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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CITY OF IMPERIAL BEACH, a
municipal corporation, SAN DIEGO
UNIFIED PORT DISTRICT, a public
corporation, and CITY OF CHULA
VISTA, a municipal corporation,
Plaintiffs,

v.

THE INTERNATIONAL BOUNDARY
& WATER COMMISSION-UNITED
STATES SECTION, an agency of the
United States, and VEOLIA WATER
NORTH AMERICA - WEST, LLC,
Defendants.

Case No.: 18cv457 JM (JMA)

**ORDER DENYING IN PART AND
GRANTING IN PART
DEFENDANTS’ MOTIONS TO
DISMISS**

On June 12, 2018, Defendants The International Boundary & Water Commission – United States Section (“USIBWC”) and Veolia Water North America – West, LLC (“Veolia”) (collectively, “Defendants”) filed separate motions to dismiss. (Doc. Nos. 15, 17.) Plaintiffs the City of Imperial Beach, San Diego Unified Port District, and the City of Chula Vista (collectively, “Plaintiffs”) oppose the motions. (Doc. No. 20.) Having carefully considered the matters presented, the court record, and the arguments of counsel, the court denies Veolia’s motion to dismiss for lack of standing, denies Defendants’

1 motions to dismiss Plaintiffs’ first and second causes of action, and grants Defendants’
2 motions to dismiss Plaintiffs’ third cause of action with leave to amend.

3 **BACKGROUND¹**

4 **I. The Parties**

5 **A. Plaintiffs**

6 The City of Imperial Beach is a California General Law City and municipal
7 corporation, duly organized and existing by virtue of the laws of the State of California.
8 The San Diego Unified Port District is a public entity created by the San Diego Unified
9 Port District Act, California Harbors & Navigation Code, Appendix 1, § 1 et seq. The City
10 of Chula Vista is a California Charter City and municipal corporation, duly organized and
11 existing under the laws of the State of California and the Charter of the City of Chula Vista.

12 **B. Defendants**

13 The USIBWC is an agency and instrumentality of the United States government
14 charged with addressing transboundary issues arising out of agreements between the
15 United States and Mexico, including the Treaty of February 3, 1944, for the Utilization of
16 Waters of the Colorado and Tijuana Rivers and of the Rio Grande (“1944 Treaty”). Veolia
17 is a limited liability company incorporated in Delaware and headquartered in
18 Massachusetts. Veolia contracts with USIBWC to operate and maintain the South Bay
19 International Wastewater Treatment Plant (“South Bay Plant”) and its associated facilities.

20 **II. The International Boundary and Water Commission**

21 The International Boundary and Water Commission (“Commission”) is a bi-national
22 body comprised of USIBWC and the Comisión Internacional de Límites y Aguas (“CILA”)
23 in Mexico. Both sections of the Commission exercise the rights and obligations of their
24 governments under the 1944 Treaty. Under the 1944 Treaty,

25 Neither Section [USIBWC or CILA] shall assume jurisdiction or control
26 over works located within the limits of the country of the other without the

27 ¹ The facts in this section are drawn from the relevant complaints and submissions from
28 the parties, and, at this stage, are taken as true to the extent they are well pleaded.

1 express consent of the Government of the latter. The works constructed,
 2 acquired or used in fulfillment of the provisions of this Treaty and located
 3 wholly within the territorial limits of either country, although these works
 4 may be international in character, shall remain, except as herein otherwise
 5 specifically provided, under the exclusive jurisdiction and control of the
 Section of the Commission in whose country the works may be situated.
 (Doc. No. 16-1 (“1944 Treaty”) Art. 2.)²

6 **III. South Bay Plant**

7 Decisions of the Commission are recorded in Minutes. In 1990, the Commission
 8 entered into an agreement known as Minute 283 to address the border sanitation problem
 9 in San Diego, California, and Tijuana, Baja California. (Doc. No. 16-2 (“Minute 283”).)
 10 Among other things, Minute 283 led to the construction of the South Bay Plant.

11 The South Bay Plant is located in the Tijuana River Valley in the City of San Diego,
 12 San Diego County, California. The South Bay Plant was designed to handle 25 million
 13 gallons per day, based on a 30-day average, “to treat sewage generated in excess of the
 14

15 ² In general, the court may not consider material other than the facts alleged in the
 16 complaint when deciding a motion to dismiss. Anderson v. Angelone, 86 F.3d 932, 934
 17 (9th Cir. 1996) (“A motion to dismiss . . . must be treated as a motion for summary
 18 judgment . . . if either party . . . submits materials outside the pleadings in support or
 19 opposition to the motion, and if the district court relies on those materials.”). However,
 “[t]here are two exceptions to this rule: the incorporation-by-reference doctrine, and
 20 judicial notice under Federal Rule of Evidence 201.” Khoja v. Orexigen Therapeutics,
Inc., 2018 WL 3826298, at *6 (9th Cir. Aug. 13, 2018). Federal Rule of Evidence 201
 21 provides that courts may take judicial notice of facts that are not subject to reasonable
 22 dispute because they are generally known or are capable of accurate and ready
 23 determination. See Fed. R. Evid. 201(b). The court may take notice of such facts on its
 24 own, and “must take judicial notice if a party requests it and the court is supplied with the
 25 necessary information.” Fed. R. Evid. 201(c). Accordingly, a court “may take judicial
 notice of matters of public record without converting a motion to dismiss into a motion
 for summary judgment.” Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001).

