**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

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| ENVIRONMENTAL WORLD WATCH, INC., et al., Plaintiffs, v. THE WALT DISNEY COMPANY, et al., Defendants. | Case No. CV 09-04045 DMG (PLAx) **ORDER RE CROSS-MOTIONS FOR SUMMARY JUDGMENT [DOC. ## 179, 189]** |

This matter is before the Court on Cross-Motions for Summary Judgment filed by Plaintiffs, Environmental World Watch, Inc., Dennis Jackson, Robert Hill, Robin McCall, and William McCall and Defendants, the Walt Disney Company, Walt Disney Enterprises, Inc., and Disney Worldwide Services, Inc. For the reasons set forth below, Plaintiffs' Motion for Summary Judgment is **DENIED**, and Defendants' Motion for Summary Judgment is **GRANTED** as to liability for storm water[1] discharges and **DENIED** as to all other issues.

[1] The Clean Water Act uses the spelling "stormwater," although the EPA has chosen to use "storm water" in its implementing regulations. Throughout this Order, the Court refers to "storm water" except where the alternate spelling is part of a direct quotation.



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# I.

# PROCEDURAL HISTORY

Plaintiffs initiated this action by filing a complaint against Defendants on June 5, 2009 [Doc. # 1]. The operative Fourth Amended Complaint ("4AC") was filed on April 18, 2012 [Doc. # 169]. The 4AC alleges that Defendants discharge storm water, storm water containing pollutants, and/or non-storm water from their studios in Burbank, California ("the Site") into the Los Angeles River in violation of Sections 301(a) and 402 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311(a), 1342, which together prohibit the discharge of pollutants from a point source without a permit issued under the National Pollutant Discharge Elimination System ("NPDES"), subject to certain exceptions. (4AC ¶¶ 1-3.) Plaintiffs seek a declaration that Defendants have violated or are in violation of the CWA; an injunction prohibiting continued violations of the CWA by Defendants; an injunction requiring Defendants to acquire a NPDES permit for their storm water discharges into the Los Angeles River; and reasonable attorney's fees and costs. (4AC at 13.) Defendants filed an Answer to the 4AC on May 2, 2012 [Doc. # 173].

# II.

# EVIDENCE

## A. Evidentiary Matters

### 1. Plaintiffs' Request for Judicial Notice

Plaintiffs ask the Court to take judicial notice of two documents: (1) Regional Water Quality Control Board Order 92-002, NPDES No. CA 0062626, issued January 27, 1993, establishing waste discharge requirements for the Site; and (2) State of California State Water Resources Control Board Notice of Intent to Comply with the Terms of the General Permit to Discharge Storm Water–WQ Order No. 97-03-DWQ. (Indiv. Plfs.' Req. for Judicial Notice [Doc. # 339]; Supplemental Declaration of Jack Silver, ¶¶ 3-4, Exs. 1-2 [Doc. # 337].) These documents satisfy the requirements for judicial notice under Fed. R. Evid. 201 because they are government documents whose contents are not subject to reasonable dispute and whose accuracy cannot reasonably be questioned. *See*

*Santa Monica Baykeeper v. Kramer Metals, Inc.*, 619 F. Supp. 2d 912 (C.D. Cal. 2011) (taking judicial notice of State and Regional Water Quality Control Board documents). The Court questions the relevance of the NPDES permit, however, as it appears to have been issued in 1993 and Plaintiffs present no evidence that it remains in effect presently.

**2. Defendants' Objections to Plaintiffs' Expert Declarations**

**a. Declarations of Dr. Larry Russell**

Plaintiffs submitted two declarations of Larry Russell, Ph.D. in support of their Motion for Summary Judgment. (Declaration of Larry Russell [Doc. # 192]; Supplemental Declaration of Larry Russell [Doc. # 337]; *see also* Defs. Compendium, Ex. 16 [Doc. # 195-5].) Russell holds a Ph.D. in sanitary engineering from the University of California at Berkeley, where he also obtained minor doctorate degrees in chemical engineering and ground water hydrology, a master's degree in sanitary engineering, and a bachelor's degree in civil engineering. (Russell Decl. ¶ 2, Ex. 1 at 28.) Russell is the President of Russell Environmental Engineering and Development Corporation, an environmental consulting firm specializing in sanitary engineering design and evaluation of forensic engineering aspects of ground water cleanups. (*Id.* at 29.) Russell has designed over 100 pretreatment systems for industrial facilities and "industrial ground water clean ups." (*Id.*) Russell's opinions are based on his personal observations during two on-site inspections and his review of public records and water samples taken by the Los Angeles Regional Water Quality Control Board ("RWQCB"), Plaintiffs, and Defendants. (*See generally id.*, ¶ 2, Ex. 1.)

Defendants object to portions of the Russell declaration under Fed. R. Evid. 702 as inadmissible expert testimony. *See Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Federal Rule of Evidence 702 states that a qualified expert witness may testify if

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

According to *Daubert*, the Court must "conduct a preliminary assessment to 'ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable.'" *San Francisco Baykeeper v. W. Bay Sanitation Dist.*, 791 F. Supp. 2d 719, 736 (N.D. Cal. 2011) (citing *Daubert*, 509 U.S. at 589). This assessment includes consideration of (1) the scientific validity of the reasoning or methodology underlying the testimony, and (2) whether that reasoning or methodology can be applied to the facts at issue, or the "fitness" requirement. *Id.* The *Daubert* Court cautioned, however, that the test is a "flexible" one that must be tied to the facts of a particular case. *Daubert*, 509 U.S. at 594; *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). Reliable testimony must be "grounded in the methods and procedures of science and signify something beyond 'subjective belief or unsupported speculation.'" *S.F. Baykeeper*, 791 F. Supp. at 736 (citing *Daubert*, 509 U.S. at 590); *see also Abarca v. Franklin Cnty. Water Dist.*, 761 F. Supp. 2d 1007, 1021 (E.D. Cal. 2011). In determining whether the methodology used is reliable, courts consider whether the technique can or has been tested; whether it has been published and subjected to peer review; the known or potential rate of error in application of the method; the existence of standards and controls and whether the witness has employed them; and whether the methodology is generally accepted in the relevant scientific community. *Daubert*, 509 U.S. at 594-95. In essence, the Court must determine whether the expert's conclusions are the result of "good science." *Abarca*, 761 F. Supp. 2d at 1021. To determine whether the expert has reliably applied the methodology to the facts of the case, the Court considers whether the conclusion represents unfounded extrapolation from underlying data, *United States v. Redlightning*, 624 F.3d 1090, 1112-14 (9th Cir. 2010), and whether the witness has used a subjective methodology, *Guidroz-Brault v. Missouri*, 254 F.3d 825, 831 (9th Cir. 2001), among other factors. Because the

primary purpose of Rule 702 and the *Daubert* analysis is to ensure that only reliable scientific evidence is presented to the trier of fact, any step that renders the expert's analysis unreliable also renders the testimony inadmissible. *Abarca*, 761 F. Supp. 2d at 1072 (citing *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 782 (10th Cir. 1999)).

Defendants assert that significant portions of Russell's declaration are based on unreliable principles and methods and insufficient data. (*See* Defs. Evid. Obj. [Doc. # 318].) Of critical importance here is the question whether Russell's conclusion—that Defendants are discharging zinc, copper, and total organic carbon ("TOC") into the Los Angeles River—is based on evidence collected without regard for generally accepted methods or principles to ensure reliability.

