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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO UNIFIED PORT
DISTRICT, a public corporation; and
CITY OF SAN DIEGO, a municipal
corporation,

Plaintiffs,

v.

MONSANTO COMPANY; SOLUTIA
INC.; and PHARMACIA
CORPORATION,

Defendants.

Case No.: 15-cv-578-WQH-AGS

ORDER

HAYES, Judge:

The matters before the Court are the Motions for Summary Judgment or, in the Alternative, Partial Summary Judgment Against Plaintiff San Diego Unified Port District filed by Defendants Monsanto Company, Solutia Inc., and Pharmacia Corporation. (ECF Nos. 422-424).

I. BACKGROUND

On March 13, 2015, Plaintiffs San Diego Unified Port District (the “Port District”) and the City of San Diego (the “City”) initiated this action by filing a Complaint. (ECF No.

1 1). On August 3, 2015, the Port District and the City filed separate First Amended
2 Complaints against Defendants Monsanto Company, Solutia Inc., and Pharmacia
3 Corporation (collectively, “Monsanto”). (ECF Nos. 24, 25). In its First Amended
4 Complaint (“FAC”), the Port District brings claims against Monsanto for public nuisance,
5 equitable indemnity, and purpresture relating to the alleged contamination of San Diego
6 Bay (the “Bay”) from polychlorinated biphenyls (“PCBs”) manufactured by Monsanto.
7 (ECF No. 25). The Port District alleges that Monsanto, the sole manufacturer of PCBs in
8 the United States from 1935 to 1979, knew PCBs presented a health risk and “were causing
9 widespread contamination of the environment.” (*Id.* ¶ 40). The Port District alleges that
10 Monsanto promoted the use and sale of PCB compounds despite this knowledge and
11 “instructed its customers to dispose of PCB containing material in local landfills, knowing
12 that landfills were not suitable for PCB contaminated waste.” (*Id.* ¶ 51). The Port District
13 alleges that Monsanto’s instructions for improper disposal of PCBs resulted in pollution of
14 the Bay.

15 On September 28, 2016, the Court issued an Order granting in part and denying in
16 part Monsanto’s Motion to Dismiss the Port District’s FAC. (ECF No. 81). The Court
17 granted the Motion to Dismiss the Port District’s equitable indemnity claim and denied the
18 Motion to Dismiss the Port District’s purpresture and public nuisance claims.

19 The parties engaged in fact and expert discovery. On August 2, 2019, Monsanto filed
20 Motions for Summary Judgment against the Port District on the Port District’s request for
21 an abatement remedy (ECF No. 422), the Port District’s purpresture claim (ECF No. 423),
22 and the Port District’s public nuisance claim (ECF No. 424).

23 On October 1, 2019, the Port District filed Oppositions to Monsanto’s Motions for
24 Summary Judgment. (ECF Nos. 450, 452, 453). The Port District also filed a Motion to
25 Strike. (ECF No. 451).

26 On October 14, 2019, the Port District filed a Notice of Supplemental Authority in
27 support of its Oppositions to Monsanto’s Motions for Summary Judgment. (ECF No. 454).
28

1 On October 18, 2019, Monsanto filed Replies in support of its Motions for Summary
2 Judgment (ECF Nos. 457, 459, 460), an Opposition to the Port District’s Motion to Strike
3 (ECF No. 461), a Motion to Strike (ECF No. 462), and a Response to the Port District’s
4 Notice of Supplemental Authority (ECF No. 463).

5 On October 21, 2019, Monsanto filed an Amended Reply in support of its Motion
6 for Summary Judgment (Abatement). (ECF No. 465).

7 On October 25, 2019, the Port District filed an Opposition to Monsanto’s Motion to
8 Strike. (ECF No. 466). On October 31, 2019, Monsanto filed a Reply in support of its
9 Motion to Strike. (ECF No. 467).

10 On December 6, 2019, the Court heard oral argument on Monsanto’s Motions for
11 Summary Judgment.

12 On January 27, 2020, Monsanto filed a Notice of Supplemental Authority in Support
13 of its Motion for Summary Judgment (Abatement). (ECF No. 478). On February 10, 2020,
14 the Port District filed a Response to Monsanto’s Notice of Supplemental Authority. (ECF
15 No. 480)

16 **II. CONTENTIONS**

17 Monsanto moves for summary judgment in its favor on the Port District’s public
18 nuisance claim, purpresture claim, and request for an abatement remedy. Monsanto
19 contends that there is an absence of evidence to support the public nuisance claim.
20 Monsanto contends that the Port District identified three public-use impairments to the
21 Bay: 1) the Campbell Shipyard sediment cap; 2) the Convair Lagoon sediment cap; and 3)
22 the 2013 Office of Environmental Health Hazard Assessment (“OEHHA”) Fish
23 Consumption Advisory. Monsanto contends that the Port District failed to identify facts
24 that demonstrate the sediment caps or the Fish Consumption Advisory impair the public’s
25 use of the Bay. Monsanto contends that that the Port District may not recover damages on
26 its purpresture claim because abatement is the only available remedy in this representative
27 public nuisance action. Monsanto further contends that there is an absence of evidence to
28 support the purpresture claim. Monsanto contends the Port District’s request for an

1 abatement fund is displaced by the Porter-Cologne Water Quality Control Act (the “Porter-
2 Cologne Act”). Monsanto contends that the request for an abatement fund remedy is not
3 ripe.

