



August 25, 2011

VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Linda Y.H. Cheng  
Agent for Service of Process  
Pacific Gas & Electric Company  
77 Beale Street, 32nd Floor  
San Francisco, CA 94105

Lee Cox, Interim President and CEO  
Pacific Gas & Electric Company  
One Market Spear Tower, Suite 2400  
San Francisco, CA 94105

***Re: Notice of Violation and Intent to File Suit Under the Clean Water Act and Resource Recovery and Conservation Act.***

Dear Sir and Madam:

California Sportfishing Protection Alliance ("CSPA") and Californians for Alternatives to Toxics ("CATs") (collectively "Citizen Groups") send this letter notifying you of Pacific Gas & Electric Company (hereinafter "PG&E" or "You")'s ongoing violations of the federal Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA") at PG&E's corporation yards and service centers ("the Facilities") located throughout Northern California.

As a result of industrial activities conducted at the Facilities, these Facilities are contaminated with numerous pollutants including, but not limited to, pentachlorophenol, polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans ("Dioxins"), hexachlorobenzene, polycyclic aromatic hydrocarbons ("PAHs"), polychlorinated biphenyls ("PCBs") creosote, phenol and cresols, ammonia, arsenic, chromium (including hexavalent chromium), dust, debris, various petroleum hydrocarbons such as gasoline and diesel fuel, various metals including copper, lead, barium, and zinc, elevated total suspended solids, elevated chemical oxygen demand, and pH exceeding environmentally safe ranges. These activities

include: (1) recycling of various materials which involves, among other things, collecting, sorting and storing piles and/or bins of scrap metal, (2), storing of piles of sand and gravel and other aggregate materials, (3) vehicle and equipment operation, vehicle fueling and maintenance, and vehicle storage, (4) various light industry activities related to metal fabrication and (5), storing and maintaining equipment and materials used in the installation and repair of its electrical and natural gas transmission and distribution systems at these Facilities. The most significant source of contamination at the Facilities is the storage, handling, and disposal of new and used utility poles and other wooden objects, including utility pole crossarms, that have been treated with various wood preservatives. The most environmentally hazardous of these wood preservatives is an oil-pentachlorophenol mixture. This pentachlorophenol mixture contains highly elevated levels of Dioxins. Dioxins are widely recognized by the US Environmental Protection Agency, the World Health Organization, and other governmental and nongovernmental organizations as among the most potent toxins known to humankind. Dioxins are well known to risk causing adverse human health effects and adverse effects on animal and plant life at extremely low concentrations. Even in minute quantities, Dioxins can cause cancer, mutations, developmental abnormalities, or fatality in exposed human, animal and plant populations. The site contamination at the Facilities poses significant risks to human health and the environment as contaminants present at the Facilities are widely dispersed into the environment by rainwater runoff, wind, and vehicle traffic.

This letter provides you notice of PG&E's unlawful discharge of pollutants from these thirty-nine (39) Facilities into waters of the United States and the ongoing and continuous violations of the substantive and procedural requirements of the Clean Water Act and National Pollution Discharge Elimination System ("NPDES") General Permit No. CAS000001 [State Water Resources Control Board] Water Quality Order No. 92-12-DWQ, as amended by Order No. 97-03-DWQ ("General Permit" or "State Board General Permit"). This letter further provides you notice of the imminent and substantial endangerment to human health and the environment caused by the handling, storage, treatment, transportation, or disposal of solid wastes at the Facilities in violation of RCRA section 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B). A complete list of the Facilities at issue in this letter is located in Exhibit 1.

CWA section 505(b) requires that sixty (60) days prior to the initiation of a civil action under CWA section 505(a), 33 U.S.C. § 1365(a), a citizen must give notice of his/her intent to file suit. Section 7002(b)(2)(A) of RCRA, 42 U.S.C. 6972 (b)(2)(A), requires that notice of intent to sue be given 90 days prior to initiation of a civil action under section 7002(a)(1)(B), 42 U.S.C. § 6972 (a)(1)(B). Notice must be given to the alleged violator, the U.S. Environmental Protection Agency, and the State in which the violations occur. As required by the CWA and RCRA, this Notice of Violation and Intent to File Suit provides notice of the violations that have occurred and which are continuing to occur at PG&E's Facilities.

It is unlawful to discharge pollutants to waters of the United States without an NPDES permit or in violation of the terms and conditions of an NPDES permit. Based on information available to the Citizen Groups, PG&E has not filed a Notice of Intent ("NOI") to be covered by the General Permit for any of the Facilities listed in Exhibit 1. Thus, PG&E's Facilities lack NPDES permit authorization for discharges of pollutants into waters of the United States. The

Citizen Groups believe that PG&E's Facilities have violated and are in violation of the General Permit and of the CWA's prohibition on the unpermitted discharge of pollutants. In addition, the Citizen Groups believe that PG&E's Facilities have violated and are in violation of RCRA as the discharges from PG&E's Facilities pose an imminent and substantial endangerment to health or the environment in violation of 42 U.S.C. § 6972(a)(1)(B). Consequently, PG&E is hereby placed on formal notice from the Citizen Groups that, after the expiration of sixty (60) days from the date of this Notice of Violation and Intent To File Suit, the Citizen Groups intend to file suit in federal court against PG&E under CWA section 505(a), 33 U.S.C. § 1365(a), for violations of the CWA. After the expiration of ninety (90) days from the date of this Notice of Violation and Intent To File Suit, the Citizen Groups intend to file suit in federal court against PG&E under RCRA section 7002(a)(1)(B), 42 U.S.C. § 6972 (a)(1)(B) for violations of RCRA.

## **I. The Noticing Parties**

CSPA is a 501(c)(3) non-profit public benefit conservation and research organization established in 1983 for the purpose of conserving, restoring, and enhancing the state's water quality, wildlife and fishery resources and their aquatic ecosystems and associated riparian habitats. To further these goals, CSPA actively seeks federal, state, and local agency implementation of environmental regulations and statutes and routinely participates in administrative, legislative and judicial proceedings. Where necessary, CSPA directly initiates enforcement actions on behalf of itself and its members to protect public trust resources. CSPA's address and contact information is as follows: California Sportfishing Protection Alliance, Bill Jennings, Executive Director, 3536 Rainier Avenue, Stockton, California, 95204; Phone: (209) 464-5067.

CATs was founded in 1982 by community groups from throughout northern California who wanted a regional resource center for information and action about hazardous chemicals, especially pesticides, and for promotion of non-toxic alternative. CATs' mission, therefore, is to enable its members and the public to gain control over pesticides and other toxic substance within the environment of California. CATs' address and contact information is as follows: Californians for Alternatives to Toxics, Patricia M. Clary, Executive Director, 315 P Street, Eureka, CA 95501; Phone (707) 445-5100.

## **II. The Noticed Party**

PG&E is a utility company that supplies electricity and natural gas to much of Northern California. PG&E owns, operates and maintains the Facilities to which this Notice Letter pertains.

## **III. Regulatory Background**

### **A. Clean Water Act**

Congress enacted the CWA "to restore and maintain the chemical, physical, and

biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). "Built on a 'fundamental premise' that the unauthorized 'discharge of any pollutant by any person shall be unlawful,' the CWA 'establishes a comprehensive statutory system for controlling water pollution.'" *Environmental Protection Information Center v. Pacific Lumber Co.* ("EPIC"), 301 F. Supp. 2d 1102, 1105 (N.D. Cal. 2004) (citations omitted). The CWA seeks to accomplish its objectives principally by regulating "point source" discharges of pollutants to waters of the United States. The CWA prohibits the discharge of any pollutant from a point source except as authorized by an NPDES permit. *See* CWA § 301(a), CWA § 402. The CWA and its implementing regulations require any person who discharges or proposes to discharge pollutants into waters of the United States in California to submit a National Pollutant Discharge Elimination System ("NPDES") permit application to the State Water Resources Control Board ("State Board"). 40 C.F.R. § 122.21(a) ["Duty to Apply"], §122.26(a)(ii) ["Permit Requirement"]; 33 U.S.C. § 1342(p)(2)(b).

The CWA generally requires that NPDES permits contain numerical "effluent limitations" on the amounts of specified pollutants that may be discharged. CWA § 402(a)(1). The CWA generally requires these effluent limitations to be set equal to the pollutant reduction attainable with various technologies or to the level needed to ensure attainment of water quality standards. *See, e.g.,* CWA §§ 301-307, 33 U.S.C. §§ 1311-1317; CWA § 502(11), 33 U.S.C. § 1362(11); *see Am. Mining Congress v. Env'tl. Protection Agency* ("AMC"), 965 F.2d 759, 761-62 (9th Cir. 1992).

## 1. The 1987 CWA Amendments

Polluted stormwater runoff into the nation's waters are a significant source of environmental pollution "at times comparable to, if not greater than, contamination from industrial and sewage sources." *Env'tl. Def. Ctr. v. EPA* ("EDC"), 344 F.3d 840, 841 (9th Cir. 2001). "Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States." *Id.* at 840-41. After enactment of the CWA in 1972, EPA promulgated regulations that would have exempted some stormwater discharges from CWA regulation. The D.C. Circuit vacated these regulations, holding that EPA lacked authority under the CWA to exempt any point sources from CWA NPDES regulation. *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977).

In 1987, Congress enacted the Water Quality Act which amended the CWA to add CWA § 402(p). CWA § 402(p) sets deadlines for EPA to issue NPDES permits regulating stormwater discharges. CWA section 402(p)(1) established a moratorium until October 1, 1994 on EPA issuance of NPDES permits for "discharges comprised entirely of stormwater." CWA § 402(p)(2) specifically excluded from this moratorium five categories of stormwater discharges, including "discharge[s] associated with industrial activity" and "discharge[s] for which the [EPA] Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." CWA § 402(p)(2)(B) & (E). CWA section 402(p)(6) further

required EPA to establish a comprehensive program and issue regulations by October 1993 that designated additional stormwater discharges "to be regulated to protect water quality" which had been covered by CWA section 402(p)(1)'s NPDES permit moratorium.

In response to the Water Quality Act, EPA promulgated regulations governing the issuance of NPDES permits to stormwater dischargers falling within CWA section 402(p)(2)'s list of non-exempt stormwater discharges in 1990 ("the Phase I Regulations"). *See* 55 Fed. Reg. 47,990 (Nov. 16, 1990); *EPIC*, 301 F. Supp. 2d at 1107. In 1999, in accord with CWA section 402(p)(6)'s mandate, EPA issued additional regulations governing the issuance of NPDES permits to facilities that had not been on the CWA section 402(p)(2) list of non-exempt facilities ("the Phase II Regulations"). *See* 64 Fed. Reg. 68,722 (Dec. 8, 1999); *EPIC*, 301 F. Supp. 2d at 1107.

