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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

STEWARDS OF THE MOKELUMNE RIVER, a California unincorporated nonprofit association,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF TRANSPORTATION and TOKS OMISHAKIN, in his official capacity as Director of the California Department of Transportation,

Defendants.

No. 2:20-cv-01542-TLN-AC

**ORDER**

This matter is before the Court on Defendants California Department of Transportation (“Caltrans”) and Toks Omishakin’s (“Omishakin”) (collectively, “Defendants”) Motions to Dismiss. (ECF Nos. 5, 6.) Plaintiff Stewards of the Mokelumne River (“Plaintiff”) opposed Omishakin’s motion and filed a Statement of Non-Opposition to Caltrans’s motion. (ECF Nos. 7, 8.) For the reasons set forth below, the Court GRANTS Caltrans’s motion (ECF No. 5), and GRANTS in part and DENIES in part Omishakin’s motion (ECF No. 6).

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1           **I.       FACTUAL AND PROCEDURAL BACKGROUND**

2           Plaintiff brings this action against Defendants for alleged violations of the Resource  
3 Conservation and Recovery Act (the “RCRA”) and state nuisance law occurring on property near  
4 the Mokelumne River. (*See* ECF No. 1.) Specifically, Plaintiff refers to the area at which the  
5 Mokelumne River flows beneath State Route 99 near the Turner Road Exit in San Joaquin  
6 County, California, and abuts residences and other privately-owned real property (the “Turner  
7 Road Site”). (*Id.* at 2, 5.) Plaintiff contends Caltrans owns or controls real property at the Turner  
8 Road Site. (*Id.* at 2, 8.) The City of Lodi draws water from the Mokelumne River near the  
9 Turner Road Site for drinking water purposes. (*Id.* at 5.) The Mokelumne River at the Turner  
10 Road Site is also used for recreational purposes such as boating, swimming, and fishing. (*Id.*)  
11 Plaintiff brings this action on behalf of individuals and businesses that own property or reside in  
12 close proximity to the Turner Road Site, individuals who utilize the Mokelumne River near the  
13 Turner Road Site for recreational purposes such as boating, swimming, and fishing, and its own  
14 members, who have an interest in the environmental protection of the Mokelumne River and the  
15 associated watershed. (*Id.* at 3–4.)

16           Plaintiff alleges Caltrans and Omishakin, in his capacity as Director of Caltrans, have  
17 failed to “adequately secure, patrol, or otherwise reasonably maintain” the Turner Road Site,  
18 resulting in the presence of a transient population that has taken up residence there. (*Id.* at 4–5.)  
19 Plaintiff contends “the transient population’s presence . . . has resulted in the discharge and  
20 disposal of solid waste” at the Turner Road Site and into the river,<sup>1</sup> causing an imminent and  
21 substantial danger to health or the environment as well as a public nuisance. (*Id.* at 5–7  
22 (emphasis removed).) Plaintiff further alleges its members have been threatened with physical  
23 harm and have had their property destroyed by members of the transient population who suffer  
24 from mental illness, drug addiction, and other maladies and/or “individuals associated with the

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25           <sup>1</sup> Plaintiff alleges the solid waste discharged at the Turner Road Site consists of human  
26 excrement, dog excrement, discarded used feminine hygiene products, discarded used condoms,  
27 drug paraphernalia including used hypodermic needles, discarded chemicals from drug-making  
28 operations, discarded auto parts, discarded bicycles and bicycle parts, discarded propane  
cylinders, discarded aerosol cans, discarded gasoline containers, and various discarded household  
goods. (*Id.* at 5.)

1 transient population” residing at the Turner Road Site. (*Id.* at 4, 7.) Plaintiff asserts these issues  
2 “could be abated” if Defendants installed fencing, barriers, live-feed cameras, and an around-the-  
3 clock security presence to prevent unauthorized access to the Turner Road Site; conducted a  
4 “thorough investigation of the Turner Road Site” with “industrial hygienists, toxicologists, and  
5 water quality experts to identify all solid waste at and emanating from the Turner Road Site”; and  
6 removed the solid waste previously discharged at the Turner Road Site. (*Id.* at 7 (emphasis  
7 removed).)

