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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA SPORTFISHING  
PROTECTION ALLIANCE, a non-  
profit corporation,

Plaintiff,

v.

CHICO SCRAP METAL, INC., a  
California corporation;  
GEORGE SCOTT, SR.,  
individually and as trustee  
of GEORGE W. SCOTT, SR.  
REVOCABLE INTER VIVOS TRUST  
DATED SEPTEMBER 25, 1995,

Defendants.

No. 2:10-CV-01207-GEB-AC

**ORDER GRANTING IN PART AND  
DENYING IN PART EACH PARTY'S  
SUMMARY JUDGMENT MOTION**

Pending are cross motions for summary judgment on the  
claims alleged in Plaintiff's Third Amended Complaint ("TAC")  
under the federal Clean Water Act ("CWA") and California Health &  
Safety Code section 25249.

**II. UNCONTROVERTED FACTS<sup>1</sup>**

Defendants "own and/or operate the [scrap metal  
recycling] facility located at 1855 Kusel Road in Oroville,  
California ('the Facility')." (Pl.'s SUF ¶¶ 1, 8, ECF No. 189.)

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<sup>1</sup> The following facts concerning the motions are either admitted or  
"deemed" uncontroverted since they have not been controverted with specific  
facts as required by Local Rule 260(b).

1 "The [F]acility's primary purpose is to receive, separate, and  
2 ship recyclable . . . scrap metals, plastics, and CRV items  
3 (bottles and cans). . . . The received materials are separated at  
4 the facility, bailed and shipped." (Packard Decl. Ex. SS, Resp.  
5 No. 12 p. 9, ECF No. 168-7.) The Facility has "stockpiles of  
6 metal and other debris" and "[m]ost of the industrial activities  
7 at the Facility occur outdoors." (Pl. SUF ¶ 11.) When it rains,  
8 "[s]torm water associated with [the Facility's] industrial  
9 activities is discharged from the Facility." (Pl.'s SUF ¶ 10.)

## 10 II. LEGAL STANDARD

11 A party is entitled to summary judgment if  
12 "the movant shows that there is no genuine  
13 dispute as to any material fact and the  
14 movant is entitled to summary judgment as a  
matter of law." . . . The moving party has  
the burden of establishing the absence of a  
genuine dispute of material fact.

15 City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1049 (9th Cir.  
16 2014) (quoting Fed. R. Civ. P. 56(a)) (citing Celotex Corp. v.  
17 Catrett, 477 U.S. 317, 323 (1986)). "A fact is 'material' when,  
18 under the governing substantive law, it could affect the outcome  
19 of the case." Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav.  
20 Ass'n, 322 F.3d 1039, 1046 (9th Cir. 2003) (quoting Anderson v.  
21 Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). A "dispute about  
22 a material fact is 'genuine,' . . . if the evidence is such that  
23 a reasonable jury could return a verdict for the nonmoving  
24 party." Anderson, 477 U.S. at 248. Summary judgment "evidence  
25 must be viewed in the light most favorable to the nonmoving  
26 party, and all reasonable inferences must be drawn in favor of  
27 that party." Sec. & Exch. Comm'n v. Todd, 642 F.3d 1207, 1215  
28 (9th Cir. 2011) (citing Johnson v. Paradise Valley Unified Sch.

1 Dist., 251 F.3d 1222, 1227 (9th Cir. 2001)).

2 A party asserting that a fact cannot be or is  
3 genuinely disputed must support the assertion  
4 by . . . citing to particular parts of  
5 materials in the record . . . or . . .  
6 showing that the materials do not establish  
7 the absence or presence of a genuine dispute,  
8 or that an adverse party cannot produce  
9 admissible evidence to support the fact.

7 Fed. R. Civ. P. 56(c)(1).

8 However, if the nonmovant does not  
9 "specifically . . . [controvert duly  
10 supported] facts identified in the [movant's]  
11 statement of undisputed facts," the nonmovant  
12 "is deemed to have admitted the validity of  
13 the facts contained in the [movant's]  
14 statement." Beard v. Banks, 548 U.S. 521, 527  
15 (2006). A district court has "no independent  
16 duty 'to scour the record in search of a  
17 genuine issue of triable fact.'"

14 Simmons v. Navajo Cnty., Ariz., 609 F.3d 1011, 1017 (9th Cir.  
15 2010) (quoting Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir.  
16 1996)).

### 17 III. DISCUSSION

#### 18 A. Objections

##### 19 1. Rule 26

20 Each party objects to what it characterizes as expert  
21 testimony evidence; Plaintiff moves to strike the declaration of  
22 Bryan Gartner submitted in support of Defendants' motion and  
23 Defendants move to exclude paragraphs 13-22 and the attached  
24 exhibits L-U from the Declaration of John Lane submitted in  
25 support of Plaintiff's motion.

26 Each objection is made under Federal Rule of Civil  
27 Procedure 26(a)(2)(B), which requires a party to disclose a  
28 written report for an expert witness who "is retained or

1 specially employed to provide expert testimony in the case;" the  
2 report must include "a complete statement of all opinions the  
3 witness will express and the basis and reasons for them; the  
4 facts of data considered by the witness in forming them; [and]  
5 any exhibits that will be used to summarize or support them."

6 (emphasis added.)

7 Plaintiff argues the Gartner declaration offers expert  
8 testimony and therefore Defendants violated Rule 26 by not  
9 disclosing his opinions earlier. Defendants counter the  
10 declaration does not contain expert testimony and instead  
11 discloses Gartner's personal observations based on his work at  
12 the Facility.

13 The Gartner declaration details Gartner's work  
14 conducted on behalf of Defendants in connection with the  
15 Facility's efforts to comply with a Department of Toxic Substance  
16 Control Order. Plaintiff has not shown that the subject matter of  
17 Gartner's declaration was subject to Rule 26's disclosure  
18 requirements. Therefore, Plaintiff's motion challenging the  
19 declaration is denied.

20 Defendants argue the referenced portions of Lane's  
21 declaration should be excluded because they include new opinions  
22 on the adequacy of the Facility's Best Management Practices  
23 ("BMPs").

24 Plaintiff responds that although Lane was retained as  
25 an expert on whether discharges from the Facility reach the  
26 Feather River, his factual statements regarding BMPs serve only  
27 to authenticate Exhibits L-U, which are photographs he took of  
28 the Facility, and therefore the referenced portions of his

1 declaration are not subject to the expert disclosure rule.  
2 Plaintiff argues that even though lane took the photographs he  
3 has not given an opinion based on what is depicted in the  
4 photographs.

5 Exhibits L-U attached to the Lane declaration are  
6 photographs of the Facility, and paragraphs 13-22 of the  
7 declaration declare when and how Lane took the referenced  
8 photographs. Therefore, Defendants have not shown the referenced  
9 portions of Lane's declaration are subject to Rule 26's  
10 disclosure requirements and their motion challenging the  
11 declaration is denied.

## 12 **2. Evidentiary Objections to Declarations**

13 Plaintiff submitted 126 evidentiary objections to the  
14 content of the declarations Defendants submitted in support of  
15 their motion and their opposition to Plaintiff's motion. Each  
16 objection has been considered. The objections are raised under  
17 Federal Rules of Evidence 701, 703, and/or 802, and the  
18 discussion in this Order infra herein reveals each objection is  
19 either sustained or overruled.

### 20 **B. Plaintiff's Requests for Judicial Notice**

21 Plaintiff supports its motion with a request that  
22 judicial notice be taken of exhibits A-N attached to its Request  
23 for Judicial Notice (ECF No. 166), and supports its opposition to  
24 Defendants' motion with a request that judicial notice be taken  
25 of exhibits A-B attached to a second Request for Judicial Notice.  
26 (ECF NO. 182.) Defendants oppose judicial notice being taken of  
27 exhibits C-F, I-K, and M-N that support Plaintiff's motion and  
28 exhibit A that supports Plaintiff's opposition.

1           Each document for which Plaintiff requests judicial  
2 notice is, with the exception of Exhibit I, a government record.  
3 Government records are susceptible to judicial notice when  
4 "relevant to an[] issue" before the court. Flick v. Liberty Mut.  
5 Fire Ins. Co., 205 F.3d 386, 392 n.7 (9th Cir. 2000) ("In this  
6 case though, we deny such a request [for judicial notice],  
7 because the [documents] are not relevant to any issue on  
8 appeal."). Plaintiff has shown that each of these exhibits is  
9 relevant to the pending motions. Therefore, its request for  
10 judicial notice of these exhibits is granted.

11           Plaintiff, however, has not shown Exhibit I, a report  
12 created by a third-party titled "Lower Feather River HUC/Honcut  
13 Creek Watershed, Existing Condition Assessment," is susceptible  
14 to judicial notice. Therefore, Plaintiff's request for judicial  
15 notice of Exhibit I is denied.

### 16           **C. Jurisdictional Issues**

17           The parties seek summary judgment on the following  
18 issues concerning the federal court's subject matter  
19 jurisdiction: whether Plaintiff has sufficiently established the  
20 element of its CWA claims that requires it to show the discharges  
21 about which it complains are into "navigable waters," and whether  
22 Plaintiff has established it has standing to prosecute this  
23 lawsuit.

#### 24           **1. "Navigable Waters"**

25           An essential element of Plaintiff's CWA claims requires  
26 it to show the pollutant discharges about which it complains were  
27 discharged "into navigable waters [of the United States] without  
28 a permit." United States Dep't of Energy v. Ohio, 503 U.S. 607,

1 611 (1992). Here "[t]he [relevant definition of the] term  
2 'waters of the United States' means[:] All waters which are  
3 currently used, or were used in the past, or may be susceptible  
4 to use in interstate or foreign commerce, including all waters  
5 which are subject to the ebb and flow of the tide." 33 C.F.R. §  
6 328.3(a)(1). The Feather River is a navigable water of the United  
7 States. See N. Bloomfield Gravel-Mining Co. v. United States, 88  
8 F. 664, 665 (9th Cir. 1898) (finding the Feather River to be  
9 navigable).

10 Plaintiff argues the Facility discharges pollutants  
11 into the Wyman Ravine, from which water flows into the Honcut  
12 Creek and then into the Feather River, and that since the Wyman  
13 Ravine is a tributary of the Feather River, it is considered  
14 "navigable waters" of the United States under the CWA. The  
15 uncontroverted facts establish that the Wyman Ravine, Honcut  
16 Creek, and Feather River are downstream from the Facility, and  
17 that the Feather River specifically is 19 miles downstream of the  
18 Facility. (Defs.' SUF ¶¶ 21-23.)

19 Plaintiff argues sufficient connectivity exists between  
20 the Facility and the Feather River to establish that the  
21 Facility's pollutants discharge into "navigable waters."  
22 Plaintiff cites as support for its position, the report of its  
23 geologist, John Lane, in which Lane opines that discharges from  
24 the Facility flow into a ditch running parallel to Kusel Road and  
25 then into an unnamed seasonal intermittent stream; and from the  
26 stream, water flows for 1.5 miles before discharging into the  
27 Wyman Ravine, which is hydrologically connected to Honcut Creek  
28 and the Feather River. (Lane Decl. Ex. A pg. 4-5, ECF No. 170-1.)

