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VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

September 9, 2019

Air Products Manufacturing Corporation
Attn: Michael Chau
Scot Govert
1515 Norman Ave.,
Santa Clara, CA 90744

SEP 12 2019

Re: Notice of Violation and Intent to File Suit under the Clean Water Act

Dear Mr. Chau and Mr. Govert:

I am writing on behalf of San Francisco Baykeeper ("Baykeeper") to give notice that Baykeeper intends to file a civil action against Air Products Manufacturing Corporation and its parent company, Air Products and Chemicals, Inc. (collectively, "Air Products") for violations of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* ("Clean Water Act" or "CWA") at its industrial gas facility located at 1515 Norman Avenue in Santa Clara, California. ("Facility").

Baykeeper is a non-profit public benefit corporation organized under the laws of California, with its office in Oakland, California. Baykeeper's mission is to protect and enhance the water quality and natural resources of San Francisco Bay, its tributaries, and other waters in the Bay Area, for the benefit of its ecosystems and communities. Baykeeper has more than five thousand members and supporters who use and enjoy San Francisco Bay and other waters for various recreational, educational, and spiritual purposes. Baykeeper's members' use and enjoyment of these waters are negatively affected by the pollution caused by the Facility's operations.

Baykeeper has serious concerns about the impact of Air Products' discharge of pollutants from the Facility via stormwater into the Guadalupe River, Alviso Slough, and San Francisco Bay. Specifically, Baykeeper's investigation of the Facility has uncovered significant, ongoing, and continuous violations of the CWA and the General Industrial Stormwater Permit issued by the State of California (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 ("1997 Permit") and by Order No. 2014-0057-DWQ ("2015 Permit") (collectively, the "Industrial Stormwater Permit").[1]

CWA section 505(b) requires that sixty (60) days prior to the initiation of a civil action under CWA section 505(a), a citizen must give notice of his or her intent to file suit. 33 U.S.C. § 1365(b). Notice must be given to the alleged violator, the U.S. Environmental Protection Agency (EPA), and the State in which the violations occur. As required by section 505(b), this Notice of Violation and Intent to File Suit provides notice to Air Products of the violations that have occurred and which

[1] On April 1, 2014, the State Water Resources Control Board adopted the 2015 Permit. As of July 1, 2015, the 2015 Permit superseded the 1997 Permit except for the purpose of enforcing violations of the 1997 Permit. 2015 Permit, Section I.A. (Finding 6).

continue to occur at the Facility. After the expiration of sixty (60) days from the date of this Notice of Violation and Intent to File Suit, Baykeeper intends to file suit in federal court against Air Products under CWA section 505(a) for the violations described more fully below.

During the 60-day notice period, Baykeeper would like to discuss effective remedies for the violations noticed in this letter. We suggest that you contact us as soon as possible so that these discussions may be completed by the conclusion of the 60-day notice period. Please note that we do not intend to delay the filing of a complaint in federal court, even if discussions are continuing when the notice period ends.

I. BACKGROUND

A. The Owner and/or Operator of the Facility

Air Products is identified as the operator of the Facility in the notice of intent to comply with the Industrial Stormwater Permit dated June 1, 2016. According to the California Secretary of State's website, the parent company of Air Products Manufacturing Company is Air Products and Chemicals, Inc.

B. Facility Operations and Stormwater Discharges

At the Facility, Air Products operates an industrial gas, chemical, and technology facility. This Facility separates air into its constituents, oxygen, nitrogen, and argon, for industrial applications. Potential pollutants from Facility operations include total suspended solids (TSS), oil and grease, iron, nitrates + nitrites (N+N), aluminum, pH, and other pollutants.

The Facility is 8 or 9 acres, comprised of three separate operations and distribution areas. The Facility site is relatively level but has several low points that drain stormwater to three outfalls. Stormwater is discharged to the City of Santa Clara's stormwater system, which then discharges to the Guadalupe River, Alviso Slough, and to San Francisco Bay.

C. The Facility's Industrial Stormwater Permit Coverage

On or around April 27, 1992, Air Products submitted its original Notice of Intent (NOI) to be authorized to discharge stormwater from the Facility under the 1997 Permit. On or around June 1, 2016, Air Products submitted an NOI to be authorized to discharge stormwater from the Facility under the 2015 Permit. The NOI identifies the Standard Industrial Classification (SIC) code for the Facility as 2813 (Industrial Gases). Information available to Baykeeper indicates that stormwater discharges from the Facility have violated several terms of the Industrial Stormwater Permit and the CWA. Apart from discharges that comply with the Industrial Stormwater Permit, the Facility lacks NPDES permit authorization for any other discharges of pollutants into waters of the United States.

D. The Waters Receiving Air Products' Stormwater Discharges

With every significant rainfall event, millions of gallons of polluted stormwater originating

from industrial operations such as the Facility pour into storm drains and local waterways. The consensus among agencies and water quality specialists is that stormwater pollution accounts for more than half of the total pollution entering surface waters each year. Such discharges of pollutants from industrial facilities contribute to the impairment of downstream waters and aquatic dependent wildlife. These contaminated discharges can and must be controlled for the ecosystem to regain its health.

The Facility discharges stormwater into the Guadalupe River, Alviso Slough, and San Francisco Bay (collectively, the "Receiving Waters"). San Francisco Bay is a water of the United States and is protected by the Clean Water Act. San Francisco Bay is an ecologically-sensitive waterbody and a defining feature of Northern California. The Bay is an important and heavily-used resource, with special aesthetic and recreational significance for people living in the surrounding communities. However, the Bay's water quality is impaired and continues to decline. The Bay's once-abundant and varied fisheries have been drastically diminished by pollution, and much of the wildlife habitat of the Bay has been degraded.

