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**OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (AMENDED) AND ORDER DENYING REHEARING EN BANC (NOVEMBER 5, 2021)**

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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INLAND EMPIRE WATERKEEPER, a Project of Orange County Coastkeeper; ORANGE COUNTY COASTKEEPER, a California Non-Profit Corporation,

*Plaintiffs-Appellants/ Cross-Appellees,*

v.

CORONA CLAY CO., a California Corporation,

*Defendant-Appellee/ Cross-Appellant.*

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Nos. 20-55420, 20-55678

D.C. No. 8:18-cv-00333-DOC-DFM

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Before: Eugene E. SILER,* Andrew D. HURWITZ, and Daniel P. COLLINS, Circuit Judges.

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**ORDER**

The majority opinion is amended as follows:

1. At slip opinion page 20, line 16, the word "into" is replaced by the word "to".

2. At slip opinion page 20, line 27, the word "admitted" is now omitted.

Judge Collins's dissent remains unchanged.

Judges Siler and Hurwitz voted to deny the petition for rehearing en banc. Judge Collins voted to grant the petition.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc, Dkt. 73, is DENIED. No additional petitions for rehearing will be entertained.

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* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

## OPINION

HURWITZ, Circuit Judge:

In this Clean Water Act ("CWA") citizen suit, the plaintiffs alleged that Corona Clay Company illegally discharged pollutants into the navigable waters of the United States, failed to monitor that discharge as required by its permit, and violated the conditions of the permit by failing to report violations. After the district court granted partial summary judgment to the plaintiffs, a jury returned a defense verdict on the remaining claims. Both sides appealed.

The resolution of the appeal is impacted heavily by two Supreme Court decisions. In the first, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, the Court held that the CWA bars citizen suits alleging only "wholly past" violations of permits. 484 U.S. 49, 67 (1987). The district court read *Gwaltney* as requiring proof of ongoing permit *discharge* violations and so instructed the jury. The second decision, *County of Maui v. Hawaii Wildlife Fund*, rejected this Court's prior interpretation of the CWA's discharge jurisdictional requirement, 33 U.S.C. §§ 1311(a), 1362(12)(A), and held that an offending discharge must reach the "waters of the United States," *id.* § 1362(7), either through a direct discharge or a "functional equivalent." 140 S. Ct. 1462, 1468 (2020). Because *County of Maui* was decided after the final judgment in this case, the jury instructions corresponded to prior Ninth Circuit law.

We disagree with the district court's interpretation of *Gwaltney* and hold that if the required jurisdictional discharge into United States waters has occurred, a

CWA citizen suit can be premised on ongoing or reasonably expected monitoring or reporting violations. We therefore vacate the district court's judgment and remand for further proceedings consistent with this opinion and with the Supreme Court's intervening decision in *County of Maui*.

## I

Corona Clay Company processes clay products in Corona, California, at an industrial facility overlooking the Temescal Creek. Those industrial activities create "storm water discharge," which Corona may release under a General Permit from the California State Water Resources Board. The Board has the authority to issue permits under the National Pollutant Discharge Elimination System ("NPDES"). *See* 33 U.S.C. § 1342(b). The permit requires Corona to maintain a Storm Water Pollution Prevention Plan ("SWPPP") employing the "Best Available Technology Economically Achievable" ("BAT") for toxic pollutants and the "Best Conventional Pollutant Control Technology" ("BCT") for conventional pollutants. Corona's permit also requires implementation of "Best Management Practices" ("BMP") and monitoring programs that document the facility's storm water discharges, analyze runoff samples, and report results to the State Board. If a discharge exceeds specified pollutant levels, the permit requires specific "exceedance response actions."

The plaintiffs are two affiliated nonprofit organizations (collectively, "Coastkeeper"). Coastkeeper's mission is to "protect water quality and aquatic resources" in the watersheds and coastal waters of Orange and Riverside Counties. That area includes the Santa Ana River watershed and Temescal Creek, a

tributary of the River. The organizations represent roughly 6,000 individual members.

Coastkeeper filed this action in 2018, alleging that Corona violated the conditions of its General Permit and discharged polluted storm water into Temescal Creek (which then flowed into the Pacific Ocean, via the Santa Ana River). Counts Two, Three, and Four alleged permit violations directly related to discharge of pollutants, and the remaining counts asserted other permit violations, including failures to monitor discharges and report violations.

The district court granted partial summary judgment to Coastkeeper on Claims One and Five of the operative complaint. On Claim One, the district court found that Corona had violated the permit's requirement to develop BMPs through the implementation of BAT and BCT. On Claim Five, the court held that Corona violated the permit's requirement to develop an adequate SWPPP for managing storm water discharges. The district court found no dispute that "Defendant's SWPPPs do not comply" with the permit's performance standards, noting, for example, that Corona failed to "implement required BMPs regarding erosion controls." The court also found that because "Defendant is in violation of at least some requirements of the SWPPP," it necessarily violated the permit. Coastkeeper then voluntarily dismissed Claims Three and Four.

This left Claims Two (alleging discharge violations), Six (alleging monitoring violations), and Seven (alleging reporting violations) for trial. The district court instructed the jury that to prevail on those claims Coastkeeper must prove either a forbidden discharge after the complaint was filed, or a reason-

able likelihood that discharge violations would thereafter recur. In issuing this instruction, the district court relied on *Gwaltney*, which precludes a citizen suit for "wholly past" violations of the CWA. *See* 484 U.S. at 67; *see also Sierra Club v. Union Oil Co.*, 853 F.2d 667, 670 (9th Cir. 1988) (interpreting *Gwaltney* to permit citizen suits predicated on "ongoing permit violations or the reasonable likelihood of continuing future violations"). The district court held that *Gwaltney* required "not just any permit violation (such as violations of monitoring and reporting requirements), but specifically discharge violations" as a predicate to a CWA citizen suit.

The special verdict form therefore asked the jury to answer several questions in order. Question 1 asked whether Corona had discharged pollutants into the waters of the United States and whether the discharge occurred after the complaint was filed or "at any time, with a reasonable likelihood that such violations will recur in intermittent or sporadic violations?" The jury was to continue to Question 2 only if it answered Question 1 "Yes." Question 2 asked the jury to determine whether run-off of storm water adversely affected the beneficial uses of Temescal Creek, and, if so, to determine the number of violations. Only after answering these two questions "Yes" would the jury proceed to questions about whether monitoring or reporting violations had occurred.

The jury answered Question One "No," and did not proceed to the other questions. The district court then entered a final judgment in favor of Corona on Claims Two, Six, and Seven, and in favor of Coastkeeper on Claims One and Five. On Claims One and Five, the district court found Corona had committed

664 daily violations of the SWPPP and 1,688 daily violations of the technology-based effluent limitations of the permit. It ordered Corona to implement structural storm water BMPs "sufficient to retain 85th percentile, 24-hour storm event, including a factor of safety, from areas subject to the [permit] no later than December 1, 2020"; to update its SWPPP to comply with the permit; and to employ professional engineers to design and certify retention basins. The court also imposed $3,700,000 in civil penalties on Corona.

In denying post-trial motions from both parties, the district court candidly admitted that "it is certainly possible to read *Gwaltney* and *Sierra Club* to encompass not merely discharge violations, but any permit violation, as an ongoing violation on which a citizen suit can be based." The court nevertheless found any error in its instructions "not prejudicial" to Coastkeeper because it had introduced no evidence of discharge violations at trial. Although noting that Corona had responded to a Rule 36 request by admitting that its storm water discharge flowed "indirectly" into Temescal Creek, the court noted "[t]his evidence . . . was not introduced at trial," and "decline[d] at this juncture to admit this evidence post hoc and overrule the jury's verdict." Both parties timely appealed.

## II

We must first consider Corona's argument that Coastkeeper lacks Article III standing to pursue this citizen suit. Article III requires that the plaintiff have a concrete and particularized injury fairly traceable to the challenged conduct that likely can be redressed by a favorable judicial decision. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*,

528 U.S 167, 180–81 (2000). When suing on behalf of its members, an organization must show that its members would have individual standing, the issues are germane to the organization's purpose, and neither the claim nor the requested relief requires individual participation. *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342–43 (1977).

This case raises two types of claims: claims of discharge violations, which allege Corona harms Coastkeeper's members by releasing storm water with pollutant levels that violate its permit; and claims of "procedural" violations, involving Corona's failure to adhere to other permit requirements, the obligation to monitor and report. "[S]tanding is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), so "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought," *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (cleaned up). We therefore analyze separately whether Coastkeeper established Article III organizational standing to pursue the discharge and procedural allegations.

**A**

The discharge claims arise in a familiar setting. In an environmental case, the "relevant showing . . . is not injury to the environment but injury to the plaintiff. To insist on the former rather than the latter as a part of the standing inquiry . . . is to raise the standing hurdle higher than the necessary showing for success on the merits." *Laidlaw*, 528 U.S. at 181. Coastkeeper presented sworn testimony from several of its members that they lived near the Creek, used it for recreation, and that pollution from the

discharged storm water impacted their present and anticipated enjoyment of the waterway.

We have routinely found such evidence sufficient to establish Article III standing. *See Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (finding "an aesthetic or recreational interest in a particular place . . . impaired by a defendant's conduct" sufficient); *see also id*. at 1151 ("*Laidlaw* recognized that an increased risk of harm can itself be injury in fact sufficient for standing."); *Covington v. Jefferson Cnty.*, 358 F.3d 626, 639, 641 (9th Cir. 2004) (finding plaintiffs' "reasonable concern of injury" and "fear that [contaminated] liquid will contaminate their property" shows an injury in fact) (cleaned up); *Central Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002) ("[A] credible threat of harm is sufficient[.]").

We again so find here. Coastkeeper established the requisite injury in fact and causation through its members' declarations averring to frequent use of the Temescal Creek for recreational or academic purposes, a noticeable decrease in water quality conditions because of Corona's discharges, and a resulting decline in their enjoyment of the waterway. These declarations show a present or imminent harm to the members' "aesthetic or recreational interest" in Temescal Creek. *Pac. Lumber Co.*, 230 F.3d at 1147. The operative complaint seeks an injunction to remediate the alleged harm, which the CWA authorizes a federal court to issue, *see* 33 U.S.C. § 1365(a), (d), thereby satisfying the redressability requirement. *Nat. Res. Def. Council v. SW Marine, Inc.*, 236 F.3d 985, 995 (9th Cir. 2000) (holding that redressability is established when a CWA citizen suit seeks injunctive relief).

**B**

We also reject Corona's argument that Coastkeeper failed to establish Article III standing to pursue its procedural claims.

It is settled that violations of a permit's "requirements for retaining records of discharge sampling and for filing reports" can be the subject of a CWA citizen suit. *NW Env't Advocs. v. City of Portland*, 56 F.3d 979, 988, 986 (9th Cir. 1995) ("[T]he plain language [of the CWA] authorizes citizens to enforce all permit conditions."). Indeed, a contrary approach "would have us immunize the entire body of qualitative regulations from an important enforcement tool." *Id.* at 989; *see also Pac. Lumber Co.*, 230 F.3d at 1151 (finding that "the Clean Water Act allows citizen suits based on violations of any conditions of an NPDES permit, even those which are purely procedural").

To be sure, Article III standing requires "a concrete injury," but that injury need not be "tangible." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Congress plainly has the power to "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan v. Def. of Wildlife*, 504 U.S. 555, 578 (1992). Congress may not create standing by permitting a plaintiff to sue on a "bare procedural violation, divorced from any concrete harm." *Spokeo*, 136 S. Ct. at 1549. But, the Supreme Court has often recognized that Congress may recognize a plaintiff's interest in information or procedure, the deprivation of which can give rise to an Article III injury. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20–25 (1998) (holding that a voter's "inability to obtain information" can satisfy Article III); *Pub. Citizen v. Dep't of Just.*, 491 U.S. 440, 449

(1989) (holding that inability to obtain information subject to disclosure laws is sufficient).

We have also repeatedly recognized that failure to provide statutorily required information can give rise to Article III injury on the part of private plaintiffs. When the right to disclosure alone serves merely to "increase public participation in the decision-making process," a violation does not rise to the level of constitutional injury. *Wilderness Soc'y Inc. v. Rey*, 622 F.3d 1251, 1259–60 (9th Cir. 2010) (cleaned up) (finding that violation of a regulatory provision requiring the Secretary of Agriculture to give notice of proposed actions did not establish standing). But, when a statute provides a right to information, the deprivation of which "result[s] in an informational harm," violation of the statute gives rise to a cognizable "informational" injury. *Id.* at 1260; *Southcentral Found. v. Alaska Native Tribal Health Consortium*, 983 F.3d 411, 419–420 (9th Cir. 2020) (finding informational injury when a tribal health foundation challenged amendments to a tribal health consortium's amendment to its code of conduct); *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 971 (9th Cir. 2018) (recognizing informational injury in a suit alleging false product labeling).

The monitoring and reporting requirements in Corona's permits are far from "bare" procedure. *Spokeo*, 136 S. Ct. at 1549. Rather, they serve the public's substantive interest in clean water and the environment. The CWA elevated that interest by providing a cause of action to affected citizens. *Lujan*, 504 U.S. at 578; 33 U.S.C. § 1365(a), (g).

**C**

Because it is settled that CWA citizen suits may rest on non-discharge violations of a permit, we turn to whether the "irreducible constitutional minimum" of injury-in-fact has been shown in this case. *Spokeo*, 136 S. Ct. at 1547. Corona argues that the mere absence of a report that should have been filed or an inspection that should have occurred could not have injured Coastkeeper or its members.

We reject that argument. These permit violations deprive the public both of information about past discharges and likely future ones. If possession of that information would reduce the risk of injury to a plaintiff who wishes to know whether the water is polluted before using the Creek for recreation, this "increased risk of harm can itself be injury." *Pac. Lumber Co.*, 230 F.3d at 1151. The injury is not simply "informational"—rather, Corona's failure to report creates a genuine threat of undetected past or future polluted discharge, harming the plaintiff's "aesthetic or recreational interest." *Id.* at 1147.

The declarations of Coastkeeper's members also document an informational injury suffered because of Corona's failure to abide by the permit's monitoring and reporting requirements. Coastkeeper member Heather Williams, an Associate Professor of Politics at Pomona College who teaches classes on the politics of water and land use, detailed her various studies of the human-environmental interactions in the waterway, including a forthcoming book on the Santa Ana River. Her interest in accurate information about Corona's discharges is obvious. Her declaration also established her aesthetic and recreational interests, expressing her concern that the industrial sediment

would create both "visible effects of water pollution" and also "the less visible effects of pollution on wildlife." Williams also fears that continuing violations would render the stream "uninhabitable to wildlife."

The declaration of Coastkeeper Associate Director Megan Brosseau similarly details an academic background in environmental studies and "human-environmental interaction." Her professional and personal mission is to preserve the Santa Ana watershed as a "swimmable, drinkable, and fishable" waterway, and she reasonably fears that that pollution will harm both the water itself and the "educational programs" conducted in Temescal Creek. Former Executive Director and current Coastkeeper member Lee Reeder is a journalist, and he averred that the "turbid, brown and red mud" flowing into Temescal Creek had significantly harmed his enjoyment of the waterway.