1 Lane states in his report:

2 On April 4, 2011, [he] observed continuous  
3 storm water flow from the Facility under  
4 Kusel Road . . . into the unnamed seasonal  
5 stream, past a stockpond approximately 30  
6 feet in diameter and into Wyman Ravine. This  
inspection was conducted from a helicopter  
and the flight is documented in [photographs  
attached to his report].

7 (Lane Decl. Ex. A p. 5, ECF No. 170-1.) Plaintiff argues Lane's  
8 report demonstrates the Facility's pollutants discharge into  
9 navigable waters since the Wyman Ravine is a tributary of the  
10 Feather River, and under the CWA, tributaries of navigable waters  
11 are themselves considered navigable waters. (Pl. Mot. 16:20-25.)

12 Defendants argue that Lane's personal observations of  
13 connectivity between the Facility and the Wyman Ravine are "pure  
14 speculation" since Lane "initially provided no evidence of  
15 connectivity [and notwithstanding his deposition testimony that  
16 he observed such connectivity and took photographs of his  
17 observations,] the "photographs fail to establish a clear and  
18 unbroken connection between the Facility and the Wyman Ravine."  
(Def. Mot. 17:5; 17:24-27.)

19 If other bodies of water are conduits for the  
20 Facility's discharges to "seep into the navigable [Feather  
21 River]," and the Facility's discharges "significantly affect the  
22 physical, biological, and chemical integrity of the [Feather]  
23 River," then the Facility's discharges are "subject to the CWA."  
24 N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 996 (9th  
25 Cir. 2007) (interpreting Rapanos v. United States, 547 U.S. 715  
26 (2006)). "Even . . . intermittent . . . [seepage is sufficient]."  
27 Headwaters, Inc. v. Talent Irrigation Dist., 241 F.3d 526, 534  
28



1 (9th Cir. 2001).

2 Since Plaintiff has shown discharges from the Facility  
3 reach the Wyman Ravine and the Wyman Ravine seeps into the  
4 Feather River, Plaintiff's motion on this issue is granted and  
5 Defendants' motion is denied.

6 **2. Standing**

7 Concerning the issue of standing, the uncontroverted  
8 facts establish that Plaintiff California Sportfishing Protection  
9 Alliance is a non-profit corporation. (Pl. SUF ¶ 165.) A non-  
10 profit organization "has standing to bring suit on behalf of its  
11 members when [1] its members would otherwise have standing to sue  
12 in their own right, [2] the interests at stake are germane to the  
13 organization's purpose, and [3] neither the claim asserted nor  
14 the relief requested requires the participation of individual  
15 members in the lawsuit." Friends of the Earth, Inc. v. Laidlaw  
16 Env't'l Servs. (TOC), Inc., 528 U.S. 167, 181 (2000). Plaintiff  
17 bears the burden of establishing standing, and as "an  
18 indispensable part of the plaintiff's case, [it] must be  
19 supported in the same way as any other matter on which the  
20 plaintiff bears the burden of proof." Lujan v. Defenders of  
21 Wildlife, 504 U.S. 555, 561 (1992).

22 Plaintiff satisfies the second and third elements of  
23 organizational standing since its claims do not require the  
24 participation of individual members and the interests at stake  
25 are germane to the organization's stated purpose, which is "the  
26 preservation of land and aquatic habitat for scientific, . . .  
27 [and] recreational . . . opportunities." (Pl.'s SUF ¶ 166.) The  
28 parties dispute whether Plaintiff meets the first prong of the

1 standing inquiry which requires Plaintiff to evince that one of  
2 its members has standing to sue in his or her own right. To  
3 establish individual standing:

4 First, the [member] must have suffered an  
5 'injury in fact'—an invasion of a legally  
6 protected interest which is (a) concrete and  
7 particularized and (b) actual or imminent,  
8 not conjectural or hypothetical. Second,  
9 there must be a causal connection between the  
10 injury and the conduct complained of—the  
11 injury has to be fairly traceable to the  
12 challenged action of the defendant, and not  
13 the result of independent action of some  
14 third party not before the court. Third, it  
15 must be likely, as opposed to merely  
16 speculative, that the injury will be  
17 redressed by a favorable decision.

12 Lujan, 504 U.S. at 560-61 (emphasis added). To demonstrate  
13 standing, Plaintiff presents three of its members as standing  
14 witnesses: Bill Jennings, Jim Crenshaw, and Chris Shutes  
15 (collectively the "Standing Witnesses"), who gave deposition  
16 testimony regarding their use of the Feather River.

17 Defendants argue Plaintiff cannot demonstrate the  
18 Standing Witnesses suffered an injury in fact fairly traceable to  
19 Defendants' conduct. Specifically, Defendants argue that the  
20 deposition testimony of each Standing Witnesses reveals that none  
21 of them have used either the Wyman Ravine or the Honcut Creek, as  
22 required to show an injury that is fairly traceable to the  
23 Facility, and that the types of aesthetic and recreational harm  
24 about which each Standing Witness complains is insufficient to  
25 demonstrate an injury in fact. Jennings did not discuss the Wyman  
26 Ravine during his deposition and could not recall spending time  
27 at Honcut Creek, (Cannata Decl. ISO Def. Mot. Ex. D, 74:1-13;  
28 77:10-13, ECF No. 195); and Crenshaw and Shutes each testified he

1 had never been on the Honcut Creek or the Wyman Ravine. (Cannata  
2 Decl. ISO Def. Mot. Ex. B, 77:1-5, ECF No. 195; Cannata Decl. ISO  
3 Def. Mot. Ex. F, 122:18-21; 155:21-156:1, ECF No. 195.)

4 Plaintiff responds that the Standing Witnesses  
5 "testified to historical and ongoing use of" the Feather River,  
6 which demonstrates their injuries are fairly traceable to  
7 Defendants' conduct since the Feather River is only 19 miles from  
8 the Facility. The uncontroverted facts establish the Feather  
9 River is 19 miles downstream of the Facility and that the  
10 Standing Witnesses each use the Feather River for aesthetic and  
11 recreational purposes. (Defs.' SUF ¶ 23; Pl.'s SUF ¶¶ 173-176.)

12 "[E]nvironmental plaintiffs adequately allege injury in  
13 fact when they aver that they use the affected area and are  
14 persons 'for whom the aesthetic and recreational values of the  
15 area will be lessened' by the challenged activities." Friends of  
16 the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc., 528 U.S.  
17 167, 183 (2000) (finding a standing witness who "canoed  
18 approximately 40 miles downstream" from the facility at issue,  
19 but who stated their enjoyment of the land was diminished by the  
20 defendant's alleged discharge of mercury in violation of the CWA  
21 "adequately documented injury in fact").

22 The Standing Witnesses' aesthetic and recreational use  
23 of the Feather River evince that they have "reasonable concerns  
24 about the effects of [Defendants'] discharges" on their interests  
25 in the Feather River. Laidlaw, 528 U.S. at 184. Since the Feather  
26 River is approximately 19 miles downstream from the Facility,"  
27 (Defs.' SUF ¶ 23), it is sufficiently close to the Facility to  
28 demonstrate each Standing Witnesses' injury is fairly traceable

1 to Defendants' conduct. Laidlaw, 528 U.S. at 183. Therefore, on  
2 this issue, Plaintiff's motion is granted and Defendants' motion  
3 is denied.

4 **D. CWA Claims**

5 The parties cross move for summary judgment on  
6 Plaintiff's claims alleged under the CWA, in which Plaintiff  
7 alleges Defendants engaged in conduct proscribed by the CWA by  
8 violating the terms of California's General Industrial Storm  
9 Water Permit (the "General Permit"), which Defendants were  
10 issued.

11 "The Clean Water Act prohibits the discharge of  
12 pollutants from a 'point source' into the waters of the United  
13 States without a permit issued under the terms of the National  
14 Pollution Discharge Elimination System ["NPDES"]." Env't'l Def.  
15 Ctr., Inc. v. United States EPA, 344 F.3d 832, 841 (9th Cir.  
16 2003). "The discharge of pollutants without an NPDES permit, or  
17 in violation of a permit, is illegal." Waterkeepers N. Cal. v. AG  
18 Indus. Mfg., Inc., 375 F.3d 913, 915 (9th Cir. 2004). "An NPDES  
19 permit serves to transform generally applicable effluent limits  
20 and other standards . . . into obligations . . . of the  
21 individual discharger." Env't'l Prot. Agency v. Cal. ex rel. State  
22 Water Res. Control Bd., 426 U.S. 200, 205 (1976). NPDES permits  
23 are issued by [the] EPA or States that have been authorized by  
24 EPA to act as NPDES permitting authorities." Env't'l Def. Ctr.,  
25 Inc. v. US EPA, 344 F.3d 832, 841 (9th Cir. 2003).

26 Much of the responsibility for administering  
27 the NPDES permitting system has been  
28 delegated to the states. States may issue  
individual permits to industrial discharges  
or may cover many discharges under the terms

1 of one general permit. California has issued  
2 a general permit to cover industrial  
3 discharges. In order to be covered under  
4 California's General Permit, individual  
5 dischargers must file a notice of intent with  
6 the state."

7 Waterkeepers N. Cal. v. AG Indus. Mfg., Inc., 375 F.3d 913, 915  
8 (9th Cir. 2004). Defendants filed "a notice of intent" with the  
9 California Regional Water Board ("Water Board"), which was  
10 approved on December 10, 2007. (Defs.' SUF ¶¶ 1, 5, ECF No. 184.)  
11 "Private citizens may sue under the Clean Water Act to enforce  
12 the specific provisions of [the] California[] General Permit."  
13 Waterkeepers N. Cal., 375 F.3d at 915 (citing 33 U.S.C. §  
14 1365(a)(1), (f)(6)).

15 Plaintiff alleges Defendants violated the terms of the  
16 General Permit as follows: (1) discharging contaminated storm  
17 water contrary to Section C of the General Permit; (2) failing to  
18 develop and implement an adequate Storm Water Pollution and  
19 Prevention Plan ("SWPPP") contrary to Section A of the General  
20 Permit; (3) failing to implement Best Available Technology  
21 Economically Achievable ("BAT")/Best Conventional Pollutant  
22 Control Technology ("BCT") contrary to Order B of the General  
23 Permit; and (4) failing to implement an adequate Monitoring and  
24 Reporting Plain ("MRP") contrary to Section B of the General  
25 Permit.

#### 26 **1. Storm Water Discharges**

27 Both parties seek summary judgment on Plaintiff's claim  
28 that Defendants violated Section C of the General Permit 131  
times by failing to submit a report to the Water Board when the  
Facility's storm water discharges contained levels of copper,

1 lead, and/or zinc in excess of the applicable water quality  
2 standards.

3 Section C(2) of the General Permit states in part:  
4 Storm water discharges . . . shall not cause  
5 or contribute to an exceedance of any  
6 applicable water quality standards contained  
7 in a Statewide Water Quality Control Plan or  
8 the applicable Regional Water Board's Basin  
9 Plan.

10 (General Permit Pg. 4.) However, Section C(3) states:

11 A Facility operator will not be in violation  
12 of [Section] C.2. as long as the facility  
13 operator has implemented BMPs that achieve  
14 BAT/BCT and . . . [t]he facility operator ...  
15 submit[s] a report to the appropriate  
16 Regional Water Board that describes the BMPs  
17 that are currently being implemented and  
18 additional BMPs that will be implemented to  
19 prevent or reduce any pollutants that are  
20 causing or contributing to the exceedance of  
21 water quality standards.