26 USIBWC requests the court take judicial notice of the 1944 Treaty, Treaty Minute
 27 283, and a particular report of the House of Representatives. (Doc. No. 16.) These items
 28 are appropriate for judicial notice because they are matters of public record. The parties
 do not dispute their authenticity and the documents do not contain disputed facts.
 Accordingly, the court grants USIBWC’s request for judicial notice.

1 capacity” of facilities in Mexico. (Minute 283 at 4.) USIBWC owns the South Bay Plant
2 and Veolia operates it. The South Bay Plant and its associated facilities are subject to the
3 terms of National Pollution and Discharge Elimination System (“NPDES”) permit
4 CA0108929 (the “NPDES Permit”). The NPDES Permit authorizes discharges of
5 pollutants at the South Bay Ocean Outfall only, and only after such pollutants have gone
6 through secondary treatment at the South Bay Plant. All other discharges are prohibited.

7 The primary influent to the South Bay Plant is sewage from Mexico. (Doc. No. 13
8 (“FAC”) ¶ 58.) While a CILA Diversion exists in Mexico to divert flows in the Mexican
9 Tijuana River into the transboundary sewage system, it “frequently malfunctions, allowing
10 sewage to flow past the Diversion and across the U.S./Mexico Border.” (FAC ¶ 59.)

11 **A. Canyon Collectors**

12 Water that crosses the border into the United States from Mexico west of the flood
13 control conveyance does so at six discernible locations: Yogurt Canyon, Goat Canyon,
14 Smuggler’s Gulch, Canyon Del Sol, Silva Drain, and Stewart’s Drain. USIBWC owns and
15 Veolia operates canyon collectors at all locations except for Yogurt Canyon.

16 The canyon collectors are among the facilities that operate under and are subject to
17 the South Bay Plant NPDES Permit. They are “designed to capture and detain polluted
18 wastewater the moment it crosses the U.S./Mexico Border into the United States.” (FAC
19 ¶ 65.) Each concrete collector abuts the border and spans the opening of one of the drainage
20 points. The canyon collectors collect and direct wastewater into a shallow detention basin.
21 Wastewater in the detention basin is then directed to a screened drain inlet (“collector
22 inlet”) regulated by a valve. When open, the water in the detention basin is accepted into
23 a pipe system and conveyed to the South Bay Plant for treatment and eventual discharge at
24 the South Bay Ocean Outfall. When closed, the water cannot drain into the treatment
25 system, and instead overflows the detention basin and travels into the downstream
26 drainages.

27 According to Plaintiffs, the downstream waters that receive canyon collector
28 overflow are either “navigable” in the traditional sense or are tributaries to the New Tijuana

1 River or the Historical Tijuana River, and ultimately the Tijuana River Estuary and the
2 Pacific Ocean. The pollutants and hazardous wastes “from Mexican waters,” (FAC ¶ 75),
3 “substantially impact downstream water quality,” (FAC ¶ 66).

4 **IV. Flood Control Conveyance**

5 In 1978, USIBWC constructed a flood control conveyance designed to capture as
6 much as 135,000 cubic feet of water per second from the Tijuana River as it crosses the
7 border from Mexico into the United States. (FAC ¶ 43.) The flood control conveyance is
8 a discrete, concrete-lined conveyance with banked sides that begins at the United States
9 border with Mexico. It directs water, sewage, and other wastes into an area of the Tijuana
10 River Valley west of the historical course of the Tijuana River, in which the Tijuana River
11 had not previously flowed. In doing so, Plaintiffs allege that USIBWC “significantly
12 upended the natural hydrology of the Tijuana River Valley.” (*Id.*) At the terminus of the
13 flood control conveyance, its contents are released into a largely undeveloped area of the
14 Tijuana River Valley. According to Plaintiffs, “[t]hese discharges have carved a new river
15 channel, the New Tijuana River, downstream of the USIBWC Flood Control Conveyance.”
16 (*Id.* ¶ 45.) The New Tijuana River flows into the “Historical Tijuana River” approximately
17 one mile downstream of the flood control conveyance’s terminus.

18 The flood control conveyance is not subject to the NPDES Permit, and Veolia is not
19 involved in its operation. Plaintiffs allege that USIBWC routinely and frequently
20 discharges a substantial portion, if not all, of the pollutants and solid and/or hazardous
21 wastes that it captures from the Mexican portion of the Tijuana River and conveys through
22 the flood control conveyance.

23 USIBWC recently constructed a temporary earthen berm at the border between the
24 United States and Mexico to reduce the volume of flow into the flood control conveyance
25 from the Tijuana River in Mexico, redirecting those flows south into the CILA Diversion.
26 However, Plaintiffs note that the berm is not designed to protect against high volume flows
27 and may wash out with even the slightest amount of precipitation. (FAC ¶ 62.)

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V. Procedural Background

On September 27, 2017, Plaintiffs notified Defendants of their intent to sue over Tijuana Valley pollution discharges, as required under the Clean Water Act (“CWA”). 33 U.S.C. § 1365(b). On March 2, 2018, Plaintiffs initiated this action against Defendants. (Doc. No. 1.) The operative First Amended Complaint (“FAC”) alleges three causes of action: (1) against USIBWC, discharges of pollutants from the flood control conveyance without a NPDES permit in violation of the CWA, 33 U.S.C. §§ 1311(a), 1342; (2) against both Defendants, discharges of pollutants from the canyon collectors in violation of the CWA and the NPDES Permit; and (3) against both Defendants, contribution to an imminent and substantial endangerment in violation of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6972(a)(1)(B). (Doc. No. 13.)