Russell relies on sampling data collected on several dates from 2009 to 2011 by Plaintiffs, the RWQCB, and Defendants in a series of locations on and surrounding Defendants' facilities. (*See* Smalstig Decl. ¶ 15, Exs. 8-10.) The RWQCB conducted water sampling on June 18, June 30, and October 14, 2009 in response to a complaint of possible discharges of hexavalent chromium by Defendants. (Russell Decl. ¶ 15, Ex. 8 at 127; Supplemental Smalstig Declaration, ¶ 18 [Doc. # 319].) The RWQCB samples were taken at the "South Keystone Street and Parkside Avenue Storm Drain," upstream of the Site, the Site's storm drain, and the "Parkside Avenue and South Lamer Street Storm Drain" downstream of the Site. (Russell Decl. ¶ 15, Ex. 8 at 131-32.) The results did not validate the allegations of ongoing discharge of hexavalent chromium to the water, but they did indicate the presence of zinc at all three locations in excess of California Toxics Rule ("CTR") levels.[2] (*Id.* at 132.) The RWQCB did not test for TOC. Suppl. Smalstig

[2] The California Toxics Rule is a water quality standard promulgated by the EPA to "fill a gap in California water quality standards" that existed for several years after a California court overturned the State's water quality control plan in 1994. *See* 40 C.F.R. § 131.38; Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California, 65 F.R. 31682-01 (May 18, 2000) (codified at 40 C.F.R. § 131).

Decl. ¶ 12.) The RWQCB sampling detected copper only on October 14, 2009. (Russell Decl. ¶ 15, Ex. 8 at 161.)

Plaintiffs' samples were taken on October 19 and 20, 2010 and October 12, 20, and 25, 2011. (Russell Decl. ¶ 18, Ex. 10.) The samples were taken from five off-site and four on-site locations, including the locations of the RWQCB samples, by an independent company called System Operation Services, Inc. (*Id.* ¶ 15.) Plaintiffs' samples also reported the presence of zinc, copper, and TOC in excess of CTR levels at most of the sampling locations. (*Id.*)

Finally, Defendants' samples were taken on June 30, 2009, October 14, 2009, and October 12, 2011, by an independent company at the same sites as samples taken by Plaintiffs and RWQCB on those days. (Russell Decl. ¶ 18, Ex. 9.) Defendants' samples confirm the accuracy of the RWQCB samples and Plaintiffs' samples, but they do not constitute a separate data set as they merely replicate the results of Plaintiffs' and RWQCB's testing. (*See* SDF § 33.)

Defendants assert that the water sampling data is unreliable because: (1) the samples were not collected in accordance with minimum sampling practices and standards; (2) the samples were not collected at the point of discharge to the Los Angeles River; and (3) the samples do not include enough sampling data to be representative of Defendant's discharging activities. Defendants' expert, Eric Smalstig, cited several water sampling guidelines, published by the Environmental Protection Agency ("EPA") and other environmental agencies, which he opines Russell should have followed. (*See* Suppl. Smalstig Decl. ¶¶ 4, 5, 7.) Finally, Defendants also argue that Russell failed to account for alternative explanations in interpreting the sampling data.

In his original declaration, Russell states that "EPA approved methods for analyzing the samples were applied by the RWQCB, Ellis and my company." (Russell Decl. ¶ 15.) He does not explain what methodology was used in collecting the samples. In his deposition on April 17, 2012, Russell testified that he was not following "an EPA form or some water board publication . . . in doing the sampling." (Declaration of Garrett

L. Jansma, ¶ 4, Ex. 3 at 114:9-14 [Doc. # 320-5].) He stated that he did not develop a sampling or "work plan" in advance of the sampling other than to attempt to sample as close as possible to the facility property. (*Id.* at 64:5-13.) Rather, he instructed the sampler "[t]o sample as close to the facility property line as possible but not to cross onto private property. And to collect samples, estimate flow and get them to the laboratory and have them analyzed." (*Id.*) In his supplemental declaration of September 20, 2012, however, Russell states that the sampling was conducted in accordance with the *Standard Methods for the Examination of Water and Wastewater*, a generally accepted methodology for water sampling techniques. (Supplemental Declaration of Larry Russell, ¶ 7 [Doc. # 337].) Russell distinguishes "constituent monitoring," which refers to ongoing sampling, from "sampling events," which are limited in scope and time and intended to create a "snapshot" of "the levels of pollutants from the sampling point on the day of the sampling." (*Id.* at ¶ 17.) Plaintiffs also submitted the declaration of Paul Harding, the individual who took Plaintiffs' samples and created the chain-of-custody worksheets to protect the integrity of the samples. (*See generally* Declaration of Paul Harding [Doc. # 338].)

Although the Court is concerned about Russell's failure to thoroughly describe in his initial declaration the methods used to collect and analyze the data, it finds that the water sampling data meets the minimum requirements of Rule 702 and *Daubert*. Russell is experienced in the collection and interpretation of water sampling data, as demonstrated by his curriculum vitae. (*See* Russell Decl. ¶ 2, Ex. 1 at 28.) Importantly, Russell relies not only on data collected by Plaintiffs, but also on data collected by Defendants and the RWQCB. The fact that all three sampling sets yielded the same results suggests to the Court that the results are reliable to the extent they establish that water leaving the Site on those days contained pollutants. *See also S.F. Baykeeper*, 791 F. Supp. 2d at 755 (noting that a defendant may not impeach its own publicly filed reports that show a water sample with pollutant discharges in excess of permit limits). Moreover, Russell's experience and explanation of how the samples were obtained, albeit

tardy, satisfy the Court that his interpretation of those samples is reliable and not based on "subjective belief or unsupported speculation." *S.F. Baykeeper*, 791 F. Supp. 2d at 735.

Additionally, the sampling data satisfies the "fitness" requirement under *Daubert* because it logically advances a material aspect of Plaintiffs' case. *See id.* at 736. Plaintiffs are not required to establish that Defendants engage in daily pollutant discharges; rather, they need only provide evidence from which a reasonable trier of fact could conclude "a continuing likelihood of a recurrence in intermittent or sporadic violations." *Cal. Sportfishing Prot. Alliance v. Diablo Grande, Inc.*, 209 F. Supp. 2d 1059, 1070 (E.D. Cal. 2002) (citing *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 64, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987)). Thus, while the Court does not rely on the samples, or Russell's testimony interpreting them, for the ultimate issue of Defendants' liability under Section 301(a), the Court finds that Russell's testimony is admissible as expert testimony under Fed. R. Evid. 702.[3]

**b. Declarations of Matt Hagemann**

Plaintiffs also submitted the declaration of Matt Hagemann, who prepared a Rebuttal Report in response to Defendants' expert report. (Declaration of Matt Hagemann [Doc. # 186]; Def. Compendium, Ex. 17.) Hagemann spent nine years as a hydrogeologist at the U.S. EPA, including as a regional Senior Science Policy Advisor. (Def. Compendium, Ex. 17 at 925.) While at the EPA, Hagemann implemented EPA regulations and policy related to the CWA, among other legislation. In addition to his work at the EPA, Hagemann has held numerous positions as a geologist and hydrogeologist since 1984. Hagemann's declaration interprets the water samples collected by the RWQCB, Plaintiffs, and Defendants and concludes that Defendants are

[3] Defendants also object to other portions of the Russell declaration in which Russell draws conclusions about the nature of activities on the Site based on his personal observation. The Court need not resolve these objections because it does not rely on Russell's opinions on these matters.

discharging the pollutants zinc, copper, and TOC from the Site's storm water system to the Los Angeles River by way of the Burbank municipal separate storm sewer system. (Hagemann Decl. ¶ 12.)

