sup>1</sup> (“CWA” or “Act”) at the Port of Benicia Terminal located at 1997 Elm Road, Benicia, CA 94510 and 1007 Bayshore Road, Benicia, CA 94510 (“Facility” or “Port”). The purpose of this letter (“Notice Letter”) is to put Valero Refining Company – California (“Valero”) on notice, and to put Amports, Inc., APS West Coast Inc., and Benicia Port Terminal Company (collectively, “Amports”) on further 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 and Valero in U.S. Federal District Court.

The civil action will allege significant, ongoing, and continuing conduct at the Port resulting in violations of the Act, California’s General Industrial Storm Water Permit (“General Permit”),<sup>2</sup> and, if applicable, Valero’s NPDES Permit for the Benicia Refinery<sup>3</sup> (“Valero Refinery NPDES Permit”), 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.

## **I. Introduction**

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

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

<sup>2</sup> 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.

<sup>3</sup> NPDES Permit CA0005550, effective January 1, 2021, adopted by the San Francisco Bay Regional Water Quality Control Board Order R2-2020-0033, December 16, 2020.

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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.

Baykeeper's investigation of the Facility revealed that petcoke from the Valero Refinery is transported via rail to the Facility and is stored there in silos. The petcoke is transferred from the silos to a ship's hold at the Port by way of a covered conveyor system. During this process, the petcoke may escape in numerous ways, causing harmful pollutants to enter the Carquinez Strait.

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.

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.

Third, at the conclusion of the loading, - the deck of the ship, and the related loading equipment on and around the ship, are hosed off, 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.

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.

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On October 4, 2021, Baykeeper sent a Notice of Intent to Sue to Amports (“October 4 Notice Letter”) identifying a host of Clean Water Act violations related to the petcoke operation at the Port. Baykeeper incorporates that letter here, and a copy of that letter is enclosed as Attachment 2. For clarity, each of Amports, Inc., APS West Coast, Inc., and Benicia Port Terminal Company is responsible for the violations of the Clean Water Act identified in the October 4 Notice Letter and in this Notice Letter.

Baykeeper’s suit will allege that Amports does not have any valid Clean Water Act permit authorizing its role in the discharges of petcoke into the Carquinez Strait. Baykeeper’s suit will also allege that Valero’s NPDES Permit does not cover or allow the discharges Baykeeper has observed during petcoke loading operations, does not cover storm water discharges from the Port that are contaminated with petcoke dust, and does not cover Amports’ conduct. In the alternative, if Valero’s NPDES Permit does apply, Baykeeper’s suit will allege that the permit did not contemplate the type of pollution occurring at the facility, the management practices and controls that are required by the Permit are inadequate to prevent discharges, and such controls are being improperly implemented by Valero and Amports personnel in a way that allows significant ongoing discharges of petcoke into waters protected by the Clean Water Act.

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 health problems like asthma, lung cancer, and heart disease.

### **I. Amports is Required to have a Permit that Covers Petcoke Discharges**

As detailed in the October 4, 2021 Notice Letter, there are several different point source and industrial storm water discharges from the Port that require an NPDES Permit. These discharges arise both from the portions of the Facility where the car unloading and parking occurs, and from the petcoke loading operation. Amports does not have a site specific NPDES Permit, does not comply with or claim coverage under the General Permit, and is not covered by Valero’s NPDES Permit for the refinery.

APS West Coast, Inc., the successor to Benicia Industries, Inc., is the lessee of the Port facility from the City of Benicia. Upon information and belief, that lease, entered

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into in or around 1965, extends to 2031 and includes the area where the petcoke loading and storage occurs. Upon information and belief, Benicia Industries subleased the area of the petcoke storage silos and loading equipment to a predecessor of Valero in or around 1968.

Benicia Port Terminal Company is the entity in charge of operating the loading and of paying the longshoremen workers who work on the ship. Benicia Port Terminal Company is a subsidiary of Amports, Inc., and is the entity who pays workers who perform the petcoke loading at the Port.

As the operator of the Port and petcoke loading, Amports is required to have a permit, regardless of whether Amports or Valero owns the portion of the Port where the silos, crane, pier, and loading occur. *See 40 C.F.R. § 122.21(b).* Liability under the Clean Water Act is strict liability. Once a “discharge” is demonstrated, causation extends to any defendant with control, responsibility, or authority, or who was otherwise the legal cause of those discharges. Based upon Baykeeper’s investigation, Amports has sufficient operational involvement with the petcoke loading to have violated the Clean Water Act.

