INDEX TO APPENDIX

APPENDIX A

Case: 18-56550 03/03/2021 DktEntry: 62

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES G. KINNEY
Plaintiff-Appellant,

v.

No. 18-56550
D.C. No. 8:17-cv-01693-RGK-JC
Central District of California
Santa Ana **(sic)**

THEE ARCH BAY COMMUNITY SERVICES DISTRICT; et al.,
Defendants-Appellees.

FILED
MAR 3 2021
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ORDER

Before: THOMAS, Chief Judge, TASHIMA and W. FLETCHER, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

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. *See* Fed. R. App. P. 35.

Kinney's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 61) are denied.

Non-party Lukashin's request for publication (Docket Entry No. 59) is denied.

No further filings will be entertained in this closed case.

APPENDIX B

Case: 18-56550 11/16/2020 DktEntry: 57-1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES G. KINNEY
Plaintiff-Appellant,

v.

No. 18-56550
D.C. No. 8:17-cv-01693-RGK-JC
Central District of California

THEE ARCH BAY COMMUNITY SERVICES DISTRICT; et al.,
Defendants-Appellees.

FILED
NOV 16 2020
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MEMORANDUM *

Appeal from the United States District Court for the Central District of California R. Gary Klausner, District Judge, Presiding

Submitted November 9, 2020**

Before: THOMAS, Chief Judge, TASHIMA and W. FLETCHER, Circuit Judges.

Charles G. Kinney appeals pro se from the district court's judgment dismissing his action

alleging violations of the Clean Water Act ("CWA"), 33 U.S.C. § 1365. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for lack of subject matter jurisdiction under the CWA. Wash. Trout v. McCain Foods, Inc., 45 F.3d 1351, 1353 (9th Cir. 1995) (dismissal for lack of subject matter jurisdiction under the CWA). We may affirm on any basis supported by the record. Thompson v. Paul, 547 F.3d 1055, 1058-59 (9th Cir. 2008). We affirm.

The district court properly dismissed for lack of subject matter jurisdiction Kinney's claims in the first amended complaint against defendants Three Arch Bay Community Services District, Three Arch Bay Association, City of Laguna Beach, and California Department of Transportation. Dismissal of Kinney's claims in the complaint against defendants Viviani, John Chaldu, and Lynn Chaldu was also proper because Kinney failed to provide defendants with adequate notice of the alleged CWA violations. See 40 C.F.R. § 135.3 (notice under CWA must provide sufficient information to permit recipient to identify violation); Wash. Trout, 45 F.3d at 1354-55 (affirming dismissal of CWA action for lack of subject matter jurisdiction where notice was "insufficient as required by the regulations promulgated under the CWA").

The district court did not abuse its discretion by dismissing the first amended complaint without leave to amend because amendment would have been futile. See Cervantes v. Countrywide Home Loans, Inc., 656

F.3d 1034, 1041 (9th Cir. 2011) (setting forth standard of review and explaining that dismissal without leave to amend is proper when amendment would be futile). The district court did not abuse its discretion by declaring Kinney a vexatious litigant and entering a pre-filing review order against him because all of the requirements for entering a pre-filing review order were met. See Ringgold Lockhart v. County of Los Angeles, 761 F.3d 1057, 1062 (9th Cir. 2014) (setting forth requirements for pre-filing review orders).

The district court did not abuse its discretion by transferring the case to Judge Klausner in the Western Division of the U.S. District Court for the Central District of California. See 28 U.S.C. § 1404(b) (intradistrict transfer between divisions is within the discretion of the district court); Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000) (standard of review). \

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. See Padgett v. Wright, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2). Kinney's request for oral argument, set forth in the opening brief, is denied.