On June 12, 2018, USIBWC moved to dismiss the FAC for failure to state a claim. (Doc. No. 15.) That same day, Veolia moved to dismiss the FAC for failure to state a claim and for lack of standing. (Doc. No. 17.) The court permitted Plaintiffs to file a single opposition brief addressing both motions.

LEGAL STANDARDS

I. Rule 12(b)(1) – Lack of Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction. “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998). As the party putting the claims before the court, Plaintiffs bear the burden of establishing jurisdiction. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

There is no subject matter jurisdiction without standing, and the “irreducible constitutional minimum” of standing consists of three elements. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). A plaintiff must have (1) suffered an injury in fact, (2) which is fairly traceable to the challenged conduct of the defendant, and (3) which is

1 likely to be redressed by a favorable judicial decision. Id. at 560–61.

2 A party may make either a facial or factual attack on subject matter jurisdiction. See,
3 e.g., Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003). In
4 resolving a facial challenge, the court considers whether “the allegations contained in [the]
5 complaint are insufficient on their face to invoke federal jurisdiction.” Safe Air for
6 Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). The court must accept the
7 allegations as true and must draw all reasonable inferences in the plaintiff’s favor. Wolfe
8 v. Strankman, 392 F.3d 358 (9th Cir. 2004). In resolving a factual challenge, the court may
9 consider evidence outside the complaint and ordinarily “need not presume the truthfulness
10 of the plaintiff’s allegations.” Safe Air for Everyone, 373 F.3d at 1039. “Once the moving
11 party has converted the motion to dismiss into a factual motion by presenting affidavits or
12 other evidence properly brought before the court, the party opposing the motion must
13 furnish affidavits or other evidence necessary to satisfy its burden of establishing subject
14 matter jurisdiction.” Id. At the motion to dismiss stage, standing is demonstrated by
15 allegations of “specific facts plausibly explaining” why the requirements are met. Barnum
16 Timber Co. v. EPA, 633 F.3d 894, 899 (9th Cir. 2011).

17 **II. Rule 12(b)(6) – Failure to State a Claim**

18 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) challenges the
19 legal sufficiency of the pleadings. To overcome such a motion, the complaint must contain
20 “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v.
21 Twombly, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff
22 pleads factual content that allows the court to draw the reasonable inference that
23 the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678
24 (2009). Facts merely consistent with a defendant’s liability are insufficient to survive a
25 motion to dismiss because they establish only that the allegations are possible rather than
26 plausible. Id. at 678–79. The court must accept as true the facts alleged in a well-pleaded
27 complaint, but mere legal conclusions are not entitled to an assumption of truth. Id. The
28 court must construe the pleading in the light most favorable to the non-moving party.

1 Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995).

2 **DISCUSSION**

3 **I. Standing**

4 Veolia challenges Plaintiffs’ Article III standing to sue it. To establish standing, and
5 thus the court’s subject matter jurisdiction, a plaintiff must have (1) suffered an injury in
6 fact, (2) which is fairly traceable to the challenged conduct of the defendant, and (3) which
7 is likely to be redressed by a favorable judicial decision. Lujan, 504 U.S. at 560–61. At
8 issue are the last two elements.

9 **A. Traceability**

10 The traceability element of Article III standing requires a causal connection between
11 the injury and the complained of conduct. Accordingly, Plaintiffs must show that the injury
12 is fairly traceable to Veolia’s alleged misconduct, and not the result of misconduct of some
13 third party not before the court. See Lujan, 504 U.S. at 560–61. Standing does not require
14 the defendant’s action to be the sole source of injury. Washington Env’tl. Council v. Bellon,
15 732 F.3d 1131, 1142 (9th Cir. 2013). In sum, “[t]he causal connection put forward for
16 standing purposes cannot be too speculative, or rely on conjecture about the behavior of
17 other parties, but need not be so airtight at this stage of the litigation as to demonstrate that
18 the plaintiffs would succeed on the merits.” Ecological Rights Found. v. Pac. Lumber Co.,
19 230 F.3d 1141, 1152 (9th Cir. 2000).

20 Here, Veolia argues that the allegations in the FAC fail to demonstrate how Veolia
21 did anything to cause the problem of cross-border pollution when its operation of
22 USIBWC’s wastewater treatment facilities does not produce, add to, or exacerbate the
23 pollution that originates in Mexico. (Doc. No. 17-1 at 11.) In the FAC, Plaintiffs allege
24 that Veolia has contracted to operate and maintain the South Bay Plant and its associated
25 facilities. (FAC ¶ 57.) Those facilities include the five canyon collectors. (FAC ¶ 63.)
26 When the collector inlets are closed, which is controlled by USIBWC and Veolia, or the
27 volume of flow exceeds the detention basin’s capacity, water in the detention basin cannot
28 travel to the treatment system, and instead overflows into the downstream drainages. (FAC

1 ¶ 65.) According to Plaintiffs, Veolia

2 controls whether additional measures are implemented to contain high-
3 volume flows in the canyon collectors, such as by placing sandbags to increase
4 their detention capacity; whether overflow is halted, such as by cleaning
5 debris from a collector inlet or turning off a pump or closing a valve; and
6 whether canyon collector discharges are contained in a localized area and
7 cleaned up. Veolia has failed to contain and clean up such discharges as
8 required by the NPDES Permit, thereby causing the presence of pollutants
9 and/or solid and hazardous wastes in the Tijuana River Valley.

8 (FAC ¶ 79.)

