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NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

ADR

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15 CALIFORNIA SPORTFISHING
16 PROTECTION ALLIANCE, a non-profit
17 corporation,

17 Plaintiff,

18 vs.

19 NELSON'S MARINE, INC., a
20 corporation.

21 Defendant.

Case No. 09-00125

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF AND
CIVIL PENALTIES

(Federal Water Pollution Control Act,
33 U.S.C. §§ 1251 to 1387)

VRW

23 CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, by and through its
24 counsel, hereby alleges:

25 **I. INTRODUCTION**

26 1. This complaint seeks relief for Defendant's discharges of polluted storm water
27 and non-storm water pollutants from Defendant's facility ("the Facility") into the waters of
28 the United States in violation of the Act and the State of California's "Waste Discharge

1 Requirements (WDRs) For Discharges of Storm Water Associated With Industrial Activities
2 Excluding Construction Activities,” State Water Resources Control Board (“State Board”)
3 Water Quality Order No. 91-13-DWQ, as amended by Water Quality Order No. 92-12-DWQ
4 and Water Quality Order No. 97-03-DWQ, National Pollutant Discharge Elimination System
5 (“NPDES”) Permit No. CAS000001, (hereinafter “the Order” or “Permit”). Defendant’s
6 violations of the discharge, treatment technology, monitoring requirements, and other
7 procedural and substantive requirements of the Permit and the Act are ongoing and
8 continuous.

9 2. The failure on the part of persons and facilities such as Defendant and its
10 industrial facility to comply with storm water requirements is recognized as a significant
11 cause of the continuing decline in water quality of the San Francisco Bay (“Bay”). The
12 general consensus among regulatory agencies and water quality specialists is that storm
13 pollution amounts to a substantial portion of the total pollution entering the aquatic
14 environment each year. With every rainfall event, millions of gallons of polluted rainwater
15 originating from industries within the surrounding area pour into the Bay.

16 3. The continuing decline in water quality in the San Francisco Bay is a matter of
17 serious public concern. The entire Bay and all of its major tributaries have been identified
18 by the State Board, the Regional Water Quality Control Board of the San Francisco Bay
19 Region (“Regional Board”), and Environmental Protection Agency (“EPA”) as impaired
20 water bodies under Section 303(d) of the Clean Water Act. 33 U.S.C. § 1313(d).

21 **II. JURISDICTION AND VENUE**

22 4. This is a civil suit brought under the citizen suit enforcement provisions of the
23 Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.* (the “Clean Water Act” or
24 “the Act”). This Court has subject matter jurisdiction over the parties and the subject matter
25 of this action pursuant to Section 505(a)(1)(A) of the Act, 33 U.S.C. § 1365(a)(1)(A), and 28
26 U.S.C. § 1331 (an action arising under the laws of the United States). The relief requested is
27 authorized pursuant to 28 U.S.C. §§ 2201-02 (power to issue declaratory relief in case of
28 actual controversy and further necessary relief based on such a declaration); 33 U.S.C. §§

1 1319(b), 1365(a) (injunctive relief); and 33 U.S.C. §§ 1319(d), 1365(a) (civil penalties).

2 5. On or about November 4, 2008, Plaintiff provided notice of Defendant's
3 violations of the Act, and of its intention to file suit against Defendant, to the Defendant; the
4 Administrator of the United States EPA; the Administrator of EPA Region IX; the Executive
5 Director of the State Board; and to the Executive Officer of the Regional Board. A true and
6 correct copy of CSPA's notice letter is attached as Exhibit A, and is incorporated by
7 reference.

8 6. More than sixty days have passed since notice was served on Defendant and
9 the State and federal agencies. Plaintiff is informed and believes, and thereupon alleges, that
10 neither the EPA nor the State of California has commenced or is diligently prosecuting a
11 court action to redress the violations alleged in this complaint. This action's claim for civil
12 penalties is not barred by any prior administrative penalty under Section 309(g) of the Act,
13 33 U.S.C. § 1319(g).

14 7. Venue is proper in the Northern District of California pursuant to Section
15 505(c)(1) of the Act, 33 U.S.C. § 1365(c)(1), because the source of the violations is located
16 within this judicial district. Pursuant to Local Rule 3-2(c), intradistrict venue is proper in
17 Oakland, California because the sources of the violations are located within Alameda
18 County, California.

19 **III. PARTIES**

20 8. Plaintiff CALIFORNIA SPORTFISHING PROTECTION ALLIANCE
21 ("CSPA") is a non-profit public benefit corporation organized under the laws of the State of
22 California with its main office in Stockton, California. CSPA has approximately 2,000
23 members who live, recreate and work in and around waters of the State of California,
24 including San Francisco Bay. CSPA is dedicated to the preservation, protection, and defense
25 of the environment, the wildlife and the natural resources of all waters of California. To
26 further these goals, CSPA actively seeks federal and state agency implementation of the Act
27 and other laws and, where necessary, directly initiates enforcement actions on behalf of itself
28 and its members.

1 9. Members of CSPA reside in and around the Bay and enjoy using the Bay for
2 recreation and other activities. Members of CSPA use and enjoy the waters into which
3 Defendant has caused, is causing, and will continue to cause, pollutants to be discharged.
4 Members of CSPA use those areas to fish, sail, boat, kayak, swim, bird watch, view wildlife
5 and engage in scientific study including monitoring activities, among other things.
6 Defendant's discharges of pollutants threaten or impair each of those uses or contribute to
7 such threats and impairments. Thus, the interests of CSPA's members have been, are being,
8 and will continue to be adversely affected by Defendant's failure to comply with the Clean
9 Water Act and the Permit. The relief sought herein will redress the harms to Plaintiff caused
10 by Defendant's activities.

11 10. Plaintiff is informed and believes, and thereupon alleges, that Defendant
12 NELSON'S MARINE, INC. (hereinafter "Defendant" or "Nelson's Marine") is a
13 corporation organized under the laws of California. Defendant Nelson's Marine operates a
14 full service boatyard in Alameda, California.

15 **IV. STATUTORY BACKGROUND**

16 11. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any
17 pollutant into waters of the United States, unless such discharge is in compliance with
18 various enumerated sections of the Act. Among other things, Section 301(a) prohibits
19 discharges not authorized by, or in violation of, the terms of an NPDES permit issued
20 pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

21 12. Section 402(p) of the Act establishes a framework for regulating municipal and
22 industrial storm water discharges under the NPDES program. 33 U.S.C. § 1342(p). States
23 with approved NPDES permit programs are authorized by Section 402(p) to regulate
24 industrial storm water discharges through individual permits issued to dischargers or through
25 the issuance of a single, statewide general permit applicable to all industrial storm water
26 dischargers. 33 U.S.C. § 1342(p).

27 13. Pursuant to Section 402 of the Act, 33 U.S.C. § 1342, the Administrator of the
28 U.S. EPA has authorized California's State Board to issue NPDES permits including general

1 NPDES permits in California.

2 14. The State Board elected to issue a statewide general permit for industrial storm
3 water discharges. The State Board issued the General Permit on or about November 19,
4 1991, modified the General Permit on or about September 17, 1992, and reissued the
5 General Permit on or about April 17, 1997, pursuant to Section 402(p) of the Clean Water
6 Act, 33 U.S.C. § 1342(p).

7 15. In order to discharge storm water lawfully in California, industrial dischargers
8 must comply with the terms of the General Permit or have obtained and complied with an
9 individual NPDES permit. 33 U.S.C. § 1311(a).

10 16. The General Permit contains several prohibitions. Effluent Limitation B(3) of
11 the General Permit requires dischargers to reduce or prevent pollutants in their storm water
12 discharges through implementation of the Best Available Technology Economically
13 Achievable (“BAT”) for toxic and nonconventional pollutants and the Best Conventional
14 Pollutant Control Technology (“BCT”) for conventional pollutants. BAT and BCT include
15 both nonstructural and structural measures. General Permit, Section A(8). Discharge
16 Prohibition A(2) of the General Permit prohibits storm water discharges and authorized non-
17 storm water discharges that cause or threaten to cause pollution, contamination, or nuisance.
18 Receiving Water Limitation C(1) of the General Permit prohibits storm water discharges to
19 any surface or ground water that adversely impact human health or the environment.
20 Receiving Water Limitation C(2) of the General Permit prohibits storm water discharges that
21 cause or contribute to an exceedance of any applicable water quality standards contained in a
22 Statewide Water Quality Control Plan or the applicable Regional Board’s Basin Plan.