## **2. The General Industrial Stormwater Permit**

The CWA authorizes EPA to grant authority to the states to issue NPDES permits in lieu of EPA-issued permits. CWA § 402(a)-(b). EPA delegated its NPDES permit-issuing authority to the California State Water Resources Control Board ("State Board") on May 14, 1973. *See* 39 Fed. Reg. 26,061 (July 16, 1974); *EPIC*, 301 F. Supp. 2d at 1105. In California, the State Board has elected to issue a single, statewide general permit applicable to all stormwater discharges associated with industrial activity, General Permit No. CAS000001, California State Water Resources Control Board Water Quality Order No. 92-12-DWQ, as amended by Order No. 97-03-DWQ ("the General Permit"). The General Permit is an NPDES permit pursuant to CWA § 402(p)(2). To discharge stormwater associated with industrial activity lawfully in California, industrial dischargers must secure coverage under the General Permit and comply with its terms or obtain and comply with an individual NPDES permit. *See* 40 C.F.R. § 122.26(c)(1). The General Permit requires existing facilities subject to its terms to file a NOI for coverage under the General Permit by March 30, 1992 and to thereafter comply with its procedural and substantive requirements. Any violation of the General Permit or its terms is a violation of the CWA.

### **B. Resource Conservation and Recovery Act**

RCRA authorizes citizen suits against any person who contributes to the past or present handling, storage, treatment, transportation or disposal of any solid waste which may present an imminent and substantial endangerment to health or the environment. RCRA § 7002(a)(1)(B). Congress enacted RCRA § 7002(a)(1)(B) to empower the courts to grant injunctive relief "to the extent necessary to eliminate any risks posed by toxic waste." S. Rep. No. 98-284, at 59 (1983) (*quoting United States v. Price*, 688 F. 2d 204, 213-14 (3rd Cir. 1982)). RCRA § 7002(a)(1)(B) "is essentially a codification of common law public nuisance remedies... [and], therefore, incorporates the legal theories used for centuries to assess liability for creating a public nuisance... and to determine appropriate remedies..." S. Rep. No. 96-172, at 5 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5019. As the U.S. Environmental Protection Agency ("EPA"), the federal agency with primary authority to implement RCRA, has declared, "the paramount and overriding

statutory objective of RCRA is protection of human health and the environment” from solid and hazardous wastes. 50 Fed. Reg. 616, 618 (Oct. 30, 2008).

To secure its environmental protection purposes, RCRA applies not only to “solid waste ‘disposal’—in the sense of the affirmative acts of collecting, transporting, and treating manufacturing or industrial by-products”—but also applies to the “non-voluntary acts of depositing, spilling and leaking” of solid and hazardous wastes. *Conn. Coastal Fishermen's Ass'n. v. Remington Arms Co.*, 989 F.2d 1305, 1314 (2d Cir. 1993).

Granting relief under RCRA § 7002(a)(1)(B) requires finding two elements: (1) the past or present handling, storage, treatment, transportation or disposal of any “solid waste” and (2) a finding that such solid waste activities may present an imminent and substantial endangerment to health or the environment. RCRA defines “solid waste” to broadly include any “discarded material”:

The term “solid waste” means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act [Clean Water Act]....

RCRA § 1004(3); 42 U.S.C. § 6903(3). EPA implementing regulations define “discarded material” to mean material that is “abandoned.” 40 C.F.R. § 261.2(a)(2); and “abandoned” material to mean material that has been “disposed of.”

RCRA defines the term “disposal” broadly:

The term “disposal” means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

RCRA § 1004(27) 42 U.S.C. § 6903(27). RCRA’s legislative history indicates that RCRA solid waste includes “‘products . . . once they have served their intended purposes and are no longer wanted by the consumer,’” i.e., have been “discarded.” *Conn. Coastal Fishermen’s Ass’n.*, 989 F.2d at 1314 (quoting H.R. Rep. No. 94-1491, at 2 (1976)); *see also American Mining Congress v. EPA*, 824 F.2d 1177, 1185 (D.C. Cir. 1987) (Congress used the term “discarded” in RCRA’s definition of “solid waste” “in its ordinary sense to mean ‘disposed of’ or ‘abandoned.’” Accordingly, materials no longer useful in their original capacity that are not destined for immediate reuse in another phase of industrial production are solid waste). Thus, material is “discarded” solid waste under RCRA “when it has been left to accumulate after serving its intended purpose.” *L.E.A.D. Group of Berks v. Exide Corp.*, Civ. No. 96-3030, 1999 U.S. Dist.

LEXIS 2672, at \*19 (E.D. Pa. Feb. 19, 1999); *see also Conn. Coastal Fishermen's Ass'n.*, 989 F.2d at 1316 (lead shot and clay trap and skeet targets that had accumulated in waterways near a shooting range constitute discarded solid waste); *Potomac River Keeper, Inc. v. National Capital Skeet and Trap Club, Inc.*, 388 F. Supp. 2d 582, 587 (D. Md. 2005) (same).

With respect to imminent and substantial endangerment, the legislative history of RCRA § 7003, 42 U.S.C. § 6973, underscores that Congress intended the section to be used expansively in taking precautions to address threats to the environment and health before such threats may create actual harm:

An endangerment is "imminent" and actionable when it is shown that it presents a threat to human health or the environment, even if it may not eventuate or be fully manifest for a period of many years--as may be the case with drinking water contamination, cancer, and many other effects. *United States v. Price . . . and United States v. Reilly Tar & Chemical Co.*, [546 F. Supp. 1100, 1109-10 (D. Minn. 1982)].

S. Rep. No. 284, 98th Cong., 1st Sess., at 59 (Oct. 28, 1984).

#### **IV. The Activities at the Facilities Alleged to Constitute Violations and the Alleged Violations of the Clean Water Act**

As noted, the CWA prohibits the discharge of any pollutant from a point source except as authorized by an NPDES permit. *See* CWA § 301(a), CWA § 402. PG&E has not filed an NOI to comply with the terms of the General Permit. Nor does PG&E have any individual NPDES permits for its discharges of contaminated storm water from the Facilities described in Exhibit 1. PG&E currently has no NPDES permit authorizing discharges of storm water or any other wastewater associated with its industrial activities for any of the Facilities described in Exhibit 1. As further described below, PG&E is thus violating the CWA by discharging storm water and other pollutants from the Facilities to waters of the United States without NPDES permit authorization.

##### **A. The Facilities Are Only Authorized to Discharge Pollutants To Waters of the United States to the Extent Permitted by an NPDES Permit.**

CWA § 402(p)(2)(B) explicitly requires an NPDES Permit for discharges associated with industrial activity. Thus, all discharges which are industrial in nature are subject to CWA NPDES permitting requirements. *Northwest Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1082 (9th Cir. 2011). In *Brown*, the Ninth Circuit held an EPA regulation, "the silvicultural rule," invalid to the extent the regulation exempted certain point source discharges associated with logging, an industrial activity, from NPDES permitting requirements. *Id.* In so doing, the Ninth Circuit explained: "if [logging] activity is industrial in nature . . . EPA is not free to create exemptions from permitting requirements for such activity." *Id.* at 1083 *citing* *NRDC v. EPA*, 966 F.2d 1292, 1304 (9th Cir. 1992).

PG&E conducts numerous activities at the Facilities that are unmistakably industrial in nature, including activities related to scrap metal recycling, sand and gravel processing, vehicle fueling and maintenance, metal fabrication, and storage of heavy equipment, waste materials, and materials used to repair and maintain an electrical power and gas transmission supply grid, all in service or an adjunct to PG&E's primary function of operating and maintaining a gas and electric distribution system. While the primary purpose of PG&E's Facilities might not be to conduct these activities individually, these activities are no less industrial simply because they are not the Facilities' primary purpose - especially given that PGE uses these Facilities to support an industrial activity: the transmission and distribution of electricity and gas. Under governing law, if industrial activities take place at the Facilities, which is plainly the case, stormwater discharges from these Facilities must be subject to NPDES regulation under CWA § 402(p)(2)(B).

EPA's Phase I Storm Water Regulations defined discharges associated with industrial activity as "the discharge from any conveyance that is used for collecting and conveying stormwater and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." 40 C.F.R. § 122.26(b)(14). The EPA regulations do not further explicitly define "industrial plant," but they do list several categories of industrial facilities that "are considered to be engaging in 'industrial activity.'" 40 C.F.R. § 122.26(b)(14)(i) - (xi). EPA regulations identify businesses by Standard Industrial Classification ("SIC") Code that are considered to be engaged in industrial activity. *Id.* SIC Codes are the U.S. Department of Labor ("DOL")'s business and labor statistics classification system established in 1937 which the DOL is now replacing with a new system, the North American Industry Classification System (NAICS).

To be consistent with governing Ninth Circuit precedent in the *Brown* case, EPA's storm water regulations must be read not to exempt industrial stormwater discharges from NPDES regulation. EPA's regulations thus mandate that facilities that conduct activities like those conducted by the businesses whose primary purposes would place them within the SIC Codes listed in 40 C.F.R. § 122.26(b)(14)(i) - (xi) are *all* subject to NPDES regulation. *See Brown*, 640 F.3d at 1080 (approving of Judge Patel's expansive construction in *Environmental Protection Information Center v. Pacific Lumber Co.*, 2003 U.S. Dist. LEXIS 25734, 2003 WL 25506817 (N.D. Cal. Oct. 14, 2003) of EPA's stormwater regulations so as to harmonize the regulation with the CWA's statutory mandates). Any contrary interpretation would read EPA's regulations as regulating some industrial activities, but exempting the very same industrial activities conducted at certain facilities whose primary function would be described by a SIC Code not enumerated in EPA's storm water regulations. Further, EPA's regulation explicitly contemplates that "*federally, State, or municipally owned or operated facilities* that meet the description of the facilities listed in paragraphs [40 C.F.R. § 122.26](b)(14)(i) through (xi)" that contribute pollutants to waters of the United States shall be required to obtain a NPDES permit (emphasis added). Strictly speaking, federally state or municipally owned or operated facilities would not be assigned SIC Codes as they are not private-sector industrial facilities.<sup>1</sup> Thus, 40 C.F.R. § 122.26(b)(14)'s

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<sup>1</sup> SIC Codes are used by the U.S. Office of Management and Budget to classify data about

recitation of SIC Codes has to be read as merely providing illustrative examples of the types of industrial activities that warrant deeming a business subject to NPDES regulation, even if strictly speaking the facility in question does not meet the formal definition for a given SIC Code in the DOL's SIC Code manual.