The Guadalupe River, into which the Facility discharges stormwater, is also is a water of the United States and is protected by the Clean Water Act. The Guadalupe River is an ecologically-sensitive and important part of the overall health of the San Francisco Bay ecosystem. Steelhead trout (*Oncorhynchus mykiss*) and chinook or king salmon (*Oncorhynchus tshawytscha*) spawn in the river, making San Jose the southernmost major U. S. city with known salmon spawning runs. The Guadalupe River also hosts a population of California Golden beavers (*Castor canadensis subauratus*). Caspian terns (*Hydroprogne caspia*), Forster's terns (*Sterna forsteri*), black-crowned night heron (*Nycticorax nycticorax*), and many other bird species nest in the Alviso Slough at the mouth of the Guadalupe River where it empties into San Francisco Bay.

II. AIR PRODUCTS' VIOLATIONS OF THE CLEAN WATER ACT

It is unlawful to discharge pollutants to waters of the United States, such as the Receiving Waters, without an NPDES permit or in violation of the terms and conditions of an NPDES permit. CWA § 301(a), 33 U.S.C. § 1311(a); *see also* CWA § 402(p), 33 U.S.C. § 1342(p) (requiring NPDES permit issuance for the discharge of stormwater associated with industrial activities). The Industrial Stormwater Permit is the applicable NPDES permit authorizing and regulating discharges of stormwater from industrial facilities, including the Facility.

Information available to Baykeeper indicates that stormwater discharges from the Facility have violated several terms of the Industrial Stormwater Permit and the CWA. The Facility lacks NPDES permit authorization for any discharges of pollutants into waters of the United States that do not comply with the Industrial Stormwater Permit.

A. Discharges in Excess of Technology-Based Effluent Limitations

The Industrial Stormwater Permit includes technology-based effluent limitations, which prohibit the discharge of pollutants from the Facility in concentrations above the level commensurate with the application of best available technology economically achievable (BAT) for toxic

pollutants[2] and best conventional pollutant control technology (BCT) for conventional pollutants.[3] 1997 Permit, Order Part B.3.; 2015 Permit, Section X.H. EPA has published Benchmark values set at the maximum pollutant concentration levels present if an industrial facility is employing BAT and BCT, as listed in Attachment 1 to this letter.[4] The 2015 Permit also includes "Numeric Action Levels" (NALs) derived from these Benchmark values, which indicate the overall pollutant control performance at the Facility. 2015 Permit, Section I.M. (Findings 61-63).

The Facility's self-reported exceedances of Benchmark values over the last five years, identified in Attachment 2 to this letter, indicate that Air Products has failed and is failing to employ measures that constitute BAT and BCT in violation of the requirements of the Industrial Stormwater Permit. Baykeeper notifies Air Products that its stormwater discharges from the Facility have consistently contained and continue to contain levels of pollutants that exceed Benchmark values for aluminum, iron, TSS, and N+N.

The Facility's ongoing discharges of stormwater containing levels of pollutants above Benchmark values demonstrate that Air Products has not developed and implemented Best Management Practices (BMPs) at the Facility sufficient to meet technology-based effluent limits. Proper BMPs could include, but are not limited to, moving certain pollution-generating activities under cover, capturing and retaining or effectively filtering stormwater before discharge, treating all stormwater prior to discharge, and other similar measures.

Air Products' failure to develop and/or implement adequate BMPs to meet BAT and BCT at the Facility violates and will continue to violate the CWA and the Industrial Stormwater Permit each and every day the Facility discharges stormwater without meeting BAT and BCT. Baykeeper alleges that Air Products has discharged stormwater containing excessive levels of pollutants from the Facility to the Receiving Waters during at least every significant local rain event over 0.1 inches in the last five years.[5] Attachment 3 compiles all dates in the last five years when a significant rain event occurred. Air Products is subject to civil penalties for each of these violations.

B. Discharges in Excess of Receiving Water Limitations

In addition to employing technology-based effluent limitations, the Industrial Stormwater Permit requires dischargers to comply with Receiving Water Limitations. 1997 Permit, Order Part C; 2015 Permit, Section VI. The Receiving Water Limitations prohibit discharges that cause or

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[2] BAT is defined at 40 C.F.R. § 125.3. Toxic pollutants are listed at 40 C.F.R. § 401.15 and include copper and zinc, among others. Effluent limitations based on BAT are also used for pollutants that are neither toxic nor conventional, such as metals. 40 CFR § 125.3 (a)(2)(v).

[3] BCT is defined at 40 C.F.R. § 125.3. Conventional pollutants are listed at 40 C.F.R. § 401.16 and include BOD, TSS, oil and grease, pH, and fecal coliform.

[4] The Benchmark values are part of EPA's Multi-Sector General Permit (MSGP) and can be found at: https://www.epa.gov/sites/production/files/2015-10/documents/msgp2015_finalpermit.pdf. The most recent sector-specific Benchmarks can be found at: https://www.epa.gov/sites/production/files/2015-10/documents/msgp2015_part8.pdf ("2015 MSGP"). SIC Code 2813 is covered under Sector C. Chemical and Allied Products Manufacturing in the 2015 MSGP.

[5] Significant local rain events are reflected in the rain gauge data available at: http://www.ncdc.noaa.gov/cdo-web/search.

contribute to an exceedance of applicable water quality standards (WQS). 1997 Permit, Order Part C.2.; 2015 Permit, Section VI.A. Applicable WQS are set forth in the California Toxics Rule (CTR)[6] and Chapter 3 of the Basin Plan.[7] Exceedances of WQS are violations of the Industrial Stormwater Permit, the CTR, and the Basin Plan.

The Basin Plan establishes the applicable WQS, including but not limited to the following:

- Waters shall not contain substances in concentrations that result in the deposition of material that cause nuisance or adversely affect beneficial uses.
- Waters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses.
- Waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses. Increases from normal background light penetration or turbidity relatable to waste discharge shall not be greater than 10 percent in areas where natural turbidity is greater than 50 NTU.
- All waters shall be maintained free of toxic substances in concentrations that are lethal to or that produce other detrimental responses in aquatic organisms.
- Surface waters shall not contain concentrations of chemical constituents in amounts that adversely affect any designated beneficial use.