8 Plaintiff filed its Complaint on August 3, 2020, seeking injunctive relief through two  
9 causes of action: (1) abatement of imminent and substantial endangerment pursuant to “RCRA §  
10 7002(a)(1)(B)” and 42 U.S.C. § 6972(a); and (2) abatement of continuing public nuisance  
11 pursuant to California Civil Code §§ 3479, 3480. (*Id.* at 8–10.) Defendants filed separate  
12 motions to dismiss on September 3, 2020, pursuant to Federal Rules of Civil Procedure (“Rule”  
13 or “Rules”) 12(b)(1) and 12(b)(6). (ECF Nos. 5, 6.) On September 17, 2020, Plaintiff opposed  
14 Omishakin’s motion to dismiss (ECF No. 7) and filed a statement of non-opposition regarding  
15 Caltrans’ motion to dismiss (ECF No. 8). Omishakin filed a reply on September 24, 2020. (ECF  
16 No. 11.)

## 17 **II. STANDARD OF LAW**

### 18 **A. Federal Rule of Civil Procedure 12(b)(1)**

19 A motion under Rule 12(b)(1) challenges a federal court’s jurisdiction to decide claims  
20 alleged in the complaint. Fed. R. Civ. P. 12(b)(1); *see also id.* at 12(h)(3) (“If the court  
21 determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the  
22 action.”); *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009) (holding the court may  
23 determine jurisdiction on a Rule 12(b)(1) motion unless “the jurisdictional issue is inextricable  
24 from the merits of a case”) (internal citations omitted).

25 A Rule 12(b)(1) motion attacking subject matter jurisdiction may be either facial or  
26 factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). When the motion is a facial attack,  
27 the court only considers the allegations in the complaint and any documents attached to the  
28 complaint or referred to in the complaint. *Gould Electronics Inc. v. U.S.*, 220 F.3d 169, 176 (3rd

1 Cir. 2000). The court accepts all the material factual allegations in plaintiff’s complaint as true.  
2 *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). “[J]urisdiction must be  
3 shown affirmatively, and that showing cannot be made by drawing from the pleadings inferences  
4 favorable to the party asserting it.” *Shipping Financial Services Corp. v. Drakos*, 140 F.3d 129,  
5 131 (2nd Cir. 1998) (citing *Norton v. Larney*, 266 U.S. 511, 515 (1925)).

6 When a Rule 12(b)(1) motion attacks the existence of subject matter jurisdiction “in fact,”  
7 no presumption of truthfulness attaches to the plaintiff’s allegations. *Thornhill Pub. Co., Inc. v.*  
8 *Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Rather, “the district court is not  
9 restricted to the face of the pleadings, but may review any evidence, such as affidavits and  
10 testimony, to resolve factual disputes concerning the existence of jurisdiction.” *McCarthy v.*  
11 *United States*, 850 F.2d 558, 560 (9th Cir. 1988). “Once challenged, the party asserting subject  
12 matter jurisdiction has the burden of proving its existence.” *Robinson*, 586 F.3d at 685 (quoting  
13 *Rattlesnake Coal. v. E.P.A.*, 509 F.3d 1095, 1102 n.1 (9th Cir. 2007)).

