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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAN CLARKE,

Plaintiff,

v.

PACIFIC GAS & ELECTRIC COMPANY,
et al.,

Defendants.

Case No. [20-cv-04629-WHO](#)

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS THE COMPLAINT**

Re: Dkt. No. 10

Roughly one hundred years ago, as alleged by plaintiff Dan Clarke, defendants Pacific Gas and Electric Company and PG&E Corporation (collectively “PG&E”) left behind hazardous waste created by its manufactured gas plants (“MGPs”) along the northern waterfront of San Francisco. Those plants have long since been abandoned. In 2014, Clarke and the San Francisco Herring Association (“SFHA”) sued PG&E for contamination arising out of the Fillmore, North Beach and Beach Street MGPs, formerly located in the Marina neighborhood where Clarke lived (the “Marina MGP case”). That case ultimately settled. Now Clarke seeks to sue PG&E for similar contamination caused by another MGP, the Cannery MGP, formerly located in the area east of the Marina neighborhood.

PG&E moves to dismiss Clarke’s causes of action for violations of the Resource Conservation and Recovery Act (“RCRA”), the Clean Water Act (“CWA”), and state strict liability and negligence law. Clarke plausibly alleges standing based on his recreational and aesthetic interests: he continues to walk in the area but his enjoyment is diminished by the damage PG&E’s conduct is causing wildlife and the environment. PG&E asks that I dismiss his RCRA claim for lack of redressability, because injunctive relief may require access to property owned by non-parties. Such an argument may have merit after discovery, but it is premature at this stage.

United States District Court
Northern District of California

1 Clarke's remaining claims are insufficiently pleaded. While he alleges an ongoing and
 2 continuous CWA violation, it appears that his claim first accrued outside the five-year statute of
 3 limitations. He also fails to plead cognizable damages for his state strict liability and negligence
 4 claims, and additionally fails to describe an ultrahazardous activity for his strict liability claim.
 5 For these reasons, PG&E's motion to dismiss the RCRA claim is DENIED, but its motion to
 6 dismiss the CWA, strict liability and negligence claims is GRANTED with leave to amend.

7 BACKGROUND

8 My previous orders in the related Marina MGP case provide a summary of the litigation
 9 between the parties over the last six years. See *San Francisco Herring Ass'n v. PG&E*, No. 14-cv-
 10 04393-WHO, Dkt. Nos. 44, 208, 233.¹ Here, I focus on the factual allegations Clarke makes with
 11 respect to the Cannery MGP, whose site is along San Francisco's northern waterfront at roughly
 12 the midway point between the Fillmore MGP and the Beach Street MGP. Complaint ("Compl.")
 13 [Dkt. No. 1] ¶ 2, Figure 1. It "is located at the northern terminus of Columbus street and is within
 14 the San Francisco Maritime National Historical Park." Id. ¶ 5. "A hotel, restaurants, shops, and a
 15 National Park Visitor Center currently occupy the site," and the Aquatic Cove abuts the site. Id.
 16 The National Park Service ("NPS") currently owns the Cannery MGP site. Id. ¶ 71.

17 Similar to his prior allegations concerning the Fillmore, North Beach, and Beach Street
 18 MGPs, Clarke alleges that PG&E and its predecessors produced and stored gas manufactured from
 19 coal and crude oil at the Cannery MGP. Compl. ¶ 50. While PG&E has acknowledged its
 20 ownership and operations of the North Beach and Fillmore MGPs, as well as the resulting
 21 contamination in the vicinity of those MGPs, it has allegedly "refused its responsibility to
 22 investigate and remediate the Cannery MGP and its vicinity." Id. ¶¶ 75, 78. Limited soil samples
 23

24 ¹ The parties request judicial notice of pleadings and orders in the related Marina MGP case.
 25 Defendants' Request for Judicial Notice in Support of Motion to Dismiss [Dkt. No. 10-2]
 26 (requesting judicial notice of orders on PG&E's motion for summary judgment and motion to
 27 dismiss the Second Amended Complaint, as well as the Second Amended Complaint); Plaintiff's
 28 Request for Judicial Notice in Support of Opposition to Defendants' Motion to Dismiss [Dkt. No.
 15-1] (requesting judicial notice of the original Complaint and Revised Consent Decree). Both
 requests are GRANTED. See *Asdar Group v. Pillsbury, Madison & Sutro*, 99 F.3d 289, 290 n. 1
 (9th Cir. 1996) (a court may take judicial notice of its own orders in a related case); *No Cost
 Conference, Inc. v. Windstream Commc'ns, Inc.*, 940 F. Supp. 2d 1285, 1296 (S.D. Cal. 2013) (a
 court may take judicial notice of a complaint in a related case).

1 taken in 1985 by the NPS and later in 1986 by PG&E “indicate significant MGP contamination of
2 soil and groundwater [in] the site and its vicinity.” *Id.* ¶¶ 71–73. Although PG&E shared its
3 results with the U.S. Environmental Protection Agency and the Regional Water Board at the time,
4 neither agency nor PG&E has required or performed any additional testing for MGP
5 contamination or remediation of the Cannery MGP Site or the vicinity thereof. *Id.* ¶ 74.

6 In sum, Clarke alleges that the Cannery MGP site and lands in the vicinity thereof,
7 including tidelands and submerged lands, remain contaminated. On a continuous and repeated
8 basis, pollutants from the site make their way via groundwater and discharge into the Bay,
9 endangering human and marine life. *Id.* ¶¶ 96–102, 109–15.

10 Clarke asserts a RCRA claim against PG&E because it allegedly “dumped, leaked,
11 discharged, spilled, injected, and/or placed MGP Waste on the Cannery MGP Site and the vicinity
12 thereof” (Compl. ¶¶ 181–85); a CWA claim for alleged discharges of “MGP wastes” into San
13 Francisco Bay (*id.* ¶¶ 186–91); and state law claims for negligence (*id.* ¶¶ 192–96) and strict
14 liability for ultrahazardous activities (*id.* ¶¶ 197–201). He seeks injunctive relief requiring PG&E
15 to fund an Environmental Remediation Trust (“ERT”) that would remediate the entire “Cannery
16 MGP Site,” and civil penalties under the CWA. *Id.*, Prayer for Relief ¶ 3–5. In addition, he seeks
17 compensatory and punitive damages “with respect to the Cannery MGP.” *Id.* ¶ 7.