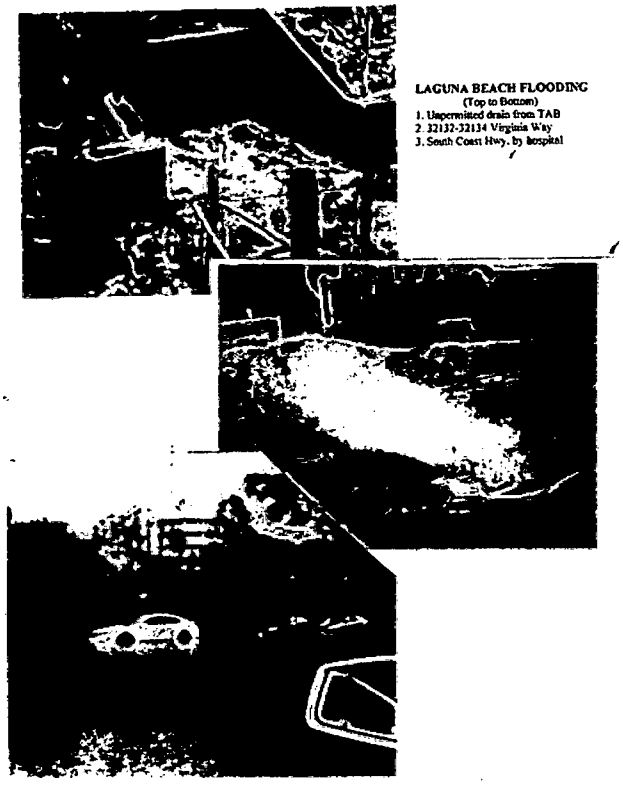
cf

FAIRCHILD AERIAL PHOTOGRAPHY COLLECTION
Whittier College
Whittier, CA 90608
(562) 907-4220

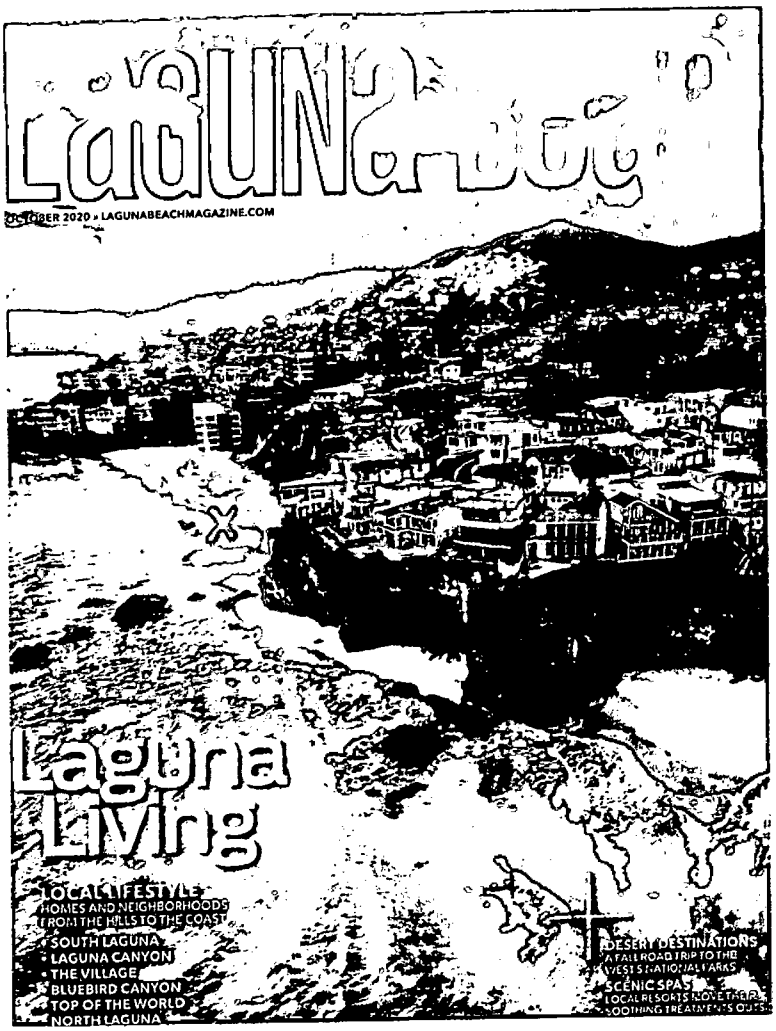
Flight C-11730
Frame 8:6
Date 8/28/1947
Scale 1"=230'
Contact Print ____ Enlargement 2.6x
Other ____
Invoice Number 41130
Completed 4/11/06

FAIRCHILD AERIAL
PHOTOGRAPHY
COLLECTION
Whittier College
Whittier, CA 90608
(562) 907-4220

Flight C-24733
Frame 1:82
Date 3/14/1964
Scale 1"=315'
Contact Print ____ Enlargement 3.8x
Other
Invoice Number 41130
Completed 4/11/06