14 B. Federal Rule of Civil Procedure 12(b)(6)

15 A motion to dismiss for failure to state a claim upon which relief can be granted under  
16 Rule 12(b)(6) tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th  
17 Cir. 2001). Rule 8(a) requires that a pleading contain “a short and plain statement of the claim  
18 showing that the pleader is entitled to relief.” See *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79  
19 (2009). Under notice pleading in federal court, the complaint must “give the defendant fair notice  
20 of what the claim . . . is and the grounds upon which it rests.” *Bell Atlantic v. Twombly*, 550 U.S.  
21 544, 555 (2007) (internal quotations omitted). “This simplified notice pleading standard relies on  
22 liberal discovery rules and summary judgment motions to define disputed facts and issues and to  
23 dispose of unmeritorious claims.” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

24 On a motion to dismiss, the factual allegations of the complaint must be accepted as true.  
25 *Cruz v. Beto*, 405 U.S. 319, 322 (1972). A court is bound to give the plaintiff the benefit of every  
26 reasonable inference to be drawn from the “well-pleaded” allegations of the complaint. *Retail*  
27 *Clerks Int’l Ass’n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not allege

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1 “‘specific facts’ beyond those necessary to state his claim and the grounds showing entitlement to  
2 relief.” *Twombly*, 550 U.S. at 570.

3           Nevertheless, a court “need not assume the truth of legal conclusions cast in the form of  
4 factual allegations.” *U.S. ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986).  
5 While Rule 8(a) does not require detailed factual allegations, “it demands more than an  
6 unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. A  
7 pleading is insufficient if it offers mere “labels and conclusions” or “a formulaic recitation of the  
8 elements of a cause of action.” *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678  
9 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
10 statements, do not suffice.”). Moreover, it is inappropriate to assume the plaintiff “can prove  
11 facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not  
12 been alleged.” *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459  
13 U.S. 519, 526 (1983).

14           Ultimately, a court may not dismiss a complaint in which the plaintiff has alleged “enough  
15 facts to state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 697 (quoting  
16 *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual  
17 content that allows the court to draw the reasonable inference that the defendant is liable for the  
18 misconduct alleged.” *Id.* at 680. While the plausibility requirement is not akin to a probability  
19 requirement, it demands more than “a sheer possibility that a defendant has acted unlawfully.”  
20 *Id.* at 678. This plausibility inquiry is “a context-specific task that requires the reviewing court to  
21 draw on its judicial experience and common sense.” *Id.* at 679.

22           In ruling on a motion to dismiss, a court may only consider the complaint, any exhibits  
23 thereto, and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201.  
24 *See Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988); *Isuzu Motors Ltd. v.*  
25 *Consumers Union of U.S., Inc.*, 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998).

26           If a complaint fails to state a plausible claim, “[a] district court should grant leave to  
27 amend even if no request to amend the pleading was made, unless it determines that the pleading  
28 could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122,

1 1130 (9th Cir. 2000) (en banc) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995));  
2 *see also Gardner v. Marino*, 563 F.3d 981, 990 (9th Cir. 2009) (finding no abuse of discretion in  
3 denying leave to amend when amendment would be futile).

### 4 **III. CALTRANS’S MOTION TO DISMISS**

5 Caltrans moves to dismiss Plaintiff’s claims pursuant to Rules 12(b)(1) and 12(b)(6).  
6 (ECF No. 5-3 at 8.) Plaintiff has filed a statement of non-opposition to Caltrans’ motion to  
7 dismiss, thus conceding these arguments. (ECF No. 8 at 2); *see Tatum v. Schwartz*, No. S-06-  
8 01440 DFL EFB, 2007 WL 419463, at \*3 (E.D. Cal. Feb. 5, 2007) (“[Plaintiff] tacitly concedes  
9 this claim by failing to address defendants’ argument in her opposition.”). Accordingly,  
10 Caltrans’s motion to dismiss the claims asserted against it (ECF No. 5) is hereby GRANTED  
11 without leave to amend and Caltrans is DISMISSED from this action. *See also Nat. Res. Def.*  
12 *Council v. Cal. Dep’t of Transp. (NRDC)*, 96 F.3d 420, 421, 423 (9th Cir. 1996) (affirming  
13 district court’s dismissal of all claims against Caltrans as barred by the Eleventh Amendment);  
14 *Ariz. Students’ Ass’n v. Ariz. Bd. of Regents*, 824 F.3d 858, 865 (9th Cir. 2016) (noting plaintiff  
15 had viable claim under *Ex parte Young* doctrine against members of state entity in their official  
16 capacities, but claim against entity was barred by the Eleventh Amendment).