4 The Port District contends that admissible evidence demonstrates that Monsanto
5 instructed users in the improper disposal of PCBs, causing pollution of Bay water and
6 contamination of Bay fish. The Port District contends that this pollution constitutes a public
7 nuisance under California law. The Port District contends that the Convair Lagoon and
8 Campbell Shipyard sediment caps were erected as remedial measures designed to limit
9 exposure to PCBs, and the caps obstruct boating in the Bay. The Port District contends that
10 the Fish Consumption Advisory has led to a decline in fishing and that PCBs in fish tissue
11 pose a threat to human health. The Port District contends it may recover damages on its
12 purpresture claim as a title holder in trust of Bay lands. The Port District further contends
13 that admissible evidence demonstrates that PCBs have polluted the Bay and constitute a
14 purpresture. The Port District contends that the Porter-Cologne Act does not displace the
15 Court’s ability to order an abatement remedy. The Port District contends that injury to the
16 public has already occurred, and its claims are ripe for adjudication.

17 **III. FACTS**

18 From the 1930s onward, PCBs were released into the environment from Monsanto
19 and its customers. PCBs are synthetic chemical compounds that were produced and used
20 during the twentieth century for “hundreds of industrial and commercial applications.”
21 (Environmental Protection Agency (“EPA”) Website, [http://www.epa.gov/pcbs/learn-
22 about-polychlorinated-biphenyls-pcbs#healtheffects](http://www.epa.gov/pcbs/learn-about-polychlorinated-biphenyls-pcbs#healtheffects), Ex. 17, Declaration of Kenneth O.
23 Corley in Support of Port District’s Opposition to Monsanto’s Motion for Summary
24 Judgment (Public Nuisance) (“Corley Decl.”), ECF No. 450-24 at 2). According to the
25 EPA’s 1976 Polychlorinated Biphenyl-Containing Wastes Disposal Procedures (“1976
26 PCB Disposal Procedures”), PCBs were originally manufactured for “closed uses” as
27 cooling and insulating fluids in heavy-duty electrical equipment, including capacitors and
28 transformers. (Ex. 25, Corley Decl., ECF No. 450-35 at 3). PCBs were also manufactured

1 for “open uses” in paints, caulks, adhesives, coatings, plasticizers, pesticide extenders, and
2 carbonless copy paper. (*Id.*; Port District’s Nuisance Facts, ECF No. 450-1 ¶ 31). The
3 EPA’s 1976 PCB Disposal Procedures stated that “[t]he sole producer of PCBs in the
4 United States is the Monsanto Company.” (Ex. 25, Corley Decl., ECF No. 450-35 at 3).
5 From 1927 to 1979, Monsanto produced and sold more than 1.4 billion pounds of PCBs,
6 approximately 99% of the PCBs used in the United States. (Port District’s Nuisance Facts,
7 ECF No. 450-1 ¶¶ 27-28).

8 In a July 22, 1971, Monsanto memorandum, “P. G. Benignus” stated that
9 Monsanto’s “Askarel Inspection and Maintenance Guide” advised customers to discard the
10 PCB product by “dumping or burying where it will not contaminate a water supply.” (Ex.
11 64, Corley Decl., ECF No. 450-74 at 2). P. G. Benignus stated:

12 Since the advent of the PCB pollution problem and as we now have an
13 incinerator, [the discard instructions] [are] no longer adequate.

14 Please change [the discard instructions] to read, “Due to possible
15 environmental pollution by PCB materials, scrap askarel must not be allowed
16 to contaminate a water supply. The material needs to be destroyed by proper
17 incineration at 2,000°F including facilities to neutralize hydrogen chloride
18 gas. The user may ship the scrap to Monsanto Co., W. G. Krummrich Plant,
19 Sauget, Illinois, Attention Supervisor Dept. A-245. It will be incinerated
20 properly, at a charge of 3 cents a pound.”

19 (*Id.*).

20 The EPA’s 1976 PCB Disposal Procedures stated that “[t]he chemical properties that
21 make PCBs desirable industrial materials”—their stability and nondegradability—“also
22 make them highly persistent in the environment.” (Ex. 25, Corley Decl., ECF No. 450-35
23 at 3). The EPA advised that PCBs cannot be “destroyed by usual waste treatment methods”
24 and should be disposed of by “high temperature incineration” in a specialized incinerator.
25 (*Id.* at 4). The EPA stated that if PCBs cannot be disposed of by proper incineration, they
26 may be disposed of in a “secure chemical waste landfill.” (*Id.*). The EPA advised:

27 Wastes containing PCBs should not be disposed of with other mixed wastes
28 in a sanitary landfill Characteristics of transport of PCBs through the soil

1 are not definitively established. The interaction with other decomposing
2 wastes is not well understood. Some landfills may contain or accept wastes
3 which could cause the release of PCBs.

4 (*Id.*). The EPA stated that after concern arose in 1970 about the persistence of PCBs in the
5 environment and potential health risks, Monsanto “voluntarily restricted domestic sales of
6 PCBs to use in transformers and capacitors (closed systems).” (*Id.* at 3). In 1979,
7 Congress passed the Toxic Substances Control Act, 15 U.S.C. §§ 2601 *et seq.*, banning the
8 manufacture of PCBs. (*Id.* at 2).

9 **a. Regional Board Cleanup and Abatement Orders**

10 PCBs are present in sediment, water, and fish in the Bay. On October 17, 1986, the
11 San Diego Regional Water Quality Control Board (the “Regional Board”) issued Cleanup
12 and Abatement Order No. 86-92 to Teledyne Ryan Aeronautical for “discharge into the
13 Convair Lagoon portion of San Diego Bay.” (Ex. 40, Omnibus Declaration of Robert M.
14 Howard in Support of Defendants’ Motions for Summary Judgment (“Howard Decl.”),
15 ECF No. 425-45 at 3). The Regional Board determined that Teledyne Ryan Aeronautical
16 “use[d] electrical transformers and capacitors which use fluids containing polychlorinated
17 biphenyls (PCBs).” (*Id.* at 2). The Regional Board stated that “[s]torm runoff from the
18 Teledyne Ryan Aeronautical facility. . . discharges into the San Diego Bay east of Convair
19 Lagoon,” causing “elevated levels of PCBs in the San Diego Bay sediments” and
20 concentrations of PCBs in mussel tissue at the “highest ever measured in the history of the
21 State Mussel Watch Program.” (*Id.* at 3-4). The Regional Board determined that the PCBs
22 in Convair Lagoon impair beneficial uses and create “a condition of pollution.” (*Id.* at 5).
23 Specifically, the Regional Board stated that “the San Diego County Health Department has
24 quarantined the Convair Lagoon portion of San Diego Bay to prevent the collection of
25 shellfish for human consumption . . . result[ing] in the impairment of the shellfish
26 harvesting beneficial use of the [Bay].” (*Id.*). The Regional Board further found:

27 Discharges of PCBs into San Diego Bay also threaten to impair other
28 beneficial uses of the waters in San Diego Bay. These include Water Contact
Recreation, Ocean Commercial and Sport Fishing, Saline Water Habitat, and

1 Marine Habitat. The presence of PCBs in the environment at certain
2 concentrations have been found to cause toxic effects in man and animals,
3 particularly if repeated exposures occur.

4 (*Id.*). The Regional Board considered cleanup and abatement options including dredging
5 and capping. The Regional Board explained that the cleanup was “not based on any finding
6 that all possible effects related to PCB contamination will be eliminated.” (Addendum No.
7 4 to CAO No. 86-92 (Jun. 1, 1992), Ex. 40, Howard Decl., ECF No. 425-45 at 20).
8 However, cleanup would “likely result in a significant reduction in the amount of PCBs
9 available to shellfish and other biota from PCB contaminated sediment.” (*Id.* at 21). “The
10 Port was the permitting authority [for remediation] under the California Coastal Act and
11 responsible for conducting an environmental review under CEQA.” (Monsanto’s Nuisance
12 Facts, ECF No. 424-2 ¶ 77). “At the end of the environmental review process, the Port
13 adopted CEQA findings approving a sand cap covered with eelgrass” at the Convair
14 Lagoon site. (*Id.* ¶ 79).

15 On May 24, 1995, the Regional Board issued Cleanup and Abatement Order No. 95-
16 21 to Campbell Industries for the Campbell Shipyard site, leased from the Port District.
17 The Regional Board determined that Campbell Industries conducted industrial processes
18 “over San Diego Bay waters or very close to the waterfront.” (Ex. 41, Howard Decl., ECF
19 No. 425-46 at 5). The Regional Board stated that “ship hydraulic system and repair and
20 paint application activities” caused PCBs to enter the Bay. (*Id.* at 24). As a “direct result”
21 of Campbell Industries’ activities, the Regional Board found elevated sediment
22 concentrations of copper, zinc, lead, tributyltin, high molecular weight polynuclear
23 aromatic hydrocarbons, total petroleum hydrocarbons, and PCBs. (*Id.* at 9, 24). “The Port
24 served as the CEQA lead agency for the remediation at Campbell Shipyard, and it
25 evaluated, designed, funded, approved, permitted, and constructed the Campbell Cap.”
26 (Monsanto’s Nuisance Facts, ECF No. 424-2 ¶ 63). “In 2004, the Port issued to itself a
27 Coastal Development Permit to construct the Campbell cap.” (*Id.* ¶ 69).

1 In 2006, and each following year, the Regional Board has “listed the Bay as
2 ‘impaired’ for PCBs under Clean Water Act Section 303(d).” (Monsanto’s Purpresture
3 Facts, ECF No. 423-2 ¶ 41; Regional Board 2016 Clean Water Act Sections 305(B) and
4 303(D) Integrated Report, Ex. 6, Corley Decl., ECF No. 450-12 at 39).

5 On October 30, 2015, the Regional Board issued Cleanup and Abatement Order No.
6 R9-2015-001B to Ryan Aeronautical Company and its successors for PCB wastes
7 discharged from storm water conveyance systems (“SWCS”) to the Bay. The Regional
8 Board found that “[s]ome of the highest concentrations of total PCBs found in San Diego
9 Bay sediment have been found adjacent to the 30-inch SWCS outfall.” (Ex. 11, Corley
10 Decl., ECF No. 450-17 at 4). The Regional Board stated that the SWCS outfall “is likely
11 one of the sources of the PCBs found in fish tissue in San Diego Bay.” (*Id.*). The Regional
12 Board explained that “PCBs can cause cancer and other health effects in humans” and
13 ordered Ryan Aeronautical Company to remediate. (*Id.* at 2).

14 On April 4, 2017, the Regional Board issued Cleanup and Abatement Order No. R9-
15 2017-0021 to Lockheed Martin Corporation for waste discharged to the East Basin of the
16 Bay. The Regional Board determined that “[a] transformer existed adjacent to the
17 laboratory building that could have leaked fluids containing PCBs.” (Ex. 9, Corley Decl.,
18 ECF No. 450-15 at 4). The Regional Board stated that “PCBs and mercury were discharged
19 from the former Tow Basin and Railway facilities to the East Basin, contributing to the
20 unhealthy levels of these pollutants in San Diego Bay fish tissue.” (*Id.* at 6-7). The Regional
21 Board found:

22 The concentrations of pollutants in the sediments of the East Basin of San
23 Diego Bay are at levels that may have an impact on human health and the
24 benthic community, and may have an impact on aquatic-dependent wildlife,
25 thus creating a condition of pollution and nuisance in waters of the State.

26 (*Id.* at 7).