9 Under the NPDES Permit, the “Discharger” is required to prepare and submit
10 a Spill and Transboundary Wastewater Flow Prevention and Response Plan
11 (“Prevention/Response Plan”). (Doc. No. 15-2 (“NPDES Permit”) at 16.)³ The
12 Prevention/Response Plan is required to incorporate procedures for containment of spills
13 or transboundary wastewater flows, as well as procedures for cleaning up such spills and
14 flows. (NPDES Permit at 20.)

15 Although Veolia is not the source of the pollution, the NPDES Permit under which
16 it operates does require Veolia to work to contain and clean up wastewater that comes into
17

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19 ³ On a motion to dismiss, the court may also consider documents apart from the pleadings
20 based on the incorporation-by-reference doctrine. Incorporation by reference “is a
21 judicially created doctrine that treats certain documents as though they are part of the
22 complaint itself.” Khoja, 2018 WL 3826298, at *9. Under this doctrine, the court may
23 consider extrinsic documents when “the plaintiff’s claim depends on the contents of a
24 document, the defendant attaches the document to its motion to dismiss, and the parties
25 do not dispute the authenticity of the document.” Kniewel v. ESPN, 393 F.3d 1068, 1076
26 (9th Cir. 2005). Here, Plaintiffs’ second cause of action alleges discharges in violation of
27 the NPDES Permit for the South Bay Plant. (FAC ¶¶ 107–16.) Determining whether
28 USIBWC and Veolia have violated the terms of the NPDES Permit requires the court to
examine the contents of the NPDES Permit. Defendants each attached a copy of the
NPDES Permit to their respective motions to dismiss, and no party disputes its
authenticity. Therefore, the court may consider the contents of the NPDES Permit
without converting the motions into motions for summary judgment under the
incorporation-by-reference doctrine.

1 the canyon collectors from Mexico. Failure to do so, as Plaintiffs allege, contributes to the
2 amount of wastewater that makes its way into the Tijuana River Valley and, eventually,
3 the Pacific Ocean. Therefore, Plaintiffs have sufficiently alleged traceability at this stage
4 of proceedings. See Washington Env'tl. Council v. Bellon, 732 F.3d at 1142 (“Nor does
5 standing require the defendant’s action to be the sole source of injury.”).

6 **B. Redressability**

7 To satisfy the final element of Article III standing, it “must be ‘likely,’ as opposed
8 to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” Lujan,
9 504 U.S. at 561 (internal citation omitted). Redressability “analyzes the connection
10 between the alleged injury and requested judicial relief.” Washington Env'tl. Council v.
11 Bellon, 732 F.3d at 1146. “Redressability does not require certainty, but only a substantial
12 likelihood that the injury will be redressed by a favorable judicial decision.” Id. This
13 element is not met when redress “depends on the unfettered choices made by independent
14 actors not before the courts and whose exercise of broad and legitimate discretion the courts
15 cannot presume either to control or to predict.” Asarco Inc. v. Kadish, 490 U.S. 605, 615
16 (1989). “A plaintiff who seeks injunctive relief satisfies the requirement of redressability
17 by alleging a continuing violation or the imminence of a future violation of an applicable
18 statute or standard.” Nat. Res. Def. Council v. Sw. Marine, Inc., 236 F.3d 985, 995 (9th
19 Cir. 2000).

20 Veolia argues that because the “primary causes of the alleged discharges are
21 inadequate facilities in the United States and problems with Mexican wastewater facilities,
22 [] nothing short of the United States and Mexican governments funding and building new
23 infrastructure and upgrading existing infrastructure will eliminate the pollution problem.”
24 (Doc. No. 17-1 at 12.) As a contract operator, Veolia has no duty to fund or build new or
25 upgraded infrastructure. Furthermore, the necessary funds would require approval by
26 Congress, an independent actor not before the court that exercises broad discretion
27 regarding the appropriation of funds.

28 Plaintiffs argue that Veolia’s argument conflates control over what flows into the

1 canyon collectors with control over what happens to the waters after they are collected and
2 detained by the system. The FAC alleges that Veolia’s failure to remove debris and contain
3 or clean up wastewater overflow pursuant to the Prevention/Response Plan contributes to
4 the amount of pollution in the Tijuana River Valley. (FAC ¶ 79.)

5 Veolia’s alleged failure to contain and clean up wastewater according to the
6 Prevention/Response Plan constitutes a continuing violation of the NPDES Permit.
7 Plaintiffs seek injunctive relief and civil penalties.

8 Thus, although any relief the court would grant Plaintiffs with respect to their claims
9 against Veolia would not end the flow of polluted water from Mexico into the United
10 States, it would mitigate injury to Plaintiffs by reducing the quantity of wastewater that
11 ends up in the Tijuana River Valley and Pacific Ocean. Accordingly, Plaintiffs have
12 demonstrated that they have Article III standing to sue Veolia under the CWA and RCRA.
13 Therefore, the court denies Veolia’s motion to dismiss for lack of standing.

14 **II. Flood Control Conveyance**

15 Plaintiffs’ first cause of action is against USIBWC for discharge of pollutants from
16 the flood control conveyance without a NPDES permit in violation of the CWA. (FAC
17 ¶¶ 95–106.)