23 17. EPA has established Parameter Benchmark Values as guidelines for
24 determining whether a facility discharging industrial storm water has implemented the
25 requisite BAT and BCT. 65 Fed. Reg. 64746, 64767 (Oct. 30, 2000). EPA has established
26 Parameter Benchmark Values for the following parameters, among others: total suspended
27 solids – 100 mg/L; oil & grease – 15 mg/L; pH – 6.0-9.0 s.u.; lead – 0.0816 mg/L; copper –
28 0.0636 mg/L; total organic carbon – 110 mg/L; and zinc – 0.117 mg/L. The California State

1 Water Resources Control Board has proposed a Benchmark Value for electrical conductance
2 of 200 µmhos/cm.

3 18. In addition to absolute prohibitions, the General Permit contains a variety of
4 substantive and procedural requirements that dischargers must meet. Facilities discharging,
5 or having the potential to discharge, storm water associated with industrial activity that have
6 not obtained an individual NPDES permit must apply for coverage under the State's General
7 Permit by filing a Notice of Intent To Comply ("NOI"). The General Permit requires
8 existing dischargers to have filed their NOIs before March 30, 1992.

9 19. Dischargers must develop and implement a Storm Water Pollution Prevention
10 Plan ("SWPPP"). The SWPPP must describe storm water control equipment and measures
11 that comply with the BAT and BCT standards. The General Permit requires that an initial
12 SWPPP have been developed and implemented before October 1, 1992. The SWPPP must,
13 among other requirements, identify and evaluate sources of pollutants associated with
14 industrial activities that may affect the quality of storm and non-storm water discharges from
15 the facility and identify and implement site-specific best management practices ("BMPs") to
16 reduce or prevent pollutants associated with industrial activities in storm water and
17 authorized non-storm water discharges (Section A(2)). The SWPPP's BMPs must
18 implement BAT and BCT (Section B(3)). The SWPPP must include: a description of
19 individuals and their responsibilities for developing and implementing the SWPPP (Section
20 A(3)); a site map showing the facility boundaries, storm water drainage areas with flow
21 pattern and nearby water bodies, the location of the storm water collection, conveyance and
22 discharge system, structural control measures, impervious areas, areas of actual and potential
23 pollutant contact, and areas of industrial activity (Section A(4)); a list of significant materials
24 handled and stored at the site (Section A(5)); a description of potential pollutant sources
25 including industrial processes, material handling and storage areas, dust and particulate
26 generating activities, and a description of significant spills and leaks, a list of all non-storm
27 water discharges and their sources, and a description of locations where soil erosion may
28 occur (Section A(6)). The SWPPP must include an assessment of potential pollutant sources

1 at the Facility and a description of the BMPs to be implemented at the Facility that will
2 reduce or prevent pollutants in storm water discharges and authorized non-storm water
3 discharges, including structural BMPs where non-structural BMPs are not effective (Section
4 A(7), (8)). The SWPPP must be evaluated to ensure effectiveness and must be revised where
5 necessary (Section A(9),(10)).

6 20. Section C(11)(d) of the General Permit's Standard Provisions requires
7 dischargers to report any noncompliance to the Regional Board. *See also* Section E(6).
8 Lastly, Section A(9) of the General Permit requires an annual evaluation of storm water
9 controls including the preparation of an evaluation report and implementation of any
10 additional measures in the SWPPP to respond to the monitoring results and other inspection
11 activities.

12 21. The General Permit requires dischargers commencing industrial activities
13 before October 1, 1992 to develop and implement an adequate written monitoring and
14 reporting program no later than October 1, 1992. Existing facilities covered under the
15 General Permit had to implement all necessary revisions to their monitoring programs no
16 later than August 1, 1997.

17 22. As part of their monitoring program, dischargers must identify all storm water
18 discharge locations that produce a significant storm water discharge, evaluate the
19 effectiveness of BMPs in reducing pollutant loading, and evaluate whether pollution control
20 measures set out in the SWPPP are adequate and properly implemented. Dischargers must
21 conduct visual observations of these discharge locations for at least one storm per month
22 during the wet season (October through May) and record their findings in their Annual
23 Report. Dischargers must also collect and analyze storm water samples from at least two
24 storms per year. Section B(5)(a) of the General Permit requires that dischargers "shall
25 collect storm water samples during the first hour of discharge from (1) the first storm event
26 of the wet season, and (2) at least one other storm event in the wet season. All storm water
27 discharge locations shall be sampled." Section B(5)(c)(i)-(iii) requires dischargers to sample
28 and analyze during the wet season for basic parameters, such as pH, total suspended solids

1 (“TSS”), electrical conductance, and total organic carbon (“TOC”) or oil and grease
2 (“O&G”), certain industry-specific parameters, and any other pollutants likely to be in the
3 storm water discharged from the facility. Dischargers must also conduct dry season visual
4 observations to identify sources of non-storm water pollution.

5 23. Section B(14) of the General Permit requires dischargers to submit an annual
6 report by July 1 of each year to the executive officer of the relevant Regional Board. The
7 annual report must be signed and certified by an appropriate corporate officer. Sections
8 B(14), C(9), (10). Section A(9)(d) of the General Permit requires the discharger to include
9 in their annual report an evaluation of their storm water controls, including certifying
10 compliance with the General Permit. *See also* Sections C(9) and (10) and B(14).

11 24. Section 505(a)(1) and Section 505(f) of the Act provide for citizen
12 enforcement actions against any “person,” including individuals, corporations, or
13 partnerships, for violations of NPDES permit requirements. 33 U.S.C. §§1365(a)(1) and (f),
14 § 1362(5). An action for injunctive relief under the Act is authorized by 33 U.S.C. §
15 1365(a). Violators of the Act are also subject to an assessment of civil penalties of up to
16 \$27,500 per day (violations from January 30, 1997 through March 15, 2004) and \$32,500
17 per day (violations after March 15, 2004) pursuant to Sections 309(d) and 505 of the Act, 33
18 U.S.C. §§ 1319(d), 1365 and 40 C.F.R. §§ 19.1 - 19.4.

19 25. The Regional Board has established water quality standards for the San
20 Francisco Bay in the Water Quality Control Plan for the San Francisco Bay Basin, generally
21 referred to as the Basin Plan.

22 26. The Basin Plan provides that “[w]aters shall not contain suspended material in
23 concentrations that cause nuisance or adversely affect beneficial uses.”

24 27. The Basin Plan includes a narrative toxicity standard which states that “[a]ll
25 waters shall be maintained free of toxic substances in concentrations that are lethal or that
26 produce other detrimental responses in aquatic organisms.”

27 28. The Basin Plan includes a narrative oil and grease standard which states that
28 “[w]aters shall not contain oils, greases, waxes, or other materials in concentrations that

1 result in a visible film or coating on the surface of the water or on objects in the water, that
2 cause nuisance, or otherwise adversely affect beneficial uses.”

3 29. The Basin Plan provides that “[t]he pH shall not be depressed below 6.5 nor
4 raised above 8.5.”

5 30. The Basin Plan establishes Marine Water Quality Objectives for zinc of 0.081
6 mg/L (4-day average) and 0.090 mg/L (1-hour average); copper of 0.0031 mg/L (4-day
7 average) and 0.0048 mg/L (1-hour average); and lead of 0.0081 mg/L (4 day average) and
8 0.21 mg/L (1hour average).

9 31. The EPA has adopted saltwater numeric water quality standards for copper of
10 0.0031 mg/L (Criteria Maximum Concentration – “CMC”) and .0048 mg/L (Criteria
11 Continuous Concentration – “CCC”), for lead of 0.210 mg/L (CMC) and 0.0081 mg/L
12 (CCC), for zinc of 0.09 mg/L (CMC) and 0.081 mg/L (CCC).

13 **V. STATEMENT OF FACTS**

14 32. Defendant Nelson’s Marine operates a full service boat yard at 1500 Ferry
15 Point in Alameda, California on a parcel located at the now closed Alameda Naval Air
16 Station. The Facility is across the street from a portion of San Francisco Bay commonly
17 known as “Seaplane Lagoon.” The Facility is engaged in full service boat repairs ranging
18 from routine maintenance to complete restoration. The Facility falls within the Standard
19 Industrial Classification (“SIC”) Codes 3732. The Facility covers about five acres, the
20 entirety of which is paved and used for transporting and storing boats throughout the
21 Facility. On information and belief, Plaintiff alleges that there is at least one building
22 located on the property. On information and belief, Plaintiff alleges that boat repairs are
23 conducted both inside and outside of this building. Boats are transported in and out of this
24 building for storage in the outside, paved areas of the Facility.

25 33. Defendant channels and collects storm water falling on the Facility though at
26 least two storm water outfalls. Each storm drain collects storm water runoff from a
27 particular area of the Facility. These outfalls discharge the storm water to the San Francisco
28 Bay.

1 34. The industrial activities at the site include various activities related to the
2 repair, maintenance, and storage of boats. This includes bottom painting, topside painting,
3 rigging, woodwork, welding, and composite repair.

