Inland Empire Waterkeeper
Advocacy • Education • Restoration • Enforcement

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October 8, 2013

VIA CERTIFIED MAIL

Burrtec Waste Group, Inc.
9890 Cherry Avenue
Fontana, California 92335

Burrtec Waste Industries, Inc.
Attention: Managing Agent
9890 Cherry Avenue
Fontana, California 92335

VIA U.S MAIL

Cole Burr
Registered Agent
Burrtec Waste Group, Inc.
9890 Cherry Avenue
Fontana, California 92335

Cole Burr
Registered Agent
Burrtec Waste Industries, Inc.
9890 Cherry Avenue
Fontana, California 92335

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

To Whom It May Concern:

I am writing on behalf of Inland Empire Waterkeeper and Orange County Coastkeeper (collectively "Waterkeeper") in regard to violations of the Clean Water Act[1] and California's Storm Water Permit[2] occurring at 9890 Cherry Avenue, Fontana California 92335 ("Fontana Facility" or "Facility"). This letter is being sent to you as the responsible owners and/or operators of the Fontana Facility, or as the registered agent for those entities. This letter puts Burrtec Waste Group, Inc. and Burrtec Waste Industries, Inc. (hereinafter referred to as the "Fontana Facility Owners and/or Operators") on notice of the violations of the Storm Water Permit occurring at the Fontana Facility including, but not limited to, discharges of polluted storm water from the Fontana Facility into local surface waters. Violations of the Storm Water Permit are violations of the Clean Water Act. As explained below, the Fontana Facility Owners and/or Operators are liable for violations of the Storm Water Permit and the Clean Water Act.

Section 505(b) of the Clean Water Act, 33 U.S.C. § 1365(b), requires that a citizen give notice of his/her intention to file suit sixty (60) days prior to the initiation of a civil action under Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a). Notice must be given to the alleged violator, the Administrator of the United States Environmental Protection Agency ("EPA"), the Regional Administrator of the EPA, the Executive Officer of the water pollution control agency

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[1] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*

[2] National Pollution Discharge Elimination System ("NPDES") General Permit No. CAS000001 [State Water Resources Control Board] Water Quality Order No. 92-12-DWQ, as amended by Order No. 97-03-DWQ.

in the State in which the violations occur, and, if the alleged violator is a corporation, the registered agent of the corporation. *See* 40 C.F.R. § 135.2(a)(1).

By this letter issued pursuant to 33 U.S.C. §§ 1365(a) and (b) of the Clean Water Act, (hereinafter "Notice Letter"), Waterkeeper puts the Fontana Facility Owners and/or Operators on notice that after the expiration of sixty (60) days from the date of this Notice Letter, Waterkeeper intends to file an enforcement action in Federal court against them for violations of the Storm Water Permit and the Clean Water Act.

I. BACKGROUND

A. Inland Empire Waterkeeper and Orange County Coastkeeper

Inland Empire Waterkeeper's office is located at 6876 Indiana Avenue, Suite D, Riverside, California 92506. Inland Empire Waterkeeper is a chapter of Orange County Coastkeeper. Orange County Coastkeeper is a non-profit public benefit corporation organized under the laws of the State of California with its office at 3151 Airway Avenue, Suite F-110, Costa Mesa, California 92626. Together, Inland Empire Waterkeeper and Orange County Coastkeeper have over 2,000 members who live and/or recreate in and around San Bernardino County and the Santa Ana River watershed. Inland Empire Waterkeeper and Orange County Coastkeeper are dedicated to the preservation, protection, and defense of the environment, wildlife, and natural resources of their local watersheds, including the Santa Ana River and its tributaries. To further these goals, Waterkeeper actively seeks federal and state agency implementation of the Clean Water Act, and, where necessary, directly initiates enforcement actions on behalf of itself and its members.

Members of Waterkeeper use and enjoy the waters into which the Fontana Facility discharges into, including the Santa Ana River and its tributaries. Members of Waterkeeper use and enjoy the Santa Ana River and its tributaries to picnic, hike, view wildlife, and engage in scientific study, including monitoring activities, among other things. Procedural and substantive violations of the Storm Water Permit including, but not limited to, the discharge of pollutants from the Fontana Facility, impairs each of these uses. Further, these violations are ongoing and continuous. Thus, the interests of Waterkeeper's members have been, are being, and will continue to be adversely affected by the Fontana Facility Owners' and/or Operators' failure to comply with the Storm Water Permit and the Clean Water Act.

B. The Owners and/or Operators of the Fontana Facility

Prior to beginning industrial operations, dischargers are required to apply for coverage under the Storm Water Permit by submitting a Notice of Intent ("NOI") to the State Water Resources Control Board ("State Board") to obtain Storm Water Permit coverage. *See* Storm Water Permit, Finding #3. Waterkeeper obtained 2 NOIs for the Fontana Facility and one State Board Receipt Letter for the Fontana Facility. The Receipt Letter is states that the Facility's NOI was approved on March 6, 1992, for Facility operator "Burtc Waste Industries Inc" and the Facility located at "Burtec Waste Industries Inc, 9890 CHERRY Ave, Fontana." One NOI is

signed by Bill Eden and dated May 20, 1997, and identifies the operator of the Facility as "Cole E. Burr" and the Facility name and location as "Rancho Disposal, 9890 Cherry Ave., Fontana, California 92335." A second NOI was obtained from the State Board, which is dated July 6, 2012, but is unsigned. This 2012 NOI identifies the Facility operator as "Burrtec Waste Industries, Inc.," located at "9890 Cherry Ave., Fontana, California 92335," and the Facility site name as "Burrtec Fontana Yard," located at "9890 Cherry Avenue, Fontana, California 92335." The Waste Discharge Identification ("WDID") number is listed as 8-36I000268.