Defendants object to the Hagemann declaration because, like the Russell declarations, it relies on sampling data that, according to Defendants, is unreliable and does not establish that Defendants in fact discharge pollutants into the Los Angeles River. For the reasons discussed above, the Court finds that the sampling data meets the requirements of reliability and fitness to survive *Daubert*. Accordingly, the Court considers the Hagemann declaration and Rebuttal Report.

**3. Plaintiffs' Objections to the Declarations of Eric Smalstig**

Plaintiffs object to the declarations of Defendants' expert, Eric Smalstig, under Fed. R. Evid. 702. As the Court noted at the hearing on October 5, 2012, Plaintiffs' objections to the original Smalstig declaration, which were not filed until after briefing on the Motions concluded, are untimely and stricken from the record. As to the Supplemental Smalstig declaration, Plaintiffs assert that Smalstig's statements about the CWA's regulatory framework and Defendant's liability thereunder are improper opinion testimony on issues of law and are therefore inadmissible under Rule 702. The Court agrees. The Court does not rely on the Supplemental Smalstig declaration to the extent it draws legal conclusions about Defendant's obligation, or lack thereof, to obtain an NPDES permit for its storm-water or non-storm water discharges.[4] *See Nationwide Transport Finance v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (noting that an expert witness cannot give an opinion as to an ultimate issue of law) (internal citations omitted).

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[4] Although Defendants do not expressly object to similar conclusions about the NPDES regulatory framework contained in the Russell and Hagemann declarations, the Court does not consider those assertions for the same reasons.

**B. Undisputed Facts**

The following facts are taken from the evidence presented by both parties in support of the Cross-Motions for Summary Judgment. The facts set forth below are undisputed unless otherwise noted.

**1. The Site**

Defendants own and operate a 51-acre motion picture studio in Burbank, California ("the Site") where they produce animated and live-action motion pictures and television content. (Defs. Reply Statement of Uncontroverted Facts ("RSUF") ¶ 3 [Doc. # 331].) The Site consists primarily of office buildings and motion picture production facilities such as sound stages, craft shops, film sets, and digital media rooms that support the production and distribution of motion pictures and television programs. (*Id.* at ¶ 4.) In addition, the Site houses certain ancillary facilities that support the Site's primary media production functions. (*Id.* at ¶ 6.) These facilities include parking lots, a commissary, and an automobile service station. (*Id.*) The automobile service station is composed of a car wash and fueling station. (*Id.*) Additionally, Defendants engage in set building, light and heavy construction, landscaping, transportation services, and a variety of other activities on the Site that support the Site's primary functions. (*Id.* at ¶ 24.) According to Lansen, none of the current construction projects disturb more than one acre, either individually or as part of a large common plan of development. (*Id.* at ¶ 23.) The number of employees that work on motion picture and television program distribution operations at the Site is significantly greater than the number of individuals providing these ancillary services. (RSUF ¶ 27.)

The Site generates both storm water (runoff generated during precipitation events) and non-storm water (runoff from irrigation at the facility which originates from the City of Burbank's potable water supplies and seeps beyond the Site's lawns and gardens). (RSUF ¶ 7.) Storm water and at least some non-storm water discharges eventually flow into the Site's storm sewer system. (*Id.*) The Site is a contained system with no inflow from outside storm water system connections that includes drop inlets and underground

piping. (Defs.' Statement of Disputed Facts, ¶¶ 1-2 ("SDF") [Doc. # 317].) The Site's storm sewer system connects and discharges to the City of Burbank's municipal separate storm sewer system ("MS4").[5] (RSUF ¶ 1.) Defendant does not dispute that the storm water collected in the Site's storm sewer system may contain pollutants including zinc, copper, and total organic carbon ("TOC"), or that it does not treat any of its storm water system discharges before they enter the Burbank MS4. (SDF ¶¶ 28, 36.)

The City of Burbank is a named co-permittee on the Los Angeles MS4 NPDES Permit. (Defs. Compendium, Ex. 8 at 685-86.) The evidence does not show that Defendants are permittees or co-permittees on any permit issued by the EPA, the California State Water Resources Control Board, or the RWQCB.

**2. Evidence of Pollutant Discharges**

As discussed above, both parties as well as the RWQCB collected and analyzed water samples from points on and around the Site on several dates after the filing of the original Complaint. Although the parties dispute the reliability and consequences of this data, the following sampling results are undisputed:

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[5] The Burbank MS4 is "designed gravity flow," meaning that water flows downward in elevation toward outfalls using the force of gravity alone. Plaintiffs' experts opine that the change in elevation between the point at which Defendants' storm water system outfalls to the Burbank MS4 and where the Burbank MS4 outfalls to the Los Angeles River establishes that all water that flows from the Site into the MS4 necessarily flows to the river. (*See* Hagemann Decl. ¶ 18.)

**Table 1: Exceedences of the US EPA Parameter Benchmark Values and California Toxics Rule (CTR)**

| Date/Sampled By | Sample Location | | Results (µg/L) | EPA Benchmark (µg/L) | CTR (µg/L) |
|---|---|---|---|---|---|
| 6/30/2009/RWQCB | Disney's Storm Drain | Zinc | 148 | 117 | 120 |
| | Parkside Avenue | | 166 | 117 | 120 |
| | S. Lamer St. | | 166 | 117 | 120 |
| 10/14/2009/RWQCB | Disney's Riverside Drive | | 430 | 117 | 120 |
| | South Buena Vista St. | | 335 | 117 | 120 |
| | Buena Vista St. | | 249 | 117 | 120 |
| 10/12/2011/Plaintiff | Zorro Parking Lot | | 500 | 117 | 120 |
| | Buena Vista St. | | 4070 | 117 | 120 |
| | Refuse E. St. | | 2540 | 117 | 120 |
| | SD West of Keystone/Parkside Rubbish Outlet* | | 900 | 117 | 120 |
| 10/12/2011/Defendant | Zorro Parking Lot | | 484 | 117 | 120 |
| | Buena Vista St. | | 6760 | 117 | 120 |
| | Outside Safety Refuse | | 1670 | 117 | 120 |
| 10/14/2009/RWQCB | South Buena Vista St. | Copper | 65.3 | 63.6 | 13 |
| 10/12/2011 Plaintiff | Buena Vista St. | | 1040 | 63.6 | 13 |
| | Buena Vista St. | | 64.3 | 63.6 | 13 |
| 10/12/2011/Defendant | Buena Vista St. | | 1500 | 63.6 | 13 |
| 10/12/2011/Plaintiff | Refuse E. St. | Total Organic Carbon | 395000 | 110000 | n/a |
| 10/12/2011/Defendant | Outside Safety Refuse | | 330000 | 110000 | n/a |

* Zinc exceedence detected by Plaintiff at Rubbish Outlet not found by Defendant.