4 35. Significant activities at the site take place outside and are exposed to rainfall.
5 These activities include the repair, maintenance, and storage of a variety of boats. Trailers
6 carrying boats enter and exit the Facility directly from and to a public road. Plaintiff alleges
7 on information and belief that most of the surfaces at the Facility are exposed to storm water
8 and storm flows due to the lack of overhead coverage, berms and other storm water controls.

9 36. Plaintiff is informed and believes, and thereupon alleges that the storm water
10 flows easily over the surface of the Facility, collecting suspended sediment, dirt, oils, grease,
11 and other pollutants as it flows toward the storm water drain. Storm water and any
12 pollutants contained in that storm water entering the drains flows directly to storm drains that
13 flow directly to the San Francisco Bay.

14 37. The management practices at the Facility are wholly inadequate to prevent the
15 sources of contamination described above from causing the discharge of pollutants to waters
16 of the United States. The Facility lacks sufficient structural controls such as grading,
17 berming, roofing, containment, or drainage structures to prevent rainfall and storm water
18 flows from coming into contact with these and other exposed sources of contaminants. The
19 Facility lacks sufficient structural controls to prevent the discharge of water once
20 contaminated. The Facility lacks adequate storm water pollution treatment technologies to
21 treat storm water once contaminated.

22 38. Since at least March 25, 2004, Defendant has taken samples or arranged for
23 samples to be taken of storm water discharges at the Facility. The sample results were
24 reported in the Facility's annual reports submitted to the Regional Board. Defendant
25 Nelson's Marine certified each of those annual reports pursuant to Sections A and C of the
26 General Permit.

27 39. Since at least March 25, 2004, the Facility has detected TSS, lead, copper, and
28 zinc in storm water discharged from the Facility. Since at least February 26, 2007, the

1 Facility has detected pH in storm water discharged from the Facility. Levels of these
2 pollutants detected in the Facility's storm water have been in excess of EPA's numeric
3 parameter benchmark values. Levels of these pollutants detected in the Facility's storm
4 water have been in excess of water quality standards established in the Basin Plan.

5 40. The levels of lead in storm water detected by the Facility have exceeded the
6 benchmark value for lead of 0.0816 mg/L established by EPA. For example, on March 29,
7 2006, the level of lead measured by Defendant in the Facility's discharged storm water was
8 0.52 mg/L. That level of lead is over six times the benchmark value for lead established by
9 EPA.

10 41. The levels of copper in storm water detected by the Facility have exceeded the
11 benchmark value for copper of 0.0636 mg/L established by EPA. For example, on May 24,
12 2006, the level of copper measured by Defendant in the Facility's discharged storm water
13 was 7.4 mg/L. That level of copper is over 116 times the benchmark value for copper
14 established by EPA.

15 42. The levels of zinc in storm water detected by the Facility have exceeded the
16 benchmark value for zinc of 0.117 mg/L established by EPA. For example, on May 24,
17 2006, the level of zinc measured by Defendant in the Facility's discharged storm water was
18 1.1 mg/L. That level of zinc is over nine times the benchmark value for zinc established by
19 EPA.

20 43. The levels of pH in storm water detected by the Facility have exceeded the
21 benchmark value for pH of 6.0 – 9.0 established by EPA. On January 25, 2008, the level of
22 pH measured by the Defendant in the Facility's discharged storm water was 5.61.

23 44. The levels of total suspended solids in storm water detected by the Facility
24 have exceeded the benchmark value for total suspended solids of 100 mg/L established by
25 EPA. For example, on February 26, 2007, the level of suspended solids measured by
26 Defendant in the Facility's discharged storm water was 250 mg/L. That level of total
27 suspended solids is 2.5 times the benchmark value for suspended solids established by EPA.

28 45. On information and belief, Plaintiff alleges that Defendants have failed to

1 analyze its storm water samples for specific conductance as required by the Section
2 B(5)(c)(i) of the General Permit since at least March 25, 2004.

3 46. On information and belief, Plaintiff alleges that Defendants have failed to
4 analyze its storm water samples for total organic carbon or oil & grease as required by the
5 Section B(5)(c)(i) of the General Permit since at least March 25, 2004.

6 47. On information and belief, Plaintiff alleges that Defendants failed to analyze
7 its storm water samples taken on April 28, 2005 for TSS and pH as required by Section
8 B(5)(c)(i) of the General Permit.

9 48. On information and belief, Plaintiff alleges that Defendants failed to analyze
10 its storm water samples taken on May 25, 2004 and taken during the 2007-2008 rainy season
11 (with the exception of one sample taken on January 25, 2008) for copper, lead, and zinc as
12 required by Section B(5)(c)(ii) of the General Permit.

13 49. On information and belief, Plaintiff alleges that Defendants have failed to
14 analyze storm water samples for two storm events during the 2007-2008 rainy season as
15 required by Section B(5)(a) of the General Permit.

16 50. On information and belief, Plaintiff alleges that Defendants have failed to
17 provide any reports of monthly wet season visual observations of storm water discharges as
18 required by Section B(4) of the General Permit since at least November 13, 2003.

19 51. On information and belief, Plaintiff alleges that Defendants have failed to
20 provide any reports of quarterly visual observations of authorized and unauthorized storm
21 water discharges as required by Section B(3) of the General Permit since at least November
22 13, 2003.

23 52. On information and belief, Plaintiff alleges that since at least November 13,
24 2003, Defendant has failed to implement BAT and BCT at the Facility for its discharges of
25 total suspended solids, copper, lead, zinc, pH, and other pollutants. The General Permit
26 requires that Defendant implement BAT for toxic and nonconventional pollutants and BCT
27 for conventional pollutants by no later than October 1, 1992. As of the date of this
28 Complaint, Defendant has failed to implement BAT and BCT.

1 53. On information and belief, Plaintiff alleges that since at least November 13,
2 2003, Defendant has failed to implement an adequate SWPPP for the Facility. Plaintiff is
3 informed and believes, and thereupon alleges, that the SWPPP prepared for the Facility does
4 not set forth site-specific best management practices for the Facility that are consistent with
5 BAT or BCT for the Facility. Plaintiff is informed and believes, and thereupon alleges, that
6 the SWPPP prepared for the Facility does not include an assessment of potential pollutant
7 sources, structural pollutant control measures employed by the Defendant, a list of actual and
8 potential areas of pollutant contact, or a description of best management practices to be
9 implemented at the Facility to reduce pollutant discharges. According to information
10 available to CSPA, Defendant's SWPPP has not been evaluated to ensure effectiveness and
11 revised where necessary to further reduce pollutant discharges. Plaintiff is informed and
12 believes, and thereupon alleges, that the SWPPP does not include each of the mandatory
13 elements required by Section A of the General Permit. Plaintiff is informed and believes,
14 and thereupon alleges, that the SWPPP does not contain an accurate map that clearly
15 delineates the boundaries of the Facility, storm water drainage areas with flow pattern and
16 nearby water bodies, the location of the storm water collection, conveyance and discharge
17 systems, structural control measures, impervious areas, areas of actual and potential pollutant
18 contact, and areas of industrial activity.

19 54. Information available to CSPA indicates that as a result of these practices,
20 storm water containing excessive pollutants is being discharged during rain events from the
21 Facility directly to the San Francisco Bay.

22 55. The San Francisco Bay has been identified by the Regional Board, State Board
23 and federal EPA as impaired for several pollutants, including mercury and unknown toxicity.
24 Sediments within Seaplane Lagoon contain elevated levels of lead and other pollutants that
25 pose an adverse risk to the environment.

26 56. Plaintiff is informed and believes, and thereupon alleges, that pollutants
27 discharged by the Facility in its storm water are contributing to violations of water quality
28 standards that apply to the San Francisco Bay and its tributaries. Plaintiff is informed and

1 believes, and thereupon alleges, that Defendant is discharging copper, lead, zinc, pH, total
2 suspended solids, and other un-monitored pollutants that are causing or contributing to
3 exceedances of applicable water quality standards. Defendant is contributing to violations of
4 water quality standards including, but not limited to, the narrative water quality standard for
5 toxicity.

6 57. Plaintiff is informed and believes, and thereupon alleges, that, Defendant has
7 failed and continues to fail to amend the Facility's SWPPP and site-specific BMPs consistent
8 with Section A(9) of the General Permit.

9 58. Plaintiff is informed and believes that Defendant failed to submit to the
10 Regional Board a true and complete annual report certifying compliance with the General
11 Permit since at least November 13, 2003. Pursuant to Sections A(9)(d), B(14), and C(9),
12 (10) of the General Permit, Defendant must submit an annual report, that is signed and
13 certified by the appropriate corporate officer, outlining the Facility's storm water controls
14 and certifying compliance with the General Permit. Plaintiff is informed and believes, and
15 thereupon alleges, that Defendant has signed incomplete annual reports that purported to
16 comply with the General Permit when there was significant noncompliance at the Facility.