18 LEGAL STANDARD

19 I. MOTION TO DISMISS UNDER RULE 12(B)(1)

20 “Because standing and ripeness pertain to federal courts’ subject matter jurisdiction, they
21 are properly raised in a [Federal] Rule [of Civil Procedure] 12(b)(1) motion to dismiss.” *Chandler*
22 *v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121–22 (9th Cir. 2010). The party invoking
23 the jurisdiction of the federal court bears the burden of establishing that the court has the authority
24 to grant the relief requested. *Id.*

25 A challenge pursuant to Rule 12(b)(1) may be facial or factual. See *White v. Lee*, 227 F.3d
26 1214, 1242 (9th Cir. 2000). In a facial attack, the jurisdictional challenge is confined to the
27 allegations pled in the complaint. See *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).
28 The challenger asserts that the allegations in the complaint are insufficient “on their face” to

1 invoke federal jurisdiction. See *Safe Air Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th
2 Cir. 2004). To resolve this challenge, the court assumes that the allegations in the complaint are
3 true and draws all reasonable inference in favor of the party opposing dismissal. See *Wolfe*, 392
4 F.3d at 362.

5 **II. MOTION TO DISMISS UNDER RULE 12(B)(6)**

6 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss if a claim
7 fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to
8 dismiss, the claimant must allege “enough facts to state a claim to relief that is plausible on its
9 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when
10 the plaintiff pleads facts that “allow the court to draw the reasonable inference that the defendant
11 is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation
12 omitted). There must be “more than a sheer possibility that a defendant has acted unlawfully.” *Id.*
13 While courts do not require “heightened fact pleading of specifics,” a claim must be supported by
14 facts sufficient to “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555,
15 570.

16 **DISCUSSION**

17 PG&E moves to dismiss the Complaint on the following grounds: (i) Clarke lacks standing
18 to bring any of the alleged claims; (ii) he cannot establish redressability for purposes of injunctive
19 relief standing for his RCRA claim because the relief he seeks would necessarily loop in non-
20 parties; (iii) his CWA claim seeks retroactive application to discharges that took place before its
21 enactment; (iv) his CWA claim is barred by the applicable statute of limitations and the concurrent
22 remedy doctrine; (v) he lacks the damages required for his state law negligence and strict liability
23 claims; and (vi) he cannot, as a matter of law, state a claim strict liability claim for ultrahazardous
24 activity. *Pacific Gas and Electric Company and PG&E Corporation’s Notice of Motion and*
25 *Motion to Dismiss Complaint (“MTD”)* [Dkt. No. 10] 2.

26 **I. STANDING**

27 Article III standing requires that a “plaintiff must have (1) suffered an injury in fact, (2)
28 that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be

1 redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).
 2 “To establish injury in fact, a plaintiff must show that he or she suffered ‘an invasion of a legally
 3 protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or
 4 hypothetical.’” *Id.* at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

5 “Where, as here, a case is at the pleading stage, the plaintiff must ‘clearly . . . allege facts
 6 demonstrating’ each element.” *Spokeo*, 136 S. Ct. at 1547 (quoting *Warth v. Seldin*, 422 U.S. 490,
 7 518, (1975)). “[A] plaintiff must demonstrate standing for each claim he seeks to press and for
 8 each form of relief that is sought.” *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650
 9 (2017) (citation omitted).

10 **A. Injury in Fact**

11 Clarke initially raised three primary bases for his standing: (i) recreational and aesthetic
 12 injuries; (ii) injuries to third parties; (iii) injury based on decision not to purchase home near the
 13 Cannery MGP. Compl. ¶¶ 14, 21, 23. In his opposition, Clarke conceded that the latter two are
 14 insufficient to establish standing, and focuses now on the first. Plaintiff’s Opposition to
 15 Defendants’ Motion to Dismiss Complaint (“Oppo.”) [Dkt. No. 15] 7.²

16 The Supreme Court has held that “environmental plaintiffs adequately allege injury in fact
 17 when they aver that they use the affected area and are persons for whom the aesthetic and
 18 recreational values of the area will be lessened by the challenged activity.” *Cantrell v. City of*
 19 *Long Beach*, 241 F.3d 674, 680 (9th Cir. 2001) (quoting *Friends of the Earth, Inc. v. Laidlaw*
 20 *Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000)). In other words, “[t]he ‘injury in fact’
 21 requirement in environmental cases is satisfied if an individual adequately shows that she has an
 22 aesthetic or recreational interest in a particular place, or animal, or plant species and that that
 23 interest is impaired by a defendant’s conduct.” *Ecological Rights Found. v. Pac. Gas & Elec. Co.*,
 24 874 F.3d 1083, 1093 (9th Cir. 2017) (hereinafter “ERF”) (quoting *Ecological Rights Found. v.*

25
 26 ² Although Clarke concedes that he cannot establish standing based on third party harms to
 27 “swimmers and rowers” who regularly exercise in the Cannery MGP area, he also cannot use them
 28 to “further bolster his claim for standing.” Compl. ¶ 21; Oppo. 7; see *Marina MGP case*, Dkt. No.
 233 at 9 (“While Clarke sufficiently alleges standing based on his own recreational and aesthetic
 interests, his attempt to further bolster standing based on potential injuries to third parties is
 improper.”).

1 Pac. Lumber Co., 230 F.3d 1141, 1147 (9th Cir. 2000) (hereinafter “Pac. Lumber”).

2 Clarke alleges that he “habitually visits the areas affected by the contamination alleged in
3 this action for aesthetic and recreational enjoyment, visiting the affected area alone and with
4 family, friends, and guests from out of town, and he intends to do so in the future.” Compl. ¶ 14.
5 His “custom” is to “drive to the Marina Green and leave his car there, while [he] or [he] and his
6 visitors, walk along the shoreline, including along Aquatic Park.” Id. ¶ 16. While there, he “likes
7 to show off the area he used to call home” and thinks about the “amazingly interconnected world
8 we live in and how we share this beautiful environment with all God’s creatures.” Id. ¶¶ 16, 18.

