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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 CALIFORNIA RIVER WATCH,

No. 2:17-cv-00524-KJM-KJN

12 Plaintiff,

13 v.

ORDER

14 CITY OF VACAVILLE,

15 Defendant.
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18 This case is before the court on defendant City of Vacaville's motion to dismiss
19 plaintiff California River Watch's complaint. Mot., ECF No. 5. At hearing on June 16, 2017,
20 Jack Silver and David Weinsoff appeared for plaintiff and Gregory Newmark appeared for
21 defendant. ECF No. 14. As discussed below, defendant's motion is DENIED.

22 I. BACKGROUND AND PROCEDURAL HISTORY

23 On March 13, 2017, plaintiff filed its complaint. *See* Compl., ECF No. 1.
24 Plaintiff, a non-profit organization, alleges the City of Vacaville's public water system transports
25 "hexavalent chromium," a contaminant and "hazardous waste," in excess of federal and state
26 maximum contaminant levels. Compl. ¶¶ 2, 15, 19, 22. Plaintiff alleges the City's water is
27 supplied for customer consumption and in its contaminated state poses an "imminent and
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1 substantial endangerment to public health or the environment” in violation of the Resource
2 Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* (RCRA). *Id.* ¶¶ 15, 29.

3 On May 13, 2017, defendants filed its motion to dismiss plaintiff’s complaint
4 under Rule 12(b)(6), contending: (1) RCRA’s anti-duplication provision bars plaintiff’s suit and
5 (2) plaintiff has otherwise failed to allege a violation of the RCRA. *See* Mot. at 11–16. Plaintiff
6 filed its opposition, Opp’n, ECF No. 9, and defendant filed its reply, Reply, ECF No. 13.

7 II. LEGAL STANDARDS

8 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move to
9 dismiss a complaint for “failure to state a claim upon which relief can be granted.” A court may
10 dismiss “based on the lack of cognizable legal theory or the absence of sufficient facts alleged
11 under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
12 1990).

13 Although a complaint need contain only “a short and plain statement of the claim
14 showing that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), in order to survive a motion
15 to dismiss this short and plain statement “must contain sufficient factual matter . . . to ‘state a
16 claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting
17 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint must include something
18 more than “an unadorned, the-defendant-unlawfully-harmed-me accusation” or “‘labels and
19 conclusions’ or ‘a formulaic recitation of the elements of a cause of action.’” *Id.* (quoting
20 *Twombly*, 550 U.S. at 555). Determining whether a complaint will survive a motion to dismiss
21 for failure to state a claim is a “context-specific task that requires the reviewing court to draw on
22 its judicial experience and common sense.” *Id.* at 679. Ultimately, the inquiry focuses on the
23 interplay between the factual allegations of the complaint and the dispositive issues of law in the
24 action. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

25 In making this context-specific evaluation, this court construes the complaint in
26 the light most favorable to the plaintiff and accept as true the factual allegations of the complaint.
27 *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007). This rule does not apply to “a legal conclusion
28 couched as a factual allegation,” *Papasan v. Allain*, 478 U.S. 265, 286 (1986), nor to “allegations

1 that contradict matters properly subject to judicial notice” or to material attached to or
2 incorporated by reference into the complaint, *Sprewell v. Golden State Warriors*, 266 F.3d 979,
3 988–89 (9th Cir. 2001).

4 III. DISCUSSION

5 A. Anti-Duplication

6 In 1976, Congress passed RCRA in an effort to end the environmental and public
7 health risks associated with mismanagement of hazardous waste. *See Hinds Invs., L.P. v. Angioli*,
8 654 F.3d 846, 850 (9th Cir. 2011). To this end, RCRA is a “comprehensive environmental statute
9 that governs the treatment, storage, and disposal of solid and hazardous waste.” *Id.* (citing
10 *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996)); *see* 42 U.S.C. § 6902(b) (articulating
11 RCRA’s purpose and objectives). RCRA gives the Environmental Protection Agency (EPA)
12 regulatory authority to govern the use of “hazardous wastes from cradle to grave, in accordance
13 with . . . rigorous safeguards and waste management procedures.” *Chi. v. Env’tl. Def. Fund*,
14 511 U.S. 328, 331 (1994).