These declarations plainly demonstrate individual concern about pollution of the waterway and in Corona's accurate reporting and monitoring. Each declaration expresses the concern that, in the future, Corona's failure to follow the permit requirements will lead the water quality to degrade and impair the declarant's ability to enjoy or study the waterway. Each declaration averred to a specific interest, whether academic, journalistic, or recreational, in the information that was harmed because of the alleged reporting and monitoring violations. This sufficiently establishes an Article III injury arising from the procedural allegations.

**D**

Our dissenting colleague asserts that the district court erred by holding that Coastkeeper had standing

because there was a triable issue of fact as to whether Corona's alleged discharges reached or imminently threatened to reach Temescal Creek. Dissenting Opinion ("Dissent") at 24–37. But, this approach "confuses the jurisdictional inquiry . . . with the merits inquiry." *Pac. Lumber Co.*, 230 F.3d at 1151; *see also id.* ("[A]n increased risk of harm can itself be injury in fact sufficient for standing."). The dissent would require Coastkeeper to conclusively establish the discharge at the core of the merits question to demonstrate standing. One does not lose standing to sue just because his claims may fail on the merits.[1]

The dissent also would remand for the district court to determine whether the jury verdict is preclusive on the issue of standing. Dissent at 24, 38–40. Because we conclude below that the jury verdict must be vacated, we necessarily also conclude that it has no preclusive effect. But more fundamentally, even if given full effect, the jury verdict does not resolve the standing issue. The only question the jury answered was phrased as follows:

> Did Plaintiffs prove, by a preponderance of the evidence, that Defendant Corona Clay Company discharged pollutants from a point

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[1] The dissent concedes that the Plaintiffs' showing of Article III standing was "sufficient to survive a defense motion for summary judgment." Dissent at 28. If there is a triable issue of fact, it follows that the party is entitled to have that issue submitted to the jury; it also follows that our dissenting colleague must believe that the jury verdict on the merits (which did not separately address standing) defeated Article III jurisdiction. As noted above, our precedent plainly rejects the notion that the failure to prevail on the merits defeats standing. *See Pac. Lumber Co.*, 230 F.3d at 1151.

> source into streams or waters that qualify as jurisdictional "waters of the United States"; and that such discharge was either (1) on or after February 27, 2018, or (2) at any time, with a reasonable likelihood that such violations will recur in intermittent or sporadic violations?

The jury answered that question with a simple "no," leaving us unable to conclude exactly which of the several issues posed by the question were decided.

## III

Relying on the text and structure of the CWA, we conclude that the district court erred in interpreting *Gwaltney* as requiring an ongoing discharge violation as a prerequisite to a CWA citizen suit asserting ongoing monitoring and reporting violations.

*Gwaltney* involved an NPDES permit regarding discharge of pollutants from a meatpacking plant. 484 U.S. at 53. In the three years before the citizen suit was filed, the defendant "repeatedly violated the conditions of the permit by exceeding effluent limitations." *Id.* The Court concluded that the CWA's reference to a defendant found "to be in violation," 33 U.S.C. § 1365(a)(1), premises a citizen suit on the "likelihood that a past polluter will continue to pollute in the future." *Id.* at 57. So, an entirely past violation not likely to recur, while of concern to regulators, cannot support a citizen suit seeking injunctive relief.

The plaintiffs in *Gwaltney*, however, only alleged discharge violations. *Id.* at 53. *Gwaltney* does not address whether a CWA citizen suit alleging reporting or monitoring violations must be premised on ongoing

or reasonably likely discharge violations. But the district court's holding that it must is undercut by the text of the Act. The CWA allows a citizen suit "against any person . . . who is alleged to be in violation of [] an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a)(1). Section 1365(f)(7) in turn defines an "effluent standard or limitation" as including "a permit or a condition of a permit issued under section 1342." (emphasis added). The Corona permit has multiple "conditions," some of which relate to storm water discharge, but others that relate only to monitoring and reporting.

Corona contends that reporting and monitoring violations cannot support a citizen suit because 33 U.S.C. § 1318, which provides for reporting and monitoring requirements in a permit, gives the EPA Administrator power to undertake enforcement actions. Noting that reporting and monitoring requirements are not expressly mentioned in the definition of "effluent limitations" in § 1365(f), Corona claims Congress left violations of these permit requirements to the Administrator alone. However, the only statute cross-referenced in the definition of "effluent limitation" in § 1365(f)—a "permit or a condition of a permit"—is "section 1342 of this title." *Id.* That section lays out the NPDES permitting scheme as a whole. Thus, the most natural reading of the statute is that any "condition of a permit" issued under the NPDES system is an "effluent limitation."

Ninth Circuit cases applying *Gwaltney* do not support the district court's conclusion that a CWA suit alleging monitoring and reporting violations can only lie if there are also current forbidden discharges. *See Nat. Res. Def. Council*, 236 F.3d at 998–99

(affirming a district court's finding of ongoing permit violations, including the failure to make and keep records of daily inspections); *NW Env't Advocs.*, 56 F.3d at 986 (holding that "the plain language of [the CWA] authorizes citizens to enforce *all* permit conditions"); *Pac. Lumber*, 230 F.3d at 1151 (finding that "the Clean Water Act allows citizen suits based on violations of any conditions of an NPDES permit, even those which are purely procedural").

To be sure, the CWA vests district courts with jurisdiction over a citizen suit only upon proof of discharge into the navigable waters of the United States. *See* 33 U.S.C. § 1365(a)(1), § 1342(a). But, nothing in the statute requires the jurisdictional discharge be current or likely to occur. Thus, we hold that *Gwaltney* permits a citizen suit based ongoing or imminent procedural violations. Because the district court's jury instructions required Coastkeeper to prove elements not required by the statute or *Gwaltney*, we vacate the jury verdict.

## IV

The qualifying jurisdictional discharge to navigable waters presents a separate problem. At the time of trial, we required CWA plaintiffs to show only that pollutants in navigable waters were "fairly traceable from the point source." *Haw. Wildlife Fund v. Cnty. of Maui*, 886 F.3d 737, 749 (9th Cir. 2018). Shortly after final judgment issued in this case, the Supreme Court held that an NPDES permit is required only when discharge from a point source flows directly into navigable waters, or when there is "functional equivalent of a direct discharge." *Cnty. of Maui*, 140 S. Ct. at 1468. An emission of polluted water is there-

fore a "discharge" for CWA purposes only "when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means." *Id.* at 1476. "Time and distance are obviously important," but there are "too many potentially relevant factors" to allow a bright-line test. *Id.*

The parties in this case reasonably tailored their cases to our Court's then-extant law. In responding to a Rule 36 request for admission, Corona admitted that its storm water discharge flows "indirectly to Temescal Wash." Plaintiffs claimed below that this admission, together with evidence that waters from the Wash flow into the Santa Ana River and then into the Pacific Ocean, sufficed to prove jurisdictional discharge. This may have been true under prior law, but it is not obvious from the record that this flow was "direct," as required by *County of Maui*. Nor was the jury asked to answer that question.

The change in law affected not only the jury instructions, but also the partial summary judgment, which were premised on the discharge. The parties deserve the ability to address whether the "indirect" discharge admitted by Corona is the "functional equivalent" of a direct discharge into the waters of the United States, or whether that required discharge can otherwise be established. As we did in similar circumstances in *County of Maui*, we therefore vacate the judgment below and remand for further proceedings in light of the Supreme Court's intervening opinion. *See Cnty. of Maui*, 807 F. App'x 695, 696 (9th Cir. 2020) (order).[2]

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[2] The dissent finds no basis for setting aside the verdict due to

## V

We address one additional matter. Coastkeeper did not present Corona's Rule 36 admission, that "storm water from the industrial area on the property . . . flows indirectly to Temescal wash," to the jury. Rather, Coastkeeper asked the district court to deem the discovery response a binding judicial admission and to instruct the jury that the facts were admitted. The court construed this request as an attempt to "admit this evidence post hoc" and denied it. And, in denying a motion for a new trial, the court again faulted Coastkeeper for not itself putting the admitted fact before the jury.

Although the issue is not likely to recur on remand, the district court erred. Federal Rule of Civil Procedure 36 permits a party to "serve on any other party a written request to admit . . . the truth of any matters" within the scope of discovery. Fed. R. Civ. P. 36(a). A matter "'admitted under this rule is conclusively established' unless the court grants a

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the intervening change in law and faults Coastkeeper for not meeting the new and more demanding standard of *County of Maui*. Dissent at 42– 43. But, when confronted with a similar situation in *County of Maui*, we remanded for further proceedings. *See* 807 F. App'x at 696. Fairness requires that we do so here; there was also no need under then-extant law for Coastkeeper to prove direct discharge and Corona had admitted to indirect discharge. That admission was sufficient to make Coastkeeper's case on discharge under then-applicable law, and for the reasons above, we conclude that the district court erred by not instructing the jury of this conceded fact. Although *County of Maui* now requires more, the record does not allow us to conclude with any degree of certainty that, if required to show direct discharge or its functional equivalent, Coastkeeper would have been unable to do so.

motion to waive or amend" under Rule 36(b). *Tillamook Country Smoker, Inc. v. Tillamook Cnty. Creamery Ass'n*, 465 F.3d 1102, 1111–12 (9th Cir. 2006) (cleaned up). "[T]he rule seeks to serve two important goals: truth-seeking in litigation and efficiency in dispensing justice." *Conlon v. United States*, 474 F.3d 616, 622 (9th Cir. 2007). For Rule 36 to be effective, "litigants must be able to rely on the fact that matters admitted will not later be subject to challenge." *In re Carney*, 258 F.3d 415, 419 (5th Cir. 2001).

Rule 36 makes plain that the admitted fact is no longer subject to dispute. In dealing with other facts not subject to "reasonable dispute," Federal Rule of Evidence 201 allows the Court to take judicial notice of adjudicative facts at "any time." Fed. R. Evid. 201(d). "In a civil case, the court must instruct the jury to accept the noticed fact as conclusive." *Id.* 201(f). Although the better practice might have been for Coastkeeper to ask the district judge to instruct the jury on the admitted fact before the close of evidence, its request that the jury be instructed in the final instructions sufficed, particularly because Corona never filed a Rule 36(b) motion to withdraw or amend the admission. *Conlon*, 474 F.3d at 621.[3]

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[3] The dissent argues that the district court did not err in declining to instruct the jury on the admission because "parties should know before resting that the other side plans to use a Rule 36 admission on a particular point." Dissent at 44–45. But a matter "admitted under this rule is conclusively established unless the court grants a motion to waive or amend." *Tillamook Country Smoker*, 465 F.3d at 1111–12 (cleaned up). Corona filed no such motion here.

## VI

The district court's judgment is vacated, and the case is remanded for further proceedings consistent with this opinion. Because we vacate the judgment, we do not address Corona's objections to the district court's costs order, the civil penalty, or the permanent injunction entered pursuant to the partial summary judgment. Each party shall bear its own costs.

VACATED AND REMANDED.

## DISSENTING OPINION OF COLLINS, CIRCUIT JUDGE

COLLINS, Circuit Judge, dissenting:

In my view, the district court erred by holding, at the summary judgment stage, that Plaintiffs Inland Empire Waterkeeper ("Waterkeeper") and Orange County Coastkeeper ("Coastkeeper") satisfied the requirements for Article III standing. Although that would ordinarily mean that the district court must now resolve the standing question on remand, Defendant Corona Clay Company ("Corona") contends that the jury trial that took place on the merits of certain claims produced an express finding that overlaps with, and is dispositive of, the Article III standing issue. Corona therefore asks us to order dismissal of all claims for lack of standing. Plaintiffs, however, disagree with Corona's standing analysis, and they argue that, in any event, the verdict must be set aside due to a number of asserted errors. I do not think that Plaintiffs have established any basis for concluding that the verdict may not be given preclusive effect on the standing issue, but I would leave it to the district court on remand to determine whether to do so. Because the majority's analysis of the case is very different—and is contrary to well-settled authority—I respectfully dissent.

### I

Because Article III standing is jurisdictional, we must address that issue at the outset, before considering any question concerning the merits of Plaintiffs' various claims, all of which were brought under the Clean Water Act ("CWA"), 33 U.S.C. § 1251

*et seq*. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998). On this record, I think it is clear that the district court erred in granting summary judgment in favor of Plaintiffs on the standing issue.

**A**

In May 2019, Plaintiffs moved for summary judgment as to liability on five claims, *viz*., the first, second, fifth, sixth, and seventh causes of action in Plaintiffs' operative First Amended Complaint.[1] Plaintiffs' first and second causes of action were based on alleged discharges of polluted stormwater from Corona's facility: the first asserted that polluted storm water discharges from that facility violated the "Effluent Limitations" in the applicable "Storm Water Permit" ("SWP") and the second alleged that the facility's storm water discharges violated the "Discharge Prohibitions" of that permit. The fifth cause of action alleged that Corona had failed adequately to develop, implement, or revise a "Storm Water Pollution Prevention Plan" ("SWPPP"), in violation of the SWP. The sixth and seventh causes of action asserted that Corona had failed to comply with its monitoring and reporting obligations. Specifically, the sixth cause of action alleged that Corona had failed adequately to develop, implement, or revise a "Monitoring and Reporting Plan," in violation of the SWP, and the seventh alleged that Corona had failed to comply with the applicable reporting requirements of the SWP.

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[1] Plaintiffs ultimately dismissed their third and fourth causes of action with prejudice.

In contending that they had Article III standing to assert these five claims, Plaintiffs did not rely on the theory that the organizations themselves had suffered an injury-in-fact that gave rise to standing. *Cf. Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982). Rather, Plaintiffs relied only on the doctrine of associational standing recognized in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). Under that doctrine, an association may establish standing "'solely as the representative of its members,'" by showing that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 342–43 (citation omitted); *see also United Food & Com. Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 554–57 (1996) (noting that the first *Hunt* requirement is "an Article III necessity for an association's representative suit," but that the third prong is a prudential requirement that Congress may abrogate). The second and third prongs are not contested here. Thus, the only question is whether Plaintiffs showed that their members would otherwise have Article III standing to sue in their own right.

The elements of Article III standing are that "(1) [the plaintiff] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a

favorable decision." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (citation omitted). In arguing that these elements were satisfied by their members, Plaintiffs relied on the declarations of three persons, all of whom are members of Waterkeeper.[2] Each of those declarants explained the ways in which Corona's alleged discharges into Temescal Creek (sometimes called "Temescal Wash") harmed their "use and enjoyment" of that creek by degrading, or threatening to degrade, the quality of the water in it. In explaining how these declarations established the Article III standing of these three members, Plaintiffs' summary judgment motion likewise asserted that "Defendant's continued discharges" impaired these members' "use and enjoyment" of the creek. Because all of the alleged violations in the complaint involved laws that were "legally and technically designed to reduce the level of pollutants in [Corona's] discharge," Plaintiffs' motion argued that the members' injuries were fairly traceable to the alleged violations.

The district court granted summary judgment to Plaintiffs on the issue of standing and also granted them partial summary judgment as to liability on the first and fifth causes of action.[3] The court, however,

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[2] Although the declarants all described themselves as members of "Waterkeeper," an additional declaration submitted by Plaintiffs explained that Waterkeeper is a "program" of Coastkeeper and is not a "separate legal entity" from Coastkeeper.