9 He alleges that his “recreational and aesthetic enjoyment of the area” is diminished by “the
10 contamination from the Cannery MGP and the harm it is causing to the environment of the
11 affected area” and “by the knowledge that the affected area is contaminated by chemicals toxic to
12 human health and the environment.” Id. ¶¶ 19, 21. He highlights “[t]he harm that contamination
13 from the Cannery MGP is causing to shorebirds, harbor seals, and sea lions in the marine areas
14 offshore of the Cannery MGP site and the reductions it causes in their numbers—including
15 through the reduction of herring and other fish on which they feed.” Id. ¶ 19. He claims that
16 “such enjoyment would be substantially increased if the contamination alleged in this action is
17 addressed.” Id. ¶ 22.

18 These allegations are quite similar to the ones he made in the Marina MGP case. Based on
19 the allegations above, Clarke has sufficiently alleged a concrete and particularized recreational and
20 aesthetic interest that is impaired due to PG&E’s conduct. They are plausible: the Cannery MGP
21 area is next to the Marina MGP area, so it is likely that his recreational activities and fondness for
22 the area are similar. An environmental plaintiff “who uses an area for recreational purposes does
23 not have to show that he or she lives particularly nearby to establish an injury-in-fact due to
24 possible or feared environmental degradation”; “[r]epeated recreational use itself, accompanied by
25 a credible allegation of desired future use, can be sufficient, even if relatively infrequent, to
26 demonstrate that environmental degradation of the area is injurious to that person.” Pac. Lumber
27 Co., 230 F.3d at 1149.

28 I found that substantially similar allegations were sufficient to establish standing in the

1 related Marina MGP case. See Marina MGP case, Dkt. No. 233 at 7 (citing ERF, 874 F.3d at
 2 1093–94). I rejected PG&E’s attempt then to narrow the standard of recreational and aesthetic
 3 injuries by requiring Clarke to plead a “direct sensory impact” or diminished ability to enjoy an
 4 activity, as opposed to diminished enjoyment of an activity. *Id.* at 6–7. PG&E repeats the same
 5 argument here, and I remain unconvinced that the case law regarding recreational and aesthetic
 6 injuries is as restrictive as PG&E suggests. Because Clarke has pleaded sufficient facts to satisfy
 7 the standard articulated by the Ninth Circuit in ERF and *Pac. Lumber*, I DENY PG&E’s motion to
 8 dismiss for failure to allege standing.

9 **B. Redressability of the RCRA Claim**

10 No matter whether Clarke has sufficiently alleged injury-in-fact based on aesthetic and
 11 recreational injuries, PG&E contends that he cannot establish redressability for the injunctive
 12 relief he seeks. Neither he nor PG&E owns the property within the Cannery MGP site that he
 13 wants investigated and remediated—the NPS does. MTD 13; see Compl. ¶ 71.

14 PG&E asserts that Clarke is required to allege that the NPS or any other third parties with
 15 legal interests in those properties (e.g., lessees from the NPS) would allow access for remedial
 16 efforts or could be required to provide it. MTD 14. The Complaint is devoid of such allegations,
 17 so PG&E concludes that there is no redressability for the injunctive relief Clarke seeks. *Id.*
 18 Clarke responds that he is not required to plead how he will gain access to the property. But if he
 19 is, he states that it is “perfectly conceivable, if not probable, that the NPS would grant the access
 20 necessary to allow the contamination left behind by PG&E remediated, free of cost to U.S.
 21 taxpayers.” *Oppo.* 9.³

22 In the Marina MGP case, Clarke sought to establish standing based on his own injuries as

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 24 ³ Clarke additionally argues that even if access to remediate the property owned by the NPS could
 25 not ultimately be gained, remedying his injuries does not depend on gaining such access because
 26 “[he] could still gain an order that required an ERT or PG&E to engage in remedial activities in
 27 other areas, including public rights-of-way, tidelands, and submerged lands, that redressed the
 28 environmental harms of which he complains, including harms that are originating from the
 Cannery MGP Site.” *Oppo.* 10. PG&E contends that would not make a difference because those
 other properties are also owned by non-parties, and Clarke does not allege that those non-parties
 would grant the required access for investigation and remediation. *Pacific Gas and Electric
 Company and PG&E Corporation’s Reply in Support of Motion to Dismiss Complaint (“Reply”)*
 [Dkt. No. 19] 6.

1 well as injuries suffered by third parties. I rejected Clarke’s attempt to establish standing based on
2 contamination beneath properties owned by third parties, such as current homeowners in the
3 Marina, and likewise found that such allegations did not establish redressability for purposes of
4 standing because “Clarke has not alleged that he has control or authority to grant access to any
5 properties for which he seeks injunctive relief, or that each of the private property owners or City
6 would allow any such relief.” Marina MGP case, Dkt. No. 233 at 10. “Therefore, while Clarke
7 sufficiently allege[d] standing based on his own recreational and aesthetic interests,” I concluded
8 that “he cannot establish injury in fact based on subsurface soil or groundwater contamination at
9 third parties’ properties; the redressability he seeks for these claims goes beyond his own
10 purported injuries.” *Id.* at 10–11. I allowed the RCRA claim based on his own recreational and
11 aesthetic injuries to proceed.

12 PG&E challenged the redressability of Clarke’s injuries by arguing that investigations and
13 actions to address MGP residues in the Marina were actively ongoing and/or completed. *Id.* at 11.
14 Because “[b]oth parties spen[t] much time debating whether PG&E has done enough to moot
15 Clarke’s RCRA claim,” I found the “dispute is factual in nature, and improper to consider at the
16 pleadings stage.” *Id.* PG&E’s challenge here is different: it does not contend that it has done
17 enough to moot Clarke’s claim. Instead, it argues that Clarke’s requested injunctive relief would
18 ultimately require access to subsurface soils, sediments, and groundwater on properties owned by
19 a federal agency, the NPS, which is not a party, and that necessarily dooms the redressability of
20 his RCRA claim.

