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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 State of Arizona, *ex rel*, Henry R. Darwin,
10 Director, Arizona Department of
Environmental Quality,

11 Plaintiff,

12 v.

13 International Boundary and Water
14 Commission, United States Section;
Edward Drusina, in his official capacity
15 as Commissioner of the International
Boundary and Water Commission, United
16 States Section,

17 Defendants and Third-
Party Plaintiffs,

18 v.

19 City of Nogales, Arizona,

20 Third-Party Defendant.
21

No. CV-12-00644-TUC-FRZ

ORDER

22 Plaintiff State of Arizona *ex rel* Henry R. Darwin, Director, Arizona Department
23 of Environmental Quality filed this action against the United States International
24 Boundary and Water Commission (“USIBWC”) and USIBWC Commissioner Edward
25 Drusina, in his official capacity, in the Superior Court of the State of Arizona, Maricopa
26 County, on May 25, 2012.

27 The case was removed by Defendants to federal court on June 22, 2012 and
28 ordered transferred to the Tucson Division on July 8, 2013.

1 The First Amended Complaint, filed May 28, 2013, alleged nine claims of
2 violations of the Arizona Pollutant Discharge Elimination System Permit Program,
3 adopted in the State of Arizona pursuant to Arizona Revised Statutes Title 49, Chapter 2,
4 Article 3.1 and Arizona Administrative Code Title 18, Chapter 9, Article 9 and 10, and
5 for violations of the Arizona Pollutant Discharge Elimination System Permit, No.
6 AZ0025607, issued by the Arizona Department of Environmental Quality (“ADEQ”) to
7 the United States Section of the International Boundary and Water Commission
8 (“USIBWC”) on November 19, 2007 and of a Compliance Order issued by ADEQ on
9 December 21 2010.

10 Defendants/Third-Party Plaintiffs filed a Third-Party Complaint against the City of
11 Nogales on July 12, 2012. (Doc 5)

12 At issue is USIBWC’s alleged illegal discharge of wastewater and disposal of
13 biosolids (sewage sludge) from the Nogales International Wastewater Treatment Plant
14 (“NIWTP”) located in Southern Arizona, and alleged illegal discharges from the
15 International Outfall Interceptor (“IOI”), which is the binational sewage collection
16 system that USIBWC used to convey wastewater from Mexico to the NIWTP for
17 treatment.

18 The Court granted judgment on the pleadings as to Claims 1, 3 and 4 by Court
19 Order filed September 26, 2014. (Doc. 35)

20 Before the Court for consideration is Plaintiff State of Arizona’s Motion for Partial
21 Summary Judgment: Liability for Counts 2, 5, 6, 7, 8 and 9, seeking summary judgment
22 as to liability on the remaining allegations of the Amended Complaint.

23 This matter was referred to the United States Magistrate Judge for all pretrial
24 proceedings and report and recommendation in accordance with the provisions of 28
25 U.S.C. § 636(b)(1) and LRCiv 72.1 and LRCiv 72.2, Rules of Practice of the United
26 States District Court for the District of Arizona.

27 Magistrate Judge D. Thomas Ferraro issued his Report and Recommendation on
28 June 18, 2015, following full briefing and oral argument on the matters, heard June 8,

1 2015, recommending that the District Court grant Plaintiff summary judgment as to
2 Claim 5, and deny partial summary judgment as to Claims 2, 6 and 7 as moot; and deny
3 summary judgment as to Claims 8 and 9 based on genuine issues of material fact.

4 The Report and Recommendation (Doc. 68) sets forth a concise factual
5 background and analysis of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*; the Arizona
6 Pollutant Discharge Elimination System (“AZPDES”) permit program - a federally
7 approved National Pollutant Discharge Elimination System (“NPDES”) - administered by
8 the Arizona Department of Environmental Quality (ADEQ) and approved under the
9 Equal Protection Agency (“EPA”), 33 U.S.C. § 1342(a).

10 Under the summary judgment legal standard, pursuant to Rule 56, Fed.R.Civ.P.,
11 the Report and Recommendation addresses each remaining claim, applying the relevant
12 legal analysis under the procedural and provisional requirements of the state and federal
13 compliance regulations at issue.

14 The parties were advised that, pursuant to Rule 72(b)(2), Fed.R.Civ.P., any party
15 may serve and file written objections within fourteen days of being served with a copy of
16 the Report and Recommendation, and a party may respond to the other party’s objections
17 within fourteen days therefrom.

18 Defendants filed Defendants’ Corrected Objections to Report and
19 Recommendation on Plaintiff’s Partial Motion for Summary Judgment on July 2, 2015,
20 (Doc. 70) objecting to the recommendation (1) that the Court find that Count 5 is not
21 moot; and (2) that the Court find USIBWC liable on Count 5 of the Amended Complaint
22 because USIBWC has admitted the allegation of Count 5. Defendants, referencing the
23 permit issued by the State in 2014, argues that Count 5 is moot and present arguments to
24 distinguish the authority cited by the Magistrate Judge in support of his findings and
25 recommendation. Plaintiff filed a response requesting the Court reject USIBWC’s
26 objections and grant summary judgment on Count 5. (Doc. 74).

27 Upon review and consideration of all matters presented and an independent
28 review of the record herein, including Defendants’ Corrected Objections to the Report

1 and Recommendation on Plaintiff's Partial Motion for Summary Judgment, the Court
2 finds that the findings of the Magistrate Judge as set forth in the Report and
3 Recommendation, shall be accepted and adopted as the findings of fact and conclusions
4 of law of this Court.

5 Based on the forgoing,

6 **IT IS HEREBY ORDERED** that the Report and Recommendation of the
7 Magistrate Judge (Doc. 68) is **ACCEPTED and ADOPTED** as the findings of fact and
8 conclusions of law by this Court; accordingly

9 **IT IS ORDERED** that Plaintiff State of Arizona's Motion for Partial Summary
10 Judgment: Liability for counts 2, 5, 6, 7, 8 and 9 (Doc. 45) is **GRANTED in part and**
11 **DENIED in part;**

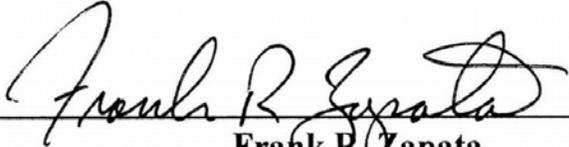
12 **IT IS FURTHER ORDERED** that Plaintiff is **GRANTED** summary judgment as
13 a matter of law as to Count Five of the First Amended Complaint;

14 **IT IS FURTHER ORDERED** that summary judgment is **DENIED** as to Counts
15 Eight and Nine based on the finding of a genuine issue of material fact;

16 **IT IS FURTHER ORDERED** that Counts Two, Six and Seven are
17 **DISMISSED as moot;**

18 **IT IS FURTHER ORDERED** that this case remains referred to Magistrate Judge
19 D. Thomas Ferraro for all pretrial proceedings and report and recommendation, including
20 the Motion of the City of Nogales for Summary Judgment on Third Party Claim (Doc.
21 64) in accordance with the provisions of 28 U.S.C. § 636(b)(1) and Local Rules LRCiv
22 72.1 and LRCiv 72.2. All filings shall be designated: **CV 12-644 TUC-FRZ (DTF)**

23
24 Dated this 30th day of September, 2015.

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26 
27 **Frank R. Zapata**
28 **Senior United States District Judge**