22 (General Permit p. 4.) Section C(4) states:

23 [the referenced report must be submitted to  
24 the Water Board] within 60 days after either  
25 the Facility operator or the . . . Water  
26 Board determines that discharges are causing  
27 or contributing to an exceedance of an  
28 applicable water quality standard.

19 (General Permit pgs. 4-5.) The uncontroverted facts establish  
20 that Defendants did not submit a report to the Water Board in  
21 response to a storm water discharge exceeding an applicable water  
22 quality standard. (Pl.'s SUF ¶ 164.)

23 Plaintiff argues the California Toxic Rules standards  
24 ("CRT standards") are "an[] applicable water quality standard"  
25 under the General Permit, and that samples of water discharged  
26 from the Facility on 131 occasions show levels of copper, lead,  
27 and/or zinc in excess of the CTR standards. (See Pl.'s SUF ¶¶  
28 115-163.)

1           The CTR "promulgates criteria for priority toxic  
2 pollutants for the State of California." 40 C.F.R. 131.38. For  
3 storm water discharges, the following pollutant concentrations  
4 apply:

5           Copper: 0.013 mg/L

6           Lead: 0.065 mg/L

7           Zinc: 0.12 mg/L

8       Id.

9           Defendants argue the CTR standards are inapplicable to  
10 the Facility and therefore they were not required to report to  
11 the Water Board each time a sample revealed levels of copper,  
12 lead, and/or zinc in excess of the CTR standards. Defendants  
13 further argue that even if they were required to report such  
14 discharges, Plaintiff has not presented evidence demonstrating  
15 that a portion of the 131 water samples Plaintiff references  
16 represent the Facility's water quality since Plaintiff has not  
17 shown that the samples came from inside the Facility.

18           Plaintiff argues that by failing to file reports with  
19 the Water Board, Defendants violated section C2 of the General  
20 Permit, citing Santa Monica Baykeeper v. Kramer Metals,  
21 Inc. ("Kramer"), 619 F. Supp. 2d 914 (C.D. Cal. 2009), in support  
22 of their position. In Kramer a plaintiff sued a scrap metal  
23 recycling facility contending its storm water discharge samples  
24 contained levels of chemicals exceeding the CTR, and contended  
25 since defendant failed to report the excess levels to the Water  
26 Board, it violated Section C of the General Permit. Id. at 926.  
27 The Kramer defendant countered that the General Permit did not  
28 require it to report violations of the CTR standards. The Kramer

1 court disagreed, stating "the [CTR standard] is a water quality  
2 standard that applies to [Defendant]." Id. The court reasoned  
3 that "[t]he CTR [standards] expressly appl[y] to 'all waters' for  
4 'all purposes and programs under the Clean Water Act'" and that  
5 storm water discharges are "regulated by the General Permit,"  
6 which requires "adherence to water quality standards," including  
7 the CTR standards. Id. at 927.

8 Defendants argue Kramer was wrongly decided and that  
9 the "CTR's criteria . . . are not applicable to storm water  
10 discharges . . . and do not establish compliance or noncompliance  
11 with the General Permit," relying primarily on Divers' Env't'l  
12 Conservation Org. v. State Water Res. Control Bd., 145 Cal. App.  
13 4th 246, 256 (2006), EPA statements, and statements from a Water  
14 Board employee. In Divers, the California Court of Appeal stated:  
15 "In regulating storm water permits the EPA has repeatedly  
16 expressed a preference for doing so by way of BMP's rather than  
17 by way of imposing . . . water quality-based numeric  
18 limitations." Defendants also cite to an EPA report entitled,  
19 "Economic Analysis of the California Toxic Rules," in which the  
20 EPA states "[t]he State of California has significant flexibility  
21 and discretion as to how it chooses to implement the CTR within  
22 the NPDES permit program," and argue therefore the CTR standards  
23 were not meant to constitute a per se violation of the General  
24 Permit. (Def. Opp'n 17:16-18.) Defendants further argue that  
25 Water Board scientist Scott Zaitz gave deposition testimony that  
26 to his knowledge the CTR are not part of the General Permit.  
27 (Cannata Opp'n Decl. Ex. A 135:14-22, ECF No. 195-1.)

28 Plaintiff replies that Divers is inapposite since the



1 Divers court was not analyzing the General Permit, and  
2 Defendants' reliance on the EPA's Economic report "does not  
3 support . . . conclu[ding] that the CTR [standards are  
4 inapplicable to facilities covered by the General Permit]" since  
5 Kramer "specifically rejected the argument that Defendants repeat  
6 here." (Pl. Reply 10:6-8; 9:16-19.) Plaintiffs also respond that  
7 Defendants citation to Zaitz's testimony is unpersuasive since he  
8 was "not speaking on behalf of the Water Board" and his testimony  
9 "relates solely to his own practice." (Pl. Reply 10:22-23; 11:3-  
10 4.)

11 CTR standards state:

12 [The] EPA . . . promulgate[d] [the standards]  
13 to fill a gap in California water quality  
14 standards that was created in 1994 when a  
15 State court overturned the State's water  
16 quality control plans which contained water  
17 quality criteria for priority toxic  
pollutants. Thus, the State of California has  
been without numeric water quality criteria  
for many priority toxic pollutants as  
required by the [CWA], necessitating this  
action by [the] EPA.

18 65 Fed. Reg. 31682. Kramer states the CTR "is a water quality  
19 standard [as the phrase is used] in the General Permit, [Section]  
20 C(2)." 619 F. Supp. 2d at 927.

21 The uncontroverted facts establish Defendants never  
22 submitted a report to the Water Board in response to receiving a  
23 storm water discharge sampling result that violated a water  
24 quality standard. (Pl.'s SUF ¶ 164.) Therefore, each time  
25 Defendants received sampling results in excess of the CTR  
26 standards, they violated Section C of the General Permit.

27 Plaintiff argues Defendants violated Section C of the  
28 General Permit 131 times. Plaintiff argues Defendants' own

1 samples reveal sixty-five instances where the level of copper,  
2 lead, and/or zinc exceeded the CTR standards, (Pl.'s SUF ¶¶ 118-  
3 128, 133, 136, 139, 140, 151-159, 163), and additional samples  
4 taken by third-parties reveal sixty-six other instances where the  
5 level of copper, lead, and/or zinc exceeded the CTR standards.  
6 (Pl.'s SUF ¶¶ 115-117, 129-132, 134-135, 137-138, 141-150, 157,  
7 160-162.)

8           Since the evidence concerning the sixty-five samples  
9 Defendants collected and analyzed is uncontroverted, Plaintiff's  
10 motion concerning these samples is granted and Defendants' motion  
11 is denied. Defendants also do not dispute the sample results  
12 taken on December 11, 2014 from SWSL2, at 9:10 AM and 2:50PM,  
13 which evince four additional violations. (Pl.'s SUF ¶¶ 160-161.)  
14 Therefore, Plaintiff's motion as to these samples is granted and  
15 Defendants' motion is denied.

16           Defendants argue that Plaintiff fails to demonstrate  
17 the remaining samples taken represent the quality of the  
18 Facility's storm water discharges since it is not evident that  
19 the samples were taken from the Facility or from an outside  
20 source; Defendants argue the analysis of this comingled storm  
21 water would not accurately reflect the levels of copper, lead,  
22 and/or zinc in the Facility's discharges, and therefore unless  
23 Plaintiff can identify the source of the remaining water samples,  
24 it cannot succeed on its claims based thereon. (Pl.'s SUF ¶¶ 115-  
25 117, 129-132, 134-135, 137-138, 141-150, 157.) Plaintiff fails to  
26 present evidence that sufficiently identifies the origin of the  
27 remaining water samples and consequently has not met its burden  
28 to show these samples are the Facility's discharges. Therefore,

1 each motion concerning the remaining sixty-two violations is  
2 denied.

3 **2. Storm Water Pollution Prevention Program ("SWPPP")**

4 The parties cross move for summary judgment on  
5 Plaintiff's claim that Defendants violated the General Permit by  
6 failing to develop and implement an adequate Storm Water  
7 Pollution Prevention Program ("SWPPP").

8 [T]he General Permit requires that permittees  
9 develop and implement a [SWPPP] that meets  
10 certain requirements. The SWPPP has two major  
11 objectives: (1) to identify and evaluate  
12 sources of pollutants and (2) to identify and  
13 implement site-specific BMPs to reduce or  
14 prevent pollutants associated with industrial  
activities in storm water discharges. Section  
A of the General Permit catalogues with  
significant detail what an SWPPP must contain  
to comply with the General Permit. A SWPPP  
must contain [inter alia] . . . maps  
(including a site map).

15 Kramer Metals, Inc., 619 F. Supp. 2d at 920. Plaintiff alleges  
16 Defendants violated the General Permit since 1989 because from  
17 1989-2007 the Facility did not have a SWPPP and the site maps on  
18 the SWPPPs the Facility eventually created are missing required  
19 information.

20 **a. Failure to Develop a Site Map**

21 Plaintiff argues Defendants violated Section E(2) of  
22 the General Permit from the time the Facility opened until 2007  
23 since it is uncontroverted that the Facility "did not develop any  
24 SWPPP" prior to 2007. (Pl SUF ¶ 15.) Section E(2) of the General  
25 Permit states: "Facility operators . . . must develop and  
26 implement a SWPPP in accordance with [S]ection A of this General  
27 Permit when the industrial activities begin." (General Permit  
28 p.6.)

1 Defendants respond that since they created a SWPPP  
2 "prior to the date on which [Plaintiff] filed its lawsuit,"  
3 Plaintiff's claim "is based on a wholly past violation," and  
4 therefore summary judgment in their favor is warranted, citing  
5 Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.,  
6 484 U.S. 49 (1987). (Def. Opp'n 23:23-24.)

7 In Gwaltney, the Supreme Court held that the CWA  
8 requires "that citizen-plaintiffs allege a state of either  
9 continuous or intermittent violation—that is, a reasonable  
10 likelihood that a past [violator] will continue to [violate the  
11 CWA] in the future," and that evidence of "wholly past  
12 violations" cannot support a citizen-plaintiff's claim under the  
13 CWA. Gwaltney, 489 U.S. at 57-58.

14 Plaintiff filed its initial complaint in this action on  
15 March 17, 2010. (ECF No. 1.) Since the uncontroverted facts  
16 evince that Defendants created a SWPPP prior to Plaintiff  
17 initiating this lawsuit, Plaintiff's claim against Defendants for  
18 failing to create a SWPPP alleges a "wholly past violation" for  
19 which a citizen-plaintiff cannot sue. Gwaltney, 489 U.S. at 58.  
20 Therefore, Plaintiff's motion on this issue is denied and  
21 Defendants' motion is granted.

22 **b. Failure to Include Required Information**

23 Plaintiff also alleges the Facility's SWPPPs are  
24 inadequate since the SWPPP site maps are missing the following  
25 required information: (1) points of discharge from the Facility,  
26 (2) structural control measures that affect storm water  
27 discharge, (3) portions of the Facility's drainage areas that are  
28 impacted by run-on from the surrounding area, and (4) areas of

1 soil erosion.