### 17 **IV. OMISHAKIN’S MOTION TO DISMISS**

18 Like Caltrans, Omishakin seeks dismissal under both Rule 12(b)(1) and 12(b)(6).<sup>2</sup>  
19 Plaintiff opposes Omishakin’s motion as discussed herein.

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22 <sup>2</sup> In support of his motion, Omishakin requests the Court judicially notice the 2019  
23 Homeless Census and Survey for San Joaquin County (Ex. A, ECF No. 6-1 at 3–5) and Executive  
24 Order N-23-30 issued by Governor Gavin Newsom (Ex. B, ECF No. 6-1 at 6–11). (*See* ECF No.  
25 6-1.) Plaintiff does not oppose the request. (*See generally* ECF No. 7.) Under Federal Rule of  
26 Evidence 201, the Court may take judicial notice of facts “not subject to reasonable dispute” that  
27 “can be accurately and readily determined from sources whose accuracy cannot reasonably be  
28 questioned.” Fed. R. Evid. 201. Such sources include public records produced by governmental  
entities. *See United States v. Esquivel*, 88 F.3d 722, 727 (9th Cir. 1996) (judicially noticing  
census data); *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547  
F.3d 962, 968 n.4 (9th Cir. 2008) (judicially noticing “records of state [entities] and other  
undisputed matters of public record”). Accordingly, the Court GRANTS Omishakin’s request.

1                   A.     Federal Rule of Civil Procedure 12(b)(1)

2                   Omishakin seeks dismissal under Rule 12(b)(1) on the bases that: (1) sovereign immunity  
3 bars Plaintiff’s claims; (2) Plaintiff lacks standing; and (3) Plaintiff failed to provide the requisite  
4 pre-suit notice under the RCRA. (See ECF No. 6-3 at 11–21.) The Court will address each  
5 argument in turn.

6                             i.        *Sovereign Immunity*

7                   “The Eleventh Amendment of the United States Constitution prohibits federal courts  
8 from hearing suits brought by private citizens against state governments, without the state’s  
9 consent.” *NRDC*, 96 F.3d at 421 (citing *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)). This  
10 immunity “extends to state agencies and to state officers, who act on behalf of the state and can  
11 therefore assert the state’s sovereign immunity.” *Id.* (citations omitted). Nevertheless, the  
12 Supreme Court established an exception to immunity in *Ex parte Young*, 209 U.S. 123 (1908), in  
13 which it held that the Eleventh Amendment does not bar claims seeking prospective injunctive  
14 relief against state officials to remedy a state’s ongoing violation of federal law. 209 U.S. at 159–  
15 60.

16                             The doctrine of *Ex parte Young* is premised on the notion that a state  
17 [cannot] authorize a state officer to violate the Constitution and laws  
18 of the United States. Thus, an action by a state officer that violates  
19 federal law is not considered an action of the state and, therefore, is  
20 not shielded from suit by the state’s sovereign immunity.

21 *NRDC*, 96 F.3d at 422.

22                   In determining whether the *Ex parte Young* exception applies, the Court must inquire into  
23 whether “[1] [the] complaint alleges an ongoing violation of federal law and [2] seeks relief  
24 properly characterized as prospective.” *Verizon Md. Inc. v. Public Serv. Com’n of Md.*, 535 U.S.  
25 635, 645 (2002) (internal quotations and citations omitted); see also *Koala v. Khosla*, 931 F.3d  
26 887, 895 (9th Cir. 2019) (emphasizing the requested relief must be prospective, not retrospective  
27 or compensatory). Importantly, claims brought under the doctrine of *Ex parte Young* are limited  
28 to suits for “prospective equitable relief, including any measures ancillary to that relief,” but not  
“retrospective relief (such as damages)” that would require payment of funds from the state  
treasury. See *id.*; *Ariz. Students’ Ass’n*, 824 F.3d at 865; *Porter v. Jones*, 319 F.3d 483, 491 (9th