Information available to Waterkeeper indicates that Burrtec Waste Industries, Inc. is an owner and/or operator of the Fontana Facility. Information available to Waterkeeper indicates that Burrtec Waste Group, Inc. is also an owner and/or operator of the Fontana Facility. Burrtec Waste Group, Inc. and Burrtec Waste Industries, Inc. are active corporations registered in California. The registered agent for both corporations is Cole Burr, 9890 Cherry Avenue, Fontana, California 92335.

The Fontana Facility Owners and/or Operators have violated and continue to violate the procedural and substantive terms of the Storm Water Permit including, but not limited to, the illegal discharge of pollutants from the Fontana Facility into local surface waters. As explained herein, the Fontana Facility Owners and/or Operators are liable for violations of the Storm Water Permit and the Clean Water Act.

C. Storm Water Pollution and the Water Receiving Fontana Facility's Discharges

With every significant rainfall event, millions of gallons of polluted storm water originating from industrial operations such as the Fontana Facility pour into storm drains and local waterways. The consensus among agencies and water quality specialists is that storm water pollution accounts for more than half of the total pollution entering surface waters each year. Such discharges of pollutants from industrial facilities contribute to the impairment of downstream waters and adversely impact aquatic-dependent wildlife. These contaminated discharges can and must be controlled for downstream ecosystems to regain their health.

Storm water discharges from hazardous waste treatment, storage or disposal facilities, like the Fontana Facility, contain pollutants such as: oil and grease ("O&G"); hydraulic fluids; transmission fluid; antifreeze; total suspended solids ("TSS"); heavy metals (such as copper, iron, lead, aluminum, and zinc); pathogens; and nutrients. Many of these pollutants are on the list of chemicals published by the State of California as known to cause cancer, birth defects, and/or developmental or reproductive harm. Discharges of polluted storm water to the Santa Ana River and its tributaries pose carcinogenic and reproductive toxicity threats to the public and adversely affect the aquatic environment.

The Fontana Facility discharges into the San Sevaine Channel,[3] which is a tributary to the Santa Ana River (collectively "Receiving Waters"). The Santa Ana River is an ecologically

[3] The Fontana Owners and/or Operators list San Sevaine Creek as the receiving water on their NOI, which is the same waterbody as the San Sevaine Channel.

sensitive area. Although pollution and habitat destruction have drastically diminished once-abundant and varied fisheries, the Receiving Waters still provide essential habitat for dozens of fish, bird, and invertebrate species. These pollutants harm the special aesthetic and recreational significance that the Receiving Waters has for people in the surrounding communities, including Waterkeeper's members. The public's use of the Receiving Waters for water contact sports exposes people to toxic metals and other contaminants in storm water and non-storm water discharges. Non-contact recreational and aesthetic opportunities, such as wildlife observation, are also impaired by polluted discharges to the Receiving Waters.

The California Regional Water Quality Control Board, Santa Ana Region Regional Board ("Regional Board") issued the *Santa Ana River Basin Water Quality Control Plan* ("Basin Plan"). The Basin Plan identifies the "Beneficial Uses" of water bodies in the region. The Beneficial Uses for the Santa Ana River near or downstream of the point at which it receives polluted storm water discharges from the Fontana Facility by way of the San Sevaine Channel (i.e., Santa Ana River Reaches 1 – 3) include: Agricultural Supply; Groundwater Recharge; Water Contact Recreation; Non-contact Water Recreation; Warm Freshwater Habitat; Wildlife Habitat; and Rare, Threatened, or Endangered species. *See* Basin Plan at Table 3-1. According to the 2010 303(d) List of Impaired Water Bodies, Reach 3 of the Santa Ana River, into which the San Sevaine Channel drains, is impaired for copper, lead, and pathogens, and Reach 2 of the Santa Ana River is impaired for indicator bacteria.[4] Polluted discharges from industrial sites such as the Fontana Facility contribute to the degradation of these already impaired surface waters and of the ecosystems that depend on these waters.

II. THE FONTANA FACILITY AND ASSOCIATED DISCHARGES OF POLLUTANTS

A. Fontana Facility Site Description

The Fontana Facility is 11 acres and 80% impervious. A corporate office building is located near the center of the eastern boundary of the Facility, and to the north of the corporate offices is a public services office building. Employee and customer parking lots are located adjacent to the east, west, and north sides of the corporate offices, and adjacent to the east side of the public services office building. Two covered areas for vehicle and equipment maintenance are located along the northern border of the Facility. A wash rack is located adjacent to each of the covered maintenance areas. An uncovered area used for storage of vehicles, bins, and other equipment is located to the south and west of the covered vehicle and equipment maintenance areas. Finally, a vehicle fueling area that includes a covered fueling area and an uncovered compressed natural gas ("CNG") facility is located in the southwest portion of the Facility. There are four points of egress/ingress at the Facility, referred to in this Notice Letter as "Driveway 1" through "Driveway 4." Three driveways lead from the Facility to Cherry Avenue: Driveway 1 is the northernmost driveway, the next driveway to the south is Driveway 2, and Driveway 3 is the next driveway south. Driveway 4 is the southernmost driveway leading from the Facility to an

[4] 2010 Integrated Report – All Assessed Waters, available at: http://www.waterboards.ca.gov/water_issues/programs/tmdl/integrated2010.shtml, (last accessed on July 8, 2013).

access road along the southern border of the Facility.