2 ///

3 **i. Points of Discharge**

4 Plaintiff argues Defendants violated Section A(4) of  
5 the General Permit since "the Facility discharges storm water  
6 from the West Gate and from the Southern property boundary, [but]  
7 neither of these discharge points have ever been identified [on  
8 the SWPPP site map]" as required by Section A(4). (Pl. Mot. 7:14-  
9 16 (emphasis added).) Plaintiff supports its position citing the  
10 uncontroverted facts that "[t]he Facility maps attached to the  
11 2008, 2010, 2012, and 2013 SWPPPs do not identify the West Gate  
12 or the west end of the property's southernmost boarder as  
13 discharge points." (Pl.'s SUF ¶ 16.)

14 Section A(4) of the General Permit states the SWPPP's  
15 site map shall include: "[t]he location of the storm water  
16 collection and conveyance system, associated points of discharge,  
17 and direction of flow." (General Permit p. 14 (emphasis added).)

18 Defendants respond they did not violate Section A(4) of  
19 the General Permit by failing to list the referenced locations as  
20 points of discharge since the locations are "not part of [the  
21 Facility's] storm water collection and conveyance system." (Def.  
22 Opp'n 25:1-2.) Defendants support this argument citing the  
23 Declaration of Kim Scott, the Facility's Environmental and Safety  
24 Coordinator, who declares the referenced points of discharge "are  
25 not part of the Facility's storm water collection conveyance  
26 system." (K. Scott Decl. Opp'n ¶ 4, ECF No. 194.)

27 Plaintiff replies that Defendants cannot explain why  
28 the referenced discharge points "are not part of [the Facility's]

1 storm water conveyance system," but provides no evidence to rebut  
2 Scott's averment. (Pl. Reply 14:11-26.)

3 Section A(4) of the General Permit does not require  
4 SWPPP site maps to include points of discharge that are not  
5 associated with a facility's storm water collection and  
6 conveyance system, and the Scott Declaration evinces that the  
7 West Gate and the Southern property boundary are not part of the  
8 Facility's storm water collection and conveyance system.  
9 Therefore, Plaintiff's motion on this issue is denied and  
10 Defendants' motion is granted.

11 **ii. Structural Control Measures**

12 Plaintiff argues Defendants violated Section A(4) of  
13 the General Permit since the Facility's "SWPPPs call for straw  
14 wattles and absorptive socks to be placed around the large . . .  
15 scrap metal piles at the Facility," yet "none of these structural  
16 BMPs have ever been identified on any of the Facility maps" as  
17 required by Section A(4). Plaintiff supports its position citing  
18 the uncontroverted facts that the SWPPPs identify straw wattles  
19 and absorbent socks as BMPs used at the Facility, yet "no straw  
20 wattles or absorbent socks have ever been identified on any of  
21 the Facility's SWPPP [site] maps." (Pl.'s SUF ¶¶ 20-21.)

22 Section A(4) of the General Permit states in part that  
23 the site map shall include: "any structural control measures that  
24 affect storm water discharges." (General Permit p. 14.)

25 Defendants respond that Section A(4) of the General  
26 Permit did not require them to identify straw wattles or  
27 absorbent socks on the SWPPP site maps since these "are not  
28 considered structural BMPs (rather they are considered non-

1 structural BMPs).” (Def. Opp’n 25:25-26:2.) Defendants cite in  
2 support of their position the averments from Damon Brown,  
3 Defendants’ expert geologist, where he avers straw wattles and  
4 absorbent socks are non-structural BMPs since “they are not  
5 permanent,” and “must be periodically replaced.” (Brown Decl.  
6 Opp’n Pl. Mot. ¶ 6, ECF No. 192.) Brown also declares “[s]traw  
7 wattles are primarily used to prevent soil erosion,” and  
8 “[a]bsorbent socks are primarily used as part of spill clean-up  
9 equipment.” (Brown Decl. Opp’n Pl. Mot. ¶¶ 4-5, ECF No. 192.)

10 Plaintiff replies that straw wattles and absorptive  
11 socks are structural rather than non-structural BMPs since  
12 Defendants have identified them as such in their SWPPPs and  
13 “Defendants’ expert . . . conceded that the straw wattles and  
14 absorptive socks are structural.” (Pl. Mot. 7:16; Pl. Reply  
15 15:10-11.) However Plaintiff’s purported support does not address  
16 the distinction between structural and non-structural BMPs.

17 The General Permit states structural BMPs “generally  
18 consist of structural devices that reduce or prevent pollutants  
19 in storm water discharges and authorized non-storm water  
20 discharges.” (General Permit p. 21.) In contrast, the General  
21 Permit states that non-structural BMPs “generally consist of  
22 processes, prohibitions, procedures, schedule[s] of activities,  
23 etc., that prevent pollutants associated with industrial  
24 activities from contacting with storm water discharges and  
25 authorized non-storm water discharges. They are considered low  
26 technology, cost-effective measures.” (General Permit p. 19.)  
27 Non-structural BMPs can include “spill clean-up procedures” and  
28 “sediment and erosion control activities.” (General Permit p. 19-

1 20.)

2 Section A(4) of the General Permit does not require a  
3 site map to include non-structural BMPs, and averments in Brown's  
4 declaration evince that straw wattles and absorptive socks are  
5 non-structural BMPs. Since Plaintiff has not sufficiently  
6 controverted Defendants' evidence, its motion on this issue is  
7 denied and Defendant's motion is granted.

8 **iii. Drainage Areas Impacted by Run-On**

9 Plaintiff argues Defendants violated section A(4) of  
10 the General Permit because "the Facility has historically been  
11 subject to significant storm water run-on from an adjacent  
12 facility at the southeast corner, causing [water] pooling, [but]  
13 neither this run-on nor its associated discharge[s] have ever  
14 been identified on any of the Facility's site maps" as required  
15 by the General Permit. (Pl. Mot. 7:20-22.) Plaintiff supports its  
16 position citing deposition testimony of Kim Scott, Jihan Gray,  
17 and Defendants' expert geologist Damon Brown, in which each  
18 discusses run-on from an adjacent facility named Apex Lumber  
19 ("Apex"). (Pl.'s SUF ¶ 22.)

20 Section A(4) of the General Permit states that site  
21 maps shall include "portions of the drainage area impacted by  
22 run-on from surrounding areas." (General Permit p. 13.)

23 Defendants argue they were not required to include  
24 references to run-on at the southeast corner of the Facility on  
25 the SWPPP site map since "there is typically no run-on in that  
26 area" and the occasions where run-on has occurred, happened  
27 during the "breach of a berm . . . [that] was immediately  
28 repaired." (Def. Opp'n 27:22-25.) Defendants support their



1 position citing the following averments in Kim Scott's  
2 declaration:

3 [The Facility] is bordered on the south and  
4 southeast by a facility called Apex Lumber, a  
5 logging and forestry equipment sales company.  
6 During the 2008-2009 and 2009-2010 storm  
7 seasons, there was no run-on from the Apex  
8 facility . . . because, at that time, [the  
9 Facility] had large work product piles  
10 [preventing run-on]. . . . Prior to the  
11 2010-2011 storm season, [the Facility] moved  
12 the work product piles. . . . [and] Apex  
13 agreed to, and did, create a small pond on  
14 the Apex facility . . . to eliminate run-on  
15 . . . . Unfortunately, during the course of the  
16 2010-2011 storm season, I noticed slight run-  
17 on from Apex on at least one occasion. . . .  
18 Apex then agreed to, and did create a  
19 trenched and bermed area near the southern  
20 fence line between the Facility and Apex  
21 prior to the 2011-2012 storm season. [The  
22 Facility] personnel inspected this southern  
23 fence line/south-eastern corner on a weekly  
24 basis during the 2011-2012 and 2012-2013  
25 storm seasons. Those inspections revealed no  
26 run-on from Apex to the Facility. During the  
27 2013-2014 storm season . . . we experienced a  
28 significant storm event that overwhelmed the  
BMPs that we had in place near the southern  
fence line. . . . I noticed a breach of our  
bermed area . . . . [which] appeared to  
create either runoff or run-on or both (it  
was difficult to determine) between [the  
Facility] and Apex (basically storm water  
pooled in this area). I immediately worked  
with a team to place sandbags and hay bales  
in this area to close off this area of  
comingled storm water. As a result, during  
the summer of 2014, in advance of the 2014-  
2015 storm season, [the Facility] implemented  
[a BMP] intended to improve the elevation of  
the southern border and eliminate the  
potential of run-on from Apex . . . , [which  
has] worked . . . meaning that it is  
effectively preventing . . . run-on at the  
southern border. . . . Because the issue of  
run-on . . . at the southern end of the  
Facility was both unintended and immediately  
repaired (during the storm), I did not  
include reference to run-on from Apex on [the  
Facility's] site map(s)."

(K. Scott Decl. in Opp'n Pl. MSJ ¶¶ 6-7, ECF No. 194.)

1 Scott's averments evince that the Facility experienced  
2 run-on from Apex Lumber at the southeast corner during the 2010-  
3 2011 and 2013-2014 storm seasons, which was not referenced on the  
4 SWPPP site maps; however, Section A(4) of the General Permit  
5 requires site maps to identify "portions of the drainage areas  
6 impacted by run-on from surrounding areas." (General Permit p.  
7 13.) Therefore, Plaintiff's motion on this issue is granted and  
8 Defendants' motion is denied.

9 **iv. Areas of Soil Erosion**

10 Plaintiff argues Defendants violated Section A(4) of  
11 the General Permit because "more than half of the Facility is  
12 covered in pervious soil, [yet] none of the [SWPPP site] maps  
13 identify any 'areas of soil erosion' as required by [Section A(4)  
14 of] the [General] Permit." (Pl. Mot. 8:1-3.) Plaintiff supports  
15 its position citing the uncontroverted facts that the Facility  
16 contains some amount of pervious soil and "Defendants' expert has  
17 admitted that none of the Facility [SWPPP site] maps identify any  
18 'areas of soil erosion.'" (Pl.'s SUF ¶¶ 26-27.)

19 Section A(4) of the General Permit states in part that  
20 site maps shall include "[the] direction and flow of each  
21 drainage area, on-site surface water bodies, and areas of soil  
22 erosion." (General Permit p. 13 (emphasis added).)

23 Defendants respond that the Facility "does not have any  
24 areas of soil erosion" and "[j]ust because there is dirt on the  
25 Facility does not mean that there will be soil erosion[,]"  
26 contending that "[f]actors such as slope, elevation, compactions,  
27 vegetation, place[ment] of straw wattles, and related BMPs impact  
28 the potential for erosion." (Def. Opp'n 29:19-20; 29:25-30:1.)

1 Defendants support their position citing the declaration of Damon  
2 Brown, in which he avers that "the Facility does not have [areas  
3 of soil erosion], and thus they are not required to be listed on  
4 the [SWPPP site maps]." (Bond Decl. ISO Def. Mot. ¶ 30, Exs. P,  
5 Q, ECF No. 181.)

6 Plaintiff replies that it is unlikely that the Facility  
7 has no areas of soil erosion since "over half of the Facility is  
8 unpaved and covered with dirt," and asserts that Defendants "have  
9 historically had problems controlling their Total Suspended  
10 Solids ("TSS")" levels, which indicates that solids such as soil  
11 are present in the Facility's storm water discharges. Plaintiff  
12 supports its argument citing the Facility's 2009-2010 Annual  
13 Report, which indicates that water samples taken from two  
14 locations at the Facility showed 697 mg/L and 802 mg/L TSS  
15 respectively. (Packard Decl. Ex. Q, CSM 004357, ECF No. 168-4.)