1 Cir. 2003) (citing *Papasan v. Allain*, 478 U.S. 265, 277–78 (1986); *Edelman v. Jordan*, 415 U.S.  
2 651, 664–68 (1974)). The inquiry into whether the *Ex parte Young* doctrine applies “does not  
3 include an analysis of the merits of the claim.” *Verizon*, 535 U.S. at 646.

4 Here, the parties agree the State’s Eleventh Amendment immunity is not abrogated by the  
5 instant claims, but they dispute whether the claims may nevertheless proceed against Omishakin  
6 (as he is sued in his official capacity as Director of Caltrans) under the *Ex parte Young* exception.  
7 Omishakin argues the Complaint does not sufficiently allege he violated the RCRA and seeks  
8 retrospective relief.<sup>3</sup> (ECF No. 6-3 at 11–15.) Plaintiff, by contrast, maintains Omishakin’s  
9 violation of the RCRA is sufficiently pleaded and that the relief Plaintiff seeks is prospective in  
10 nature. (ECF No. 7 at 6–9.) The Court examines each element of the *Ex parte Young* test in turn.

11 *a) Ongoing Violation of Federal Law by State Official*

12 The RCRA is a “comprehensive environmental statute that governs the treatment, storage,  
13 and disposal of solid and hazardous waste.” *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996).  
14 Its primary purpose is “to reduce the generation of hazardous waste and to ensure the proper  
15 treatment, storage, and disposal of that waste which is nonetheless generated, ‘so as to minimize  
16 the present and future threat to human health and the environment.’” *Id.* (quoting 42 U.S.C. §  
17 6902(b)). Plaintiff brings this action pursuant to 42 U.S.C. § 6972(a)(1)(B), which authorizes  
18 private citizens to bring suit under the RCRA against persons contributing “to the past or present  
19 handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which  
20 may present an imminent and substantial endangerment to health or the environment.” (See ECF  
21 No. 1 at 1–2, 8); 42 U.S.C. § 6972(a)(1)(B); see also *Hinds Invs., L.P. v. Angioli (Hinds)*, 654  
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24 <sup>3</sup> Omishakin further argues that, even if the Court has jurisdiction over the RCRA claim  
25 (Claim One), supplemental jurisdiction is unavailable for Plaintiff’s pendent state-law public  
26 nuisance claim (Claim Two). (ECF No. 6-3 at 12–13, 15 (citing *Pennhurst State School & Hosp.*  
27 *v. Halderman*, 465 U.S. 89 (1984)).) Plaintiff concedes its state-law claim is barred. (ECF No. 7  
28 at 10); see *Tatum*, 2007 WL 419463, at \*3. Accordingly, the Court DISMISSES Plaintiff’s state  
law claim (Claim Two) without leave to amend and addresses the viability of Plaintiff’s RCRA  
claim only. *Pennhurst*, 465 U.S. at 121; see also *Papasan*, 478 U.S. at 277 (*Ex parte Young*  
exception does not apply where challenged state official action is contrary to state law only).

1 F.3d 846, 848 (9th Cir. 2011) (noting the RCRA contains a provision permitting citizen suits in  
2 certain circumstances).

3 Omishakin argues Plaintiff fails to satisfy the first prong of the *Ex parte Young* doctrine  
4 because the Complaint fails to allege facts showing Omishakin has taken any affirmative action  
5 that violates the RCRA. (ECF No. 6-3 at 13.) In opposition, Plaintiff contends that no  
6 affirmative action is required to trigger the *Ex parte Young* doctrine. (See ECF No. 7–9.) Rather,  
7 mere ownership and control over the property on which the disposal is occurring is sufficient.  
8 (*Id.*) The Court is unpersuaded by Plaintiff’s argument.