15 RCRA has two non-duplication provisions, *see* 42 U.S.C. § 6905(a)–(b), one of
16 which is relevant here. Section 6905(a) provides that RCRA cannot be used to regulate any
17 activity or substance,

18 [W]hich is subject to the Federal Water Pollution Control Act [33
19 U.S.C.A. § 1251 *et seq.*], the Safe Drinking Water Act [42
20 U.S.C.A. § 300f *et seq.*], the Marine Protection, Research and
21 Sanctuaries Act of 1972 [16 U.S.C.A. §§ 1431 *et seq.*, 1447 *et seq.*,
33 U.S.C.A. §§ 1401 *et seq.*, 2801 *et seq.*], or the Atomic Energy
Act of 1954 [42 U.S.C.A. § 2011 *et seq.*]

22 42 U.S.C. § 6905(a) (brackets in original; italics added). For purposes of this motion, defendant
23 contends plaintiff’s case should be dismissed because it is asking the court to enjoin actions under
24 the RCRA that are permitted under the Safe Drinking Water Act (SDWA). Mot. at 2.

25 If adhering to RCRA and another act creates an inconsistency, RCRA yields to an
26 Act listed in RCRA’s anti-duplication provision, in this instance, the SDWA. *Ecological Rights*
27 *Found. v. Pac. Gas & Elec. Co.*, No. 10–00121, 2015 WL 537771, at *4 (N.D. Cal. Jan. 30, 2015)
28 (“By virtue of § 6905(a), RCRA cannot [] serve as an additional avenue to impose a different

1 regulatory requirement.”); *see also Goldfarb v. Mayor & City Council of Balt.*, 791 F.3d 500, 507
2 (4th Cir. 2015) (“The statute simply instructs that RCRA provisions must give way when
3 enforcement would be inconsistent with any of the other delineated acts); *Coon ex rel. Coon v.*
4 *Willet Dairy, LP*, 536 F.3d 171, 174 (2d Cir. 2008) (relying on the anti-duplication provision to
5 prohibit plaintiff’s RCRA claims challenging identical activities authorized by a CWA-based
6 permit); *cf. Boeing Co. v. Movassaghi*, 768 F.3d 832, 841 (9th Cir. 2014) (“RCRA excludes from
7 its coverage radioactive materials regulated under the Atomic Energy Act.”).

8 On the other hand, “[w]hen two statutes are capable of co-existence, it is the duty
9 of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as
10 effective.” *S.F. Herring Ass’n v. Pac. Gas & Elec. Co.*, 81 F. Supp. 3d 847, 866 (N.D. Cal.
11 Feb. 26, 2015) (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)); *see also Goldfarb*, 791
12 F.3d at 510 (allowing regulation unless RCRA is “incompatible, incongruous, [and]
13 inharmonious” with other delineated acts). The burden is on the defendant to show an
14 inconsistency would result if plaintiff’s RCRA claims were to proceed and be enforced. *S.F.*
15 *Herring Ass’n*, 81 F. Supp. 3d at 866.

16 The first step in determining whether there is an inconsistency here is for the court
17 to determine whether defendant’s activity is subject to the SDWA. *See id.* (the critical question is
18 “whether the [] Defendants’ . . . activities themselves are regulated under the [] Act and could be
19 further regulated under RCRA without the creation of a regulatory inconsistency.”). Without
20 pointing to any authority, defendant simply asserts the SDWA regulates hexavalent chromium.
21 *See Mot.* at 14 (“[H]exavalent chromium in drinking water is a substance which is subject to
22 regulation under the Safe Drinking Water Act”). But this assertion is belied by the SDWA itself,
23 which lists hexavalent chromium as an “unregulated contaminant.” *See List of SDWA*
24 *Unregulated Contaminants*, located at [https://www.epa.gov/dwucmr/third-unregulated-](https://www.epa.gov/dwucmr/third-unregulated-contaminant-monitoring-rule)
25 *contaminant-monitoring-rule* (last visited August 30, 2017).¹ To the extent the RCRA regulates
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27 ¹ The court sua sponte takes judicial notice of this governmental website. *See United*
28 *States ex rel. Modglin v. DJO Glob. Inc.*, 48 F. Supp. 3d 1362, 1381 (C.D. Cal. 2014) (“Under
Rule 201, the court can take judicial notice of [p]ublic records and government documents

1 hexavalent chromium, its regulation poses no inconsistency with the SDWA. Defendant's first
2 argument is unavailing.

3 B. Merits of Complaint

4 While chief responsibility for RCRA enforcement lies with the EPA, a private
5 citizen may file suit against persons "alleged to be in violation of the statutes' requirements."
6 *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 506 (9th Cir. 2013) (citing 42
7 U.S.C. § 6972). To establish a violation under RCRA, a private citizen must allege three things:
8 (1) the defendant is a generator or transporter of solid or hazardous waste; (2) the defendant has
9 "contributed" or "is contributing to" the handling, storage, treatment, transportation, or disposal
10 of solid or hazardous waste; and (3) the solid or hazardous waste in question may present an
11 "imminent and substantial" endangerment to health or the environment. 42 U.S.C.
12 § 6972(a)(1)(B); *Ecological Rights*, 713 F.3d at 514. Here, defendant challenges only the "solid
13 or hazardous waste" portion of the first element. *See* Mot. at 11.

