

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  
CENTRAL DISTRICT OF CALIFORNIA

ENVIRONMENTAL WORLD	)	Case No. CV 09-04045 DDP (PLAx)
WATCH, INC., DENNIS JACKSON,	)	
ROBERT HILL, ROBIN McCALL,	)	<b>Order Denying Defendants' Motion</b>
and WILLIAM McCALL,	)	<b>to Dismiss</b>
	)	
Plaintiffs,	)	[Motion filed on September 3,
	)	2009]
v.	)	
	)	
THE WALT DISNEY COMPANY,	)	
WALT DISNEY ENTERPRISES,	)	
INC.; DISNEY WORLDWIDE	)	
SERVICES, INC.,	)	
	)	
Defendants.	)	
	)	
_____	)	

Presently before the Court is Defendants Walt Disney Company, Disney Worldwide Services, Inc., and Walt Disney Enterprises' (together "Disney") motion to dismiss for lack of standing and for failure to state a claim. After reviewing the parties' moving papers and hearing oral argument, the Court denies the motion.

**I. Background**

Plaintiffs in this action are Environmental World Watch, Inc. ("EWW"), a Delaware corporation based in Los Angeles County, and several individuals that live and recreate in the vicinity of

1 Disney's commercial property in Burbank, CA. Disney is a worldwide  
2 entertainment company with headquarters located at 500 South Buena  
3 Vista Street in Burbank, California (the "Studio Lot"). (Second  
4 Amended Complaint ("SAC") ¶ 14.)

5 According to the SAC, Disney has operated a 50-acre film  
6 production, broadcast, and office facility at the 500 South Buena  
7 Vista Street Property since approximately 1939. (SAC, Ex. A at  
8 25.) Plaintiffs contend that, for decades, Disney has pumped water  
9 from the ground for use in its air-cooling system, added various  
10 chemical compounds to the cooling waters, and then discharged the  
11 spent water through "well water disposal lines" and pipes. (Id.)  
12 As a result, they contend, Disney has discharged hexavalent  
13 chromium ("Cr VI") into the land, water, and air surrounding the  
14 Studio Lot. (Id.)

15 The SAC alleges that Disney continued to discharge Cr VI even  
16 after EPA banned use of the compound in air-cooling systems in  
17 1990, and that discharges occurred regularly over the past five  
18 years (i.e., within the applicable statute of limitations period).<sup>1</sup>  
19 (Id. at 26.)

20 According to Plaintiffs, the contaminated cooling water  
21 traveled through three pipes and emptied into the street at the  
22 intersection of Keystone and Parkside (in Burbank), eventually  
23 contaminating the aquifer below the City of Los Angeles's Polliwog  
24 Park. (Id.) At some point, Plaintiffs contend, those three pipes  
25 were connected to a City of Burbank storm drain that runs under the  
26 intersection of Keystone and Parkside, immediately east of the 500

---

27  
28 <sup>1</sup> The EPA regulations governing the use of Cr VI in cooling  
systems are codified at 40 C.F.R. § 749.68.

1 South Buena Vista Street property line, and empties into the Los  
2 Angeles River. (Id. at 29, 35.)

3 The SAC alleges that testing conducted on May 1, 2009 and  
4 every day thereafter at "the discharge pipe terminus into the Los  
5 Angeles River" revealed that "quantities of Cr VI found in samples  
6 of H2O and H2O sludge as residue exceed the Maximum Contaminant  
7 Level (MCL) for Cr VI in drinking water and the No Significant Risk  
8 Level (NSRL) under Ca Health and Safety Code section 25249.5, et  
9 seq."<sup>2</sup> (Id. at 35 n. 1.)

10 After sending notices of intent to file suit on May 22, 2009,  
11 June 1, 2009, and June 18, 2009, Plaintiffs sued Disney for  
12 violations of the Resource Conservation and Recovery Act ("RCRA"),  
13 42 U.S.C. § 6901 et seq. and the Clean Water Act ("CWA"), 33 U.S.C.  
14 § 1251 et seq., pursuant to both statutes' citizen suit provisions.  
15 They filed a first amended complaint on June 23, 2009, (Dkt. No.  
16 4), and pursuant to the parties' stipulation, (Dkt. No 12), a  
17 second amended complaint on August 14, 2009, (Dkt. No 14.)