LAGUNA BEACH FLOODING
(Top to Bottom)
1. Unpermitted drain from TAB
2. 32132-32134 Virginia Way
3. South Coast Hwy. by hospital


LAGUNA BEACH
OCTOBER 2020 • LAGUNABEACHMAGAZINE.COM
Laguna Living
LOCAL LIFESTYLE
HOMES AND NEIGHBORHOODS FROM THE HILLS TO THE COAST
SOUTH LAGUNA
LAGUNA CANYON
THE VILLAGE
BLUEBIRD CANYON
TOP OF THE WORLD
NORTH LAGUNA
DESERT DESTINATIONS
A FALL ROAD TRIP TO THE WEST'S NATIONAL PARKS
SCENIC SPAS
LOCAL RESORTS' NOVEL THEIR SOOTHING TREATMENTS OUTS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES - GENERAL

Case No.	8:17-cv-01693-RGK-JC	Date	August 30, 2018
Title	***Kinney v. Three Arch Bay Community Services District et al.***		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE	
Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiff:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: **(IN CHAMBERS) Order Re: Defendant Three Arch Bay's Motion for Summary Judgment (DE 128); Defendant Charles Viviani's Motion for Security and Control (DE 15)**

I. INTRODUCTION

On September 28, 2017, plaintiff Charles Kinney ("Kinney") filed a complaint against Defendants Three Arch Bay Community Services District ("TAB"), Charles Viviani ("Viviani"), John and Lynn Chaldu (collectively, the "Chaldus"), and Does 1–10. Kinney later added the City of Laguna Beach (the "City"), the Three Arch Bay Association ("TABA"), and the California Department of Transportation ("Caltrans") as defendants in this action. Kinney alleges three claims against the defendants: (1) violation of the Clean Water Act (the "CWA") for discharging pollutants without a permit; (2) violation of the applicable permit; and (3) declaratory relief seeking a determination of the parties' rights and duties with respect to the CWA.

On January 5, 2018, the Court dismissed Kinney's claims against Viviani and the Chaldus. The Court has also now dismissed Kinney's claims against Caltrans and the City for failure to comply with the CWA's notice requirement.

Now before the Court is TAB's Motion for Summary Judgment and Viviani's Motion for Security and Control (DE 15, DE 128). For the following reasons, the Court **GRANTS** Viviani's Motion for Security and Control (DE 15). The Court also **DISMISSES** this case for lack of subject matter jurisdiction so **DENIES AS MOOT** TAB Motion for Summary Judgment (DE 128).

II. FACTUAL BACKGROUND

In the FAC, Kinney alleges the following:

Kinney owns a duplex on Virginia Way in Laguna Beach, California. His property sits below Three Arch Bay, a subdivision managed by TAB or TABA, and across the street from properties owned by Viviani and the Chaldus.

Over the last 16 years, TAB has discharged pollutants along with storm water runoff from lands under its control. More severe during rainstorms, the pollutants travel through Kinney's property, across his neighbors' properties, across the Caltrans-controlled Pacific Coast Highway, into the City's drainage system, and eventually into the Pacific Ocean.

Kinney alleges that the defendants have violated the Clean Water Act by discharging pollutants into the ocean either without or in violation of a National Pollutant Discharge Elimination System ("NPDES") permit. He requests damages as well as civil penalties and declaratory and injunctive relief.

III. MOTION FOR SUMMARY JUDGMENT

A. Judicial Standard: Subject Matter Jurisdiction

Dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(1) where a court lacks subject matter jurisdiction over the plaintiff's claims. Fed. R. Civ. P. 12(b)(1). The burden of demonstrating subject matter jurisdiction rests on the party asserting jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

B. Discussion

TAB argues that the Court does not have subject matter jurisdiction over Kinney's claims against TAB due to a defective Sixty-Day Notice of Intent to File Suit. The Court agrees.

The CWA prohibits the discharge of pollutants into navigable waterways except as authorized by the statute, and allows a citizen to bring a private suit against alleged violators. A citizen who wishes to bring an action under the CWA must first comply with the statute's sixty-day notice requirement. 33 U.S.C. § 1365(b)(1)(A). The notice must alert the violator of the "alleged violation," the "specific standard, limitation, or order" at issue, the activity that constitutes the violation, the persons responsible, and the dates. 40 C.F.R. § 135.3(a).