16 It is uncontroverted that the Facility contains some  
17 pervious soil. (Pl.'s SUF ¶ 26.) Further, although Defendants'  
18 expert opines the Facility contains no areas of soil erosion, the  
19 Facility's 2009-2010 Annual Report TSS levels support drawing the  
20 reasonable inference that soil from the Facility is eroding into  
21 the Facility's water discharges since the TSS level measures  
22 solid particles suspended in the discharges. Therefore, each  
23 motion on this issue is denied.

24 **3. Best Available Technology Economically Achievable**  
25 **("BAT")/Best Conventional Pollution Control**  
26 **Technology ("BCT")**

27 The parties cross move for summary judgment on  
28 Plaintiff's claim that Defendants violated General Permit Order

1 B(3), which states in pertinent part “[f]acility operators  
2 covered by this General Permit must reduce or prevent pollutants  
3 associated with industrial activity in storm water discharges...  
4 through implementation of BAT for toxic and non-conventional  
5 pollutants and BCT for conventional pollutants.” (General Permit  
6 p. 4 (emphasis added).) The CWA discusses the assessment of  
7 BAT/BCT in 33 U.S.C. § 1314 (b) (2) (B) as follows:

8 Factors relating to the assessment of [BAT]  
9 ... shall include consideration of the total  
10 cost of application of technology in relation  
11 to the effluent reduction benefits to be  
12 achieved from such application, and shall  
13 also take into account the age of equipment  
14 and facilities involved, the process  
employed, the engineering aspects of the  
application of various types of control  
techniques, process changes, non-water  
quality environmental impact (including  
energy requirements), and such other factors  
as the Administrator deems appropriate.

15 “[T]he factors for assessing BCT are defined at 33  
16 U.S.C. §1314(b) (4) (B) and are similar.” Cal. Sportfishing Prot.  
17 Alliance v. Cal. Ammonia Co., No. CIV S-05-0952 WBS JMF, 2007 WL  
18 273847, at \*7 (E.D. Cal. Jan. 29, 2007).

19 Plaintiff makes six arguments concerning Defendants’  
20 failure to implement BAT/BCT: (1) storm water discharge samples  
21 reveal chemical levels in excess of EPA benchmarks; (2)  
22 Defendants have not provided covered storage for the Facility’s  
23 waste piles; (3) Defendants have not implemented modern sweeping  
24 technology; (4) Defendants failed to use appropriate filtration  
25 media; (5) Defendants failed to properly design and size the  
26 filtration units they do use; and (6) Defendants failed to  
27 implement BMPs to address dissolved metals.

28 **a. Chemical Levels in Excess of EPA Benchmarks**

1 Plaintiff argues Defendants have not achieved BAT/BCT  
2 since the Facility's discharges reveal levels of chemicals in  
3 excess of the EPA benchmark levels, which is a per se violation  
4 of the General Permit. Plaintiff supports its position citing a  
5 compilation chart which shows the Facility's storm water  
6 discharge sample results exceed the EPA benchmark for aluminum  
7 iron, and zinc. (Gray Decl. Ex. G, ECF No. 177-1.)

8 Defendants respond that discharge levels in excess of  
9 the EPA benchmark levels are only circumstantial evidence that  
10 the Facility failed to implement BAT/BCT, and contend Plaintiff  
11 has not shown the referenced water samples were taken from the  
12 Facility. (Def. Mot. 27:24-25.) Defendants argue if the samples  
13 were taken from an outside source, the results may not represent  
14 the Facility's discharges, and therefore Plaintiff has not shown  
15 the Facility violated the General Permit.

16 Plaintiff has not presented evidence identifying the  
17 source of the referenced water samples. Therefore, each motion on  
18 this issue is denied.

19 **b. Covered Storage**

20 Plaintiff argues Defendants have not implemented  
21 BAT/BCT at the Facility since "Defendants[] [have identified in]  
22 SWPPPs . . . stockpiles of . . . metals stored at the Facility as  
23 pollutant sources," but these stockpiles "ha[ve] [not been]  
24 covered . . . to prevent storm water contact." Plaintiff contends  
25 that as a result, "storm water washes through and across the  
26 [metal] stockpiles, collecting finely divided toxic heavy metal  
27 particulates and sediment, before discharging from the Facility."  
28 (Pl. Mot. 8:10-13.) Plaintiff supports its position citing

1 Defendants' SWPPPs, which list areas of exposed scrap metal as a  
2 source of potential pollutants at the Facility, (Packard Decl.  
3 Ex. G CSM 000307; Ex. I CSM 000497, ECF Nos. 186-1, 186-2), and  
4 the undisputed facts establishing that some of the Facility's  
5 metal stockpiles are not covered. (Pl.'s SUF ¶ 29.)

6 Defendants respond that the Facility is adequately  
7 managing its metal stockpiles since water that washes across the  
8 stockpiles "encounter[s] [a] myriad [of tools] aimed at filtering  
9 sediment." (Def. Opp'n 31:2-3.) Defendants support their position  
10 citing Kim Scott's declaration, where she avers the Facility  
11 prevents pollutants from leaving the Facility when storm water is  
12 discharged through "daily sweeping, two bio-swales, sand filters,  
13 vegetated filters, straw wattles & blankets, absorbent socks,  
14 berms & grading to direct flow, gravel & baserock to filter storm  
15 water, tanks to capture the storm water before it discharges, and  
16 a filtering drain inlet box." (K. Scott Decl. ¶ 8, ECF No. 194.)

17 The uncontroverted facts establish that some of  
18 Defendants' metal stockpiles are uncovered; but it has not been  
19 shown that covering the stockpiles is necessary in light of how  
20 the stockpiles are managed. Therefore each motion is denied on  
21 this issue.

22 **c. Modern Sweeping Technology**

23 Plaintiff argues the technology Defendants use to trap  
24 and capture pollutants before they are released in the Facility's  
25 storm water discharges has not achieved BAT/BCT, contending:

26 Defendants use [1950's era] "drum" or "brush"  
27 sweepers on the Facility's impervious  
28 surfaces, [and] this . . . technology . . .  
has been surpassed by a new generation of  
"regenerative" sweepers that use a pulse of

1 air to dislodge particulate matter together  
2 with vacuum hoses to capture and hold fine  
3 particulate.

4 (Pl. Mot. 8:20-23.) Plaintiff argues Defendants should have  
5 implemented this new technology since Plaintiff has documented,  
6 "a number of locations [where] . . . distinctly visible piles and  
7 rows of fine particulate matter remained on the surface of the  
8 Facility" after sweeping. (Pl. Mot. 8:24-26.) Plaintiff cites the  
9 uncontroverted fact that Defendants use "drum" or "brush"  
10 sweepers, (Pl.'s SUF ¶ 33), and the rebuttal report of  
11 Plaintiff's expert geologist, Steven Bond, in which he opines  
12 "the Facility's sweeping procedures and the sweeping equipment  
13 are wholly inadequate to prevent metal particulates and other  
14 debris on the Facility from coming into contact with storm water  
15 and discharge[s] from the Facility." (Bond Decl. Ex. B. p 16, ECF  
16 No. 167-1.) Specifically Bond declares:

17 On the . . . September [18,] 2014 site  
18 inspection, portions of the Facility had  
19 recently been swept[,] . . . [however] large  
20 portions of the concrete pad [were] . . .  
21 left unswept and covered in layers of [debris  
22 such that] . . . areas of dirt, finely  
23 divided metal particulate, and debris [were]  
24 exposed to rainfall and . . . to storm water  
25 runoff . . . . [Defendants' sweepers are] not  
26 effective at removing the fine particulate  
27 materials from within the cracks, joints, and  
28 fissures of the concrete pavement. Further,  
[they] obviously cannot sweep close to or  
within the piles or under bins, leaving large  
portions of the Facility processing areas  
unswept.

(Bond Decl. Ex. B. p. 16, ECF No. 167-1.)

Defendants counter, citing the following quoted  
averments from Damon Brown's declaration: Defendants are not

1 required to use the "regenerative sweepers" Plaintiff references  
2 since their current sweeping protocol "is effective," and  
3 "keeping the soil at the site for managed reuse [as they can with  
4 the drum and brush sweepers] is more beneficial to the  
5 environment than sending [the soil] into the waste stream" as  
6 would happen if the Facility used a regenerative sweeper. (Brown  
7 Decl. ¶ 33, ECF No. 181.) Defendants further rejoin that the  
8 Facility "engages in daily sweeping" and that Plaintiff's  
9 concerns regarding Bond's September 18, 2014 visit are "of no  
10 consequence" since that was "a dry, hot day and no rain was  
11 forecasted," and the Facility "engage[s] in much more careful and  
12 elaborate sweeping on days on which rain is forecasted." (Def.  
13 Opp'n 32:3-14.) Defendants also rely on the following averments  
14 from the Declaration of Jihan Gray, the Facility Manager, who  
15 avers that between 2007-2008, the Facility "implemented and/or  
16 engaged in . . . daily sweeping near scrap metal piles." (Gray  
17 Decl. ¶ 3, ECF No. 177.) Defendants also cite the portion of Kim  
18 Scott's declaration, where she avers the Facility was swept  
19 "prior to [Plaintiff's September 18, 2014] inspection, [but the  
20 Facility] did not perform the very thorough sweeping inspection  
21 that it typically does prior to or on a day when rain is  
22 forecasted." (K. Scott Decl. ¶ 9, ECF No. 194.)

23 In light of the disputed factual issues each motion on  
24 this issue is denied.

25 **d. Appropriate Filtration Media**

26 Plaintiff argues the Facility currently uses sand in  
27 its water filtration system which is not as effective as other  
28 filtration media and that by choosing to use sand, Defendants



1 fail to achieve BAT/BCT. (Pl. Mot. 9:2-5; 9:11-13.) Plaintiff  
2 supports its position by citing a report on which Defendants'  
3 expert environmental chemist, Barton Simmons, relies in reaching  
4 his conclusions, where it was found that filtration media such as  
5 compost, packing wood, enviro-media, ash, zeolite, and fine glass  
6 are capable of removing zinc from ground water at a 50-97% rate,  
7 whereas sand is capable of removing zinc from ground water at a  
8 16% rate, and that those same materials removed copper from  
9 groundwater at a 39-97% rate, whereas sand removed copper from  
10 ground water at a 29% rate. (Packard Decl. Ex. ZZ CSM 026363.)

11 Defendants respond that its sand filters are adequate,  
12 and cite the rebuttal report of Plaintiff's expert Steven Brown  
13 who states: "Having observed the sand filters at the Facility and  
14 having [the] benefit of the observations made at the site during  
15 recent 2014 storm events, the design appears sound for its  
16 current purpose." (Brown Decl. Ex. P p. 8, ECF No. 181-17.)