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1 **b. Fish Consumption Advisories**

2 According to the EPA, PCBs enter the environment through disposal of PCBs into
3 poorly maintained hazardous waste sites, illegal or improper dumping of PCB wastes, leaks
4 or releases from electrical transformers containing PCBs, disposal of PCBs into landfills
5 not designed to handle hazardous waste, and burning PCB wastes in industrial incinerators.
6 (EPA Website, Ex. 17, Corley Decl., ECF No. 450-24 at 3). Once released into the
7 environment, PCBs bind to soil and sediment and bioaccumulate in fish and wildlife. (*Id.*
8 at 9). The Surface Water Ambient Monitoring Program’s (“SWAMP”) 2009-2010
9 Summary Report on Contaminants in Fish from the California Coast, published in 2012,
10 concluded that PCBs in the Bay have “reached concentrations in fish tissue that pose
11 potential health concerns PCBs may cause cancer, damage the liver, digestive tract,
12 and nerves; and affect development, reproduction, and the immune system.” (Ex. 5, ECF
13 No. 450-11 at 12). SWAMP reported in 2012 that PCBs in fish tissue cause “significant
14 risks” to fish-eating birds, in addition to the effects on humans. (*Id.* at 83).

15 In 2013, OEHAA published a Fish Consumption Advisory for fish from the Bay due
16 to mercury and PCBs. (Ex. 1e, Corley Decl., ECF No. 450-7 at 2). The Fish Consumption
17 Advisory provides:

18 Several programs collected fish from San Diego Bay and analyzed them for
19 chemicals of potential concern for human health. The Office of Environmental
20 Health Hazard Assessment (OEHHA) evaluated the results of these studies
21 and found mercury and PCBs in some fish species at levels of concern for fish
22 consumers. OEHHA is providing these guidelines to help people choose
23 which types of fish are safer to eat.

24 (*Id.*). The Fish Consumption Advisory states that PCBs enter fish through the food they eat
25 and are “passed up the food chain.” (*Id.*). “Because [PCBs] do not break down easily, they
26 stay in the environment for a long time.” (*Id.*). The Fish Consumption Advisory warns that
27 “PCBs affect many body functions resulting in a variety of health problems, including
28 effects on the nervous system.” (*Id.*). The Fish Consumption Advisory warns that “PCBs
can cause cancer.” (*Id.* at 5).

1 The Fish Consumption Advisory states that women 45 years of age and under and
2 children between the ages of 1 and 17 should never consume barred sand bass, spotted sand
3 bass, shiner perch, topsmelt, yellowfin croaker, leopard shark, or gray smoothhound shark
4 from the Bay. (*Id.* at 4). Women 45 and younger and children 1 to 17 may consume either
5 two servings per week of diamond turbot, spotted turbot, black perch, pile surfperch,
6 rainbow surfperch, or California lizardfish, or one serving per week of Pacific chub
7 mackerel, round stingray, or shovelnose guitarfish from the Bay. (*Id.*). “Women over 45
8 years and men can safely eat more fish.” (*Id.* at 5). Women over 45 and men should never
9 consume shiner perch or topsmelt from the Bay. (*Id.*). Women over 45 and men may
10 consume either two servings per week of diamond turbot, spotted turbot, black perch, pile
11 surfperch, rainbow surfperch, California lizardfish, round stingray, or shovelnose
12 guitarfish, or one serving per week of spotted sand bass, barred sand bass, yellowfin
13 croaker, pacific chub mackerel, leopard shark, or gray smoothhound shark from the Bay.
14 (*Id.*). “PCBs are in the fat and skin of the fish.” (*Id.* at 4-5). People should “[e]at only the
15 skinless fillet” and “[r]emove and throw away the skin before cooking.” (*Id.*).

16 In 2017, the San Diego Water Board concluded that PCBs are “present at levels of
17 concern in fish from the San Diego Bay.” (February 2017 Monitoring & Assessment, Ex.
18 75, Corley Decl., ECF No. 450-85 at 3). In 2018, OEHAA amended the Fish Consumption
19 Advisory “because additional mercury and PCB data became available.” (Ex. 1b, Corley
20 Decl., ECF No. 450-4 at 2). The amended Fish Consumption Advisory states that, “[w]hile
21 banned in the 1970s, [PCBs] persist for many years in the environment and are still found
22 in the air and water from spills, leaks, and improper disposal.” (*Id.*). The amended Fish
23 Consumption Advisory adds Pacific chub mackerel to the list of Bay fish that women 45
24 and under and children 1 to 17 should never consume. (Ex. 1a, Corley Decl., ECF No. 450-
25 3 at 2). The amended Fish Consumption Advisory recommends women 45 and under and
26 children 1 to 17 limit consumption of black perch to one serving per week, instead of the
27 two servings per week in the 2013 Fish Consumption Advisory. (*Id.*). The amended Fish
28 Consumption Advisory relaxes the limitation on pile surfperch and rainbow surfperch for

1 women over 45 and men, stating that they may consume up to seven servings per week.
2 (*Id.*). The amended Fish Consumption Advisory states that “[e]ating fish with higher levels
3 of chemicals like mercury or PCBs may cause health problems in children and adults.”
4 (*Id.*). The amended Fish Consumption Advisory states that “PCBs can build up to very
5 high levels in the skin, fat, and some internal organs of fish.” (Ex. 1b, Corley Decl., ECF
6 No. 450-4 at 2). According to the 2018 OEHHA Health Advisory and Guidelines for Eating
7 Fish from San Diego Bay, PCBs are a “potential concern for people who eat fish because
8 of their toxicity and their ability to accumulate in fish tissue.” (Ex. 1d, Corley Decl., ECF
9 No. 450-6 at 12).