If a plaintiff does not meet the statute's requirements for notice, the action must be dismissed for lack of jurisdiction. *Wash. Trout v. McCain Foods*, 45 F.3d 1351, 1354 (9th Cir. 1995) (citing *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 33 (1989)). The notice requirement is "strictly construed," and merely giving notice is not enough if the requirements set forth in the regulation are not satisfied. *Id.*

Here, Kinney's Sixty-Day Notice is deficient because the notice fails to identify the "specific standard, limitation, or order" that TAB allegedly violated. 40 C.F.R. § 135.3(a). Kinney's notice states that "over the last five years," the "initial acts" of TABA and/or TAB have resulted in the discharge of mud, silt, and other pollutants into the ocean. (*See* Notice, ECF No. 114-2, at 2.) It also states that the "polluted discharges collected and directed by TABA and/or [TAB] that go into the ocean occur during storm events, on the day(s) after a storm event(s), and/or during non-storm events." *Id.* at 3. The notice

further states that TABA and/or TAB "at various times" engage in construction projects and use goats for fire control, which result in pollutant discharge into the ocean. *Id.* at 5. But Kinney's notice does *not* identify any "specific standard, limitation or order" that TAB is alleged to have violated. 40 C.F.R. § 135.3(a).

Kinney does not appear to dispute this. Instead, he argues that because TAB has no NPDES permit, he need not identify the narrative and/or numeric standards that TAB violated. (Pl.'s Opp'n 2:13–15, ECF No. 135.) The CWA's notice requirement, however, is "strictly construed." *Wash. Trout*, 45 F.3d at 1354. The notice must identify "sufficient information to permit the recipient to identify the alleged violations and bring itself into compliance." *S.F. BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1157–58 (9th Cir. 2002) (citation omitted). Here, Kinney's notice fails to identify the specific effluent standard or standards that TAB allegedly violated, so TAB did not have sufficient information to identify the violation or bring itself into compliance. *See id.* Accordingly, Kinney's Sixty-Day Notice is deficient. The Court therefore must dismiss his claims against TAB for lack of subject matter jurisdiction.[1]

Further, the Court *sua sponte* finds that Kinney's notice is also deficient as to defendant TABA. *See* Fed. R. Civ. P. 12(b)(1); 12(h)(3); *Maria v. Loretta Lynch*, No. CV 16-3107-AG (GJS), 2016 WL 4445225, at *3 (C.D. Cal. Aug. 19, 2016) (explaining that courts may raise the issue of subject matter jurisdiction at any time during the action). As Kinney's contentions against TAB and TABA are the same, Kinney's notice also fails to identify any specific standard, limitation, or order that TABA allegedly violated. Accordingly, the Court must also dismiss Kinney's claims against TABA for lack of subject matter jurisdiction.

IV. MOTION FOR SECURITY AND CONTROL

A. Judicial Standard

Local Rule 83-8.1 declares that it is the policy of the Court to "discourage vexatious litigation." C.D. Cal. Civ. R. 83-8.1. To effectuate this stated policy, the Local Rules authorize courts in the Central District of California to "order a party to give security in such amount as the Court determines to be appropriate to secure the payment of any costs, sanctions, or other amounts which may be awarded against a vexatious litigant." C.D. Cal. Civ. L.R. 83-8.2. In addition to the Local Rules, the All Writs Act vests the Court with inherent power to enter pre-filing orders against vexatious litigants. 28 U.S.C. § 1651.

[1] Because the Court dismisses Kinney's claims under Rule 12(b)(1), it does not reach TAB's other arguments.

B. Discussion

Viviani asks the Court to declare Kinney a vexatious litigant, citing a flurry of litigation in state and federal court initiated by Kinney pertaining to water drainage and flooding near Kinney's Virginia Way property. Viviani requests that the Court require Kinney to post security in the amount of $5,000 and enter a pre-filing order prohibiting Kinney from filing future actions in the Central District without the Court's preapproval.

A court may impose a pre-filing order only if it: (1) provides the vexatious litigant notice and an opportunity to be heard, (2) compiles an adequate record of the cases and motions justifying the pre-filing order, (3) makes substantive findings as to the frivolous or harassing nature of the litigant's conduct, and (4) narrowly tailors the pre-filing order to the specific harassing conduct at issue. *De Long v. Hennessey*, 912 F.2d 1144, 1147 (9th Cir. 1990). The first two requirements are procedural while the latter two are substantive considerations that help the court to determine whether a party is a vexatious litigant and fashion an appropriate remedy to prevent the party's abusive litigation practices without unduly restricting the party's right to access the courts. *Ringgold-Lockhart v. Cty. of L.A.*, 761 F.3d 1057, 1062 (9th Cir. 2014).