[3] Corona is wrong in suggesting that the district court's order only addressed the issue of standing as to the first and fifth causes of action. That is not consistent with how the parties briefed the issue, how the court's order described its ruling, or how the court later in the trial proceedings construed its earlier ruling.

denied summary judgment as to the second, sixth, and seventh causes of action. As to standing, the court concluded that Plaintiffs' three members had established injury-in-fact that was fairly traceable to the challenged conduct because their declarations stated "that pollution from Defendant's Facility has discharged pollution into the Creek, affecting the water quality of the habitat." The court held that it did not matter, for standing purposes, whether that pollution had caused "actual environmental harm"; it was sufficient that the "pollution" affected the members' "enjoyment from recreation" in the area.

**B**

In granting summary judgment to Plaintiffs on the issue of standing, the district court seemed to lose sight of the fact that the requirements of Article III standing are "an indispensable part of the plaintiff's case," and that "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Thus, to succeed on its motion for summary judgment as to standing, Plaintiffs needed to show, not merely that they had made a sufficient showing to allow the trier of fact to find standing, but that there was "no genuine dispute as to any material fact" as to their standing and that they were therefore "entitled to judgment as a matter of law" in their favor on that issue. Fed. R. Civ. P. 56(a). I agree that Plaintiffs' showing was sufficient to survive a defense motion for summary judgment had one been made, but it was not enough to estab-

lish that their members' Article III standing had been proved as a matter of law.

As noted earlier, the only theory of standing presented in Plaintiffs' members' declarations was that Corona had contributed, and threatened to contribute, to the pollution of Temescal Creek, thereby affecting the water quality and impairing the members' enjoyment of the creek. *See supra* at 26. That is likewise the only theory on which the district court predicated its ruling on Article III standing, *see supra* at 27, and it is the only theory of standing that Plaintiffs invoke in their appellate briefs. Plaintiffs' theory that their declarants suffered an injury-in-fact that is fairly traceable to Corona's conduct thus rested dispositively on the assertion that Corona's pollution reached Temescal Creek or threatened to do so. Accordingly, Plaintiffs' claim of standing could be resolved in their favor as a matter of law only if, *inter alia*, they presented sufficient evidence to show that there was no genuine issue of material fact as to whether Corona's alleged polluted discharges reached the creek or threatened to do so.

Moreover, in addition to showing that the declarants suffered a fairly traceable injury-in-fact, Plaintiffs also had to show that those injuries would be redressed by the particular remedies that are available under the CWA and that were sought in this case. *Steel Co.*, 523 U.S. at 106–07. The law is clear that the CWA only permits citizen suits when, at the time of filing of the suit, there is an "ongoing" violation or a "reasonable likelihood" of future violations, and that "the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past." *Gwaltney of Smithfield, Ltd. v. Chesapeake*

*Bay Found.*, 484 U.S. 49, 57, 59 (1988). Given that focus, it follows that the declarants' asserted aesthetic and recreational injuries would be redressed by the CWA's forward-looking remedies only if the declarants are "injured or face[ ] the threat of future injury due to illegal conduct ongoing at the time of suit" or imminently threatened in the future. *Friends of the Earth*, 528 U.S. at 185 (emphasis added). Thus, for example, to the extent that a private plaintiff in a CWA suit can request that the defendant be ordered to pay civil penalties to the Government, it has standing to do so only because, and only if, the deterrent effect of those penalties would redress ongoing or future injuries by "abating current violations" or "preventing future ones." *Id.* at 187; *see also id.* at 188 ("private plaintiffs, unlike the Federal Government, may not sue to assess penalties for wholly past violations"). Consequently, in order for Plaintiffs to establish at summary judgment their sole standing theory—*i.e.*, that Corona's various CWA violations led to pollution that reached Temescal Creek or threatened to do so, thereby causing ongoing or threatened future injuries—Plaintiffs had to show that there is no genuine dispute that, at the time of their suit, Corona's polluted discharges were reaching the creek or imminently threatened to reach it. *See Lujan*, 504 U.S. at 569 n.4 (standing is evaluated based on the facts "'as they exist when the complaint is filed'" (citation omitted)).[4]

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[4] This result is true even assuming *arguendo* (as Plaintiffs contend) that *Gwaltney* only requires that a private CWA plaintiff show *some* ongoing violation of the CWA and not necessarily a discharge violation. *Cf.* Maj. Opin. at 18. Here, Plaintiffs' only Article III standing theory was that the alleged violations—

Plaintiffs did not carry this burden, as the district court's own summary judgment order elsewhere recognized. In granting summary judgment as to liability on the first cause of action (relating to discharges in violation of "effluent limitations"), the district court placed loadbearing weight on its (arguably erroneous) view that, to prevail on the issue of whether Corona had exceeded the relevant effluent limitations, "Plaintiffs need not show that discharges have reached the body of water in question." By contrast, the district court concluded that Plaintiffs' second cause of action required a showing that the "receiving waters" were discolored or that beneficial uses were adversely affected. Finding triable issues on these latter points, the district court denied summary judgment on the second cause of action. Thereafter, the parties tried, and the district court expressly submitted to the jury, the question of whether Corona's discharges were reaching Temescal Creek "on or after February 27, 2018"—the date of filing of Plaintiffs' suit—or were "reasonabl[y] likel[y]" to "recur," and the jury answered that question "No." That negative answer then provided the basis for the district court's entry of judgment against Plaintiffs on the second, sixth, and seventh causes of action.[5]

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including reporting violations—are fairly traceable to their members' injuries because those violations led to actual or threatened polluted discharges and that those discharges led to the members' injuries. Thus, even assuming that *Gwaltney* did not require a showing of ongoing or futures discharges, the particular theory of Article III standing on which Plaintiffs chose to rely required them to make such a showing.

[5] In challenging the jury verdict on appeal, Plaintiffs have expressly not done so vis-à-vis the second cause of action. The adverse judgment on that cause of action is thus unchallenged.

Because the record on summary judgment presented a triable issue of fact as to whether, at the time of the filing of the complaint, polluted storm water discharges from Corona's facility were reaching Temescal Creek or imminently threatened to do so, the district court erred in resolving the Article III standing issue in Plaintiffs' favor as a matter of law.[6]

**C**

In evaluating the district court's upholding of Plaintiffs' discharge-based theory of Article III standing, the majority commits the very same error that the district court did—it erroneously holds that Plaintiffs made a sufficient showing of standing, but without ever asking whether Plaintiffs had shown that there were no genuine issues of material fact as to standing. *See* Maj. Opin. at 11–14. The majority nonetheless insists that I am somehow "'confus[ing] the jurisdictional inquiry . . . with the merits inquiry.'" *Id.* at 17

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[6] Moreover, even apart from the triable issue concerning whether polluted discharges reached the creek, the declarations submitted by Plaintiffs in support of standing also contained potential deficiencies or ambiguities that could have been resolved, at a trial, against Plaintiffs. As Corona notes, some of the declarants' statements or photographs concerning their use of the creek appear to relate to segments that are upstream from Corona's facility and that thus could not plausibly have been affected by Corona's alleged discharges. Another declarant vaguely described looking for a home "in the Temescal Creek area" and claimed that she was worried about Corona's actions' effect on home prices, but a trier of fact could reasonably conclude that this particular theory of injury was inadequate to establish standing. *See Lujan*, 504 U.S. at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require").

(quoting *Ecological Rts. Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000)). On the contrary, it is the majority's position that is confused and, indeed, contrary to controlling Supreme Court and Ninth Circuit precedent.

As I have explained, *Lujan* squarely holds that the elements of Article III standing are "an indispensable part of the plaintiff's case" and that, as a result, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." 504 U.S. at 561 (emphasis added). That means that, if (as here) Plaintiffs seek summary judgment in their favor, they must establish that their Article III standing "cannot be . . . genuinely disputed." *See* FED. R. CIV. P. 56(c)(1); *see also Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329 (1999). If they fail to make this showing, because there *is* a triable dispute as to standing, then Plaintiff's standing contentions "must be 'supported adequately by the evidence adduced at trial.'" *Lujan*, 504 U.S. at 561 (emphasis added) (citation omitted). As the majority concedes, "[i]f there is a triable issue of fact" as to standing, "it follows that the party is entitled to have that issue submitted to the jury." *See* Maj. Opin. at 17 n.1.

Here, the only theory of Article III standing that Plaintiffs presented at summary judgment—and the only one that they assert on appeal—rested on the premise that pollutants actually reached the creek or threatened to do so, thereby impairing Plaintiffs' enjoyment of that creek. *See supra* at 26–27. Accordingly, under a straightforward application of *Lujan*,

Plaintiffs' burden at summary judgment was to show that there was no genuine dispute that pollutants from Corona did reach Temescal Creek or imminently threatened to reach it. They inarguably failed to carry that burden; indeed, the majority does not contend otherwise. But despite the majority's concession that Corona was "entitled to have that issue submitted to the jury," *see* Maj. Opin. at 17 n.1, the majority inexplicably upholds the district court's order declining to submit that issue to the jury.[7]

The majority instead posits that, because this theory of standing overlapped with the merits of Plaintiffs' claims, Plaintiffs were somehow excused from making the showing that *Lujan* requires. *See* Maj. Opin. at 17. That is quite wrong. The majority relies on *Pacific Lumber*'s admonition that courts must not confuse a "jurisdictional inquiry" with a "merits inquiry," 230 F.3d at 1151, but that does not mean (as the majority would have it) that, in such a

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[7] Even more baffling is the majority's assertion that, because I think that the district court should be reversed on this point, I therefore "must believe that the jury verdict on the merits (which did not separately address standing) defeated Article III jurisdiction." *See* Maj. Opin. at 17 n.1. I have said nothing of the sort. As I have explained, the district court's order granting summary judgment to Plaintiffs on the standing issue must be reversed because it wrongly resolved a genuinely disputed issue that should have been submitted for resolution at trial but was not. This case is really that simple. In the quoted comment, the majority crosses the wires by referencing the entirely separate question of whether Corona is correct in contending that the jury's findings on the merits issues that were submitted to the jury should now have the effect of precluding a trial on the standing issue. As I explain below, I take no position on that issue, but would instead leave it for the district court to address on remand. *See infra* at 38–40, 45.

case of overlap, the plaintiff is thereby *excused* from making the showing of Article III standing that *Lujan* requires. On the contrary, *Pacific Lumber* simply reaffirmed what the Supreme Court held in *Friends of the Earth*, namely, that the Article III standing inquiry is not as demanding as the merits inquiry, because the former can be satisfied without showing actual "environmental harm." 528 U.S. at 180–81. As *Pacific Lumber* explained, a plaintiff can show actual or imminent harm to its "aesthetic and recreational interests" without showing that there was "actual environmental degradation." 230 F.3d at 1149, 1151 (emphasis added); *see also Friends of the Earth*, 528 U.S. at 181 ("The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff."). However, given the particular theory of standing Plaintiffs asserted here, there could be neither harm to their aesthetic and recreational interests nor environmental degradation unless pollutants from Corona's facility reached the creek. Nothing in *Pacific Lumber* excuses Plaintiffs from making the lesser showing that Article III standing requires merely because that inquiry, on these facts, overlaps with the more demanding standards that apply with respect to the merits of the claims.

But even worse than all of this, the majority proceeds to uphold a portion of the district court's grant of summary judgment on the standing issue based on a theory that was neither presented nor substantiated below and that Plaintiffs have not asserted in their appellate briefs. The majority contends that, as to the sixth and seventh causes of action (which rested on Corona's alleged monitoring and reporting

deficiencies), Plaintiffs have standing by virtue of their "informational injury suffered because of Corona's failure to abide by the permit's monitoring and reporting requirements." *See* Maj. Opin. at 15. According to the majority, when an interested party is deprived of a statutory right to obtain specified information, that "gives rise to a cognizable 'informational' injury" that itself suffices for Article III standing purposes. *See id*. at 14 (citing *Wilderness Soc'y v. Rey*, 622 F.3d 1251, 1260 (9th Cir. 2010)). Noting that one of Plaintiffs' declarants mentioned that she was writing a book about the Santa Ana River (into which Temescal Creek flows), the majority announces that her "interest in accurate information about Corona's discharges is obvious," and that this interest establishes her standing to assert the sixth and seventh causes of action. *See* Maj. Opin. at 15–16. For several reasons, this analysis is plainly incorrect.

As an initial matter, Plaintiffs' declarations and summary judgment motion never mentioned or relied upon the pure information-deprivation theory of standing that the majority concocts here. *See supra* at 26–27. Rather, they rested on the alternative theory that, as the majority puts it, "Corona's failure to report creates a genuine threat of undetected past or future polluted discharge, harming [Plaintiffs'] 'aesthetic or recreational interest.'" *See* Maj. Opin. at 15 (emphasis added) (citation omitted). But as the italicized language makes clear, that theory would only establish a fairly traceable injury-in-fact that could be redressed by the forward-looking remedies in a citizen suit under the CWA only if there were ongoing or threatened future discharges. *See Gwaltney*, 484 U.S. at 59 (the particular "harm" that is traceable

to the "ongoing violation" sought to be enjoined must "lie[ ] in the present or the future, not in the past").[8] That latter issue concerning discharges was triable for the reasons explained earlier.

Moreover, there simply is no factual basis in the summary judgment record for concluding that Plaintiffs established a pure information-deprivation standing theory as a matter of law. Although, as the majority notes, one of Plaintiffs' declarants mentions that she is working on a book "that describes the politics of governing the Santa Ana River in Southern California," she mentions that fact only in the "personal background" section of her declaration, and she never links it to her alleged injuries in the way that the majority does. When she turns, in her declaration, to describing the injuries that she asserts are fairly traceable to Corona's challenged conduct, she never contends (as the majority would have it) that Corona has deprived her of information she needs for her book. On the contrary, her only theory of injury is that Corona's actions have affected the waters of Temescal Creek and thereby impaired her "use and enjoyment" of that creek. Far from reading the factual record in the light most favorable to the party opposing summary judgment—*viz.*, Corona—the majority instead

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[8] Because the "harm sought to be addressed" by a CWA private citizen suit must lie "in the present or the future," *Gwaltney*, 484 U.S. at 59, the majority is wrong to the extent that it implicitly suggests that aesthetic or recreational harms associated with past pollution that has since abated would somehow be redressed by the mere disclosure of information about that past pollution. *See* Maj. Opin. at 15. The majority may be correct that a purely informational harm that is caused by ongoing reporting violations would be redressed by such a disclosure, but no such theory has been raised here.

aggressively reads it in Plaintiffs' favor in order to uphold granting them summary judgment as a matter of law. All of this is contrary to well-settled law. *See, e.g.*, *JL Beverage Co. v. Jim Beam Brands Co.*, 828 F.3d 1098, 1105 (9th Cir. 2016) (noting that, on a "motion for summary judgment, not only does the movant carry the burden of establishing that no genuine dispute of material fact exists, but the court also views the evidence in the light most favorable to the nonmoving party").

**II**

Given that the standing issue should not have been resolved in Plaintiffs' favor at summary judgment as to any claim, the next question is what follows from that conclusion. At a minimum, it means that the judgment in Plaintiffs' favor as to the first and fifth causes of action—which were partially decided in Plaintiffs' favor at summary judgment—should be reversed. But that leaves the question of whether those claims should now be tried on remand, as well as the issue of what effect, if any, the district court's error has on the jury's verdict in Corona's favor on the sixth and seventh causes of action.