18 The SAC alleges that Disney is a past or present generator,  
19 transporter, owner or operator "of a treatment, storage, or  
20 disposal facility, which has contributed or is contributing to the  
21 past or present storage, treatment, transportation, and/or disposal  
22 of any solid or hazardous waste which may present an imminent and  
23 substantial endangerment to health or the environment." (SAC ¶  
24 51); see 42 U.S.C. § 6972(a)(1)(B). They specifically allege the  
25 following: (1) violations of the procedural and substantive  
26

---

27 <sup>2</sup> The SAC also alleges that testing conducted at the  
28 Polliwag Park property shows Cr VI contamination in the soil to a  
depth of twenty-five feet. (Id. at 26.)

1 requirements of RCRA section 3004, 42 U.S.C. § 6924, (SAC ¶ 56);  
2 (2) un-permitted handling, treatment, storage, transportation  
3 and/or disposal of hazardous waste pursuant to 42 U.S.C. § 6925  
4 (SAC ¶ 64); and (3) violating the prohibition on open dumping  
5 pursuant to 42 U.S.C. § 6945 (SAC ¶ 67.)

6 Plaintiffs also allege that Disney is discharging pollutants  
7 from a point source without a National Pollutant Discharge  
8 Elimination System ("NPDES") permit in violation of CWA § 301, 33  
9 U.S.C. § 1311, and that they are discharging storm water  
10 contaminated with industrial pollutants in violation of CWA §  
11 402(p), 33 U.S.C. § 1342(p). (SAC ¶¶ 75-76.)

12 Disney moves to dismiss the SAC for failure to state a claim  
13 upon which relief can be granted, pursuant to Rule 12(b)(6) of the  
14 Federal Rules of Civil Procedure, and for lack of Article III  
15 standing. They contend that "the RCRA causes of action (one  
16 through five of the SAC) should be dismissed because Plaintiffs  
17 fail to identify a 'hazardous waste' . . . and fail to describe  
18 where and when the hazardous waste allegedly was disposed in the  
19 last five years." (Mot. at 3.)

20 With respect to the CWA causes of action (six and seven in the  
21 SAC), Disney argues that Plaintiffs "fail to adequately allege  
22 discharge of a particular pollutant from a particular point source"  
23 and as to count seven, that Disney does not need a NPDES permit in  
24 order to discharge storm water because they are covered by the City  
25 of Burbank's municipal storm water permit. (Id.)

## 26 **II. Legal Standard**

27 Pursuant to Federal Rule of Procedure Rule 12(b)(6), a  
28 complaint is subject to dismissal when the plaintiff's allegations

1 fail to state a claim upon which relief can be granted. When  
2 considering a Rule 12(b)(6) motion, courts accept the plaintiff's  
3 allegations of material fact as true, and construe the complaint in  
4 the light most favorable to the non-moving party. Cahill v.  
5 Liberty Mut. Ins. Co., 80 F.3d 336, 337-338 (9th Cir. 1996).

6 In Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009), the  
7 Supreme Court explained that a court considering a 12(b)(6) motion  
8 should first "identify[] pleadings that, because they are no more  
9 than conclusions, are not entitled to the assumption of truth."  
10 Id. Next, the court should identify the complaint's "well-pleaded  
11 factual allegations, . . . assume their veracity and then determine  
12 whether they plausibly give rise to an entitlement to relief."  
13 Id.; see also Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th  
14 Cir. 2009) ("In sum, for a complaint to survive a motion to  
15 dismiss, the non-conclusory factual content, and reasonable  
16 inferences from that content, must be plausibly suggestive of a  
17 claim entitling the plaintiff to relief." (internal quotation marks  
18 omitted)).

### 19 **III. Discussion**

#### 20 **A. Standing**

21 In order to satisfy Article III's standing requirements, a  
22 plaintiff must show:

23 (1) it has suffered an injury in fact that is (a) concrete  
24 and particularized and (b) actual or imminent, not  
25 conjectural or hypothetical; (2) the injury is fairly  
26 traceable to the challenged action of the defendant; and (3)  
it is likely, as opposed to merely speculative, that the  
injury will be redressed by a favorable decision.

27 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S.  
28 167, 180-81 (2000) (internal quotation marks omitted). At the

1 motion to dismiss stage, allegations are presumed to be correct,  
2 and thus "general factual allegations of injury resulting from the  
3 defendant's conduct may suffice" to establish the prerequisites for  
4 standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561  
5 (1992).

6 "[E]nvironmental plaintiffs adequately allege injury in fact  
7 when they aver that they use the affected area and are persons 'for  
8 whom the aesthetic and recreational values of the area will be  
9 lessened' by the challenged activity." Friends of the Earth, 528  
10 U.S. at 183 (quoting Sierra Club v. Morton, 405 U.S. 727, 735  
11 (1972)); see also Desert Citizens Against Pollution v. Bisson, 231  
12 F.3d 1172, 1176 (9th Cir. 2000) ("We have held repeatedly that  
13 environmental and aesthetic injuries constitute injuries in fact  
14 for standing purposes.").