PG&E performs numerous industrial activities at the Facilities similar to the activities conducted by businesses that fall within the SIC Codes enumerated in 40 C.F.R. § 122.26(b)(14), including SIC Codes 1429, 1442, 1799, 4214, 4225, 4226, 4231, 3496, 3498, 5032, and 5093. As discussed further below, these activities include activities related to scrap metal recycling, sand and gravel processing, vehicle maintenance, metal fabrication and storage of heavy equipment and materials used for these and other industrial activities. *Id.*

CWA subsection 402(p)(2)(E) grants broad authority both to EPA and to States such as California with EPA-approved NPDES programs to designate additional sources of stormwater runoff as requiring NPDES permits besides those otherwise listed in CWA subsection 402(p)(2)(A)-(D). *See EPIC*, 301 F. Supp. 2d at 1112 (observing that the EPA preamble to EPA's Phase II regulations states that EPA and States with EPA-approved NPDES programs have the authority to designate additional stormwater dischargers besides those otherwise listed in CWA subsections 402(p)(2)(A)-(D) as subject to NPDES permit regulation and agreeing that the preamble interpretation is correct as in accord with the Ninth Circuit's holding in *Environmental Defense Center*, 344 F.3d at 840). EPA regulations, 40 C.F.R. § 122.26(a)(9)(i)(C), (D), further provide the States with such authority.

Like EPA's regulation, 40 C.F.R. § 122.26(b)(14), the General Permit lists certain SIC Code classifications as the businesses that are subject to NPDES regulation under the General Permit. The State Board, however, has made plain in the General Permit that "industrial facilities" that are subject to NPDES regulation and that must seek General Permit authorization to discharge stormwater include any sites where any of these industrial activities occur, regardless of whether the activity is primary or auxiliary to the facility operator's function. Thus, the State Board stated in the General Permit:

The General Permit is intended to cover all facilities described in Attachment 1, whether the facility is primary or is auxiliary to the facility operator's function. For example, although a school district's primary function is education, a facility that it operates for vehicle maintenance of school buses is a transportation facility that is covered by this General Permit.

*See* State Board Fact Sheet for State Water Resources Control Board Water Quality Order Number 97-03-DWQ National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000001 (General Permit) Waste Discharge Requirements (WDRs) for Discharges of Storm Water Associated with Industrial Activities at III. Further, that the State

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categories of industries or kinds of business in our economy, not the activities of government agencies. *See* <http://www.census.gov/epcd/www/naicsusr.html>

Board contemplates assigning multiple SIC codes to a facility to fit that there might be multiple industrial activities being conducted at a single facility is underscored by the fact that the General Permit's Notice of Intent to be covered allows permit applicants to list up to three SIC Codes to describe activities at their facilities. This indicates that the State Board, commensurate with CWA § 402(p)(2)(B) mandates, intends dischargers to identify multiple industrial activities at their facilities when they conduct multiple activities that could generate contaminated industrial stormwater runoff.

The Facilities are the types of industrial facilities that the State Board has effectively determined are properly subject to NPDES permit regulation and that should apply for authorization to discharge storm water pursuant to the General Permit - hence are industrial facilities within the meaning of CWA section 402(p), 33 U.S.C. § 1342(p). The State Board has determined that facilities where any industrial activities are conducted (even if the primary business purpose of the company at issue is not to conduct the activity in question) that fall within eleven enumerated categories should apply for authorization to discharge under the General Permit. PG&E conducts industrial activities at the Facilities that fall within one or more of these enumerated categories.

PG&E routinely conducts industrial activities at the Facilities that fall within the General Permit's recycling facilities category of industrial activity, *i.e.*, breaking up, sorting, and wholesale distribution of scrap and waste material ("Sector N," facilities classified as within SIC Codes 5015 and 5093). These industrial activities further fall within EPA's storm water regulations' definition of industrial activities. *See* 40 C.F.R. § 122.26(b)(14)(vi) (facilities conducting recycling activities classified as within SIC Codes 5015 and 5093 are industrial facilities). Specifically, at the Facilities, PG&E collects and breaks apart scrap metal objects, sorts these scrap metal objects into bins, and then sells these scrap metal objects wholesale to a metals recycling company. PG&E generates substantial revenue by this metals recycling activity. PG&E further collects and recycles the following materials at the Facilities: various plastics, used motor oil, used transformer oil, and used consumer electronic waste.

PG&E routinely conducts industrial activities at the Facilities like those that fall within the General Permit's mineral mining and dressing category ("Sector J," facilities classified as within SIC Codes 1429, crushed and broken stone processing (*i.e.*, used concrete and asphalt), SIC code 1442, construction sand and gravel processing, and SIC Code 5032 handling and distributing Brick, Stone, and Related Construction Materials). Specifically, at the Facilities, PG&E stores, sorts, and distributes large piles of new and used sand, gravel, concrete, and asphalt which it uses for various construction purposes as part of maintaining its electrical and gas networks. PG&E sorts and handles these aggregates at the Facilities.

PG&E routinely conducts numerous industrial activities at the Facilities that fall within the General Permit's transportation category of industrial activity ("Sector P," facilities classified as within SIC Codes 41, 42 (except for 4221 – 25), 43, 44, 45, and 5171). These industrial activities further fall within EPA's storm water regulations' definition of industrial activities. *See* 40 C.F.R. § 122.26(b)(14)(viii). Specifically, PG&E performs maintenance and repairs on

numerous motor vehicles and pieces of heavy equipment at the Facilities that PG&E maintains in its service vehicles fleet. At the Facilities, PG&E performs fueling of these vehicles, changes the motor oil, transmission fluid, coolant fluids, hydraulic fluids, and brake fluids in these vehicles; performs mechanical repairs on these vehicles, cleans vehicle parts, washes the vehicles, and stores new and waste parts, oil, fuel, batteries, and tires used by or for these vehicles. PG&E also parks its sizable vehicle fleet of cars, vans, trucks, and heavy duty motor equipment out of doors at the Facilities. In addition, at some Facilities, such as 24300 Clawiter Road in Hayward, California, PG&E operates compressed natural gas fueling stations available for public use.

PG&E also routinely conducts numerous activities at the Facilities that fall within the General Permit's light industry category of industrial activity. Specifically, at the Facilities PG&E conducts various industrial activities related to Metal Fabrication ("Sector AA," facilities within SIC Codes 3496 and 3498). PG&E welds sections of metal pipe and other metal objects to create parts and materials used in maintaining PG&E's electrical and gas distribution grids.

Furthermore, the State Board has determined that the requirement to obtain authorization to discharge storm water under the General Permit applies to light industry facilities where industrial materials, equipment, or activities are exposed to storm water. These include "material handling sites, sites used for the storage and maintenance of material handling equipment . . . shipping and receiving areas, storage areas (including tank farms) for raw materials . . . intermediate and finished products . . . and areas where industrial activity has taken place in the past and significant materials remain." *See* General Permit, Attachment 4, ¶ 9. Significant materials are defined to include "raw materials; fuels; materials such as solvents, detergents, and plastic pellets; finished materials such as metallic products; raw materials used in food processing or production; hazardous substances designated under section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act; any chemical the facility is required to report pursuant to section 313 of title III of SARA; fertilizers; pesticides; and waste products such as ashes, slag, and sludge that have the potential to be released with storm water discharges." General Permit, Attachment 4, ¶ 5; *see also* 40 C.F.R. §122.26(b)(12).

PG&E currently uses the Facilities for the storage of a wide range of objects including new and used wooden utility poles, treated wood waste, (including Dioxins and pentachlorophenol contaminated wood waste, soils and sediments), piles of contaminated soil awaiting disposal, electrical generators, transformers, cables, metal pipes, plastic pipes, and other equipment and parts used in the installation and maintenance of PG&E's utility poles, electric transmission lines, and natural gas distribution systems. These objects are all stored out of doors and are exposed to storm water flows. This storage activity makes those portions of the Facilities that are "material handling sites, sites used for the storage and maintenance of material handling equipment . . . shipping and receiving areas, storage areas (including tank farms) for raw materials . . . intermediate and finished products" that the State Board General Permit has identified as industrial facilities subject to NPDES regulation. In addition, this storage activity alternatively makes the Facilities analogous to warehousing facilities that fall within SIC Code 4225. The State Board draft revised General Permit identifies facilities within SIC Code 4225 as industrial facilities that require NPDES permit authorization to discharge storm water. The State

Board's issuance of this draft revised General Permit constitutes the State Board's designation under CWA subsection 402(p)(2)(E) of facilities analogous to those within SIC Code 4225 as additional sources of stormwater runoff requiring NPDES permits besides those otherwise listed in CWA subsection 402(p)(2)(A)-(D). Alternatively, if this draft revised General Permit does not constitute such a designation, the State Board will have completed such a designation when it finalizes the revised General Permit.

Some of PG&E's Facilities are "areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water," and thus fall within the State Board General Permit's definition of industrial sites subject to NPDES regulation. *See* General Permit, Attachment 4, ¶ 9, 40 C.F.R. § 122.26(b)(14). For example, the PG&E Facility located at 1099 West 14th Street, Eureka, California is the location of the former manufacturing of a type of gas. This former manufacturing activity has left the site where this facility is located with significant residual subsurface contamination with various pollutants, including various petroleum hydrocarbons.

Finally, PG&E routinely conducts numerous activities at the Facilities that further fall within EPA's storm water regulations' definition of industrial activities. *See* 40 C.F.R. § 122.26(b)(14)(x) (facilities conducting construction activities are deemed industrial facilities). Although the construction activities that involve soil disturbance are typically performed offsite from the Facilities, PG&E's Facilities are staging grounds for the offsite activities and include preparation and disposal of soil and other aggregates, preparation of ready-mix cement for offsite use, preparation of lumber and utility poles for offsite installation, preparation of pipes, and cables. All of these construction related activities serve to further illustrate the industrial nature of PG&E's Facilities.

Furthermore, although the industrial activities described above that PG&E conducts at the Facilities may not be the singular function of each the Facilities, the Facilities are nonetheless "industrial facilities" within the meaning of and subject to regulation under the Clean Water Act since these activities occur on some portions of the premises of each of PG&E's Facilities.

Alternatively, even if the Facilities were properly deemed to only be classified as having the SIC Code that describes PG&E's *overall* business purpose rather than by the activities which occur at the Facilities, the Facilities would still be nonetheless industrial facilities within the meaning of the General Permit and hence subject to NPDES regulation. The General Permit requires facilities "engaged in the generation of electricity for distribution and sale which results primarily from a process utilizing fossil-type fuel or nuclear fuel in conjunction with a thermal cycle employing the steam water system as the thermodynamic medium to seek coverage under the permit." *See* 40 C.F.R. § 423.10 (defining the term steam electric power generating facilities). Further, oil and gas exploration, processing, or treatment operations, as well as oil and gas "transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations" are likewise required to obtain coverage under the General Permit. *See* General Permit, Attachment 1. Because PG&E's

primary purpose is the generation and transmission of electricity and natural gas, SIC Codes 4911, 4923, 4931, and 4939 apply to the PG&E's overall corporate operations. Thus if PG&E were correct in contending that operations which support a business's primary purpose should be given the same SIC Code as the overall business, the Facilities, whose purpose is to support the PG&E's transmission of steam generating (in part) electricity and natural gas treatment and transmission, must also be given those SIC codes and apply for coverage under the General Permit. According to the State Board, there are well over a hundred facilities that have filed a Notice of Intent to be covered by the General Permit which describe themselves as falling within SIC Codes 4911, 4923, 4925, 4931, or 4939.<sup>2</sup> Notably, PG&E has also described the Facilities as being described by SIC Code 4931.