21 The Ninth Circuit has decided “that the statutory language permitting suits against ‘any
22 person . . . who has contributed or who is contributing’ to the handling, storage, treatment,
23 transportation or disposal of hazardous waste, [42] § 6972(a)(1)(B), requires that a defendant
24 be actively involved in or have some degree of control over the waste disposal process to be liable
25 under RCRA.” *Hinds Investments, L.P. v. Angioli*, 654 F.3d 846, 851 (9th Cir. 2011) (citing 42
26 U.S.C. § 6972(a)(1)(B)) (emphasis added). In light of this contributor liability language, Clarke
27 argues that nothing in RCRA limits plaintiffs to the current owners of contaminated properties –
28 i.e., there is no requirement that, at the time of suit (or at any other time), a defendant who had

1 such active involvement or control, own the property where the waste was disposed. He contends
2 that such a requirement was rejected in *United States v. Price*, 523 F. Supp. 1055, 1072 (D.N.J.
3 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982), where the court held that defendants' "sale of the
4 property [where contaminants were disposed] did not relieve them of their accountability under
5 [RCRA]." See also *id.* (noting that "society's interests in deterring the improper disposal of
6 hazardous wastes and in alleviating serious hazards as quickly as possible mandate that those
7 responsible for the disposal of such wastes not be able to shirk their statutory responsibilities by
8 simply selling the property on which the wastes are stored"); *Delaney v. Town of Carmel*, 55 F.
9 Supp. 2d 237, 256 (S.D.N.Y.1999) ("The term ['contributed to'] has been universally held to infer
10 something more than mere ownership of a site; some level of causation between the contamination
11 and the party to be held liable must be established.").

12 PG&E's cited authority is not particularly helpful to the question before me. Its sole
13 RCRA case, *Sierra Club v. Chesapeake Operating, LLC*, 248 F. Supp. 3d 1194 (W.D. Okla.
14 2017), was not decided in the context of dismissing an unredressable RCRA claim. Rather, the
15 court was deciding whether to "decline to exercise jurisdiction over the action under the Burford
16 abstention and primary jurisdiction doctrines because the Oklahoma Corporation Commission
17 [{"OCC"}] ha[d] taken action in response to the increased seismicity caused by wastewater
18 disposal activities." *Id.* at 1199. The court found that dismissal of the action was appropriate
19 under the Burford abstention doctrine because "the primary relief that plaintiff [sought] for its
20 RCRA claim [was] available from the OCC." *Id.* at 1204. In drawing this conclusion, it
21 responded to one of plaintiff's arguments that "it also seeks relief under RCRA in the form of an
22 order requiring defendants to," among other things "reinforce vulnerable structures that current
23 forecasts indicate could be affected by major earthquakes," a form of relief purportedly not
24 available from the OCC. *Id.* The court rejected the argument because "[a]lthough RCRA
25 provides that the court has jurisdiction [] 'to order such person to take such other action as may be
26 necessary,' see, [section] 6972(a), the court has found no authority to support a requirement,
27 mandated by this court, that the defendants reinforce vulnerable structures, including vulnerable
28 structures owned by third parties who are not before the court seeking that relief." *Id.*

1 Even if the holding in *Chesapeake Operating* can be imported to the redressability
2 question, the alleged facts here are different. Clarke is not seeking to redress third-party harms by
3 accessing properties owned by third parties, as was the issue in the *Marina MGP* case. See *Marina*
4 *MGP* case, Dkt. No. 233 at 10 (citing *Chesapeake Operating* and holding that Clarke “has not
5 alleged how redressing third-party harms necessarily related to his own injuries”). Instead, he is
6 seeking relief that would benefit him, i.e., cleaning up the waste that diminishes his aesthetic and
7 recreational enjoyment of the area. Whether NPS would grant access to PG&E to perform the
8 requested relief is an open question, but PG&E has not provided me with adequate case law that
9 supports dismissal at the pleadings stage.

10 In short, I cannot conclude that Clarke’s RCRA claim based on recreational and aesthetic
11 injuries is unredressable at this stage. If discovery establishes that the NPS will not grant access to
12 PG&E to investigate and/or remediate its contributions to that contamination, PG&E may raise
13 this issue on summary judgment. Most RCRA redressability issues, which seem to arise in the
14 context of whether a defendant has done enough to moot a plaintiffs’ claim, are fact-intensive and
15 resolved after the pleadings stage. See *Marina MGP* case, Dkt. No. 233 at 11 (dispute over
16 whether PG&E has done enough to moot Clarke’s RCRA claim is “factual in nature and improper
17 to consider at the pleadings stage”); *id.* at 12 (“flawed requested remedy is not sufficient basis for
18 dismissal”); *Doe v. U.S. Dep’t of Justice*, 753 F.2d 1092, 1104 (D.C. Cir. 1985) (“[I]t need not
19 appear that the plaintiff can obtain the specific relief demanded as long as the court can ascertain
20 from the face of the complaint that some relief can be granted.”); accord generally *Lujan*, 504
21 U.S. at 568–70 (addressing the question of redressability with reference to the actions of third
22 parties at the summary judgment stage).⁴

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⁴ One wonders if the issue here isn’t whether NPS is an indispensable party under Rule 19, but that
issue too should await discovery. See *Raritan Baykeeper, Inc. v. NL Indus., Inc.*, No. 09-CV-4117
JAP, 2013 WL 103880, at *19 (D.N.J. Jan. 8, 2013) (in denying Middlesex County’s motion to
dismiss the RCRA claim against it as moot, the court noted that plaintiffs, in their opposition,
“withdrew their claim against the County but did not release the County from the lawsuit since the
County is a necessary party because it owns property on the Site, which will likely need to be
accessed during remediation”); see *Steel Valley Authority v. Union Switch and Signal*
Division, 809 F.2d 1006, 1013–14 (3d Cir. 1987) (a property owner is a party to be joined to an
action if injunctive relief would interfere with its rights).

1 PG&E’s motion to dismiss the RCRA claim for lack of redressability is DENIED.

2 **III. CWA CLAIM**

3 To state a claim under the CWA, a plaintiff must allege “(1) the ongoing addition of (2) a
4 pollutant (3) to the navigable waters of the United States (4) from a point source (5) without a
5 permit (or in violation of a permit).” *Woodward v. Goodwin*, No. C 99-1103 MJJ, 2000 WL
6 694102, at *5 (N.D. Cal. May 12, 2000). PG&E argues that Clarke has failed to state a claim for
7 relief under the CWA for two reasons: (i) Clarke fails to allege an “ongoing” violation and rather
8 seeks improper retroactive application of the CWA; and (ii) his CWA claim for penalties is barred
9 by the five-year statute of limitations of 28 U.S.C. § 2462 and his claim for injunctive relief is
10 likewise barred under the concurrent remedy doctrine. MTD 14–19.