18 Congress enacted the CWA “to restore and maintain the chemical, physical, and
19 biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA prohibits the
20 “discharge of any pollutants.” CWA § 301(a), 33 U.S.C. § 1311(a). Under the CWA, a
21 “discharge of pollutants” is “any addition of any pollutant to navigable waters from any
22 point source.” 33 U.S.C. § 1362(12). “Navigable waters” are “the waters of the United
23 States, including the territorial seas.” 33 U.S.C. § 1362(7). A “point source” is “any
24 discernible, confined and discrete conveyance, including but not limited to any pipe, ditch,
25 channel, tunnel, conduit . . . from which pollutants are or may be discharged.” 33 U.S.C.
26 § 1362(14). A point source “need not be the original source of the pollutant; it need only
27 convey the pollutant” to waters of the United States. S. Fla. Water Mgmt. Dist. v.
28 Miccosukee Tribe of Indians, 541 U.S. 95, 105 (2004).

1 Thus, to establish a violation of the CWA, Plaintiffs must adequately allege that
2 USIBWC (1) discharged (2) a pollutant (3) to navigable waters (4) from a point source. In
3 dispute is whether the flow of polluted water through and out of the flood control
4 conveyance qualifies as a discharge under the CWA.

5 **A. Whether the Waters Are Meaningfully Distinct**

6 USIBWC argues that the movement of water through the flood control conveyance
7 into the river is a conveyance within a single waterway, and thus not a discharge.

8 The Supreme Court held in Miccosukee that the transfer of polluted water between
9 “two parts of the same water body,” i.e., water bodies that are not meaningfully distinct,
10 does not constitute a discharge of pollutants under the CWA because nothing is being
11 added. Miccosukee, 541 U.S. at 109. “[I]f one takes a ladle of soup from a pot, lifts it
12 above the pot, and pours it back into the pot, one has not ‘added’ soup or anything else to
13 the pot.” Id. at 110 (quoting Catskill Mountains Chapter of Trout Unlimited, Inc. v. City
14 of New York, 273 F.3d 481, 492 (2d Cir. 2001), adhered to on reconsideration, 451 F.3d
15 77 (2d Cir. 2006)).

16 The same concept applies when an improved portion of a navigable waterway flows
17 into an unimproved portion of the same waterway. In Los Angeles Cty. Flood Control
18 Dist. v. Nat. Res. Def. Council, Inc., 568 U.S. 78 (2013), the Los Angeles County Flood
19 Control District (“District”) operated a municipal separate storm sewer system, a drainage
20 system that collected, transported, and discharged storm water. The District obtained a
21 NPDES permit to discharge the storm water, which was often heavily polluted, into
22 navigable waters. Id. at 80–81. Monitoring stations for the Los Angeles and San Gabriel
23 Rivers, located in concrete channels constructed for flood-control purposes, regularly
24 detected polluted water. Accordingly, the defendants brought suit under the CWA, alleging
25 the water-quality measurements from those monitoring stations demonstrated the District
26 was violating the terms of its permit. Id. at 81. The Ninth Circuit held “that a discharge
27 of pollutants occurred under the CWA when the polluted water detected at the monitoring
28 stations ‘flowed out of the concrete channels’ and entered downstream portions of the

1 waterways lacking concrete linings. Because the District exercises control over the
2 concrete-lined portions of the rivers, the Court of Appeals held, the District is liable for the
3 discharges that, in the appellate court’s view, occur when water exits those concrete
4 channels.” Id. at 82 (internal citation omitted). The Supreme Court reversed because the
5 improved and unimproved portions were not meaningfully distinct waterways.
6 Accordingly, the Supreme Court held “the flow of water from an improved portion of a
7 navigable waterway into an unimproved portion of the very same waterway does not
8 qualify as a discharge of pollutants under the CWA.” Id. at 83.

9 First, USIBWC argues that the “New Tijuana River” does not exist outside of the
10 FAC, and instead there is only one Tijuana River, not two distinct water bodies. The New
11 Tijuana River is not referenced in the notice of intent to sue letter (“NOI”) nor the original
12 complaint filed by Plaintiffs. However, Plaintiffs allege in the FAC that there is no natural
13 or historical hydrological connection between the New Tijuana River and the Tijuana
14 River. But for the flood control conveyance, the New Tijuana River would not exist.
15 Because the court accepts as true all well-pleaded facts and construes the pleadings in the
16 light most favorable to the nonmoving party on a motion to dismiss, the court accepts the
17 existence of the New Tijuana River as a separate water body at this stage.

18 Second, USIBWC argues that there is no meaningful distinction between the New
19 Tijuana River and the Tijuana River. “Because the Tijuana River both created, and is the
20 sole source of, the ‘New Tijuana River,’ the waters of the former and the latter are in every
21 sense the same.” (Doc. No. 22 at 3.) While this argument is logical and somewhat
22 compelling, the border complicates matters. Plaintiffs argue because the polluted water in
23 the flood control conveyance comes from a body of water in Mexico, it introduces
24 pollutants into the waters of the United States for the first time, thereby adding pollutants
25 in violation of the CWA. The parties could not identify any case, and the court is aware of
26 none, in which a court addressed a CWA claim in which polluted water enters the United
27 States from another country.

28 ///

1 To deal with this issue, USIBWC argues the flood control conveyance itself is a
2 water of the United States, and thus movement of water between it and the New Tijuana
3 River is the flow of water between the same domestic waterway. This line of argument
4 focuses solely on waters in the United States. USIBWC argues the flood control
5 conveyance is a tributary of the New Tijuana River, Historical Tijuana River, Tijuana River
6 Estuary, and Pacific Ocean. See Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526,
7 533 (9th Cir. 2001) (“A stream which contributes its flow to a larger stream or other body
8 of water is a tributary.”) (internal citation and quotation omitted). In Headwaters, the Ninth
9 Circuit determined that irrigation canals were waters of the United States because they
10 were tributaries to the streams with which they exchanged water. Id.