17 59. Information available to Plaintiff indicates that Defendant has not fulfilled the
18 requirements set forth in the General Permit for discharges from the Facility due to the
19 continued discharge of polluted storm water. Plaintiff is informed and believes, and
20 thereupon alleges, that all of the violations alleged in this Complaint are ongoing and
21 continuing.

22 **VI. CLAIMS FOR RELIEF**

23 **FIRST CAUSE OF ACTION**

24 **Failure to Develop and Implement the Best Available and** 25 **Best Conventional Treatment Technologies** 26 **(Violations of Permit Conditions and the Act, 33 U.S.C. §§ 1311, 1342)**

27 60. Plaintiff realleges and incorporate Paragraphs 1-59, as if fully set forth herein.

28 61. The General Permit's SWPPP requirements and Effluent Limitation B(3)
require dischargers to reduce or prevent pollutants in their storm water discharges through

1 implementation of BAT for toxic and nonconventional pollutants and BCT for conventional
2 pollutants. Defendant has failed to implement BAT and BCT at the Facility for its
3 discharges of total suspended solids, copper, lead, zinc, pH, and other un-monitored
4 pollutants in violation of Effluent Limitation B(3) of the General Permit.

5 62. Each day since November 13, 2003 that Defendant has failed to develop and
6 implement BAT and BCT in violation of the General Permit is a separate and distinct violation
7 of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

8 63. Defendant has been in violation of the BAT/BCT requirements every day since
9 October 1, 1992. Defendant continues to be in violation of the BAT/BCT requirements each
10 day that it fails to develop and fully implement an adequate BAT/BCT for the Facility.

11 **SECOND CAUSE OF ACTION**
12 **Failure to Prepare, Implement, Review, and Update**
13 **an Adequate Storm Water Pollution Prevention Plan**
14 **(Violations of Permit Conditions and the Act, 33 U.S.C. §§ 1311, 1342)**

15 64. Plaintiff realleges and incorporate Paragraphs 1-63, as if fully set forth herein.

16 65. Section A and Provision E of the General Permit requires dischargers of storm
17 water associated with industrial activity to have developed and be implementing an adequate
18 SWPPP no later than October 1, 1992.

19 66. Defendant has failed to develop and implement an adequate SWPPP for the
20 Facility. Defendant's ongoing failure to develop and implement an adequate SWPPP for the
21 Facility is evidenced by, *inter alia*, Defendant's outdoor storage of various boats, without
22 appropriate best management practices; the continued exposure of significant quantities of
23 various materials to storm water flows; the failure to either treat storm water prior to
24 discharge or to implement effective containment practices; and the continued discharge of
25 storm water pollutants from the Facility at levels in excess of EPA benchmark values.

26 67. Defendant has failed to update the Facility's SWPPP in response to the
27 analytical results of the Facility's storm water monitoring.

28 68. Each day since November 13, 2003 that Defendant has failed to develop,
implement and update an adequate SWPPP for the Facility is a separate and distinct violation

1 of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

2 69. Defendant has been in violation of the SWPPP requirements every day since
3 November 13, 2003. Defendant continues to be in violation of the SWPPP requirements each
4 day that it fails to develop and fully implement an adequate SWPPP for the Facility.

5 **THIRD CAUSE OF ACTION**

6 **Failure to Develop and Implement an Adequate Monitoring and Reporting Program
(Violation of Permit Conditions and the Act, 33 U.S.C. §§ 1311, 1342)**

7 70. Plaintiff re-alleges and incorporates Paragraphs 1-69, inclusive, as if fully set
8 forth herein.

9 71. Section B of the General Permit requires dischargers of storm water associated
10 with industrial activity to have developed and be implementing a monitoring and reporting
11 program (including, *inter alia*, sampling and analysis of discharges) no later than October 1,
12 1992.

13 72. Defendant has failed to develop and implement an adequate monitoring and
14 reporting program for the Facility. Defendant's ongoing failure to develop and implement
15 an adequate monitoring and reporting program are evidenced by, *inter alia*, their failure to
16 monitor storm water discharges for specific conductance and either total organic carbon or
17 oil & grease.

18 73. Each day since November 13, 2003 that Defendant has failed to develop and
19 implement an adequate monitoring and reporting program for the Facility in violation of the
20 General Permit is a separate and distinct violation of Section 301(a) of the Act, 33 U.S.C. §
21 1311(a). The absence of requisite monitoring and analytical results are ongoing and
22 continuous violations of the Act.

23 **FOURTH CAUSE OF ACTION**

24 **Discharges of Contaminated Storm Water
25 in Violation of Permit Conditions and the Act
26 (Violations of 33 U.S.C. §§ 1311(a), 1342)**

27 74. Plaintiff re-alleges and incorporates Paragraphs 1-73, inclusive, as if fully set
28 forth herein.

75. Discharge Prohibition A(2) of the General Permit requires that storm water

1 discharges and authorized non-storm water discharges shall not cause or threaten to cause
2 pollution, contamination, or nuisance. Receiving Water Limitations C(1) and C(2) of the
3 General Permit require that storm water discharges and authorized non-storm water discharges
4 shall not adversely impact human health or the environment, and shall not cause or contribute
5 to a violation of any water quality standards contained in a Statewide Water Quality Control
6 Plan or the applicable Regional Board's Basin Plan.

7 76. Plaintiff is informed and believes, and thereupon alleges, that since at least
8 November 13, 2003, Defendant has been discharging polluted storm water from the Facility
9 directly to storm drains that flow into the San Francisco Bay, in violation of the Discharge
10 Prohibition A(2) of the General Permit.

11 77. During every rain event, rainwater flows freely over exposed materials, waste
12 products, and other accumulated pollutants at the Facility, becoming contaminated with these
13 pollutants. The rainwater then flows untreated from the Facility into a storm drain. This
14 contaminated storm water flows into the San Francisco Bay.

15 78. Plaintiff is informed and believes, and thereupon alleges, that these discharges of
16 contaminated storm water are causing pollution and contamination of the waters of the United
17 States in violation of Discharge Prohibition A(2) of the General Permit.

18 79. Plaintiff is informed and believes, and thereupon alleges, that these discharges
19 of contaminated storm water are adversely affecting human health and the environment in
20 violation of Receiving Water Limitation C(1) of the General Permit.

21 80. Plaintiff is informed and believes, and thereupon alleges, that these discharges of
22 contaminated storm water are contributing to the violation of the applicable water quality
23 standards in a Statewide Water Quality Control Plan and/or the applicable Regional Board's
24 Basin Plan in violation of Receiving Water Limitation C(2) of the General Permit.

25 81. Every day since at least November 13, 2003, that Defendant has discharged and
26 continues to discharge polluted storm water from the Facility in violation of the General Permit
27 is a separate and distinct violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a). These
28 violations are ongoing and continuous.

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FIFTH CAUSE OF ACTION
False Certification of Compliance In Annual Report
(Violations of Permit Conditions and the Act, 33 U.S.C. §§ 1311, 1342)

82. Plaintiff realleges and incorporate Paragraphs 1-81, as if fully set forth herein.

83. Defendant has falsely certified compliance with the General Permit in each of the annual reports submitted to the Regional Board since at least June 30, 2004.

84. Each day since at least June 30, 2004 that Defendant has falsely certified compliance with the General Permit is a separate and distinct violation of the General Permit and Section 301(a) of the Act, 33 U.S.C. § 1311(a). Defendant continues to be in violation of the General Permit’s certification requirement each day that it maintains its false certification of its compliance with the General Permit.