Finally, even if PG&E were correct that the Facilities are not properly characterized as "industrial facilities" within the meaning of Clean Water Act section 402(p), EPA regulations, and the General Permit, the discharges of pollutants via storm water from the Facilities is nonetheless prohibited without NPDES permit authorization. CWA § 402(p)'s does not exempt any polluted stormwater discharges from CWA § 301(a)'s prohibition on unauthorized discharge. Instead, CWA § 402(p) merely creates a temporary moratorium, which expired in 1994, for the EPA from having any duty to issue NPDES permits for certain discharges "comprised entirely of stormwater." Congress' purpose in CWA § 402(p) was to ease the burden on EPA on its duty to issue permits, not to insulate dischargers from liability under CWA § 301(a) for stormwater discharges.

Further, the legislative history of the Water Quality Act, which enacted CWA section 402(p), further underscores that Congress did not intend any exemption for CWA regulation of stormwater discharges to extend past October 1994, if such exemption ever existed at all. Instead, Congress enacted CWA section 402(p)'s temporary moratorium on NPDES permits for certain stormwater discharges merely to give EPA more time to develop a stormwater program and issue NPDES permits for stormwater in an orderly sequence with permits issued to the highest priority dischargers first. Thus, to the extent that Congress' language could be construed as exempting dischargers from liability under CWA 301(a), it did so only until October 1, 1994.

Alternatively, to the extent that any EPA moratorium or permit shield existed, it was only for discharges comprised entirely of stormwater. Because as discussed below, PG&E's

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<sup>2</sup> Description of SIC Codes = 4911 Electric Services - Establishments engaged in the generation, transmission, and/or distribution of electric energy for sale; 4923 Natural Gas Transmission and Distribution - Establishments engaged in both the transmission and distribution of natural gas for sale; 4925 Mixed, Manufactured, or Liquefied Petroleum Gas Production - Establishments engaged in the manufacture and/or distribution of gas for sale, including mixtures of manufactured with natural gas; 4931 Electric and Other Services Combined - Establishments primarily engaged in providing electric services in combination with other services, with electric services as the major part though less than 95 percent of the total; 4939 Combination Utilities, Not Elsewhere Classified - Establishments primarily engaged in providing combinations of electric, gas, and other services, not elsewhere classified.

discharges from the Facilities contain numerous pollutants, they are not comprised entirely of stormwater and do not meet any possible NPDES regulatory exemption under CWA § 402(p)(1).

**B. Discharges of Storm Water from PG&E's Facilities Contain Elevated Levels of Numerous Pollutants.**

According to site investigations conducted by the non-profit environmental group, Ecological Rights Foundation ("ERF")<sup>3</sup>, pollutants found in PG&E's storm water generated by industrial activities at the Facilities include, but are not limited to, the following: pentachlorophenol, Dioxins, hexachlorobenzene, PAHs, PCBs creosote, phenol and cresols, ammonia, arsenic, chromium (including hexavalent chromium), dust, debris, various petroleum hydrocarbons such as gasoline and diesel fuel, various metals including copper, lead, barium, and zinc, elevated total suspended solids, elevated chemical oxygen demand, and pH exceeding environmentally safe ranges. All of these substances are "significant materials" within the meaning of the General Permit.

Discharges of pollutants from the Facilities is prohibited without authorization from an NPDES permit as described above, PG&E conducts various operations at the Facilities outdoors, where the activities are exposed to rainfall, including (1) recycling of various materials which involves, among other things, collecting, sorting and storing piles and/or bins of scrap metal, (2), storing of piles of sand and gravel and other aggregate materials, (3) vehicle and equipment operation, vehicle fueling and maintenance, and vehicle storage, (4) various light industry activities related to metal fabrication and (5), storing and maintaining equipment and materials used in the installation and repair of its electrical and natural gas transmission and distribution systems at these Facilities. The Facilities store outdoors new and used utility poles and various wooden materials, including utility pole crossarms and braces, that have been treated with pentachlorophenol, creosote, or chromated copper arsenate ("CCA"), and chemonite. These Facilities also store and maintain equipment used in the installation and upkeep of utility poles.

In the course of conducting the above listed industrial activities, PG&E discharges pollutants to waters of the United States in various ways, as described further below.

(1), PG&E's storage and loading, unloading, sorting, and handling of used and new soil, sand, gravel, used concrete and asphalt spoils, and other aggregate materials (collectively "aggregate materials") generates dust and particulate matter that is further transported around and off the Facilities' premises by service vehicle traffic and wind. Rainfall falls upon piles of aggregate materials at the Facilities and upon areas both on the Facilities and off-site of the Facilities where dust and particulate matter originating from PG&E's piles of aggregate materials

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<sup>3</sup> ERF has initiated its own federal lawsuit against PG&E for CWA and RCRA violations, *Ecological Rights Foundation v. Pacific Gas & Electric Co.*, Case No. 3:10-CV-00121-RS. ERF has sampled stormwater from several PG&E Facilities described in Exhibit 1 to this Notice Letter. Furthermore, Exhibits 2-7 include ERF's sampling data, photographs, and discovery responses acquired by ERF and reviewed by the Citizen Groups.

are located. Storm water runoff picks up and transports dust and particulate matter and other contaminants originating from the aggregate material piles and conveyor belts and trucks used to sort or otherwise handles the aggregate materials at the Facilities and conveys these pollutants into waters located adjacent to or otherwise near the Facilities that qualify as waters of the United States. In addition, at many of the Facilities, wind blows dust and particulate matter from piles of soil, sand, gravel, and other aggregates directly into waters of the United States. For example, the PG&E Facility located at 4801 Oakport Street, Oakland, California is one such Facility.

(2) PG&E's storage, sorting, breaking apart of, and loading and unloading of materials for recycling, including various scrap metal, generates dust and particulate matter that is further transported around and off the Facilities' premises by service vehicle traffic and wind. Rainfall falls upon piles and bins of materials that PG&E is recycling, including scrap metal, at the Facilities and upon areas both on the Facilities and off-site of the Facilities where dust and particulate matter originating from PG&E's recycling activities is located. Storm water runoff picks up and transports dust and particulate matter and other contaminants originating from PG&E's recycling activities at the Facilities and conveys these pollutants into waters located adjacent to or otherwise near the Facilities that qualify as waters of the United States.

(3) PG&E's service vehicles, both while parked at the Facilities and when being driven on and off the Facilities, also serve as the source of the release of many other pollutants to the Facilities' premises, including various petroleum hydrocarbons such as gasoline and diesel fuel, anti-freeze, battery fluids, hydraulic fluids, and various metals including copper, lead, and zinc that leak from or flake off from the vehicles (such as from the vehicles' brake pads). Storm water runoff picks up and transports these contaminants at the Facilities and conveys these pollutants into waters located adjacent to or otherwise near the Facilities that qualify as waters of the United States.

(4) PG&E stores, loads and unloads, and handles new and used/discarded utility poles and other wooden objects such as pole cross-arms treated with various wood preservatives such as pentachlorophenol, creosote, CCA, and chemonite at the Facilities. These wood preservatives further contain, *inter alia*, the following pollutants: Dioxins, pentachlorophenol, hexachlorobenzene, PAHs, PCBs, creosote, phenol and cresols, ammonia, arsenic, chromium (including hexavalent chromium), and various petroleum hydrocarbons. PG&E further saws, breaks, or cuts up used/discarded utility poles and wooden objects at the Facilities, generating waste sawdust and wood chips in the process. Loading, unloading, stacking and otherwise moving treated utility poles and other treated wood materials and wastes generates waste particles and wood chips. Wood preservatives and oils from these new and used utility poles and wooden objects leak and drip from the poles and wooden objects onto the ground beneath areas where these poles and wooden objects are stored. In addition, wood preservatives and oils from these new and used utility poles and wooden objects are released to the environment at the Facilities in the form of wood chips that flake off or otherwise are dislodged from the utility poles and wooden objects and from the sawdust and other particulate generated by sawing, cutting, moving or breaking up used utility poles and wooden objects. Rainfall falls upon stacks,

piles and bins of new and used utility poles, wooden objects and treated wood wastes at the Facilities and upon areas both on the Facilities and off-site of the Facilities where dust and particulate matter originating from PG&E's piles of stacks, piles and bins of new and used utility poles, wooden objects and treated wood wastes are located. Storm water runoff picks up and transports dust and particulate matter and other contaminants originating from stacks, piles and bins of new and used utility poles, wooden objects and treated wood wastes at the Facilities and conveys these pollutants into waters located adjacent to or otherwise near the Facilities that qualify as waters of the United States. In addition, wind blows dust, particulate matter and treated wood waste from cutting, sawing, or breaking up used utility poles and wooden objects, and from other sources at the Facilities directly into waters of the United States. PG&E stores, loads and unloads, and handles new and used electrical generators, transformers, cables, metal pipes, plastic pipes, and other equipment and parts used in the installation and maintenance of PG&E's utility poles, electric transmission lines, and natural gas distribution systems. Rainfall falls upon the stacks, piles and bins of new and used electrical generators, transformers, cables, metal pipes, plastic pipes, and other equipment and parts, and storm water runoff picks up and transports dust and metal particulate matter and other contaminants originating from the electrical generators, transformers, cables, metal pipes, plastic pipes, and other equipment and parts and conveys these pollutants into waters located adjacent to or otherwise near the Facilities that qualify as waters of the United States.

The storm water runoff from the Facilities described in the preceding paragraph flows into water bodies adjoining or otherwise near the Facilities from the various driveways leading into and out of the Facilities, various culverts and other surface channels at and adjacent to the Facilities, the drop inlets and storm drain systems used to convey storm water away from the Facilities, and from sheet flow off of other portions of the Facilities, all of which are point sources.<sup>4</sup> As a result, PG&E discharges various pollutants into waters of the United States,

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<sup>4</sup> By way of example, the Citizen Groups have attached as Exhibit 3 to this letter, maps of the PG&E Facilities located at (a) 24300 Clawiter Road, Hayward, California; (b) 4801 Oakport Street, Oakland, California; and (c) 2555 Myrtle Avenue, Eureka, California and excerpts from the Spill Prevention Control and Countermeasure Plans for these three facilities which depict or describe storm water flows over the ground and into storm drain inlets which then convey storm water flow into underground piping which in turn conveys storm water flows into adjoining waterways. The subsurface storm drain discharge pipes and outlets or outfalls from these pipes all constitute point sources that discharge pollutants to waters of the United States. The remaining PG&E Facilities have similar surface and/or subsurface storm drain conveyance systems which constitute point sources. In addition to such storm drain conveyance systems, the Facilities have additional point sources in the form of driveways, channels, piles of sand and gravel and recycling materials, stacks of utility poles, open-topped bins and roll-off containers containing used poles and other treated wood waste, and other wooden objects such as utility pole cross-arms, stacks of construction supplies and parts such as cables, transformers, pipes, etc. from which polluted storm water flows into waters of the United States. Finally, as discussed, the Facilities themselves are discrete identifiable sources of storm water discharge and hence themselves constitute point sources.

including pentachlorophenol, Dioxins, hexachlorobenzene, PAHs, PCBs, creosote, phenol and cresols, ammonia, arsenic, chromium (including hexavalent chromium), various petroleum hydrocarbons such as gasoline and diesel fuel, and various metals, including but not limited to, copper, lead, barium, and zinc, elevated total suspended solids, chemical oxygen demand, and pH exceeding environmentally safe ranges.