11 **A. Ongoing Violations**

12 “Taking its cues from the present-tense syntax and the legislative history, the Supreme
13 Court has confirmed that standing under the CWA requires that ‘the harm sought to be addressed
14 by the citizen suit lies in the present and the future, not in the past.’” *Woodward*, 2000 WL
15 694102, at *6 (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49,
16 59 (1987)). Subject-matter jurisdiction therefore exists only where “the citizen plaintiffs make a
17 good-faith allegation of continuous or intermittent violation.” *Gwaltney*, 484 U.S. at 64. The
18 Court rejected the suggestion that a heightened pleading standard be imposed, concluding that
19 Federal Rule of Civil Procedure 11 protects defendants from factually baseless assertions of
20 ongoing or intermittent violations of the Act. *Id.* at 65.

21 Contrary to PG&E’s contention, Clarke’s CWA claim does not require retroactive
22 application of the statute. His allegations are based on PG&E’s alleged ongoing and continuous
23 violations, namely that PG&E “continues to violate” the CWA due to repeated unpermitted
24 discharges of pollutants into the San Francisco Bay from the remains of the Cannery MGP Site
25 (Compl. ¶¶ 113, 175(i) 187, 189–90), as well as through its illegal failure to do anything to stop
26 those discharges (*id.* at ¶¶ 75–79, 107, 115).

27 Clarke makes substantially similar allegations of continuous, ongoing violations of the
28 CWA as those that I found were adequate in the Marina MGP case:

1 In the instant case, the plaintiffs have provided enough facts to
2 support an ongoing regulatory violation. The complaint explicitly
3 states that ‘PG&E has violated, and continues to violate, effluent
4 standards and limitations as defined under section 505(f) of the CWA
5 . . . by discharging pollutants into the waters of the United States
6 without a permit’ Compl. ¶ 215. It supports this allegation with
7 facts that ‘toxic chemicals from the MGP Wastes located in the soil
8 of the MGP Sites’ are continually discharged into the Bay. *Id.* ¶¶
9 216–18.

10 Significantly, the complaint also alleges that PG&E’s current
11 behavior contributes to ongoing violations relating to the MGP
12 discharges. It provides that PG&E’s refusal to test for contaminants
13 in groundwater that serves as a conduit means that MGP sites will
14 ‘continue to present an imminent and substantial endangerment to
15 human health and the environment’ *Id.* ¶ 169 (emphasis added).

16 *San Francisco Herring Ass’n v. Pac. Gas & Elec. Co.*, 81 F. Supp. 3d 847, 861 (N.D. Cal. 2015);
17 see, e.g., Compl. ¶ 115, 187–91.

18 Accordingly, I find that Clarke has adequately alleged an ongoing discharge that does not
19 seek retroactive application of the CWA. PG&E’s motion to dismiss the CWA claim on this
20 ground is DENIED.

21 **B. Statute of Limitations and the Concurrent Remedy Doctrine**

22 That said, whether Clarke’s “continuous or intermittent violation” allegation is within the
23 five-year statute of limitations under 28 U.S.C. § 2462 is a separate question. See *HEAL Utah v.*
24 *PacifiCorp*, 375 F. Supp. 3d 1231, 1249–50 (D. Utah 2019) (differentiating “‘continuous
25 violations’ in the context of [section] 2462” and “the separate jurisdictional requirement
26 prescribed in *Gwaltney*”; finding “good reason to view the *Gwaltney* jurisdictional requirement
27 and [section] 2462 differently” because “[a]lthough both standards deal with a similar issue—the
28 import of a violation’s ongoing effects—they serve distinct purposes”).⁵

Section 2462 provides a five-year limitations period for Clarke’s CWA claim from the date
when the cause of action “first accrued”. *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517,

⁵ See *Friends of Warm Mineral Springs, Inc. v. McCarthy*, No. 8:13-cv-3236-R-23TGW, 2015 WL 2169241, at *3 n.6 (M.D. Fla. May 8, 2015) (“The parties in this action and the opinions in many other actions conflate the limitation in 28 U.S.C. § 2462 with the jurisdictional requirement in 33 U.S.C. § 1365(a). 28 U.S.C. § 2462 forbids liability under 33 U.S.C. § 1311(a) if more than five years has passed between the accrual of the claim and the filing of the complaint. Separately, 33 U.S.C. § 1365(a) ‘require[s for jurisdiction] that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future.’”) (quoting *Gwaltney*, 484 U.S. at 57).

1 1521–23 (9th Cir. 1987) (federal five-year limitation period applies to citizen action seeking
2 enforcement of civil penalties under CWA). The date when the claim first accrues under section
3 2462 is the date of the underlying violation, not the date of discovery. *Gabelli v. S.E.C.*, 568 U.S.
4 442, 447–48 (2013) (“[A] claim accrues when the plaintiff has a complete and present cause of
5 action[.]”) (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)).

6 Because Clarke alleges that discharges began while the Cannery MGP was still operating,
7 PG&E argues that to the extent any CWA claim could be asserted, it would have first accrued, at
8 the latest, when the CWA permitting requirements became effective in 1973 (i.e., the date its
9 conduct constituted a violation). Given then that Clarke’s CWA claim for penalties would be
10 barred by the five-year statute of limitations under section 2462, it argues that equitable remedies
11 based on the same set of facts are likewise barred by the concurrent remedy doctrine. See *Fed.*
12 *Election Comm’n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) (“[E]quity will withhold its relief
13 in such a case where the applicable statute of limitations would bar the concurrent legal remedy.”)
14 (quoting *Cope v. Anderson*, 331 U.S. 461, 463–64 (1947)).

15 The timeliness of Clarke’s claim depends on whether his allegations involve a “single,
16 continuing violation” of the CWA or “repeated, discrete violations” of the CWA. If it is the
17 former, his CWA claim is time-barred because the alleged contamination “first accrued” decades
18 ago while the Cannery MGP was operating, when it was demolished, or when PG&E’s conduct
19 became a violation upon the CWA’s enactment, all of which are well before the five-year statute
20 of limitations. If it is the latter, his claim is not time-barred because each alleged action, including
21 ones within the last five years, is a discrete CWA violation. Without much guidance from the
22 Ninth Circuit on the difference between a “single, continuing violation” and “repeated, discrete
23 violations”, I turn to the cases cited by the parties.