## **II. Valero’s NPDES Permit for the Refinery Does Not Cover Amports, Petcoke Loading, or Storm Water Discharges Associated with Industrial Activity at the Port**

Initially, because Amports operates the pet coke loading facility, Valero’s NPDES Permit does not cover Amports’ conduct. Permits protect only the conduct of the permittee and the permit shield defense under the Clean Water Act can only be asserted by the permit holder. As a result, even were Valero’s NPDES Permit to apply to the petcoke discharges, Amports still must obtain a specific NPDES Permit or comply with the General Permit.

Second, neither the Valero Refinery NPDES Permit nor the Regional Water Board’s order adopting it address or cover petcoke discharge into waters of the United States. Because the Permit does not address the discharges at all, discharges of petcoke directly into the water and discharges of storm water that are contaminated by petcoke are not discharges covered by Valero’s NPDES Permit.

Third, even if Valero’s Permit could be read to contemplate potential petcoke discharges or storm water from the petcoke storage and loading, the observed petcoke

APS West Coast, Inc.  
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discharges violate the Valero Refinery NPDES Permit. It does not allow for or contemplate the type of discharges observed by Baykeeper. Further, the Valero Refinery NPDES Permit explicitly disallows any discharges that are not described in the NPDES Permit and accompanying Order. *See* Valero Refinery NPDES Permit, Attachment F – Fact Sheet, § IV.A.1. Nothing in Valero’s Refinery NPDES Permit allows for discharges of petcoke into waters of the United States, let alone by Amports.

### **III. In the Alternative, the Discharges Associated with Petcoke Loading at the Port Violate Valero’s NPDES Permit**

If Valero’s NPDES Permit does in fact cover the petcoke loading operation, the evidence observed by Baykeeper demonstrates that any Best Management Practices (“BMPs”) to eliminate petcoke pollution or storm water runoff from the Port are ineffective, not being implemented, and inadequate. Upon information and belief, including based on information provided by Therese Cannata in her December 2, 2021, letter responding to the October 4, 2021 Notice Letter, the Storm Water Pollution Prevention Plan (“SWPPP”) associated with Valero’s NPDES Permit contains language related to BMPs related to petcoke storage and loading, and storm water discharges from the area around the silos and loading operation. Upon information and belief, the BMPs described in Valero’s SWPPP are insufficient to prevent petcoke from being discharged directly into the Carquinez Strait. Upon information and belief, those BMPs are not properly being implemented and/or are inadequate to prevent pollution of jurisdictional waters through petcoke loading.

Upon information and belief, Valero’s SWPPP also describes storm water discharges from the site by explaining that storm water around the petcoke loading and storage areas is not conveyed into any collection system or storm drain, but instead “sheets” off of the Site. Upon information and belief, the sheeting storm water which flows at the Site during rainstorms of at least 0.1” of rainfall locally (*see* dates listed in the attached October 4 Notice Letter, Attachment 1) contains petcoke dust and other pollutants. Because these pollutants are discharged into waters of the United States from an industrial site, Amports is required to have an NPDES Permit.

The SWPPP’s assertions that there is no petcoke in the storm water, and that the storm water discharges by “sheeting” rather than by collection in a storm drain system does not change that a permit is required. Because the petcoke loading operation is an

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industrial operation, any storm water that is discharged must be done pursuant to a permit, even if it is “sheeting” rather than a conveyance through a drain system.

In sum, for the reasons explained in the October 4, 2021 Notice Letter, as well as for the reasons identified in this letter, Amports, Inc., APS West Coast, Inc., and Benicia Port Terminal Company are required to have an NPDES Permit for their operation of the petcoke loading at the Port. Further, Valero’s NPDES Permit does not cover Amports’ conduct, does not cover the petcoke loading operation, and is not a defense under the Clean Water Act to Amports’ illegal discharges. Finally, and in the alternative, if Valero’s NPDES Permit does cover the petcoke discharges observed by Baykeeper, Valero and Amports are violating the terms of that NPDES Permit, are failing to properly identify and implement Best Management Practices, and are failing to properly report discharges of petcoke into the Carquinez Strait.

#### **IV. 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.

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**V. Name and Address of Noticing Party**

San Francisco Baykeeper  
1736 Franklin Street, Suite 800  
Oakland, California 94612  
(510) 735-9700

**VI. Counsel**

Baykeeper is represented by its counsel Robert “Perl” Perlmutter, Eric Buescher and Ben Eichenberg. All communications should be directed to counsel as follows:

Eric Buescher, Senior Staff Attorney  
[eric@baykeeper.org](mailto:eric@baykeeper.org)  
Ben Eichenberg, Staff Attorney  
[ben@baykeeper.org](mailto:ben@baykeeper.org)  
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Robert S. Perlmutter  
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396 Hayes Street  
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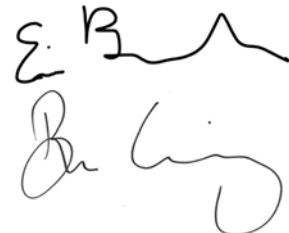
## VII. Conclusion