B. Fontana Facility Industrial Activities and Associated Pollutants

According to information available to Waterkeeper, the Fontana Facility functions as a central location for Burrtec Waste Industries, Inc.'s offices, and for maintenance and storage of vehicles and solid waste collection bins ("bins"). The Fontana Facility's industrial activities are pollutant sources, and include, but are not limited to: maintenance of vehicles; maintenance of equipment, such as repair and painting of bins; vehicle and equipment cleaning operations; vehicle and equipment fueling; storage of vehicles, equipment, and fuels; bin storage; and hazardous materials storage, including motor oil, hydraulic/lube oil, degreasers, paints, cleaning detergents, and solvents.

The 1992 Receipt Letter for the Facility's NOI from the State Board lists the Standard Industrial Classification ("SIC") Code for the Facility as 4953 (Hazardous Waste Treatment Storage or Disposal). The Facility's 1997 NOI lists SIC Code as 4212 (Motor Freight Transportation and Warehousing) and the Facility's 2012 NOI lists the SIC Code again as 4953. The Storm Water Pollution Prevention Plan ("SWPPP") for the Facility, last revised in 2009, lists the SIC Code for the Facility as 4212.

For facilities classified as SIC Code 4212, the Storm Water Permit requires permit coverage for "vehicle maintenance shops, equipment cleaning operations, or airport deicing operations." Storm Water Permit, Attachment 1. The Storm Water Permit regulates the portions of the facility which are used for "vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication) or other operations identified herein that are associated with industrial activity." Storm Water Permit, Attachment 1; *see also* Storm Water Permit, Attachment 4 (stating that "storm water associated with industrial activity" includes storm water discharges from material handling activities and storage areas for material handling equipment). Waterkeeper puts the Fontana Facility Owners and/or Operators on notice that one or more of these regulated activities is conducted at locations throughout the entire Fontana Facility, and thus the entire Facility requires Storm Water Permit coverage. In addition, even if the regulated industrial activities are not occurring throughout the entire Facility at all times, under the Storm Water Permit's definition of "storm water associated with industrial activities" and explanation of material handling activities, Waterkeeper puts the Fontana Facility Owners and/or Operators on notice that since no best management practices ("BMPs") or other controls exist to separate the storm water flows from portions of the Facility where non-regulated activities may occur from storm water flows from the regulated industrial activities, storm water at the Facility commingles and thus, all storm water discharges from the Facility are regulated under the Storm Water Permit.

The pollutants associated with the Facility include, but are not limited to: O&G; metals, including aluminum, copper, cadmium, chromium, lead, nickel, and zinc; TSS; nutrientsm including nitrogen and phosphorous; synthetic organic compounds; trash, debris and floatables; and pathogens, including coliform bacteria.

Information available to Waterkeeper indicates that storage of vehicles and equipment, storage of materials associated with vehicle maintenance and repair, and other industrial activities occur at the Fontana Facility outdoors without adequate cover to prevent storm water and non-storm water exposure to pollutant sources, and without secondary containment or other measures to prevent polluted storm water and non-storm water from discharging from the Fontana Facility. The resulting illegal discharges of polluted water impact Waterkeeper's members' use and enjoyment of the Receiving Waters by degrading the quality of the Receiving Waters and by posing risks to human health and aquatic life.

C. Fontana Facility Storm Water Flow and Discharge Locations

The Fontana Facility site map indicates that a "water treatment system," which consists of a clarifier ("Clarifier 1") that empties to an underground "leach field," is located in the southwest corner of the Facility. Based on the direction of storm water flows indicated on the Facility site map, the employee parking lot located to the west of the corporate offices, the covered fueling area and uncovered CNG facility, and portions of the uncovered area used for storing vehicles and equipment drain to Clarifier 1 and the underground "leach field." According to the Fontana Facility SWPPP, the capacity of Clarifier 1 and the underground leach field is exceeded after collecting the "first-flush runoff." After the capacity of Clarifier 1 and the underground "leach field" is exceeded, storm water is discharged via a "notch" located near the southwest corner of the Facility, and/or via an overflow weir located approximately forty feet to the east of the notch.

According to Facility documents, the remaining portions of the vehicle and equipment storage area, the covered equipment and vehicle maintenance areas, and the wash rack adjacent to the maintenance area that is located near the northwest corner of the Facility drain to a second clarifier ("Clarifier 2") located near the northwest corner of the Facility. A third clarifier ("Clarifier 3") is located in the wash rack located adjacent to the covered maintenance area near the northeast corner of the Facility. According to the SWPPP, Clarifier 2 and Clarifier 3 drain to the sanitary sewer.[5] The SWPPP does not describe the capacities of these clarifiers, or to where they discharge when their capacities are exceeded.

The SWPPP states that there is only one discharge point at the Fontana Facility, which is named "Monitoring Point 3," that appears to be the notch located near the southwest corner of the Facility. Yet the 2007-2008 and 2008-2009 Annual Reports list 2 discharge points, identified as "Site 1" and "Site 2." However, the November 14, 2007, Regional Board inspection report indicates that there are at least 3 discharge points, presumably the 2 identified in the Annual Reports, and a third "from the east side of the truck maintenance garage." Moreover, the Fontana Facility site map indicates that storm water discharges along each side of the 4 driveways, from a drain outlet to Cherry Avenue located to the north of Driveway 1, and from a drain outlet to Cherry Avenue located to the north of Driveway 4.