10 The EPA states that “PCBs are one of the most widely studied environmental
11 contaminants. Many studies in animals and human populations have been performed to
12 assess the potential carcinogenicity of PCBs.” (EPA Website, Ex. 17, Corley Decl., ECF
13 No. 450-24 at 8). The EPA states that PCBs “cause a variety of adverse health effects.” (*Id.*
14 at 7). The EPA states that “[s]tudies in animals provide conclusive evidence that PCBs
15 cause cancer.” (*Id.* at 8). “[T]he data strongly suggest that PCBs are probable human
16 carcinogens.” (*Id.*). The EPA states that studies in animals and humans “support evidence
17 for potential [] non-carcinogenic effects of PCBs,” including serious “effects on the
18 immune system, reproductive system, nervous system, endocrine system and other health
19 effects.” (*Id.* at 7). The EPA states that “the types of PCBs likely to be bioaccumulated in
20 fish and bound to sediments are the most carcinogenic PCB mixtures.” (*Id.* at 9). The EPA
21 states that “people who ingest PCB-contaminated fish or other animal products and contact
22 PCB-contaminated sediment may be exposed to PCB mixtures that are even more toxic
23 than the PCB mixtures contacted by workers and released into the environment.” (*Id.*).

24 **c. Port District’s Jurisdiction Over Bay Lands**

25 Prior to January 1, 2020, the Port District held title in trust to 29% of the water acres
26 in the Bay. The State of California held title to 61% of the water acres in the Bay, and the
27 military held title to the additional 10%. The “State of California and Fish and Wildlife
28

1 Service have primary authority over fish kills and fish habitat.” (Monsanto’s Nuisance
2 Facts, ECF No. 424-2 ¶ 103).

3 On September 27, 2019, Governor Gavin Newsom signed Senate Bill No. 507 (“S.B.
4 507”). S.B. 507, which became effective on January 1, 2020, “add[s] Section 5.7 to the San
5 Diego Unified Port District Act.” (S.B. 507 Legislative Counsel’s Digest, Ex. A, Port
6 District’s Supplemental Authority, ECF No. 454-1 at 2). Section 5.7 provides, in relevant
7 part:

8 There is hereby granted in trust to the district all the right, title, and interest of
9 the State of California, held by the state by virtue of its sovereignty, in and to
10 all those remaining tidelands and submerged lands not previously granted,
11 whether filled or unfilled, within the San Diego Bay lying northerly of the
12 following described line:

13 Beginning at NGS monument Road 2 (PID DC1690), thence S 68°07’54” W
14 8,621.00 feet to NGS monument North Island NAS Shoran Tower (PID
15 DC1727)

16 (*Id.* at 4). The Port District is now the majority title holder of Bay lands.

17 **IV. LEGAL STANDARD**

18 “A party may move for summary judgment, identifying each claim or defense—or
19 the part of each claim or defense—on which summary judgment is sought. The court shall
20 grant summary judgment if the movant shows that there is no genuine dispute as to any
21 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
22 56(a). A material fact is one that is relevant to an element of a claim or defense and whose
23 existence might affect the outcome of the suit. *See Matsushita Elec. Indus. Co., Ltd. v.*
24 *Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The materiality of a fact is determined
25 by the substantive law governing the claim or defense. *See Anderson v. Liberty Lobby, Inc.*,
26 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

27 The moving party has the initial burden of demonstrating that summary judgment is
28 proper. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970). Where the party moving
for summary judgment does not bear the burden of proof at trial, “the burden on the moving
party may be discharged by ‘showing’—that is, pointing out to the district court—that there

1 is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at
2 325; see *United Steelworkers v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542-43 (9th Cir.
3 1989) ("[O]n an issue where the plaintiff has the burden of proof, the defendant may move
4 for summary judgment by pointing to the absence of facts to support the plaintiff's claim.
5 The defendant is not required to produce evidence showing the absence of a genuine issue
6 of material fact with respect to an issue where the plaintiff has the burden of proof. Nor
7 does Rule 56(c) require that the moving party support its motion with affidavits or other
8 similar materials negating the nonmoving party's claim." (citations omitted)).

9 If the moving party meets the initial burden, the burden shifts to the opposing party
10 to show that summary judgment is not appropriate. *Anderson*, 477 U.S. at 256; *Celotex*,
11 477 U.S. at 322, 324. The nonmoving party cannot defeat summary judgment merely by
12 demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita*,
13 475 U.S. at 586; see also *Anderson*, 477 U.S. at 252 ("The mere existence of a scintilla of
14 evidence in support of the [nonmoving party's] position will be insufficient."). The
15 nonmoving party must "go beyond the pleadings and by her own affidavits, or by the
16 depositions, answers to interrogatories, and admissions on file, designate specific facts
17 showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (quotations
18 omitted). The nonmoving party's evidence is to be believed, and all justifiable inferences
19 are to be drawn in its favor. *Anderson*, 477 U.S. at 256.

20 **V. MOTION FOR SUMMARY JUDGMENT – PUBLIC NUISANCE**

21 Monsanto moves for summary judgment on the Port District's public nuisance claim.
22 Monsanto contends that the Port District lacks standing and has failed "to demonstrate
23 through discovery a genuine issue of material fact supporting its claim that a public
24 nuisance from PCBs exists in San Diego Bay." (ECF No. 424 at 2).

25 The Port District contends that PCBs have polluted the Bay and constitute a public
26 nuisance. The Port District contends that it has standing to pursue this representative public
27 nuisance action.

28 ///

1 **a. Public Nuisance in the Bay**

2 Monsanto contends that the Port District identified

3 no more than three alleged public-use impairments from PCBs in San Diego
4 Bay: (1) the sediment cap at Convair Lagoon . . . ; (2) the sediment cap at the
5 former Campbell shipyard . . . ; and (3) a 2013 limited fish advisory issued by
6 California’s Office of Environmental Health Hazard Assessment (“OEHHA”)

7

8 (ECF No. 424-1 at 4-5). Monsanto contends that the sediment caps, as a matter of law,
9 cannot be a public nuisance because the Port District “expressly approved” the caps. (*Id.*
10 at 24). Monsanto asserts that “fish populations and fishing in the Bay are thriving, and the
11 Port cannot show any ‘substantial harm’ from the 2013 OEHHA fish advisory.” (*Id.* at 25).
12 Monsanto asserts that the Fish Consumption Advisory is not a nuisance per se because “no
13 statute ‘expressly defines’ the Port’s alleged harm—the existence of OEHHA’s 2013
14 advisory based on the lawful sale of a useful product ending over 40 years ago—to be a
15 public nuisance.” (*Id.* at 28).