24 PG&E contends that Clarke has alleged a “single, continuing violation” such as those at
25 issue in *Sierra Club v. Oklahoma Gas & Elec. Co.*, 816 F.3d 666, 674 (10th Cir. 2016) and *HEAL*
26 *Utah v. PacificCorp.*, 375 F. Supp. 3d 1231, 1249 (D. Utah 2019). In *Oklahoma Gas*, the Tenth
27 Circuit held that an action for civil penalties based on a “single, continuing violation” of the Clean
28 Air Act (“CAA”)—the unpermitted construction of a facility—accrued on the first day of

1 unpermitted construction. 816 F.3d at 672. “[A]ny penalties stemming from the alleged violation
2 [were] therefore time-barred,” as that construction had occurred more than five years before the
3 complaint was filed. *Id.* at 673. It rejected plaintiff’s argument that the statute of limitations
4 should be equitably tolled based on the continuing violation doctrine, holding that application of
5 the doctrine was barred because 28 U.S.C. § 2462 explicitly provided for its limitation period to
6 begin running on the date the claim “first accrue[s].” *Id.* at 673 (quoting 28 U.S.C. § 2462)
7 (emphasis in original).

8 The Tenth Circuit distinguished “between a single, continuing violation and repeated,
9 discrete violations,” finding that when the latter exists “an entirely new violation would first
10 accrue apart from the other violations in the series and would begin a new statutory clock.” *Id.* at
11 672 n.5. “In contrast, a single, continuing violation would not extend the limitations periods of
12 [section] 2462 because the statute would begin to run as soon as that violation first accrued and
13 would not reset thereafter.” *Id.* (emphasis in original).

14 The Tenth Circuit also rejected plaintiff’s argument that where a continuing violation
15 exists, the limitation period under section 2462 does not begin to run until the final day of the
16 violation. *Id.* at 672. It found that a claim “accrues as soon as the plaintiff can file suit and obtain
17 relief” and “a continuing violation is actionable even before the last act of the violation where the
18 conduct that has already occurred is sufficient to support a claim.” *Id.* at 673. Accordingly, it
19 concluded that plaintiff’s cause of action “first accrued” on April 1, 2008, the day of unpermitted
20 construction or modification in violation of the CAA, “even if the violation continued until some
21 later date.” *Id.* Given that “[a]ny penalties stemming from the alleged violation [were] time-
22 barred”, it found that plaintiff’s request for declaratory and injunctive relief was also time-barred
23 under the concurrent remedy doctrine “because the equitable claims [were] based on the same
24 facts supported the time-barred legal claim.” *Id.* at 673, 675.

25 The District Court of Utah in *HEAL* followed *Oklahoma Gas* and found that the CWA
26 claims were time-barred based on similar facts. 375 F. Supp. 3d at 1249. There, environmental
27 organizations brought an action against a power plant operator, alleging that the power plant
28 violated the CWA when it installed a “collection system” between 2007 and 2008, which was

1 connected to the unpermitted discharge of fill material into the waters of the United States at its
2 power plant. *Id.* at 1238–39. The environmental organizations argued that their CWA claim,
3 brought in 2016, was not time-barred under section 2462 because the power plant “[was] in
4 ‘continuing violation’ of the CWA each day the fill material remains in place.” *Id.* at 1248.

5 The court rejected that argument, finding that “[a]s in *Oklahoma Gas*, [the power plant’s]
6 addition of fill materials to jurisdictional waters during the installation of the collection system
7 gave rise to a claim that first accrued outside the statutory period, even if its effects continued.”
8 *Id.* at 1249. The environmental organizations “could have filed suit and obtained relief beginning
9 in 2007 or 2008 at the latest, meaning the statute of limitations was exhausted no later than
10 sometime in 2013—several years before the 2016 filing of [the] lawsuit.” *Id.* The enduring
11 presence of the fill material “[was] at best a ‘continuing violation’ which, under *Oklahoma Gas*,
12 [did] not reset [section] 2462’s statutory clock.” *Id.*

13 Clarke advances two theories that he contends are different than the time-barred claims in
14 *Oklahoma Gas* and *HEAL*—ongoing migration via groundwater and failure to test or remediate.
15 For his first theory, he asserts that *Oklahoma Gas* and *HEAL* involved a “single” violation that
16 started long ago and continued to this day—i.e., a discrete statutory violation that occurred one
17 time and was not remedied. By contrast, he alleges that PG&E’s violations of the CWA are
18 multiple and continuous, a new violation occurring and a new claim accruing each time pollutants
19 from the Cannery MGP are discharged into the Bay. *Oppo.* 18–19 (citing *Compl.* ¶¶ 113-14, 187–
20 90). He contends that his claim does not involve a “single” violation, as in *Oklahoma Gas* and
21 *HEAL*, but rather falls into the “repeated, discrete violations” recognized in *Oklahoma Gas*, where
22 “[each violation] begin[s] a new statutory clock.” *Oklahoma Gas*, 816 F.3d at 672 n.5.

23 I am not convinced that Clarke’s allegations amount to a set of discrete unlawful acts
24 within the last five years that would not be time-barred by section 2462. The cited paragraphs of
25 his Complaint do not clearly allege “discrete,” “repeated,” or “multiple” CWA violations. To the
26 contrary, the Complaint alleges that an “ongoing migration” of contaminants through groundwater
27 is “the functional equivalent of a direct discharge[.]” *Compl.* ¶¶ 112-113 (emphasis added). This
28 appears to involve only one discharge (not multiple discharges or discrete discharges), which

1 would amount to a single violation that first accrued decades ago, during the operation or
2 demolition of the Cannery MGP, but continues and remains un-remedied till this day.