11 Notably, the cases cited by the parties were decided within the context of summary
12 judgment, where either the factual record had been developed through discovery, Los
13 Angeles Cty. Flood Control Dist., 568 U.S. 78, or the case recognized the need for future
14 development of the record, Miccosukee, 541 U.S. at 99 (“we vacate and remand for further
15 development of the factual record”). The court finds that the factual determination of
16 whether the flood control conveyance and the New Tijuana River are meaningfully distinct,
17 which would include determining whether the flood control conveyance is a tributary under
18 the Clean Water Act, cannot be made based on the record currently before the court.

19 **B. Water Transfer Rule**

20 Even if the New Tijuana River is meaningfully distinct from the Tijuana River,
21 USIBWC argues that no NPDES permit is required under the Water Transfer Rule.

22 Certain discharges do not require a NPDES permit, such as discharges from a water
23 transfer. 40 C.F.R. § 122.3(i). This exception is called the Water Transfer Rule. “Water
24 transfer means an activity that conveys or connects waters of the United States without
25 subjecting the transferred water to intervening industrial, municipal, or commercial use.
26 This exclusion does not apply to pollutants introduced by the water transfer activity itself
27 to the water being transferred.” Id. (emphasis added). However, as above, the portion of
28 the Tijuana River in Mexico complicates the application of the Water Transfer Rule here.

1 Plaintiffs argue that because the flood control conveyance adds pollutants from
2 waters of Mexico into waters of the United States, the Water Transfer Rule does not apply.
3 In response, USIBWC reiterates its argument that the flood control conveyance is a
4 tributary, and thus a water of the United States itself. As a result, USIBWC argues, the
5 Water Transfer Rule would have to apply if the flood control conveyance and the New
6 Tijuana River were meaningfully distinct.

7 At this stage of the proceedings, the factual record has not been developed to allow
8 the court to rule on whether the flood control conveyance and New Tijuana River are
9 meaningfully distinct or whether the flood control conveyance is a tributary. Accordingly,
10 the court denies USIBWC's motion to dismiss Plaintiffs' first cause of action.

11 **III. Canyon Collectors**

12 Plaintiffs' second cause of action, against both Defendants, alleges Defendants
13 discharge pollutants from the canyon collectors in violation of the CWA and the NPDES
14 Permit for the South Bay Plant. (FAC ¶¶ 107–16.) Defendants argue the water that flows
15 past the canyon collectors are not discharges under the CWA or the NPDES Permit.

16 Despite the general prohibition on the discharge of pollutants, the CWA also
17 establishes a permit system that authorizes the discharge of some pollutants—the NPDES.
18 33 U.S.C. § 1342. Under the NPDES, the Environmental Protection Agency and approved
19 states may issue permits for the discharge of pollutants that meet certain requirements.
20 NPDES permits “place limits on the type and quantity of pollutants that can be released
21 into the Nation’s waters.” Miccosukee, 541 U.S. at 102. The NPDES Permit applies to
22 discharges from the South Bay Plant and its facilities, which include the five canyon
23 collectors.

24 **A. Discharges Under the CWA Generally**

25 As Plaintiffs allege in the FAC, when the collector inlets of the canyon collectors
26 are closed, “water in the detention basin cannot drain into the conveyance and treatment
27 system, and instead overflows the detention basin and discharges into the downstream
28 drainages.” (FAC ¶ 65.) “The downstream waters that receive canyon collector discharges

1 are either ‘navigable’ in the traditional sense of the word or are tributaries to the New
2 Tijuana River or the Historical Tijuana River, and ultimately the Estuary and the Pacific
3 Ocean.” (FAC ¶ 66.)

4 Defendants argue that the movement of water described in the FAC is not a discharge
5 that requires a NPDES permit or violates the CWA because the canyon collectors are
6 tributaries that flow into natural drainages. See Los Angeles Cty. Flood Control Dist.,
7 568 U.S. at 83 (“the flow of water from an improved portion of a navigable waterway into
8 an unimproved portion of the very same waterway does not qualify as a discharge of
9 pollutants under the CWA.”). However, as discussed above, making such a determination
10 is a factual question not appropriate for determination on a motion to dismiss.

11 **B. Discharges Under the NPDES Permit for the South Bay Plant**

12 Defendants also argue that Plaintiffs’ second cause of action fails because the
13 movement of water in the canyon collectors that is not collected for treatment does not
14 violate the terms of the NPDES Permit.

15 “Although the NPDES permitting scheme can be complex, a court’s task in
16 interpreting and enforcing an NPDES permit is not—NPDES permits are treated like any
17 other contract.” Nat. Res. Def. Council, Inc. v. Cty. of Los Angeles, 725 F.3d 1194, 1204
18 (9th Cir. 2013). The court must read the NPDES Permit as a whole and “give effect to
19 every word or term employed by the parties and reject none as meaningless or surplusage.”
20 In re Crystal Properties, Ltd., L.P., 268 F.3d 743, 748 (9th Cir. 2001).