VII. RELIEF REQUESTED

Wherefore, Plaintiff respectfully requests that this Court grant the following relief:

- a. Declare Defendant to have violated and to be in violation of the Act as alleged herein;
- b. Enjoin Defendant from discharging polluted storm water from the Facility unless authorized by the Permit;
- c. Enjoin Defendant from further violating the substantive and procedural requirements of the Permit;
- d. Order Defendant to immediately implement storm water pollution control and treatment technologies and measures that are equivalent to BAT or BCT and prevent pollutants in the Facility’s storm water from contributing to violations of any water quality standards;
- e. Order Defendant to comply with the Permit’s monitoring and reporting requirements, including ordering supplemental monitoring to compensate for past monitoring violations;
- f. Order Defendant to prepare a SWPPP consistent with the Permit’s requirements and implement procedures to regularly review and update the SWPPP;
- g. Order Defendant to provide Plaintiff with reports documenting the quality

1 and quantity of their discharges to waters of the United States and their efforts to comply with
2 the Act and the Court's orders;

3 h. Order Defendant to pay civil penalties of \$27,500 per day per violation for
4 all violations occurring before March 15, 2004, and \$32,500 per day per violation for all
5 violations occurring after August 28, 2002, for each violation of the Act pursuant to Sections
6 309(d) and 505(a) of the Act, 33 U.S.C. §§ 1319(d), 1365(a) and 40 C.F.R. §§ 19.1 - 19.4;

7 i. Order Defendant to take appropriate actions to restore the quality of waters
8 impaired or adversely affected by their activities;

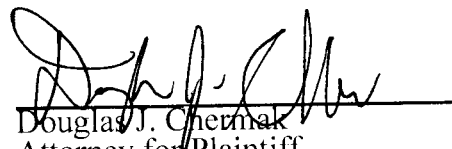
9 j. Award Plaintiff's costs (including reasonable investigative, attorney, witness,
10 compliance oversight, and consultant fees) as authorized by the Act, 33 U.S.C. § 1365(d); and,

11 k. Award any such other and further relief as this Court may deem appropriate.

12
13 Dated: January 12, 2009

Respectfully submitted,
LOZEAU DRURY LLP

14
15
16 By:



Douglas J. Chermak
Attorney for Plaintiff
CALIFORNIA SPORTFISHING PROTECTION
ALLIANCE

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California Sportfishing Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

3536 Rainier Avenue, Stockton, CA 95204

Tel: 209-464-5067, Fax: 209-464-1028, E: deltakeep@aol.com

VIA CERTIFIED MAIL

RETURN RECEIPT REQUESTED

October 29, 2008

Carl Nelson
President and Agent of Service for Process
Nelson's Marine, Inc.
1500 Ferry Point
Alameda, CA 94501

The Honorable Donald C. Winter
Secretary of the Navy
1000 Navy Pentagon
Washington, D.C. 20350-1000

Jerry Busch
Department of the Navy BRAC PMO, West
1455 Frazee Road, Suite 900
San Diego, CA 92109-4310

**Re: Notice of Violations and Intent to File Suit Under the Federal Water
Pollution Control Act**

Dear Messrs. Nelson, Busch, and Winter:

I am writing on behalf of the California Sportfishing Protection Alliance ("CSPA") in regard to violations of the Clean Water Act ("Act") that CSPA believes are occurring at Nelson's Marine, Inc. ("Facility") located at 1500 Ferry Point in Alameda, California. CSPA is a non-profit public benefit corporation dedicated to the preservation, protection, and defense of the environment, wildlife, and natural resources of the San Francisco Bay and other California waters. This letter is being sent to you as the responsible owner, officer, or operator of the Facility (all recipients are hereinafter collectively referred to as "Nelson's Marine").

This letter addresses Nelson's Marine's unlawful discharge of pollutants from the Facility into San Francisco Bay. The Facility is discharging storm water pursuant to National Pollutant Discharge Elimination System ("NPDES") Permit No. CA S000001, California Regional Water Quality Control Board, San Francisco Bay Region ("Regional Board") Order No. 92-12-DWQ as amended by Order No. 97-03-DWQ (hereinafter "General Permit"). The WDID identification number for the Facility listed on documents submitted to the Regional Board is 20I014579. The Facility is engaged in ongoing violations of the substantive and procedural requirements of the General Permit.

Section 505(b) of the Clean Water Act requires a citizen to give notice of intent to file suit sixty (60) days prior to the initiation of a civil action under Section 505(a) of the Act (33 U.S.C. § 1365(a)). 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 Clean Water Act, this Notice of Violation and Intent to File Suit provides notice of the violations that have occurred, and continue to occur, at the Facility. Consequently, Nelson's Marine is hereby placed on formal notice by CSPA that, after the expiration of sixty days from the date of this Notice of Violation and Intent to Sue, CSPA intends to file suit in federal court against Nelson's Marine, Inc., Carl Nelson, The Department of the Navy, Jerry Busch, and Donald C. Winter under Section 505(a) of the Clean Water Act (33 U.S.C. § 1365(a)), for violations of the Clean Water Act and the Order. These violations are described more extensively below.

I. Background.

On August 31, 1998, Nelson's Marine filed its Notice of Intent to Comply with the Terms of the General Permit to Discharge Storm Water Associated with Industrial Activity ("NOI"). Nelson's Marine certifies that the Facility is classified under SIC code 3732 ("boat repair yard"). Nelson's Marine is located at Alameda Point, formerly the Naval Air Station Alameda. Alameda Point is currently owned by the Department of the Navy. The Facility collects and discharges storm water from its five-acre industrial site through at least two outfalls that discharge into the San Francisco Bay, adjacent to the former Alameda Naval Air Station's Seaplane Lagoon. The Regional Board has identified waters of San Francisco Bay as failing to meet applicable water quality standards for PCBs, selenium, exotic species, dioxins, pesticides, and mercury. *See* http://www.waterboards.ca.gov/tmdl/docs/303dlists2006/final/r2_final303dlist.pdf.

The Regional Board has identified beneficial uses of the Bay region's waters and established water quality standards for the San Francisco Bay in the "Water Quality Control Plan for the San Francisco Bay Basin," generally referred to as the Basin Plan. *See* http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/basin_plan/docs/basin_plan07.pdf. The beneficial uses of these waters include among others contact and non-contact recreation, fish migration, endangered and threatened species habitat, shellfish harvesting, and fish spawning. The non-contact recreation use is defined as "[u]ses of water for recreational activities involving proximity to water, but not normally involving contact with water where water ingestion is reasonably possible. These uses include, but are not limited to, picnicking, sunbathing, hiking, beachcombing, camping, boating, tide pool and marine life study, hunting, sightseeing, or aesthetic enjoyment in conjunction with the above activities. Water quality considerations relevant to non-contact water recreation, such as hiking, camping, or boating, and those activities related to tide pool or other nature studies require protection of habitats and aesthetic features." *Id.* at 2.1.16. Visible pollution, including visible sheens and cloudy or muddy water from industrial areas, impairs people's use of the Bay for contact and non-contact water recreation.

The Basin Plan includes a narrative toxicity standard which states that "[a]ll waters shall be maintained free of toxic substances in concentrations that are lethal or that produce other

detrimental responses in aquatic organisms.” *Id.* at 3.3.18. The Basin Plan includes a narrative oil and grease standard which states that “[w]aters shall not contain oils, greases, waxes, or other materials in concentrations that result in a visible film or coating on the surface of the water or on objects in the water, that cause nuisance, or otherwise adversely affect beneficial uses.” *Id.* at 3.3.7. The Basin Plan provides that “[w]aters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses.” *Id.* at 3.3.14. The Basin Plan also provides that “[t]he pH shall not be depressed below 6.5 nor raised above 8.5.” *Id.* at 3.3.9. The Basin Plan establishes Marine Water Quality Objectives for zinc of 0.081 mg/L (4-day average) and 0.090 mg/L (1-hour average); copper of 0.0031 mg/L (4-day average) and 0.0048 mg/L (1-hour average); and lead of 0.0081 mg/L (4 day average) and 0.21 mg/L (1hour average). *Id.* at Table 3-3. EPA has adopted numeric water quality standards for copper of .0031 mg/L (4-day average) and .0048 mg/L (1-hour average), for lead of .210 mg/L (4-day average) and .0081 mg/L (1-hour average), and for zinc of .090 mg/L (4-day average) and .081 mg/L (1-hour average). 65 Fed.Reg. 31712 (May 18, 2000).

The U.S. Environmental Protection Agency (“EPA”) has published benchmark levels as guidelines for determining whether a facility discharging industrial storm water has implemented the requisite best available technology economically achievable (“BAT”) and best conventional pollutant control technology (“BCT”). The following benchmarks have been established for pollutants discharged by Nelson’s Marine: pH – 6.0-9.0 units; total suspended solids (“TSS”) – 100 mg/L; oil and grease (“O&G”) – 15 mg/L; total organic carbon (“TOC”) – 110 mg/L; zinc – 0.117 mg/L; copper – .0636 mg/L; and lead – .0816 mg/L. The State Water Quality Control Board also has proposed adding a benchmark level to the General Permit for specific conductance (200 µmho/cm).