16 The Port District contends that pollution of the water, sediment, and fish in the Bay
17 constitutes a public nuisance caused by Monsanto’s promotion of PCBs and instructions
18 for improper disposal. The Port District contends that there is significant evidence that
19 PCBs in the Bay cause health risks to humans, ecological risks to fish and birds, and
20 substantial interference with “the public’s free and comfortable use of the Bay.” (ECF No.
21 450 at 21). The Port District asserts that the sediment caps and the Fish Consumption
22 Advisory are “example[s] of the type of harm Monsanto’s PCBs cause in the Bay.” (*Id.* at
23 21). The Port District asserts that consumption of fish from the Bay poses a threat to human
24 health. The Port District further asserts that fish consumption advisories are “*de facto*
25 harm” and “lead to a decline in the benefits associated with recreational fishing, as anglers
26 forgo fishing entirely, choose alternate sites, decline consumption of fish caught, and/or
27 enjoy the fishing experience less.” (*Id.* at 28).

28 Under section 3479 of the California Civil Code, a nuisance is

[a]nything which is injurious to health, including, but not limited to, the illegal

1 sale of controlled substances, or is indecent or offensive to the senses, or an
 2 obstruction to the free use of property, so as to interfere with the comfortable
 3 enjoyment of life or property, or unlawfully obstructs the free passage or use,
 4 in the customary manner, of any navigable lake, or river, bay, stream, canal,
 or basin, or any public park, square, street, or highway

5 “A public nuisance is one which affects at the same time an entire community or
 6 neighborhood, or any considerable number of persons, although the extent of the
 7 annoyance or damage inflicted upon individuals may be unequal.” Cal. Civ. Code § 3480.
 8 The interference “must be both *substantial* and *unreasonable*.” *People ex rel. Gallo v.*
 9 *Acuna*, 14 Cal. 4th 1090, 1105 (1997). A substantial interference is “a ‘real and appreciable
 10 invasion of the plaintiff’s interests,’ one that is ‘definitely offensive, seriously annoying or
 11 intolerable.’” *Id.* (quoting Rest. 2d Torts § 821f, coms. c & d, pp. 105-06). “The
 12 unreasonableness of a given interference represents a judgment reached by comparing the
 13 social utility of an activity against the gravity of the harm it inflicts” *Id.* The question
 14 is “whether reasonable persons generally, looking at the whole situation impartially and
 15 objectively, would consider it unreasonable.” *San Diego Gas & Electric Co. v. Superior*
 16 *Court*, 13 Cal. 4th 893, 938 (1996) (quotation omitted).

17 Civil Code section 3479 sets forth the acts which constitute a nuisance in the
 18 present tense. Under its terms, anything that “is” injurious to health, indecent
 19 or offensive to the senses, or an obstruction to the free use of property is
 20 defined as a nuisance. Despite the use of the present tense, . . . an affected
 21 party need not wait until actual injury occurs before bringing an action to
 22 enjoin a nuisance.

23
 24
 25
 26 *Beck Dev. Co. v. S. Pac. Transp. Co.*, 44 Cal. App. 4th 1160, 1213 (1996).¹

27
 28 ¹ The plaintiff in a public nuisance claim is required to prove causation—that “the defendant created or assisted in the creation of the nuisance.” *City of Modesto Redev. Agency v. Superior Court*, 119 Cal. App. 4th 28, 38 (2004). Monsanto does not move for summary judgment on the Port District’s public nuisance claim based on a lack of evidence to support causation. Accordingly, the Court does not address causation in this Order.

1 “Pollution of water constitutes a public nuisance” under California law. *Newhall*
2 *Land & Farming Co. v. Superior Court*, 19 Cal. App. 4th 334, 341 (1993) (citing *Carter v.*
3 *Chotiner*, 210 Cal. 288, 291 (1930) (“There is no doubt that pollution of water constitutes
4 a nuisance and in a proper case will be enjoined.”); *Selma Pressure Treating Co. v. Osmose*
5 *Wood Preserving Co.*, 221 Cal. App. 3d 1601, 1619 (1990)). “In fact, water pollution
6 occurring as a result of treatment or discharge of wastes in violation of Water Code section
7 13000 et seq. is a public nuisance per se.” *Id.* (citing Cal. Wat. Code § 13050(m) (defining
8 public nuisance)).

9 In this case, the Regional Board has determined that the Bay is polluted by PCBs
10 under the California Water Code. In 1986, the Regional Board found “elevated levels of
11 PCBs in the San Diego Bay sediments” at Convair Lagoon and “lipid weight levels of
12 PCB’s in mussel tissue planted at Convair Lagoon . . . [at] the highest ever measured . . .
13 .” (CAO No. 86-92, Ex. 40, Howard Decl., ECF No. 425-45 at 4). The Regional Board
14 found that the discharge of PCBs into Convair Lagoon from the Teledyne Ryan
15 Aeronautical property impaired shellfish harvesting and threatened the public’s health and
16 use of the Bay, “creat[ing] a condition of pollution, as defined by the California Water
17 Code.” (*Id.* at 5; *see* Cal. Wat. Code § 13050 (“(1) ‘Pollution’ means an alteration of the
18 quality of the waters of the state by waste to a degree which unreasonably affects either of
19 the following: (A) The waters for beneficial uses. (B) Facilities which serve these
20 beneficial uses. (2) ‘Pollution’ may include ‘contamination.’”); *see also* Cal. Wat. Code §
21 13050(k) (“‘Contamination’ means an impairment of the quality of the waters of the state
22 by waste to a degree which creates a hazard to the public health through poisoning or
23 through the spread of disease. ‘Contamination’ includes any equivalent effect resulting
24 from the disposal of waste, whether or not waters of the state are affected.”)). In 1995, the
25 Regional Board determined that “[c]oncentrations of PCBs in bay sediments are above
26 background levels along the Campbell shoreline.” (CAO No. 95-21, Ex. 41, Howard Decl.,
27 ECF No. 425-46 at 24). Based on the elevated levels of PCBs and other chemicals, the
28 Regional Board found that “[t]he contaminated bay sediments present at Campbell