The Industrial Stormwater Permit includes additional Receiving Water Limitations that prohibit stormwater discharges that cause or threaten to cause pollution, contamination, or nuisance. *See* 1997 Permit, Order Part A.2.; 2015 Permit, Sections III.C., VI.C. The Receiving Water Limitations also prohibit stormwater discharges to surface or groundwater that adversely impact human health or the environment. 1997 Permit, Order Part C.1.; 2015 Permit, Section VI.B.

Baykeeper alleges that the Facility's stormwater discharges have caused or contributed to exceedances of the Receiving Water Limitations in the Industrial Stormwater Permit and applicable WQS. These allegations are based on the Facility's self-reported data submitted to the San Francisco Bay Regional Water Quality Control Board. The sampling results indicate that the Facility's discharges are causing or threatening to cause pollution, contamination, and/or nuisance; adversely impact human health or the environment; and violate applicable WQS. The Basin Plan notes in particular that San Francisco Bay south of the Dumbarton Bridge, where discharge from the Facility enters the Bay, is a unique, water-quality-limited, hydrodynamic and biological environment. Controlling urban runoff sources such as industrial stormwater is critical to this

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[6] The CTR is set forth at 40 C.F.R. § 131.38 and is explained in the Federal Register preamble accompanying the CTR promulgation set forth at 65 Fed. Reg. 31,682 (May 18, 2000).
[7] The Basin Plan is published by the San Francisco Bay Regional Water Quality Control Board at: http://www.waterboards.ca.gov/sanfranciscobay/basin_planning.shtml#2004basinplan.

portion of the Bay.[8]

Baykeeper alleges that each day that the Facility has discharged stormwater, the Facility's stormwater has contained levels of pollutants that exceeded one or more of the Receiving Water Limitations. Baykeeper alleges that Air Products has discharged stormwater exceeding Receiving Water Limitations from the Facility to Receiving Waters during at least every significant local rain event over 0.1 inches since July 15, 2016. *See* Attachment 3. Each discharge from the Facility that violates a Receiving Water Limitation constitutes a separate violation of the Industrial Stormwater Permit and the CWA, and Air Products is subject to civil penalties for each of these violations.

C. Failure to Develop and Implement an Adequate Storm Water Pollution Prevention Plan

The Industrial Stormwater Permit requires dischargers to develop and implement a legally-adequate Storm Water Pollution Prevention Plan (SWPPP). 1997 Permit, Section A.1.a. and Order Part E.2.; 2015 Permit, Sections I.I. (Finding 54), X.B. The Industrial Stormwater Permit also requires dischargers to make all necessary revisions to existing SWPPPs promptly. 1997 Permit, Order Part E.2.; 2015 Permit, Section X.B.

The SWPPP must include, among other requirements, the following: a site map, a list of significant materials handled and stored at the site, a description and assessment of all potential pollutant sources, a description of the BMPs that will reduce or prevent pollutants in stormwater discharges, and specifications of BMPs designed to reduce pollutant discharge to BAT and BCT levels. 1997 Permit, Sections A.1-A.10.; 2015 Permit, Section X. Moreover, the Industrial Stormwater Permit requires dischargers to evaluate and revise SWPPPs to ensure they meet these minimum requirements, in particular that the necessary BMPs are in place and being implemented. *See* 1997 Permit, Section A.9. (requiring a comprehensive site compliance evaluation completed each reporting year, and revisions to the SWPPP implemented within 90 days after the evaluation); 2015 Permit, Section X.D.2.a. (obligating the discharger to "ensure its SWPPP is developed, implemented and revised as necessary to be consistent with any applicable municipal, state, and federal requirements that pertain to the requirements in this General Permit").

Based on information available to Baykeeper, Air Products has failed to prepare and/or implement an adequate SWPPP and/or to revise the SWPPP to satisfy each of the requirements of the Industrial Stormwater Permit. For example, Air Products' past or current SWPPP has not/does not include and/or Air Products has not implemented adequate BMPs designed to reduce pollutant levels in discharges to BAT and BCT levels in accordance with the Industrial Stormwater Permit, as evidenced by the data in Attachment 2.

In addition, the SWPPP fails to include all the information required by the Industrial Stormwater Permit (or the information provided is inaccurate or insufficient), including but not limited to the following.

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[8] Basin Plan, section 3.3.21.

- Identification of advanced BMPs from Section X.G.2.b necessary to reduce or prevent discharges of pollutants in stormwater discharge in a manner that reflects best industry practice considering technological availability and economic practicability and achievability. According to the SWPPP, "[t]here are no advanced BMPs at the Santa Clara facility." The hypothetical advanced BMPs identified in the SWPPP—for example, "if exposure minimum BMPs are used at the Facility in the future"—are insufficient.

- Procedures to identify alternate team members to implement the SWPPP and conduct required monitoring when the regularly assigned team members are temporarily unavailable. The SWPPP is lacking such procedures, including a list of alternate pollution prevention team members who will perform duties when regular team members are absent.

- An accurate site map. The site map currently includes features such as "Russel Lane" which is mislabeled, and leaves out features like parking lots and that are within the facility boundary but are unlabeled. The detailed site map also fails to include the facility boundary. Other missing elements include:

    - Areas of soil erosion;
    - Municipal storm drain inlets that may receive the facility's industrial stormwater discharges and non-stormwater discharges (NSWDs);
    - Identification of all impervious areas of the facility (paved areas such as parking lots, buildings, covered storage areas, other roofed structures);
    - Locations where materials are directly exposed to precipitation;
    - Identification of all waste treatment and disposal areas; and
    - Identification of all dust or particulate generating areas.

- List of the industrial materials handled at the Facility, the location where each industrial material is stored, received, shipped, and handled, and the typical quantities and handling frequency for each material.

- Identification and description of areas protected by containment structures and the corresponding containment capacity.

- A description of each material handling and storage area, including: the type, characteristics, and quantity of industrial materials handled or stored; the shipping, receiving, and loading procedures; the spill or leak prevention and response procedures; and the areas protected by containment structures and the corresponding containment capacity.