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[5] Industrial storm water discharges to municipal sanitary sewers require coverage under an Industrial Wastewater Discharge Permit. The Fontana Facility SWPPP does not indicate whether the Fontana Facility Owners and/or Operators have received a permit from the City of Fontana to discharge to the city sewer.

III. VIOLATIONS OF THE CLEAN WATER ACT AND THE STORM WATER PERMIT

A. Discharges of Polluted Storm Water from the Fontana Facility in Violation of Effluent Limitation B(3) of the Storm Water Permit

Effluent Limitation B(3) of the Storm Water Permit requires dischargers to reduce or prevent pollutants associated with industrial activity in storm water discharges through implementation of BMPs that achieve best available technology economically achievable ("BAT") for toxic pollutants[6] and best conventional pollutant control technology ("BCT") for conventional pollutants.[7] EPA's Industrial Storm Water Permit contains benchmark values, which are objective standards for evaluating whether a permittee's BMPs achieve compliance with BAT/BCT, as required by Effluent Limitation B(3) of the Storm Water Permit ("EPA Benchmarks").[8]

Storm water sampling at the Fontana Facility demonstrates that concentrations of pollutants in storm water discharges repeatedly exceed applicable EPA Benchmarks. Attachment A contains a table with the dates on which storm water discharges from the Fontana Facility since the 2008-2009 Annual Report exceed EPA Benchmarks. In addition, after an inspection was conducted at the Facility by the Regional Board in 2007, the Regional Board specifically put the Fontana Facility Owners and/or Operators on notice that BMPs must be developed "**immediately**" to address the exceedances of the EPA Benchmarks, and that actions taken to address the exceedances and other "non-compliance issues noted in the report must be submitted by January 31, 2008." Yet, information available to Waterkeeper indicates that no response was submitted, and based on continued exceedances of EPA Benchmarks, no action in response to the exceedances was taken.

The repeated exceedances of EPA Benchmarks demonstrate that the Fontana Facility Owners and/or Operators have failed to develop and/or implement required BMPs at the Fontana Facility that achieve compliance with the BAT/BCT standards. Waterkeeper puts the Fontana Facility Owners and/or Operators on notice that they violate Effluent Limitation B(3) of the Storm Water Permit each time storm water discharges from the Facility without BMPs that achieve BAT/BCT including, but not limited to, the dates identified in Attachment A.[9] These violations are ongoing and will continue every time the Fontana Facility Owners and/or Operators discharge polluted storm water without developing and/or implementing BMPs that

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[6] Toxic pollutants are listed at 40 C.F.R. § 401.15 and include copper and lead, among others.

[7] Conventional pollutants are listed at 40 C.F.R. § 401.16 and include BOD, TSS, O&G, pH, and fecal coliform.

[8] *See United States Environmental Protection Agency (EPA) National Pollutant Discharge Elimination System (NPDES) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP) Authorization to Discharge Under the National Pollutant Discharge Elimination System*, as modified effective May 27, 2009 ("Multi-Sector Permit"), Fact Sheet at 106; *see also*, 73 Federal Register 56572 (2008).

[9] For example, the Fontana Owners and/or Operators claim that the results of sampling submitted in the 2011-2012 and 2012-2013 Annual Reports are not from discharges from the Facility but rather were taken to evaluate the effectiveness of the BMPs. Thus, whether the storm water sampled actually left the facility or not, the results demonstrate BAT/BCT is not being achieved at the Facility.

achieve compliance with the BAT/BCT standards. Waterkeeper will update the dates of violations when additional information and data become available. Each time the Fontana Facility Owners and/or Operators discharge polluted storm water in violation of Effluent Limitation B(3) of the Storm Water Permit is a separate and distinct violation of the Storm Water Permit and Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). The Fontana Facility Owners and/or Operators are subject to civil penalties for all violations of the Clean Water Act occurring since October 8, 2008.

B. Discharges of Polluted Storm Water from the Fontana Facility in Violation of Receiving Water Limitations C(1) and C(2) of the Storm Water Permit

Receiving Water Limitation C(1) of the Storm Water Permit prohibits storm water discharges and authorized non-storm water discharges to surface water or groundwater that adversely impact human health or the environment. Discharges that contain pollutants in concentrations that exceed levels known to adversely impact aquatic species and the environment constitute violations of Receiving Water Limitation C(1) of the Storm Water Permit. Receiving Water Limitation C(2) of the Storm Water Permit prohibits storm water discharges and authorized non-storm water discharges that cause or contribute to an exceedance of an applicable Water Quality Standard ("WQS").[10] Applicable WQS include, among others, the Criteria for Priority Toxic Pollutants in the State of California, 40 C.F.R. § 131.38 ("CTR"). The Basin Plan sets out additional WQSs, including WQSs for total coliform and fecal coliform when the Beneficial Uses of a lake or stream include Municipal and Domestic Supply, Non-contact Water Recreation, and Water Contact Recreation, such as the Receiving Waters. Discharges that contain pollutants in excess of an applicable WQS violate Receiving Water Limitation C(2) of the Storm Water Permit and the Clean Water Act.

Information available to Waterkeeper indicates that storm water discharges from the Fontana Facility contain elevated concentrations of pollutants such as copper, lead, zinc, and pathogens, including coliform bacteria and *Escherichia coli*, among others. The Receiving Waters are impaired for copper, lead, and pathogens. Information available to Waterkeeper indicates that storm water discharges from the Fontana Facility containing elevated concentrations of pollutants can be acutely toxic and/or have sub-lethal impacts on the avian and aquatic wildlife in the Receiving Waters. Information available to Waterkeeper further indicates that storm water discharges from the Fontana Facility containing elevated concentrations of pollutants cause or contribute to a violation of an applicable WQS. Attachment A contains a table with the dates on which storm water discharges from the Facility since the 2008-2009 Wet Season exceed a WQS.