1. Notice

"Due process requires notice and an opportunity to be heard." *De Long*, 912 F.2d at 1147 (citation omitted). Accordingly, a litigant must receive a chance to be heard before a court issues a pre-filing order, which can be satisfied when the opposing party serves a motion to impose such an order. *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1058 (9th Cir. 2007). Here, Viviani filed a noticed motion. Kinney received timely notice of the motion and responded with an opposition. (*See* Pl.'s Opp'n to Def.s' Mot. For Payment of Security, ECF No. 13.) The notice requirement is therefore satisfied.

2. Adequate Record for Review

The district court must create an adequate record for review. To the extent possible, a court should list all cases, litigation history, and other filings that it relies on to conclude that a party is, in fact, a vexatious litigant. *Ringgold-Lockhart*, 761 F.3d at 1063–64; *De Long*, 912 F.2d at 1147 ("An adequate record for review should include a listing of all the cases and motions that led the district court to conclude that a vexatious litigant order was needed."). The Court provides a synopsis of Kinney's vexatious activity below.

As Viviani points out, Kinney has filed at least twelve cases and twenty-five appeals since 2001 on matters related to his real property. In about half of these cases, Kinney sued his neighbors for matters involving fences and easements near Kinney's real property on Fernwood Avenue in the Silver Lake neighborhood of Los Angeles (the "Fernwood Matter"). *See* Order Granting Motion to Declare

Charles Kinney a Vexatious Litigant, Kinney v. Cooper, No. 2:15-cv-08910-PSG-JC (C.D. Cal. May 13, 2016), ECF No. 70. In the other half, Kinney sued regarding flooding or pooling of water near his real property on Virginia Way in Laguna Beach, California. *See, e.g.*, *Kinney v. Three Arch Bay Cmty. Servs. Dist.*, 8:16-cv-00796-RGK-JC, 2017 WL 2999684 (C.D. Cal. June 15, 2017); *Keegan v. Viviani*, G048609, 2015 WL 3633602 (Cal. Ct. App. June 11, 2015) (collecting three cases); *Kinney v. Chaldu*, No. G042618, 2010 WL 2746338, at *1 (Cal. Ct. App. July 13, 2010). For his conduct in the Fernwood Matter, courts have declared Kinney a vexatious litigant three times: Once in 2008, in Los Angeles Superior Court; then in 2011, in the California Court of Appeal; and then in 2016, in the Central District of California. *See Kinney v. Clark*, 12 Cal. App. 5th 724, 728–32 (Ct. App. 2017). Additionally, in 2014, the State Bar of California Review Department disbarred Kinney for his vexatious conduct. *See Matter of Kinney*, No. 09-O-18100, 2014 WL 7046611, at *1, *9 (Cal. Bar Ct. Dec. 12, 2014). While these sanctions pertain to matters other than Kinney's Virginia Way property at issue here, the Court takes notice of Kinney's vexatious activity throughout the state and federal court systems.

In the Virginia Way matter at hand, Kinney began filing complaints as early as 2002, when Kinney sued Viviani, the Chaldus, the City, and other entities alleging that they impaired the drainage system on Virginia Way and thereby caused flooding and water pooling. *Chaldu*, 2010 WL 2746338. In that case, Kinney alleged state law claims of nuisance and trespass against the defendants. *Id.* Kinney filed at least five appeals over the course of the litigation. *See Kinney v. City of Laguna Beach*, No. G041499, 2009 WL 4693266, at *1 (Cal. Ct. App. Dec. 10, 2009); *Kinney v. Overton*, 153 Cal. App. 4th 482, 497–98 (Ct. App. 2007). Although many of the appeals related to procedural matters, he appears to have lost on all issues.[2] *Id.* In one instance, a court sanctioned Kinney for appealing a non-appealable order. *See Kinney v. Overton*, No. G037708, 2007 WL 2045560, at *1 (Cal. Ct. App. July 18, 2007). In another instance, the California Court of Appeal allowed the lower court to grant Kinney leave to amend, but lamented that Kinney's pleading was "inartful" and "sloppy." *City of Laguna Beach*, 2009 WL 4693266, at *11. Opining that the "frustration" of the trial court was "understandable" and that the trial court must be "exasperated at this point," the appellate court explained that Kinney failed in his pleadings to include all defendants he thought might be liable and failed purposely to pursue causes of action he knew were possible options. *Id.* Finally, in 2010, having had enough of Kinney's dilatory tactics, the trial court dismissed Kinney's nuisance and trespass complaint for failure to prosecute. *Chaldu*, 2010 WL 2746338, at *3–*4. The Court of Appeal affirmed the dismissal. *Id.* at *11.