17 In light of the factual disputes concerning this issue,  
18 each motion is denied.

19 **e. Properly Designed and Sized Filtration Units**

20 Plaintiff argues even if Defendants' water filtration  
21 units used a filtration media other than sand, the units would  
22 still fail to achieve BAT/BCT since "the filtration units  
23 themselves are so poorly designed and undersized for the volumes  
24 of storm water generated at the Facility that storm water  
25 [overflows and] bypasses [the water filtration system] without  
26 treatment under common, normal rainfall conditions." (Pl. Mot.  
27 9:14-17.) Plaintiff supports its position citing Steven Bond's  
28 opening report, which states that the Facility's water filtration

1 units have "an inappropriate design and do[] not function as a  
2 filter under common, normal rainfall conditions." (Bond. Decl.  
3 Ex. A p. 16-17, 38 ECF No. 167-1.)

4 Defendants respond that the Facility's "sand filters  
5 are more than adequate to meet the BAT/BCT standards," (Def.  
6 Opp'n 32:24), and support their position citing Damon Brown's  
7 following deposition testimony: the sand filters are "working  
8 well when you look at the monitoring data." (Cannata Opp'n Decl.  
9 Ex. C 265:1-267:13, 195-1.)

10 In light of the factual disputes concerning the  
11 effectiveness of the Facility's water filtration units, each  
12 motion on this issue is denied.

13 **f. Dissolved Metals**

14 Plaintiff argues the Facility has not achieved BAT/BCT  
15 concerning dissolved metals since water sample results "show...  
16 [dissolved] copper, lead, zinc, nickel, chromium and molybdenum  
17 are discharged" from the Facility, and Defendants "have . . .  
18 failed to develop and implement BMPs to address discharges of any  
19 dissolved metals, which, by definition, are not [mitigated] by  
20 filtration." (Pl. Mot. 10:23; 11:1-3; 11:4-7.) Plaintiff cites  
21 two water samples taken from the Facility on December 6, 2007,  
22 and relies on Steven Bond's analysis of those samples, where he  
23 opines copper, lead, zinc, nickel, chromium and molybdenum are  
24 discharged from the Facility in their dissolved form, and  
25 concludes "[t]here are no BMPs at the Facility that address the  
26 issue of dissolved or dissociated pollutants." (Packard Decl. Ex.  
27 W CSM000729-754, ECF No. 168-5; Bond Decl. Ex. A, App'x B Table  
28 2, ECF No. 167-1; Bond Decl. Ex. A p.9, ECF No. 167-1.)

1 Defendants counter that the Facility's BMPs address  
2 dissolved metals and support their position citing Damon Brown's  
3 declaration, where he avers Bond's assessments of the Facility's  
4 BMPs are "incorrect" since research has shown the traditional  
5 sand filters the Facility uses "have excellent heavy metal  
6 removal properties" and have been "effective for the treatment of  
7 dissolved metal contaminants commonly found in storm water."  
8 (Brown Decl. ISO Def. Mot. Ex. P, p. 8, ECF No. 181-17.)  
9 Defendants also rely on a portion of Barton Simmons' declaration  
10 where he avers that Bond's methodology was faulty since he relied  
11 on two samples, which is an insufficiently small sample size, and  
12 the samples he analyzed presented "non-detect" chemical levels,  
13 which should not have been used. (Simmons Decl. Opp'n Pl. Mot., ¶  
14 11, ECF No. 190.)

15 In light of the factual disputes concerning the  
16 Facility's BMPs addressing dissolved metals, each motion on this  
17 issue is denied.

18 **4. Monitoring and Reporting Program ("MRP")**

19 Plaintiff and Defendants cross move for summary  
20 judgment on Plaintiff's claim alleging Defendants failed to  
21 comply with Section B of the General Permit, which requires  
22 Defendants to develop and implement a Monitoring and Reporting  
23 Program ("MRP") for the Facility.

24 As part of [a] MRP, a permittee must conduct  
25 visual observations of storm water throughout  
26 the Wet Season; must collect water samples at  
27 each outfall during specific times; must  
28 analyze these samples for specific  
contaminants; and must file Annual Reports  
with the [Water] Board summarizing the visual  
observation, results of sampling analysis,  
and General Permit compliance.

1 Santa Monica Baykeeper v. Int'l Metals Ekco, Ltd., 619 F. Supp.  
2 2d 936, 942 (C.D. Cal. 2009). Plaintiff alleges Defendants' MRP  
3 was inadequate since Defendants (1) failed to sample for all  
4 required pollutants, (2) failed to consistently sample at each of  
5 the Facility's discharge points, and (3) failed to take the  
6 required number of samples during the 2012-2013 wet season.

7 **a. Sampling Required Pollutant Parameters**

8 Each party seeks summary judgment on Plaintiff's claim  
9 alleging Defendants violated Section B of the General Permit by  
10 failing to test the Facility's water samples for polychlorinated  
11 biphenyl ("PCBs"). Defendants further seek summary adjudication  
12 on Plaintiff's claim that Defendants violated Section B by  
13 failing to test the Facility's water samples for nickel, cadmium,  
14 chromium, antimony, arsenic, mercury, molybdenum, and selenium.

15 Section B(5) of the General Permit requires that storm  
16 water samples be analyzed for "[t]oxic chemicals and other  
17 pollutants that are likely to be present in storm water  
18 discharges in significant quantities." (General Permit p. 27.)  
19 The General Permit defines "significant quantities" as follows:  
20 "the volume, concentration, or mass of pollutant that can cause  
21 or threaten to cause pollution, contamination, or nuisance; or  
22 adversely impact human health or the environment; and/or cause or  
23 contribute to a violation of any applicable water quality  
24 standards for the receiving water." (General Permit Attachment  
25 4.)

26 **i. PCBs**

27 Plaintiff argues Defendants were required to analyze  
28 their water samples for PCBs since surface soil samples at the

1 Facility reveal the presence of PCBs and Defendants' expert  
2 Barton Simmons acknowledges PCBs are "ubiquitous" in the scrap  
3 metal industry, yet Defendants have not required PCB testing of  
4 their storm water samples. (Pl. Mot. 11:9-21; Pl. RJN Ex. H, CSM  
5 002179, ECF No. 166-3.)

6 Defendants respond "PCBs are virtually insoluble," and  
7 so "[t]he probability of the Facility's storm water containing  
8 PCBs above the benchmark level is extremely low." (Def. Opp'n  
9 45:11-22.) Defendants cite in support of their position Simmons'  
10 Declaration where he avers:

11 [w]hether or not PCBs are present in the soil  
12 at [the Facility] is somewhat irrelevant to  
13 the present case [because] . . . . [t]here is  
14 not only no evidence that PCBs in storm water  
15 have left [the Facility], but also no reason  
16 to expect PCBs in storm water. PCBs are  
virtually insoluble; . . . . [therefore],  
[t]he probability of the Facility's storm  
water containing PCBs above a benchmark is  
extremely low.

17 (Simmons Decl. ¶ 6, ECF No. 190.)

18 Plaintiff disagrees, citing the portion of Steven  
19 Bond's declaration where he avers that Simmons' opinion is "not  
20 credible" for the following reasons:

21 [T]he solubility of PCBs is not a  
22 precondition for transport in storm water or  
23 any surface water flows. Storm water  
24 transports solid and dissolved chemical  
25 components alike. Regardless of the  
26 solubility of a contaminant, it is subject to  
27 transport in solid particulate form. Eroded  
28 sediment is transported in storm water mainly  
as a mass of suspended soil particulates  
referred to as total suspended solids (TSS).  
Storm water samples, unless otherwise  
specified, are analyzed for the total  
concentrations of contaminants which include  
total, dissolved, and dissociated chemicals.

1 (Bond Decl. IS Pl. Reply ISO Pl. MSJ ¶ 6, ECF No. 211.)

2 In light of the disputed factual issues concerning  
3 whether PCBs are likely to end up in the Facility's storm water  
4 and Section B(5)'s requirement that the Facility need only  
5 analyze water samples for "pollutants that are likely to be  
6 present in storm water discharges in significant quantities,"  
7 each motion on this issue is denied.

8 **ii. Remaining Chemicals**

9 Defendants seek summary judgment on Plaintiff's claim  
10 alleging they violated Section B(5) by failing to test the  
11 Facility's water samples for nickel, cadmium, chromium, antimony,  
12 arsenic, mercury, molybdenum, and selenium, arguing that  
13 significant quantities of these chemicals were not present in the  
14 water samples. Defendants support their position citing Barton  
15 Simmons' rebuttal report where Simmons states that based on the  
16 Water Board's December 2007 sampling, the concentration of  
17 nickel, cadmium, chromium, antimony, arsenic, mercury, and  
18 selenium were all below the background or benchmark levels, and  
19 therefore testing was not required, (Simmons Decl. Ex. B,  
20 PLF013760, ECF No. 178-2); and that the Facility's 2010 sampling,  
21 which shows the levels of nickel, cadmium and chromium, were  
22 below background or benchmark levels. (Simmons Decl. ¶ 7, ECF No.  
23 178.) Defendants also argue they were not required to test for  
24 the referenced pollutants since Section B(5)(c)(iii) of the  
25 General Permit lists circumstances under which a facility need  
26 not sample for pollution parameters listed in Table D; however,  
27 this argument has not been shown relevant since Plaintiff's claim  
28 does not reference pollutants listed in Table D of the General

1 Permit. (General Permit p. 43.)

2 Plaintiff responds there is a genuine material factual  
3 issue concerning whether Defendants should have analyzed the  
4 water samples for the referenced chemicals, arguing the chemicals  
5 are likely to be present in the Facility's storm water in  
6 significant quantities, citing Steven Bond's expert report, where  
7 he states that the referenced chemicals have all been found at  
8 the Facility by the government and opines:

9 Based on the nature of the operations at the  
10 Facility, the types of materials handled and  
11 stored at the Facility, and the general lack  
12 of structural controls and less than ideal  
13 housekeeping practices, the above-referenced  
[chemicals] are likely to be present in CMS's  
storm water discharges in significant  
quantities.

14 (Bond Dec. ISO Pl. Mot. Ex. A, p. 35-36, ECF No. 167-1.)

15 In light of the factual dispute concerning whether  
16 significant quantities of the referenced chemicals are likely  
17 present in the Facility's storm water, each motion on this issue  
18 is denied.

19 **b. Consistent Sampling**

20 Plaintiff alleges Defendants violated Section B(7) of  
21 the General Permit by failing to consistently sample all  
22 discharge points at the Facility; specifically Plaintiff alleges  
23 Defendants failed to sample: (1) discharge point SWSL1 in 2009-  
24 2010; (2) discharge point SWSL1 in 2010-2011; (3) the discharge  
25 point at the West Gate in any year; and (4) the discharge point  
26 at the southwestern corner at the western end of the southern  
27 Property boundary in any year.

28 Section B(7)(a) of the General Permit states "facility

1 operators shall . . . collect samples of storm water discharges  
2 from all drainage areas that represent the quality and quantity  
3 of the facility's storm water discharges." (General Permit. P.  
4 28.) However, Section B(7)(d) states:

5 [f]acility operators who determine that the  
6 industrial activities and [Best Management  
7 Practices] within two or more drainage areas  
8 are substantially identical may . . .  
9 collect samples from a reduced number of  
substantially identical drainage areas....  
Facility operators must document such a  
determination in the annual report.

10 (General Permit p. 28.)

11 **i. 2009-2010 Wet Season**

12 Plaintiff argues Defendants failed to sample the  
13 discharge area identified as SWSL1 during the 2009-2010 season,  
14 and cites the Facility's 2009-2010 Annual Report, which  
15 identifies two discharge locations, SWSL1 and SWSL2. (Pl.'s SUF  
16 ¶ 75.)