The exceedances of CTR limits and the Basin Plan WQSs demonstrate that the Fontana Facility Owners and/or Operators have violated and continue to violate Receiving Water Limitation C(1) and/or Receiving Water Limitation C(2). Waterkeeper puts the Fontana Facility Owners and/or Operators on notice that they violate Receiving Water Limitation C(1) and/or

[10] WQS include pollutant concentration levels determined by the State Water Resources Control Board and the EPA to be protective of the Beneficial Uses of the Receiving Water. Discharges above WQS contribute to the impairment of the Receiving Water' Beneficial Uses.

Receiving Water Limitation C(2) each time storm water discharges from the Facility containing pollutants that adversely affect human health or the environment and/or cause or contribute to a violation of an applicable WQS including, but not limited to, the dates identified in Attachment A. Each time that discharges of storm water from the Fontana Facility adversely impact human health or the environment is a separate and distinct violation of Receiving Water Limitation C(1) of the Storm Water Permit and Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). Each time that discharges of storm water from the Fontana Facility cause or contribute to a violation of an applicable WQS is a separate and distinct violation of Receiving Water Limitation C(2) of the Storm Water Permit and Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). These violations are ongoing and Waterkeeper will update the dates of violation when additional information and data becomes available. The Fontana Facility Owners and/or Operators are subject to civil penalties for all violations of the Clean Water Act occurring since at least October 8, 2008.

C. Unauthorized and Authorized Non-Storm Water Discharges from the Fontana Facility in Violation of Discharge Prohibition A(1) of the Storm Water Permit

Except as authorized by Special Conditions D(1) of the Storm Water Permit, Discharge Prohibition A(1) prohibits permittees from discharging materials other than storm water (non-storm water discharges) either directly or indirectly to waters of the United States. Prohibited non-storm water discharges must be either eliminated or permitted by a separate NPDES permit. *See* Storm Water Permit, Discharge Prohibition A(1).

Information available to Waterkeeper indicates that unauthorized non-storm water discharges occur at the Facility due to inadequate BMP development and/or implementation necessary to prevent these discharges. For example, Waterkeeper investigators observed non-storm water discharging from the covered vehicle maintenance area in the northeast corner of the Facility to one of the drain outlets along Cherry Avenue. These non-storm water discharges resulting from cleaning and washing operations are not from sources that are listed among the authorized non-storm water discharges in Special Conditions D(1) of the Storm Water Permit and thus are always prohibited without a separate NPDES permit. Information available to Waterkeeper indicates that the Fontana Facility Owners and/or Operators have not obtained a separate NPDES permit for the Facility's unauthorized non-storm water discharges, as thus these discharges are in violation of Discharge Prohibition A(1) of the Storm Water Permit.

Certain non-storm water discharges are allowed, such as fire hydrant flushing, drinking fountain water, and landscape watering, only if all requirements under Special Conditions D(1) of the Storm Water Permit are met. Special Conditions D(1) requires, among other things, the development and implementation of BMPs, which must be specifically listed in the SWPPP, to prevent or reduce the contact of non-storm water discharges with significant materials or equipment. The non-storm water discharges also cannot contain significant quantities of pollutants. Thus, even the non-storm water discharges listed in Special Condition D.1, such as irrigation drainage, which are consistently observed at the Facility (*see e.g.* 2010-2011 Annual Report), are prohibited because the Fontana Facility Owners and/or Operators have not developed or implemented the required BMPs to prevent pollutant exposure to the non-storm

water, and are not otherwise in compliance with the Special Conditions D(1) that would authorize such discharges. These non-storm water discharges are not authorized by a separate NPDES permit or subject to Special Condition D(1). Therefore, the Fontana Facility Owners and/or Operators are in violation of the Storm Water Permit for these prohibited non-storm water discharges.

Waterkeeper puts the Fontana Facility Owners and/or Operators on notice that Discharge Prohibition A(1) of the Storm Water Permit is violated each time non-storm water is discharged from the Fontana Facility. These discharge violations are ongoing and will continue until the Fontana Facility Owners and/or Operators develop and implement BMPs that prevent prohibited non-storm water discharges, or obtain separate NPDES permit coverage. Each time the Fontana Facility Owners and/or Operators discharge prohibited non-storm water in violation of Discharge Prohibition A(1) of the Storm Water Permit is a separate and distinct violation of the Storm Water Permit and section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). Fontana Facility Owners and/or Operators are subject to civil penalties for all violations of the Clean Water Act occurring since October 8, 2008.

D. Failure to Develop, Implement and/or Revise an Adequate Storm Water Pollution Prevention Plan

Section A(1) and Provision E(2) of the Storm Water Permit requires dischargers to have developed and implemented a SWPPP by October 1, 1992, or prior to beginning industrial activities, that meets all of the requirements of the Storm Water Permit. The objective of the SWPPP requirement is to identify and evaluate sources of pollutants associated with industrial activities that may affect the quality of storm water discharges, and to implement site-specific BMPs to reduce or prevent pollutants associated with industrial activities in storm water discharges. Storm Water Permit, Section A(2). These BMPs must achieve compliance with the Storm Water Permit's Effluent Limitations and Receiving Water Limitations. To ensure compliance with the Storm Water Permit, the SWPPP must be evaluated on an annual basis pursuant to the requirements of Section A(9). The SWPPP must also be revised as necessary to ensure compliance with the Storm Water Permit. *Id.,* Sections A(9) and A(10).