- A description of all industrial activities that generate a significant amount of dust or particulate that may be deposited within the facility boundaries, including: discharge

locations, the source type, and the characteristics of the dust or particulate pollutant.

- An evaluation of the facility identifying all NSWDs, sources, and drainage areas, including:
    - An evaluation of all drains (inlets and outlets) that identifies connections to the stormwater conveyance system;
    - Evaluation of how all unauthorized NSWDs have been eliminated; and
    - A description of all NSWDs, including the quantity, associated drainage area, and whether it is an authorized or unauthorized NSWD.
- A description of the facility locations where soil erosion may be caused by industrial activity, contact with stormwater, authorized and unauthorized NSWDs, or run-on from areas surrounding the facility.
- A complete assessment of potential pollution sources, including, but not limited to:
    - The approximate quantity of each industrial material handled, produced, stored, recycled, or disposed;
    - All sampling, visual observation, and inspection records;
    - The effectiveness of existing BMPs to reduce or prevent pollutants in industrial stormwater discharges and authorized NSWDs; and
    - The estimated effectiveness of implementing, to the extent feasible, minimum BMPs to reduce or prevent pollutants in industrial stormwater discharges and authorized NSWDs.
- Identification and description of all necessary and appropriate spill and leak response equipment, location(s) of spill and leak response equipment, and spill or leak response equipment maintenance procedures, including an appropriate schedule for maintenance of identified equipment and systems used outdoors that may spill or leak pollutants.

Accordingly, Air Products has violated the CWA each and every day of the last five years because it has failed to develop and/or implement an adequate SWPPP meeting all of the requirements of the Industrial Stormwater Permit, and Air Products is subject to civil penalties for each of these violations. Air Products will continue to be in violation every day until it develops and implements an adequate SWPPP.

D. Failure to Comply with Level 1 and Level 2 Exceedance Response Action Requirements

When the Industrial Stormwater Permit became effective on July 1, 2015, all dischargers were in "Baseline status." 2015 Permit, Section XII.B. A discharger's Baseline status for any given parameter changes to "Level 1 status" if stormwater sampling results indicate an NAL exceedance

for that same parameter. 2015 Permit, Section XII.C. Level 1 status commences on July 1 following the reporting year during which the exceedance(s) occurred. 2015 Permit, Section XII.C. By October 1 following commencement of Level 1 status, a discharger is required to: (1) complete an evaluation, with the assistance of a Qualified Industrial Storm Water Practitioner (QISP), of the industrial pollutant sources at the facility that are or may be related to the NAL exceedance(s); and (2) identify in the evaluation the corresponding BMPs in the SWPPP and any additional BMPs and SWPPP revisions necessary to prevent future NAL exceedances and to comply with the requirements of the Industrial Stormwater Permit. 2015 Permit, Section XII.C.1.a.-c. Although the evaluation may focus on the drainage areas where the NAL exceedance(s) occurred, a discharger must evaluate all drainage areas. 2015 Permit, Section XII.C.1.c.

Based upon this Level 1 evaluation, a discharger is required to, as soon as practicable but no later than January 1 following commencement of Level 1 status, revise the SWPPP as necessary and implement any additional BMPs identified in the evaluation and certify and submit via SMARTS a Level 1 ERA Report prepared by a QISP that includes a summary of the Level 1 ERA Evaluation and a detailed description of the SWPPP revisions and any additional BMPs for each parameter that exceeded an NAL. 2015 Permit, Section XII.C.2.a.i-ii. A discharger in Level 1 status must also certify and submit via SMARTS the QISP's identification number, name, and contact information (telephone number, e-mail address) no later than January 1 following commencement of Level 1 status. 2015 Permit, Section XII.C.2.a.iii. A discharger's Level 1 status for a parameter will return to Baseline status once the discharger has completed the Level 1 ERA Report and implemented all identified additional BMPs, and results from four consecutive Qualifying Storm Events (QSEs) that were sampled subsequent to BMP implementation indicate no additional NAL exceedances for that parameter. 2015 Permit, Section XII.C.2.b.

A discharger's Level 1 status for any parameter changes to Level 2 status on July 1 following the reporting year in which NAL exceedance(s) occurred for that same parameter while the discharger is in Level 1. 2015 Permit, Section XII.D. By January 1 following commencement of Level 2 status, the discharger is required to submit via SMARTS a Level 2 ERA Action Plan to address NAL exceedance(s) in the drainage areas where the NAL exceedances occurred. 2015 Permit, Section XII.D.1.a.-e. The Level 2 ERA Action Plan must include a schedule and detailed description of the tasks required to complete the discharger's selected demonstration(s). *Id.* The discharger is required to submit via SMARTS a Level 2 ERA Technical Report by January 1 of the reporting year following the submittal of the Level 2 ERA Action Plan. 2015 Permit, Section XII.D.2.a.-c.

Based on information available to Baykeeper, as of July 1, 2016, Air Products was in Level 1 status for aluminum, iron, and N+N based on NAL exceedances during the 2015-2016 reporting period (the annual average for aluminum during the 2015-2016 reporting period was 2.866 mg/L, more than three times the NAL; the annual average for iron during the 2015-2016 reporting period was 3.927 mg/L, approximately four times the NAL; and the annual average for N+N during the 2015-2016 reporting period was 3.039, over four times the NAL). Air Products submitted on SMARTS its Level 1 ERA Evaluation/Report for N+N on or around December 22, 2016, and submitted on SMARTS its updated SWPPP on or around December 28, 2016. Though required to

be submitted by January 1, 2017 (2015 Permit, Section XII.C.2.a.), no Level 1 ERA Evaluation/Report was submitted for iron or aluminum.