Corona raised this issue in a post-trial motion that alternatively invoked Federal Rules of Civil Procedure 60(b)(4) and 59(e). In that motion, Corona argued that the jury's finding concerning Corona's lack of polluted discharges into "waters of the United States" was binding on Plaintiffs and was dispositive of the Article III standing issue. Plaintiffs opposed the motion, arguing that, in light of Plaintiffs' already-pending appeal, the district court should summarily deny the motion, leaving it for this court to resolve

Corona's arguments on Corona's expected cross-appeal. Alternatively, Plaintiffs argued that the motion lacked merit, because the jury's verdict was flawed and would be set aside on appeal and because, in any event, the jury's verdict was insufficient to establish that Plaintiffs lacked standing. The district court summarily denied Corona's motion, concluding that Corona should present these arguments to this court on appeal. Corona then cross-appealed the judgment and the denial of its post-trial motion.

The resulting remaining issues on appeal can be grouped into two categories. First, we must address whether Plaintiff is correct in contending that the jury's verdict must be set aside. If it must be, then the judgment on all four remaining claims—the first, fifth, sixth, and seventh causes of action— must be reversed, and the case remanded for a retrial that includes the standing issue.[9] But if that verdict survives, then we must address whether Corona is correct in arguing that the verdict establishes that Plaintiffs failed to prove standing, thereby requiring dismissal of all claims. I will address these questions in reverse order.

**A**

As set forth earlier, the only theory of Article III standing that Plaintiffs put forward at summary judgment required them to establish as a matter of law that, at the time Plaintiffs filed suit, either polluted discharges were reaching Temescal Creek

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[9] As noted earlier, Plaintiffs have expressly stated that they are not challenging the adverse judgment on the second cause of action, and so that claim would not be retried. *See supra* note 5.

from Corona's facility or there was an imminent threat that future discharges would reach the creek. *See supra* at 28–30. That issue was improperly removed from the jury, as I have explained. Ironically, however, the district court for different reasons imposed a similar requirement at trial as a statutory matter. *See infra* at 40–42. The result was that the jury ended up making an express finding that Plaintiffs had failed to prove that:

> [Corona] discharged pollutants from a point source into streams or waters that qualify as jurisdictional "waters of the United States"; and that such discharge was either (1) on or after February 27, 2018, or (2) at any time, with a reasonable likelihood that such violations will recur in intermittent or sporadic violations.

By its terms, this verdict establishes either that (1) Corona never discharged pollutants into Temescal Creek; or (2) Corona ceased all such discharges before February 27, 2018, with no reasonable likelihood of a recurrence of "such violations."[10] In asserting that this finding is not dispositive of the Article III standing issue, Plaintiffs first contend that the jury may have misconstrued the phrase "discharge . . . into" to exclude the sort of indirect runoff that was alleged here, but they point to nothing in the jury instructions or the arguments of the parties at trial that invited the jury to conclude that, even if Corona's discharges reached the creek, that would not count as a "discharge . . . into" the creek. On the contrary, for example,

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[10] The district court specifically instructed the jury that "Temescal Wash is a qualifying water of the United States."

Corona's closing argument to the jury at trial was that polluted discharges did not reach the creek at all. On this record, there is no reasonable likelihood that the jury construed the instructions and verdict form as excluding indirect discharges. *See R.H. Baker & Co. v. Smith-Blair, Inc.*, 331 F.2d 506, 509 (9th Cir. 1964) ("'A special verdict must, of course, be construed in the light of the surrounding circumstances.'" (citation omitted)).

Plaintiffs also note the verdict's reference to "violations," and they argue that, in light of that word, the jury could theoretically have found that Corona's discharges did reach the creek, that those discharges did contain pollutants, but that the level of pollutants did not amount to a "violation." And because environmental harm is not necessary for Article III standing, *see Friends of the Earth*, 528 U.S. at 181–82, Plaintiffs suggest that such a jury finding would not necessarily be dispositive of Plaintiffs' sole theory of Article III standing. Concluding that the parties' briefing on this point is insufficient to resolve that narrowly focused issue, I would remand that aspect of Corona's post-trial motion to the district court for it to address in the first instance.[11]

**B**

There should be no such remand, however, if Plaintiffs are correct in contending that the jury's

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[11] Without even considering how the jury's verdict should be understood in light of the instructions and the parties' arguments and evidence, the majority simply announces, without analysis, that the import of the verdict cannot be known. *See* Maj. Opin. at 18. That is manifestly not the proper resolution of this question.

verdict must in any event be set aside. Plaintiffs challenge that verdict in this court on four different grounds, but in my view, all of them lack merit.

**1**

Over Plaintiffs' objection, the district court instructed the jury that, to prevail on its second, sixth, and seventh causes of action, Plaintiffs were required to show that Corona's discharges reached "waters of the United States" on or after the date on which the complaint was filed or that there was a likelihood of a "recurrence in intermittent or sporadic violations." As already noted, the court's verdict form reflected the same requirement. The district court did not impose this requirement under the theory that it was needed to establish Article III standing; indeed, the court had reiterated at a pretrial conference concerning motions in limine that it had resolved the standing question at summary judgment. Rather, the district court concluded that this showing was required by the citizen-suit provisions of the CWA, as construed in *Gwaltney*. The court thus imposed the requirement as a matter of "statutory standing," rather than Article III standing. *See Friends of the Earth*, 528 U.S. at 175 (explaining that *Gwaltney* held that "citizens lack statutory standing under [the CWA] to sue for violations that have ceased by the time the complaint is filed"); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128, n.4 (2014) (clarifying that "statutory standing" does not "implicate subject-matter jurisdiction"). Plaintiffs contend, and the majority agrees, that the district court's instruction rested on a misreading of *Gwaltney* and that, so long as "the required jurisdictional discharge into United States waters has occurred," a

plaintiff in a private CWA action need only show some ongoing or threatened violation of the CWA and not necessarily a discharge-related violation. *See* Maj. Opin. at 7.

In my view, it is unnecessary to resolve this issue. In the current posture of this case, the relevant question is whether Plaintiffs have shown a basis for refusing to give the jury's verdict preclusive effect with respect to the Article III standing issue that was wrongly withheld from the jury. The resolution of the parties' competing positions concerning *Gwaltney*, however, would have no effect whatsoever on whether the jury verdict may be given such effect. As I have explained earlier, when Plaintiffs successfully sought and obtained summary judgment in their favor on the Article III standing issue, they did so based only on the theory that pollutants from Corona's facility were reaching, or threatened to reach, Temescal Creek, thereby harming their aesthetic and recreational interests. *See supra* at 26–27, 30 n.4, 36 n.8. Because Plaintiffs' only Article III standing theory has always been a discharge-based theory, the fact that the jury verdict was for other (and possibly erroneous) reasons serendipitously focused on actual or threatened discharges provides no basis for declining to give that verdict preclusive effect vis-à-vis Plaintiffs' discharge-based Article III standing theory. Put another way, the fact that the jury's finding was tailored to discharges as opposed to reporting and monitoring violations—even if erroneous for other purposes—provides no basis for declining to give it binding effect on the issue of Plaintiffs' discharged-based theory of standing.

**2**

Plaintiffs further contend that the jury instructions were erroneous because they did not reflect the standards later announced in *County of Maui vs. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020). This subsequent change in law provides no basis for setting aside the jury's verdict.

Soon after the district court entered a final judgment in this case, the Supreme Court in *County of Maui* held that the CWA's permit requirements are triggered only when "there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge." 140 S. Ct. at 1476 (simplified). At the time this case was tried, our court had adopted a less demanding standard that required only that the pollutants be "fairly traceable from the point source to a navigable water." *Hawaii Wildlife Fund v. County of Maui*, 886 F.3d 737, 749 (9th Cir. 2018). The Supreme Court held that our court's "broad interpretation of the statute," which could trigger permitting requirements even when a pollutant "traveled long and far (through groundwater) before it reached navigable waters," was "too extreme." 140 S. Ct. at 1470, 1472, 1476.

Had the jury been instructed under the Supreme Court's new standard, it arguably would have been permitted to conclude that the distance that Corona's discharges had to travel to reach the creek—1100 feet—did not amount, on this record, to the "functional equivalent of a direct discharge." 140 S. Ct. at 1476 (emphasis added). I do not see how Plaintiffs were possibly prejudiced by the fact that the jury was not permitted to hold them to this stricter standard. As I have explained, given the context of the trial and the

parties' arguments, there is no reasonable likelihood that the jury would have construed the instructions and the verdict form to exclude the sort of indirect discharge that was at issue here. *See supra* at 39. In other words, the jury here was given the opportunity to hold Corona liable under the looser standards that we had previously applied, and it concluded that those standards had not been met. Because any post-verdict change in the law on this point was thus less favorable to Plaintiffs, it provides no basis for setting aside an adverse verdict that was based on more permissive standards.[12]

**3**

Relatedly, Plaintiffs also assert that the jury verdict must be set aside because the district court erroneously "failed to instruct the jury as to what the law defines as a discharge 'into' waters" and therefore did not make clear to the jury that indirect discharges were covered. But, once again, there is no reasonable likelihood, on this record, that the jury would have construed the instructions and verdict form as excluding indirect discharges. *See supra* at 39. Accordingly,

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[12] Contrary to what the majority contends, I do not "fault[ ]" Plaintiffs "for not meeting the new and more demanding standard of *County of Maui*." *See* Maj. Opin. at 21 n.2. Rather, my view is that, given Plaintiffs' failure to satisfy the more lenient standard, there is no conceivable reason why they should be given a retrial in order to try to prove what the majority concedes is a "more demanding standard." *Id.* The majority points to our remand in *County of Maui*, but that does not support the majority's remand here. In that case the plaintiffs prevailed under the more lenient standard, and so they obviously had to be given a chance to meet the newer and more demanding standard. 140 S. Ct. at 1469. That reasoning is inapplicable here.

even if an instruction on this point should have been given, any error in this case would be harmless.

**4**

Finally, Plaintiffs argue that the district court should have instructed the jury that Corona was bound by its response, in an answer to a request for admission under Federal Rule of Civil Procedure 36, that "storm water from the industrial area on the property . . . indirectly flows to Temescal wash." Plaintiffs, however, did not present the admission until after the close of evidence, when they asked the district court to treat the statement as a binding judicial admission. Because the purpose of Rule 36 admissions is to frame the issues for trial, *see Asea, Inc. v. Southern Pac. Transp. Co.*, 669 F.2d 1242, 1245 (9th Cir. 1981), a party does not have an automatic right to introduce such an admission for the first time after the trial record is closed. As a general matter, parties should know before resting that the other side plans to use a Rule 36 admission on a particular point, so that they can meet the point with trial evidence.[13] Reopening might be warranted in some cases, but that is plainly a matter within the district court's "sound discretion." *See Zenith Radio*

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[13] The majority's reliance upon *Tillamook Country Smoker, Inc. v. Tillamook County Creamery Ass'n*, 465 F.3d 1102 (9th Cir. 2006), is unavailing. Unlike this case, *Tillamook* did not involve a party's *belated* use of an answer to a request for admission. On the contrary, the answer was properly submitted in support of a summary judgment motion, and the opposing party had a full opportunity to respond with argument and evidence in the ordinary course. *Id.* at 1111–12. The same cannot be said here, where a party first sought to submit an answer to a request for admission after the trial record had already been closed.

*Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971). Plaintiffs have not shown that that discretion was abused here.[14]

**III**

Because I do not perceive any basis at this point to overturn the jury verdict, I would remand for the district court to address whether the verdict is dispositive of the sole theory of Article III standing that Plaintiffs presented at summary judgment. If the district court answered that question in the affirmative, then it should enter judgment dismissing this action in its entirety. If it answered that question in the negative, then it should proceed with a trial on the then-remaining claims.[15] Because the majority instead vacates the judgment on the first, fifth, sixth, and seventh causes of action, and remands with different instructions, I respectfully dissent.

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[14] Because Plaintiffs' request to rely on the admission was properly rejected as untimely, the majority is wrong in suggesting that the admission somehow provides a basis for granting a do-over based on *County of Maui*. *See* Maj. Opin. at 21 n.2. Moreover, contrary to what the majority insinuates, the admission did not concede that polluted storm water flowed from Corona's facility to the creek.

[15] That would include at least the first and fifth causes of action. Moreover, if on remand the district court concluded that the standing issue needs to be tried, then the court would be required to address whether its prior construction of *Gwaltney* was correct. If the answer to that question is no, then the sixth and seventh causes of action might need to be retried as well.

**ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT [194] (JUNE 22, 2020)**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

INLAND EMPIRE WATERKEEPER ET AL.

v.

CORONA CLAY COMPANY

Case No. SA CV 18-00333-DOC-DFM

Before: David O. CARTER, Judge.

Before the Court is Defendant Corona Clay Company's ("Defendant") Motion for Relief from Judgment ("Motion") (Dkt. 194), brought under Federal Rules of Civil Procedure 59(e) and 60(b). The Court finds this matter appropriate for resolution without oral argument. See Fed. R. Civ. P. 78; C.D. Cal. R. 7-15. Having reviewed the moving papers, the Court DENIES Defendant's Motion.

As Plaintiffs note in their Opposition (Dkt. 196), Plaintiffs have appealed the Court's Final Judgment (Dkt. 191) to the Ninth Circuit. Opp'n at 1. Defendant, meanwhile, challenges that same Final Judgment in the instant Motion. Therefore, in the interests of judicial economy, the Court finds that Defendant should present

its objections to the Final Judgment during the appeal to the Ninth Circuit. The Court finds no reason to undertake a duplicative review of the Final Judgment, and will defer to the Ninth Circuit to conduct an efficient review of all parties' challenges to the Final Judgment.

Defendant's Motion is accordingly DENIED. The Court hereby STAYS any execution of the Final Judgment pending review by the Ninth Circuit (to the extent not already stayed by Plaintiffs' appeal).

The Clerk shall serve this minute order on the parties.

**FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (APRIL 6, 2020)**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

INLAND EMPIRE WATERKEEPER ET AL.,

*Plaintiffs,*

v.

CORONA CLAY COMPANY,

*Defendant.*

Case No. 8:18-cv-00333-DOC-DFM

Before: David O. CARTER,
United States District Judge.

## FINAL JUDGMENT

In their First Amended Complaint, Plaintiffs Inland Empire Waterkeeper and Orange County Coastkeeper ("Plaintiffs") brought seven causes of action against Defendant Corona Clay Company ("Defendant"), for violations of the 2015 General Industrial Storm Water Permit (the "Permit").

On June 10, 2019, the Court entered an order granting partial summary judgment on Plaintiffs' First and Fifth Causes of Action.

By stipulation of the parties, Plaintiffs' Third and Fourth Causes of Action were dismissed with prejudice before trial.

The remaining claims—Plaintiffs' Second, Sixth, and Seventh Causes of Action—were tried before a jury from October 21 through October 25, 2019. On October 25, 2019, the jury rendered a verdict in favor of Defendant on the Second, Sixth, and Seventh Causes of Action.