Sections A(3) – A(10) of the Storm Water Permit set forth the requirements for a SWPPP. Among other information, the SWPPP must include: identification of individual(s) and their responsibilities in developing, implementing, and revising the facility's SWPPP (*see* Storm Water Permit Section A(3)(a)); a site map with information including storm water drainage areas with flow patterns, nearby water bodies, and the location of the storm water collection and conveyance system and associated points of discharge (*see id.,* Section A(4)); and a list of significant materials handled and stored at the facility (*see id.,* Section A(5)). Sections A(7) and A(8) require 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.

Information available to Waterkeeper indicates that the Fontana Facility Owners and/or Operators began conducting operations without developing a SWPPP. Even after developing a SWPPP, the Fontana Facility Owners and/or Operators are conducting operations at the Facility with an inadequately developed, implemented, and/or revised SWPPP. For example, the Regional Board has inspected the Facility and no SWPPP was produced in response to the Board's request. Further, the Regional Board has sent notices to the Fontana Facility Owners and/or Operators noting the inadequacy of BMPs and thus the need to develop additional BMPs and revise the SWPPP. Yet information available to Waterkeeper indicates that the Fontana Facility Owners and/or Operators developed only one SWPPP in 2009, and it fails to incorporate all requirements of the Storm Water Permit, is not properly implemented, and has never been revised. The Fontana Facility Owners and/or Operators have failed and continue to fail to develop and/or implement a SWPPP that contains BMPs to prevent the exposure of pollutant sources to storm water and the subsequent discharge of polluted storm water from the Fontana Facility.

In addition, the Fontana Facility SWPPP fails to identify the significant materials handled and stored at the Facility. The Fontana Facility SWPPP indicates that a list of significant materials that may come into contact with storm water is included in Worksheet No. 2 in Appendix B of the SWPPP. However, the Worksheet No. 2 attached to the SWPPP is blank. Therefore, in violation of Section A(5), the Fontana Facility Owners and/or Operators failed to include in their SWPPP a list of significant materials handled and stored at the Facility.

The SWPPP for the Fontana Facility fails to include an adequate site map. The site map fails to include all of the requirements of the SWPPP, such as an outline of storm water drainage areas and identification of all discharge points associated with the storm water collection and conveyance system. The SWPPP is therefore not in compliance with Section A(4).

Another example of the inadequacy of the SWPPP is its failure to identify the current storm water pollution prevention team, in violation of Section A(3)(a). In their 2012–2013 Annual Report, the Fontana Facility Owners and/or Operators even note that, "[t]he SWPPP pollution prevention team needs to be revised to include current onsite personnel."

Waterkeeper puts the Fontana Facility Owners and/or Operators on notice that they violate Section A and Provision E(2) of the Storm Water Permit and the Clean Water Act every day that they operate the Fontana Facility with an inadequately developed, implemented, and/or revised SWPPP. Every day that the Fontana Facility Owners and/or Operators operate the Fontana Facility with an inadequately developed, implemented, and/or revised SWPPP is a separate and distinct violation of the Storm Water Permit and the Clean Water Act. The Fontana Facility Owners and/or Operators have been in daily and continuous violation of the Storm Water Permit's SWPPP requirements. These violations are ongoing and Waterkeeper will update the number of violations throughout this enforcement action. The Fontana Facility Owners and/or Operators are subject to civil penalties for all violations of the Clean Water Act occurring since October 8, 2008.

E. Failure to Develop, Implement, and/or Revise an Adequate Monitoring and Reporting Program

Section B(1) and Provision E(3) of the Storm Water Permit requires facility operators to develop and implement a monitoring and reporting plan ("M&RP") by October 1, 1992, or when industrial activities begin at the facility, that meets all of the requirements of the Storm Water Permit. The primary objective of the M&RP is to detect and measure the concentrations of pollutants in a facility's discharge to ensure compliance with the Storm Water Permit's Discharge Prohibitions, Effluent Limitations, and Receiving Water Limitations. *See* Storm Water Permit, Section B(2). The M&RP must therefore ensure that BMPs are effective, and are evaluated and revised whenever appropriate to ensure compliance with the Storm Water Permit. Dischargers must revise and update the M&RP to reflect current BMPs, and as otherwise required by the Storm Water Permit. *See id.*, *see also id.,* Section B(4).

Sections B(3) through B(16) of the Storm Water Permit set forth the M&RP requirements. Specifically, Section B(3) requires dischargers to conduct quarterly visual observations of all drainage areas within their facility for the presence of authorized and unauthorized non-storm water discharges. Section B(4) requires dischargers to conduct visual observations of storm water discharges during the first hour of discharge at each discharge point of at least one storm event per month during the Wet Season.[11] Sections B(3) and (4) further require dischargers to document the presence of any floating or suspended material, O&G, discolorations, turbidity, odor and the source of any pollutants when conducting visual observations. Dischargers must maintain records of observations, observation dates, locations observed, and responses taken to eliminate unauthorized non-storm water discharges and to reduce or prevent pollutants from contacting non-storm water and storm water discharges. *Id.*, Sections B(3) and (4).