21 The NPDES Permit prohibits the discharge of waste to any location other than the
22 South Bay Ocean Outfall. (NPDES Permit at 4.) Transboundary flows are defined as
23 “[w]astewater and other flows that cross the international border from Mexico into the
24 United States.” (NPDES Permit at A-10.) The NPDES Permit does not address
25 transboundary flows during wet weather events. For dry weather transboundary flows, the
26 NPDES Permit recognizes different categories. A Facilities Spill Event is a “discharge of
27 treated or untreated wastewater or other material to the environment that occurs from the
28 Discharger’s Facilities, including . . . the five canyon collector systems.” (NPDES Permit

1 at 15 (emphasis added).) A Flow Event Type A is a “dry weather transboundary treated or
2 untreated wastewater or other flow through a conveyance structure . . . and not diverted
3 into the canyon collector system for treatment at the” South Bay Plant. (Id. (emphasis
4 added).)

5 Defendants argue the wastewater that flows past the canyon collectors when the
6 collector exceeds capacity is a Flow Event Type A. Because the permit’s definition for a
7 Flow Event Type A does not contain the word “discharge,” whereas a Facilities Spill Event
8 does, Defendants argue it does not qualify as a discharge under the NPDES Permit.
9 However, the permit states that its prohibition on discharges of waste to any location other
10 than the South Bay Ocean Outfall “applies to any dry weather discharge of waste
11 overflowing the canyon collectors,” which Plaintiffs argue includes Flow Events Type A.
12 (NPDES Permit at F-36 (emphasis added).) Both Veolia and USIBWC argue that
13 Plaintiffs’ interpretation of the NPDES Permit at F-36 would swallow the distinction
14 between a Facilities Spill Event and a Flow Event Type A. USIBWC would have the court
15 read the phrase “any dry weather discharge of waste overflowing the canyon collectors” to
16 mean a Facilities Spill Event only.

17 At oral argument, the court directed the parties’ attention to another section of the
18 NPDES Permit that references Facilities Spill Events, Flow Events Type A, and discharges.
19 Page 26 of the NPDES Permit contains a list of notification and reporting requirements. It
20 states that “Facilities Spill Events and Flow Events Types A and B . . . shall be categorized
21 for notification and reporting purposes” into six different categories. (NPDES Permit at
22 26.) The description of each of those six categories uses the term “discharge” to describe
23 the movement of water. Because this list is for both Facilities Spill Events and Flow Events
24 Type A, it suggests that both events are discharges. The distinction between the two events
25 then would depend on where the wastewater is located in the treatment system. A Facilities
26 Spill Event includes wastewater that has been diverted into the canyon collector system,
27 whereas a Flow Event Type A is “not diverted into the canyon collector system for
28 treatment.” (NPDES Permit at 15.) Although USIBWC argues that the use of “discharge”

1 in this section of the NPDES Permit is in a generic sense, there is no evidence within the
2 permit that “discharge” is used generically in some sections but specifically in others.
3 Consequently, it appears from the NPDES Permit that a Flow Event Type A can be a
4 discharge that violates the terms of the permit.

5 Based on the court’s reading of the NPDES Permit, Plaintiffs adequately allege in
6 the FAC that Defendants discharge water from a location other than the South Bay Ocean
7 Outfall, thereby violating the terms of the NPDES Permit. Accordingly, the court denies
8 Defendants’ motions to dismiss Plaintiffs’ second cause of action.

9 **IV. RCRA Claim**

10 Plaintiffs’ third cause of action, asserted against both Defendants, is for violation of
11 the RCRA. (FAC ¶¶ 117–26.)

12 The RCRA “is a comprehensive environmental statute that governs the treatment,
13 storage, and disposal of solid and hazardous waste.” Meghrig v. KFC W., Inc., 516 U.S.
14 479, 483 (1996). Its primary purpose is “to reduce the generation of hazardous waste and
15 to ensure the proper treatment, storage, and disposal of that waste which is nonetheless
16 generated, ‘so as to minimize the present and future threat to human health and the
17 environment.’” Id. (quoting 42 U.S.C. § 6902(b)). The RCRA permits citizen suits against
18 “any person . . . who has contributed or who is contributing to the past or present handling,
19 storage, treatment, transportation, or disposal of any solid or hazardous waste which may
20 present an imminent and substantial endangerment to health or the environment.”
21 42 U.S.C. § 6972(a)(1)(B).

22 The Ninth Circuit has held that “contribution” requires “that a defendant be actively
23 involved in or have some degree of control over the waste disposal process to be liable
24 under RCRA.” Hinds Investments, L.P. v. Angioli, 654 F.3d 846, 851 (9th Cir. 2011).
25 “Handling the waste, storing it, treating it, transporting it, and disposing of it are all active
26 functions with a direct connection to the waste itself.” Id. While the parties, in their papers
27 and at oral argument, discussed causation separately from contribution, the court views
28 causation as a part of the contribution element. See California Dep’t of Toxic Substances

1 Control v. Interstate Non-Ferrous Corp., 298 F. Supp. 2d 930, 979 (E.D. Cal. 2003) (“To
2 be liable under RCRA, [a defendant’s] ‘contribution’ must be causally connected to the
3 possibility of an ‘imminent and substantial endangerment.’”). Accordingly, the court will
4 address contribution and causation together.

5 **A. Mexico’s Wastewater Collection and Treatment System**

6 Plaintiffs allege that USIBWC has violated the RCRA because it “has contributed
7 and continues to contribute to the design, construction, operation, maintenance, and
8 monitoring of the transnational wastewater collection and treatment system that originates
9 in Mexico . . . causing sewage and other solid and/or hazardous waste to enter the United
10 States and discharge from the USIBWC Flood Control Conveyance.” (FAC ¶ 121
11 (emphasis added).)