(Defs. Compendium, Ex. 17 at 929.) According to Hagemann, the absence of precipitation prior to these sampling dates indicates that the water sampled was non-storm water. (*Id.* at 928.)

## III.

## LEGAL STANDARDS

Summary judgment should be granted "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); *accord Wash. Mut. Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011). Material facts are those that may affect the outcome of the case. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986)). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has met its initial burden, Rule 56(c) requires the nonmoving party to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(c), (e) (1986)); *see also Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010) (en banc) ("Rule 56 requires the parties to set out facts they will be able to prove at trial."). "[T]he inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

## IV.

## DISCUSSION

### A. The Statutory and Regulatory Scheme and NPDES

The CWA's stated purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *see also Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles*, 673 F.3d 880, 885 (9th Cir. 2011), *reversed on other grounds by Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council*, __ U.S. __, 133 S. Ct. 710 (Jan. 8. 2013). At the heart of the CWA is Section 301(a), which states, "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1342 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Under Section 502(12), 33 U.S.C. § 1362(12), "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." Under that framework, entities may comply with the CWA by obtaining an NPDES permit from the EPA or, in some states, from a state agency. The EPA has authorized the State of California to enforce the CWA by implementing its own water-quality standards and issuing NPDES permits. *Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles*, 673 F.3d at 886. Under the Porter-Cologne Water Quality Control Act, the California State Water Resources Control Board and nine regional boards are charged with this enforcement duty. *See* Cal. Water Code §§ 13000, *et seq*. The Los Angeles RWQCB oversees compliance with the CWA in Los Angeles County, including in Burbank.

In addition, private citizens are authorized to bring suit to enforce specific provisions of the CWA. *See* 33 U.S.C. § 1365(a)(1) ("[A]ny citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter."). A citizen plaintiff may prove an ongoing violation of the CWA either "(1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent

or sporadic violations."[6] *Cal. Sportfishing Prot. Alliance*, 209 F. Supp. 2d at 1070 (citing *Gwaltney*, 484 U.S. at 64). Intermittent or sporadic violations do not cease to be ongoing "until the date when there is no real likelihood of repetition." *Natural Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 998 (9th Cir. 2000) (citing *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 172 (4th Cir. 1988)).

Prior to 1987, courts read Section 301(a) as a total prohibition of discharges from point sources except where the EPA issued a permit for the discharge of pollutants. *See Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1374 (D.D.C. 1977). In 1987, Congress passed the Water Quality Act Amendments. Under the amended Section 402(p), 33 U.S.C. § 1342(p), "[p]rior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of storm water."[7] This apparent blanket exemption was limited by certain categories of entities that are required to obtain permits, among them "any discharge associated with industrial activity" and "a discharge from a municipal separate storm sewer system serving a population of 250,000 or more."[8] *Id.* at § 1342(p)(2)(B)-(C); *see also Nw. Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1082 (9th Cir. 2011), *cert. granted by Georgia-Pacific West, Inc. v. Nw. Env'tl Def. Ctr.*,

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[6] An entity's failure to apply for an NPDES permit, alone, does not create a private right of action under the CWA. *See Env'tl. Protection Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 827 (N.D. Cal. 2007) ("[I]n the absence of an actual addition of any pollutant to navigable waters from any point, there is . . . no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.") (internal quotation marks omitted). Accordingly, Plaintiffs may maintain its causes of action only if it can establish that no triable issues exist as to the fact that Defendant discharges pollutants from a point source.

[7] As discussed below, after the statute was enacted, the EPA promulgated a series of regulations through 1999 that modified the NPDES requirements according to the agency's findings regarding certain types of entities' adverse water quality impact. The Court discusses the development of these regulations and how they apply today.

[8] Section 402(p) also requires a permit for any discharge "for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 33 U.S.C. § 1342(p)(2)(E); 40 C.F.R. § 122.26(a)(1)(v). That category is not at issue in this case.

__ U.S. __, 133 S. Ct. 22, 183 L. Ed. 2d 673 (U.S. 2012) ("[A]s part of the 1987 amendments, Congress required NPDES permits for the most significant sources of storm water pollution"). Storm water discharges falling into these categories must obtain an NPDES permit from either the EPA or a state agency. *See* 33 U.S.C. § 402(a)-(b).

Pursuant to Section 402(p)(4), the EPA promulgated regulations in two phases. *Brown*, 640 F.3d at 1082; *see also* 133 Cong. Rec. 983, 1006 (Jan. 8, 1987) (statement of Rep. Roe) ("[Section 402(p)] establishes an orderly procedure which will enable the major contributors of pollutants to be addressed first, and all discharges to be ultimately addressed in a manner which will not completely overwhelm EPA's capabilities."). In 1990, the EPA promulgated the Phase I Rule regarding large municipal and industrial discharges pursuant to Section 402(p)(4). *See Env'tl Def. Ctr., Inc. v. USEPA*, 344 F.3d 832, 842 (9th Cir. 2003). Under Phase II, the EPA was to study storm water discharges not covered by Phase I and issue regulations accordingly. *Id.*; 33 U.S.C. § 1342(p)(5)-(6). In 1999, the EPA promulgated this Phase II rule, which required permits for discharges from small municipal MS4s and from construction activity disturbing between one and five acres. 40 C.F.R. § 122.26(a)(9)(i)(A)-(B).

**B. <u>Defendants' Obligation to Obtain an NPDES Permit for Storm Water Discharges Under Section 402(p)</u>**

Defendants first move for summary judgment on their legal obligation to obtain an NPDES permit for storm-water discharges from the Site. For the reasons discussed below, the Court finds that Defendants are not obliged to obtain an NPDES permit for storm water discharges as a matter of law.

**1. Plaintiffs' Interpretation of Section 402(p) is Untenable**

Plaintiff asks the Court to interpret Section 402(p) as requiring NPDES permits for storm water discharges by entities that are not industrial or municipal and have not otherwise been designated by the EPA as requiring a permit. *See* 33 U.S.C. § 1342(p)(A)-(E). The Court declines to adopt Plaintiffs' broad interpretation of Section 402(p).

Following the 1987 amendments, Courts interpreting Section 402(p) and its implementing regulations acknowledge that facilities are required to obtain an NPDES permit for storm water discharges only if they fall within the categories enumerated in the statute. As noted in *Brown*, *supra*, the changes to Section 402(p) arose after Congress "recognized the EPA's difficulties stemmed in part from the large number of storm water sources falling within the definition of a point source" under the previous law and accordingly "exempted many storm water discharges from the NPDES permitting process." 640 F.3d at 1082-83. In *Conservation Law Found. v. Hannaford Bros., Co.*, the court noted that "the legislative history is replete with evidence that Congress was concerned with the overwhelming and unnecessary regulation created by the absolute prohibition on all storm water discharges that existed before the enactment of the Water Quality Act." 327 F. Supp. 2d 325, 332 (D. Vt. 2004) (finding that the defendant was not required to obtain NPDES permit because it was not subject to an individual designation and was not required to obtain a permit under the Phase I or Phase II regulations, notwithstanding that it discharged storm water from a point source). Moreover, both the Phase I and Phase II regulations have been largely upheld in the Ninth Circuit. *See, e.g.*, *Env'tl Def. Ctr.*, 344 F.3d at 879; *Am. Mining Cong. V. EPA*, 965 F.2d 759, 762 (9th Cir. 1992). Thus, although the previous Section 402(p), as interpreted by *Costle*, 568 F.2d at 1377, required permits for any facility that discharged storm water runoff from its property, the amended version sought to avoid the "administrative nightmare" that would result from actually enforcing such a broad provision. *Id.* (citing 131 Cong. Rec. 15616, 15657 (June 13, 1985) (Statement of Sen. Wallop)).