Sections B(5) and B(7) of the Storm Water Permit require dischargers to collect samples of storm water discharges from all locations where storm water is discharged. Under Section B(5) of the Storm Water Permit, the Fontana Facility Owners and/or Operators are required to collect at least two samples from each discharge point during each Wet Season, including one sample from the first storm event of the Wet Season. These samples must be taken during the first hour of discharge. Storm water samples shall be analyzed for TSS, pH, specific conductance, and total organic carbon or O&G. Storm Water Permit Section B(5)(c)(i). These samples shall also be analyzed for toxic pollutants and other pollutants that are likely to be present in storm water discharges in significant quantities. *Id.*, Section B(5)(c)(ii). Finally, as a sector K SIC code 4953, the Fontana Facility Owners and/or Operators are required to analyze their samples for Ammonia (NH3); Magnesium (Mg); Chemical Oxygen Demand (COD); Arsenic (As); Cadmium (Cd); Cyanide (CN); Lead (Pb); Mercury (Hg); Selenium (Se) and; Silver (Ag). *See id.,* Section B(5)(c)(iii); *see also id.,* Table D.

The Fontana Facility Owners and/or Operators have been conducting operations at the Fontana Facility with an inadequately developed, implemented, and/or revised M&RP. For

[11] The Wet Season is defined from October 1 through May 31.

example, the Fontana Facility Owners and/or Operators fail to analyze storm water samples for all Table D pollutants listed above. In fact, the SWPPP lists many of these pollutants as being associated with industrial activities, and some sample result worksheets in the Facility's Annual Reports list some of these pollutants, but the storm water samples are not actually analyzed for these parameters. In addition, the Fontana Facility Owners and/or Operators have not sampled for pollutants likely to be present in discharges in significant quantities. Information available to Waterkeeper indicates that pathogens, including *Escherichia coli* and coliform bacteria, are likely to be present in significant quantities in storm water runoff from solid waste vehicle and equipment maintenance facilities such as the Fontana Facility. In sum, the Fontana Facility Owners and/or Operators fail to analyze their samples as required in violation of Section B(5)(c) of the Storm Water Permit.

Second, the Fontana Facility Owners and/or Operators fail to collect storm water samples from each of the Facility's discharge points, as required by Section B(5) and Section B(7) of the Storm Water Permit. For example, information available to Waterkeeper indicates that there are several discharge points at the Facility, but as of the 2012-2013 Wet Season storm water samples are collected from only one discharge point. The Regional Board also notified the Fontana Facility Owners and/or Operators that they are not collecting storm water from each discharge location. The Fontana Owners' and/or Operators' failure to collect storm water samples from every discharge point is a violation of Sections B(5) and B(7) of the Storm Water Permit.

Third, the Fontana Facility Owners and/or Operators do not consistently collect samples from two storm events per Wet Season or from the first storm event of the year, as required. For example, information available to Waterkeeper indicates that neither requirement was met for the 2009-2010 Wet Season. These failures are violations of Section B(5)(a) of the Storm Water Permit.

The Fontana Facility Owners and/or Operators fail to conduct quarterly visual observations of unauthorized and authorized non-storm water discharges, and fail to conduct monthly observations of storm water discharges, as required by Sections B(3) and B(4) of the Storm Water Permit. For example, no observations of either authorized or unauthorized non-storm water discharges were reported in the Facility's 2007-2008, 2008-2009 and 2009-2010 Annual Reports. In other Annual Reports for the Facility, visual observations that were reported do not provide the information required by the Storm Water Permit, and are not conducted at each discharge location as required.

Additionally, the Fontana Facility Owners and/or Operators failed to report monthly visual observations of storm water discharges in the Facility's 2007-2008, 2008-2009, 2009-2010, and 2010-2011 Annual Reports.[12] The Wet Season visual observations in 2011-2012 and 2012-2013 Annual Reports are incomplete and are not conducted at each discharge point as required. Because the Fontana Facility Owners and/or Operators failed to take visual observations as required, they also failed to document the presence of any floating or suspended

[12] The Fontana Facility Owners and/or Operators partially filled out visual observation forms in 2010-2011 Annual Report, but these forms document that all Wet Season observations were conducted when there was no storm water discharges.

material, O&G, discolorations, turbidity, odor, or the source of any pollutants, in violation of Sections B(3) and B(4) of the Storm Water Permit.

The Fontana Facility Owners' and/or Operators' failure to conduct sampling and monitoring as required by the Storm Water Permit demonstrates that they have failed to develop, implement, and/or revise an M&RP that complies with the requirements of Section B and Provision E(3) of the Storm Water Permit. The Fontana Facility Owners and/or Operators have been, and will continue to be, in violation of the Storm Water Permit's M&RP requirements each day they operate with an inadequately developed, implemented, and/or revised M&RP. Every day that the Fontana Facility Owners and/or Operators conduct operations with an inadequately developed, implemented, and/or revised M&RP is a separate and distinct violation of the Storm Water Permit and the Clean Water Act. These violations are ongoing and Waterkeeper will update the number of violations throughout this enforcement action. The Fontana Facility Owners and/or Operators are subject to civil penalties for all violations of the Clean Water Act occurring since October 8, 2008.

F. Failure to Comply with the Storm Water Permit's Reporting Requirements

Section B(14) of the Storm Water Permit requires a permittee to submit an Annual Report to the Regional Board by July 1 of each year. The Storm Water Permit, in relevant part, requires that the Annual Report include the following: 1) a summary of visual observations and sampling results, 2) an evaluation of the visual observation and sampling and analysis results and the laboratory reports; and 3) the Annual Comprehensive Site Compliance Evaluation Report. Section B(14). As part of the Annual Comprehensive Site Compliance Evaluation, the facility operator shall review and evaluate all of the BMPs to determine whether they are adequate or whether SWPPP revisions are needed. *See* Storm Water Permit Section A(9). The Annual Report shall be signed and certified by a duly authorized representative, under penalty of law that the information submitted is true, accurate, and complete to the best of their knowledge. *See* Storm Water Permit, Sections B(14), C(9), and C(10).