IT IS THEREFORE ORDERED that judgment is entered in Plaintiffs' favor on the First and Fifth Causes of Action. Accordingly, the Court orders that:

(1) Defendant is liable for 664 daily violations (September 4, 2017 through June 30, 2019) of the Storm Water Pollution Prevention Plan, that is, section X.C.1, subsections b and c, of the Permit;

(2) Defendant is liable for 1688 daily violations (March 2, 2015 through October 15, 2019) of the Permit's Section V limitations on technology-based effluents;

(3) Defendant shall implement structural storm water Best Management Practices sufficient to retain the 85th percentile, 24-hour storm event, including a factor of safety, from areas subject to the Storm Water Permit no later than December 1, 2020. All retention basins should be designed and certified by a California licensed professional engineer,

and comply with the requirements of section X.H.6 of the Permit;

(4) Defendant shall update and amend its Storm Water Pollution Prevention Plan to comply with section X.C.1, subsections b and c, of the Permit, no later than July 1, 2020; and

(5) Defendant shall pay civil penalties for violations of the Clean Water Act in the sum of $3,700,000 by July 1, 2020.

IT IS FURTHER ORDERED that Plaintiffs' Third and Fourth Causes of Action are dismissed with prejudice.

IT IS FURTHER ORDERED that judgment is entered in favor of Defendant on the Second, Sixth, and Seventh Causes of Action.

IT IS FURTHER ORDERED that Plaintiffs are the prevailing party as to the First and Fifth Causes of Action, and that Defendant is the prevailing party as to the Second, Sixth, and Seventh Causes of Action. As each party has prevailed on some claims and not others, the parties shall bear their own fees and costs in this matter.

IT IS SO ORDERED AND ENTERED. JUDGMENT IS DEEMED ENTERED AS OF THE DATE BELOW.

/s/ David O. Carter
United States District Judge

Dated: April 6, 2020

**ORDER DENYING PLAINTIFFS' MOTION TO ALTER OR AMEND THE JUDGMENT OR, IN THE ALTERNATIVE, FOR NEW TRIAL [143] (DECEMBER 20, 2019)**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

INLAND EMPIRE WATERKEEPER ET AL.,

v.

CORONA CLAY CO.,

Case No. SA CV 18-0333-DOC-DFM

Before: Hon. David O. CARTER, Judge.

Before the Court is Plaintiffs Inland Empire Waterkeeper and Orange County Coastkeeper's ("Plaintiffs") Motion to Alter or Amend the Judgment or, in the Alternative, for New Trial ("Motion") (Dkt. 143). Having reviewed the moving papers submitted by the parties and considered their oral arguments, the Court now DENIES Plaintiffs' Motion.

## I. Background

### A. Facts

The Court has previously summarized the facts in this case in its Order Granting in Part and Denying

in Part Plaintiffs' Motion for Partial Summary Judgment as to Liability (Dkt. 55), and thus only a brief review is necessary here. Plaintiff Inland Empire Waterkeeper is a program of Plaintiff Orange County Coastkeeper, an environmental nonprofit organization whose members live and/or recreate in and around the Santa Ana Watershed. First Amended Complaint ("FAC") (Dkt. 12) ¶¶ 1-3. Defendant Corona Clay Company ("Defendant") owns a clay recycling plant in Temescal Valley, California. Decl. of Jennifer F. Novak ("Novak Decl."), Dkt. 28, Ex. 1 at 1. Stormwater from Defendant's facility, Plaintiffs allege, carries pollutants and runs into the Temescal Wash, a creek that deposits into the Santa Ana River. *Id.*, Ex. 1 at 1, Ex. 2 at 4.

Beginning in 2014, Defendant obtained coverage to discharge storm water under the General Permit from the California State Water Resources Board, Santa Ana Region ("Regional Board"). *Id.*, Ex. 33. In 2015, 2016, and 2017, the Regional Board determined that Defendant was in violation of the General Permit and issued Notices of Violation, finding that Defendant's facility had problems related to the discharge of storm water. *Id.*, Exs. 13, 15, 16.

**B. Procedural History**

Plaintiffs sued Defendant under the Clean Water Act, filing their FAC on April 20, 2018 (Dkt. 12). On May 6, 2019, Plaintiffs filed a Motion for Partial Summary Judgment (Dkt. 23), which this Court granted in part and denied in part (Dkt. 55). After summary judgment and a subsequent joint stipulation (Dkt. 106), three causes of action remained for trial:

- Cause of Action Two: Violation of the Clean Water Act by Discharging Polluted Storm Water in Violation of the Storm Water Permit's Discharge Prohibitions;
- Cause of Action Six: Failure to Adequately Develop, Implement, and/or Revise a Monitoring and Reporting Plan in Violation of the Storm Water Permit and the Clean Water Act; and
- Cause of Action Seven: Failure to Report as Required by the Storm Water Permit in Violation of the Storm Water Permit and the Clean Water Act.

*See* Mot. at 3.

At trial, the jury, using a special verdict form, found for Defendant on all three remaining causes of action. On November 1, 2019, Plaintiffs filed the instant Motion. Defendant submitted its Opposition (Dkt. 162-1) on November 19, 2019, and Plaintiffs filed their Reply (Dkt. 163) on November 25, 2019.

## II. Legal Standard

### A. Rule 59(e): Alteration or Amendment of Judgment

Under Federal Rule of Civil Procedure 59(e), a party may file a "motion to alter or amend a judgment." Fed. R. Civ. P. 59(e). While the district court enjoys "considerable discretion" to grant or deny a motion under Rule 59(e), *McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999), amending a judgment is an "extraordinary remedy," *Rishor v. Ferguson*, 822 F.3d 482, 492 (9th Cir. 2016). There are four

grounds upon which a motion to amend a judgment may generally be granted:

> (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law.

*Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011) (citing *McDowell*, 197 F.3d at 1255 n.1). Put differently, a motion pursuant to Rule 59(e) "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law. *McDowell*, 197 F.3d at 1255 (quoting *Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)).

Under Local Rule 7-18, a motion for reconsideration may be made only on the following grounds:

> (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision.

L.R. 7-18. Furthermore, the Local Rules expressly mandate that "[n]o motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion." *Id.*

**B. Rule 59(a): New Trial**

Rule 59(a) permits a court to grant a new trial after a jury trial "on all or some of the issues . . . for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). Granting a new trial is left to the sound discretion of the trial court. *See Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 278 (1989).

Historically recognized bases for a new trial include, but are not limited to: (1) a verdict against the clear weight of the evidence, *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987); (2) evidence, discovered after trial, that would not have been uncovered earlier through the exercise of due diligence, and that is of such magnitude that its production at trial would likely have changed the outcome of the case, *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 992-93 (9th Cir. 2001) (citing *Defs. of Wildlife v. Bernal*, 204 F.3d 920, 929 (9th Cir. 2000)); (3) jury misconduct; and (4) error in law that has affected the substantial rights of a party, such as erroneous jury instructions, *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990), or erroneous evidentiary rulings, *Obrey v. Johnson*, 400 F.3d 691, 701 (9th Cir. 2005); *see also* Fed. R. Civ. P. 61; Charles A. Wright & Arthur R. Miller, 11 Fed. Prac. & Proc. Civ. § 2805 (3d ed.).

When evaluating whether a verdict is against the clear weight of the evidence, the district court may

"weigh the evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party." *Landes*, 833 F.2d at 1371. At the same time, it is generally expected that a judge will grant motions for a new trial only when the judge has given full respect to the jury's findings but is left with the firm conviction that a mistake has been committed. *Id.* at 1371-72.

## III. Discussion

### A. The Circumstances of This Case Do Not Warrant an Amended Judgment or a New Trial

All but one of Plaintiffs' arguments turn, essentially, on one purported error of law: that the Court wrongly interpreted and applied *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), and its progeny, most notably *Sierra Club v. Union Oil Co.*, 853 F.2d 667 (9th Cir. 1988). Those cases preclude a citizen suit under the Clean Water Act for "wholly past" violations. That is, citizen suits must be predicated on "ongoing permit violations or the reasonable likelihood of continuing future violations." *Sierra Club*, 853 F.2d at 670. The Court, during the process of crafting jury instructions with the parties, interpreted this requirement to mean not just any permit violation (such as violations of monitoring and reporting requirements), but specifically discharge violations. Hence the language in the jury instructions and the special verdict form to which Plaintiffs object—e.g., "that such discharge was either (1) on or after February 27, 2018, or (2) at any time, with a

reasonable likelihood that such violations will recur in intermittent or sporadic violations." Mot. at 8.

But for this purported misinterpretation, Plaintiffs argue, the jury could have moved past the first question on the verdict form, and considered and found in Plaintiffs' favor for the sixth and seventh causes of action. *See generally* Mot. The Court admits that this may have been an error of law; it is certainly possible to read Gwaltney and *Sierra Club* to encompass not merely discharge violations, but any permit violation, as an ongoing violation on which a citizen suit can be based. The Court is not aware, however, of binding precedent in this Circuit that mandates this interpretation and forecloses the interpretation the Court followed at trial. As such, the Court does not find that this reading, if erroneous, is the sort of clear legal error necessary to support a motion pursuant to Rules 59(e) or Rule 59(a). The proper course, the Court finds, would be for the Ninth Circuit to resolve this question on appeal, rather than for the Court to sit in review of its own prior ruling with no new developments in the case law to guide it. This would also be the more efficient approach, for if the Circuit were to adopt Plaintiffs' interpretation of "ongoing violations," the Court has sufficient evidence on the record to simply enter judgment on the sixth and seventh causes of action in Plaintiffs' favor on remand.

Moreover, the Court finds that its interpretation, even if erroneous, was not prejudicial to Plaintiffs. In their final argument, Plaintiffs contend that in a Request for Admission, Defendant admitted "that Defendant's facility discharged industrial storm water into Temescal Creek." Mot. at 25. This evidence, however, was not introduced at trial, and the Court declines

at this juncture to admit this evidence post hoc and overrule the jury's verdict on the sixth and seventh causes of action. As Defendant notes in its Opposition, "Plaintiffs were well aware that they needed to prove such discharge to support their Second Cause of Action." Opp'n at 8-9. Had Plaintiffs introduced this evidence at trial, and had it been as persuasive as their Motion claims, the jury undoubtedly would have been able to move past the first question of the special verdict form and to consider the subsequent causes of action.

As Plaintiffs have not carried their burden to justify an amended verdict under Rule 59(e) or a new trial under Rule 59(a), and because the Court's alleged legal error was not prejudicial to Plaintiffs, the Court DENIES Plaintiffs' Motion.

## IV. Disposition

For the reasons set forth above, the Court DENIES Plaintiffs' Motion to Alter orAmend the Judgment or, in the Alternative, for New Trial.

The Clerk shall serve this minute order on the parties.

**SPECIAL VERDICT FORM**
**(OCTOBER 25, 2019)**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

INLAND EMPIRE WATERKEEPER ET AL.,

*Plaintiffs,*

v.

CORONA CLAY CO.,

*Defendant.*

Case No. 8:18-cv-00333-DOC-DF

Courtroom: 9D

Before: Hon. David O. CARTER,
United States District Judge.

We answer the questions submitted as follows:

1. Did Plaintiffs prove, by a preponderance of the evidence, that Defendant Corona Clay Company discharged pollutants from a point source into streams or waters that qualify as jurisdictional "waters of the United States"; and that such discharge was either (1) on or after February 27, 2018, or (2) at anytime, with a reasonable likelihood that such violations will recur in intermittent or sporadic violations?

Yes ____ No __X__

If you answered "Yes" to Question 1, continue to Question 2. If you answered "No" to Question 1, proceed to the end of this verdict form, have the Presiding Juror sign and date the verdict form in the space at the bottom of the page and notify the bailiff that you have reached a verdict.

2. Did Plaintiffs prove, by a preponderance of the evidence, that storm water run-off from Defendant's facility adversely affected the beneficial uses of Temescal Creek.

Yes ____ No ____

What is the total number of times you find that Defendant violated this Permit Condition: ____

3. Place an "X" on each line where you find that Plaintiffs proved, by a preponderance, that between **July 1, 2015** and **June 30, 2016,** Defendant:

a. ____ Failed to collect at least two storm water samples between July 1 and December 30, and there were at least two rain events where Defendant could have collected samples.

- How many times did Defendant fail to collect a sample? ____ (max of 2)

b. ____ Failed to collect at least two storm water samples between January 1 and June 30, and there were at least two rain events where Defendant could have collected samples.

- How many times did Defendant fail to collect a sample? ____ (max of 2)

c. ____ Failed to analyze at least one sample for iron (Fe).

- How many times did Defendant fail to sample for iron? ____ or N/A (no Sample)

d. ____ Failed to analyze at least one sample for Oil and Grease (O&G or HEM) in violation of Permit Condition XI.B.

- How many times did Defendant fail to sample for Oil and Grease? ____ or N/A (no Sample)

e. ____ Failed to analyze at least one sample for pH within 15 minutes of collecting the sample.

- How many times did Defendant fail to sample for pH within 15 minutes of collecting the sample? ____ or N/A (no Sample)

4. Place an "X" on each line where you find Plaintiffs proved, by a preponderance, that between **July 1, 2015** and **June 30, 2016** Defendant:

a. ____ Failed to submit at least one storm water laboratory report to SMARTS within 30 days of receiving the laboratory report.

- How many times did Defendant fail to meet this requirement? ____ (max of 4)

b. ____ Did not explain any failure to collect at least four storm water samples in its Annual Report.

- How many times did Defendant fail to meet this requirement? ____ (max of 1)

5. Place an "X" on each line where you find Plaintiffs proved, by a preponderance, that between **July 1, 2016** and **June 30, 2017** Defendant:

a. ____ Failed to collect at least two storm water samples between July 1 and December 30, and there were at least two rain events where Defendant could have collected samples.

- How many times did Defendant fail to collect a sample? ____ (max of 2)

b. ____ Failed to collect at least two storm water samples between January 1 and June 30, and there were at least two rain events where Defendant could have collected samples.

- How many times did Defendant fail to collect a sample? ____ (max of 2)

c. ____ Failed to analyze at least one sample for iron (Fe).

- How many times did Defendant fail to sample for iron? ____ or N/A (no Sample)

d. Failed to analyze at least one sample for oil and grease (O&G or HEM).

- How many times did Defendant fail to sample for Oil and Grease? _____ or N/A (no Sample)

e. Failed to analyze at least one sample for pH within 15 minutes of collecting the sample.

- How many times did Defendant fail to sample for pH within 15 minutes of collecting the sample? _____ or N/A (no Sample)

6. Place an "X" on each line where you find Plaintiffs proved, by a preponderance, that between July **1, 2016** and June 30, 2017 Defendant:

a. ____ Failed to submit at least one storm water laboratory report to SMARTS within 30 days of receiving the laboratory report.

- How many times did Defendant fail to meet this requirement? ____ (max of 4)

b. ____ Did not explain any failure to collect at least four storm water samples in its Annual Report.

- How many times did Defendant fail to meet this requirement? ____ (max of 1)

7. Do you find, by a preponderance of the evidence, that the annual average for Total Suspended Solids (TSS) was over 100 mg/L during the **2016-2017 reporting year?** ____

8. If you answered Yes to Question 7, did Plaintiff prove by a preponderance of the evidence that Defendant failed to submit a Level 1 Action Plan to SMARTS? ____

9. Place an "X" on each line where you find Plaintiffs proved, by a preponderance, that between **July 1, 2017** and **June 30, 2018** Defendant:

a. ____ Failed to collect at least two storm water samples between July 1 and December 30, and there were at least two rain events where Defendant could have collected samples.