15 Plaintiffs submitted declarations from two EWW board members  
16 with their Opposition. Board member William Dunlap states that he  
17 lived near the 500 South Buena Vista Street Property in 2006 when  
18 the contamination in Polliwog Park was discovered, and that he has  
19 regularly walked, exercised, and ridden his horse in the vicinity  
20 of the alleged Cr VI contamination. The Court concludes that  
21 Dunlap's allegations are sufficient to confer standing. See  
22 Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 399 F.3d 248, 255  
23 (3d Cir. 2005) (RCRA plaintiffs satisfied injury in fact  
24 requirement where they alleged that they lived near former site of  
25 chromium manufacturing and were concerned about health risks caused  
26 by exposure to Cr VI from the site).

27 Because EWW has alleged that one of its members has suffered  
28 an injury in fact sufficient to confer Article III standing, the

1 Court concludes that the organization itself has established  
2 standing. See Friends of the Earth, 528 U.S. at 181 (noting that  
3 an organization has standing to bring suit on behalf of its members  
4 where members could sue in their own right, the interests involved  
5 are germane to the organization's purpose, and the requested relief  
6 does not require the participation of individual members in the  
7 suit).

8 **B. RCRA**

9 The Court concludes that Plaintiffs have alleged facts  
10 plausibly suggesting that Disney has disposed of a "hazardous  
11 waste" within the meaning of RCRA. The facts alleged, taken as  
12 true, suggest that Disney released Cr VI from the 500 South Buena  
13 Vista Street Property. While Plaintiffs have not conclusively  
14 proved that the alleged Cr VI discharges are of a sufficient  
15 concentration to qualify as hazardous under EPA's regulatory  
16 definition, they are not required to do so at the pleading stage.

17 RCRA "is a comprehensive environmental statute that empowers  
18 EPA to regulate hazardous wastes from cradle to grave, in  
19 accordance with . . . rigorous safeguards and waste management  
20 procedures." Chicago v. Env'tl. Def. Fund, 511 U.S. 328, 331  
21 (1994).

22 RCRA defines the term "hazardous waste," in relevant part, as:  
23 [A] solid waste, or combination of solid wastes, which  
24 because of its quantity, concentration, or physical,  
25 chemical, or infectious characteristics may cause, or  
26 significantly contribute to an increase in mortality or an  
27 increase in serious irreversible, or incapacitating  
28 reversible, illness . . . or pose a substantial present or  
potential hazard to human health or the environment when  
improperly treated, stored, transported, or disposed of, or  
otherwise managed.

1 42 U.S.C. § 6903(5).<sup>3</sup>

2 The Act requires EPA to regulate the identification, disposal,  
3 and treatment of hazardous waste, and directs the EPA Administrator  
4 to "promulgate regulations identifying the characteristics of  
5 hazardous waste, and listing particular hazardous wastes (within  
6 the meaning of section 6903(5) of this title), which shall be  
7 subject to the provisions of this subchapter." 42 U.S.C. §  
8 6921(b)(1). Pursuant to § 6921, EPA may deem wastes hazardous if:

9 They possess one of the four hazardous characteristics  
10 identified by the EPA in 40 C.F.R. Part 261, Subpart C  
11 ("characteristic wastes"), see id. § 261.3(a)(2)(I) (1991),  
or have been found to be hazardous as a result of an EPA  
rulemaking. See id. Part 261, Subpart D ("listed wastes").

12 Chem. Waste Mgmt., Inc. v. EPA, 976 F.2d 2, 7-8 (D.C. Cir. 1992).

13 EPA's regulations provide that solid waste containing chromium is  
14 "hazardous waste," within the meaning of RCRA, where the chromium  
15 concentration exceeds 5 mg/L (which is equivalent to 5 parts per  
16 million ("ppm") or 5,000 parts per billion ("ppb")).<sup>4</sup> 40 C.F.R. §  
17 261.24.

18 Disney "do[es] not dispute that waste containing a  
19 sufficiently high concentration of Cr VI could potentially be

---

21 <sup>3</sup> "Disposal," within the meaning of the Act, amounts to  
22 "the discharge, deposit, injection, dumping, spilling, leaking, or  
23 placing of any solid waste or hazardous waste into or on any land .  
so that such solid waste or hazardous waste or any constituent  
thereof may enter the environment . . . ." 40 C.F.R. § 260.10.