But Kinney was undeterred. In 2010 and 2011, Kinney again filed three separate lawsuits in state court against TAB, Viviani, and the Chaldus, asserting state law claims of nuisance and trespass, again arising from drainage problems on Virginia Way.[3] *Keegan*, 2015 WL 3633602 at *1. Once again, the

[2] In *City of Laguna Beach*, the California Court of Appeal partially reversed the lower court's judgment against Kinney, but only on the ground that Kinney might be able to amend his complaint to state a claim. *See* 2009 WL 4693266, at *12.

[3] To be sure, some of these lawsuits were filed by Marian Keegan, not Charles Kinney. However, Kinney served as Keegan's lawyer in the lawsuits, and Kinney is known to use other plaintiffs as puppets for the purpose of pursuing frivolous lawsuits. *See Matter of Kinney*, 2014 WL 7046611, at *4.

trial court granted summary judgment to all defendants and disposed of the action. *Id.* In affirming the trial court's holding on appeal, the California Court of Appeal noted in frustration that "[t]hese are the seventh and eighth appeals arising out of the knock-down drag-out saga engulfing what must surely be a residential area bereft of neighborly pleasantries." *Id.* Kinney then tried to appeal the matter to the United States Supreme Court, but it declined to grant certiorari. *Kinney v. Three Arch Bay Cmty. Servs. Dist.*, 136 S. Ct. 1181 (2016). Predictably, Kinney then appealed the trial court's award of costs to defendants. *Keegan v. Viviani*, No. G050032, 2015 WL 4576384, at *4 (Cal. Ct. App. June 11, 2015). The Court of Appeal affirmed the trial court's award, and this time sanctioned Kinney for his appeal. *Id.* The court noted that the primary arguments in the lawsuit were "utterly absurd" and that the "need to discourage the conduct of Attorney Kinney, whose bad tactics are well known, [was] great." *Id.* In response, Kinney then filed a motion to strike or tax costs. Exasperated, the California Court of Appeal denied Kinney's appeal yet again, opining that the appeal had an "utter lack of merit," that Kinney exhibited "continuing shamelessness in the face of irrefutable facts," and that his lawsuits had, at that point, "degenerated into what can reasonably be characterized as an attempt by plaintiff Charles Kinney . . . to inflict as much pain and expense on his neighbors as he possibly can." *Kinney v. Three Arch Bay Cmty. Servs. Dist.*, No. G053727, 2017 WL 6276437, at *1, *3 (Cal. Ct. App. Dec. 11, 2017), *reh'g denied* (Jan. 4, 2018), *review denied* (Feb. 21, 2018).

Finding no recourse in state court, Kinney turned to federal court. Instead of alleging claims of nuisance and trespass, he came up with a new theory: the Clean Water Act. In July 2016, Kinney filed his first lawsuit in this Court, alleging that TAB, Viviani and the Chaldus violated the Clean Water Act by discharging pollutants into the Pacific Ocean, again near Kinney's Virginia Way property. *See* First Am. Compl., Kinney v. Three Arch Bay Cmty. Servs. Dist., 8:16-cv-00796-RGK-JC, ECF No. 14. On June 15, 2017, this Court dismissed the case due to Kinney's failure to satisfy the notice requirement of the Clean Water Act. *Kinney v. Three Arch Bay Cmty. Servs. Dist.*, 2017 WL 2999684, at *3 (C.D. Cal. Jun. 15, 2017). Kinney had argued that his 2011 state court complaint was sufficient to satisfy the notice requirement, but the Court explained why it was not. *See id.* at *2–3. Kinney then appealed the Court's decision, but the Ninth Circuit affirmed the Court's ruling, explaining that the Court "properly determined" that Kinney's CWA notice was inadequate. *Kinney v. Three Arch Bay Cmty. Servs. Dist.*, 723 Fed. Appx. 553 (9th Cir. 2018).