- How many times did Defendant fail to collect a sample? ____ (max of 2)

b. ____ Failed to collect at least two storm water samples between January 1 and June 30, and there were at least two rain events where Defendant could have collected samples.

- How many times did Defendant fail to collect a sample? ____ (max of 2)

c. ____ Failed to analyze at least one sample for iron (Fe).

- How many times did Defendant fail to sample for iron? _____ or N/A (no Sample)

d. Failed to analyze at least one sample for oil and grease (O&G or HEM).

- How many times did Defendant fail to sample for Oil and Grease? ____ or N/A (no Sample)

e. Failed to analyze at least one sample for pH within 15 minutes of collecting the sample.

- How many times did Defendant fail to sample for pH within 15 minutes of collecting the sample? ____ or N/A (no Sample)

10. Place an "X" on each line where you find Plaintiffs proved, by a preponderance, that between **July 1, 2017** and **June 30, 2018** Defendant:

a. ____ Failed to submit at least one storm water laboratory report to SMARTS within 30 days of receiving the laboratory report.

- How many times did Defendant fail to meet this requirement? ___ (max of 4)

b. ____ Did not explain any failure to collect at least four storm water samples in its Annual Report.

- How many times did Defendant fail to meet this requirement? ___ (max of 1)

11. Do you find, by a preponderance of the evidence, that the annual average for Total Suspended Solids (TSS) was over 100 mg/L during the **2017-2018 reporting year?** ____

12. If you answered Yes to Questions 7, 8, and 11, did Plaintiff prove, by a preponderance of the evidence, that Defendant failed to submit a Level 2 Action Plan to SMARTS? ____

13. Place an "X" on each line where you find Plaintiffs proved, by a preponderance, that between **July 1, 2018** and **June 30, 2019** Defendant:

a. _____ Failed to collect at least two storm water samples between July 1 and December 30, and there were at least two rain events where Defendant could have collected samples.

- How many times did Defendant fail to collect a sample? ____ (max of 2)

b. _____ Failed to collect at least two storm water samples between January 1 and June 30, and there were at least two rain events where Defendant could have collected samples.

- How many times did Defendant fail to collect a sample? ____ (max of 2)

c. _____ Failed to analyze at least one sample for iron (Fe).

- How many times did Defendant fail to sample for iron? _____ or N/A (no Sample)

d. _____ Failed to analyze at least one sample for oil and grease (O&G or HEM).

- How many times did Defendant fail to sample for Oil and Grease? ____ or N/A (no Sample)

e. _____ Failed to analyze at least one sample for pH within 15 minutes of collecting the sample.

- How many times did Defendant fail to sample for pH within 15 minutes of collecting the sample? _____ or N/A (no Sample)

14. Place an "X" on each line where you find Plaintiffs proved, by a preponderance, that between **July 1, 2018** and **June 30, 2019** Defendant:

a. _____ Failed to submit at least one storm water laboratory report to SMARTS within 30 days of receiving the laboratory report.

- How many times did Defendant fail to meet this requirement? _____ (max of 4)

b. _____ Did not explain any failure to collect at least four storm water samples in its Annual Report. How many times did Defendant fail to meet this requirement? ____ (max of 1)

15. Place an "X" on each line where you find Plaintiffs proved, by a preponderance, that Defendant failed to maintain (keep) records of the following:

a. ____ Any single storm water laboratory report from July 1, 2015 — today.

- How many records were not maintained for this category? ____

b. _____ Any Annual Report or portion thereof from July 1, 2015 — today.

- How many records were not maintained for this category? ____

*You have now reached the end of the verdict form and should review it to ensure it accurately reflects your unanimous determinations. The Presiding Juror should then sign and date the verdict form in the spaces below and notify the bailiff that you have reached a verdict. The Presiding Juror should retain possession of the verdict form and bring it when the jury is brought back into the courtroom.*

By: [redacted]_____
Jury Foreperson

Dated: 10/25/2019

**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY (JUNE 10, 2019)**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

INLAND EMPIRE WATERKEEPER and ORANGE COUNTY COASTKEEPER,

*Plaintiffs,*

v.

CORONA CLAY CO,

*Defendant.*

Case No. SA CV 18-0333-DOC (DFMx)

Before: David O. CARTER,
United States District Judge.

**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY [23]**

Before the Court is Plaintiffs Inland Empire Waterkeeper ("Waterkeeper") and Orange County Coastkeeper's ("Coastkeeper") (collectively, "Plaintiffs")

Motion for Partial Summary Judgment as to Liability ("Motion")[1] against Defendant Corona Clay Co. ("Corona Clay" or "Defendant"). Oral arguments were held in this matter on June 3, 2019. After considering the papers and hearing the arguments raised by the parties, the Court GRANTS IN PART and DENIES IN PART Plaintiffs' Motion.

## I. Background

This case arises out of Plaintiffs' allegations that Defendant is in violation of the Clean Water Act due to Defendant's clay manufacturing facility ("Facility") generating and discharging pollutants in violation of California's permit requirements under the National Pollutant Discharge Elimination System ("NPDES").

### A. Legal Background

The Clear Water Act ("CWA" or "the Act") prohibits the discharge of any pollutant into "navigable waters" unless the discharge complies with the applicable provisions of the CWA. *Natural Resources Defense Council, Inc. v. County of L.A.*, 725 F.3d 1195, 1198 (9th Cir. 2013) (citing 33 U.S.C. § 1311(a)). Under the Act, a "pollutant" can include rock, sand, wrecked or discarded equipment, cellar dirt and industrial, municipal, and agricultural waste discharged into water. 33 U.S.C. § 1362(6). Under 33 U.S.C. § 1342, an entity or facility must obtain coverage under a National Pollutant Discharge Elimination System ("NPDES") permit in order to lawfully discharge a

[1] Plaintiffs do no seek summary judgment on their third cause of action or fourth cause of action, and thus the Court does not discuss the merits of these claims at the present time.

pollutant into navigable waters. *See* 33 U.S.C. § 1342; *Natural Resources Defense Council*, 725 F.3d at 1198. The CWA allows for citizen suits against entities in violation of "an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a)(1). The CWA "imposes strict liability for NPDES violations." *Santa Monica Baykeeper v. Kramer Metals, Inc. (Kramer)*, 619 F.Supp.2d 914, 919 (C.D. Cal. 2009).

The Environmental Protection Agency ("EPA") has authorized the state of California to issue the applicable NPDES permit. 40 C.F.R. §§ 122.26(e)(1), 122.21. In California, a facility that discharges storm water associated with industrial activities must obtain coverage under the state's 2015 General Industrial Storm Water Permit ("General Permit"), which is an NPDES permit. 40 C.F.R. §§ 122.26(e)(1), 122.21; Plaintiff's Request for Judicial Notice ("Pl. RJN") (Dkt. 27), Ex. A. at 3. In the Santa Ana River watershed, the state Regional Water Quality Control Board, Santa Ana Region regulates coverage of facilities under the General Permit. *Natural Resources Defense Council*, 725 F.3d at 1198; Cal. Wat. Code § 13200(e).

The requirements of the General Permit include compliance with effluent limitations, receiving water limitations, implementation of a Storm Water Pollution Prevention Plan ("SWPPP"), and the development of a monitoring and reporting program. *Santa Monica Baykeeper v. Intern'l Metals Ekco, Ltd.*, 619 F.Supp.2d 936, 940 (C.D. Cal. 2009). The General Permit requires implementation of Best Available Technology Economically Achievable ("BAT") for toxic pollutants, and of Best Conventional Pollutant Control Technology ("BCT") for other pollutants. 33 U.S.C. §§ 1311(b)(2)(A), 1311(b)(2)(E); *see also* Pl. RJN, Ex. A. at 3. The Gen-

eral Permit also requires the permitted facilities to implement Best Management Practices ("BMPs") to comply with effluent limitations and meet applicable water quality standards.[2] Pl. RJN., Ex. A. at 5. In addition, the General Permit requires a discharging facility (often referred to as a "discharger") to implement a SWPPP when industrial activities begin. *Id.* at 17. Finally, the General Permit requires the permitted facilities to comply with a monitoring and reporting program. *Id.* at 26–28.

### B. Factual Background[3]

Plaintiff Inland Empire Waterkeeper ("Waterkeeper") is a program of Plaintiff Orange County Coastkeeper ("Coastkeeper"), an environmental nonprofit organization. First Amended Complaint ("FAC") (Dkt. 12) ¶¶ 1–2. Plaintiffs have approximately more than 6,000 members who live and/or recreate in and around the Santa Ana River watershed. *Id.* ¶ 3.

Defendant Corona Clay Company ("Corona Clay") owns a clay recycling plant located at 10600 Dawson Canyon Road, Temescal Valley, CA 92883 ("Facility"). Declaration of Jennifer F. Novak ("Novak Decl.") (Dkt. 28), Ex. 1 at 1. Defendant's Facility crushes

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[2] 40 C.F.R. § 122.44(k)(4) "requires the use of BMPs to control or abate the discharge of pollutants when numeric effluent limitations ("NELs") are infeasible." Pl. RJN, Ex. A at 48.

[3] Unless indicated otherwise, to the extent any of these facts are disputed, the Court concludes they are not material to the disposition of the Motion. Further, to the extent the Court relies on evidence to which the parties have objected, the Court has considered and overruled those objections. As to any remaining objections, the Court finds it unnecessary to rule on them because the Court does not rely on the disputed evidence.

clay tile and used brick to create a substance that can be used for a variety of purposes. Plaintiff's Statement of Facts ("SUF") (Dkt. 23-1) ¶ 3; Defendant's Statement of Genuine Dispute ("SGD") (Dkt. 37-1) ¶ 3. Defendant also provides raw materials to contractors specializing in in the installation of baseball fields and running tracks. *Id.* ¶ 3. Defendant's Facility operates on approximately 20 acres of land in Corona, California, and consists of 20.3 acres exposed to storm water. Novak Decl., Ex. 1 at 1.

As indicated in its annual SWPPPs, Defendant accepts approximately 20,000 tons of materials annually to crush and screen into an industrial substance. Mot. at 5–6. *See, e.g.,* Novak Decl., Ex. 2 at 9; Ex. 19 at 7. Stormwater from the Facility runs into the Temescal Wash, a creek that deposits into the Santa Ana River. Novak Decl., Ex. 1 at 1, Ex. 2 at 4. Plaintiffs allege that the stormwater becomes polluted with sediment from the Facility, and eventually discharges into the Santa Ana River, continuing on into the Pacific Ocean. Mot. at 6.

Beginning in 2014, Defendant obtained coverage under the General Permit to discharge storm water from the California State Water Resources Control Board, Santa Ana Region ("Regional Board"). SUF 11–13; Novak Decl., Ex. 33. In 2015, 2016, and 2017, the Regional Board issued Notices of Violation to Defendant, pursuant to the General Permit for discharges of storm water associated with industrial activities. SUF 51. *See* Novak Decl., Ex. 13, 15, 16. The Regional Board found that Corona Clay was in violation of General Permit, and noted several specific issues with the Facility and the discharge of storm water. *Id.* Plaintiffs also allege that their independent

investigation has confirmed the Regional Board's observations. Mot. at 6.

**C. Procedural History**

On December 13, 2017, Plaintiffs issued a 60-day notice to Corona Clay, informing Defendant of its violations of applicable state and federal law and of Plaintiff's intention to file suit, as required under 33 U.S.C. § 1365 (Dkt. 2-1). On February 27, 2018, Plaintiff filed the Complaint in the instant action (Dkt. 2). On April 20, 2018, Plaintiffs filed the First Amended Complaint ("FAC") (Dkt. 12). In the FAC, Plaintiffs bring the following seven causes of action:

(1) Violation of Section 301(a) of the Clean Water Act by Discharging Contaminated Storm Water in Violation of the Storm Water Permit's Effluent Limitations, under 33 U.S.C. §§ 1311(a), 1342, 1365(a), and 1365(f);

(2) Violation of the Clean Water Act by Discharging Polluted Storm Water in Violation of the Storm Water Permit's Discharge Prohibitions, under 33 U.S.C. §§ 1311(a), 1342, 1362(a), and 1365(f);

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

(4) Defendant's Discharges of Non-Storm Water in violation of the Storm Water Permit and the Clean Water Act, under 33 U.S.C. §§ 1311(a), 1342, 1365(a), and 1365(f);

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

(6) Defendant's Failure to Adequately Develop, Implement, and/or Revise a Monitoring and Reporting Plan in Violation of the Storm Water Permit and the Clean Water Act, under 33 U.S.C. §§ 1311(a), 1342, 1365(a), and 1365(f); and

(7) Defendant's Failure to Report as Required by the Storm Water Permit in Violation of the Storm Water Permit and the Clean Water Act, under 33 U.S.C. §§ 1311(a), 1342, 1365(a), and 1365(f). FAC at 35–44. Plaintiffs seek declaratory and injunctive relief, civil penalties, and attorney's fees and costs.

*See generally* FAC.

On May 6, 2019, Plaintiffs filed the instant Motion for Partial Summary Judgment as to Liability ("Motion") (Dkt. 23), seeking judgment in their favor on claims 1, 2, 5, 6, and 7 of the FAC. Defendant opposed the Motion on May 13, 2019 ("Opposition") (Dkt. 37). Plaintiff replied on May 20, 2019 ("Reply") (Dkt. 40).

## II. Legal Standard

Summary judgment is proper if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment is to be granted cautiously, with due respect

for a party's right to have its factually grounded claims and defenses tried to a jury. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A court must view the facts and draw inferences in the manner most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1992); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1161 (9th Cir. 1992). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial, but it need not disprove the other party's case. *Celotex*, 477 U.S. at 323. When the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out that the non-moving party has failed to present any genuine issue of material fact as to an essential element of its case. *See Musick v. Burke*, 913 F.2d 1390, 1394 (9th Cir. 1990).

Once the moving party meets its burden, the burden shifts to the opposing party to set out specific material facts showing a genuine issue for trial. *See Liberty Lobby*, 477 U.S. at 248–49. A "material fact" is one which "might affect the outcome of the suit under the governing law. . . . " *Id.* at 248. A party cannot create a genuine issue of material fact simply by making assertions in its legal papers. *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., Inc.*, 690 F.2d 1235, 1238 (9th Cir. 1982). Rather, there must be specific, admissible, evidence identifying the basis for the dispute. *See id.* The Court need not "comb the record" looking for other evidence; it is only required to consider evidence set forth in the moving and opposing papers and the portions of the record cited therein. Fed. R. Civ. P. 56(c)(3); *Carmen*

*v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001). The Supreme Court has held that "[t]he mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for [the opposing party]." *Liberty Lobby*, 477 U.S. at 252.