**C. Unauthorized Discharges in Violation of Clean Water Act Section 301(a)'s Discharge Prohibition**

PG&E has violated and continues to violate CWA section 301(a), which prohibits the discharge of any pollutant into navigable waters from point sources, except in compliance with provisions of the Act. 33 U.S.C. § 1311(a). Specifically, CWA 301(a) prohibits the discharge of pollutants without an NPDES permit. 33 U.S.C. §1342(a)(1). PG&E has discharged and is continuing to discharge pollutants to waters of the United States storm water runoff conveyed from the various driveways leading into and out of the Facilities, various culverts and other surface channels at and adjacent to the Facilities, the drop inlets and storm drain systems used to convey storm water away from the Facilities, and from sheet flow off of other portions of the Facilities, all of which are point sources. Based on storm water discharges from the PG&E Facilities located at: (a) 24300 Clawiter Road, Hayward, California; (b) 4801 Oakport Street, Oakland, California; (c) 2555 Myrtle Avenue, Eureka, California; (d) 1099 West 14th Street, Eureka, California, (e) 275 Industrial Road, San Carlos, California, and (f) 25051 O'Neil Avenue, Hayward, California<sup>5</sup> and from the observations of storm water discharges from sites similar to the Facilities and from ERF's sampling of storm water discharges from utility poles that are analogous to the utility poles stored at the Facilities,<sup>6</sup> the Citizen Groups allege and puts PG&E on notice that each day that PG&E discharged storm water from the Facilities, PG&E's storm water has contained various pollutants including pentachlorophenol, Dioxins, hexachlorobenzene, PAHs, PCBs, creosote, phenol and cresols, ammonia, arsenic, chromium (including hexavalent chromium), various petroleum hydrocarbons such as gasoline and diesel fuel, and various metals including copper, lead, barium, and zinc, elevated total suspended solids, chemical oxygen demand, and pH exceeding environmentally safe ranges. While PG&E should be aware of each day that PG&E has discharged storm water from the Facilities (as the General Permit requires PG&E to monitor such discharges), the Citizen Groups allege and put PG&E on notice that PG&E has discharged storm water containing excessive levels of pollutants

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<sup>5</sup> As described in Exhibit 2 to this letter, the dates and locations where ERF took storm water and sediment/soil samples from several of these Facilities and the results ERF obtained from analyzing these samples. Exhibit 5 to this notice letter depicts the sampling locations and corresponding Dioxin results for the facilities located at (a) 24300 Clawiter Road, Hayward, California; (b) 4801 Oakport Street, Oakland, California; (c) 2555 Myrtle Avenue, Eureka, California; (d) 1099 West 14th Street, Eureka, California.

<sup>6</sup> ERF has separately provided PG&E with copies of ERF's results of sampling storm water runoff from PG&E's utility poles placed in the field in various locations in the San Francisco Bay area as part of its discovery responses in ERF's existing action, *Ecological Rights Foundation v. Pacific Gas & Electric Co.*, 3:10-CV-00121-RS.

from the Facilities to waters of the United States during at least every significant local rain event over 0.1 inches in the last five years. Significant local rain events are reflected in the rain gauge data available at <http://cdec.water.ca.gov>, <http://lwf.ncdc.noaa.gov/oa/ncdc.html>, and <http://www7.ncdc.noaa.gov/CDO/cdo>.

The Citizen Groups further allege that, as discussed above, PG&E has discharged pollutants to waters of the United States on each day that wind has transported sand and gravel and other aggregate material and sawdust generated from sawing, cutting up, or breaking up utility poles and wooden objects from certain of the Facilities as discussed above to adjoining waters of the United States. PG&E should be aware of each such day of violation as PG&E is aware of what days PG&E has stored large piles of loose sand and gravel and other aggregate material and on what days PG&E has sawed or cut up utility poles and/or wooden objects at the Facilities on windy days. Days of significant windspeed are maintained in data available from the National Oceanic and Atmospheric Administration and available at <http://www7.ncdc.noaa.gov/CDO/cdo>.

The Citizen Groups allege that PG&E has discharged pollutants directly and indirectly to waters of the United States without NPDES permit authorization for at least the last five years, and continues to discharge pollutants without an NPDES permit in violation of the CWA. Each discharge of pollutants from the Facilities to waters of the United States without NPDES permit authorization constitutes a separate CWA violation. PG&E's violations will continue each day pollutants are discharged without a permit in violation of CWA requirements. PG&E is subject to civil penalties for violations of CWA section 301(a) within the past five (5) years.

#### **D. Discharges in Violation of the General Permit**

The CWA provides that "the discharge of any pollutant by any person shall be unlawful" unless the discharger is in compliance with the terms of a NPDES permit. CWA section 301(a), 33 U.S.C. § 1311(a); *see also* CWA section 402(p), 33 U.S.C. § 1342(p) (requiring NPDES permit issuance for the discharge of storm water associated with industrial activities). As discussed in Section III.A., PG&E's Facilities are industrial facilities within the meaning of the General Permit that discharge storm water associated with industrial activities which is contaminated with pollutants. The General Permit only authorizes such discharges conditioned on compliance with the terms of the General Permit. Each of these permit terms constitutes an "effluent limitation" within the meaning of CWA section 505(f), 33 U.S.C. § 1365(f). The Facilities' storm water discharges have violated several of these permit terms, thereby violating CWA effluent limitations. The Citizen Groups further allege that even if PG&E sends one or more NOIs to the State Board and acquires NPDES permit authorization under the General Permit, the violations of the General Permit described herein will remain on-going as PG&E has not met the General Permit's requirements.

##### **1. Discharges in Excess of BAT/BCT Levels**

The Effluent Limitations of the General Permit, ¶ E.3, prohibit PG&E's Facilities from

discharging pollutants above the level commensurate with application of Best Available Technology Economically Achievable ("BAT") and the Best Conventional Pollutant Control Technology ("BCT"). EPA and the State Board have published Benchmark Values set at the maximum level of pollutant loading generally expected if an industrial facility is employing BAT and BCT. The Citizen Groups believe that PG&E's Facilities have failed to employ measures that constitute BAT and BCT for corporation yard and electrical service facilities, such as moving polluting generating activities under cover or indoors; capturing and effectively filtering or otherwise treating all storm water prior to discharge, routing storm sewer discharges to publicly owned treatment works (following treatment necessary to meet pretreatment standards); using regenerative sweepers and periodically power washing the Facilities to reduce the build-up of pollutants on-site; washing tires or employing other measures to prevent off-site tracking of pollutants; and other like measures for reducing storm water pollutant discharges to the limits of available, economically achievable, technology.

Based on ERF's sampling of discharges from the Facilities described above and observations of storm water discharges from sites similar to the Facilities, the Citizen Groups allege and put PG&E on notice that each day that PG&E discharged storm water from the Facilities, PG&E's storm water has contained various pollutants including pentachlorophenol, Dioxins, hexachlorobenzene, PAHs, PCBs, creosote, phenol and cresols, ammonia, arsenic, chromium (including hexavalent chromium), various petroleum hydrocarbons such as gasoline and diesel fuel, and various metals including copper, lead, barium, and zinc, elevated total suspended solids, chemical oxygen demand, and pH exceeding environmentally safe ranges various petroleum hydrocarbons, pentachlorophenol, Dioxins, furans, various metals, excessive total suspended solids, and pH levels falling outside of environmentally safe levels. While PG&E should be aware of each day that PG&E has discharged storm water from the Facilities (as the General Permit requires PG&E to monitor such discharges)<sup>7</sup>, the Citizen Groups allege and put PG&E on notice that PG&E has discharged storm water containing excessive levels of pollutants from the Facilities to waters of the United States during at least every significant local rain event over 0.1 inches in the last five years. Significant local rain events are reflected in the rain gauge data available at <http://cdec.water.ca.gov> and <http://lwf.ncdc.noaa.gov/oa/ncdc.html>.

The Citizen Groups allege that PG&E's unlawful discharges of storm water from the Facilities with levels of pollutants exceeding BAT and BCT levels of control continue to occur

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<sup>7</sup> Evidence of PG&E's discharges of penta-oil wood treatment chemicals in stormwater are clearly visible during storm events and when standing water is present at the facilities. Attached as Exhibit 6 are photographs taken during ERF's site inspections. Exh. 6-A depicts a penta-oil sheen present on surface water at PG&E's Clawiter Rd., Hayward facility; Exhs. 6-B and 6-C show a penta-oil sheen flowing from the treated pole storage area to a drop inlet at PG&E's Myrtle Ave., Eureka Facility; Exh. 6-D depicts a penta-oil sheen flowing into a drop inlet (stenciled "Drains to Bay") at PG&E's W. 14<sup>th</sup> Ave, Eureka facility. Attached as Exhibit 7 is a video taken during the site inspection at PG&E's W. 14<sup>th</sup> St. facility showing the path of penta-oil flowing from the treated pole storage area into a drop inlet, and also flowing off site onto an adjacent property.

presently during all significant rain events. Each discharge of storm water and non-storm water from PG&E's Facilities after the effective date of the BAT and BCT requirements constitutes a separate violation of the General Permit and the CWA. PG&E is subject to civil penalties for violations of the General Permit and the CWA within the past five (5) years.

PG&E's continued discharge of storm water containing levels of pollutants above BAT- and BCT-based levels of control necessarily means that PG&E has not developed and/or implemented sufficient BMPs at PG&E's Facilities to prevent storm water flows from coming into contact with the sources of contaminants at the Facilities or otherwise to control the discharge of pollutants from the Facility. Accordingly, PG&E has not developed and/or implemented an adequate Storm Water Pollution Prevention Plan ("SWPPP") or Monitoring and Reporting Program ("MRP") at the Facilities.

## **2. Discharges that Have Impaired Receiving Waters**

The Discharge Prohibitions of the General Permit, ¶ A.2, prohibit storm water discharges that cause or threaten to cause pollution, contamination, or nuisance. The Discharge Prohibitions of the General Permit, ¶ A.2, prohibit storm water discharges to surface or groundwater that adversely impact human health or the environment. The Receiving Water Limitations of the General Permit, ¶ C.2, prohibit storm water discharges that cause or contribute to an exceedance of applicable Water Quality Standards. Applicable Water Quality Standards are set forth in the California Toxics Rule ("CTR") and the applicable Basin Plan for each region.