After all this, however, Kinney again filed the present action in this Court, this time after sending a CWA notice to the defendants. Despite knowing at this point who all defendants should have been in the action, he again failed to include all defendants in his initial complaint. Instead, he opted to add new defendants piecemeal as the litigation progressed. (*See* ECF Nos. 32, 87, 88.) But the Court has now ruled that, yet again, Kinney's suit against all defendants must be dismissed because his CWA notice continues to be inadequate.

3. Substantive Findings of Frivolousness or Harassment

The third requirement to impose a pre-filing order focuses on the substance of the party's litigation history to determine whether the party has engaged in a pattern of frivolous or abusive lawsuits. Under Local Rule 83-8.4, the Court may, at its discretion, rely on California law to determine whether a party has engaged in a pattern of activity sufficient to render him a vexatious litigant. *See* C.D. Cal. L.R. 83-8.4; *Ringgold-Lockhart*, 761 F.3d at 1061 n.1; *Huggins v. Hynes*, 117 Fed. Appx. 517 (9th Cir. 2004). Under California Code of Civil Procedure section 391(b), a party is a "vexatious litigant" if he does any of the following:

> (1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing. . . .
> (3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.
>
> Cal. Code Civ. Proc. § 391(b)(1), (3).

Kinney satisfies the criteria of section (b)(1) of the vexatious litigant statute. A "litigation" under section (b)(1) includes proceedings in both trial and appellate courts. *McComb v. Westwood Park Ass'n*, 62 Cal. App 4th 1211, 1216 (Ct. App. 1998). Kinney has "commenced, prosecuted, or maintained" at least five litigations in the seven year period preceding the filing of this lawsuit that have been finally determined adversely to him.[4] *See* Cal. Code Civ. Proc. § 391(b)(1). Indeed, the California Court of Appeal noted in a recent opinion that it was "either the ninth or tenth appeal (we have long lost count)."

[4] Those litigations are:

1. *Kinney v. Three Arch Bay Cmty. Servs. Dist.*—8:16-cv-00796-RGK-JC
2. *Kinney v. Three Arch Bay Cmty. Servs. Dist.*—8:17-cv-01693-RGK-JC
3. *Kinney v. Cooper*—2:15-cv-08910-PSG-JC
4. *Kinney v. Chomsky*— 2:14-cv-05895-PSG-MRW
5. *Keegan v. Viviani*—Court of Appeal No. G048609
6. *Keegan v. Viviani*—Court of Appeal No. G050032
7. *Kinney v. Three Arch Bay Cmty. Servs. Dist.*—Court of Appeal No. G053727
8. *Kinney v. Three Arch Bay Cmty. Servs. Dist.*—Ninth Cir. No. 17-55899
9. *Kinney v. Three Arch Bay Cmty. Servs. Dist.*—U.S. Supreme Court No. 15-7297
10. *Kinney v. Three Arch Bay Cmty. Servs. Dist.*—Orange Cty. Super Ct. Nos. 30-2010-00409507, 30-2011-00529377, 30-2011-00529382

This is only a sampling of Kinney's vexatious activity; it is not intended to be comprehensive.

Kinney, 2017 WL 6276437, at *1. Because Kinney has "commenced, prosecuted, or maintained" so many litigations in the last five years, Kinney is a vexatious litigant under section (b)(1).

Kinney also satisfies the criteria of section (b)(3) of the statute. He repeatedly files "unmeritorious motions, pleadings, or other papers," and regularly engages in tactics that are "frivolous or solely intended to cause unnecessary delay." Cal. Code Civ. Proc. § 391(b)(3). For example, in this case alone, Kinney filed a frivolous motion to transfer the case to the Southern Division (*See* ECF No. 48.), even though the Court already explained in Kinney's last case that the matter was properly before this Court. (*See* Case No. 8:16-cv-00796-RGK-JC, ECF No. 12.) Kinney also filed baseless motions for reconsideration of the Court's orders, ignoring the stringent criteria of Local Rule 7-18. (ECF Nos. 52, 74.) And in the prior lawsuit before this Court, Kinney filed a frivolous appeal to the Ninth Circuit; the Ninth Circuit summarily dismissed the appeal. *Kinney,* 723 Fed. Appx. 553 (9th Cir. 2018). More generally, the Court has already described Kinney's pattern of excessive frivolous lawsuits before other state and federal courts, sometimes pertaining to the Virginia Way property, and other times pertaining to other matters. Despite repeatedly failing to prevail in these lawsuits, Kinney persists in filing new actions and appeals. Kinney engages in other dilatory tactics as well. In his original litigation, for example, the California Court of Appeal expressed its frustration at Kinney's repeated failure to include defendants and allege causes of action. *City of Laguna Beach*, 2009 WL 4693266, at *11. He continues to engage in the same conduct here, failing to include defendants in his initial pleadings, and failing to provide adequate notice under the CWA not once, but twice. Kinney is aware of the CWA's notice requirement, yet has twice now failed to comply with its demands. The Court therefore finds, as the California Court of Appeal found, that Kinney's tactics are purposely and solely intended "to cause unnecessary delay" and "to inflict as much pain and expense on his neighbors as he possibly can." *Kinney*, 2017 WL 6276437, at *1.