9 Controlling authorities discussing application of the *Ex parte Young* exception note the  
10 doctrine applies to enjoin a state official from enforcing a purportedly unconstitutional law with  
11 which the official has “some connection with enforcement,” which suggests an affirmative action  
12 must be alleged. See *Confederated Tribes & Bands of Yakama Indian Nation v. Locke*  
13 (*Confederated Tribes*), 176 F.3d 467, 469 (9th Cir. 1999); *Snoeck v. Brussa*, 153 F.3d 984, 987  
14 (9th Cir. 1998) (“As *Ex [p]arte Young* explains, the officers of the state must be cloaked with a  
15 duty to enforce the laws of the state and must threaten or be about to commence civil or criminal  
16 proceedings to enforce an unconstitutional act.”). Further, with respect to the duty to enforce, the  
17 Ninth Circuit indicates the public official must have a “special” and “fairly direct” connection  
18 with the enforcement of the challenged statute. See *Confederated Tribes*, 176 F.3d at 470  
19 (requisite connection not established against governor, who was not responsible for operating the  
20 state lottery or determining where its tickets would be sold); *Snoeck*, 153 F.3d at 986 (noting “a  
21 generalized duty to enforce state law or general supervisory power over the persons responsible  
22 for enforcing the challenged provision will not subject an official to suit”). Absent such  
23 connection, an action merely asserts a claim against a state official “as a representative of the  
24 State, . . . thereby attempting to make the State a party.” *Confederated Tribes*, 176 F.3d at 469  
25 (quoting *Ex parte Young*, 209 U.S. at 157).

26 Here, Plaintiff has not alleged a “special” and “fairly direct” connection between  
27 Omishakin and the enforcement of the RCRA. See *id.* at 470; *Ex parte Young*, 209 U.S. at 155–  
28 56. More importantly, the Complaint contains no allegations that Omishakin is specifically

1 responsible for enforcing the RCRA, or that Omishakin is a member of a “municipality,”  
2 “intermunicipal agency,” or “interstate agency” within the meaning of the RCRA tasked with the  
3 responsibility and authority to provide for the planning or administration of solid waste  
4 management. *See* 42 U.S.C. § 6903. Indeed, the Complaint asserts Omishakin is the Director of  
5 Caltrans, an agency “responsible for maintenance and operations of roadways comprising the  
6 California state highway system” (ECF No. 1 at 4), not the Department of Toxic Substances  
7 Control for the California Environmental Protection Agency, the state entity authorized by the  
8 United States Environmental Protection Agency to implement the RCRA in California. *See* Cal.  
9 Health & Safety Code §§ 58000–58018. Accordingly, the Court cannot say Plaintiff has  
10 established the requisite “connection” for the *Ex parte Young* doctrine to apply to the instant case.

11 Nor is the Court persuaded that a continuing violation of federal law by Omishakin may  
12 be established pursuant to “contributor liability” as defined under the RCRA.<sup>4</sup> Plaintiff argues the  
13 term “contribution” must be liberally construed to encompass passive inaction, such as the failure  
14 to take steps to safely and temporarily store waste and properly dispose of waste. (ECF No. 7 at  
15 7–8.) However, Plaintiff identifies no controlling or persuasive authority that supports its  
16 definition of “contribute” or the contention that no affirmative action is needed.