II. Alleged Violations of the NPDES Permit.

A. Discharges in Violation of the Permit.

Nelson’s Marine has violated and continues to violate the terms and conditions of the General Industrial Storm Water Permit. Section 402(p) of the Act prohibits the discharge of storm water associated with industrial activities, except as permitted under an NPDES permit (33 U.S.C. § 1342) such as the General Permit. The General Permit prohibits any discharges of storm water associated with industrial activities or authorized non-storm water discharges that have not been subjected to BAT or BCT. Effluent Limitation B(3) of the General Permit requires dischargers to reduce or prevent pollutants in their storm water discharges through implementation of BAT for toxic and nonconventional pollutants and BCT for conventional pollutants. BAT and BCT include both nonstructural and structural measures. General Permit, Section A(8). Conventional pollutants are TSS, O&G, pH, biochemical oxygen demand (“BOD”), and fecal coliform. 40 C.F.R. § 401.16. All other pollutants are either toxic or nonconventional. *Id.*; 40 C.F.R. § 401.15.

In addition, Discharge Prohibition A(1) of the General Permit prohibits the discharge of materials other than storm water (defined as non-storm water discharges) that discharge either directly or indirectly to waters of the United States. Discharge Prohibition A(2) of the General Permit prohibits storm water discharges and authorized non-storm water discharges that cause or threaten to cause pollution, contamination, or nuisance.

Receiving Water Limitation C(1) of the General Industrial Storm Water Permit prohibits storm water discharges and authorized non-storm water discharges to surface or groundwater that adversely impact human health or the environment. Receiving Water Limitation C(2) of the General Permit also prohibits storm water discharges and authorized non-storm water discharges that cause or contribute to an exceedance of any applicable water quality standards contained in a Statewide Water Quality Control Plan or the applicable Regional Board's Basin Plan.

Nelson's Marine has discharged and continues to discharge storm water with unacceptable levels of pH, TSS, copper, lead, zinc and other pollutants in violation of the General Permit. Nelson's Marine's sampling and analysis results reported to the Regional Board confirm discharges of specific pollutants and materials other than storm water in violation of the Permit provisions listed above. Self-monitoring reports under the Permit are deemed "conclusive evidence of an exceedance of a permit limitation." *Sierra Club v. Union Oil*, 813 F.2d 1480, 1493 (9th Cir. 1988).

The following discharges of pollutants from the Facility have violated Discharge Prohibitions A(1) and A(2) and Receiving Water Limitations C(1) and C(2) and are evidence of ongoing violations of Effluent Limitation B(3) of the General Industrial Storm Water Permit.

Date	Parameter	Observed Concentration	Benchmark Value	Location (as identified by the Facility)
1/25/2008	pH	5.61	6.0 – 9.0	North
1/25/2008	Copper	0.51 mg/L	0.0636 mg/L	South
3/26/2007	Copper	0.6 mg/L	0.0636 mg/L	NW Drain
3/26/2007	Copper	0.6 mg/L	0.0636 mg/L	SW Drain
2/26/2007	pH	5.99	6.0 – 9.0	NW Drain
2/26/2007	Copper	0.15 mg/L	0.0636 mg/L	NW Drain
2/26/2007	Zinc	0.32 mg/L	0.117 mg/L	NW Drain
2/26/2007	pH	5.59	6.0 – 9.0	SW Drain
2/26/2007	Total Suspended Solids	250	100 mg/L	SW Drain
2/26/2007	Copper	0.72 mg/L	0.0636 mg/L	SW Drain
2/26/2007	Zinc	0.19 mg/L	0.117 mg/L	SW Drain
5/24/2006	Copper	7.4 mg/L	0.0636 mg/L	NW Drain
5/24/2006	Lead	0.35 mg/L	0.0816 mg/L	NW Drain
5/24/2006	Zinc	1.1 mg/L	0.117 mg/L	NW Drain
5/24/2006	Copper	1.5 mg/L	0.0636 mg/L	SW Drain

5/24/2006	Zinc	0.7 mg/L	0.117 mg/L	SW Drain
3/29/2006	Copper	4.2 mg/L	0.0636 mg/L	NW Drain
3/29/2006	Lead	0.52 mg/L	0.0816 mg/L	NW Drain
3/29/2006	Zinc	0.44 mg/L	0.117 mg/L	NW Drain
3/29/2006	Copper	0.7 mg/L	0.0636 mg/L	SW Drain
3/29/2006	Lead	0.18 mg/L	0.0816 mg/L	SW Drain
3/29/2006	Zinc	0.34 mg/L	0.117 mg/L	SW Drain
4/28/2005	Copper	0.609 mg/L	0.0636 mg/L	NW Drain
4/28/2005	Zinc	0.29 mg/L	0.117 mg/L	NW Drain
4/28/2005	Copper	6.27 mg/L	0.0636 mg/L	SW Drain
4/28/2005	Lead	0.77 mg/L	0.0816 mg/L	SW Drain
4/28/2005	Zinc	0.6 mg/L	0.117 mg/L	SW Drain
1/26/2005	Total Suspended Solids	120 mg/L	100 mg/L	So. Corner
1/26/2005	Copper	5.3 mg/L	0.0636 mg/L	So. Corner
1/26/2005	Lead	0.19 mg/L	0.0816 mg/L	So. Corner
1/26/2005	Zinc	0.84 mg/L	0.117 mg/L	So. Corner
1/26/2005	Copper	0.49 mg/L	0.0636 mg/L	West Corner
1/26/2005	Zinc	0.34 mg/L	0.117 mg/L	West Corner
3/25/2004	Total Suspended Solids	110 mg/L	100 mg/L	Sample 1a
3/25/2004	Copper	3 mg/L	0.0636 mg/L	Sample 1a
3/25/2004	Lead	0.14 mg/L	0.0816 mg/L	Sample 1a
3/25/2004	Zinc	0.59 mg/L	0.117 mg/L	Sample 1a
3/25/2004	Total Suspended Solids	110 mg/L	100 mg/L	Sample 1b
3/25/2004	Copper	2.9 mg/L	0.0636 mg/L	Sample 1b
3/25/2004	Lead	0.14 mg/L	0.0816 mg/L	Sample 1b
3/25/2004	Zinc	0.6 mg/L	0.117 mg/L	Sample 1b
3/25/2004	Copper	1.3 mg/L	0.0636 mg/L	Sample 2
3/25/2004	Zinc	1.5 mg/L	0.117 mg/L	Sample 2

CSPA's investigation, including its review of Nelson's Marine's analytical results documenting pollutant levels in the Facility's storm water discharges well in excess of applicable water quality standards and the EPA's benchmark values indicates that Nelson's Marine has not implemented BAT and BCT at the Facility for its discharges of TSS, decreased pH, copper, lead, zinc and other pollutants, in violation of Effluent Limitation B(3) of the General Permit. Nelson's Marine was required to have implemented BAT and BCT by no later than October 1, 1992. Thus, Nelson's Marine is discharging polluted storm water associated with its industrial operations without having implemented BAT and BCT. Visual observations of the facility confirm that no treatment facilities or storm water control measures are evident. Maintenance work on vessels and masts, including sanding, painting, and other vessel maintenance activities, can be observed being conducted outside with new visible barriers or storm water treatment between the work areas and the storm drains. In addition, the above numbers indicate that the facility is discharging polluted storm water in violation of Discharge Prohibitions A(1) and A(2)

and Receiving Water Limitations C(1) and C(2) of the General Permit. CSPA alleges that such violations also have occurred and will occur on other rain dates, including every significant rain event that has occurred since October 29, 2003, and that will occur at the Facility subsequent to the date of this Notice of Violation and Intent to File Suit. Attachment A, attached hereto, sets forth each of the specific rain dates on which CSPA alleges that Nelson's Marine has discharged storm water containing impermissible levels of TSS, pH, copper, lead, and zinc in violation of Effluent Limitation B(3), Discharge Prohibitions A(1) and A(2), and Receiving Water Limitations C(1) and C(2) of the General Permit.

These unlawful discharges from the Facility are ongoing. Each day that the facility has failed to install BAT and BCT at the facility, with or without a discharge of storm water, is a violation of the General Permit. Each discharge of storm water from the facility that has not been subjected to BAT and BCT also constitutes a separate violation of the General Industrial Storm Water Permit and the Act. Consistent with the five-year statute of limitations applicable to citizen enforcement actions brought pursuant to the federal Clean Water Act, Nelson's Marine is subject to penalties for violations of the General Permit and the Act since October 29, 2003.

B. Failure to Develop and Implement an Adequate Storm Water Monitoring Plan

Section B of the General Permit describes the monitoring requirements for storm water and non-storm water discharges. Facilities are required to make monthly visual observations of storm water discharges (Section B(4)) and quarterly visual observations of both unauthorized and authorized non-storm water discharges (Section B(3)). Section B(5)(a) of the General Permit requires that dischargers "shall collect storm water samples during the first hour of discharge from (1) the first storm event of the wet season, and (2) at least one other storm event in the wet season. All storm water discharge locations shall be sampled." (emphasis added). Section B(5)(c)(i) requires that the samples shall be analyzed for total suspended solids, pH, specific conductance, and total organic carbon. Oil and grease may be substituted for total organic carbon. Section B(5)(c)(ii) further requires that "samples shall be analyzed for . . . [t]oxic chemicals and other pollutants that are likely to be present in storm water discharges in significant quantities."