Based on information available to Baykeeper, as of July 1, 2017, Air Products was in Level 1 status for TSS based on NAL exceedances during the 2016-2017 reporting period (the annual average for TSS during the 2016-2017 reporting period was 121.733 mg/L, over the NAL). Additionally, based on information available to Baykeeper, as of July 1, 2017, Air Products was in Level 2 status for aluminum, iron, and N+N based on continued NAL exceedances during the 2016-2017 reporting period (the annual average for aluminum during the 2016-2017 reporting period was 4.639 mg/L, more than six times the NAL; the annual average for iron during the 2016-2017 reporting period was 7.607 mg/L, seven and a half times the NAL; and the annual average for N+N during the 2016-2017 reporting period was 5.141 mg/L, also seven and a half times the NAL). On or around December 29, 2017, Air Products submitted on SMARTS its Level 1 ERA Evaluation/Report for TSS, its Level 2 ERA Action Plan for aluminum, iron, and N+N, and its updated SWPPP.

Based on information available to Baykeeper, as of July 1, 2018 Air Products continued to be in Level 2 status for aluminum, iron, and N+N, and entered Level 2 status for TSS, based on NAL exceedances during the 2017-2018 reporting period (the annual average for aluminum during the 2017-2018 reporting period was 4.517 mg/L, more than six times the NAL; the annual average for iron during the 2017-2018 reporting period was 5.032 mg/L, five times the NAL; the annual average for N+N during the 2017-2018 reporting period was 7.015 mg/L, ten times the NAL; and the annual average for TSS during the 2017-2018 reporting period was 131 mg/L, above the NAL). On or around December 31, 2018, Air Products submitted on SMARTS its updated SWPP.

Based on information available to Baykeeper, as of July 1, 2019, Air Products continued to be in Level 2 status for aluminum, iron, N+N, and TSS, based on NAL exceedances during the 2018-2019 reporting period (the annual average for aluminum during the 2018-2019 reporting period was 5.641 mg/L, more than six times the NAL; the annual average for iron during the 2018-2019 reporting period was 7.492 mg/L, seven and a half times the NAL; the annual average for N+N during the 2018-2019 reporting period was 1.715 mg/L, two and a half times the NAL; and the annual average for TSS during the 2017-2018 reporting period was 135.636 mg/L, above the NAL). Though required to be submitted on SMARTS by January 1, 2019 by the 2015 Permit, Air Products did not submit its Level 2 ERA Action Plan for TSS until on or around June 27, 2019. Likewise, though required to be submitted on SMARTS by January 1, 2019 by the 2015 Permit, Air Products did not submit its Level 2 ERA Technical Report for aluminum, iron, and N+N until on or around June 12, 2019.

Air Products' Level 2 ERA Action Plan's recommended BMPs for aluminum, iron, and N+N were insufficient, and Air Products' Level 2 ERA Technical Report recommended only one additional BMP: "End of pipe" treatment – particulate filtration," under which "[d]ifferent treatment systems will be evaluated for cost, effectiveness and feasibility." BMPs selected for implementation in Air Products' Level 2 ERA Action Plan include (1) storm drain cleaning; (2) catch basin inserts; (3) storm drains covers during dry weather; (4) fiber rolls around storm drains; (5) paving; (6)

berms; (7) gravel removal; (8) observation; and (9) construction BMPs. These BMPs were insufficient and did not achieve adequate reductions in pollutant concentrations in the Facility's stormwater discharges, as evidenced by continued NAL exceedances after advanced BMPs were implemented during the 2017-2018 and 2018-2019 reporting periods. Further, the selected advanced BMP in Air Products' Level 2 ERA Technical Report fails to specify an implementation schedule, as required by the 2015 Permit. Section XII.D.1.e. Thus, Air Products' Level 2 ERA Action Plan and Technical Report for aluminum, iron, and N+N fail to meet the requirements of Section XII of the 2015 Permit.

Air Products Level 2 ERA Action Plan recommended one advanced BMP for TSS that consisted of end of pipe treatment and particulate filtration. This BMP was insufficient and did not achieve adequate reductions in pollutant concentrations in the Facility's stormwater discharges, as evidenced by continued NAL exceedances after advanced BMPs were implemented during the 2018-2019 reporting period. Furthermore, the 2015 Permit requirement that Level 2 ERA Action Plans include a schedule of implementation and that all BMPs be implemented within one year (section XII.D.1.d-e.) were not met by the statement that the one advanced BMP's completion date would be "[t]o be determined." Thus, Air Products' Level 2 ERA Action Plan for TSS fails to meet the requirements of Section XII of the 2015 Permit.

Accordingly, Air Products has failed and continues to fail to conduct an adequate Level 1 evaluation, an adequate Level 1 ERA Report, an adequate Level 2 ERA Action Plan, and an adequate Level 2 ERA Technical Report that comply with the 2015 Permit. As such, Air Products is in daily violation of the 2015 Permit. Every day that Air Products conducts operations at the Facility without an adequate Level 1 evaluation, an adequate Level 1 ERA Report, an adequate Level 2 ERA Action Plan, and/or an adequate Level 2 ERA Technical Report as required by the 2015 Permit is a separate and distinct violation of the 2015 Permit and section 301(a) of the Clean Water Act, 33 U.S.C. section 1311(a). Air Products has been in daily and continuous violation of the 2015 Permit's Level 1 status ERA requirements for aluminum, iron, and N+N every day since at least July 1, 2016, the 2015 Permit's Level 1 status ERA requirements for TSS every day since at least July 1, 2017, the 2015 Permit's Level 2 status ERA requirements for aluminum, iron, and N+N every day since at least July 1, 2017, and the 2015 Permit's Level 2 status ERA requirements for TSS every day since at least July 1, 2018. These violations are ongoing, and Baykeeper will include additional violations when information becomes available. Air Products is subject to civil penalties for all violations of the Clean Water Act so occurring.

E. Unpermitted Discharges

Section 301(a) of the CWA prohibits the discharge of any pollutant into waters of the United States unless the discharge is authorized by a NPDES permit issued pursuant to section 402 of the CWA. *See* 33 U.S.C. §§ 1311(a), 1342. Air Products sought coverage for the Facility under the Industrial Stormwater Permit, which states that any discharge from an industrial facility not in compliance with the Industrial Stormwater Permit "must be either eliminated or permitted by a separate NPDES permit." 1997 Permit, Order Part A.1.; 2015 Permit, Sections I.A. (Finding 8) and I.C. (Finding 28).