The Court also rejects Plaintiffs' contention that storm water containing even incidental pollutants becomes non-storm water under the CWA. First, Plaintiffs' interpretation is inconsistent with the plain language of the statute and regulations. Section 301(a) prohibits "the discharge of *any pollutant* by any person" except in compliance with, among others, Section 402, which governs the NPDES permitting scheme. Section 402(p), in turn, governs municipal and industrial discharges "composed

entirely of storm water." Likewise, the regulations define storm water as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13). Thus, if the Court were to accept Plaintiffs' assertion that Section 402(p) governs only discharges *that do not contain pollutants*, the very purpose of that subsection—to bring pollutant-laden discharges into compliance with Section 301(a)—would be completely undermined.

Moreover, Plaintiffs' interpretation does not square with the limited case law addressing this question. As the Supreme Court recently recognized, "*[b]ecause storm water is often heavily polluted* . . . the CWA and its implementing regulations require" certain entities to obtain permits under the NPDES permitting system. *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. at 712 (emphasis added). The Supreme Court's interpretation is consistent with district courts' understanding of the term, as well. In *Rosemere Neighborhood Ass'n v. City of Vancouver*, No. CV 04-05667, 2005 WL 2656995 at *5 (W.D. Wash. Oct. 18, 2005), a district court found that "[i]n the absence of any evidence that [the municipal defendant] is *actively* adding pollutants to the storm water handled by its MS4 system, it is 'comprised entirely of storm water' for purposes of the CWA." (Emphasis added). Similarly, in *Hannaford*, the Court found that the defendant, a shopping plaza that whose runoff indisputably contained pollutants much like the pollutants involved here, was exempt from the requirements of Section 402(p) because it was neither a municipality nor an industrial site, not because its storm water contained pollutants. 327 F. Supp. 2d at 334.

Plaintiffs direct the Court to *Env'tl Prot. Info. Ctr. (EPIC) v. Pac. Lumber Co.*, 301 F. Supp. 2d 1102, 1113 (N.D. Cal. 2004), in which the court held that the defendant's discharge of pollutants mixed with storm water through point sources associated with silvicultural activity was not governed by Section 402(p). In that case, the discharges at issue were found to be outside the ambit of Section 402(p) because they were not composed "entirely of storm water." The court noted, however, that they were instead

subject to the silvicultural regulation at 40 C.F.R. § 122.27. *See id.* at 1113. Here, Plaintiffs do not allege that any other subsection of Section 402 might subject the Site to a permitting requirement. Rather, their allegations rest on Defendants' failure to obtain a permit under Section 402(p). Accordingly, and in light of the more persuasive precedents adopting a broader definition of "storm water," the Court finds that the *Pacific Lumber* court's interpretation of the statute is not controlling and declines to adopt it. *See also Hannaford*, 327 F. Supp. 2d at 334 (acknowledging, but declining to follow, *Pacific Lumber*).

**2. Defendants are not Required to Obtain an NPDES Permit for the Site's Storm Water Discharges**

As previously noted, Section 402(p) requires that all discharges "associated with industrial activity" be regulated by an NPDES permit.[9] Under 40 C.F.R. § 122.26(b)(14), a discharge associated with industrial activity means "the discharge from any conveyance which is used for collecting and conveying storm water and which is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." The regulation lists 11 categories of "industries" subject to the permit requirement. Five of these categories are defined by "Standard Industrial Classification" ("SIC") codes, a system for classifying industries promulgated by the Office of Management and Budget; the remaining six categories are defined narratively.[10] In summary, these categories are:

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[9] In 1991, the California State Water Resources Control Board issued a statewide General Permit for Industrial Discharges, which was modified and reissued in 1997. (Defs. Compendium, Ex. 6.) Industrial facilities operating in California wishing to discharge storm water must submit a "Notice of Intent" to the State Water Resources Control Board and comply with the requirements under the General Permit. (*Id.* at 218.) Defendants have not applied for coverage under this General Permit.

[10] The SIC manual, issued most recently in 1987, is being replaced by the North American Industry Classification System ("NAICS"), first released in 1997. SIC classifications are still widely used by various agencies, including the EPA. (*See* Defs. Compendium, Exs. 19, 20.) According to the NPDES Storm Water Program Question and Answer Document Volume 2, issued by the EPA in July 1993, a facility's SIC code is "based on the primary activity occurring at the site." (*Id.*, Ex. 20 at 991.) "The operation that generates the most revenue or employs the most personnel is the operation in which the facility is primarily engaged." (*Id.*) In a document entitled *NPDES Storm Water Program Question*

(i) facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 C.F.R. subchapter (N);

(ii) facilities engaged in logging, pulp mills, industrial inorganic materials, petroleum refining, leather tanning and finishing, flat glass, steel works, fabricated structural metal products, ship and boat building and repairing;

(iii) facilities engaged in the mineral industry including active or inactive mining and oil and gas exploration, production, processing, or treatment, or transmission facilities that discharge storm water contaminated by contact with raw material, intermediate products, finished products, byproducts, or waste products from the facility;

(iv) facilities engaged in hazardous waste treatment, storage, or disposal facilities;

(v) landfills, land application sites, and open dumps that receive or have received industrial wastes;

(vi) facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards;

(vii) steam electric power generating facilities;

(viii) transportation facilities and portions thereof engaged in vehicle maintenance, including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication);

(ix) treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system;

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*and Answer Document Volume 2*, published in 1993, the EPA instructed facilities to determine their SIC code for the purpose of determining NPDES obligations by determining "the primary SIC code based on the primary activity occurring at the site." (Defs. Compendium, Ex. 20 at 991.)

(x) construction activity, except operations that result in a disturbance of less than five acres of total land area which is not part of a larger common plan of development or sale; and

(xi) textile mills, facilities engaged in the production of meat, tobacco products, apparel, wood kitchen cabinets, furniture and fixtures, paperboard containers and boxes, converted paper and paperboard products, printing and publishing, drugs, paints, varnishes, lacquers, enamels, rubber and miscellaneous plastic products, industrial and commercial machinery and computer equipment, other electronic and electrical equipment, measuring, analyzing, and controlling instruments, other miscellaneous manufacturing industries, and public warehousing and storage.

The parties do not dispute that the Site is not a municipality and does not operate its own MS4. (RSUF ¶ 21.) It is also undisputed that the Site has not been specially designated by the EPA or a California state or regional agency as one that "contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." (RSUF ¶ 22); *see* 33 U.S.C. § 1342(p)(2)(E). Accordingly, Defendants are required to obtain an NPDES permit under Section 402(p) only if the Site can be classified as a facility engaged in industrial activity under 40 C.F.R. § 122.26(b)(14). *See Cal. Sportfishing Prot. Alliance v. Shamrock Materials, Inc.*, No. CV 11-02565, 2011 WL 5223086 at *7 (N.D. Cal. Nov. 2, 2011) ("[T]he primary question here is whether Defendants' Facility is properly 'classified as' any of the SICs listed in 40 C.F.R. § 122.26(b)(14).").