17 Defendants respond they were not required to sample  
18 SWSL1 since under Section B(7)(a), SWSL1 is substantially  
19 identical to SWSL2, which was sampled. The Facility's 2009-2010  
20 Annual Report states discharges from SWSL2 are representative of  
21 the discharges from SWSL1:

22 The [West Gate] storm water sample location  
23 ... is located immediately north of the  
entrance. The [South West Corner] storm water  
24 sample location . . . is located down stream  
of the West Gate location on the south west  
25 frontage of the facility. The flows from the  
West Gate join the flow at the south frontage  
of the property at the South West Corner  
26 sample location; therefore it was determined  
27 that one sample location is representative of  
both flows and only one sample location (down  
28 gradient location) was sample[d] as allowed  
in Section B7d of the General Permit.



1 (Pl.'s SUF ¶ 76; Packard Decl. Ex. Q CSM 4357, ECF No. 168-4)  
2 (emphasis added.)

3 Section B(7)(a) of the General Permit states that in  
4 order to rely on the storm water samples from SWSL2 as  
5 representative of SWSL1, the facility operator must determine  
6 "the industrial activities and BMPs" within both areas are  
7 "substantially identical." (General Permit p. 28.) However,  
8 neither party sufficiently addresses this requirement, and  
9 therefore each motion on this issue is denied.

10 **ii. 2010-2011 Wet Season**

11 Plaintiff argues Defendants were required to sample  
12 storm water discharges from SWSL1 during 2010-2011; however, the  
13 uncontroverted facts show the 2010-2011 Annual Report does not  
14 list SWSL1 as a discharge location. (Pl.'s SUF ¶ 80.)

15 Defendants respond that they were not required to  
16 sample storm water discharges from SWSL1 in 2010-2011 since the  
17 SWSL1 discharge point was eliminated. (Def. Opp'n 42:7-8.)  
18 Defendants support their position citing the portion of Kim  
19 Scott's declaration where she avers that at the end of the 2009-  
20 2010 storm season, the Facility determined that much of the  
21 discharge from SWSL1 was being caused by a neighboring facility,  
22 and after she spoke with the neighboring facility, it was  
23 determined that "(1) the discharge from SWSL1 was no longer  
24 likely due to the improvements [that the neighboring facility  
25 stated it would make] and (2) any discharge from SWSL2 would be  
26 representative of the industrial activities on the entire  
27 Facility," and therefore the Facility "eliminated SWSL1 as a  
28 discharge point." (K. Scott Decl. Opp'n Pl. Mot. ¶¶ 17-18, ECF

1 No. 194.)

2 Plaintiff replies that Defendants' 2010-2011 Annual  
3 Report reveals the Facility did not consider SWSL2 to be  
4 representative of SWSL1 since the report "affirmatively directs  
5 Defendants to indicate whether they are claiming the B(7)(d)  
6 exemption[,] . . . and Defendants failed to respond [in the  
7 Annual Report] that they were" claiming the exemption. (Pl. Reply  
8 22:15-18.)

9 Kim Scott's declaration shows the Facility did not  
10 report samples from SWSL1 in the 2010-2011 Annual Report because  
11 she considered SWSL2 to be representative of the entire Facility.  
12 However, the 2010-2011 Annual Report prescribed that if  
13 Defendants chose not to report storm water sampling from SWSL1  
14 because they opined SWSL2 was representative, they needed to  
15 disclose that information in their 2010-2011 Annual report.  
16 Defendants did not do so. Therefore, Plaintiff's motion on this  
17 issue is granted, and Defendants' motion is denied.

18 **iii. West Gate**

19 Plaintiff argues Defendants violated Section B of the  
20 General Permit by failing "to identify, sample and monitor"  
21 discharges from the West Gate of the Facility. (Pl. Mot. 13:8-9.)  
22 The uncontroverted facts establish the Facility's Annual Reports  
23 have never reported storm water samples taken from the West Gate.  
24 (Pl.'s SUF ¶ 97.) Plaintiff supports its argument that there were  
25 storm water discharges at the West Gate by citing Steven Bond's  
26 averments that "[i]t seemed reasonable to assume that, under high  
27 flow conditions [meaning intense rainstorms] . . . there would be  
28 flow out of the [West Gate]," (Packard Decl. Ex. EEE 48:19-25,

1 ECF No. 168-12), and photographs Bond took on December 11, 2014  
2 showing discharge at the West Gate. (Bond Decl. ¶ 10, Ex. I,  
3 CSM19396, CSM19405, CSM19408, ECF No. 167-2.) Plaintiff also  
4 relies on samples requested by the Water Board showing there were  
5 water discharges from the Facility's West Gate in December 2007.  
6 (Packard Decl. Ex. W, CSM 000730, ECF No. 168-5.)

7 Defendants respond they were not required to sample at  
8 West Gate since the Facility installed a berm, "which has  
9 prevented discharges in that area[,] and even if storm water did  
10 discharge, sampling at the West Gate "would be redundant [of  
11 sampling at SWSL2]." (Def. Mot. 30:3-13.) Defendants also cite a  
12 portion of Jihan Gray's declaration, where she avers "[s]torm  
13 water sometimes discharged from the Facility at [the West Gate,  
14 but] . . . [s]ampling at the 'West Gate' would be redundant  
15 because it is home to . . . many of the same BMPs as SWSL1 and  
16 SWSL2," and also that she "installed a berm at the 'West Gate  
17 area [in November 2014] which has completely prevented  
18 discharges." (Gray Decl. ¶ 12, ECF No. 177.)

19 Gray's averments evince that water has discharged from  
20 the West Gate, and therefore Section B(7) of the General Permit  
21 requires Defendants to sample storm water from that location  
22 unless the facility operator determines "the industrial  
23 activities and BMPs" at the West Gate are substantially identical  
24 to another location and "such a determination [is documented] in  
25 the annual report." (General Permit p. 28.) The uncontroverted  
26 facts establish that Defendants' Annual Report does not list the  
27 West Gate as a discharge point, (Pl.'s SUF ¶ 97); nor does the  
28 report state that the West Gate was substantially identical to

1 another discharge point. Therefore, Plaintiff's motion on this  
2 issue is granted and Defendants' motion is denied.

3 ///

4 **iv. Southern Boundary**

5 Plaintiff argues Defendants "failed to identify, sample  
6 and monitor" the southwest corner at the western end of the  
7 southern property boundary," (Pl. Mot. 13:7-1), and supports its  
8 argument citing Steven Bond's deposition testimony, where he  
9 avers that on December 12, 2014, he observed, "discharges . . .  
10 from several areas in the southwest corner" beyond SWSL2."  
11 (Packard Decl. Ex. JJ, 134:1-23, ECF No. 168-7.) Further, the  
12 uncontroverted facts establish the Facility's Annual Report never  
13 reported storm water samples taken at this location. (Pl.'s SUF ¶  
14 97.)

15 Defendants respond that the General Permit did not  
16 require them to sample the "alleged southwestern discharge point"  
17 since the only evidence of discharge from this location was a  
18 "one-time occurrence" during "one of the largest storm events in  
19 recent memory," as a result of which the Facility's "outfall pipe  
20 at SWSL2 was overwhelmed and compromised," and "storm water began  
21 flowing out through the pipe as well as around the pipe."  
22 Defendants also rejoin that the Facility "made interim repairs to  
23 the SWSL2 pipe[,] and the area has been secure in subsequent  
24 storm events." (Def. Opp'n 43:10-20.) Defendants cite the  
25 following portion of Kim Scott's declaration concerning the  
26 matter:

27 due to the nature, size and intensity [of the  
28 December 11, 2014 storm event, the  
Facility's] outfall pipe at SWSL2 was  
overwhelmed and compromised. As a result,

1 storm water began flowing out through the  
2 pipe as well as around the pipe. [The  
3 Facility] immediately made interim repairs to  
4 that location and the area has been secure in  
5 subsequent storm events.

6 (K. Scott. Decl. ¶ 20, ECF No. 194.) Defendants also cite Scott's  
7 declaration where she avers "any discharge from SWSL2 would be  
8 representative of the industrial activities on the entire  
9 Facility," and therefore the Facility was not required to report  
10 any storm water discharges from the southwest corner. (K. Scott  
11 Decl. ¶ 17, ECF No. 194.)

12 Plaintiff replies "Defendants have never claimed  
13 reduced sampling in relation to the southern boundary discharge  
14 point as required to claim the exemption under Section B(7)(d)."  
15 (Pl. Reply 24:1-3.)

16 Kim Scott's averments evince that storm water  
17 discharged from the southwest corner at the western end of the  
18 southern property boundary. (K. Scott. Decl. ¶ 20, ECF No. 194.)  
19 The General Permit required the Facility to sample water from the  
20 southwest corner at the western end of the southern property  
21 boundary unless, inter alia, the facility operator "documented  
22 [his or her] . . . determination [in the annual report that the  
23 discharge point was substantially identical to another discharge  
24 point,]" which Defendants did not do. (General Permit p. 28.)  
25 Therefore, Plaintiff's motion on this issue is granted and  
26 Defendants' motion is denied.

27 **c. Failure to Take Samples**

28 Plaintiff argues Defendants violated Section 5 of the  
General Permit by failing to take two storm water discharge

1 samples during the 2012-2013 wet season. Concerning this matter,  
2 Section B(5) (a-b) of the General Permit states:

3 Facility operators shall collect storm water  
4 samples during the first hour of discharge  
5 from (1) the first storm event of the wet  
6 season, and (2) at least one other storm  
7 event in the wet season. All storm water  
8 discharge locations shall be sampled. . . .  
Sample collection is only required of storm  
water discharges that occur during scheduled  
facility operating hours and that are  
preceded by at least (3) three working days  
without storm water discharges.

9  
10 (Pl. RJN Ex. A General Permit p. 26-27.) Plaintiff argues “[f]or  
11 the 2012-2013 wet season, Defendants did not report any storm  
12 water samples to the Regional Board and certified under oath that  
13 . . . ‘[t]here was no qualifying event,’ . . . [h]owever, . . .  
14 it is undisputed that storm water discharged from the Facility on  
15 at least three [occasions] during the 2012-2013 wet season.” (Pl.  
16 Mot. 13:20-14:1.) Plaintiff contends discharges occurred November  
17 17, 2012; December 21, 2012; and March 20, 2013.

18 **i. November 17, 2012**

19 Plaintiff cites in support of its position that a  
20 discharge occurred on November 17, 2012, the Lane Report, where  
21 Lane provides the results from a sampling event conducted on  
22 November 17, 2012. (Lane Decl. Ex. I. PLF014630, ECF No. 170-3.)

23 Defendants respond “there were no discharges” in  
24 November 2012, and that the November 17, 2012 samples were taken  
25 by a third-party and Plaintiff cannot demonstrate “what occurred  
26 on that date, where the samples were taken, or when they were  
27 taken.” (Def. Opp’n 35:3-6; 35:14.) Defendants cite a portion of  
28 Kim Scott’s declaration where she avers “[o]n November 17, 2012

1 there was not enough rain at the Facility to generate a  
2 discharge.” (K. Scott Decl. ¶¶ 11, ECF No. 194.)

