

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

7
8 PUGET SOUNDKEEPER ALLIANCE,

9 Plaintiff,

v.

10 APM TERMINALS TACOMA, LLC, et
11 al.,

12 Defendants.

CASE NO. C17-5016 BHS

ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFF'S AND
DEFENDANT'S MOTIONS FOR
SUMMARY JUDGMENT

13 This matter comes before the Court on Plaintiff Puget Soundkeeper Alliance's
14 ("Soundkeeper") motion for partial summary judgment, Dkt. 196, and Defendant Port of
15 Tacoma's ("Port") cross-motion for partial summary judgment, Dkt. 210. The Court has
16 considered the pleadings filed in support of and in opposition to the motions and the
17 remainder of the file and hereby grants the motions in part and denies them in part.

18 **I. PROCEDURAL HISTORY**

19 On January 9, 2017, Soundkeeper filed a complaint against Defendant APM
20 Terminals Tacoma, LLC ("APM" or "APMT") alleging ongoing violations of APMT's
21 "National Pollutant Discharge Elimination System ("NPDES") permit authorizing
22 discharges of pollutants from APMT's facility to navigable waters." Dkt. 1, ¶ 1.

1 Soundkeeper alleged that “APMT owns and operates a large marine cargo terminal used
2 for ship unloading and cargo distribution located at or about 1675 Lincoln Ave, Tacoma,
3 WA 98241, and contiguous and/or adjacent properties (the “facility”).” *Id.*, ¶ 12.

4 On November 28, 2017, Soundkeeper filed a second amended complaint adding
5 the Port as a defendant, stating that the Port owns the facility, and that APMT leases the
6 facility. Dkt. 75.

7 On February 8, 2018, the Port moved to dismiss Soundkeeper’s claims on multiple
8 grounds. Dkt. 81. On June 4, 2018, the Court granted in part and denied in part the
9 Port’s motion. Dkt. 107.

10 On June 13, 2018, Soundkeeper filed a third amended complaint adding the Port’s
11 new tenants Defendants SSA Marine, Inc., and SSA Terminals, LLC (collectively
12 “SSA”). Dkt. 109.

13 On January 10, 2019, Soundkeeper filed a motion for partial summary judgment
14 arguing that: (1) the Port is liable for APMT’s violations, (2) the Port is liable for Level 3
15 corrective action requirements that occurred in 2013 and 2015, (3) the Port is liable for
16 failing to monitor discharges from the wharf, (4) the Port’s stormwater pollution
17 prevention plans (“SWPPP”) are inadequate, (5) Soundkeeper has standing to bring its
18 claims, and (6) the Court has subject matter jurisdiction over the alleged violations. Dkt.
19 196. On January 28, 2019, the Port responded and filed a cross-motion for summary
20 judgment dismissing Soundkeeper’s claim in its entirety. Dkt. 210. SSA joined in the
21 Port’s opposition to Soundkeeper’s motion. Dkt. 209. On February 1, 2019,
22

1 Soundkeeper replied. Dkt. 218. On February 19, 2019, Soundkeeper responded. Dkt.
2 229. On February 22, 2019, the Port replied. Dkt. 231.

3 On June 4, 2019, the Court granted Soundkeeper's motion for leave to amend.
4 Dkt. 253. On June 5, 2019, Soundkeeper filed its Fourth Amended Complaint ("FAC")
5 dropping APMT and SSA Marine, Inc. as parties and adding SSA Terminals (Tacoma),
6 LLC. Dkt. 254. The Port moved for summary judgment on Soundkeeper's second claim
7 for relief in the third amended complaint, which is now Soundkeeper's first claim for
8 relief in the FAC. *Compare* Dkt. 109, ¶¶ 64–67 with Dkt. 254, ¶¶ 59–63.

9 II. FACTUAL BACKGROUND

10 On May 13, 2014, APMT signed off on its 2013 Industrial Stormwater General
11 Permit ("ISGP") annual report. Dkt. 34-6. APMT admitted that its copper discharge
12 exceeded the benchmark for all four quarters of the year. *Id.* at 5. These discharges
13 triggered Level 1, Level 2, and Level 3 corrective actions under its ISGP. *Id.* APMT's
14 Level 3 corrective action was as follows:

15 Additional filtration media for total metals removal will be installed
16 in select stormwater conveyance systems located within drainage basins A,
17 B, and C. Treatment media will include a mixture of biochar, gravelly sand,
and crushed oyster shells to effectively remove total metals out of the
stormwater discharge.