The Site has been assigned the SIC Code 7812, which includes "[e]stablishments primarily engaged in the production of theatrical and nontheatrical motion pictures." (RSUF ¶ 28.) SIC Code 7812 is part of SIC Code Major Group No. 78, which includes "establishments producing and distributing motion pictures."[11] (*Id.* at ¶ 29.) Neither

[11] SIC Code 7812 corresponds with NAICS Code 512110. (RSUF ¶ 32.)

Code 7812 nor Major Group No. 78 is listed in 40 C.F.R. § 122.26(b)(14) as the type of facility engaged in "industrial activity. Over the years, Defendants as well as various government agencies have reported that the Site falls within this group and the corresponding NAICS Code. (*Id.* at ¶¶ 33-34; *see also* Defs. Compendium, Ex. 21.) Thus, at first blush, the Site is not one associated with "industrial activity" subject to the NPDES permitting requirement.

Plaintiffs assert, however, that the Site may still be characterized as an "industrial" site based on the industrial-like activities that take place on the Site. The SIC Manual defines "auxiliaries" as "establishments primarily engaged in performing management or support services for other establishments of the same enterprise. (Defs. Compendium, Ex. 19 at 979. A unit that performs auxiliary functions at the same physical location as the primary site can be considered a separate establishment, and thus subject to a unique SIC Code, if all of the following conditions are met:

(1) Separate reports can be prepared on the number of employees, their wages and salaries, sales, or receipts, and other types of establishment data; and

(2) the unit serves other establishments of the same enterprise; and

(3) employment is significant for both the auxiliary and operating activities.

(*Id.*) Courts have not resolved whether a particular site may be classified with two SIC Codes. *See, e.g.*, *Cal. Sportfishing Prot. Alliance*, 2011 WL 5223086 at *9 (noting that "neither party has definitively established that the Facility can be properly classified only under one SIC Code"). Additionally, the Court can find no authority for the proposition that on-site activities that are industrial in nature are treated as independent of the primary facility and thus subject to a unique NPDES permitting requirement. *Cf. Ecological Rights Found. V. Pac. Gas & Elec. Co.*, No. CV 10-00121, 2011 WL 445091 at *2 (N.D. Cal. 2011) (finding that off-site facilities engaged in industrial activities in support of company's primary function, gas and electricity, were subject to the permitting requirement).

The undisputed facts establish that the Site cannot logically be classified as one engaged in "industrial activities."[12] It is undisputed that the Site's primary activities are the production and distribution of motion pictures and television shows. (RSUF ¶ 5.) The Site also houses certain secondary facilities, such as parking lots, a commissary, and an automobile service station that provides fueling and washing services to employees and visitors to the lot. (*Id.* at ¶ 6.) None of the Site's current construction activities disturbs more than one acre. (*Id.* at ¶ 23.) The number of employees working in the Site's film and television operations is significantly greater than the number of individuals providing the secondary services described above. (*Id.* at ¶ 27.) The revenues generated from the Site's primary activities are also significantly greater than those generated by the secondary facilities. (*Id.* at ¶ 28.) Although it is true that the Site has been designated as a "critical source" by the City of Burbank, this designation relates to the commissary, which the City classifies as a restaurant, and not the Site's automobile services, as Plaintiffs allege. (*See* Defs. Compendium Ex. 8 at 811.) Plaintiffs attempt to demonstrate that the Site's industrial-like activities are so substantial as to warrant special classification, but neither the undisputed facts nor the case law support such a finding. *See, eg., Ecological Rights Found. v. Pac. Gas & Elec. Co.*, No. CV 10-00121, 2013 WL 1124089 at *4-5 (N.D. Cal. Mar. 1, 2013) (declining to classify off-site facilities that support non-industrial facilities as "industrial" in part because the EPA and California Water Resources Board do not endorse such an interpretation of Section 402(p)). The Court finds that the Site does not discharge storm water associated with industrial activity under Section 402(p), and Defendants are not required to obtain an NPDES permit for their storm water discharges.

[12] Indeed, both of Plaintiffs' experts declined to opine whether the Site creates "discharges associated with industrial activity." (*See* RSUF ¶¶ 38-41.)

Accordingly, Defendant's Motion for Summary Judgment as to its obligation to obtain an NPDES permit for its storm water discharges is **GRANTED.** Plaintiffs' Motion for Summary Judgment is **DENIED** as to this question.

**C. Defendant's Obligation to Obtain an NPDES Permit for Non-Storm Water Discharges Containing Pollutants**

Defendant next seeks summary judgment that it need not obtain an NPDES permit for discharges of pollutants in its non-storm water, which consists of irrigation runoff and water from occasional fire line flushing. (*See* SDF ¶ 26.) Plaintiffs assert that, because the non-storm water contains copper, zinc, and TOC, which are pollutants, Defendant must obtain an NPDES permit to comply with the CWA's total ban on unpermitted point-source discharges. Defendant argues that its discharges are "conditionally exempt" from the permitting requirement under the Los Angeles County MS4 NPDES permit ("LA MS4 Permit").

In addition to requiring permits for discharges associated with industrial activities, Section 402(p) requires that municipalities obtain NPDES permits for all storm water discharges from MS4s. 33 U.S.C. §1342(p)(2)(C). As a condition of such permit, municipalities are required to "effectively prohibit non-stormwater discharges into the storm sewers" and "require controls to reduce the discharge of pollutants to the maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B). The EPA has interpreted this "effective prohibition" requirement to mean that

> municipalities will not be held responsible for prohibiting some specific components or discharges or flows [including fire hydrant flushing and landscape irrigation] through their municipal separate storm sewer system, even though such components may be considered non-storm water discharges, unless such discharges are specifically identified on a case-by-case basis as needing to be addressed. *However, operators of such non-storm water discharges need to obtain NPDES permits for these discharges*

> *under the present framework of the CWA (rather than the municipal operator of the municipal separate storm sewer system).*[13]

National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 F.R. 47990-01, 47995 (Nov. 16, 1990) (codified at 40 C.F.R. §§ 122-124) (emphasis added).

Los Angeles County operates its MS4 pursuant to the LA MS4 Permit. (Defs. Compendium, Ex. 8.) The LA MS4 Permit names as permittees approximately 80 cities in the Los Angeles region, the Los Angeles County Flood Control District, and Los Angeles County, including the City of Burbank. (*Id.* at 685.) Among the requirements in the LA MS4 Permit is the requirement that permittees "effectively prohibit non-storm water discharges into the MS4 and watercourses, except where such discharges" are covered by a separate NPDES permit for non-storm water discharges or fall into one of the categories of conditionally exempt discharges. (*Id.* at 642.) These conditionally exempt categories include "[f]lows incidental to urban activities" including "reclaimed and potable landscape irrigation runoff." (*Id.*) The LA MS4 Permit notes,

> [I]n the event that any of the above categories of non-storm water discharges are determined to be a source of pollutants by the Regional Board Executive Officer, the discharge will no longer be exempt from this prohibition unless the Permittee implements conditions approved by the Regional Board Executive Officer to ensure that the discharge is not a source of pollutants.