14 RCRA defines the term "hazardous waste" to mean a solid waste, or combination
15 of solid wastes, which because of quantity, concentration, or physical, chemical, or infectious
16 characteristics may—"(A) cause, or significantly contribute to an increase in mortality or an
17 increase in serious irreversible, or incapacitating reversible, illness"; or "(B) pose a substantial
18 present or potential hazard to human health or the environment when improperly treated, stored,
19 transported, or disposed of, or otherwise managed." 42 U.S.C.A. § 6903 (5).

20 RCRA does not identify which wastes are hazardous, but rather leaves that
21 designation to the EPA. *See* 42 U.S.C. § 6921(a) (EPA Administrator "develop[s] and
22 promulgate[s] criteria for identifying the characteristics of hazardous waste, and for listing
23 hazardous waste"); *Wash. v. Chu*, 558 F.3d 1036, 1039 n.2 (9th Cir. 2009) ("RCRA does not
24 identify which wastes are hazardous . . . because it leaves that designation to the EPA"). Under
25 EPA regulations, solid waste containing chromium is "hazardous waste" within the meaning of

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27 available from reliable sources on the Internet, such as websites run by governmental agencies.")
28 (internal citations omitted).

1 the RCRA, whether nor not discarded, where the chromium concentration exceeds 5 mg/L, which
2 is equivalent to 5 parts per million (ppm) or 5,000 parts per billion (ppb). 440 C.F.R. § 261.24.
3 “Chromium,” the EPA explains, occurs in two valence, or chemical bond, states: trivalent
4 chromium and (Cr III) and hexavalent chromium (Cr VI). See U.S. EPA Chromium Compounds
5 Fact Sheet, available at [https://www.epa.gov/sites/production/files/2016-09/documents/
6 chromium-compounds.pdf](https://www.epa.gov/sites/production/files/2016-09/documents/chromium-compounds.pdf) (last visited August 30, 2017).² The latter of the two valence states is
7 the substance at issue here.

8 Several courts have recognized hexavalent chromium is a hazardous waste
9 regulated by RCRA, whether or not discarded. See *Ctr. for Cmty. Action & Envtl. Justice v.*
10 *BNSF R. Co.*, 764 F.3d 1019, 1025 (9th Cir. 2014) (recognizing hexavalent chromium as a
11 “hazardous material”); see also *Interfaith Cmty. Org. v. Honeywell Int’l, Inc.*, 263 F. Supp. 2d
12 796, 836 (D. N.J. 2003) (“[H]exavalent chromium is a hazardous substance under RCRA.”); *Steel*
13 *Mfrs. Ass’n v. EPA*, 27 F.3d 642, 645 (D.C. Cir. 1994) (electronic arc furnace dust is a form of
14 hazardous waste because it contains hexavalent chromium).

15 Defendant contends plaintiff’s allegation that hexavalent chromium is a hazardous
16 waste is conclusory because no facts allege the City’s “water was discarded,” as defendant
17 contends is required to allege a RCRA violation. Mot. at 11–16. But no showing that material has
18 been “discarded” is needed to properly identify a hazardous waste subject to RCRA. Plaintiff
19 alleges the City’s public sampling reports reveal the presence of hexavalent chromium in the
20 drinking water the City supplies to its customers. Compl. ¶ 15. This “hazardous waste” is
21 transported in drinking water supplied from the City’s wells to the homes, businesses, and schools
22 of Vacaville residents. Compl. ¶ 18. Defendant has not challenged plaintiff’s allegation of harm
23 so the court declines to address this issue. Plaintiff has stated a RCRA claim.

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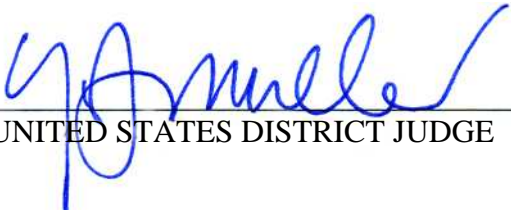
27 ² The court judicially notices this government website. Fed. R. Evid. 201.
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1 IV. CONCLUSION

2 Defendant's motion is DENIED. This order resolves ECF No. 5. Defendant shall
3 file an answer within fourteen (14) days of the filed date of this order.

4 IT IS SO ORDERED.

5 DATED: August 30, 2017.

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8 UNITED STATES DISTRICT JUDGE
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