Accordingly, based on Kinney's satisfaction of the criteria set forth in the California Vexatious Litigant Statute, the Court concludes that Kinney has engaged in a pattern of frivolous and abusive actions that satisfies the third *DeLong* factor.

4. Breadth of the Order

Lastly, the Court may impose a pre-filing order only if it narrowly tailors the order to the specific harassing conduct at issue. *De Long*, 912 F.2d at 1147.

A pre-filing order must be narrowly tailored to the specific abusive practice at issue "to prevent infringement on the litigator's right of access to the courts." *De Long*, 912 F.2d at 1148 (internal quotation marks omitted). The Court does not take lightly its inherent power to issue a pre-filing order. *Ringgold-Lockhart*, 761 F.3d at 1062 ("In light of the seriousness of restricting litigants' access to the courts, pre-filing orders should be a remedy of last resort."). Kinney is already prohibited from filing in the Central District any new lawsuits related to the Fernwood Matter without the express written

authorization of a judge of this Court. *See* Order Granting Motion to Declare Charles Kinney a Vexatious Litigant, Kinney v. Cooper, No. 2:15-cv-08910-PSG-JC (C.D. Cal. May 13, 2016), ECF No. 70. Viviani now asks that Kinney be prohibited from filing suits related to *any* matter in the Central District without preapproval, and that the Court enter an order requiring Kinney to post security in the amount of $5,000.

The Court modifies this request in two ways. First, to comply with the narrow tailoring requirement, the Court will apply the pre-filing order only to lawsuits against Viviani, the Chaldus, TAB, TABA, the City of Laguna Beach, and/or the California Department of Transportation relating to Kinney's property on Virginia Way. The vexatious activity discussed herein pertains to flooding, drainage, and pollution near that property, so it is appropriate to tailor the pre-filing order in this manner. Second, the Court declines to impose a security requirement at this time. The present case has been dismissed, and the pre-filing order will apply to any future lawsuits. If this or another court within this district determines that that future complaint is not duplicative, frivolous, or harassing, then Kinney should be able to proceed with his case.

V. CONCLUSION

The Court concludes that it has no subject matter jurisdiction over TAB or TABA because Kinney's CWA notice is inadequate. Because all of the defendants are now dismissed from this case, the Court **DISMISSES** the case for lack of subject matter jurisdiction, and **DENIES AS MOOT** TAB's Motion for Summary Judgment (DE 128). In addition, the Court finds that Kinney is a vexatious litigant because he has been filing frivolous and harassing litigation against the defendants for many years. *See* Cal. Code Civ. Proc. § 391. The Court accordingly **GRANTS** Viviani's Motion for Security and Control (DE 15). The Court imposes the following pre-filing restrictions on Kinney:

- Charles Kinney and any person acting on his behalf must obtain written authorization from a Judge of this Court before initiating a new action related to his Virginia Way property, where the pleading asserts claims against Charles Viviani, John and Lynn Chaldu, the City of Laguna Beach, the Three Arch Bay Association, the Three Arch Bay Community Services District, and/or the California Department of Transportation.

- As a condition of being allowed to file any such action, Charles Kinney or anyone acting on his behalf must persuade the Court that the lawsuit is neither frivolous, duplicative, nor harassing.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES - GENERAL

Case No.	8:17-cv-01693-RGK-JC	Date	August 30, 2018
Title	***Kinney v. Three Arch Bay Community Services District et al.***		

	:
Initials of Preparer	VRV