12 USIBWC argues that it cannot be held liable under the RCRA for the state of water
13 treatment systems in Mexico because it is not actively involved in and does not have any
14 degree of control over those systems. Under the 1944 Treaty, “[n]either Section [USIBWC
15 or CILA] shall assume jurisdiction or control over works located within the limits of the
16 country of the other without the express consent of the Government of the latter.” (1944
17 Treaty Art. 2.) Plaintiffs do not allege in the FAC that Mexico has granted USIBWC
18 control over the treatment plant in Tijuana. Under Minute 283, the operation and
19 maintenance of the treatment plant in Tijuana “shall be charged to Mexico,” not USIBWC.
20 (Minute 283 at 5 ¶ 3.)

21 Plaintiffs did not contest or otherwise address this argument in their opposition brief
22 or at oral argument. Therefore, the court grants USIBWC’s motion to dismiss Plaintiffs’
23 third cause of action as it relates to any treatment systems in Mexico.

24 **B. Flood Control Conveyance, Canyon Collectors, and Other Infrastructure**

25 Plaintiffs allege that Defendants “have systematically and routinely contributed to
26 the past and/or present handling, storage, treatment, transport, and/or disposal of hazardous
27 and/or solid wastes in the Tijuana River Valley . . . through operating, maintaining, and/or
28 controlling the USIBWC Flood Control Conveyance, canyon collectors, and other

1 infrastructure.” (FAC ¶ 120.) Defendants argue that they do not contribute to the pollution
2 within the meaning of the RCRA because the polluted waters originate in Mexico and flow
3 into the United States by gravity, unaided by USIBWC or Veolia.

4 **1. Flood Control Conveyance**

5 Plaintiffs argue that USIBWC handles waste in the flood control conveyance by
6 actively capturing polluted water from the Tijuana River in Mexico and transporting it
7 approximately nine-tenths of a mile for disposal at the New Tijuana River. Additionally,
8 USIBWC handles waste in the flood control conveyance by constructing berms from
9 waste-laden sediment to temporarily block the entrance. (FAC ¶ 62.) Through the
10 construction of the berms, Plaintiffs argue the USIBWC exerts some level of control over
11 the amount of wastewater that flows into and out of the flood control conveyance.

12 USIBWC asserts that Plaintiffs’ argument falsely equates USIBWC’s control over
13 its infrastructure with control over waste that passes through that infrastructure. The flood
14 control structure does not enable USIBWC to remove pollutants from the water that passes
15 through it, and USIBWC does not exert any control over waste that enters the Tijuana River
16 in Mexico and flows across the border.

17 At best, USIBWC transports waste through the flood control conveyance. However,
18 that transportation is passive in nature, merely permitting the waste from Mexico to flow
19 through the system. The FAC does not allege that USIBWC is in any way the source of
20 the wastewater that eventually travels into and through the flood control conveyance. Nor
21 does the FAC alleged that USIBWC actively handles or treats any wastewater in the flood
22 control conveyance. As a result, Plaintiffs have not adequately alleged that USIBWC plays
23 a “more active role with a more direct connection to the waste” that flows through the flood
24 control conveyance. See Hinds, 654 F.3d at 851.

25 **2. Canyon Collectors**

26 Defendants argue that neither USIBWC nor Veolia exercise control over waste that
27 flows through the canyon collectors but is not diverted to one of the drains for treatment at
28 the South Bay Plant. The South Bay Plant has a capacity limited to 25 million gallons per

1 day, and the NPDES Permit sets the effluent limit at the same. (NPDES Permit at 5.)
2 Defendants actively transport, handle, and treat the water that enters the canyon collectors’
3 drains and is pumped to the South Bay Plant. However, Defendants cannot actively control
4 wastewater beyond the limitations of the current infrastructure. As with the flood control
5 conveyance, the transportation between the border and the drainage points past the canyon
6 collectors involves passive, not active, transportation.

7 In a section of the opposition brief addressing standing, Plaintiffs themselves note
8 the “critical distinction between controlling what flows *into* the Canyon Collector systems
9 (over which Veolia has no control), and what happens to the waters *after* they are collected
10 and detained by the system.” (Doc. No. 20 at 32 (italics in original, underlined emphasis
11 added).) Wastewater that is not detained by the canyon collectors, like the wastewater that
12 is never detained in the flood control conveyance, would flow into the Tijuana River Valley
13 and make its way to the Pacific Ocean regardless of Defendants’ actions. Cf. Zands v.
14 Nelson, 797 F. Supp. 805, 810 (S.D. Cal. 1992) (“Indeed, this interpretation does no more
15 than hold defendants responsible for gasoline that would not have been brought onto the
16 property but for the presence of a gas station.”). Therefore, contribution has not been
17 alleged sufficiently to state a claim for relief under the RCRA.

18 Accordingly, the court grants Defendants’ motions to dismiss Plaintiffs’ third cause
19 of action with leave to amend.

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CONCLUSION

For the foregoing reasons, the court denies in part and grants in part Defendants' motions to dismiss. The court denies Veolia's motion to dismiss for lack of standing, denies Veolia's motion to dismiss Plaintiffs' CWA claim, and grants Veolia's motion to dismiss Plaintiffs' RCRA claim with leave to amend. The court denies USIBWC's motion to dismiss Plaintiffs' CWA claims, and grants USIBWC's motion to dismiss Plaintiffs' RCRA claim with leave to amend. Plaintiffs may file an amended complaint within 14 days of the entry of this order.

IT IS SO ORDERED.

DATED: August 29, 2018



JEFFREY T. MILLER
United States District Judge

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