3 Even if the “ongoing migration” constitutes a series of separate “discharges,” as Clarke
4 contends, the Complaint does not explain why that would still not constitute a “single violation,”
5 as the term is used Oklahoma Gas and HEAL. See Oklahoma Gas 816 F.3d at 672 (explaining
6 that a “single violation continues over an extended period of time ‘when the plaintiff’s claim seeks
7 redress for injuries resulting from a series of separate acts that collectively constitute one unlawful
8 act’ as opposed to ‘conduct that is a discrete unlawful act.’”) (quoting Shomo v. City of New York,
9 579 F.3d 176, 181 (2d Cir. 2009)). Counsel for Clarke spent much time at the hearing explaining
10 how Clarke’s claims involve multiple discrete violations of the CWA, but the fact of the matter is
11 that the Complaint, on its face, does not make those allegations.

12 Clarke’s second “failure to act” theory fares no better. He argues that the application of
13 Oklahoma Gas to find his CWA claim untimely is inappropriate because his claim is also based on
14 PG&E’s current and ongoing illegal refusals to do any investigation or remediation that could stop
15 the discharges. Oppo. 19; Compl. ¶¶ 8-12, 75–79, 107, 115. In support of this theory, he cites to
16 *Colorado Dep’t of Pub. Health & Env’t, Hazardous Materials & Waste Mgmt. Div. v. United*
17 *States*, 381 F. Supp. 3d 1300, 1311 (D. Colo. 2019), where the court found Oklahoma Gas
18 inapplicable because “[p]laintiff’s claim alleges a failure to act,” and because defendants “failed to
19 take required action, there is no way to identify a discrete act at a specified point in time” from
20 which the statute of limitations can be calculated.

21 Clarke’s reliance on *Colorado Dep’t of Pub. Health* is inapposite. That case involved a
22 Colorado statute of limitations that “uses critically different language” than 28 U.S.C. § 2462, the
23 statute analyzed in Oklahoma Gas and applicable here. *Colorado Dep’t of Pub. Health*, 381 F.
24 Supp. 3d at 1310. Section 2462 “requires any action for failure to obtain a mandatory pre-
25 construction permit to be brought ‘within five years from the date when the claim first accrued.’”
26 *Id.* (quoting Oklahoma Gas, 816 F.3d at 671) (emphasis added). “By contrast, [Colorado’s statute
27 of limitations] begins to run when the department discovers a violation.” *Id.* (emphasis added).
28 Clarke does not adequately explain why his “failure to act” theory satisfies, or can circumvent, the

1 “first accrued” language of section 2462.

2 Because the Complaint fails to allege a timely CWA claim for penalties under section
3 2462, the related CWA claim for injunctive relief is likewise barred by the concurrent remedy
4 doctrine. PG&E’s motion to dismiss the CWA claim on these grounds is GRANTED with leave
5 to amend.⁶

6 **IV. STATE LAW CLAIMS**

7 **A. Viable Claim for Damages**

8 PG&E moves to dismiss Clarke’s negligence and strict liability claims on grounds that he
9 has not stated a viable claim for damages. MTD 19–20. Clarke contends that refraining from
10 buying a new home was a detriment that was proximately caused by PG&E’s acts and omissions,
11 and therefore is sufficient to satisfy his burden to allege harm resulting from PG&E’s negligence
12 and conduct for which it is strictly liable. *Oppo*, 22 (citing *Compl.* ¶ 23).

13 PG&E asserts that this argument fails for three reasons. First, the decision not to search
14 for a new house in a particular location is not a cognizable injury because it would not constitute
15 personal injury, property damage, or economic loss; Clarke cites no authority for the proposition
16 that his choice not to look for another house in the area constitutes any other type of compensable
17 injury. *Reply* 12.⁷ Second, even if Clarke had standing to seek damages, he could not do so here
18 because such damages would be entirely speculative. *Id.* Third, even if he overcame those

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20
21 ⁶ PG&E also contends that the Complaint does not clearly allege that failure to investigate or
22 remediate violated the CWA, and even if it did, such claims are not within the permissible scope
23 of a CWA in the absence of a prior agency order directing investigation or remediation. *Reply* 11;
24 see *Compl.* ¶ 174 (recognizing that no “regulatory agency” has “ordered an investigation or
25 cleanup of the site or its vicinity[.]”). Because this argument was raised in PG&E’s reply brief,
26 and Clarke did not squarely address it at the hearing, the issue is not ripe for my decision. But if
27 Clarke chooses to amend his Complaint to bring CWA claims based on a “failure to act” theory,
28 he should include allegations that support his theory and address the concerns raised in PG&E’s
reply brief.

⁷ Although anxiety can be a form of emotional distress, PG&E argues that its availability as a
basis for damages in California is limited to three categories, all inapplicable here: “negligent
 mishandling of a corpse; negligent misdiagnosis of a disease; or negligent breach of a duty arising
 out of a pre-existing relationship, as required for emotional distress damages as a ‘direct’ victim.”
 CACI Instruction No. 1620 (citing *Burgess v. Superior Court*, 2 Cal. 4th 1064, 1076 (1992)).
 Clarke does not respond to this argument in his opposition brief, and instead only focuses on the
 alleged harm of not purchasing a home.

1 hurdles, Clarke cannot bootstrap claims relating to the Marina MGPs into this case given his
2 dismissal of such claims; he fails to allege that his injury arose from the Cannery MGP itself. *Id.*
3 at 13.

4 I agree that Clarke’s “refrain from buying a home” theory of injury is merely speculative.
5 The theory is premised on allegations regarding purported “health risks” from the “unknown
6 extent” of MGP Waste—he decided not to look for a house in the area because of health risks he
7 might encounter from “possible exposure to unremediated MGP Wastes should he buy another
8 home in the area.” Compl. ¶ 23.

9 As I previously held in the Marina MGP case, Clarke’s alleged health concerns—based on
10 his alleged routine handling over 18 years of “black rocks” that he claimed were cancer causing—
11 were too speculative to constitute a “concrete injury” for purposes of standing. *Marina MGP case*,
12 Dkt. No. 233 at 8–9. This Complaint’s unspecified “health risks” from “possible exposure” in the
13 hypothetical scenario of Clarke buying another home in the area is even more speculative.

14 Nor are those allegations plausibly tied to the Cannery MGP itself. Clarke only points to
15 paragraph 23 in his Complaint, which reads:

16 After Clarke sold his previous home to PG&E as a result of the
17 contamination of the neighborhood and the inability to reach an
18 agreed-upon plan with PG&E for remediating his home, Clarke
19 refrained from searching for a new residence along San Francisco’s
20 northern waterfront because of the unknown extent of MGP Wastes
from the SF Waterfront MGPs and the related health risks from
possible exposure to unremediated MGP Wastes should he buy
another home in the area.

21 Compl. ¶ 23. Paragraph 23 generally refers to “SF Waterfront MGPs”, which includes the
22 Fillmore, North Beach, Beach Street, and the Cannery MGPs. *Id.* ¶¶ 2, 23. Clarke does not allege
23 that he could have or would have purchased a home in the area of the Cannery MGP site, nor does
24 he try to claim that the Cannery MGP caused contamination in other residential areas where he
25 used to live or would like to live.

26 PG&E’s motion to dismiss the negligence and strict liability claims on this basis is
27 GRANTED with leave to amend.
28

B. Ultrahazardous Activity

PG&E moves to dismiss Clarke’s strict liability claim for the additional reason that, as a matter of law, operation of an MGP was not “uncommon,” and could be made safe through the exercise of due care. MTD 21–22.

“The doctrine of ultrahazardous activity provides that one who undertakes an ultrahazardous activity is liable to every person who is injured as a proximate result of that activity, regardless of the amount of care he uses.” *Pierce v. Pacific Gas & Electric Co.*, 166 Cal. App. 3d 68, 85 (1985). The doctrine “focuses not on a product and its defects but upon an activity intentionally undertaken by the defendant, which by its nature is very dangerous.” *Id.* “[T]he doctrine scrutinizes not the accident itself but the activity which led up to the accident.” *Id.*

Six factors apply to determine whether an activity should be classified as ultrahazardous: [1] “existence of a high degree of risk of some harm to the person, land or chattels of others; [2] likelihood that the harm that results from it will be great; [3] inability to eliminate the risk by the exercise of reasonable care; [4] extent to which the activity is not a matter of common usage; [5] inappropriateness of the activity to the place where it is carried on; and [6] extent to which its value to the community is outweighed by its dangerous attributes.” *Edwards v. Post Transportation Co.*, 228 Cal. App. 3d 980, 985 (1991). While “the several factors are to be considered together and “establishment of one factor alone is usually not sufficient to categorize an activity”, the California Supreme Court “has limited the doctrine of ultrahazardous activity to encompass only activities which are neither commonplace nor customary.” *Id.*; *Pierce*, 166 Cal. App. 3d at 85 (citation omitted).

PG&E cites multiple cases that have disposed of strict liability claims involving the delivery of power or the operations of power plants. See, e.g., *Pierce*, 166 Cal. App. 3d at 85 (finding public utility’s maintenance of high-voltage power systems is not an ultrahazardous activity because it “has become pervasive and is now entirely commonplace”); *United States v. S. California Edison Co.*, 300 F. Supp. 2d 964, 991 (E.D. Cal. 2004) (granting motion to dismiss because “[u]nder California law, the activities of power plants are not classified as ultrahazardous for the purposes of the strict liability doctrine”). It also points out that at the time of the MGP

1 operations in the late 1800s and early 1900s, production and delivery of manufactured gas was at
2 least as common as the delivery of electricity, if not more so. See, e.g., *Davoust v. City of*
3 *Alameda*, 149 Cal. 69, 72 (1906) (“There is obviously no distinction, so far as the law on the
4 subject is concerned, between an electric plant for furnishing light, which is comparatively a new
5 thing, and a gas plant maintained for the same purpose”). Because operation of an MGP was not
6 an unusual or abnormal activity, PG&E contends that it cannot be considered an ultrahazardous
7 activity.

8 Clarke responds that his allegations are not just based on operation of a power plant and
9 power lines but rather “the operation and demolition of the Cannery MGP . . . [and] the creation
10 and refinement of gas from coal and oil and disposal of wastes created thereby . . . constitutes an
11 ultrahazardous activity.” Compl. ¶ 198. Given the inherently factual nature of the determination
12 whether an activity is ultrahazardous, he argues that it would be inappropriate to resolve this
13 determination on a motion to dismiss. Oppo. 23.

14 While the inquiry of whether an activity should be classified as ultrahazardous requires
15 fact-specific analysis regarding the activity in question, strict liability claims are still subject to
16 dismissal at the pleadings stage if they are not plausibly pleaded. Courts have dismissed strict
17 liability claims for failure to allege an ultrahazardous activity. See *supra*, *California Edison Co.*,
18 300 F. Supp. 2d at 99; see also *Greenfield MHP Assocs., L.P. v. Ametek, Inc.*, 145 F. Supp. 3d
19 1000, 1010 (S.D. Cal. 2015) (dismissing strict liability claims because “[p]laintiffs cite no cases
20 supporting the proposition that the use, storage and/or disposal of such solvents is considered an
21 ultrahazardous activity”); *In re Burbank Envtl. Litig.*, 42 F. Supp. 2d 976, 983 (C.D. Cal. 1998)
22 (dismissing strict liability claims because “plaintiffs have not stated sufficient facts to establish the
23 use of [certain chemicals] is an ultrahazardous activity”). At present, Clarke fails to state
24 sufficient facts to establish that the activity in question here was an ultrahazardous activity. He
25 cites no cases supporting that proposition. The case law cited by PG&E, which Clarke does not
26 convincingly refute, suggests that the activity was entirely commonplace and cannot constitute an
27 ultrahazardous activity.

28 PG&E’s motion to dismiss Clarke’s claims for strict liability under the doctrine of

1 ultrahazardous activity is GRANTED with leave to amend.

2 **CONCLUSION**

3 For the foregoing reasons, PG&E’s motion to dismiss for lack of standing and
4 redressability of the RCRA claim is DENIED. Dismissal of the CWA claim for failure to plead an
5 “ongoing” violation is DENIED, but dismissal based on the statute of limitations and the
6 concurrent remedy doctrine is GRANTED. Dismissal of the strict liability and negligence claims
7 are also GRANTED for failure to allege cognizable damages and an ultrahazardous activity. If
8 Clarke can in good faith allege facts that fix these deficiencies, he has leave to amend within
9 twenty (20) days of this Order.

10 **IT IS SO ORDERED.**

11 Dated: November 20, 2020



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14 William H. Orrick
15 United States District Judge
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United States District Court
Northern District of California