The Fontana Facility Owners and/or Operators fail to submit Annual Reports that comply with the Storm Water Permit reporting requirements. For example, since the 2008-2009 Annual Report, the Fontana Facility Owners and/or Operators certified that: (1) a complete Annual Comprehensive Site Compliance Evaluation was done pursuant to Section A(9) of the Storm Water Permit; (2) the SWPPP's BMPs address existing potential pollutant sources; and (3) the SWPPP complies with the Storm Water Permit, or will otherwise be revised to achieve compliance. However, information available to Waterkeeper indicates that these certifications are erroneous. For example, none of the Annual Reports since the 2008-2009 submittal have been signed, indicating that the required Annual Comprehensive Site Compliance Evaluation was not conducted, and that the information in the Annual Reports has not been certified as required.

The Fontana Facility Owners and/or Operators have also submitted incomplete Annual Reports. For instance, many of the Annual Report's forms used to document visual observations are left blank, and laboratory reports of sample analysis have not been submitted as required. In

addition, the facility operator must report any noncompliance at the time that the Annual Report is submitted, including 1) a description of the noncompliance and its cause, 2) the period of noncompliance and, if the noncompliance has not been corrected, the anticipated time it is expected to continue, and 3) steps taken or planned to reduce and prevent recurrence of the noncompliance. Storm Water Permit, Section C(11)(d). The Fontana Owners and/or Operators do not report their non-compliance as required.

Each of the failures to report as required is a violation of the Storm Water Permit, and indicates a continuous and ongoing failure to comply with the Storm Water Permit's reporting requirements. The Fontana Facility Owners and/or Operators have been, and will continue to be, in daily and continuous violation of the Storm Water Permit's reporting requirements until their reporting complies with the Permit. Every day that the Fontana Facility Owners and/or Operators operate the Fontana Facility without reporting as required by the Storm Water Permit is a separate and distinct violation of the Storm Water Permit and Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). These violations are ongoing and Waterkeeper will update the number of violations throughout this enforcement action. The Fontana Facility Owners and/or Operators are subject to civil penalties for all violations of the Clean Water Act occurring since October 8, 2008.

IV. RELIEF AND PENALTIES SOUGHT FOR VIOLATIONS OF THE CLEAN WATER ACT

Pursuant to Section 309(d) of the Clean Water 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 Clean Water Act subjects the violator to a penalty for all violations occurring during the period commencing five years prior to the date of a notice of intent to file suit letter. These provisions of law authorize civil penalties of up to $32,500 per day per violation for all Clean Water Act violations between March 15, 2004 and January 12, 2009, and $37,500 per day per violation for all Clean Water Act violations after January 12, 2009. In addition to civil penalties, Waterkeeper will seek injunctive relief preventing further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), declaratory relief, and such other relief as permitted by law. Lastly, pursuant to Section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), Waterkeeper will seek to recover its costs, including attorneys' and experts' fees, associated with this enforcement action.

V. CONCLUSION

Waterkeeper is willing to discuss effective remedies for the violations described in this Notice Letter. However, upon expiration of the 60-day notice period, Waterkeeper will file a citizen suit under Section 505(a) of the Clean Water Act for Union Pacific's violations of the Storm Water Permit. Please direct all communications to Waterkeeper's legal counsel:

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Sincerely,

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Attachment A: Table of Storm Water Sampling Data at the Fontana Facility Demonstrating Storm Water Permit Violations

Sampling Location[1]	Sampling Date	Parameter	Sample Result	Units	Benchmark	Magnitude of Benchmark Exceedance
Site 1	11/30/07	SC	1000	umhos/cm	200	5
Site 1	11/30/07	TSS	180	mg/L	100	1.8
Site 2	11/30/07	O & G	75	mg/L	15	5
Site 2	11/30/07	SC	820	umhos/cm	200	4.1
Site 2	11/30/07	TSS	1900	mg/L	100	19
Site 2	12/19/07	O & G	45	mg/L	15	3
Site 2	12/19/07	SC	260	umhos/cm	200	1.3
Site 2	12/19/07	TSS	750	mg/L	100	7.5
Site 1	11/26/08	SC	210	umhos/cm	200	1.05
Site 2	11/26/08	O & G	54	mg/L	15	3.6
Site 2	11/26/08	TSS	260	mg/L	100	2.6
Site 1	12/15/08	O & G	23	mg/L	15	1.53
Site 1	12/15/08	TSS	180	mg/L	100	1.8
Site 2	12/15/08	O & G	59	mg/L	15	3.93
Site 2	12/15/08	TSS	220	mg/L	100	2.2
Site 2	1/19/10	O & G	33	mg/L	15	2.2
Site 2	1/19/10	TSS	810	mg/L	100	8.1
Site 1	11/20/10	SC	220	umhos/cm	200	1.1
Site 1	2/16/11	TSS	510	mg/L	100	5.1
MP#1	10/5/11	SC	340	umhos/cm	200	1.7
MP#1	10/5/11	TSS	110	mg/L	100	1.1
MP#1	2/27/12	O & G	17	mg/L	15	1.13
MP#1	2/27/12	SC	270	umhos/cm	200	1.35

[1] The Fontana Facility Owners and/or Operators use inconsistent terms in their Annual Reports and their SWPPP to identify sampling locations. Samples were taken at points identified in Annual Reports variously as "Site 1," "Site 2," "MP1," and "MP #1." Neither the SWPPP nor the Annual Reports use these terms or include descriptions of where samples were taken.