Because Air Products has not obtained coverage under a separate NPDES permit and has failed to eliminate discharges not permitted by the Industrial Stormwater Permit, each and every discharge from the Facility described herein not in compliance with the Industrial Stormwater Permit has constituted and will continue to constitute a discharge without CWA permit coverage in violation of section 301(a) of the CWA, 33 U.S.C. section 1311(a). Air Products is subject to penalties for each violation of the Industrial Stormwater Permit and the CWA occurring in the last five years.

III. PERSONS RESPONSIBLE FOR THE VIOLATIONS

The following persons/entities are responsible for the aforementioned violations:

- Air Products Manufacturing Corporation
- Air Products and Chemicals, Inc.

IV. NAME AND ADDRESS OF NOTICING PARTY

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

V. COUNSEL

Baykeeper is represented by Ben Eichenberg in this matter. Please direct all communications to me at the address and phone number listed above or ben@baykeeper.org.

VI. REMEDIES

Baykeeper intends, at the close of the 60-day notice period or thereafter, to file a citizen suit under CWA section 505(a) against Air Products for the above-referenced violations. Baykeeper will seek declaratory and injunctive relief to prevent further CWA violations pursuant to CWA sections 505(a) and (d), 33 U.S.C. section 1365(a) and (d), and such other relief as permitted by law. Baykeeper will seek civil penalties pursuant to CWA section 309(d), 33 U.S.C. section 1319(d), and 40 C.F.R. section 19.4, against Air Products in this action. The CWA imposes civil penalty liability of up to $37,500 per day per violation for violations occurring between January 12, 2009 and November 2, 2015, and up to $51,570 per day per violation for violations occurring after November 2, 2015. 33 U.S.C. § 1319(d); 40 C.F.R. §§ 19.1-19.4. Baykeeper will seek to recover attorneys' fees, experts' fees, and costs in accordance with CWA section 505(d), 33 U.S.C. section 1365(d).

As noted above, Baykeeper would like to meet with you to discuss effective remedies for the

violations noted in this letter. Please contact me to initiate these discussions.

Sincerely,

_____

Ben Eichenberg
Staff Attorney
San Francisco Baykeeper

Cc:

Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
Mail Code: 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Mike Stoker, Regional Administrator
U.S. EPA, Region 9
75 Hawthorne Street
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William Barr, U.S. Attorney General
U.S. Department of Justice
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Michael Montgomery, Executive Officer
Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, California 94612

Eileen Sobeck, Executive Director
State Water Resources Control Board
1001 I Street
Sacramento, California 95814

Attachment 1: EPA Benchmarks and Water Quality Standards for Discharges to Fresh Water

Parameter	Units	Benchmark value	Source
pH	SU	6.0 (6.5) – 9.0 (8.5)	2015 MSGP (2017 Basin Plan)
Total Suspended Solids	mg/L	100	2015 MSGP
Chemical Oxygen Demand	mg/L	120	2015 MSGP
Oil and Grease	mg/L	15	2000 MSGP
Aluminum Total	mg/L	0.75	2015 MSGP
Copper Total	mg/L	0.0156	2015 MSGP
Iron Total	mg/L	1.0	2015 MSGP
Lead Total	mg/L	0.095	2015 MSGP
Zinc Total	mg/L	0.13	2015 MSGP
Nitrate + Nitrite Nitrogen	mg/L	0.68	2015 MSGP

Attachment 2: Table of Exceedances for Air Products

Table containing each stormwater sampling result which exceeds EPA Benchmarks and/or causes or contributes to an exceedance of a numeric water quality standard. The EPA Benchmarks are listed in Attachment 1. All stormwater samples were reported by the Facility during the past five years.

Date of Sample	Parameter	Result	Units
2/14/19	Aluminum, Total	1.1	mg/L
2/14/19	Aluminum, Total	1.7	mg/L
2/14/19	Aluminum, Total	8.8	mg/L
2/14/19	Iron, Total	1.4	mg/L
2/14/19	Iron, Total	3.1	mg/L
2/14/19	Iron, Total	11	mg/L
2/14/19	Nitrite Plus Nitrate (as N)	1	mg/L
2/14/19	Total Suspended Solids (TSS)	140	mg/L
1/15/19	Aluminum, Total	3.6	mg/L
1/15/19	Aluminum, Total	4.9	mg/L
1/15/19	Iron, Total	4.9	mg/L
1/15/19	Iron, Total	6.5	mg/L
1/15/19	Nitrite Plus Nitrate (as N)	8.3	mg/L
1/6/19	Aluminum, Total	1.3	mg/L
1/6/19	Aluminum, Total	1.3	mg/L
1/6/19	Iron, Total	2	mg/L
1/6/19	Nitrite Plus Nitrate (as N)	0.75	mg/L
1/6/19	Nitrite Plus Nitrate (as N)	1.6	mg/L
1/6/19	Total Suspended Solids (TSS)	230	mg/L
11/28/18	Aluminum, Total	2.7	mg/L
11/28/18	Aluminum, Total	8	mg/L
11/28/18	Aluminum, Total	28	mg/L
11/28/18	Iron, Total	4.3	mg/L
11/28/18	Iron, Total	14	mg/L
11/28/18	Iron, Total	39	mg/L
11/28/18	Nitrite Plus Nitrate (as N)	0.88	mg/L
11/28/18	Nitrite Plus Nitrate (as N)	3.7	mg/L
11/28/18	Total Suspended Solids (TSS)	210	mg/L
11/28/18	Total Suspended Solids (TSS)	520	mg/L
3/1/18	Aluminum, Total	2.1	mg/L
3/1/18	Aluminum, Total	6.5	mg/L
3/1/18	Aluminum, Total	8.4	mg/L
3/1/18	Iron, Total	3.7	mg/L
3/1/18	Nitrite Plus Nitrate (as N)	1.1	mg/L
3/1/18	Nitrite Plus Nitrate (as N)	13	mg/L