3 In light of the conflicting evidence on the issue of  
4 whether there was a discharge at the Facility on November 17,  
5 2012, each motion concerning this date is denied.

6 **ii. December 21, 2012**

7 Plaintiff cites in support of its position that a  
8 discharge occurred from the Facility on December 21, 2012, the  
9 Lane Report in which Lane “presents the analytical results for  
10 ... the sampling event conducted on December 21, 2012.” (Lane  
11 Decl. Ex. J, PLF014664, ECF No. 170-4.)

12 Defendants respond that they “do[] not believe” there  
13 was a discharge from the Facility on December 21, 2012, citing to  
14 a portion of Jihan Gray’s Declaration, and arguing that “[t]hough  
15 Ms. Gray does not recall December 21, 2012 with certainty, she  
16 knows and attests to her custom and practice that she tries to  
17 complete a Wet Weather Visual Observation Form whenever it  
18 rains/discharges,” and since there is no form for December 21,  
19 2012, this is evidence that there was no discharge from the  
20 Facility that day. (Def. Opp’n 36:18-28; Gray Decl. ¶ 4, ECF No.  
21 193 (emphasis added).)

22 Plaintiff replies that evidence of Gray’s habit is  
23 insufficient to create a genuine dispute of fact since Lane  
24 analyzed samples from that date.

25 Gray’s averment that she “tries to complete a Wet  
26 Weather Visual Observation Form whenever it rains/discharges” is  
27 insufficient to controvert Plaintiff’s direct evidence concerning  
28 the discharge on December 21, 2012. See Fed. R. Evid. 406

1 Advisory Committee's Note (2011) (stating the "adequacy of  
2 sampling and uniformity of response are key factors" in  
3 determining whether a particular behavior is a habit); see also  
4 S.E.C. v. Dunn, No. 2:09-CV-2213 JCM (VCF), 2012 WL 475653, at \*5  
5 (D. Nev. Feb. 14, 2012) ("This court finds that, as contemplated  
6 in the Federal Rules of Evidence, the term 'habit' requires more  
7 consistency of action than has been shown here."). Therefore  
8 Plaintiff's motion concerning this date is granted and  
9 Defendants' motion is denied.

10 **iii. March 20, 2013**

11 Plaintiff cites in support of its position that  
12 Defendants failed to report a storm water discharge on March 20,  
13 2013, a report showing storm water samples analyzed by KIFF  
14 Analytical LLC, which states the sample date is "03/20/2013."  
15 (Packard Decl. Ex. Z, CSM003763, ECF No. 168-5.)

16 Defendants respond that they were not required to file  
17 a report for March 20, 2013, since the discharge occurred prior  
18 to the start of business hours, citing Section 5(b)(8) of the  
19 General Permit, which states in part that when a discharge begins  
20 more than one hour before a facility begins its operations, the  
21 facility operator "may . . . sample collection more than one hour  
22 after discharge begins if the facility operator determines that  
23 the objectives of the Section will be better satisfied." (General  
24 Permit p. 29 (emphasis added).) Defendants cite in support of  
25 their position that the rain event on March 20, 2013 began prior  
26 to business hours the Wet Weather Visual Observation Form filled  
27 out by Jihan Gray, which states "rain heavy through night[,]  
28 sample had been discharging for several hours before 8:00 A.M."



1 (Gray Decl. Ex. D, CSM 4268, ECF No. 193-1.)

2 Plaintiff offers no evidence from which a reasonable  
3 inference could be drawn that the wet weather event on March 20,  
4 2013 began less than one hour before the Facility opened.  
5 Therefore, Plaintiff's motion concerning this date is denied and  
6 Defendants' motion is granted.

7 **E. California Law**

8 Plaintiff's Cal. Health & Safety Code section 25249  
9 claim alleges Defendants knowingly discharged lead into sources  
10 of drinking water. Plaintiff alleges Defendants violated section  
11 25249 on forty-two occasions by discharging water with lead  
12 concentrations above the CTR standard. Defendants seek summary  
13 judgment on each of the forty-two discharges; however, Plaintiff  
14 only seeks summary judgment on eighteen discharges and argues the  
15 remaining twenty-four discharges present a genuine issue of  
16 material fact precluding summary judgment.

17 Cal. Health & Safety Code section 25249 states in  
18 pertinent part, "[n]o person . . . shall knowingly discharge or  
19 release a chemical known to the state to cause cancer or  
20 reproductive toxicity into water or into land where such chemical  
21 passes or probably will pass into any source of drinking water."  
22 "Lead has been identified as a known carcinogen and reproductive  
23 toxin." Evnt'l. Law Found. v. Beech-Nut Nutrition Corp., 235 Cal.  
24 App. 4th 307, 312 (2015). However, a "safe harbor exemption" in  
25 Cal. Health & Safety Code section 25249.9(b) states: "section  
26 25249 shall not apply to any discharge or release [if the  
27 defendant can show, inter alia, that] "the discharge or release  
28 is in conformity with all other laws and with every applicable

1 regulation, permit, requirement, and order.”

2 Plaintiff argues it is uncontroverted that on twelve  
3 dates between 2008 and 2012, samples of storm water from the  
4 Facility revealed concentrations of lead in excess of the CTR  
5 standards. (Pl.’s SUF ¶¶ 218-227, 232, 235-237, 250-257.)

6 Defendants rejoin there is no evidence the Facility  
7 discharged or released lead into sources of drinking water since  
8 the origin of the lead concentrations in the samples is unclear  
9 and therefore Plaintiff has not shown lead was “discharged or  
10 released” from the Facility. Defendants argue they have not  
11 “discharged or released” lead as the phrase is used in section  
12 25249, and cite Consumer Advocacy Grp., Inc. v. Exxon Mobile  
13 Corp. (“CAG”), 104 Cal. App. 4th 438 (2002), in support of their  
14 argument. The CAG court held that the words “discharge” and  
15 “release” “convey movement out of a confined space such as a  
16 container, not, . . . simply movement from one point to  
17 another,” stating:

18 “discharge or release” as used in section  
19 25249 refers to a movement of chemicals from  
20 a confined space into the land or the water.  
21 The subsequent passive migration of chemicals  
22 through the soil or water after having been  
23 so discharged or released by a party does not  
24 constitute another discharge or release  
25 within the meaning of section 25249.

23 Id. at 444, 450.

24 Plaintiff has not presented evidence that the Facility  
25 was the source of the lead detected in the referenced water  
26 samples. Therefore its motion on this issue is denied.

27 Defendant argues even if the source of the detected  
28 levels of lead is uncertain, its motion on all forty-two samples

1 should be granted for four reasons: (1) the "safe harbor  
2 exemption," applies, (2) Plaintiff's TAC is insufficiently vague,  
3 (3) there is insufficient evidence that any discharge was made  
4 "knowingly[,]" and (4) there is insufficient evidence any  
5 discharge was made "into a source of drinking water."

6 **1. Safe Harbor**

7 Defendants argue they are protected by the "safe harbor  
8 exemption" since inter alia, the "discharges or releases" from  
9 the Facility are "in conformity with . . . every applicable  
10 regulation, permit, requirement, and order." Cal. Health & Safety  
11 Code § 25249.9(b). Plaintiff responds that Defendants have  
12 violated the terms of the General Permit, and therefore the safe  
13 harbor exemption does not apply.

14 Plaintiff presented sufficient evidence to demonstrate  
15 that some of the Facility's storm water discharges violated  
16 Section C of the General Permit by "caus[ing] or contribut[ing]  
17 to an exceedance of . . . [the] applicable water quality  
18 standards" for lead in the CTR. (General Permit. P. 4) Therefore,  
19 Defendants' summary judgment motion based on the safe harbor  
20 exemption is denied.

21 **2. Vagueness**

22 Defendants argue the allegations in Plaintiff's TAC  
23 concerning Plaintiff's section 25249 claim are so vague that the  
24 basis of Plaintiff's claim cannot be determined. (Def. Mot.  
25 32:27-28:1.) Plaintiff responds that the TAC and Exhibit D  
26 attached to the TAC demonstrate its section 25249 claim is not  
27 vague. Concerning this claim, Plaintiff alleges "[t]his action  
28 ... seeks to remedy Defendant[s'] . . . continuing discharge or

1 releases of lead and lead compounds into sources of drinking  
2 water in violation of California Health & Safety Code Section  
3 25249.5 (also referred to as 'Proposition 65').” (TAC ¶¶ 4-5.)  
4 Exhibit D, which is attached to the TAC, is a “Notice of  
5 Proposition 65 Violations” that Plaintiff sent Defendants, it  
6 states: the asserted “violations [of section 25249] involve the  
7 discharge of lead and lead compounds into sources of drinking  
8 water.” (TAC Ex. D.) In light of the referenced allegations in  
9 the TAC, Defendants have not shown this claim is impermissibly  
10 vague.

### 11 **3. “Knowingly”**

12 Defendants argue Plaintiff cannot show any discharge or  
13 release of lead from the Facility was done “knowingly.” Plaintiff  
14 responds that Defendants “have known that the Facility discharges  
15 lead since at least the date” when Defendants received lab  
16 reports from a November 1, 2008 sampling event revealing lead in  
17 the storm water. (Packard Decl. ISO Pl. Mot. Ex. O, CSM 000660,  
18 ECF No. 168-3.) The water sample results Plaintiff references  
19 were published in Defendants’ 2008-2009 Annual Report and create  
20 a genuine issue of material fact concerning whether Defendants  
21 had knowledge that the discharges or releases from its Facility  
22 contained lead. Therefore Defendants’ motion based on this  
23 argument is denied.

### 24 **4. “Into a Source of Drinking Water”**

25 Defendants argue Plaintiff cannot show any discharge or  
26 release of lead from the Facility “passes or probably will pass  
27 into a source of drinking water” as required to prove its section  
28 25249 claim. Plaintiff responds that the Facility’s discharges

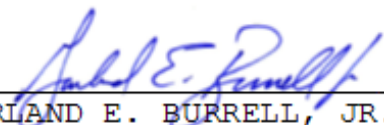
1 probably will pass into the Wyman Ravine, which is a designated  
2 source of drinking water. Plaintiff supports its position by  
3 citing to John Lane's report where he states that on April 4,  
4 2012, he personally "observed continuous storm water flow from  
5 the Facility . . . into Wyman Ravine." (Lane Decl. Ex. A p.4, ECF  
6 No. 170-1.) Plaintiff also cites the uncontroverted fact that  
7 the Wyman Ravine is a tributary of the Feather River, (Pl SUF ¶  
8 265), and the text of the Basin Plan, which states the Feather  
9 River is an existing source of drinking water, and "[t]he  
10 beneficial uses of any . . . body of water generally apply to its  
11 tributary streams." (Pl. RJN Ex. B Basin Plan ("Basin Plan")  
12 II.2.00; II.4.00-II-6.00, ECF No. 166-1).

13 In light of Plaintiff's evidence, Defendants' motion on  
14 this issue is denied.

15 **IV. CONCLUSION**

16 For the stated reasons, Plaintiff's motion for partial  
17 summary judgment is GRANTED in part and DENIED in part, and  
18 Defendants' motion for summary judgment is GRANTED in part and  
19 DENIED in part.

20 Dated: August 14, 2015

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23 \_\_\_\_\_  
24 GARIAND E. BURRELL, JR.  
25 Senior United States District Judge  
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