The Citizen Groups allege and put PG&E on notice that PG&E's storm water discharges from the Facilities have caused or contributed to exceedances of the Water Quality Standards set forth in the applicable Basin Plans and CTR. Based on site investigations and sampling acquired from ERF, the Citizen Groups believe and allege that the pollutants contained in PG&E's storm water include, among other pollutants, pentachlorophenol, Dioxins, hexachlorobenzene, PAHs, PCBs, creosote, phenol and cresols, ammonia, arsenic, chromium (including hexavalent chromium), various petroleum hydrocarbons such as gasoline and diesel fuel, and various metals including copper, lead, barium, and zinc, elevated total suspended solids, chemical oxygen demand, and pH exceeding environmentally safe ranges. The Citizen Groups believe that the levels of pollutants in PG&E's storm water discharges have caused pollution, contamination, or nuisance in violation of the Discharge Prohibitions of the General Permit, ¶ A.2., and have adversely impacted the environment in violation of the Receiving Water Limitations of the General Permit, ¶ C.1. Moreover, the Citizen Groups believe that the discharge of these pollutants has caused or contributed to receiving waters from attaining one or more applicable Water Quality Standards in violation of the Receiving Water Limitations of the General Permit, ¶ C.1.

The Citizen Groups allege and put PG&E on notice that each day that PG&E discharged storm water from the Facilities, PG&E's storm water contained levels of pollutants that caused or contributed to exceedance of one or more of the applicable Water Quality Standards. While

PG&E should be aware of each day that PG&E has discharged storm water from the Facilities (as the General Permit requires PG&E to monitor such discharges), the Citizen Groups allege and put PG&E on notice that PG&E discharged storm water from the Facilities during at least every significant local rain event over 0.1 inches that have caused or contributed to Water Quality Standards not being met in the applicable receiving waters over the last five years. Significant local rain events in the last five (5) years are otherwise available at <http://cdec.water.ca.gov> and <http://lwf.ncdc.noaa.gov/oa/ncdc.html>.

PG&E's unlawful discharges from these Facilities continue to occur presently during all significant rain events. Each discharge from PG&E's Facilities that causes or contributes to an exceedance of an applicable Water Quality Standard constitutes a separate violation of the General Permit and the CWA. PG&E is subject to penalties for violations of the General Permit and the CWA within the past five (5) years.

### **3. Violation of General Permit Conditions Related to Development and Implementation of an Adequate Storm Water Pollution Prevention Plan**

The General Permit, Section A: Storm Water Pollution Prevention Plan Requirements, ¶ 1 requires dischargers covered by the General Permit and commencing industrial activities before October 1, 1992 to develop and implement an adequate SWPPP by October 1, 1992. Section A, ¶ 1 of the General Permit also requires dischargers to make all necessary revisions to existing SWPPPs promptly, and in any case no later than August 1, 1997.

The SWPPP must include, among other requirements, the following: (a) identification of all the members of a storm water pollution prevention team responsible for developing and implementing the SWPPP, General Permit Section A, ¶ 3; (b) a site map showing the storm water conveyance system and areas of actual and potential pollutant contact and all areas of on-going industrial activity, General Permit Section A, ¶ 4; (c) a list of significant materials handled and stored at the site including quantities and frequencies, General Permit Section A, ¶ 5; (d) a description of all potential pollutant sources, industrial processes, material handling and storage, dust and particulate generating activities, significant spills and leaks, non-storm water discharges, and potential soil erosion activity, General Permit Section A, ¶ 6; (e) an assessment of potential pollutant sources at the Facility and a description of the BMPs to be implemented at the Facility that will reduce or prevent pollutants in storm water discharges and authorized non-storm water discharges, including structural BMPs where non-structural BMPs are not effective must be included, General Permit Section A, ¶¶ 7, 8; (f) specification of Best Management Practices ("BMPs") designed to reduce pollutant discharge to BAT and BCT levels, including BMPs already existing and BMPs to be adopted or implemented in the future, General Permit Section A, ¶ 8; (g) a comprehensive site compliance evaluation completed each reporting year, and revisions to the SWPPP as necessary after the evaluation has been completed, General Permit Section A, ¶ 9; and (h) revisions to the SWPPP within 90 days after a facility manager determines that the SWPPP is in violation of any requirements of the General Permit, General Permit Section A, ¶ 10.d. Facility operators are required to at all times properly operate and

maintain any facilities and systems of treatment and control (and related appurtenances) which have been installed or used to achieve compliance with the conditions of the General Permit and the requirements of the SWPPP, General Permit Section C, ¶ 5.

PG&E has failed to adopt SWPPPs for the Facilities meeting these requirements. PG&E's failure to prepare adequate SWPPPs and/or to revise the SWPPPs in all the above respects constitute violations of the General Permit, Section A, ¶ 8. PG&E will continue to be in violation every day that PG&E fails to develop and implement adequate SWPPPs for each of its Facilities. PG&E is subject to penalties for violations of the General Permit and the CWA occurring within the past five (5) years.

**4. Failure to Develop and Implement an Adequate Monitoring and Reporting Program and Perform Annual Comprehensive Site Compliance Evaluations as Required by the General Permit**

Section B, 1 and Provision E, ¶ 3 of the General Permit require facility operators to develop and to implement an adequate monitoring and reporting program by October 1, 1992 or when industrial activities begin at a facility. Section B, ¶ 2 of the General Permit, indicates that the MRP must ensure that storm water discharges comply with the Discharge Prohibitions, Effluent Limitations, and Receiving Water Limitations specified in the General Permit. Facility operators must ensure that their MRP practices reduce or prevent pollutants in storm water and authorized non-storm water discharges as well as evaluate and revise their practices to meet changing conditions at the facility. Section B, ¶ 2 of the General Permit. This may include revising the SWPPP as required by Section A of the General Permit. *Id.* The MRP must measure the effectiveness of the BMPs used to prevent or reduce pollutants in storm water and authorized non-storm water discharges, and facility operators must revise the MRP whenever appropriate. *Id.* Facility operators are also required to provide an explanation of monitoring methods describing how the facility's monitoring program will satisfy these objectives. Section B, ¶ 10.

Pursuant to the monitoring and reporting requirements of the General Permit, facility operators must conduct and record visual observations of all drainage locations at the facility for authorized non-storm water, unauthorized non-storm water, and storm water discharges. Facility operators must also implement responsive measures to eliminate unauthorized non-storm water discharges and reduce or prevent pollutants from contacting non-storm water discharges and to reduce or prevent pollutants in storm water discharges. Section B, ¶¶ 3, 4, 7. Facility operators must document the presence of any floating or suspended material, oil and grease, discolorations, turbidity, odor, and the source of any pollutants. Section B, ¶¶ 3, 4. Facility operators must maintain records of observation dates, locations observed, observations, and responses taken to eliminate unauthorized non-storm water discharges and to reduce or prevent pollutants from contacting non-storm water and storm water discharges. *Id.* These observations must be made during the wet and dry seasons. Section B, ¶ 3 of the General Permit also requires facility operators to conduct quarterly visual observations of all drainage areas within their facilities for the presence of authorized and unauthorized non-storm water discharges. Section B, ¶ 4 requires

facility operators to observe one storm event per month during the wet season (October 1-May 30) and record their observations of the storm water discharges. Facility operators must complete the monthly storm water observations in the first hour of discharge on a day preceded by three working days without storm water discharges. Section B, ¶ 4(a), (b).

In addition to conducting visual observations, facility operators are required to collect and sample storm water samples during the first hour of discharge from the first storm event of the wet season and at least one other storm event in the wet season. Section B, ¶ 5(a). Facility operators may only take storm water samples on days preceded by at least three working days without storm water discharge. Section B, ¶ 5(b). Facility operators that do not collect samples from the first storm event of the wet season are required to explain in the Annual Report why the first storm event was not sampled. Section B, ¶ 5(a). Facility operators must indicate whether storm water is stored or temporarily contained on site. *Id.* Stored or contained storm water must be sampled at the time the stored or contained storm water is released. *Id.* Facility operators must analyze the storm water samples for TSS, pH, specific conductance, TOC or oil and grease, toxic chemicals and other pollutants that are likely to be present in the discharges, and any other analytical parameters required by the California Regional Water Quality Control Board ("Regional Board") or listed in the General Permit under Table D. If either sample collection or monthly visual observations of storm water discharges occur more than one hour after discharge begins, facility operators must explain in the Annual Report why the sampling occurred more than one hour after discharges began. Section B, ¶ 8(b).

To achieve the objectives of the monitoring program, facility operators must comply with certain procedural requirements, including explaining monitoring methods; providing a description of the visual observation and sampling methods, location, and frequency; and identifying the analytical methods and corresponding method of detection limits used to detect pollutants in storm water discharges. Section B, ¶ 10. Facility operators must retain records of all storm water monitoring information and copies of all reports for at least five years. Section B, ¶ 13. Facility operators must submit an Annual Report by July 1 each year to the Regional Board that includes a summary of visual observations and sampling results, laboratory reports, the Annual Comprehensive Site Compliance Evaluation Report, an explanation of why a facility did not implement any required activities, and records specified in Section B, ¶ 13. Section B, ¶ 14.

PG&E has been operating with an inadequately developed and/or inadequately implemented MRP at each of its Facilities in violation of the substantive and procedural requirements set forth above. PG&E's monitoring program has not ensured that storm water discharges are in compliance with the Discharge Prohibitions, Effluent Limitations, and Receiving Water Limitations of the General Permit as required by General Permit sections B(2) and B(10). The monitoring program has not resulted in practices at each Facility that adequately reduce or prevent pollutants in storm water as required by General Permit sections B(2) and (4). PG&E's MRPs have not effectively identified compliance problems at the Facility or resulted in effective revision of the SWPPP to address such pollution problems as required by General Permit sections B(2) and (4).

PG&E has not submitted annual reports to the applicable Regional Board in the last five years. PG&E has failed to sample storm water from all discharge points at the Facilities, including gaps in berms or other locations. PG&E has failed to analyze its discharges for all toxic chemicals and other pollutants likely to be present in each Facility's storm water discharges in significant amounts. PG&E has failed to complete all required visual observations. Accordingly, PG&E has violated the monitoring and reporting provisions as specified by General Permit sections B(3)-(8), (13), and (14) every day for the last five years.

As a result of PG&E's failure to adequately develop and/or implement an adequate MRP at the Facilities, PG&E has been in daily and continuous violation of the General Permit and the CWA on each and every day for the last five years. These violations are ongoing. PG&E will continue to be in violation of the monitoring and reporting requirements every day it fails to adequately develop and implement an effective MRP at the Facility. PG&E is subject to penalties for each violation of the General Permit and the CWA occurring for the last five years.

#### **IV. Violations of RCRA**

As described in this Notice Letter, at each Facility listed in Exhibit 1, PG&E has contributed to the handling, storage, treatment, transportation or disposal of solid waste, including but not limited to Treated Wood Waste, and has created conditions which may present an imminent and substantial endangerment to health or the environment. PG&E knows at which of its Facilities it has handled, stored, treated, transported and /or disposed of solid waste, including but not limited to Treated Wood Waste, poles, braces, and the locations at the Facilities where such occurred.