1. Failure to Sample and Analyze Storm Water for Mandatory Parameters

CSPA's review of Nelson's Marine's monitoring data indicates that Nelson's Marine has failed to analyze for specific conductance and O&G in every storm water sample taken at the Facility for the past five years. Nelson's Marine failed to analyze its storm water samples taken on April 28, 2005 for pH and TSS. Nelson's Marine also failed to analyze the following storm water samples for copper, lead, and zinc: samples taken on May 28, 2004 and all but one of the storm water samples taken during the 2007-2008 rainy season.

Each failure to analyze for a specific required parameter is a violation of General Permit, Section B(5)(c)(i) and B(5)(c)(ii). For the failures to analyze for specific conductance and O&G,

eight samples per annual report (two storm drains times two storm events times two parameters) times five annual reports (2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008) plus two extra samples during 2003-2004 (five distinct storm water samples were taken during that rainy season) add up to 42 distinct violations of the General Permit. The failure to sample for copper, lead, and zinc adds up to fifteen violations (nine for 2007-2008, six for 2003-2004). These violations are distinct and ongoing.

2. *Failure to Sample Required Storm Events*

CSPA's review of Nelson's Marine's monitoring data indicates that Nelson's Marine failed to collect and analyze storm water samples from two storm events during the 2007-2008 rainy season. While Nelson's Marine did indicate on its 2007-2008 Annual Report that it took samples from two storm events, the attached laboratory reports are actually the identical data from the storm water samples taken during the 2006-2007 rainy season. At the end of the 2007-2008 Annual Report, however, it does appear that there is one data point from a laboratory for a sample taken around January 24, 2008, from a "North" and a "South" location. This is also deficient with respect to the required parameters. For the North location, there is no analysis for specific conductivity, O&G, copper, lead, and zinc. For the South location, there is no analysis for specific conductivity, O&G, pH, and total suspended solids. This failure to sample two required storm events is a distinct and ongoing violation of Section B(5)(a) of the General Permit.

3. *Failure to Conduct Required Visual Observation of Storm Water and Non-Storm Water Discharges*

Section B(3) of the General Permit requires all dischargers to visually observe authorized and unauthorized non-storm water discharges from their facilities quarterly throughout the year. Visual observations must document "the presence of any discolorations, stains, odors, floating materials, etc., as well as the source of any discharge." Records of observations must be maintained and the discharger must respond to eliminate unauthorized non-storm water discharges and to reduce pollutants in authorized non-storm water discharges. The discharger's SWPPP must also be modified accordingly.

Section B(4) of the General Permit requires all dischargers to visually observe storm water discharges from their facilities at least once per month during the wet season (October 1 – May 30). Visual observations must document the presence of any "floating and suspended material, oil and grease, discolorations, turbidity, odor, and source of any pollutants." Records of observations must be maintained and the discharger must respond to reduce or prevent future discharges of pollutants. The discharger's SWPPP must also be modified accordingly.

Based on a review of publicly available documents, CSPA is informed and believes that Nelson's Marine has consistently failed to conduct the visual observations required by Sections B(3) and B(4) of the General Permit. From its 2003-2004 Annual Report to the present,

Nelson's Marine has not provided any reports of monthly wet season visual observations of storm water discharges nor has it provided any reports of quarterly visual observations of authorized and unauthorized storm water discharges. Each failure to conduct required visual observations constitutes a distinct and ongoing violation of Sections B(3) and B(4) of the General Permit.

4. *Liability for Continuous and Ongoing Failure to Implement an Adequate Monitoring and Reporting Program*

CSPA is informed and believes that Nelson's Marine's failure to implement an adequate monitoring program is evidenced by this pattern of missed sampling and observation opportunities. Each of Nelson's Marine's failures to comply with these mandatory monitoring requirements constitutes a separate and ongoing violation of the Act. Consistent with the five-year statute of limitations applicable to citizen enforcement actions brought pursuant to the federal Clean Water Act, Nelson's Marine is subject to penalties for these violations of the General Permit and the Act since October 29, 2003.

C. *Failure to Prepare, Implement, Review and Update an Adequate Storm Water Pollution Prevention Plan.*

Section A and Provision E(2) of the General Industrial Storm Water Permit require dischargers of storm water associated with industrial activity to develop, implement, and update an adequate storm water pollution prevention plan ("SWPPP") no later than October 1, 1992. Section A(1) and Provision E(2) requires dischargers who submitted an NOI pursuant to the General Permit to continue following their existing SWPPP and implement any necessary revisions to their SWPPP in a timely manner, but in any case, no later than August 1, 1997.

The SWPPP must, among other requirements, identify and evaluate sources of pollutants associated with industrial activities that may affect the quality of storm and non-storm water discharges from the facility and identify and implement site-specific best management practices ("BMPs") to reduce or prevent pollutants associated with industrial activities in storm water and authorized non-storm water discharges (General Permit, Section A(2)). The SWPPP must include BMPs that achieve BAT and BCT (Effluent Limitation B(3)). The SWPPP must include: a description of individuals and their responsibilities for developing and implementing the SWPPP (General Permit, Section A(3)); a site map showing the facility boundaries, storm water drainage areas with flow pattern and nearby water bodies, the location of the storm water collection, conveyance and discharge system, structural control measures, impervious areas, areas of actual and potential pollutant contact, and areas of industrial activity (General Permit, Section A(4)); a list of significant materials handled and stored at the site (General Permit, Section A(5)); a description of potential pollutant sources including industrial processes, material handling and storage areas, dust and particulate generating activities, a description of significant spills and leaks, a list of all non-storm water discharges and their sources, and a description of locations where soil erosion may occur (General Permit, Section A(6)).

The SWPPP also must include 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 (General Permit, Section A(7), (8)). The SWPPP must be evaluated to ensure effectiveness and must be revised where necessary (General Permit, Section A(9),(10)).

CSPA's investigation of the conditions at the Facility as well as Nelson's Marine's Annual Reports indicate that Nelson's Marine has been operating with an inadequately developed or implemented SWPPP in violation of the requirements set forth above. Nelson's Marine has failed to evaluate the effectiveness of its BMPs and to revise its SWPPP as necessary. Nelson's Marine has been in continuous violation of Section A and Provision E(2) of the General Permit every day since October 29, 2003 at the very latest, and will continue to be in violation every day that Nelson's Marine fails to prepare, implement, review, and update an effective SWPPP. Nelson's Marine is subject to penalties for violations of the Order and the Act occurring since October 29, 2003.

E. Failure to File True and Correct Annual Reports.

Section B(14) of the General Industrial Storm Water Permit requires dischargers to submit an Annual Report by July 1st of each year to the executive officer of the relevant Regional Board. The Annual Report must be signed and certified by an appropriate corporate officer. General Permit, Sections B(14), C(9), (10). Section A(9)(d) of the General Industrial Storm Water Permit requires the discharger to include in their annual report an evaluation of their storm water controls, including certifying compliance with the General Industrial Storm Water Permit. *See also* General Permit, Sections C(9) and (10) and B(14).

For the last five years, Nelson's Marine and its agent, Carl Nelson, inaccurately certified in their Annual Reports that the facility was in compliance with the General Permit. Consequently, Nelson's Marine has violated Sections A(9)(d), B(14) and C(9) & (10) of the General Industrial Storm Water Permit every time Nelson's Marine failed to submit a complete or correct report and every time Nelson's Marine or its agents falsely purported to comply with the Act. Nelson's Marine is subject to penalties for violations of Section (C) of the General Industrial Storm Water Permit and the Act occurring since October 29, 2003.

IV. Persons Responsible for the Violations.

CSPA puts Nelson's Marine, Inc., Carl Nelson, The Department of the Navy, Jerry Busch, and Donald C. Winter on notice that they are the persons responsible for the violations described above. If additional persons are subsequently identified as also being responsible for the violations set forth above, CSPA puts Nelson's Marine, Inc., Carl Nelson, The Department of

Carl Nelson, Jerry Busch, Donald Winter
Nelson's Marine, Inc.
October 29, 2008
Page 10 of 15

the Navy, Jerry Busch, and Donald C. Winter on notice that it intends to include those persons in this action.