(*Id.* at 643.) The LA MS4 Permit also establishes a program for the elimination of all "illicit discharges," which are defined as discharges "to the storm drain system that [are] prohibited under local, state, or federal statutes, ordinances, codes, or regulations," including non-storm water discharges except where authorized by an NPDES permit,

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[13] At argument, Defendant stated that this rulemaking does not apply to the present case because it was in reference to the "Phase II" regulations. In fact, it is the Phase I regulation that governs the Burbank MS4, as Los Angeles County serves a population of 250,000 or more. *See* 33 U.S.C. § 1342(p)(2)(C); 40 C.F.R. § 122.26(a)(1)(iii).

conditionally exempt as described above, or authorized by the Regional Board Executive Officer.[14] (*Id.* at 683.) Pursuant to the LA MS4, the City of Burbank has implemented a "storm water and runoff pollution control ordinance." Burbank Mun. Code § 8-1-1003 (Defs. Compendium, Ex. 13.)

Defendants assert that, because the Site's non-storm water discharges from landscape irrigation and fire line flushing are conditionally exempt from the LA MS4 prohibition requirement, they are also exempt from the permitting requirement even if they entrain pollutants. There is little case law interpreting the scope and effect of municipal NPDES permits, and what does exist offers neither clarity nor consensus on the obligations of private entities that discharge to NPDES-permitted MS4s. Nevertheless, the Court finds that Defendants' proposed "implied exemption" interpretation is not supported by the language of the statute or regulations, case law, or the purpose or intent of the CWA.

First, Section 402(p)(3)(B) states that permits for discharges from MS4s "shall include a requirement to effectively prohibit non-stormwater discharges." A plain reading of this language strongly suggests that it is intended to impose obligations on and create exemptions for *operators of MS4s*, not on dischargers to MS4s. This reading is consistent with the regulation at 40 C.F.R. § 122.26(a)(3)(i), which states that "[p]ermits must be obtained for all discharges from large and medium municipal separate storm sewer systems." Although the regulation authorizes the issuance of a "system-wide permit covering all discharges from municipal storm sewers within a large or medium [MS4]," it requires the operator of a discharge from an MS4 to either participate in a permit application or submit a distinct permit application to cover its own discharges. 40 C.F.R. § 122.26(a)(3)(iii). Thus, the regulation does not appear to allow a discharger of a

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[14] The regulations define "illicit discharge" as "any discharge to a [MS4] that is not composed entirely of storm water except discharges pursuant to a NPDES permit (*other than the NPDES permit for discharges from the municipal separate storm sewer*) and discharges resulting from firefighting activities." (Emphasis added).

pollutant to automatically avoid the permitting requirement merely because its discharges flow into an otherwise NPDES-compliant MS4.

This reading is also consistent with case law interpreting the NPDES regulatory framework. Courts in the Ninth Circuit consistently hold that the CWA imposes strict liability for NPDES violations. *See Kramer Metals*, 619 F. Supp. 2d at 919; *Hawaii Thousand Friends v. City and Cnty. of Honolulu*, 821 F. Supp. 1368, 1392 (D. Haw. 1993). In *S.F. Baykeeper*, 791 F. Supp. 2d at 770-73, the court examined whether the defendant's discharges were covered under the regional MS4 permit as "permitted discharges." The defendant argued that the regional MS4 tolerated some pollution, and therefore the defendant's discharges were permitted as long as they did not exceed the terms of the permit, notwithstanding that the defendant was not a named permittee or intended third-party beneficiary of the permit. *Id.* at 770. The court first noted that "dischargers are not insulated from liability merely because they make illegal discharges via a system owned and operated by other entities." *Id.* at 771; *see also United States v. Ortiz*, 427 F.3d 1278, 1284 (10th Cir. 2005) (defendant's discharges of pollutants through a storm drain violated the CWA even though the storm drain was operated by a separate municipality). The court next noted that "an NPDES permit should be interpreted like a contract," and therefore the absence of an apparent intent in the permit to benefit the defendant counseled against implying coverage. *Id.*; *see also Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles*, 673 F.3d at 892 ("We review a permit's provisions and meaning as we would any contract or legal document."). The court concluded that a permit covers only permittees. *Id.* at 772.

The Court finds that Defendants may not shield themselves from liability for non-storm water pollutant discharges under the LA MS4 Permit. The language of the statute, regulations, and the permit itself focuses on the conduct and responsibilities of the *permittees*, not other entities within the jurisdiction of the permittees that also discharge pollutants. *See also Piney Run Pres. Assoc. v. Cnty. Comm'rs of Carroll Cnty*, 268 F.3d 255 (4th Cir. 2001) (noting that "as long as a *permit holder* complies with the CWA's

reporting and disclosure requirements, *it* may discharge pollutants not expressly mentioned in the permit") (emphasis added).

The "effective prohibition" requirement on which Defendant relies imposes an affirmative obligation on the permittees—to prohibit all but certain common (and often innocuous) types of non-storm water discharges—but it does not supplant the independent permitting requirement that exists for all non-storm water discharges containing pollutants. The language of the LA MS4 Permit, which focuses on the permittees' obligations rather than the actions of third-party dischargers, supports this reading of the statute. (*See* Defs. Compendium, Ex. 8 at 642) (noting that the permittees, including Burbank, "shall comply with the following" obligations, including one to "effectively prohibit non-storm water discharges into the MS4 . . . except where such discharges" fall within the conditional exemptions). That Burbank has implemented a storm water and runoff pollution control ordinance merely demonstrates the municipality's compliance with the LA MS4 Permit.[15] (*See id.*)

The Court concludes that Defendant is not exempt or conditionally exempt from the NPDES permitting requirement for non-storm water discharges containing pollutants. Accordingly, Defendant's Motion for Summary Judgment is **DENIED** as to this issue.

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[15] The Burbank ordinance prohibits non-storm water discharges other than those "pursuant to an NPDES permit or discharges that are exempted or conditionally exempted by such permit." (Defs. Compendium, Ex. 13 at 852.) This language is consistent the statute's requirement that the municipality "effectively prohibit" all non-storm water discharges because it does not obligate the municipality to regulate certain discharges; it does not, however, exempt unpermitted dischargers themselves from obtaining an NPDES permit. The Court also notes that Permit 1168, issued to Defendant in 2009, authorizes Defendant to discharge process wastewater subject to standards set forth therein. (*See* Defs. Compendium, Ex. 6.) Permit 1168 states that "No person shall cause any discharge to enter the storm drain system unless such discharge . . . [c]onsists of nonstormwater that is authorized by an NPDES permit issued by the U.S. EPA, the State Board, or a Regional Board." Accordingly, while Permit 1168 sets effluent limitations for Defendant's process wastewater discharges, it does not bring Defendant into compliance with the CWA's permitting requirements for non-storm water discharges.

**D. Defendants' Liability for Non-Storm Water Discharges Containing Pollutants Under CWA § 301(a), 33 U.S.C. § 1311(a)**

Plaintiffs request partial summary judgment as to (1) Defendants' liability under Section 301(a) for discharging pollutants from a point source, and (2) Defendants' liability under Section 402(p) for discharging storm water without an NPDES permit. The Court has already determined that Defendants are not required to obtain an NPDES permit for storm water discharges because the discharges are not "associated with industrial activity" under Section 402(p). *See* § III.A, *supra*. Accordingly, Plaintiffs' Motion for Summary Judgment is denied as to that issue. Defendant's non-storm water discharges, however, are not similarly exempt from the permitting requirement.