## III. Requests for Judicial Notice

Plaintiffs request that the Court take judicial notice of the following documents:

A. National Pollutant Discharge Elimination System ("NPDES") General Permit for Storm Water Discharges Associated with Industrial Activities, Order NPDES No. CAS-00001, Order 2014-0057-DWQ and Fact Sheet (excerpted pages);

B. Water Quality Control Plan ("Basin Plan") for the Santa Ana River Basin, adopted by the California Regional Water Quality Control Board, Santa Ana Region, Resolution 94-1 (excerpted pages);

C. National Pollutant Discharge Elimination System ("NPDES") General Permit No. CAS00001 (General Permit) Waste Discharge Requirements for Discharges of Stormwater Associated with Industrial Activities Excluding Construction Activities, Order 97-03-DWQ (excerpted pages);

D. United States Environmental Protection Agency, Industrial Stormwater Fact Sheet, Sector E: Glass, Clay, Cement, Concrete, and Gypsum Product Manufacturing Facilities;

E. United States Environmental Protection Agency Industrial Storm Water Monitoring and Sampling Guide, Final Draft, March 2009;

F. January 2014 through March 2019 Records of Climatological Observations for Corona, California from the United States Department of Commerce National Oceanic & Atmospheric Administration National Environmental Satellite Data, and Information Service; and

G. Additional Excerpted pages from the National Pollutant Discharge Elimination System ("NPDES") General Permit for Storm Water Discharges Associated with Industrial Activities, Order NPDES No. CAS-00001, Order 2014-0057-DWQ and Fact Sheet.

Pl. RJN (Dkt. 27); Pl. Suppl. RJN (Dkt. 45).

Additionally, Defendant requests that the Court take judicial notice of the following document:

A. Attachment C–Glossary to National Pollutant Discharge Elimination System ("NPDES") General Permit for Storm Water Discharges Associated with Industrial Activities (General Permit").

Def. RJN (Dkt. 37-7, 37-8).

Judicial notice is a court's recognition of the existence of a fact without the necessity of formal proof. *See Castillo–Villagra v. I.N.S.*, 972 F.2d 1017, 1026 (9th Cir. 1992). Under Federal Rule of Evidence 201, a court may take judicial notice of court filings and other matters of public record. *Harris v. Cty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) (noting

that a court may take judicial notice of "undisputed matters of public record"); *see also Reyn's Pasta Bella, LLC v. Visa USA*, Inc., 442 F.3d 741, 746, n.6 (9th Cir. 2006) (taking judicial notice of pleadings, memoranda, and other court filings). A court can also appropriately take judicial notice of copies of "records and reports of administrative bodies," *U.S. v. Richie*, 342 F.3d 903, 908 (9th Cir. 2003), as well as legislative history. *Anderson v. Holder*, 673 F.3d 1089, 1094, n.1 (9th Cir. 2012). The Court does not, however, take judicial notice of reasonably disputed facts contained within the judicially-noticed documents. *See Lee v. City of L.A.*, 250 F.3d 668, 688–89 (9th Cir. 2001).

As the aforementioned documents fall into the categories of judicial notice, the Court takes judicial notice of the documents as requested by Plaintiffs and by Defendant.

## IV. Discussion

Plaintiffs argue they are entitled to summary judgment on their first, second, fifth, sixth, and seventh claims, yet Defendant maintains that Plaintiffs do not have the requisite standing to bring their claims. The Court will first discuss standing as a threshold matter, and will then turn to the merits of Plaintiffs' Motion.

### A. Standing

Plaintiffs argue they have representational standing to bring the instant action on behalf of their members. Mot. at 7–11. Defendant argues that Plaintiffs lack standing because the three declarations on behalf of Plaintiffs' members do not establish an injury-in-fact

or an injury fairly traceable to Defendant's conduct. Opp'n at 3–10.

To satisfy Article III's standing requirements, a Plaintiff must show that (1) it has suffered an injury in fact; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) the injury can be redressed by the court. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). An organization has standing to sue on behalf of its members when (1) its members would have standing to sue in their own right; (2) the interests at stake are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Laidlaw*, 528 U.S. at 181 (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

Defendant does not appear to dispute, and the Court finds, that Plaintiffs have satisfied the second and third elements of organizational standing: Plaintiffs' interests in seeking to prevent pollution from entering Temescal Creek are germane to the organizations' purpose, and the participation of individual members is not required to bring the instant action for injunctive, declaratory, and monetary relief. *See* SUF ¶ 16–17 (Waterkeeper is a program of Coastkeeper; Waterkeeper's mission is to enhance and protect the quality of the waterways within the Upper Santa Ana River Watershed).

Instead, the standing dispute hinges on whether any of Plaintiff's members would have standing to sue in their own right. *See Ecological Rights Found.*

*V. Pac. Gas & Elec. Co.*, No. 15-15424, 2017 WL 4974746, at *6 (9th Cir. Nov. 2, 2017). Specifically, Corona Clay maintains that the three declarations from Waterkeeper's members do not establish an injury in fact, and that an injury is not fairly traceable to any conduct of Defendant. Opp'n at 3–10.

"[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Laidlaw*, 528 U.S. at 183 (2000) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). "The 'injury in fact' requirement in environmental cases is satisfied if an individual adequately shows that she has an aesthetic or recreational interest in a particular place, or animal, or plant species and that that interest is impaired by a defendant's conduct." *Ecological Rights Foundation v. PG & E Elecs. Co.*, 874 F.3d 1083, 1093 (9th Cir. 2017) (quoting *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000)). To meet the injury in fact threshold under *Laidlaw*, it is enough for an individual to show "a connection to the area of concern sufficient to made credible the contention that the person's future life will be less enjoyable—that he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction—if the area in question remains or becomes environmentally degraded." *Pacific Lumber*, 230 F.3d at 1149.

Here, Plaintiffs have submitted declarations from their members to demonstrate injury in fact that is fairly traceable to Defendant's conduct. Plaintiffs submitted declarations from three members: Megan Brousseau (Associate Director of Waterkeeper, 2012–

present) (Dkt. 23-3), Heather Williams (member of Waterkeeper) (Dkt. 23-5), and Lee Reeder (former Associate Director of Waterkeeper, current member) (Dkt. 26). All three members describe a longstanding connection with Temescal Creek, and frequent use of the body of water for recreational purposes. *See* Williams Decl. ¶¶ 15–20; Brousseau Decl. ¶¶ 22–25; Reeder Decl. ¶¶ 20–25. The members state that they enjoy use of the Temescal Creek, that they have noticed a decrease in the "water quality condition of the creek due to [] pollutants," and that the pollution in the Creek "significantly harms [their] enjoyment of [] recreational activities in and around the creek." Reeder Decl. ¶¶ 24–28; *see also* Williams Decl. ¶¶ 15, 20, 23, 24; Brousseau Decl. ¶¶ 23, 25, 29, 30. Accordingly, Plaintiffs have shown that the three members "use the area" and that the "aesthetic and recreational values of the area [is or] will be lessened by the challenged activity," thus demonstrating injury in fact. *Laidlaw*, 528 U.S. at 183.

Turning to an injury fairly traceable to a defendant's conduct, "the causal connection put forward for standing purposes cannot be too speculative, or rely on conjecture about the behavior of other parties, but need not be so airtight at this stage of the litigation as to demonstrate that the plaintiffs would succeed on the merits." *Pacific Lumber*, 230 F.3d at 1152. "The issue in the causation inquiry is whether the alleged injury can be traced to the defendant's challenged conduct, rather than to that of some other actor not before the court."[4] *Id.* The plaintiff need not show

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[4] To the extent Defendant argues Plaintiffs cannot demonstrate that Defendant Facility solely or particularly contributed to the pollution of Temescal Creek, the Court notes that it need not decide

actual environmental harm to body of water in question in order to satisfy the fairly traceable inquiry for a Clean Water Act lawsuit, as doing would "confuse[ ] the jurisdictional injury (does the court have power under Article III to hear the case?) with the merits injury (did the defendant violate the law?)." *Pacific Lumber*, 230 F.3d at 1151. Thus, where a plaintiff has demonstrated that members derive less enjoyment from recreation due to a defendant's pollution, this is sufficient to satisfy the causation element of standing. *See, e.g., California Sportfishing Protection Alliance v. River City Waste Recyclers, LLC*, 205 F.Supp.3d 1128, 1147 (E.D. Cal. 2016) (finding that a plaintiff demonstrated harm fairly traceable to defendant's conduct where plaintiff derived less enjoyment from recreation in the body of water due to defendant's pollution, and plaintiff declared that they believed defendant's "discharged pollutants in its storm water flows and contributed to the contamination of fish and waters downstream").

Here, Plaintiffs' members declare that pollution from Defendant's Facility has discharged pollution into the Creek, affecting the water quality of the habitat. *See, e.g.*, Brousseau Decl. ¶¶ 27–29 (stating that Defendant's facility discharged clay into the Creek and that this has caused decreased quality of habitat in the Temescal Creek). Plaintiffs need not scientifically prove that no other facility has contributed to pollution of the habitat for standing purposes; instead, it is enough to show that members' enjoyment of the

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whether other actors have also polluted the Creek; instead, it is sufficient for standing purposes to argue that Defendant's violations of the Clean Water Act have degraded the environment of the Creek.

environment "is lessened" due to Defendant's "alleged violations of various provisions of the Clean Water Act." *Pacific Lumber*, 230 F.3d at 1152. Plaintiffs specifically state that pollution from Defendant's Facility has resulted in a decrease in the quality of the Temescal Creek habitat, and in turn has harmed their enjoyment of Temescal Creek. *See* Reeder Decl. ¶¶ 28–29; Brousseau Decl. ¶ 29. Accordingly, Plaintiffs have shown injury in fact that is fairly traceable to Defendant's conduct. Defendant's conduct as argued by Plaintiffs—discharge of pollution from the Facility that has degraded the habitat of Temescal Creek—can be redressed by the injunctive and declaratory relief sought in the FAC. Plaintiffs thus have demonstrated injury in fact that is fairly traceable to Defendants, as well as redressability, sufficient for standing.

### B. First Claim for Failure to Meet Technology-Based Effluent Limitations

Plaintiffs bring their first cause of action for violations of the CWA by discharging contaminated storm water in violation of the General Permit's effluent limitations. FAC at 35. Specifically, Plaintiffs allege that Defendant failed to develop and/or implement Best Management Practices ("BMPs") that achieve reductions in pollutant discharge associated with industrial activities at the Facility (which are attainable via Best Available Technology Economically Achievable ("BAT") and Best Conventional Pollutant Control Technology ("BCT"), in violation of both the General Permit and the CWA. FAC ¶¶ 246–48. Plaintiffs allege that the discharges of storm water from the Facility contain levels of pollutants that do not achieve compliance with BAT/BCT standards every

time stormwater discharges from the Facility. FAC ¶ 247.

### 1. The Parties' Arguments

Plaintiffs argue they are entitled to summary judgment on their first claim because the General Permit requires dischargers to implement BMPS that achieve BAT or BCT standards, and a Facility's exceedances of benchmarks for stormwater sampling evidences a failure to properly implement BMPS to meet the BAT and BCT. Mot. at 12. First, Plaintiffs note that the General Permit limits Defendant's effluents of Total Suspended Solids ("TSS") to 100 mg/L and iron to 1.0 mg/L. Pl. RJN, Ex. A at 32. Defendant's Facility has had repeated violations of Numeric Action Levels ("NALs") of Total Suspended Solids ("TSS") and iron above those levels. Novak Decl., Ex. 7 at 3; Novak Decl., Ex. 12 at 4; Novak Decl., Ex. 27 at 4. Plaintiffs argue these sampling results show that Defendant was required to engage in more effective and rigorous rounds of BMP implementation, but displayed "malignant indifference" to the requirements of the General Permit. Mot. at 13. Second, Plaintiffs argue that Defendant proposed a minimal course of BMPs in its SWPPP when first enrolling under the General Permit, and continued to reaffirm the same minimal BMPs each year since, despite Regional Board staff's repeated warnings that Defendant's BMPs were missing, ineffective, or inadequate. Mot. at 13–14.

Plaintiff argues that Defendant's repeated exceedances of Numeric Action Levels, coupled with its refusal to implement effective and more robust BMPs, demonstrates Defendant's failure to meet the BCT

standard every time the Facility experienced a rain event large enough to create discharge. Mot. at 14. Accordingly, Plaintiffs argue Defendant was in violation of the General Permit's effluent limitations every time it rained and there was a discharge from the Facility. Mot. at 14–15.

Defendant argues substantial fact questions remain because Plaintiffs do not present evidence of discharges from the Facility actually reaching Temescal Creek. Opp'n at 11–13. Defendant also note that one Regional Board inspector observed a silt basin installed by Defendant prevented discharge entirely when he visited during a heavy rain. Opp'n at 12.

**2. Violations of Effluent Limitations under the CWA**

"A permittee violates the CWA when it discharges pollutants in excess of the levels specified in the [NPDES] permit, or where the permittee otherwise violates the permit's terms." *Natural Resources Defense Council*, 725 F.3d at 1204. A facility's permit to comply with the CWA "will govern storm water discharges." *Santa Monica Baykeeper v. Int'l Metals Ekco, Ltd.*, 619 F.Supp.2d 936, 943 (C.D. Cal. 2009). One court has noted that, when a water sampling result exceeds the benchmark value, this exceedance indicates modifications to the SWPPP may be necessary, but the result does not in and of itself constitute a violation of a permit. *Ekco*, 619 F.Supp.2d at 944. On the other hand, courts in this district have held "[a] monitoring report that shows a water sample with pollutant discharges in excess of permit limits is conclusive evidence of a violation." *Inland Empire Waterkeeper v. Uniweb, Inc.*, 2008 WL 6098645, at * 9 (C.D. Cal.

Aug. 6, 2008) (citing *Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1491 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931 (1988), *reinstated with minor amendment*, 853 F.2d. 667 (9th Cir. 1988)). *See also San Francisco Baykeeper v. West Bay Sanitary Dist.*, 791 F.Supp.2d 719, 755 (N.D. Cal. 2011).

**3. Plaintiff's NALs, BMPs, and Effluent Limitations**

As the General Permit states:

> "[t]he NALs are not intended to serve as technology-based or water quality-based numeric effluent limitations. The NALs are not derived directly from either BAT/BCT requirements or receiving water objectives. NAL exceedances defined in this General Permit are not, in and of themselves, violations of this General Permit."

Pl. RJN, Ex. A. at 10. Indeed, Plaintiff concedes that exceedances, standing alone, do not constitute a violation of effluent limitations, *see* Mot. at 13, but Plaintiff maintains that Defendant's exceedances coupled with its failure to implement more robust BMPs demonstrate such a violation.

Under the General Permit, dischargers must implement minimum BMPs and applicable advanced BMPs, and must "implement BMPs when necessary, in order to support attainment of water quality standards." Pl. RJN, Ex. A at 5. BMPs are utilized by the General Permit in place of numeric effluent limitations, presumably because numeric effluent limitations are infeasible. *See* RJN, Ex. A at 48 (stating that the applicable federal code requires use of BMPs when

numerical effluent limitations are infeasible).[5] Accordingly, Plaintiffs would not be able to prove a violation of effluent limitations by pointing to a specific numerical violation, and must instead demonstrate that Defendant does not meet BMPs. And as Plaintiffs indicate, Regional Board staff have found that Defendant has not met minimal BMPs or implemented necessary BMPs in several instances. *See* Novak Decl., Ex. 15 at 2, Ex. 16 at 1–4.

Though some cases regarding effluent limitations have found violations, or not, based on specific exceedances of effluent limitations,[6] specific exceedances of limitations are not available or practicable in the instant case, as the California General Permit uses BMPs rather than specific effluent limitations. *See generally* Pl. RJN, Ex. A. Accordingly, instead, the Court relies on NAL exceedances in combination with violations of the BMPs as indicated in the General Permit,[7] which the EPA delegated to state authorities to implement. *See* Pl. RJN, Ex. A at 48–49; 40 C.F.R. §§ 122.26(e)(1), 122.21. Moreover, BMPs are explicitly authorized by the CWA when specific numeric effluent limitations are not available.[8] Here, Defend-

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[5] The Court emphasizes again that this use of BMPs instead of NELs, as allowed for in the General Permit, is in compliance with the Clean Water Act. *See* 40 C.F.R. § 122.44(k)(4).