1 Shipyards have caused or threaten to cause a condition of pollution as described in
2 California Water Code Section 13050 . . . [and] may adversely affect San Diego Bay
3 beneficial uses.” (*Id.* at 24-25).

4 In 2015, the Regional Board determined that “[s]ome of the highest concentrations
5 of total PCBs found in San Diego Bay sediment have been found adjacent to the 30-inch
6 SWCS outfall that drains a portion of the former TDY facility.” (CAO No. R9-2015-001B
7 Ex. 11, Corley Decl., ECF No. 450-17 at 4). The Regional Board determined that the “PCB-
8 laden sediment discharged from the former TDY facility . . . is likely one of the sources of
9 the PCBs found in fish tissue in San Diego Bay,” which exists at “unhealthy levels.” (*Id.*).
10 In 2017, the Regional Board determined that “PCBs and mercury were discharged from
11 the former Tow Basin and Railway facilities to the East Basin, contributing to unhealthy
12 levels of these pollutants in San Diego Bay fish tissue.” (CAO No. R9-2017-0021, Ex. 9,
13 Corley Decl., ECF No. 450-15 at 6-7). The Regional Board stated:

14 The concentrations of pollutants in the sediments of the East Basin of San
15 Diego Bay are at levels that may have an impact on human health and the
16 benthic community, and may have an impact on aquatic-dependent wildlife,
thus creating a condition of pollution and nuisance in waters of the State.

17 (*Id.* at 7). In all cases, the Regional Board ordered the dischargers of the PCBs to study and
18 take remedial measures to reduce the effects of PCBs at certain sites in the Bay, including
19 constructing sediment caps.

20 Based on the Regional Board’s Cleanup and Abatement Orders, the Port District
21 placed sediment caps at Campbell Shipyard and Convair Lagoon to “isolat[e] [] pollutants
22 in existing sediments” and protect against “bioturbation.” (*See* Regional Board Order No.
23 R9-2004-0295 (Oct. 13, 2004), Ex. 10, Corley Decl., ECF No. 450-16 at 5). The sediment
24 caps obstruct the Bay at Convair Lagoon and Campbell Shipyard; boats cannot anchor
25 where caps are present, and fishing is not allowed. (*See* Exhibits to Declaration of Paul
26 Brown, Ex. 22, Corley Decl., ECF No. 450-29 at 5-8 (photographs of buoys at cap locations
27 stating, “DO NOT ANCHOR,” “NO FISHING ALLOWED,” and “DO NOT DISTURB .
28

1 . . . SUBMERGED OBSTRUCTIONS ARE PRESENT”)). Because the Port District
2 expressly authorized construction of the sediment caps, the caps cannot be deemed a
3 nuisance. *See* Cal. Civ. Code § 3482 (“Nothing which is done or maintained under the
4 express authority of a statute can be deemed a nuisance.”); *Carson Harbor Vill., Ltd. v.*
5 *Unocal Corp.*, 270 F.3d 863, 888 (9th Cir. 2010) (applying section 3482 to a water quality
6 board permit). However, the nuisance in this case is the alleged pollution of the Bay, not
7 the sediment caps.

8 The Port District has come forward with evidence that the Bay is polluted or
9 contaminated by PCBs. The Bay is listed as “‘impaired’ for PCBs under Clean Water Act
10 Section 303(d).” (Monsanto’s Purpresture Facts, ECF No. 423-2 ¶ 41; Regional Board
11 2016 Clean Water Act Sections 305(B) and 303(D) Integrated Report, Ex. 6, Corley Decl.,
12 ECF No. 450-12 at 39). SWAMP published a report in 2012 that concluded that the Bay
13 has one of the “most severe PCB contamination” levels on the California coast, and PCBs
14 in the Bay have “reached concentrations in fish tissue that pose potential health concerns .
15 . . .” (Ex. 5, ECF No. 450-11 at 12, 57). In 2013, OEHAA published a Fish Consumption
16 Advisory for fish from the Bay due to mercury and PCBs, finding “mercury and PCBs in
17 some fish species at levels of concern for fish consumers.” (Ex. 1e, Corley Decl., ECF No.
18 450-7 at 2). PCBs in fish tissue also cause “significant risks” to fish-eating birds as they
19 are “passed up the food chain.” (SWAMP Report, Ex. 5, ECF No. 450-11 at 83; 2013
20 OEHHA Fish Consumption Advisory, Ex. 1e, Corley Decl., ECF No. 450-7 at 2). In 2017,
21 the San Diego Water Board concluded that PCBs are “present at levels of concern in fish
22 from the San Diego Bay.” (February 2017 Monitoring & Assessment, Ex. 75, Corley Decl.,
23 ECF No. 450-85 at 3). In 2018, OEHAA made the fish consumption guidelines even more
24 restrictive for women 45 and under and children. (*See* Ex. 1b, Corley Decl., ECF No. 450-
25 4). The Regional Board stated that “the OEHHA consumption advisory warrants not
26 delisting San Diego Bay for impairment (Category 5) [under Clean Water Act Section
27 303(d)] due to PCBs in fish tissue” (Clean Water Act Sections 305(B) and 303(D)
28 Integrated Report, Ex. 6, Corley Decl., ECF No. 450-12 at 39).