24 <sup>4</sup> Chromium occurs in the environment primarily in two  
25 valence states, trivalent chromium and ("Cr III") and hexavalent  
26 chromium ("Cr VI"). See U.S. EPA, Technology Transfer Network,  
Chromium Compounds Fact Sheet, available at  
27 <http://www.epa.gov/ttn/atw/hlthef/chromium.html> (last updated  
November 6, 2007). Inhaled Cr VI is a known human carcinogen, Cr  
28 III is believed to be much less toxic. (Id.) Because it is  
difficult to differentiate between Cr VI and Cr III, tests in  
nature generally measure total chromium. (Id.)

1 considered a hazardous waste under RCRA." (Defs.' Reply at 3.) It  
2 contends, however, that Plaintiffs have not alleged facts  
3 suggesting that Disney discharged waste containing a Cr VI  
4 concentration that exceeds EPA's toxicity threshold.

5 The Court disagrees.

6 Under Iqbal, the Court must first dispatch the allegations  
7 contained within the SAC that do nothing more than state a legal  
8 conclusion, and then evaluate the remaining factual content to  
9 determine whether the SAC states a RCRA claim that is plausible on  
10 its face. Cf. Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 683  
11 (9th Cir. 2009) ("Plaintiffs' general statement that Wal-Mart  
12 exercised control over their day-to-day employment is a conclusion,  
13 not a factual allegation stated with any specificity. We need not  
14 accept Plaintiffs' unwarranted conclusion in reviewing a motion to  
15 dismiss.") Accordingly, the Court assigns no weight to Plaintiffs'  
16 conclusory recitations of the elements of a RCRA claim. (See,  
17 e.g., SAC ¶ 30.) ("DEFENDANTS have discharged or are intentionally  
18 and illegally continuing to discharge hazardous waste in violation  
19 of RCRA and the CWA.")

20 The SAC, however, consists of more than just conclusory  
21 assertions - it states specific facts that the Court must assume  
22 are true. Plaintiffs contend that Disney continues to add Cr VI to  
23 the water it uses in its air cooling system (in spite of the EPA  
24 ban) and that the spent water is being discharged into the Los  
25 Angeles River through a particular storm drain pipe, the location  
26 of which is identified in the SAC.<sup>5</sup> They further allege that

---

27  
28 <sup>5</sup> In a footnote in Plaintiffs' Opposition, they contend  
(continued...)

1 testing at the terminus of the storm drain at issue revealed Cr VI  
2 concentrations that exceed California's water quality standards.

3 Taking these facts together, and drawing all reasonable  
4 inferences in Plaintiffs' favor, the SAC plausibly suggests that  
5 Disney disposed of Cr VI in a concentration that would render it a  
6 hazardous waste within the meaning of RCRA.

7 Disney points out that California's water quality standards  
8 with respect to chromium are far more stringent than the federal  
9 standard.<sup>6</sup> RCRA does not authorize citizen suits predicated on  
10 violations of state standards that are more stringent than the  
11 applicable federal standard. See Ashoff v. Ukiah, 130 F.3d 409,  
12 412 (9th Cir. 1997). Thus, a waste cannot be deemed hazardous,  
13 within the meaning of RCRA, solely because it contains a chromium  
14 concentration that violates California's water quality standards.

15 Even so, Plaintiffs are not required to prove that Disney is  
16 disposing of a specific concentration of Cr VI at the pleading  
17 stage - they need only plead facts that plausibly suggest a Cr VI  
18 release that exceeds the federal standard. Plaintiffs discovery of  
19 Cr VI at a storm drain terminus that, they allege, deposits waste  
20

---

21 <sup>5</sup>(...continued)  
22 that "[i]n addition to hexavalent chromium Plaintiffs have alleged  
23 that hazardous solvents including TCE, PCE and other toxic metals  
24 such as mercury . . . are being discharged by Disney." (Opp. at  
25 10, n. 5.) Plaintiffs provide no factual allegations to support  
26 their assertion that Disney is discharging "TCE, PCE and other  
toxic metals such as mercury" from the 500 South Buena Vista Street  
Property. Accordingly, the Court concludes that the SAC's  
allegations regarding chemicals other than Cr VI are conclusory,  
and therefore not entitled to any presumption of truth.

27 <sup>6</sup> The California Maximum Contaminant Level for chromium is  
28 50 micrograms-per liter (which is equivalent to 50 ppb) - far less  
than the 5,000 ppb of chromium required to make a waste hazardous  
under 40 C.F.R. § 261.24.

1 from the Studio Lot, coupled with their allegation that Disney  
2 continues to use Cr VI in its air-cooling system (in violation of  
3 federal law), is sufficient to state a claim under RCRA.