The handling, storage, treatment, transportation or disposal of solid waste, including Treated Wood Waste causes an imminent and substantial endangerment to health and the environment. Treated Wood Waste is disposed when the oil-pentachlorophenol or other mixtures used to treat utility poles moves from the inside of the poles to the surface of the poles and then drips off the poles, or solidifies and flakes or drops off the poles. For those surfaces of the poles that consist of end-grain – the top and bottom of the poles – the wood treatment chemicals travel along the same vascular passageways as were used by the former tree to transport water and nutrients up the tree. In the case of treated poles, the chemicals leak out of the top and bottom of the poles via these very numerous but small vessels. For those surfaces of the poles that are perpendicular to the grain of the poles, the wood treatment mixtures also escape via the vascular system of the former tree as those vessels intersect knots in the poles and, because the tree has had its bark stripped off, the ends of the tree's vessels intersect the longer sides of the poles. Wood treatment chemicals leak out of the ends of these vessels that are perpendicular to the grain of the poles. Finally, because the wood treatment mixtures have been forced under pressure into the poles, the pressure of the wood treatment chemicals inside the poles tends to force the wood treatment chemicals out of the poles. This is especially the case when the poles are exposed to sunlight, which heats the poles and expands the fibers of the wood, as well as the oil-pentachlorophenol mixture inside the poles. This expansion process

forces the wood treatment mixtures out of the wood through the vascular system as described, as well as out through cracks and fissures in the wood. The wood treatment mixtures – with their attendant highly toxic contaminants – thus spill, leaks, discharge, ooze, run, or otherwise escape from confinement inside the poles and are deposited on the ground beneath the poles where the chemicals are then dispersed further into the environment. This process is precisely the way that the wood treatment chemicals go from their useful state – inside the poles – to being of no use – deposited on the ground where they are then discarded and dispersed into the wider environment. This toxic mixture contaminates the surface areas, storm drains and/or water bodies adjoining or near the poles and the Facilities at which PG&E stores these poles. The chemicals that leak from the poles are waste from treated wood and are thus treated wood waste.

Additional sources of wastes that are heavily contaminated with Dioxins, hexachlorobenzene, and pentachlorophenol, creosote, PAHs, PCBs, chromium, copper, arsenic and other toxicants being disposed of, released or further distributed to the environment from the poles are as follows: (1) PG&E and/or its agents make contact with the poles, including using forklifts to pick up and hold the poles. In this process, wood chips, flakes and particulate matter are dislodged from the poles and fall to the ground and are then spread around the Facilities, or are tracked off of the Facilities by vehicles, or in storm water, or are blown off the Facilities by wind. (2) PG&E and/or its agents prepare the poles for field placement and drill holes in, or saw into, the poles thus generating sawdust. This sawdust is released onto and around the Facilities, or is tracked off of the Facilities by vehicles, or in storm water, or are blown off the Facilities by wind. (3) PG&E and/or its agents handle and prepare used or “out of service” poles and other wooden objects including cross arms for storage, transportation or disposal and generate sawdust by sawing, cutting or breaking up the poles. This process releases sawdust wood chips and other particulate matter onto and around the Facilities, some of which are then tracked off of the Facilities by vehicles, conveyed off-site by storm water flows, or are blown into the ambient air by wind and then disbursed into adjoining residential and commercial neighborhoods, adjoining waterways, and the ground areas on-site and off-site of the Facilities. (4) PG&E handles and stores waste utility poles and other Treated Wood Waste in bins and dumpsters at the Facilities that are awaiting transportation and/or disposal. Rain falls on these bins and dumpsters, picking up toxic chemicals that leach out of the poles and Treated Wood Waste. A mixture of rainwater, particulate matter including sawdust and contaminated soils and sediments, and toxic chemicals then leaks from the bins and dumpsters onto the ground at the Facilities. Wind, rain, the shoes of PG&E workers and the tires of PG&E vehicles then cause these leaked chemicals to be disbursed into the wider environment. (5) Dust and dirt, soil and sediments at these Facilities are contaminated with wood treatment chemicals from the poles and Treated Wood Waste. PG&E has this contaminated dust and dirt swept up and placed in bins and dumpsters, or sweeps it off site. As with Treated Wood Waste in bins and dumpsters, the contaminated dirt, once in the dumpsters, gets rained upon. This causes the contaminated soils, sediments and other particulates, as well as toxic wood treatment chemicals that leach out of them, to leak out of the bin or dumpster and to be deposited on the ground. Wind, rain, storm water follows, animals, the shoes of PG&E workers and the tires of PG&E vehicles then cause these chemicals and contaminated wastes to be disbursed into the wider environment.

The California Department of Toxic Substances Control (“DTSC”) has classified treated wood waste from utility poles as hazardous waste for purposes of California law. Under normal circumstances, this would require that treated wood waste be disposed of in a landfill licensed to accept hazardous waste. PG&E has been given an exemption from this disposal requirement provided that it gathers all wood waste from its utility poles and disposes of that waste in a landfill that has been lined. As a consequence, PG&E itself treats whatever comes off its utility poles as solid waste to be disposed of in landfills. PG&E is not effective in doing so and, therefore, much waste from PG&E’s poles escapes being confined in lined landfills. Instead, as described by the processes in this letter, this solid waste is dispersed onto and around its Facilities and into the wider environment, including surface waters and groundwater.

As a result of the disposal of solid waste, including treated Wood Waste, and the dispersal of contaminants discussed in the preceding paragraphs, PG&E discharges Dioxins, hexachlorobenzene, and pentachlorophenol, creosote, PAHs, PCBs, chromium, copper, arsenic and other toxicants into waterways adjoining or near the Facilities at levels that threaten the health of aquatic organisms in the waterways and endanger the health of persons who use the waterways for water contact recreation, drinking water, as a food source, and/or as a source of irrigation water. PG&E is further discharging levels of these toxicants to the ambient air at levels that threatens the health of persons passing by who breathe airborne dust from the Facilities and the health of persons who reside in or occupy residential and commercial properties located next to or near the Facilities. The latter are exposed to accumulated dust and particulate matter blown from the Facilities that then settle on their properties and inside their homes—potentially contaminating their garden crops and areas where they walk and from where they then transport dust and particulate matter into their homes and businesses—creating ongoing risks of chronic exposure to these contaminants. PG&E is further contaminating the ground at levels that risk exposing persons who come into contact with contaminated soils or sediments, or walk over such contaminated areas, to harmful levels of pollutants that they then track into their automobiles and residences, creating ongoing risks of chronic exposure to these contaminants. Finally, as a result of the dispersal of contaminants discussed in the preceding paragraphs, PG&E is risking contamination of subsurface aquifers with harmful levels of pollutants that potentially supply sources of drinking water, as contaminants originating from the Facilities migrate from surface soils and sediment, and subsurface areas, into groundwater below the Facilities.

The presence of solid wastes, including Treated Wood Waste and its associated chemical contaminants, at the Facilities, where humans and wildlife may come into contact with them, and the dispersal those solid wastes and chemicals into the environment causes an imminent and substantial endangerment to health and the environment. The chemicals in the pentachlorophenol-containing wood treatment mixture are highly toxic and are known to the State of California, the federal government and the World Health Organization to cause cancer, immunotoxicity, birth defects and other reproductive toxicity. Currently existing published, peer reviewed literature shows that pentachlorophenol is routinely contaminated with Dioxins and hexachlorobenzene. Dioxins and hexachlorobenzene are manufacturing impurities that are found in virtually all samples of technical grade pentachlorophenol, which is widely used to treat power

poles to this day. For example, a study published by the California State Water Resources Control Board (that focused on contamination at power pole-treatment sites) analyzed concentrations of several Dioxins congeners in commercial chlorophenol products. This study found that where pentachlorophenol concentrations were 170,000 parts per million, the penta, hexa, hepta and octa congeners of polychlorinated dibenzo-pdioxins were found at levels of between 11 and 216,000 parts per million, depending on the congener, and the tetra, penta, hexa, hepta and octa congeners of polychlorinated dibenzofurans were found at levels of between 840 and 18,000 parts per million, once again, depending on the congener. Hence, any disposal of pentachlorophenol from the poles can reasonably be expected to also include the disposal of Dioxins and hexachlorobenzene contaminants.

In assessing cancer hazard from dioxins, it is safe to rely on a linear, no-threshold model for genotoxic chemicals. A linear no-threshold model for cancer risk assessment is a standard toxicological method used to assess cancer risk. For example, under the California Code of Regulations, the California Office of Environmental Health Hazard Assessment ("OEHHA") assumes that "the absence of a carcinogenic threshold dose shall be assumed and no-threshold models shall be utilized" when assessing cancer risk from a particular carcinogen. OEHHA has determined that, in the absence of convincing data which shows a threshold below which there is no risk of cancer, it is standard toxicological practice to assume no threshold exists for cancer hazard. Under the linear no-threshold model, exposure to extremely low levels of a carcinogen increases the quantitative risk of contracting cancer, even if that risk is very small. Based on currently existing published, peer reviewed studies, there is no significant evidence to show that there is a threshold below which there is no cancer risk from exposure to certain Dioxins. Data exists which demonstrates biological effects of Dioxins in the nanogram and picogram range, i.e., at levels substantially below those previously found to be toxic for these chemicals.

Based on a review of current, published, peer reviewed literature, dioxins and hexachlorobenzene, when discharged into an aquatic environment, can be ingested and concentrated in the fatty tissues of aquatic organisms. This literature demonstrates that Dioxins and hexachlorobenzene bio-accumulate and bio-magnify in organisms. These chemicals degrade very slowly and they bind to fatty substances. What this means is that if a fish eats many microscopic organisms, each of which have ingested a low level of Dioxins and hexachlorobenzene, the Dioxins and hexachlorobenzene from each microscopic organism will remain in the fatty tissues and fluids of the fish, resulting in a much greater concentration of these chemicals in the fish. Similarly, any fish that feeds on fish that have eaten microscopic organisms that have ingested Dioxins and hexachlorobenzene will have even greater concentrations of these chemicals in its fatty tissues and fluids. This same bio-magnifying process applies up any food chain, especially resulting in high concentrations of these chemicals in the fatty tissues and fluids of animals at the top of an aquatic food chain, such as osprey, bald eagles, salmon, raccoons, bear, seals, whales and humans. This bio-magnified amount concentrated in fatty tissues and fluids is commonly referred to as the "body burden" of these chemicals.

Dioxins and hexachlorobenzene are part of a class of compounds that the scientific

community identifies as "dioxin-like" compounds. These chemicals are called dioxin-like compounds because they tend to affect organisms in the same way as does the most potent toxic chemical of this class, 2,3,7,8 tetrachlorodibenzo-p-dioxin, but have different potencies for causing toxicological effects. It is the generally accepted practice within the scientific community to assess the toxicological effects of Dioxins and hexachlorobenzene based on their relative potencies compared to the potency of 2,3,7,8 tetrachlorodibenzo-p-dioxin. These relative potencies have been set by various organizations including the World Health Organization ("WHO").