Date corrective action was completed: September 30th, 2014.

18 *Id.* Soundkeeper cites this report and asserts that the Port "acknowledged" this Level 3
19 corrective action, Dkt. 196 at 10, but Soundkeeper fails to specifically identify where the
20 Port acknowledged this report. On June 20, 2014, the Washington Department of
21 Ecology ("Ecology") conditionally approved APMT's plan to implement an "innovative
22

1 filtration media mixture.” Dkt. 34-8 at 2. The Port was copied on this letter. *Id.* at 3
2 (“cc: . . . Anita Fichthorn, Port of Tacoma”).

3 APMT’s annual report for 2015 identifies Level 3 corrective actions for discharges
4 of “TSS”, copper, and zinc that exceeded the permit benchmarks. Dkt. 34-9 at 3, 5, 7.
5 The report identifies two corrective actions: (1) replacing the media filtration bags at the
6 discharge points and (2) a modification of permit coverage form submitted to Ecology
7 with a deadline extension and expected completion date of 9/30/2019. *Id.* at 3–8.

8 On January 26, 2016, Ecology employees drafted a technical memorandum
9 discussing APMT’s corrective actions and proposed solutions. Ecology stated that the
10 conditionally approved response of filtration media would not be considered an
11 appropriate response given the continued discharge of pollutants that exceeded the
12 benchmarks. Dkt. 34-11. Ecology was considering denying APMT’s proposed response
13 and requiring a different type of treatment system. *Id.* Ecology stated that it conveyed
14 this to APMT’s representative over the phone the previous day. *Id.* The report also states
15 that APMT’s representative “mentioned continued problems with their tide-flex valves
16 and working with the Port of Tacoma to get this issue resolved.” *Id.* Although the Court
17 is unable to locate the letter in the record, it appears that Ecology formally notified
18 APMT of the denial of APMT’s proposed response in early February. *See* Dkt. 34-13
19 (reference to February 1, 2016 letter from Ecology to APMT).

20 On March 7, 2016, APMT responded to Ecology’s letter and summarized a phone
21 conversation between AMPT and Ecology employees. *Id.* APMT stated that preparing
22 an engineering report by Ecology’s deadline of March 31, 2016 was not possible because

1 APMT was facing the prospect of losing its only client and possibly terminating its lease
2 with the Port. *Id.* APMT stated that the Port refused to provide any financial assistance
3 for structural mitigation measures unless APMT extended its lease beyond December 31,
4 2017 and the Port confirmed “that inspection, maintenance, repair and replacement of the
5 Outfall Gates is the [Port’s] responsibility and cost.” *Id.* at 4. APMT informed Ecology
6 that it had retained a contractor to “jet all stormwater lines and oil/water separators” and,
7 after that was completed, the contractor would install cameras in the lines to compile a
8 video record of the flow in the lines. *Id.*

9 On March 21, 2016, Ecology completed a site inspection. Ecology employee Paul
10 Stasch (“Stasch”) wrote an inspection report that provides in part as follows:

11 John Diamant [(“Diamant”)] and I met with [APMT employees
12 Gerry Olson (“Olson”)] and Glen Eddy to discuss their Level III Corrective
13 Action. This has been a long outstanding issue with the facility. The
14 original corrective action has not proven reliable in achieving the
15 Benchmark Values. Of all the major facilities in the Tacoma industrial area,
16 this facility has the least robust treatment system installed.

17 The reasons discussed for the delay in implementation of an
18 upgraded system has been the economy and the inability for the Port of
19 Tacoma and AMP Terminal to come to terms on a stable lease agreement.
20 The situation remains in flux but Ecology cannot delay the legal
21 requirements any longer. Mr. Olson stated that by the end of March there
22 will be more certainty on the final lease arrangements with the Port and
other considerations from Matson.

Mr. Olson presented a lot of good information, both historic and
current. He agreed to accelerate the line jetting of the stormwater
conveyance system and to send us a letter detailing their proposed path
forward for the installation of an upgraded treatment system with a high
likelihood of achieving the Benchmark Values of Subbasins A, B and C.

Dkt. 211-32 at 2.

1 On October 11, 2016, Ecology issued Administrative Order #13823 regarding
2 APMT's request for permission to modify its permit coverage by extending the time to
3 comply. Dkt. 15-1. Ecology granted the extension subject to conditions as follows:

4 APM must submit an engineering report for the treatment of
5 stormwater discharged from Subbasins A, B and C for Ecology's review
6 and approval on or before April 15, 2017 to Paul Stasch at Ecology. See
7 contact information below. A copy of the engineering report must also be
8 submitted to Ms. Deanna Seaman [{"Seaman"}] at the Port of Tacoma for
9 the Port's review and comment.

10 The approved treatment technology must be installed and
11 operational by November 15, 2017.

12 In the interim, all catch basins at the permitted facility must have
13 catch basin inserts with metal removal capabilities installed. Catch basin
14 inserts must be installed January 1, 2017.

15 Subbasin A must be vacuum swept on a weekly basis until final
16 treatment is operational.

17 Subbasins B and C must be vacuum swept on a monthly basis until
18 final treatment is installed.

19 Copies of monthly facility inspection must be provided to Ecology
20 and the Port of Tacoma within fifteen days of their completion and
21 certification.

22 *Id.*

On November 2, 2016, Soundkeeper sent APMT a notice of intent to sue letter.
Dkt. 1 at 19–3. There is no indication that the Port was sent a copy. On January 9, 2017,
Soundkeeper filed the original complaint in this matter against APMT as the sole
defendant. Dkt. 1.

On March 28, 2017, Olson emailed Stasch and Diamant informing them that (1)
AMPT's contractor had prepared an engineering report that would be submitted to
Ecology no later than April 15, (2) APMT intended to meet the November 15 deadline

1 for an operating system, and (3) APMT was keeping the Port informed and updated. Dkt.
2 87-14. On April 5, 2017, APMT formally submitted its engineering report. Dkt. 165-1.

3 On April 12, 2017, Stasch wrote a technical memorandum to Diamant on his
4 review of the engineering report. He stated that APMT may no longer lease the terminal
5 from the Port at the end of the year and that the lease may transfer to SSA and warned
6 that “[t]hese plans create uncertainty regarding who will end up constructing and
7 managing the recommended Level 3 Corrective Action.” *Id.* His specific comments
8 were in part as follows:

- 9 1. I recommend that we work with the Port of Tacoma to Partner, or take
10 responsibility for mitigating the Level Three Corrective Action for this
11 site. As suggested in our meeting, if the Port will do this, we can agree
to issue a new ISWGP to SSAT (instead of transferring APMT’s permit
to SSAT).
- 12 2. If the Port does not take responsibility for the system, there is no
13 commitment from SSAT that they would adopt APMT’s recommended
Corrective Actions.
- 14 3. There is no schedule for constructing/installing the recommended
15 treatment system (this ties into number 1 and 2 (above)).
- 16 4. There is no statement of ownership of the system or who will be
responsible for managing it (this ties into number 1 and 2 (above)).

17 *Id.*

18 On May 12, 2017, Seaman informed Ecology that the Port would manage the
19 design/construction of the stormwater treatment system going forward because APMT
20 was terminating its lease. Dkt. 165-3 at 2. She also stated that “[u]ntil such time as
21 APMT vacates the terminal, APMT will continue to hold the permit, maintain appropriate
22

1 best management practices (“BMPs”) and sample as required under their permit.” *Id.* at
2 3.

3 On August 24, 2017, the Port applied for a new ISGP permit. Dkt. 215-5. On
4 September 22, 2017, Soundkeeper submitted public comments regarding the application.
5 Soundkeeper opposed the permit “unless such coverage is (1) accompanied by an
6 administrative order requiring the Port to timely implement a Level 3 corrective action at
7 this facility, or alternatively (2) transferred from APM to the Port.” Dkt. 211-38 at 3. On
8 October 2, 2017, Ecology issued the Port a new ISGP permit. Dkt. 82-3.

9 On October 23, 2017, the Port signed Ecology Agreed Order #15434 addressing
10 “the current operations at the site which, if left unaddressed, are likely to trigger
11 additional Level 3 Corrective Actions and/or violate water quality standards.” Dkt. 82-4.
12 In short, the Port agreed to implement BMPs, create a SWPPP, and construct a
13 stormwater treatment system no later than September 30, 2018. *Id.*

14 III. DISCUSSION

15 A. Motion to Strike

16 The Port moves to strike two exhibits that Soundkeeper submitted in support of its
17 motion. First, Soundkeeper submitted “a true and correct copy of an internal Washington
18 State Department of Ecology (“Ecology”) email dated October 3, 2017 which [counsel]
19 received from Ecology in response to a public records request on October 31, 2017.”
20 Dkt. 197, ¶ 2. Soundkeeper argues that “evidence that a document is a public record is
21 sufficient to authenticate it.” Dkt. 218 at 12 (citing Fed. R. Evid. 901(b)(7)). In that
22 sense, the Court agrees that it could accept the document as a public record, but the Court

1 may disregard the entire content of the document because Soundkeeper has failed to
2 establish that the statements made in the alleged email are admissible. While the
3 document appears to be an email, the author is not identified and it is unclear whether the
4 email was sent or merely drafted. Therefore, the Court grants the Port's motion to strike
5 this irrelevant document.

6 Second, Soundkeeper submitted an email that the Port claims is protected by the
7 attorney-client privilege. Dkt. 197-2. The Court denies the Port's request to strike as
8 moot because the document is not relevant to the Court's consideration of the parties'
9 motions.

10 **B. Summary Judgment**

11 **1. Standard**

12 Summary judgment is proper only if the pleadings, the discovery and disclosure
13 materials on file, and any affidavits show that there is no genuine issue as to any material
14 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).
15 The moving party is entitled to judgment as a matter of law when the nonmoving party
16 fails to make a sufficient showing on an essential element of a claim in the case on which
17 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,
18 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole,
19 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*
20 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must
21 present specific, significant probative evidence, not simply "some metaphysical doubt").
22 Conversely, a genuine dispute over a material fact exists if there is sufficient evidence

1 supporting the claimed factual dispute, requiring a judge or jury to resolve the differing
2 versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W.*
3 *Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

4 The determination of the existence of a material fact is often a close question. The
5 Court must consider the substantive evidentiary burden that the nonmoving party must
6 meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
7 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
8 issues of controversy in favor of the nonmoving party only when the facts specifically
9 attested by that party contradict facts specifically attested by the moving party. The
10 nonmoving party may not merely state that it will discredit the moving party’s evidence
11 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*
12 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,
13 nonspecific statements in affidavits are not sufficient, and missing facts will not be
14 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888–89 (1990).

15 **2. Standing**

16 To satisfy the standing requirements of Article III of the Constitution, a plaintiff
17 must show: 1) it has suffered an “injury in fact;” 2) the injury is fairly traceable to the
18 challenged action; and 3) it is likely, as opposed to speculative, that the injury will be
19 redressed by a favorable decision. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*
20 *(TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

21 In this case, Soundkeeper moves for partial summary judgment that it has standing
22 to bring this action. Dkt. 196 at 34. Soundkeeper has submitted multiple declarations

1 from individuals stating injuries based on the Port's alleged violations of the CWA. For
2 example, Dean Burke declares that his "interests in using and enjoying Commencement
3 Bay are injured as a direct result of Port of Tacoma's Clean Water Act violations." Dkt.
4 199, ¶ 22. Mr. Burke participates in numerous activities in and around the Bay. *Id.* ¶¶ 6–
5 13. Although this evidence appears to clearly establish standing to pursue the CWA
6 violations, the Port advances numerous objections that are ultimately without merit.
7 First, the Port asserts that the "Court should not resolve [Soundkeeper's] standing and
8 subject matter jurisdiction until the defendants can conduct discovery." Dkt. 210 at 37
9 n.16. Standing, however, is a "threshold question in every federal case, determining the
10 power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).
11 Moreover, jurisdiction may be challenged at any time. Fed. R. Civ. P. 12(h)(3).
12 Therefore, the Court concludes that standing should be addressed before proceeding to
13 the merits of the claims and delay for discovery purposes is not warranted.

14 Second, the Port argues that it discharges into Sitcum Waterway, which is only 1%
15 of the surface area of Commencement Bay. The Port relies on its expert for the assertion
16 that its discharges are unlikely to have a measurable impact on Commencement Bay.
17 Dkt. 210 at 37. The Port cites no authority for its proposition that Soundkeeper's
18 evidence is insufficient because it only establishes that the Port's alleged violations have
19 a de minimus impact on a larger waterway. Instead, the authorities provided to the Court
20 establish a wide latitude for injuries resulting from alleged violations of the CWA.
21 *Laidlaw*, 528 U.S. at 183 (evidence sufficient when "Norman Sharp averred that he had
22 canoed approximately 40 miles downstream of the Laidlaw facility and would like to

1 canoe in the North Tyger River closer to Laidlaw’s discharge point, but did not do so
2 because he was concerned that the water contained harmful pollutants.”); *Friends of the*
3 *Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 158 (4th Cir. 2000)
4 (“Gaston Copper’s discharge affects or can affect the waters for a significant distance
5 downstream. The parties have stipulated that the overflow from Lake Watson pours into
6 Boggy Branch, a tributary of Bull Swamp Creek, which empties into the Edisto River.”).
7 Thus, the Court concludes that Soundkeeper has submitted sufficient evidence to
8 establish an injury in fact.

9 Second, the Port argues that Soundkeeper has failed to establish “causation.” This
10 argument is without merit because causation is not an element of standing and the Port
11 attempts to mislead the Court into ruling on the merits of Soundkeeper’s alleged
12 violations. The proper question is whether the injury is fairly traceable to challenged
13 action. *Laidlaw*, 528 U.S. at 181. The Court concludes that Soundkeeper has established
14 that its member’s injuries are fairly traceable to the Port’s alleged CWA violations.

15 Finally, the Port argues that Soundkeeper has failed to establish that the injuries
16 are redressable because the “Port is not violating the CWA.” Dkt. 210 at 38. This
17 argument goes to the merits, not the ability to bring a claim for violations of the CWA.
18 Therefore, the Court grants Soundkeeper’s motion and concludes that Soundkeeper has
19 standing to bring its claims against the Port.

20 **3. Level 3 Violations**

21 Soundkeeper seeks summary judgment on the issue of whether the Port is jointly
22 liable for alleged violations that occurred during AMPT’s tenancy. Dkt. 196 at 15–24.

1 The main problem with Soundkeeper’s motion is that it seeks a broad determination of
2 liability based on the Port’s alleged control and responsibility over discharges without
3 specifically identifying violations. The Court declines to consider Soundkeeper’s motion
4 in the absence of an underlying violation for which the Port could have had control or
5 responsibility over.

6 The single exception to Soundkeeper’s position is that it seeks a determination
7 whether the Port is liable for APMT’s Level 3 Corrective Actions in 2013 and 2015. Dkt.
8 196 at 24. Soundkeeper sets forth two theories of liability. First, Soundkeeper argues
9 that the Port is liable because it exercised control over and responsibility for the
10 discharges from the facility that APMT leased. Dkt. 196 at 25. The CWA “clearly
11 makes violations by ‘any person’ unlawful, not solely permit-holders.” *Assateague*
12 *Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433, 442 (D. Md. 2010).
13 “Rather than a bright-line rule allowing or disallowing claims against non-permittees, the
14 majority of courts utilize a fact-based analysis to determine if a non-permittee has, in its
15 own right, acted in such a way that it could reasonably be considered to be in violation of
16 federal pollution control requirements such as the conditions of a permit.” *Puget*
17 *Soundkeeper All. v. Total Terminals Int’l, LLC*, 371 F. Supp. 3d 857, 863 (W.D. Wash.
18 2019).

19 The Port contends that even if Soundkeeper established the Port’s liability for
20 these actions, the violations were not ongoing when Soundkeeper filed the complaint
21 against the Port. Dkt. 210. The Court agrees. Soundkeeper added the Port to this action
22 on November 28, 2017, which is two months after APMT’s permit terminated on October

1 | 1, 2017. The corrective actions that were triggered by APMT’s failure to meet
2 | benchmark exceedances ended with the termination of that permit. *See, e.g., Nw. Env’tl.*
3 | *Def. Ctr. v. Unified Sewerage Agency of Washington Cty.*, CIV. 88-1128-FR, 1989 WL
4 | 81608, at *9 (D. Or. July 7, 1989) (“a citizen suit may not be maintained with regard to
5 | permit conditions which are no longer in force.”); *Pub. Interest Research Group v.*
6 | *Carter–Wallace, Inc.*, 684 F.Supp. 115 (D.N.J. 1988) (“Plaintiffs’ interpretation of
7 | § 1365, allowing for citizen enforcement of an expired permit so long as the same
8 | discharger is in violation of its current permit, must also be rejected.”). The Port, as a
9 | new permittee, violates its permit if it fails to meet those benchmarks as set forth in its
10 | permit. Soundkeeper is essentially attempting to do in this enforcement action what it
11 | failed to do by opposing the Port’s permit application by requesting that Ecology transfer
12 | coverage from APMT to the Port. Dkt. 211-38 at 3. It appears that Ecology complied
13 | with Soundkeeper’s alternative request by entering an agreed order with the Port to
14 | design and construct a new stormwater treatment system. Dkt. 82-3. Thus, Soundkeeper
15 | is attempting to have its cake and eat it as well in seeking penalties for an alleged transfer
16 | of corrective actions between permits and an agreed order requiring an immediate Level
17 | 3 corrective action. Dkt. 211-38 at 4 (“If Ecology does not transfer permit coverage, or if
18 | it issues permit coverage to the Port without an accompanying administrative order,
19 | Soundkeeper’s intention is to appeal that issuance of coverage to the [state board].”).
20 | Soundkeeper, however, fails to provide any authority or persuasive argument for the
21 | proposition that a lessor’s alleged violations are ongoing after a permit is terminated.
22 | Therefore, the Court denies Soundkeeper’s motion and grants the Port’s motion on the

1 issue of whether APMT's Level 3 Corrective action violations were ongoing when
2 Soundkeeper filed its complaint against the Port.

3 Second, Soundkeeper argues that APMT's corrective actions transferred to the
4 Port with the new permit. Dkt. 196 at 25–28. Soundkeeper's argument is long on
5 advocacy and short on legal authority. In the absence of binding or persuasive authority
6 holding that public policy favors transferring liability, the Court denies Soundkeeper's
7 motion on this issue.

8 **4. Wharf**

9 Soundkeeper argues that the Port is liable for failing to monitor discharges from
10 the wharf and failing to identify the wharf in its SWPPP. Dkt. 196 at 28–34. The Court,
11 however, concluded that the wharf area is not covered by the Port's ISGP. Dkt. 304.
12 Therefore, the Court denies Soundkeeper's motion on this issue.

13 **5. The Port's Motion**

14 The Port moves for summary judgment on Soundkeeper's entire claim against the
15 Port. Dkt. 210 at 1–2 (“grant the Port's Cross Motion for Partial Summary Judgment of
16 [Soundkeeper's] Second Cause of Action in its Third Amended Complaint”).¹ The only
17 remaining issue is whether Soundkeeper can establish that the Port is violating its current
18 permit. The Port argues that Soundkeeper is unable to establish any violation because it
19 would not be violating its new permit until September 30, 2019 at the earliest. Dkt. 210
20

21 ¹ Although the operative complaint in the Fourth Amended Complaint, Dkt. 254, Soundkeeper
22 did not amend its claim against the Port.

1 at 17–18. The Court agrees with the Port on this issue because the permit requires
2 corrective action be taken by September 30th of the year following three quarterly
3 violations.² Although the Court has rejected the majority of Soundkeeper’s arguments in
4 response, it does argue that the Port is in violation of the agreed order. Dkt. 229 at 7.
5 Soundkeeper, however, fails to establish that violation of an agreed order is grounds for a
6 citizen suit. While permit violations normally result in an agreed order, the order in this
7 case was issued contemporaneously with the Port’s permit and not as a result of a
8 violation of the permit. Therefore, the Court grants the Port’s motion on Soundkeeper’s
9 claim.

10 IV. ORDER

11 Therefore, it is hereby **ORDERED** that Soundkeeper’s motion for partial
12 summary judgment, Dkt. 196, and the Port’s cross-motion for partial summary judgment,
13 Dkt. 210, are **GRANTED in part** and **DENIED in part**. The Clerk shall terminate the
14 Port as a defendant.

15 Dated this 17th day of November, 2020.

16
17 

18 **BENJAMIN H. SETTLE**
United States District Judge

19
20
21
22

² If the Port violated the permit during its first year of coverage, 2017-18, then it would have to take corrective action by September 30th of the following year, or September 30, 2019.