As discussed above, the CWA prohibits the discharge of pollutants into navigable waters, which is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The CWA defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). A point source "need not be the original source of the pollutant; it need only convey the pollutant to navigable waters." *Rapanos v. United States*, 547 U.S. 715, 743, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006) (citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 105, 124 S. Ct. 1537, 158 L. Ed. 2d 264 (2004)). The Ninth Circuit has held that storm sewers are established point sources subject to NPDES requirements. *Env'tl Def. Ctr., Inc.*, 344 F.3d at 841.

To establish a violation of Section 301(a), Plaintiffs must show (1) discharge of a pollutant; (2) from a point source; (3) to navigable waters; (4) without an NPDES permit. *Env'tl Protection Info. Ctr. v. Pac. Lumber Co.*, 301 F. Supp. 2d 1102, 1105-06 (N.D. Cal. 2004) (citing *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993)). As noted above, to establish a continuing violation of the

CWA, Plaintiffs need only show that discharges continued on or after the date the complaint was filed or evidence from which a reasonable trier of fact could find a continuing likelihood of intermittent or sporadic violations. *See Cal. Sportfishing Protection Alliance*, 209 F. Supp. 2d at 1070.

As described above, both parties, as well as the RWQCB, collected water samples from locations on and around the Site on several dates following the initiation of this lawsuit. (SDF ¶ 31.) Samples taken on June 30, 2009, October 14, 2009, and October 12, 2011, contained zinc, copper, and TOC, as described in the chart above. *See* § III.B.2, *supra*. It is undisputed that on each of these dates, the levels of zinc, copper, and TOC exceeded the EPA Benchmark and CTR levels.[16] (SDF ¶ 31.)

The parties disagree as to whether a violation of CWA § 301(a) occurs where the level of pollutants in a discharge exceeds the EPA Benchmark, the CTR, or neither. The Court can find no binding authority addressing the question in the present context. *But see Kramer Metals*, 619 F. Supp. 2d at 927 (finding that the CTR is a "water quality standard" for the purpose of California's General Industrial Storm Water Permit, and a discharge of pollutants in excess of the CTR constitutes a violation of the permit). The Court notes, however, that the CWA imposes strict liability for NPDES violations and neither the CWA nor its implementing regulations contain an exception for "de minimis" violations. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979) (noting EPA's authority to grant exemptions for de minimis circumstances where doing so would be a reasonable interpretation of the CWA); *Hawaii's Thousand Friends*, 821 F. Supp. at 1392 (noting that the CWA does not excuse de minimis violations). The Court also notes

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[16] EPA Benchmarks are "the pollutant concentrations above which EPA determined represent a level of concern" and "a level that, if below, a facility presents little potential for water quality concern." *Santa Monica Baykeeper v. Int'l Metals Ekco, Ltd.*, 619 F. Supp. 2d 936, 943 (C.D. Cal. 2009) (citing Final Reissuance of National Pollutant Discharge Elimination System (NPDES) Storm Water Multi-Sector General Permit for Industrial Activities, 65 F.R. 64746-01, 64746 (Oct. 30, 2000)). The EPA uses the EPA Benchmarks as a measurement of the effectiveness of control measures implemented pursuant to NPDES permits. *See id.* at 944.

that the RWQCB used the CTR as its benchmark for determining a CWA violation in its October 2009 sampling, and courts in this district have held that the CTR is an adequate measure of an entity's compliance with its permit. *Kramer Metals*, 619 F. Supp. 2d at 927; *Int'l Metals Ekco*, 619 F. Supp. 2d at 948. (*See also* Russell Decl. ¶ 15, Ex. 8 at 127.) The Court need not resolve this dispute at this time, because the evidence shows that Defendant's discharges contained pollutants in excess of both the EPA benchmarks and the CTR.

Plaintiffs must also establish, however, that Defendant discharged the pollutants *to the Los Angeles River*, a navigable water. Plaintiffs assert that the design of the Burbank MS4 and the relative elevations of the Site, the MS4, and the outfall to the Los Angeles River, make it inevitable that any discharges from the Site eventually enter the river. (*See* Hagemann Decl. ¶ 8; Suppl. Russell Decl. ¶¶ 20, 23 ("The RWQCB sampling results are direct evidence that pollutants from [the Site] outfall emit to the Los Angeles River . . . This premise is accepted across the industry concerning the fate and transport of toxic metals once they enter a storm drain system of the same type existing within [the Site] and the MS4 system.").) Without disputing the design of its own storm water system or the MS4, Defendants allege that the evidence does not establish that the pollutants actually discharged to the river. As Smalstig notes, no samples were taken from the Burbank MS4's outfall to the Los Angeles River. (Suppl. Smalstig Decl. ¶ 20.) In fact, of the 18 total samples taken, only three were taken from locations near to the point where the Site discharges to the Burbank MS4. (*Id.* ¶ 19.) Smalstig opines it is likely that "some exfiltration occurs within the conveyance systems . . . through leaks at corroded connections, broken pipe sections or old sewer pipe joints," which could mean that pollutants discharged from the Site do not actually enter the Los Angeles River. (*Id.*

at ¶ 27.) Plaintiffs' experts do not demonstrate that they accounted for this possibility when analyzing the samples.[17]

In *S.F. Baykeeper v. W. Bay Sanitary Dist.*, the plaintiff put forth a similar argument as do Plaintiffs here: because the defendant's non-storm water discharges reached the local MS4, they should be "presumed to reach surface waters because subsequent rain event[s would] wash the pollutants through the MS4 to surface waters." 791 F. Supp. 2d at 761. The court rejected this argument, noting that the plaintiff provided no persuasive case law establishing the proposition that once a discharge "hits an MS4, it is presumed to reach surface waters even *e.g.*, in the face of a clean up effort." *Id.* Although Defendants do not claim that any clean up effort prevents their discharges from entering the river, the Court is disinclined to grant Plaintiffs' motion for summary judgment on this issue where Plaintiffs have not demonstrated the absence of a triable issue of fact as to whether the pollutants reached the Los Angeles River. *See id.*

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[17] The parties do not dispute that "the point of compliance identified in NPDES permits for discharges to the LA/Burbank MS4 is the point where the discharge enters the MS4." (RSUF ¶ 25.) The standards set forth in an NPDES permit, however, have no bearing on Defendants' discharges because Defendants are not currently subject to any permit. Moreover, even if that standard did apply here, Smalstig's extensive testimony on Plaintiffs' failure to test at the MS4's outfall to the Los Angeles River suggests that the point of compliance is disputed.

## V.

## CONCLUSION

For the reasons discussed above, the Court orders the following:

(1) Defendant's Motion for Summary Judgment is **GRANTED** as to Defendant's obligation to obtain an NPDES permit for its storm water discharges;

(2) Defendant's Motion for Summary Judgment is **DENIED** as to all other issues;

(3) Plaintiff's Motion for Summary Judgment is **DENIED** in its entirety; and

(4) By no later than October 3, 2013, the parties shall meet and confer and file a Joint Report regarding a proposed new final pretrial conference and trial date.

**IT IS SO ORDERED.**

DATED: September 23, 2013

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE