

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA**

HOMEFED VILLAGE III MASTER, LLC;)	Case No. 3:20-cv-0784-L-JLB
)	
)	
Plaintiff,)	ORDER DENYING DEFENDANT
vs.)	RECYCLING INTERNATIONAL
)	INC.'S MOTION FOR SUMMARY
OTAY LANDFILL, INC et al;)	JUDGMENT [ECF NO. 94]
)	
Defendants.)	
)	
)	
)	

Before the Court is a Motion for Summary Judgment filed by Defendant Recycling International Inc., dba LKQ (“LKQ”). [ECF No. 94]. Plaintiff HomeFed filed a Response in Opposition, and LKQ filed a Reply. The matter is submitted on the briefs without oral argument. *See* Civ. L. R. 7.1(d)(1). For the reasons stated below, Defendant LKQ’s Motion is denied.

//
//
//

1 I. FACTUAL BACKGROUND

2 HomeFed, a property developer, brought suit against its surrounding businesses,
3 including LKQ, for contamination it encountered during development of its Otay
4 Ranch Village III property in the City of Chula Vista.

5 LKQ is a wholly-owned subsidiary of LKQ Corporation. In or about August
6 2008, LKQ Corporation acquired Pick Your Part Auto Wrecking, a self-service auto
7 parts recycler selling parts from automobiles to customers. At the time of this
8 acquisition, Pick Your Part Auto Wrecking was operating an auto wrecking facility at
9 various parcels along Energy Way, in Chula Vista, California.

10 LKQ currently uses the LKQ facility for vehicle processing. Oil, gasoline, and
11 vehicle fluids are drained from vehicles at the LKQ facility. Vehicle crushers are
12 operated at the LKQ facility. The prior owners of the facility prepared a September
13 2007 Phase I Environmental Due Diligence Report prepared by Geomatrix
14 Consultants that was provided to LKQ. In 2015, the City of Chula Vista and the
15 Regional Water Quality Control Board (“RWQCB”) inspected the LKQ facility. As of
16 2016, LKQ had retained Apex Companies to perform an annual inspection of the LKQ
17 facility. On April 25, 2017, Apex performed another inspection. Apex photographed
18 the vehicle crusher used by LKQ at the facility. Apex performed another annual
19 inspection on May 8, 2018.

20 HomeFed encountered petroleum contamination in April 2017 during
21 excavation while installing a roadside stormwater trench (“Stormwater Trench”) on
22 the west side of its development near the border with the LKQ Facility. In September
23 2021, Plaintiff inspected and photographed the LKQ facility and installed a
24 groundwater monitoring well on the LKQ facility. Plaintiff subsequently installed two
25 groundwater monitoring wells directly adjacent to the property line with the LKQ
26 facility. The Stormwater Trench runs downhill, along Heritage Road towards the Otay
27 River Valley, and the storm drain pipe discharges into a retention basin on the north
28

1 side of Main Street. This retention basin, in turn, discharges into the Otay River via a
2 culvert under Main Street.

3 Plaintiff implemented emergency measures to contain and handle the impacted
4 groundwater, utilizing sumps and cutoff walls that were installed in the storm drain
5 trench system to mitigate impacted groundwater migration through the gravel backfill
6 of the trench so as to prevent the impacted groundwater from flowing into the Otay
7 River Valley. Three sumps were installed within the containment area, and a fourth
8 sump was installed down gradient.

9 The sumps allow monitoring of the groundwater within the storm drain trench
10 backfill, as well as providing the means for Plaintiff to pump the contaminated
11 groundwater out of the containment area and dispose of it in an environmentally safe
12 manner. To mitigate potential down gradient migration of impacted groundwater via
13 the storm drain trench, approximately 577,100 gallons of groundwater were extracted
14 from the four Heritage Road sumps from May 2017 to February 2019. The pumped
15 groundwater was transported offsite to an approved disposal facility.

16 II. RELEVANT PROCEDURAL BACKGROUND

17 On April 24, 2020, Plaintiff HomeFed Village III filed the original complaint in
18 this action seeking declaratory and injunctive relief, or damages, for Defendants
19 violations of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §
20 6972(a)(1), and common law theories of public nuisance, private nuisance, and
21 trespass. [ECF No. 1.] Plaintiff seeks to recover costs and damages that Plaintiff has
22 incurred or will incur in order to respond to impacts to groundwater, soil, and soil gas
23 on the Village 3 property, by solid and/or hazardous wastes and the constituents
24 thereof, including petroleum hydrocarbons, volatile organic compounds (VOCs), and
25 methane. *Id.*

26 On May 11, 2020, Plaintiff filed a First Amended Complaint. (FAC [ECF No.
27 4.]) Defendant LKQ filed a motion to dismiss on July 13, 2020, which was deemed
28 moot by a subsequent joint motion on July 27, 2020. [ECF No. 17.] Plaintiff was

1 allowed to amend the complaint and filed a Second Amended Complaint (“SAC”) on
2 August 6, 2020. [ECF No. 18.]

3 On August 15, 2022, LKQ filed the present Motion for Summary Judgment
4 against Plaintiff HomeFed. [ECF No. 94.] On September 12, 2022, HomeFed filed a
5 Response in Opposition. [ECF No. 115.] On September 19, 2022, LKQ filed a Reply.
6 [ECF No. 119.]

7 III. LEGAL STANDARD

8 Summary judgment is appropriate under Rule 56(c) where the moving party
9 demonstrates the absence of a genuine issue of material fact and entitlement to
10 judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477
11 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law, it
12 could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
13 248 (1986). A dispute about a material fact is genuine if “the evidence is such that a
14 reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S.
15 at 248.

16 The party seeking summary judgment bears the initial burden of establishing
17 the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving
18 party can satisfy this burden in two ways: (1) by presenting evidence that negates an
19 essential element of the nonmoving party’s case; or (2) by demonstrating that the
20 nonmoving party failed to make a showing sufficient to establish an element essential
21 to that party’s case on which that party will bear the burden of proof at trial. *Id.* at
22 322–23. If the moving party fails to discharge this initial burden, summary judgment
23 must be denied and the court need not consider the nonmoving party’s evidence.
24 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

25 If the moving party meets the initial burden, the nonmoving party cannot defeat
26 summary judgment merely by demonstrating “that there is some metaphysical doubt
27 as to the material facts.” *Matsushita Elect. Indus. Co., Ltd. v Zenith Radio Corp.*, 475
28 U.S. 574, 586 (1986). Rather, the nonmoving party must “go beyond the pleadings”

1 and by “the depositions, answers to interrogatories, and admissions on file,” designate
2 “specific facts showing that there is a genuine issue for trial.” *Celotex*, 477 U.S. at
3 324 (quoting Fed. R. Civ. P. 56(e)).

4 The court must draw all inferences from the underlying facts in the light most
5 favorable to the nonmoving party. *See Matsushita*, 475 U.S. at 587. “Credibility
6 determinations, the weighing of evidence, and the drawing of legitimate inferences
7 from the facts are jury functions, not those of a judge, [when] he [or she] is ruling on a
8 motion for summary judgment.” *Anderson*, 477 U.S. at 255.

9 “[T]he district court may limit its review to the documents submitted for the
10 purpose of summary judgment and those parts of the record specifically referenced
11 therein.” *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir.
12 2001). The court is not obligated “to scour the record in search of a genuine issue of
13 triable fact.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing *Richards v.*
14 *Combined Ins. Co. of Am.*, 55 F.3d 247, 251 (7th Cir. 1995)).

15 IV. DISCUSSION

16 A. Public Nuisance Claims

17 Nuisance is defined as “anything which is injurious to health . . . so as to
18 interfere with the comfortable enjoyment of life or property, or unlawfully obstructs
19 the . . . use, in the customary manner, of any navigable lake, or river. Cal.Civ.Code
20 §3479. “A public nuisance is one which affects at the same time an entire community
21 or neighborhood, or any considerable number of persons, although the extent of the
22 annoyance or damage inflicted upon individuals may be unequal.” Cal.Civ.Code §
23 3480. A party seeking to assert a claim for public nuisance and trespass must
24 “establish a ‘connecting element’ or a ‘causative link’ between the defendant's
25 conduct and the threatened harm.” *Citizens for Odor Nuisance Abatement v. City of*
26 *San Diego*, 8 Cal.App.5th 350, 359 (2017).

27 //

28 //

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. *Causation*

LKQ argues that summary judgment is appropriate because HomeFed failed to establish a migration pathway that shows LKQ caused the contamination at the HomeFed site.¹ (Mot. at 6). LKQ claims that the expert opinions of Mark Cejas and Gary McCue, upon which HomeFed relies to substantiate their claims, do not meet the criteria for admissible evidence and do not demonstrate the migration pathway Plaintiff needs to prove its claims. (*Id.* at 8). With regard to Cejas’ report, LKQ’s rebuttal expert, Gregory S. Douglas opined that (1) Cejas’ conclusion that there was a chemical match between groundwater samples collected at sumps at the Stormwater Trench and LKQ’s property is unreliable because no chemical match exists between the samples, (2) Cejas’ groundwater transport conclusions are not supported, and (3) there is no forensic connection between the contaminated water at the Village 3 site and LKQ facility found in the sump samples. (Gee Dec. Ex. E at 28 [ECF No. 94-2.]) LKQ claims that Cejas’ methodology and findings are flawed based on the finding that there were asphalt pavement diagnostic signatures in the samples when LKQ had no asphalt on its property.

LKQ further argues that McCue’s December 3, 2021, expert report must be excluded under *Daubert* because he fails to provide any methodology for his

¹ Pursuant to LKQ’s request under Federal Rule of Evidence 201(b)(2) the Court takes judicial notice of the following: “Landfill Nuisance Easement and Covenants Running with the Land,” recorded on March 17, 1997 (Req. Jud. Notice, Ex. A [ECF No. 93]; “Grant Deed (Otay Landfill)” recorded on October 31, 1997 (*Id.* at Ex. B); “City of Chula Vista tract May No. 16-02, Otay Ranch Village III North” recorded December 13, 2016 (*Id.* at Ex. C); City of Chula Vista “Parcel Map 21636” recorded December 11, 2018 (*Id.* at Ex. D); Grant Deed from HomeFed Village III Master LLC to Village of Escaya Apartments, LLC, recorded March 8, 2008 (*Id.* at Ex E); Grant Deed from HomeFed Village III Master LLC to Escaya Self-Storage LLC recorded February 13, 2020 (*Id.* at Ex. F); Grant Deed from HomeFed Village III Master LLC to RG Escaya, LLC, recorded March 9, 2022 (*Id.* at Ex. G).

Request for judicial notice of Litigation Guaranty from Fidelity Title, Exhibit H, is **DENIED** as the document “cannot be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed.R.Ev. 201(b)(2)

1 conclusion that his company traced the contamination in the Stormwater Trench to
2 LKQ. (Mot. at 12). Instead, LKQ contends that other hydrogeologist expert witnesses
3 have analyzed the relevant hydrogeology of the area and opined that groundwater in
4 the region flows from northeast to southwest, from the Stormwater Trench to the LKQ
5 facility, making it virtually impossible for LKQ to be the source of contamination in
6 the Stormwater Trench. (*Id.* at 13).

7 HomeFed counters that there is sufficient admissible evidence which
8 contradicts LKQ's assertions. (Oppo. at 15). First, HomeFed argues that LKQ is
9 relying on data as to an entirely different aquifer than the perched groundwater
10 running beneath LKQ and Village 3 and provides no evidence as to the relevant
11 aquifer. (Oppo. at 15). Second, Plaintiff asserts that the perched groundwater does not
12 flow downhill, but instead both the groundwater at LKQ and the Stormwater Trench
13 water is found at 205 feet above mean sea level, is flat, and sits atop a flat geological
14 strata. (*Id.*) McCue contends that free product does not move through the groundwater
15 like a river, but that it can migrate downward and will stop at the capillary fringe
16 where it will move laterally. (*Id.* at 15-16). HomeFed claims that Cejas' expert report
17 is based on reliable methodology and "data showing the ratios of the terpane, sterane,
18 and triaromatic sterane biomarkers for waters samples from the LKQ facility (SDR-
19 02) and Village 3 (Sumps 1-4)" matched, which confirms that LKQ is the source of
20 the contamination. (Oppo. at 17-18). In HomeFed's view, LKQ's argument that Cejas'
21 report rests on unsupported assumptions due to his findings regarding asphalt
22 biomarkers oversimplifies the actual data and conclusions. (*Id.* at 17).

23 In *Daubert* the Supreme Court held that Federal Rule of Evidence 702 imposes
24 a special obligation upon a trial judge to "ensure that any and all scientific testimony
25 ... is not only relevant, but reliable." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137,
26 141 (1999) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993)).
27 FRE 702 states: "If scientific, technical, or other specialized knowledge will assist the
28 trier of fact to understand the evidence or to determine a fact in issue, a witness

1 qualified as an expert by knowledge, skill, experience, training, or education, may
2 testify thereto in the form of an opinion or otherwise.” Fed.R.Ev. 702. When
3 determining whether an expert's methodology is reliable, a court should consider
4 factors such as “testing, peer review, error rates, and ‘acceptability’ in the relevant
5 scientific community.” *Kumho Tire Co.*, 526 U.S. at 141 (citing *Daubert*, 509 U.S. at
6 593–94). “The test is whether or not the reasoning is scientific and will assist the jury.
7 If it satisfies these two requirements, then it is a matter for the finder of fact to decide
8 what weight to accord the expert's testimony.” *Kennedy v. Collagen Corp.*, 161 F.3d
9 1226, 1230 (9th Cir.1998). “As one court has summarized: ‘Disputes as to the strength
10 of [an expert's] credentials, faults in his use of [a particular] methodology, or lack of
11 textual authority for his opinion, go to the weight, not the admissibility, of his
12 testimony.’” *Id.* (citing *McCulloch v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d
13 Cir.1995).)

14 (a) *Cejas*

15 The Court finds that *Cejas* testimony is admissible under FRE 702 and *Daubert*.
16 *Cejas* provided reliable chemical analysis of the contaminated water at LKQ and
17 HomeFed to demonstrate the similarities between the two and support the conclusion
18 that LKQ was the source of the contamination for purposes of summary judgment.
19 *Cejas* has a Masters of Science in Analytical Chemistry from Florida International
20 University and has been working as an analytical chemist since 2001, consulting
21 industry and government-related clients in over 150 subsurface contamination sites
22 across the United States. (*Cejas* at ¶¶ 15, 16). *Cejas* has published and presented on
23 analytical chemistry and environmental forensics methods and techniques for
24 petroleum hydrocarbons, pesticides, and legacy industrial contaminants. (*Id.* at ¶16).

25 LKQ does not challenge *Cejas* knowledge or experience with regard to
26 chemical analysis, but challenge *Cejas*’ education and background to the extent he
27 renders an opinion about the hydrogeological pathway for contamination. Because
28 *Cejas*’ does not render an opinion on the hydrogeological pathway, but instead renders

1 an opinion on the forensic chemical composition of the samples, the Court finds his
2 education and professional experience sufficient to satisfy *Daubert*.

3 Cejas' chemical analysis in his report and testimony fall within the parameters
4 set forth under Rule 702. In his report, Cejas opined:

5 The VOC and SVOC range petroleum hydrocarbons, gasoline oxygenate
6 hydrocarbons, and light distillate range solvent hydrocarbons determined in
7 samples from Sump-1, Sump-2, Sump-3, Sump-4, and MW-HR04 locations
8 were more likely than not related to the hydrocarbon chemistry types evident in
9 samples from SDR-02-FP, SDR-02, and SDR-02-CWFP. The 3 SDR samples
10 were located in the LKQ property (figure 2). The four Sump and MWHR04
11 samples resided within the ORV3 property boundary (figures 1, 2). MW-H04
12 was located between ORV3 and LKQ at the same elevation as LKQ, and the
13 height of the four sump samples was lower (figure 1). The specific relationships
14 of "Chemical Fingerprints" (FPs) were conclusive 'match' cases, indicating a
15 likely chemical transport pathway between the LKQ and ORV3 Sumps.

16 (Gee Dec. Ex. C at 14 [ECF No. 94-2.]) In support of his conclusion, Cejas listed two
17 chemical lines of evidence, and two site-related lines of evidence to support his
18 conclusion that the chemical signatures matched stating that:

19 A diagnostic ether oxygenate assemblage that consisted of methyl-tert-butyl-
20 ether (MTBE), and tert-amyl-methyl-ether (TAME) was apparent in product
21 and water samples collected from LKQ, MW-HR04, and the Sump-3 water
22 sample. The dissolved phase gasoline additives signature was diagnostic for a
23 mixed gasoline source zone. The corresponding oxygenate ether assemblage
24 was also apparent in water and soil samples analyzed by conventional VOC
25 range analytical methods and collected from LKQ and the ORV3 Sumps.

26 (Gee Dec. Ex. C at 14 [ECF No. 94-2.])

27 In his first chemical line of evidence and site related line of evidence, Cejas
28 noted the existence of "asphalt pavement diagnostic signatures" that likely was from
"solvent/fuel pavement dissolution process." Cejas stated:

Site-Related Line of Evidence - 1 (SLOE-1): A series of asphalt pavement
diagnostic signatures were expressed as features: water samples dominated by
gasoline range (GRO) chemistry, product samples dominated by GRO
chemistry, and water samples dominated by the asphalt pavement residual range
chemistry. LKQ Auto Wrecker Facility utilizes solvents for cleaning parts and

1 removes refined petroleum products from discarded vehicles. The presence of
2 asphalt pavement associated residual range petroleum biomarker, SPAH, and
3 PAH FPs in GRO dominant water samples and GRO dominant product samples
4 invites the interpretation that the asphalt sourced chemistry was likely from a
5 solvent/fuel induced pavement dissolution process vs. water facilitated
6 pavement runoff.

7 (Cejas Dec. at ¶54 [ECF No. 115-4.])

8 Cejas opines that the chemical signatures discovered in the LKQ and Village 3
9 water samples were caused by “numerous spills of gasoline, oil, and vehicle fluids that
10 occurred at different points at the LKQ facility” which resulted in chemical source
11 mixing and environmentally induced alteration effects, as discussed in peer reviewed
12 papers authored by Dr. Douglas regarding the effects of weathering on chemical
13 fingerprinting. (Cejas Dec. at ¶¶ 27-30, 33, 35; Shoecraft Dec. Ex 14 at 250-251 [ECF
14 No. 115-1.]) Although LKQ contends that Cejas’ forensic chemical analysis is
15 significantly flawed because it referenced asphalt pavement signatures, LKQ’s own
16 expert, Dr. Douglas, concluded that the asphalt-like material in the samples were
17 caused by road paving operations rather than LKQ. Cejas rebukes Dr. Douglas’
18 conclusion, pointing out that the asphalt pavement diagnostic signatures could not
19 have been from the asphalt paving because that did not happen until December 2017
20 and the samples were collected in May and June of 2017. (Cejas Dec. at ¶ 23 [ECF
21 No. 115-4.])

22 Cejas has demonstrated that his opinions rest on reliable methodology regarding
23 the chemical matching process and multiple lines of evidence to show forensic
24 chemical linkage where there are two impacted locations with no clear pathway,
25 including peer-review materials regarding the weathering effect of multiple chemical
26 spills. Whether and to what extent those lines of evidence are sufficiently
27 determinative of the ultimate issue of causation goes to weight, and not admissibility
28 of the evidence. *Kennedy*, 161 F.3d at 1230.

(b) *McCue*

1 Plaintiff has provided sufficient support for McCue’s conclusion that LKQ is
2 the traceable source of the contamination for purposes of summary judgment.
3 McCue’s top-line conclusion that the “LKQ facility is the source of contamination
4 encountered in groundwater” is supported by sufficiently reliable methodology.
5 McCue has been a California Certified Hydrogeologist since 1996 and has over 34
6 years of environmental consulting experience relating to the “fate and transport of
7 contaminants in soil, soil gas, and groundwater.” (McCue Dec. at ¶ 2 [ECF No. 115-
8 2.]) In his December 3, 2021, expert report, McCue described the method undertaken
9 for the groundwater assessment:

10 Sumps and storm drain trench cutoff walls were installed to assess ongoing
11 contamination in groundwater and to mitigate the flow of contaminated ground
12 water to the Otay River via the installed trench, respectively. The sumps are
13 located approximately 100 to 120 feet from the LKQ facility. MTBE, BTEX,
14 and total VOC concentrations in the sumps have been as high as 2,200 ug/L,
15 13,730 ug/L and 17,403 ug/L, respectively (Table 2). These data indicate the
16 presence of a fuel hydrocarbon source. Further assessment activities were
17 conducted on Site in 2017 and 2018 to assess the impact of the contaminated
18 groundwater on the Site.

19 . . .

20 These sump and soil gas results warranted further investigation of the area,
21 specifically the LKQ facility to assess if it is the source of the fuel
22 hydrocarbons in groundwater and soil gas.

23 Four soil borings, two of which were converted to groundwater monitoring
24 wells were drilled adjacent to the eastern boundary of the LKQ facility. The
25 borings/wells are SB-HR01, MW-HR02, SB-HR03, and MW-HR04. Soil
26 contamination was encountered as shallow as 10 fbg and deeper down to
27 groundwater, which fluctuates in this area from approximately 35 to 60 fbg.
28 *Finding contaminated soil at such a shallow depth of 10 to 15 fbg indicated that
a release had occurred very close to that location. The LKQ facility was the
only potential source of the contamination at that shallow depth.* For this
reason, assessment of the LKQ property was warranted.

As discussed in the Background Section, TRC conducted a limited assessment
of soil and groundwater on the LKQ facility. Five shallow soil borings were
advanced to depths of 0.8 to 5 fbg (HAB-01, HAB-02, HAB-04, HAB-05 and
HAB-06); and one groundwater monitoring wells, SDR-02, was drilled and

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

installed (Figure 2). Soil and groundwater sampling was conducted, and the samples were variously tested for GRO, DRO, and VOCs (Tables 4 and 5).

Contaminated soil was encountered from ground surface, into groundwater at approximately X fbg, and to 50 fbg, the bottom of the boring. *This indicates the LKQ facility is the source of contamination encountered in groundwater.* Light Non-Aqueous Phase Liquids (LNAPLs) generally referred to as free product, was encountered in the bore hole during sampling.

(Gee Declaration Ex G at 53-54 [ECF No. 94-2.]) (emphasis added).

McCue supports his conclusion by referencing a 2016 GEOCON investigation of Village 3 which located the groundwater table to be in excess of 100 feet below the lowest graded earth. (McCue Dec. at ¶ 6). Samples of the perched groundwater from the Trench were analyzed by EnviroMatic Analytical, utilizing USEPA Methods 8015B and 8260B, which McCue states are standard practice for assessing petroleum and hydrocarbons and VOC's in soil and groundwater. (McCue Dec. at ¶15). The results of those tests revealed that the perched groundwater was contaminated with petroleum hydrocarbons and fuel related VOC's. (*Id.* at ¶16). As a result of these findings, McCue concluded that the contamination was "attributable to releases of petroleum products like gasoline, diesel, and oil into the environment, where these substances migrated into the perched groundwater." (*Id.* at ¶16).

McCue noted that a comparison of the free product seen in the LKQ groundwater monitoring well SDR-02 and the free product in the Trench were visually identical. (McCue Dec. at ¶ 12). In his December 3, 2021, report, McCue analyzed the soil and groundwater data, opining that "all the locations are contaminated with fuel hydrocarbons, including BTEX, fuel oxygenates including MTBE, and some solvent chemicals (Table 1, 2, 3, 4a and 5)." (Gee Dec, Ex G at 55 [ECF No. 94-2.]) From this data, the company for whom McCue worked, TRC, concluded that the contamination

1 was traced from the Stormwater Trench to the LKQ property.² (*Id.*) An expert in
2 hydrogeology would reasonably rely on geological data from GEOCON, groundwater
3 analysis performed by EnviroMatic Analytical, and on his own knowledge of
4 groundwater contamination patterns to reach these conclusions. Accordingly,
5 McCue’s opinions are drawn from “objective, verifiable evidence.” *Daubert v.*
6 *Merrell Dow Pharmaceuticals. Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995).

7 Accordingly, the expert reports of Cejas and McCue are admissible. The
8 conclusions reached by both experts regarding chemical matching of groundwater
9 samples at the LKQ property and Village 3 provide sufficient admissible evidence to
10 raise a genuine issue of material fact with regard to causation of the groundwater
11 contamination at the Village 3 site. *Anderson*, 477 U.S. at 248.

12 (c) “Percolation Pond”

13 LKQ further argues that a 2016 aerial Google Earth photograph shows a
14 stormwater percolation pond due north of the Stormwater Trench that appeared green,
15 like the green color of the Stormwater Trench, and argues that the contamination in
16 the Trench could have been caused by an algae bloom from residual fertilizer and
17 sunlight, or stormwater runoff, which is a more plausible explanation for the
18 contamination than it coming from the LKQ facility to the west. (Mot. at 15).

19 Plaintiff HomeFed responds that the basin was created during the rough grading
20 of Village 3 as a source of water for the trucks used to spray water onto the surface,
21 was drained each day, filled each night, and therefore no standing water existed for
22 any significant period of time that could create an “algae bloom.” (Oppo. at 19).

23 HomeFed further argues that it would be impossible for an algae bloom in the pond to
24 migrate through subsurface groundwater and reemerge in the Stormwater Trench, and
25

26
27 ² To the extent HomeFed purports to add additional support for a migration theory in
28 McCue’s June 10, 2022, expert report that was not presented in the original report,
that information is excluded under *Daubert* and FRE 26. Instead, Plaintiff must rely
on McCue’s original report.

1 instead the most likely source of the green color is the chemical Fluorescein, an
2 ingredient present in commercial antifreeze. (*Id.*)

3 Plaintiff has provided sufficient evidence to support its argument that the
4 percolation pond was not the source of contamination at the Trench to raise a genuine
5 issue of material fact. In his declaration, McCue states “Dr. Douglas provides no
6 explanation of how algae laden water could have migrated from the retention basin
7 (percolation pond) to the vicinity of the storm drain trench” and that:

8 In over thirty years of experience conducting groundwater investigations in San
9 Diego as well as other areas in South California, I have never encountered nor
10 heard of algae migration in groundwater, nor have I ever heard of algae being
11 associated with gasoline related chemicals like MTBE and BTEX. Algae in
12 retention basins does not percolate to the subsurface because the bottom of
13 retention basins accumulate sand and fine sediment that would naturally filter
14 the algae out of the percolating surface water.

15 (McCue Dec. at ¶ 49 [ECF No 115-2.])

16 In addition, Curt Smith, Vice President of Community Development for
17 HomeFed Corporation, provided a Google Earth image of the “percolation pond”
18 taken in November 2016 and disputed Douglas’ conclusion that the contamination
19 was due to an “algae bloom” or “storm water” runoff. (Smith Dec. at ¶ 8 [ECF No.
20 115-5.]) Smith states that no substantial volume of water was present for a significant
21 amount of time because

22 the company’s grading contractor utilized water trucks on a daily basis to spray
23 water onto the surface of the Property to aid in the compaction of fill and to
24 control dust. In order to expedite the refilling of these water trucks, the basin
25 was excavated. Each night, the basin would be filled with water from the Otay
26 Water District’s water supply system. Over the course of the following day, the
27 basin would be drained to fill up the trucks, and the process of refilling the
28 basin would be repeated the following night.

(Smith Dec. at ¶ 11 [ECF No. 115-5.])

Smith also refutes Douglas’ contention that a City of Chula Vista Notice
directed to HomeFed shows that “stormwater runoff” and its attendant pollutants
migrated to the percolation ponds and resulted in green algae blooms stating “the

1 notice identified by Dr. Douglas did not relate to any findings by the City of Chula
2 Vista that HomeFed had allowed storm water runoff to enter a percolation pond, or
3 had allowed algae blooms to propagate at the Property.” (*Id.* at ¶17, 18). By
4 demonstrating that there is a dispute regarding the assertion that the “percolation
5 pond” or “storm water” runoff caused the contamination in the Trench rather than
6 LKQ, this claim survives summary judgment.

7 For the foregoing reasons, the Court denies summary judgment.

8 2. *Standing for Public Nuisance*

9 To allege standing in a public nuisance claim, a private citizen must allege a
10 special injury that is “different in kind, rather than degree, than that suffered by the
11 general public.” Cal. Civ. Code § 3493; *Venuto v. Owens-Corning Fiberglass Corp.*,
12 22 Cal. App. 3d 116, 124 (1971). “The public nuisance doctrine is aimed at the
13 protection and redress of *community* interests and, at least in theory, embodies a kind
14 of collective ideal of civil life[.]” *People ex rel. Gallo v. Acuna*, 60 Cal.Rptr.2d 277,
15 284 (1997)(emphasis in original). The interference must be both substantial and
16 unreasonable. *Acuna*, 60 Cal.Rptr.2d at 285. “A substantial interference is ‘a real and
17 appreciable invasion of the plaintiff’s interests.’” *Araujo v. Coachella Valley Water*
18 *District*, 2021 WL 6113744, *3 (S.D. Cal. 2021) (citing *Acuna*). Courts employ an
19 objective standard when determining whether an invasion is unreasonable, asking
20 ““whether reasonable persons generally, looking at the whole situation impartially and
21 objectively, would consider it unreasonable.”” *San Diego Gas & Electric Co. v.*
22 *Superior Court*, 13 Cal.4th 893, 938 (1996).

23 LKQ argues that HomeFed has not established standing to pursue its public
24 nuisance claim because it is the sole owner of the property, and therefore the only
25 party harmed by the discovery of contaminated groundwater at the site. (Mot. at 17).
26 Further, LKQ claims that the HomeFed Site is in the Otay Valley Hydrologic Area, is
27 designated by the California Regional Water Quality Control Board (“RWQCB”) to
28 include only “beneficial uses for industrial supplies and is excepted from municipal

1 supply” indicating that the contamination does not interfere with the community at
2 large, including as a drinking water source. (*Id.*)

3 In response, HomeFed contends that LKQ ignores the fact that the groundwater
4 contamination now has a preferential pathway to contaminate surface waters,
5 specifically the Otay River. (Oppo. at 23). The Otay River has been designated by the
6 RWQCB as including “non-contact recreation” and “potential” “contact water
7 recreation” as beneficial uses including picnicking, hiking or other potential
8 recreational activities involving bodily contact with water, therefore, Plaintiff argues it
9 is for a jury to determine whether the risk of contaminated water flowing into the Otay
10 River would interfere with the public’s use of the River. (*Id.*)

11 Plaintiff has sufficiently asserted standing by providing admissible evidence in
12 support of its contention that the threatened harm to Otay River is a substantial and
13 unreasonable interference with the customary use of the River, and that it has suffered
14 harm that is “different in kind, rather than degree, than that suffered by the general
15 public.” *Venuto*, 22 Cal. App. 3d at 124. Plaintiff contends that contaminated water is
16 bypassing the cutoff walls which could result in the soil contaminated with gasoline
17 and other toxic chemicals reaching the Otay River through preferential hydrologic
18 channels, thereby interfering with the public’s enjoyment of the River. In McCue’s
19 declaration, he explained that testing of Sump 3, which is downstream of the two
20 cutoff walls in the storm drain trench, on September 3, 2020, demonstrated that
21 groundwater samples contained MTBE which indicated that perched groundwater is
22 able to bypass the cutoff walls, or is entering the trench below the lower cutoff wall.
23 (McCue Dec. at ¶ 28-30).

24 LKQ argues that McCue’s findings regarding contaminated groundwater
25 flowing around the containment wall was not presented in his original expert report
26 and contradicts his earlier expert report, therefore, it must be excluded under FRE 702
27 and *Daubert*. (*Id.* at 8-9). Despite LKQ’s contentions, McCue’s declaration is
28 consistent with his December 2021 expert report and prior deposition testimony and

1 should not be excluded under *Daubert*. In the December report, McCue described the
2 measures taken to prevent contaminated water from traveling to the Otay River, and
3 indicated that additional testing would be required in the future. He opined,

4 [t]he purpose of the containment measures was to mitigate contaminated
5 groundwater migration through the gravel backfill of the storm drain trench.
6 The cut off walls retard the migration of contaminated water that enters the
7 storm drain trench. The long-term effectiveness of the cut off wall system is
8 unknown. Long term monitoring of the sumps will be required until the source
9 of the contamination is mitigated or remediated.

10 (Gee Dec., Ex. G at 20).)

11 Similarly, McCue’s prior deposition testimony does not contradict his findings
12 in the declaration, because he noted, “it’s important to understand how these
13 concentrations are changing over time. So, yes, these sumps should probably be
14 sampled again in the future.” (Gee Dec., Ex. M at 203:6-16 [ECF No. 94-2.]) The later
15 assessment of groundwater seeping around the containment walls is consistent with
16 his statement that long-term monitoring will be required and that the sumps would be
17 sampled again in the future. Accordingly, the assertions in McCue’s declaration
18 regarding the discovery that contaminated groundwater was seeping around the
19 containment measures is admissible.

20 The evidence that contaminated groundwater may seep around the containment
21 measures shows that it could reach the Otay River. The RWQCB Basin Plan for San
22 Diego which “has designated beneficial uses for Agriculture Supply, Non-contact
23 Water Recreation, Warm Freshwater Habitat, Wildlife Habitat, and Rare, Threatened,
24 or Endangered Species” indicating multiple beneficial community uses of the River
25 which could be threatened by contaminated soil. (McCue Dec. at ¶ 21). This is
26 sufficient to show standing for purposes of summary judgment despite the absence of
27 current contamination of the River. *In re Firearm Cases*, 126 Cal.App.4th 959, 988
28 (2005) (A public nuisance “may be enjoined because harm is threatened that would be

1 significant if it occurred, and that would make the nuisance actionable under the rule
2 here stated, although no harm has yet resulted.”)

3 Plaintiff has further shown that it suffered harm different in kind and character
4 from the harm to the community because it incurred substantial expenses in
5 monitoring and removing the contaminated soil, as demonstrated by Robert Penner,
6 Vice-President of Asset Management and Senior Financial Analyst for HomeFed
7 Corporation LLC. He states:

8 Within days of encountering the highly contaminated groundwater (which
9 contained free product mixed in with the water) I engaged TRC Solutions as our
10 environmental consultants to begin investigating and assessing the situation.
11 Shortly thereafter, I directed HomeFed Village III to enroll in the County of San
12 Diego, Department of Environmental Health (“DEH”), Land and Water Quality
13 Division’s Voluntary Assistance Program on or about May 25, 2017 so that
14 HomeFed Village III would have regulatory oversight of our site investigation
and assessment. The total amount paid to TRC for its work specific to assessing
this contamination is approximately \$568,680.00.

15 (Robert Penner Dec. at ¶ 13 [ECF No. 115-3.]) In addition, HomeFed incurred
16 additional expenses in constructing makeshift containment systems, as noted here:

17 We installed two “cutoff walls” within the trench, just downstream from the
18 location where the contaminated water was infiltrating into the trench, and
19 installed sumps near the base of these walls to pump out water collecting behind
20 the wall. A third sump was installed on the downstream side of the second
21 cutoff wall, and a fourth sump was installed further downstream, near the
22 location where the storm drain pipe discharges into the retention basin. The
23 costs associated with this work totaled \$235,234.00 paid to Cass Construction,
the site utility contractor, and \$75,000.00 paid to Hunsaker & Associates, the
civil engineer, for redesigning Heritage Road.

24 (*Id.* at ¶17). More expenses were incurred “[b]etween 2017 and 2019 [when]
25 HomeFed Village III pumped 557,100 gallons of contaminated groundwater from the
26 sumps which was hauled away and disposed of off site by an environmental
27 contractor, NRC, at a cost of \$735,420.68.” (*Id.* at ¶ 18). This evidence demonstrates
28 that the harm Plaintiff suffered is different in kind and character than that of the

1 community at large and supports a finding of standing for the public nuisance for
2 summary judgment purposes. Accordingly, Plaintiff has sufficiently alleged standing
3 for purposes of this summary judgment motion.

4 *B. RCRA Claim*

5 The Citizen Suit provision of RCRA, 42 U.S.C. § 6972(a)(1)(B), allows “any
6 person” to commence a civil action on his own behalf against “any person,”
7 “including any past or present generator, past or present transporter, or past or present
8 owner or operator of a treatment, storage, or disposal facility, who has contributed or
9 who is contributing to the past or present handling, storage, treatment, transportation,
10 or disposal of any solid or hazardous waste which may present an *imminent and*
11 *substantial endangerment* to health or the environment.” (Emphasis added).

12 Pursuant to 42 U.S.C. § 6903(3), the term “disposal” means the discharge,
13 deposit, injection, dumping, spilling, leaking, or placing of any solid waste or
14 hazardous waste into or on any land or water so that such solid waste or hazardous
15 waste or any constituent thereof may enter the environment or be emitted into the air
16 or discharged into any waters, including ground waters.” Pursuant to 42 U.S.C. §
17 6903(27), “solid waste” means any “discarded material, including solid, liquid [or]
18 semisolid ... material resulting from resulting from industrial, commercial, mining,
19 and agricultural operations, and from community activities[.]” “A finding of
20 ‘imminency’ does not require a showing that actual harm will occur immediately so
21 long as the risk of threatened harm is present: ‘An ‘imminent hazard’ may be declared
22 at any point in a chain of events which may ultimately result in harm to the public.’”
23 *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994).

24 LKQ argues that HomeFed has not shown through admissible evidence that any
25 endangerment currently exists or is likely to exist in the future, but instead, the RCRA
26 claims are based on the 2017 Stormwater Trench incident which is “wholly past.”
27 (Mot. at 18-19). LKQ further contends that HomeFed has presented no evidence of the
28 likelihood of contaminated groundwater traveling to the Otay River, and has produced

1 no evidence that even if contaminated groundwater made its way from the HomeFed
2 site to the River that it would cause any harm to the River. (*Id.* at 21-22). In addition,
3 LKQ contends that Plaintiff’s expert McCue did not research whether the Otay River
4 was impaired by oil and grease contamination or determine whether or not a Total
5 Daily Maximum Load (“TMDL”)³ was exceeded by the alleged petroleum release.
6 This makes it impossible for HomeFed to establish any endangerment to human health
7 or the environment if more contaminated groundwater was discovered in the
8 Stormwater Trench, according to LKQ. (*Id.* at 22-23).

9 Plaintiff HomeFed contends that LKQ misstates the nature of the RCRA claim,
10 noting that the claim is based on past and ongoing disposals of solid waste, not a one-
11 time incident. (Oppo. at 24). Plaintiff further asserts that there is a genuine issue of
12 material fact regarding whether past or present waste disposal from LKQ may present
13 an imminent and substantial endangerment to the environment because (1) the releases
14 were ongoing, (2) there is evidence that the contaminated groundwater has made its
15 way around the engineering controls put in place, and (3) no quantities of any amount
16 may enter the Otay River because those substances are “hazardous to aquatic life.”
17 (Oppo. at 25; McCue Dec. at 11:22-12:14, 26:1-8; 9:8-17). HomeFed claims that there
18 were hundreds of gallons of contaminated water in the trench behind the containment
19 wall at the time the motion was filed, and that if the water table rises it will
20 “overwhelm the cutoff walls and flow into the Otay River.” (*Id.* at 26; McCue Dec. at
21 26:1-8).

22 The Court finds that Plaintiff has provided sufficient admissible evidence to
23 raise a genuine issue of material fact with regard to whether the contaminated
24

25 ³“A TMDL is the calculation of the maximum amount of a pollutant allowed to enter a
26 waterbody so that the waterbody will meet and continue to meet water quality
27 standards for that particular pollutant.” U.S. Environmental Protection Agency,
28 <https://www.epa.gov/tmdl/overview-total-maximum-daily-loads-tmdls> (last visited
June 21, 2023)

1 groundwater at the HomeFed site may present an imminent and substantial
2 endangerment to the environment under RCRA. In explaining how the contaminated
3 groundwater may cause an imminent endangerment to the Otay River, McCue attests
4 to his personal knowledge, including his involvement as Principal Hydrogeologist
5 since 2017 on behalf of HomeFed. (McCue Dec. at ¶ 2). McCue states that ongoing
6 releases of contaminants have infiltrated the soil noting that “the presence of 3.35 feet
7 of gasoline floating on top of the perched groundwater suggests multiple prolonged
8 releases of gasoline onto the ground surface occurring over a period of many years.”
9 (McCue Dec. at ¶ 45 [ECF No. 115-2.]) According to McCue, “the existence of a
10 preferential pathway for the contaminated perched groundwater discovered at Village
11 3 to reach the Otay River means any past, present, or future releases of oil or
12 petroleum products that have causes or contributed to the presence of free product in
13 that perched groundwater may present an imminent and substantial endangerment to
14 the environment.” (*Id.* at ¶ 22). Testing of Sump 3, which is downstream of the two
15 cutoff walls in the storm drain trench, on September 3, 2020, demonstrated that
16 groundwater samples contained MTBE which indicated that perched groundwater is
17 able to bypass the cutoff walls, or is entering the trench below the lower cutoff wall.
18 (*Id.* at ¶ 28-30). As a result, McCue opines that the “the existence of free product and
19 contaminated perched groundwater may present an imminent and substantial
20 endangerment to the environment. (*Id.* at ¶ 30).

21 Though LKQ argues that there is no evidence that contaminated groundwater
22 would cause any harm to the River because the River contains a large volume of water
23 and the quantities of oil found at the Stormwater Trench previously were quite small,
24 that is not the proper standard. A substantial endangerment does not require
25 quantification but instead, “endangerment is substantial if there is some reasonable
26 cause for concern that someone or something may be exposed to a risk of harm by a
27 release or a threatened release of a hazardous substance if remedial action is not
28 taken.” *California Dept. of Toxic Substance Control v. Interstate Non-Ferrous Corp.*,

1 298 F.Supp. 2d 930, 980 (E.D. Cal. 2003). The Section 401 permit issued by the
2 Regional Water Quality Control Board pursuant to the Clean Water Act clearly states
3 that “substances hazardous to aquatic life including, but not limited to, petroleum
4 products... must be prevented from contaminating the soil and/or entering waters of
5 the United States and/or State.” (Shoecraft Dec., Ex 9 at 209). The Section 401 permit
6 further provides that *any* discharge of oil or petroleum product in waters must be
7 immediately reported. (*Id.* at p. 221)(emphasis added).

8 Plaintiff has accordingly introduced sufficient admissible evidence to raise a
9 genuine issue of material fact regarding whether contaminated perched groundwater
10 may create a substantial and imminent endangerment to the environment under the
11 RCRA. *Anderson*, 477 U.S. at 248.

12 V. CONCLUSION AND ORDER

13 For the foregoing reasons, Defendant LKQ’s Motion for Summary Judgement
14 is DENIED

15 IT IS SO ORDERED.

16 Dated: July 11, 2023

17 
18 Hon. M. James Lorenz
19 United States District Judge