17 To the contrary, the Ninth Circuit found that “[c]ontributing’ requires a more active role  
18 with a more direct connection to the waste, such as by handling it, storing it, treating it,  
19 transporting it, or disposing of it.” *Hinds*, 654 F.3d at 851 (quoting with approval *Sycamore*  
20 *Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 854 (7th Cir. 2008) (“The vast majority of  
21 courts that have considered this issue read [the] RCRA to require affirmative action rather than  
22 merely passive conduct . . . for handling or storage liability.”); *Interfaith Cmty. Org. v. Honeywell*  
23 *Int’l, Inc.*, 263 F. Supp. 2d 796, 844 (D.N.J. 2003), *aff’d*, 399 F.3d 248 (3d Cir. 2005) (“only  
24 *active* human involvement with the waste is subject to liability under [the] RCRA . . .”) (emphasis

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25 <sup>4</sup> The issue of “contributor liability” under the RCRA is likely more appropriately  
26 addressed with respect to Omishakin’s Rule 12(b)(6) motion, as determining the applicability of  
27 the *Ex parte Young* doctrine typically “does not include an analysis of the merits of the claim.”  
28 *Verizon*, 535 U.S. at 646. However, to the extent Plaintiff relies on the RCRA’s definition of  
“contributor liability” to establish an ongoing violation by Omishakin, the Court will briefly  
address the argument.

1 in original)). Indeed, in *Hinds*, the Ninth Circuit rejected the plaintiff’s arguments that  
2 “contribute” should be applied expansively to hold the defendants liable for “assist[ing] in  
3 creating waste” even though they “[did] not actually generate or produce it.” *Id.* at 850–51.  
4 Instead, the court construed contributor liability under the RCRA to require that a defendant “had  
5 a measure of control over the waste at the time of its disposal or was otherwise actively involved  
6 in the waste disposal process.” *Id.* at 852. Because, at most, Plaintiff asserts passive conduct by  
7 Omishakin, it fails to establish an ongoing violation under the “contributor liability” definition.

8 In sum, the Court finds the connection identified by Plaintiff is too tenuous to establish an  
9 ongoing violation of federal law by Omishakin under the *Ex parte Young* doctrine.

10 *b) Request for Prospective Relief*

11 Having determined Plaintiff fails to establish the first prong of the *Ex parte Young*  
12 doctrine for an ongoing violation of federal law by a state officer, the Court declines to reach the  
13 issue of whether the relief sought was prospective.

14 Based on the foregoing, the Court finds Plaintiff has not established the *Ex parte Young*  
15 exception to Eleventh Amendment sovereign immunity applies in this case. Moreover, in light of  
16 the facts already alleged, the Court finds further amendment would be futile. *Gardner*, 563 F.3d  
17 at 990. Plaintiff’s claim against Omishakin is DISMISSED without leave to amend.

18 *ii. Defendant’s Remaining Arguments*

19 In light of the Court’s ruling on the inapplicability of the *Ex parte Young* doctrine, the  
20 Court does not reach Omishakin’s remaining arguments under Rule 12(b)(1). Omishakin’s  
21 motion is therefore GRANTED on sovereign immunity grounds.

22 **B. Federal Rule of Civil Procedure 12(b)(6)**

23 In light of the Court’s finding that it lacks jurisdiction on grounds of Eleventh  
24 Amendment sovereign immunity, the Court does not reach Omishakin’s motion to dismiss  
25 pursuant to Rule 12(b)(6). Accordingly, the motion is DENIED as moot.

26 **V. CONCLUSION**

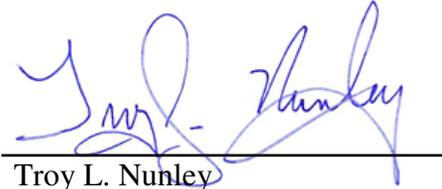
27 For the foregoing reasons, Caltrans’s Motion to Dismiss is hereby GRANTED without  
28 leave to amend. (ECF No. 5.) Omishakin’s Motion to Dismiss pursuant to Federal Rule of Civil

1 Procedure 12(b)(1) is GRANTED without leave to amend. (ECF No. 6.) Omishakin's Motion to  
2 Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is DENIED as moot. (ECF No. 6.)

3 The Clerk of the Court is directed to close this case.

4 IT IS SO ORDERED.

5 DATED: July 14, 2021

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Troy L. Nunley  
United States District Judge