An extensive body of literature on the carcinogenicity and developmental, reproductive and immunotoxicity of Dioxins and related compounds in laboratory studies exists. These studies provide adequate evidence that 2,3,7,8 tetrachlorodibenzo-p-dioxin is a carcinogen in laboratory animals based on long-term bioassays conducted in both sexes of rats and mice. All studies have produced positive results, leading to the conclusion that tetrachlorodibenzo-p-dioxin is a multistage carcinogen increasing the incidence of tumors at sites distant from the site of treatment and at doses well below the maximum tolerated dose. 2,3,7,8 tetrachlorodibenzo-p-dioxin has been shown to be a carcinogen in hamsters, which are relatively resistant to the effects of dioxin-like compounds. Recent data have shown 2,3,7,8 tetrachlorodibenzo-p-dioxin to be a liver carcinogen in small fish.

Recent peer reviewed studies of human populations exposed to Dioxins and related compounds has strengthened the inference, based on all the evidence from mechanistic, animal, and epidemiological studies that these compounds are appropriately characterized as human carcinogens. Recently, the International Agency for Research on Cancer ("IARC"), the cancer research arm of the World Health Organization, has upgraded its assessment of 2,3,7,8 tetrachlorodibenzo-p-dioxin to the status of being known to cause cancer in humans. The IARC did this as part of a broadly and extensively peer reviewed process.

Dioxins and hexachlorobenzene can cause developmental and reproductive toxicity in both animals and humans. The potential for Dioxins and related compounds to cause reproductive and developmental toxicity in animals has been recognized for many years and there is extensive, peer reviewed literature regarding these effects.

A wide variety of developmental events, crossing three vertebrate classes and several species within each class, can be perturbed by Dioxins and dioxin-like compounds, suggesting that Dioxins have the potential to disrupt a large number of critical developmental events at specific developmental stages. Some of these changes can disrupt organ system structure and irreversibly impair organ function. A general finding in fish, bird, and mammalian species is that the embryo or fetus is more sensitive to Dioxins-induced mortality than the adult. In mammals, postnatal functional alterations involving learning behavior and the developing reproductive system are sensitive to prenatal dioxin exposure at low levels (in the parts per billion range or lower). The developing immune system is also highly sensitive to extremely low Dioxins levels. Alterations in developing systems and diminished prenatal viability and growth have been observed at maternal Dioxins body burdens and/or daily Dioxins doses during gestation above

100 nanograms per kilogram of body weight in virtually every species tested. These doses of Dioxins are not maternally toxic. Higher dose levels can be demonstrated to result in prenatal mortality.

Individual species vary in their sensitivity to any particular Dioxins effect. The evidence available to date indicates that humans most likely fall in the middle of the range of sensitivity for individual effects among animals. In Dioxins-exposed men, subtle changes in biochemistry and physiology, such as enzyme induction, altered levels of circulating reproductive hormones, or reduced glucose tolerance, have been detected in a limited number of available studies. These findings, coupled with knowledge derived from animal experiments, suggest the potential for adverse impacts on human metabolism and developmental and/or reproductive biology and, perhaps other effects in the range of current human exposures at nanograms per kilogram (parts per trillion) levels. As body burdens of Dioxins-like compounds increase, the probability and the severity, as well as the spectrum of human non-cancer effects most likely increase. Hence, any additional increase in body burden of Dioxins-like compounds increases the risk of harmful toxicological effects.

The immune system is a particularly vulnerable target for the toxicity of dioxin-like compounds, including Dioxins and hexachlorobenzene. The ability of an animal to resist and/or control viral, bacterial, parasitic, and neoplastic diseases is determined by both nonspecific and specific immunological functions, which can be adversely affected by very low levels of Dioxins-like compounds in body tissues.

Evidence has accumulated to demonstrate that the immune system is a target for toxicity of Dioxins and structurally related compounds. The evidence has derived from numerous studies in various animal species. Animal studies suggest that some immunotoxic responses may be evoked at very low levels of dioxin exposure, which indicates the potential for similar risk to humans.

In summary, exposure to Dioxins and hexachlorobenzene can increase the body burden of these chemicals, particularly in species like humans who are at the top of long food chains. Any increase in body burdens of these chemicals increases the human risk of several toxic end points including cancer, developmental toxicity, reproductive toxicity, and possibly immunotoxicity. Because of the present high body burdens of these compounds in humans and wildlife, any increment in dosage will generate an increased risk of toxicity in humans. Because there is such a wide range of species of animals for which exposure to Dioxins-like compounds has been shown to disrupt prenatal development and to cause embryo/fetal mortality, exposure to Dioxins and hexachlorobenzene is likely to increase the risk of embryo/fetal mortality in both fish, birds and marine mammals. Exposure to Dioxins and hexachlorobenzene can increase the risk that wildlife, including fish, birds, and mammals will suffer decreased immune system function, and thus bear an increased risk that they will contract, or succumb to viral, bacterial, parasitic, and neoplastic infections and diseases. As body burdens of these chemicals increase, so does the risk that all of the above mentioned species will suffer the above referenced toxic endpoints.

Because the toxic chemicals in the pentachlorophenol mixture used to treat Your poles are so long lived and because they bio-accumulate and biomagnify in living organisms, many species, including fish, birds, and mammals, including humans, that participate in the food chain downstream of PG&E's poles, bear an increased risk of suffering the toxic endpoints discussed above.

The Citizen Groups allege that PG&E has and continues to cause an imminent and substantial endangerment to health and the environment of each Facilities' locality from its handling, storage, treatment, transportation or disposal of solid waste, including Treated Wood Waste, and with each discharge of storm water from the Facilities containing Dioxins, hexachlorobenzene and pentachlorophenol. The Citizen Groups further allege that PG&E has and continues to cause an imminent and substantial endangerment to health and the environment of each Facilities' locality each day that Dioxins, hexachlorobenzene and pentachlorophenol are tracked out of the Facilities onto adjacent public streets by vehicle or equipment tires. Accordingly, PG&E has been violating this RCRA provision continuously for at least the past five years. Thus, the dates of violations to which this Notice pertains are each and every single day dating back five years from the date of this letter. The Citizen Groups further put PG&E on notice that these violations will continue on every day into the future until PG&E ceases its improper handling, storage, treatment, transportation or disposal of solid waste, ceases discharging storm water or tracking particulate matter containing Dioxins, hexachlorobenzene and pentachlorophenol from its Facilities and removes the Dioxins, hexachlorobenzene and pentachlorophenol from the environment that it has released from the Facilities.

## VI. COUNSEL

The Citizen Groups have retained legal counsel to represent it in this matter. Please direct all communications to:

William Verick  
Fredric Evenson  
424 First Street  
Eureka, CA 95501  
(707) 268-8900

## VII. REMEDIES

The Citizen Groups will seek declaratory and injunctive relief preventing further CWA violations pursuant to CWA sections 505(a) and (d), 33 U.S.C. §1365(a) and such other relief as permitted by law. In addition, the Citizen Groups will seek civil penalties of up to \$32,500 per day per violation for PG&E's CWA violations occurring from March 15, 2004 through January 12, 2009, and \$37,500 per day per violation for PG&E's CWA violations occurring after January

12, 2009 pursuant to CWA section 309(d), 33 U.S.C. §1319(d), and the EPA Adjustment of Civil Monetary Penalties for Inflation Regulation, 40 C.F.R. § 19.4. The Citizen Groups will seek to recover attorneys, experts' fees and costs in accord with CWA section 505(d), 33 U.S.C. § 1365(d).

The Citizen Groups intend to seek injunctive relief preventing further violations of RCRA pursuant to Section 7002(a), 42 U.S.C. § 6972(a), and such other relief as is permitted by law.

In addition to the violations set forth above, this notice covers all ongoing violations of the CWA and RCRA and violations evidenced by information which becomes available to the Citizen Groups after the date of this Notice of Intent to File Suit.

The Citizen Groups believe this Notice of Violations and Intent to Sue sufficiently states grounds for filing suit. The Citizen Groups intend, at the close of the 60-day notice period or thereafter, to file a citizen suit under CWA section 505(a) against PG&E for the above-referenced violations. At the close of the 90-day notice period or thereafter, the Citizen Groups intend to amend its CWA complaint to add violations pursuant to RCRA section 7002(a)(1)(B).

The Citizen Groups would be happy to discuss effective remedies for the violations referenced in this Notice. If you wish to pursue such discussions in the absence of litigation, we suggest that you initiate these discussions immediately so that a resolution may be reached before the end of the 60-day notice period (for the Citizen Groups' alleged CWA violations) and 90-day notice period (for the Citizen Groups' alleged RCRA violations). Although the Citizen Groups are always interested in avoiding unnecessary litigation, in order to preserve their remedies, the Citizen Groups will not delay filing a complaint if a satisfactory remedy has not been reached by the time the applicable notice periods have expired.

Sincerely,

William Verick  
Fredrick Evenson  
Counsel for CATs and CSPA

Cc:

Lisa P. Jackson, Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Mail Code: 1101A  
Washington, D.C. 20460

Debbie Raphael, Acting Director  
Department of Toxic Substances Control  
1001 "I" Street  
P.O. Box 806  
Sacramento, CA 95812

Jared Blumenfeld, Acting Regional  
Administrator  
U.S. EPA - Region 9  
75 Hawthorne Street  
San Francisco, California 94105

Eric H. Holder, Jr. U.S. Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530-0001

Bruce Wolf, Executive Officer  
Regional Water Quality Control Board  
San Francisco Bay Region  
1515 Clay Street, Suite 1400  
Oakland, CA 94612

Thomas Howard, Executive Director  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

Catherine Kuhlman, Executive Officer  
Regional Water Quality Control Board  
North Coast Region  
5550 Skylane Blvd., Suite A  
Santa Rosa, CA 95403

Roger W. Briggs, Executive Officer  
Regional Water Quality Control Board  
Central Coast Region  
895 Aerovista Place, Suite 101  
San Luis Obispo, CA 93401

Pamela Creedon, Executive Officer  
Regional Water Quality Control Board  
Central Valley Region, Fresno Office  
1685 E Street, Suite 200  
Fresno, CA 93706

Mark Leary, Acting Director  
Department Resources, Recycling and  
Recovery (Cal Recycle)  
801 "K" Street  
MS 19-01  
Sacramento, CA 95814

Pamela Creedon, Executive Officer  
Regional Water Quality Control Board  
Central Valley Region, Redding Office  
415 Knollcrest Drive  
Redding, CA 96002

Pamela Creedon, Executive Officer  
Regional Water Quality Control Board  
Central Valley Region, Sacramento Office  
11020 Sun Center Drive, #200  
Rancho Cordova, CA 95670-6114