V. Name and Address of Noticing Party.

Our name, address and telephone number is as follows:

Bill Jennings, Executive Director;
California Sportfishing Protection Alliance,
3536 Rainier Avenue,
Stockton, CA 95204
Tel. (209) 464-5067

VI. Counsel.

CSPA has retained legal counsel to represent it in this matter. Please direct all communications to:

Michael R. Lozeau
Douglas J. Chermak
Lozeau Drury LLP
1516 Oak Street, Suite 216
Alameda, California 94501
Tel. (510) 749-9102
michael@lozeaudrury.com
doug@lozeaudrury.com

Andrew L. Packard
Law Offices of Andrew L. Packard
319 Pleasant Street
Petaluma, California 94952
Tel. (707) 763-7227
andrew@packardlawoffices.com

VII. Penalties.

Pursuant to Section 309(d) of the Act (33 U.S.C. § 1319(d)) and the Adjustment of Civil Monetary Penalties for Inflation (40 C.F.R. § 19.4) each separate violation of the Act subjects Nelson's Marine to a penalty during the period commencing five years prior to the date of this Notice of Violations and Intent to File Suit. The penalty provisions provide for maximum penalties of up to \$27,500 per day per violation for violations occurring before March 15, 2004, and \$32,500 per day per violation for violations occurring after March 15, 2004. In addition to civil penalties, CSPA will seek injunctive relief preventing further violations of the Act pursuant to Sections 505(a) and (d) (33 U.S.C. § 1365(a) and (d)) and such other relief as permitted by law. Lastly, Section 505(d) of the Act (33 U.S.C. § 1365(d)), permits prevailing parties to recover costs and fees, including attorneys' fees.

CSPA believes this Notice of Violations and Intent to File Suit sufficiently states grounds for filing suit. We intend to file a citizen suit under Section 505(a) of the Act against Nelson's Marine and its agents for the above-referenced violations upon the expiration of the 60-day

notice period. However, during the 60-day notice period, we would be willing to discuss effective remedies for the violations noted in this letter. If you wish to pursue such discussions in the absence of litigation, we suggest that you initiate those discussions within the next 20 days so that they may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing when that period ends.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Jennings". The signature is written in a cursive, flowing style with a large initial "B".

Bill Jennings, Executive Director
California Sportfishing Protection Alliance

SERVICE LIST

Stephen Johnson, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dorothy R. Rice, Executive Director
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Michael Mukasey, U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Wayne Nastri, Administrator
U.S. EPA – Region 9
75 Hawthorne Street
San Francisco, CA, 94105

Bruce H. Wolfe, Executive Officer II
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

ATTACHMENT A
Rain Dates, Nelson's Marine, Alameda, California

November 02	2003	February 15	2004	January 28	2005
November 03	2003	February 16	2004	February 07	2005
November 06	2003	February 17	2004	February 11	2005
November 07	2003	February 18	2004	February 14	2005
November 08	2003	February 20	2004	February 15	2005
November 09	2003	February 21	2004	February 16	2005
November 14	2003	February 22	2004	February 17	2005
November 15	2003	February 24	2004	February 18	2005
November 17	2003	February 25	2004	February 19	2005
November 30	2003	February 26	2004	February 20	2005
December 01	2003	February 27	2004	February 21	2005
December 02	2003	March 01	2004	February 27	2005
December 04	2003	March 25	2004	February 28	2005
December 05	2003	March 27	2004	March 01	2005
December 06	2003	April 20	2004	March 02	2005
December 07	2003	November 04	2004	March 03	2005
December 09	2003	November 10	2004	March 04	2005
December 10	2003	November 11	2004	March 18	2005
December 12	2003	November 13	2004	March 19	2005
December 13	2003	November 18	2004	March 20	2005
December 14	2003	November 27	2004	March 21	2005
December 19	2003	December 06	2004	March 22	2005
December 20	2003	December 07	2004	March 23	2005
December 21	2003	December 08	2004	March 27	2005
December 23	2003	December 09	2004	March 28	2005
December 24	2003	December 10	2004	March 29	2005
December 25	2003	December 11	2004	April 03	2005
December 28	2003	December 15	2004	April 04	2005
December 29	2003	December 26	2004	April 07	2005
January 01	2004	December 27	2004	April 08	2005
January 02	2004	December 28	2004	April 09	2005
January 06	2004	December 29	2004	April 22	2005
January 08	2004	December 30	2004	April 23	2005
January 08	2004	December 31	2004	April 27	2005
January 09	2004	January 01	2005	April 28	2005
January 14	2004	January 02	2005	May 04	2005
January 23	2004	January 05	2005	May 05	2005
January 24	2004	January 06	2005	May 08	2005
January 26	2004	January 07	2005	May 09	2005
January 27	2004	January 08	2005	May 18	2005
January 30	2004	January 09	2005	May 19	2005
February 01	2004	January 10	2005	June 08	2005
February 02	2004	January 11	2005	June 09	2005
February 03	2004	January 25	2005	June 16	2005
February 06	2004	January 26	2005	June 18	2005
February 13	2004	January 27	2005	September 21	2005

ATTACHMENT A

Rain Dates, Nelson's Marine, San Leandro, California

October	14	2005	February	18	2006	October	24	2006
October	15	2005	February	27	2006	October	25	2006
October	26	2005	February	28	2006	November	02	2006
October	29	2005	March	01	2006	November	03	2006
November	04	2005	March	02	2006	November	05	2006
November	07	2005	March	03	2006	November	07	2006
November	08	2005	March	04	2006	November	11	2006
November	09	2005	March	05	2006	November	12	2006
November	10	2005	March	06	2006	November	13	2006
November	25	2005	March	07	2006	November	17	2006
November	28	2005	March	09	2006	November	18	2006
November	29	2005	March	10	2006	November	22	2006
November	30	2005	March	11	2006	November	26	2006
December	01	2005	March	12	2006	November	27	2006
December	02	2005	March	13	2006	December	08	2006
December	07	2005	March	14	2006	December	09	2006
December	17	2005	March	15	2006	December	10	2006
December	18	2005	March	16	2006	December	11	2006
December	19	2005	March	17	2006	December	12	2006
December	20	2005	March	20	2006	December	13	2006
December	21	2005	March	21	2006	December	14	2006
December	22	2005	March	24	2006	December	15	2006
December	25	2005	March	25	2006	December	21	2006
December	26	2005	March	27	2006	December	26	2006
December	27	2005	March	28	2006	December	27	2006
December	28	2005	March	29	2006	January	04	2007
December	29	2005	March	30	2006	January	10	2007
December	30	2005	March	31	2006	January	16	2007
December	31	2005	April	01	2006	January	18	2007
January	07	2006	April	02	2006	January	26	2007
January	10	2006	April	03	2006	January	27	2007
January	11	2006	April	04	2006	January	28	2007
January	14	2006	April	05	2006	January	30	2007
January	17	2006	April	07	2006	February	07	2007
January	18	2006	April	09	2006	February	08	2007
January	19	2006	April	10	2006	February	09	2007
January	21	2006	April	11	2006	February	10	2007
January	25	2006	April	12	2006	February	11	2007
January	27	2006	April	15	2006	February	12	2007
January	28	2006	April	16	2006	February	13	2007
January	29	2006	April	17	2006	February	14	2007
January	30	2006	May	19	2006	February	16	2007
February	01	2006	May	21	2006	February	22	2007
February	02	2006	May	21	2006	February	23	2007
February	04	2006	October	04	2006	February	24	2007
February	11	2006	October	05	2006	February	25	2007
February	17	2006	October	08	2006	February	26	2007

ATTACHMENT A

Rain Dates, Nelson's Marine, San Leandro, California

February	27	2007	January	23	2008
February	28	2007	January	24	2008
March	20	2007	January	25	2008
March	26	2007	January	26	2008
April	09	2007	January	27	2008
April	11	2007	January	28	2008
April	19	2007	January	29	2008
April	20	2007	January	30	2008
April	21	2007	January	31	2008
April	22	2007	February	02	2008
April	23	2007	February	03	2008
April	27	2007	February	12	2008
May	02	2007	February	19	2008
May	03	2007	February	20	2008
May	04	2007	February	21	2008
September	22	2007	February	22	2008
October	09	2007	February	23	2008
October	10	2007	February	24	2008
October	12	2007	February	26	2008
October	15	2007	March	1	2008
October	16	2007	March	13	2008
October	17	2007	March	14	2008
November	10	2007	March	15	2008
November	11	2007	March	20	2008
November	15	2007	March	28	2008
December	04	2007	March	29	2008
December	06	2007	April	22	2008
December	07	2007	April	23	2008
December	15	2007			
December	17	2007			
December	18	2007			
December	19	2007			
December	20	2007			
December	27	2007			
December	28	2007			
December	29	2007			
December	30	2007			
January	03	2008			
January	04	2008			
January	05	2008			
January	06	2008			
January	07	2008			
January	08	2008			
January	09	2008			
January	10	2008			
January	21	2008			
January	22	2008			