3/1/18	Total Suspended Solids (TSS)	200	mg/L
3/1/18	Total Suspended Solids (TSS)	260	mg/L
1/24/18	Aluminum, Total	1.9	mg/L
1/24/18	Aluminum, Total	4.8	mg/L
1/24/18	Aluminum, Total	6.3	mg/L
1/24/18	Iron, Total	3	mg/L
1/24/18	Iron, Total	6.2	mg/L
1/24/18	Iron, Total	11	mg/L
1/24/18	Nitrite Plus Nitrate (as N)	0.84	mg/L
1/24/18	Nitrite Plus Nitrate (as N)	1.1	mg/L
1/24/18	Nitrite Plus Nitrate (as N)	18	mg/L
1/24/18	Total Suspended Solids (TSS)	130	mg/L
1/24/18	Total Suspended Solids (TSS)	210	mg/L
11/16/17	Aluminum, Total	1.2	mg/L
11/16/17	Aluminum, Total	2.1	mg/L
11/16/17	Aluminum, Total	4.9	mg/L
11/16/17	Iron, Total	1.7	mg/L
11/16/17	Iron, Total	2.9	mg/L
11/16/17	Iron, Total	7.5	mg/L
11/16/17	Nitrite Plus Nitrate (as N)	2.4	mg/L
11/16/17	Nitrite Plus Nitrate (as N)	3.2	mg/L
11/16/17	Nitrite Plus Nitrate (as N)	34	mg/L
11/16/17	Oil and Grease	18	mg/L
11/16/17	Total Suspended Solids (TSS)	140	mg/L
11/4/17	Aluminum, Total	2.3	mg/L
11/4/17	Aluminum, Total	2.7	mg/L
11/4/17	Aluminum, Total	11	mg/L
11/4/17	Iron, Total	2.7	mg/L
11/4/17	Iron, Total	3.6	mg/L
11/4/17	Iron, Total	18	mg/L
11/4/17	Nitrite Plus Nitrate (as N)	0.92	mg/L
11/4/17	Nitrite Plus Nitrate (as N)	1.1	mg/L
11/4/17	Nitrite Plus Nitrate (as N)	7.9	mg/L
11/4/17	Total Suspended Solids (TSS)	310	mg/L
2/20/17	Aluminum, Total	2.2	mg/L
2/20/17	Aluminum, Total	3.2	mg/L
2/20/17	Aluminum, Total	16	mg/L
2/20/17	Iron, Total	2.7	mg/L
2/20/17	Iron, Total	4.7	mg/L
2/20/17	Iron, Total	29	mg/L
2/20/17	Nitrite Plus Nitrate (as N)	2.6	mg/L
2/20/17	Total Suspended Solids (TSS)	160	mg/L
2/20/17	Total Suspended Solids (TSS)	440	mg/L

2/7/17	Aluminum, Total	1	mg/L
2/7/17	Aluminum, Total	1.1	mg/L
2/7/17	Aluminum, Total	12	mg/L
2/7/17	Iron, Total	1.5	mg/L
2/7/17	Iron, Total	1.7	mg/L
2/7/17	Iron, Total	25	mg/L
2/7/17	Nitrite Plus Nitrate (as N)	7.2	mg/L
2/7/17	Total Suspended Solids (TSS)	460	mg/L
1/7/17	Aluminum, Total	1	mg/L
1/7/17	Aluminum, Total	2	mg/L
1/7/17	Aluminum, Total	5.1	mg/L
1/7/17	Iron, Total	2.9	mg/L
1/7/17	Iron, Total	7.8	mg/L
1/7/17	Nitrite Plus Nitrate (as N)	0.69	mg/L
1/7/17	Nitrite Plus Nitrate (as N)	13	mg/L
1/7/17	Total Suspended Solids (TSS)	140	mg/L
10/28/16	Aluminum, Total	0.88	mg/L
10/28/16	Aluminum, Total	2.6	mg/L
10/28/16	Aluminum, Total	3.8	mg/L
10/28/16	Iron, Total	1.2	mg/L
10/28/16	Iron, Total	2.8	mg/L
10/28/16	Iron, Total	3.5	mg/L
10/28/16	Nitrite Plus Nitrate (as N)	0.76	mg/L
10/28/16	Nitrite Plus Nitrate (as N)	3.8	mg/L
10/28/16	pH	6.02	SU
10/15/16	Aluminum, Total	2	mg/L
10/15/16	Aluminum, Total	4.7	mg/L
10/15/16	Aluminum, Total	12	mg/L
10/15/16	Iron, Total	5.7	mg/L
10/15/16	Iron, Total	6.8	mg/L
10/15/16	Iron, Total	18	mg/L
10/15/16	Nitrite Plus Nitrate (as N)	1.7	mg/L
10/15/16	Nitrite Plus Nitrate (as N)	4.3	mg/L
10/15/16	Nitrite Plus Nitrate (as N)	42	mg/L
10/15/16	Total Suspended Solids (TSS)	240	mg/L
1/18/16	Aluminum, Total	1.6	mg/L
1/18/16	Aluminum, Total	2.4	mg/L
1/18/16	Aluminum, Total	2.4	mg/L
1/18/16	Iron, Total	2.1	mg/L
1/18/16	Iron, Total	2.9	mg/L
1/18/16	Iron, Total	5.6	mg/L
1/18/16	Nitrite Plus Nitrate (as N)	1.3	mg/L
1/5/16	Aluminum, Total	2.1	mg/L