Baykeeper remains 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,



**Shute, Mihaly, & Weinberger, LLP**  
Robert Perlmutter



**San Francisco Baykeeper**  
Eric J. Buescher  
Ben Eichenberg

Enclosure

Cc: Therese Cannata (via e-mail only)

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**ATTACHMENT 1: 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  
U.S. Environmental Protection Agency  
William Jefferson Clinton Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Martha Guzman, Regional Administrator  
U.S. Environmental Protection Agency, Region IX  
75 Hawthorne Street  
San Francisco, California 94105

Eileen Sobeck, Executive Director  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, California 95812-0100

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

## **ATTACHMENT 2**



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 Act<sup>1</sup> (“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 Permit<sup>2</sup> (“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.

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

<sup>2</sup> 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.



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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.

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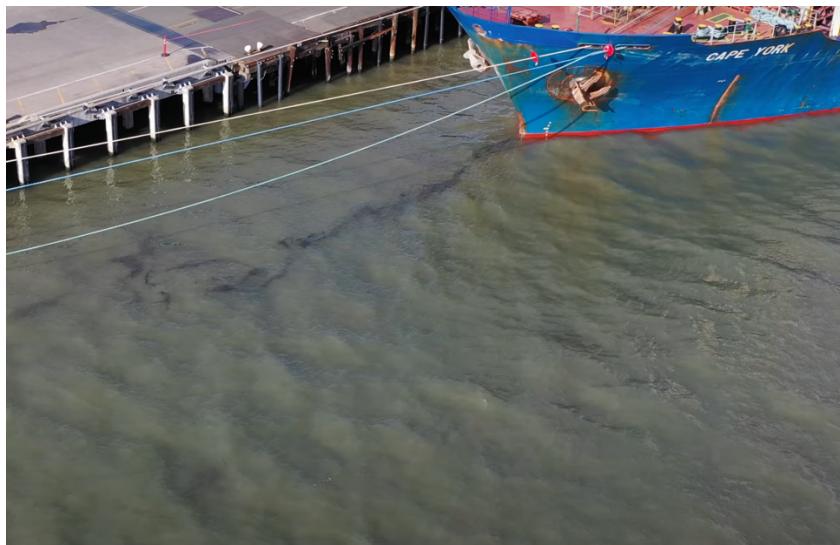
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First, petcoke spills off of the conveyor belt system and is deposited onto the wharf and directly into Carquinez Strait. This occurs while the crane boom is in the lowered position, and, as depicted below, continues as the boom is raised while the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

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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

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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

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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. ACQE*, 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. ACQE*, 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.

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**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

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Achievable (“BAT”) for toxic and non-conventional<sup>3</sup> pollutants like petcoke, and Best Conventional Pollutant Control Technology (“BCT”) for conventional<sup>4</sup> 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”)<sup>5</sup>—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.<sup>6</sup>

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

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

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

<sup>5</sup> 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.

<sup>6</sup> *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).

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(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

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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

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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

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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**

San Francisco Baykeeper  
1736 Franklin Street, Suite 800  
Oakland, California 94612  
(510) 735-9700

### **IV. COUNSEL**

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

Eric Buescher, Senior Staff Attorney  
[eric@baykeeper.org](mailto:eric@baykeeper.org)

Ben Eichenberg, Staff Attorney  
[ben@baykeeper.org](mailto:ben@baykeeper.org)

**SAN FRANCISCO BAYKEEPER**  
1736 Franklin Street, Suite 800  
Oakland, California 94612  
(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,

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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.<sup>7</sup>

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.

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<sup>7</sup> 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.

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**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

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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.<sup>8</sup> 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

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

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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.

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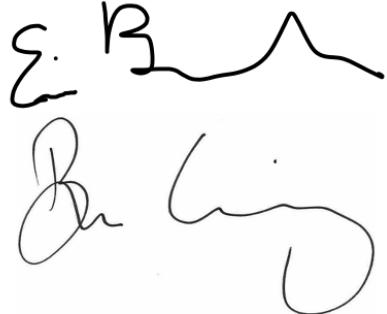
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## VII. CONCLUSION

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,

The image shows two handwritten signatures stacked vertically. The top signature is "E. B." followed by a stylized surname. The bottom signature is "Ben Eichenberg".

**San Francisco Baykeeper**

Eric J. Buescher

Ben Eichenberg

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**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		

Notice of Violation and Intent to File Suit

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**ATTACHMENT 2: SERVICE LIST**

VIA U.S. MAIL

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Michael Montgomery, Executive Officer  
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