[6] *See San Francisco Baykeeper*, 791 F.Supp.2d at 755; *Inland Empire Waterkeeper*, 2008 WL 6098645, at *4.

[7] The CWA authorizes BMPs to control or abate the discharge of pollutants when "numeric effluent limitations are infeasible." 40 C.F.R. § 122.44(k)(4).

[8] The General permit states that "the State Water Board expects that this [earlier referenced] information and assessment process will provide information necessary to determine the feasibility

ant failed to meet BMPs, thus violating the General Permit, on numerous occasions in the past several years. Novak Decl., Ex. 15 at 1–2 (in 2015, the SWPPP stated that fiber rolls and gravel bag check dams were to be implemented but neither were implemented at the Facility; additionally, structural BMPS were required given the nature of materials handled at the Facility, but such structural BMPs were neither identified in the SWPPP nor implemented at the site); Novak Decl., Ex. 15 at 2 (in 2016, two BMPs noted in the SWPPP were a cattle crossing and an infiltration basin, but neither BMP was observed at the facility); Novack. Dec., Ex. 16 at 1–2 (in 2017, Defendant failed to implement erosion control BMPs despite erosion occurring in several areas of industrial activity; the SWPPP included an infiltration basin and a cattle crossing but neither BMP was observed during inspection). The Court consequently finds that the exceedances of NALs by Defendant's Facility and Defendant's continual failure to meet or implement required BMPs constitutes a violation of the General Permit and, by extension, a violation of the CWA.

Defendant argues that Plaintiffs cannot conclusively demonstrate a violation of the General Permit and the CWA because Plaintiffs have not shown that discharges from Defendant's Facility have actually reached Temescal Creek. Opp'n at 12. To the contrary, Plaintiffs need not show that discharges have reached the body of water in question; under the CWA, a discharging facility's violation of BMPs can be determinative of whether that facility has violated

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of numeric effluent limitations for industrial dischargers in the next reissuance of this General Permit." Pl. RJN, Ex. A. at 10.

its state permit and the CWA. 40 C.F.R. § 122.44(k)(4)(BMPs controls the discharge of pollutants when authorized under the CWA). As California's current General Permit utilizes BMPs, these practices are determinative of whether Defendant's Facility has committed violations of the CWA's effluent limitations.

The Court therefore GRANTS IN PART Plaintiffs' Motion as to their first cause of action, as the Court finds Defendant violated the CWA's effluent limitations. Additionally, Plaintiff appears to seek the Court's judgement that Defendant's facility has discharged storm water 108 times during a five-year period and Defendant has been in violation of the General Permit's effluent limitations each time. Mot. at 15. Plaintiffs hinge their argument on the notion that the facility discharges every time it rains .14 inches, and it has rained that amount 108 times in five years. Yet Plaintiffs cannot conclusively demonstrate 108 violations solely based on their finding that there was a discharge from Defendant's Facility during one instance of .14 inches of rain. Accordingly, the Court DENIES IN PART Plaintiffs' Motion as to claim one to the extent Plaintiffs seek judgment that Defendant has committed 108 distinct effluent limitation violations.

### C. Second Claim for Violation of General Permit's Discharge Prohibitions

Plaintiffs bring the second cause of action for violation of the CWA via violation of the General Permit's discharge prohibitions, alleging that Defendant's Facility has discharged prohibited storm water discharges that result in coloration of receiving waters

and contain suspended solids in violation of the Basin Plan. FAC ¶ 256.

### 1. The Parties' Arguments

Plaintiffs note the Basin Plan prohibits discharges that "result in coloration of the receiving waters" and "suspended or settleable solids" in untenable amounts. Mot. at 16. Plaintiffs then argue they are entitled to summary judgment on their second claim because Defendant's discharges of polluted storm water are colored deep red and brown, and that the facility's storm water samples indicate suspended solids in Defendant's runoff exceed applicable benchmarks. Mot. at 16–17. Defendant again argues that Plaintiffs present no evidence of discharge actually reaching Temescal Creek, and thus that Plaintiffs cannot succeed on their Motion. Opp'n at 12.

### 2. Violation of the General Permit's Discharge Prohibitions

Under the General Permit, discharges "that violate any discharge prohibitions contained in applicable . . . (Basin Plans) . . . are prohibited." Pl. RJN, Ex. A at 13-1. The Basin Plan for the Santa Ana River Basin ("Basin Plan") is the applicable plan. Pl. RJN, Ex. B. Under the Basin Plan, waste discharges "shall not result in coloration of the receiving waters" and "shall not contain floating materials, including solids," which cause "a nuisance or adversely affect beneficial uses." *Id.* at 15.

The Court finds there are genuine issues of material fact as to Plaintiffs' discharge prohibition violation claim under the Basin Plan. Plaintiffs cite Regional Board staff's Notices of Violation, arguing

the Regional Board confirms that the storm water from Defendant's facility starkly contrasts with surrounding runoff. *See* Novak Decl., Ex. 13, 15–16. However, in contrast to the Regional Board's statements that Defendant has failed to adequately implement BMPs—as noted above, with respect to Plaintiffs' first claim—Plaintiffs fail to point to any finding by the Regional Board that Defendant is in violation of the Basin Plan. Moreover, the Basin Plan is quite attenuated from the CWA; discharges prohibited by the Basin Plan are prohibited by the General Permit, and the General Permit governs the CWA obligations of industrial facilities including Defendant's Facility.

Accordingly, the Court finds that a general dispute of material facts remains as to this claim, and DENIES Plaintiffs' Motion as to their second cause of action.

### D. Fifth Claim for Failure to Adequately Develop, Implement and Revise SWPPPs

Plaintiffs bring the fifth cause of action for violation of the CWA via Defendant's failure to adequately develop, implement, and/or revise its SWPPP. FAC ¶¶ 279–83. Plaintiffs argue they are entitled to summary judgment on the SWPPP claim because Defendant fails to meet the requirements of a SWPPP under the General Permit. Mot. at 18–19. Defendant argues it was repeatedly updated its report in compliance with the General Permit. Opp'n at 14.

Under the General Permit, dischargers "shall develop and implement a site-specific SWPPP for each industrial facility covered by this General Permit." Pl. RJN, Ex. A. at 17. A SWPPP must contain, among other elements, a site map and an annual comprehen-

sive facility compliant evaluation (an annual evaluation). *Id.* Additionally, dischargers must revise their SWPPP whenever necessary, and certify and submit their SWPPP within 30 days whenever the SWPPP contains significant revisions. *Id.* In terms of performance standards, a SWPPP must also: (a) identify and evaluate all sources of pollutants that may affect the quality of industrial storm water discharges; (b) identify and describe the minimum BMPs and any advanced BMPs "implemented [by the facility] to reduce or prevent pollutants in industrial storm water discharges;" and (c) describe conditions or circumstances that may require future revisions to the SWPPP. *Id.* at 18.

Here, Plaintiffs show that Defendant is not in compliance with some aspects of the General Plan. Specifically, Plaintiffs show there is an absence of material fact that Defendant's SWPPPs do not comply with the performance standards outlined in Section X.C.1 of the General Plan. Pl. RJN, Ex. A at 18. Subsection B of the performance standards requires that Defendant identify and describe the minimum BMPs and any advanced BMPs "implemented [by the facility] to reduce or prevent pollutants in industrial storm water discharges;" these BMPs "shall be selected to achieve compliance with [the] General Permit." *Id.* In direct contrast, after the Regional Board alerted Defendant through Notices of Violation that its BMPs were not effective to control the discharge of clay materials and that the check dams used by Defendant were not sufficient to reduce fine particles in runoff (and thus Defendant's BMPs were not compliance with the General Permit), Defendant re-proposed the same BMPs in its 2017 SWPPP revision as in its pre-

vious SWPPPs. *See* Novak Decl., Ex. 13 (Notice of Violation); Novak Decl., Ex. 16 (Notice of Violation); Novak Decl., Ex. 2 at 12 (2017 SWPPP revision). Specifically, the Regional Board notified Defendant that its SWPPP failure to implement required BMPs regarding erosion controls, as required by the General Permit Section X.H.1.e., in 2016, yet in 2017 Defendant had still failed to implement erosion control BMPs, thus evidencing a failure to develop and/or implement required BMPs in its SWPPP. *Compare* Novak Decl., Ex. 15 at 1–2 (failure to implement erosion control BMPs as required in each SWPPP under the General Permit), *with* Novak Decl., Ex. 16 at 1–2 (repeated failure to implement erosion control BMPs). *See also* Novak Decl., Ex. 13 at 1 (Defendant on notice in 2015 that its SWPPP failed to develop and implement erosion control BMPs).

Defendant is similarly in violation of Subsection (c) of the performance standards, which requires a SWPPP to describe conditions or circumstances that may require future revisions to the SWPPP. Pl. RJN, Ex. A at 18. As indicated above, Defendant was on notice that its BMPs did not result in meeting NALs.[9] However, Defendant did not indicate any new BMPs to come into compliance with NALs, or acknowledge the need for future revisions due to its NAL exceedances. Novak Decl., Ex. 2 at 12 (Defendant's SWPPP), Ex. 15, Ex. 24, Ex. 25.[10] Additionally,

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[9] *See* Section IV.B of this Order.

[10] *See also* Exhibits evidencing that Defendant's Facility has had repeated violations of Numeric Action Levels ("NALs") of Total Suspended Solids ("TSS") and iron above those levels. Novak Decl., Ex. 7 at 3; Novak Decl., Ex. 12 at 4; Novak Decl., Ex. 27 at 4.

Defendant did not develop further BMPs with respect to erosion control, despite being on notice that its erosion control measures were insufficient. *See* Novak Decl., Ex. 2 at 12; Novak Decl., Ex. 13 at 1; Novak Decl., Ex. 15 at 1–2; Novak Decl., Ex. 16 at 1–2. Accordingly, the Court finds that Defendant is in violation of at least some requirements of the SWPPP, which in turn constitutes a violation of the General Permit. *See, e.g., Kramer*, 619 F.Supp.2d at 932 (finding that revisions to the SWPPP were necessary under the General Permit and thus the defendant was in violation of the General Permit).

The Court thus GRANTS IN PART Plaintiffs' Motion as to their fifth cause of action, finding Defendant in violation of Section X.C.1, subsections b and c of the General Permit.

### E. Sixth Cause of Action for Failure to Adequately Implement Monitoring Plan

Plaintiffs bring their sixth cause of action for failure to adequately develop, implement, and/or revise a monitoring and reporting plan in violation of the General Permit and, in turn, the CWA. FAC ¶¶ 290–300. Plaintiffs contend there is no dispute of material fact that Defendant violated the General Permit's monitoring requirements. Mot. at 20–22. Plaintiffs argue, specifically, that Defendant has violated the monitoring requirements by failing to: (1) train team members responsible for monitoring, including its foreman Jose Arana; (2) conduct all monthly dry-weather visual observations; (3) conduct sampling event visual observations; (4) analyze storm water samples for iron and oil and grease ("O&G"); and (5) collect at least four samples from qualifying storm

events each reporting year. *Id.* Defendant contends that its foreman, Jose Arana, is not responsible for the SWPPP, and that factual issues remain regarding compliance with storm water sampling. Opp'n at 14–15.

The General Permit requires dischargers such as Defendant to engage in monitoring. Pl. RJN, Ex. A at 26–28. The monitoring requirements include identification of team members assigned to conduct monitoring requirements, monthly visual observations, sampling event visual observations, collection of four samples from qualifying storm events each year, and analysis of all collective samples for TSS and O & G. *Id.* The General Permit also requires that the discharger ensure all team members implementing the various compliance activities are property trained to implement requirements of the General Permit, including monitoring activities. *Id.* at 24–25.

The Court finds that Plaintiffs are not entitled in judgment on their sixth claim. Plaintiffs are not entitled to judgment regarding violation of the General permit's training requirements; while Plaintiffs provide evidence that Arana was not training to perform observations under the SWPPP, Defendant notes that Craig Deleo, rather than Mr. Arana, is responsible for the monitoring requirements of the General Plan. *See* Pl. RJN, Ex. 2 at 5 (list Deleo as responsible for monitoring). A factual dispute thus remains as to Defendant's compliance with the General Permit's training requirements.

Similarly, Plaintiffs are not entitled to judgment on a violation of the General Permit's monitoring requirements based on a failure to conduct visual observations, conduct sampling event visual observations, analyze samples for iron and O&G, or to collect at

least four samples from qualifying storm events each year. Plaintiffs cite their request for production of monthly inspections, and on that basis state that Defendant has failed to conduct monthly visual inspections as well as to sample and visually observe at least four qualifying storm events per year. Mot. at 21. However, a request for production from Plaintiffs does not conclusively demonstrate that Defendant failed to conduct monthly visual inspections, and as Defendant notes, the reporting requirements of Defendant during qualifying storm events and for sampling are disputed. *See* Hacunda Decl., Ex. 1 at 6–9. Accordingly, a dispute of material fact remains as to Defendant's compliance with the monitoring requirements of observation, sampling, analyzing sampling, and collection.

Accordingly, the Court finds that a general dispute of material facts remains as to this claim, and DENIES Plaintiffs' Motion as to their sixth cause of action.

### F. Seventh Cause of Action for Failure to Report

Finally, Plaintiffs bring their seventh cause of action for failure to report in violation of the General Permit and thus the CWA. FAC ¶¶ 301–11. Plaintiffs argue they are entitled to judgment for failure to report because, had Defendant reported the required information, it would be public available electronically through the State Water Resources Control Board's Stormwater Multiple Application and Report Tracking System ("SMARTS"). Mot. at 23–25. However, the instances of qualifying storm events ("QSEs"), and thus the number of required instances of sampling and reporting, is disputed by Defendant. *See* Opp'n

at 14–15 (citing SGD at 149–51). Moreover, Plaintiff's failure to report claim appears dependent on its argument that Defendant failed to adequately monitor and sample. *See* Mot. at 23 (stating that Defendant failed to collect requisite storm water samples and thus failed to report results). Given that the Court denied Plaintiffs' Motion as to the monitoring claim, and viewing the facts in the light most favorable to the non-moving party, the Court declines to find an absence of genuine issues of material fact as to Defendant's reporting or lack thereof.

Accordingly, at this stage, the Court DENIES Plaintiffs' Motion as to their seventh cause of action.

## V. Disposition

The Court GRANTS IN PART and DENIES IN PART Plaintiffs' Motion for Partial Summary Judgment. The Court therefore GRANTS IN PART Plaintiffs' Motion as to the first cause of action to the extent that the Court finds Defendant violates the effluent limitations. The Court DENIES Plaintiffs' Motion as to the second cause of action. The Court GRANTS IN PART Plaintiffs' Motion as to the fifth cause of action, finding Defendant in violation of Section X.C.1, subsections b and c of the General Plan. The Court DENIES Plaintiffs' Motion as to the sixth cause of action. The Court DENIES Plaintiffs' Motion as to the seventh cause of action.

/s/ David O. Carter
United States District Judge

Dated: June 10, 2019