1/5/16	Aluminum, Total	2.3	mg/L
1/5/16	Iron, Total	2.7	mg/L
1/5/16	Iron, Total	3.4	mg/L
1/5/16	Nitrite Plus Nitrate (as N)	3.9	mg/L
12/21/15	Aluminum, Total	3.4	mg/L
12/21/15	Aluminum, Total	3.5	mg/L
12/21/15	Aluminum, Total	5.1	mg/L
12/21/15	Iron, Total	3.5	mg/L
12/21/15	Iron, Total	4	mg/L
12/21/15	Iron, Total	7.7	mg/L
12/21/15	Nitrite Plus Nitrate (as N)	10	mg/L
12/21/15	Total Suspended Solids (TSS)	140	mg/L
12/21/15	Total Suspended Solids (TSS)	150	mg/L
12/13/15	Aluminum, Total	0.9	mg/L
12/13/15	Aluminum, Total	3.6	mg/L
12/13/15	Aluminum, Total	12	mg/L
12/13/15	Iron, Total	1.3	mg/L
12/13/15	Iron, Total	3.4	mg/L
12/13/15	Iron, Total	19	mg/L
12/13/15	Nitrite Plus Nitrate (as N)	8.6	mg/L
12/13/15	Total Suspended Solids (TSS)	400	mg/L
12/3/15	Aluminum, Total	1.9	mg/L
12/3/15	Aluminum, Total	2.2	mg/L
12/3/15	Aluminum, Total	2.4	mg/L
12/3/15	Iron, Total	2.2	mg/L
12/3/15	Iron, Total	2.5	mg/L
12/3/15	Iron, Total	2.8	mg/L
12/3/15	Nitrite Plus Nitrate (as N)	1.6	mg/L
12/3/15	Nitrite Plus Nitrate (as N)	1.8	mg/L
11/24/15	Aluminum, Total	1.6	mg/L
11/24/15	Aluminum, Total	1.8	mg/L
11/24/15	Aluminum, Total	4.3	mg/L
11/24/15	Iron, Total	1.9	mg/L
11/24/15	Iron, Total	2.1	mg/L
11/24/15	Iron, Total	5.2	mg/L
11/24/15	Nitrite Plus Nitrate (as N)	1.9	mg/L
11/24/15	Nitrite Plus Nitrate (as N)	9.7	mg/L
11/24/15	Total Suspended Solids (TSS)	120	mg/L
11/16/15	Aluminum, Total	0.86	mg/L
11/16/15	Aluminum, Total	2.2	mg/L
11/16/15	Aluminum, Total	4.8	mg/L
11/16/15	Iron, Total	1.3	mg/L
11/16/15	Iron, Total	3.3	mg/L

11/16/15	Iron, Total	7.3	mg/L
11/16/15	Nitrite Plus Nitrate (as N)	14	mg/L
11/16/15	Nitrite Plus Nitrate (as N)	0.76	mg/L
11/16/15	Nitrite Plus Nitrate (as N)	1.6	mg/L
11/16/15	Total Suspended Solids (TSS)	150	mg/L
11/8/15	Aluminum, Total	1.1	mg/L
11/8/15	Aluminum, Total	1.8	mg/L
11/8/15	Aluminum, Total	5.7	mg/L
11/8/15	Iron, Total	1.6	mg/L
11/8/15	Iron, Total	2.4	mg/L
11/8/15	Iron, Total	8.5	mg/L
11/8/15	Nitrite Plus Nitrate (as N)	1.2	mg/L
11/8/15	Nitrite Plus Nitrate (as N)	2.7	mg/L
11/8/15	Nitrite Plus Nitrate (as N)	6.3	mg/L
11/8/15	pH	5.6	SU
11/8/15	pH	5.9	SU
11/8/15	pH	6	SU
11/8/15	Total Suspended Solids (TSS)	120	mg/L
11/2/15	Aluminum, Total	1.6	mg/L
11/2/15	Aluminum, Total	2.6	mg/L
11/2/15	Aluminum, Total	2.6	mg/L
11/2/15	Iron, Total	1.5	mg/L
11/2/15	Iron, Total	2.6	mg/L
11/2/15	Iron, Total	4.4	mg/L
11/2/15	Nitrite Plus Nitrate (as N)	14	mg/L
11/2/15	pH	6	SU
11/2/15	pH	6	SU
11/2/15	pH	6	SU

Attachment 3: Alleged Dates of Exceedances by Air Products During Past Five Years

Days with precipitation one-tenth of an inch or greater, as reported by NOAA's National Climatic Data Center for San Jose, California station, GHCND:USW00023293, when a stormwater discharge from the Facility is likely to have occurred.
http://www.ncdc.noaa.gov/cdo-web/search

2014	2015	2016	2017	2018	2019
	2/6	1/5	1/3	1/3	1/5
	2/8	1/6	1/4	1/8	1/6
	3/11	1/15	1/7	1/9	1/9
	4/7	1/16	1/8	1/18	1/15
	4/25	1/17	1/9	1/24	1/16
	5/14	1/18	1/10	1/25	1/20
	6/10	1/19	1/12	2/26	1/31
	11/2	1/22	1/18	3/1	2/2
	11/9	1/31	1/19	3/2	2/3
	11/15	2/17	1/20	3/3	2/4
	11/25	2/18	1/22	3/13	2/8
9/25	12/3	3/4	1/23	3/14	2/9
10/25	12/10	3/5	2/2	3/22	2/10
10/31	12/11	3/6	2/3	3/24	2/13
11/13	12/13	3/7	2/5	4/6	2/14
11/20	12/18	3/11	2/6	4/7	2/15
11/29	12/19	3/13	2/7	4/16	2/16
11/30	12/21	3/21	2/9	11/21	2/17
12/2	12/22	4/8	2/17	11/22	2/27

12/3	12/24	4/9	2/18	11/23	3/2
12/11	12/28	4/10	2/20	11/28	3/5
12/12		4/22	2/21	11/29	3/6
12/15		5/6	3/4	12/1	3/20
12/16		5/21	3/5	12/4	3/22
12/17		10/16	3/20	12/5	3/23
12/19		10/27	3/21	12/16	3/25
		10/28	3/22	12/17	3/27
		10/30	3/24	12/24	5/15
		11/20	3/25		5/16
		11/26	4/6		5/18
		11/27	4/7		5/19
		12/10	4/8		5/21
		12/15	4/13		
		12/23	4/16		
			4/20		
			10/19		
			11/4		
			11/16		
			11/27		