4 **C. CWA**

5 Plaintiffs contend that Disney is discharging pollutants from  
6 a point source without an NPDES permit in violation of CWA § 301,  
7 33 U.S.C. § 1311, (SAC ¶ 72), and that it is discharging storm  
8 water contaminated with industrial pollutants in violation of CWA §  
9 402(p), 33 U.S.C. § 1342(p), (SAC ¶¶ 75-76).

10 In order to state a prima facie case under § 301, Plaintiffs  
11 must allege facts suggesting that Disney: (1) discharged (2) a  
12 pollutant (3) from a point source (4) to navigable waters (5)  
13 without an NPDES permit. See Comm. to Save Mokelumne River v. E.  
14 Bay Mun. Util. Dist., 13 F.3d 305, 309 (9th Cir. 1993).

15 The Court concludes that Plaintiffs have stated a § 301 claim.  
16 Disney contends that Plaintiffs have not identified discharges of a  
17 specific pollutant from a particular point source, but as the Court  
18 explains above in its discussion of Plaintiffs' RCRA claims, they  
19 have adequately so alleged. The SAC states facts suggesting that  
20 Disney's facility is a point source within the meaning of the CWA,  
21 and that it discharged a pollutant (i.e., Cr VI) from the  
22 facility's air-cooling system into navigable waters without a NPDES  
23 permit.

24 With respect to Plaintiffs' CWA § 402(p) claim, Disney  
25 contends that it does not need a permit to discharge storm water  
26 containing Cr VI because the operative municipal storm water and  
27  
28

1 urban runoff permit - the Los Angeles County MS4 Permit<sup>7</sup> (which  
2 includes the City of Burbank) - grants Burbank "adequate legal  
3 authority" to "prohibit non-storm water discharges to the storm  
4 drain system . . . ." (Mot. to Dismiss 14.)

5 Disney offers no support for its contention that Burbank's  
6 legal authority to prohibit non-storm water discharges, under the  
7 terms of the MS4 Permit, forecloses Plaintiffs' claim under the  
8 CWA. Further, the MS4 permit states that "[u]nauthorized non-storm  
9 water discharges (even when commingled with storm water) shall be  
10 eliminated or covered by a separate NPDES permit." (Silver Decl.,  
11 Ex. A at 11.) Accordingly, the Court concludes that Plaintiffs  
12 have stated a claim under § 402(p) of the CWA.

13 **D. Request for a Stay**

14 Disney asks the Court to stay this case pursuant to Federal  
15 Rule of Civil Procedure 41(d), which provides the following:

16 If a plaintiff who previously dismissed an action in any  
17 court files an action based on or including the same claim  
18 against the same defendant, the court: (1) may order the  
19 plaintiff to pay all or part of the costs of that previous  
20 action; and (2) may stay the proceedings until the  
21 plaintiff has complied.

22 Fed. R. Civ. P. 41(d).

23 On January 10, 2007, EWW and several individuals including one  
24 of the plaintiffs in this action, served Disney with a notice of  
25 violation, alleging that it was discharging wastewater containing  
26 Cr VI from the Studio Lot in violation of California's Proposition  
27 65. (Defs.' Mot at 4.) EWW then filed a lawsuit in Los Angeles  
28 Superior Court against Disney on June 1, 2007. (Id.) On August

---

27 <sup>7</sup> The parties agree that the Court may take judicial notice  
28 of the MS4 permit.

1 15, 2007, that action was dismissed for failure to file a proof of  
2 service. (Id.)

3 A few months later, on October 29, 2007, EWW filed a second  
4 lawsuit in state court alleging the same claims. (Id.) After a  
5 year of active litigation, EWW voluntarily dismissed the case on  
6 November 7, 2008. (Id.) On February 5, 2009, the court granted a  
7 judgment of costs in favor of Disney. (Id. at 5.) EWW has yet to  
8 satisfy the judgment. (Id.)

9 Disney contends that, because the previously dismissed action  
10 concerned the same claims at issue in this case, the Court should  
11 stay this case until EWW satisfies the judgment of costs entered in  
12 the prior state court action.

13 The present case, unlike EWW's prior state court action,  
14 presents claims arising under federal law. Further, some of the  
15 individual plaintiffs in this action were not party to the previous  
16 lawsuit. Accordingly, the Court concludes that a stay is not  
17 warranted.

#### 18 **IV. Conclusion**

19 For the reasons set forth above, the Court DENIES Disney's  
20 Motion to Dismiss.

21

22 IT IS SO ORDERED.

23

24

25 Dated: October 19, 2009

26

27

28



DEAN D. PREGERSON  
United States District Judge