1 The Port District has come forward with evidence that PCBs in the Bay threaten to
2 interfere with the public's health or interfere with the public's right to use the Bay. The
3 EPA has concluded that "[s]tudies in animals provide conclusive evidence that PCBs cause
4 cancer." (EPA Website, Ex. 17, Corley Decl., ECF No. 450-24 at 8). "[T]he data strongly
5 suggest that PCBs are probable human carcinogens." (*Id.*). The EPA states that "[s]tudies
6 of PCB workers found increases in rare liver cancers and malignant melanoma. The
7 presence of cancer in the same target organ (liver) following exposure to PCBs both in
8 animals and humans . . . adds weight to the conclusion that PCBs are probable human
9 carcinogens." (*Id.* at 9). The EPA states:

10 The types of PCBs that tend to bioaccumulate in fish and other animals and
11 bind to sediments happen to be the most carcinogenic components of PCB
12 mixtures. As a result, people who ingest PCB-contaminated fish or other
13 animal products and contact PCB-contaminated sediment may be exposed to
14 PCB mixtures that are even more toxic than the PCB mixtures contacted by
15 workers and released into the environment.

16 (*Id.*). The EPA states that studies in animals and humans "support evidence for potential [
17] non-carcinogenic effects of PCBs," including serious "effects on the immune system,
18 reproductive system, nervous system, endocrine system and other health effects." (*Id.* at 7;
19 *see also* SWAMP Report, Ex. 5, ECF No. 450-11 at 12 ("PCBs may cause cancer, damage
20 the liver, digestive tract, and nerves; and affect development, reproduction, and the immune
21 system"); 2013 OEHHA Fish Consumption Advisory, Ex. 1e, Corley Decl., ECF No. 450-
22 7 at 5 ("PCBs can cause cancer.")). According to the EPA, studies in animals "were not
23 able to identify a level of PCB exposure that did not cause effects on the immune system."
24 (EPA Website, Ex. 17, Corley Decl., ECF No. 450-24 at 11).

25 OEHHA issued its original Fish Consumption Advisory in 2013 because of the
26 "potential concern for human health" due to mercury and PCBs. (Ex. 1e, Corley Decl.,
27 ECF No. 450-7 at 2 ("OEHHA found mercury and PCBs in some fish species [in the Bay]
28 at levels of concern for fish consumers. OEHHA is providing these guidelines to help
people choose which types of fish are safer to eat.")). In addition to restricting the number

1 of servings of Bay fish that consumers should eat per week, the Fish Consumption
2 Advisory, as amended in 2018, identifies eight species of Bay fish that women 45 and
3 under and children should never consume, and two species that women over 45 and men
4 should never consume, due to the presence of PCBs and mercury. For women 45 and under
5 and children, the list of do-not-eat fish includes the Pacific chub mackerel, the “largest or
6 most consumed fish in the San Diego Bay.” (Deposition of William Desvousges
7 (“Desvousges Dep.”), Ex. 15, Corley Decl., ECF No. 450-21 at 9:20-10:10). According to
8 Monsanto’s expert, William Desvousges, between 65% and 81% of the fish caught in the
9 Bay are precluded from consumption by women 45 and under and children.² (*Id.* at 7:19-
10 8:5; *see People v. Truckee Lumber Co.*, 116 Cal. 397, 399-400 (1897) (holding that “it is
11 not open to serious question” that polluting the waters of a river, destroying the fish therein,
12 interferes with the public right to “wild game” and constitutes a nuisance)).

13 The Court finds that the Port District has presented evidence of specific facts that
14 could support the conclusion by a reasonable trier of fact that PCBs have polluted the Bay
15 and caused substantial harm to either human health or the use and enjoyment of the Bay.

16 ///

17 ///

18

19

20

² Desvousges stated:

21

Q. Based off of the analysis you have done, in your opinion would 81% of the fish caught
22 in San Diego Bay be subject to a do-not-eat fish advisory for women under 45 and children?

23

MR. MILLER: Objection to the form.

24

THE WITNESS: [Desvousges:] Well, this is based on the data for the intercepts in San
25 Diego Bay from RecFIN. It’s not based on the overall data because the overall data is 65%.
26 So the 81% is what would be observed from the intercept data. So we have two different –
we’ve provided both of those numbers. So I would say it’s either 65 or 81.

27

(Desvousges Dep., Ex. 15, Corley Decl., ECF No. 450-21 at 7:19-8:5). The fish consumption advisory is
28 the same for women 45 and under and children. (*See* 2013 OEHHA Fish Consumption Advisory, Ex. 44,
Howard Decl., ECF No. 425-49 at 4). Monsanto’s objection to the form of the question is overruled.

1 **b. Port District’s Standing to Bring Public Nuisance Claim**

2 Monsanto contends that the Port District lacks standing to pursue a public nuisance
3 claim based on the Fish Consumption Advisory because the Port District’s jurisdiction is
4 limited to a fraction of the Bay, and the Port District does not own or manage the fish
5 populations.

6 The Port District contends that it has standing to pursue this representative public
7 nuisance action because the legislature “expressly authorized [the Port District] to bring a
8 public nuisance action to ‘protect, preserve, and enhance’ the Bay by seeking abatement of
9 a public nuisance.” (ECF No. 450 at 30).

10 Section 731 of the California Code of Civil Procedure provides:

11 A civil action may be brought in the name of the people of the State of
12 California to abate a public nuisance, as defined in Section 3480 of the Civil
13 Code, by the district attorney or county counsel of any county in which the
14 nuisance exists, or by the city attorney of any town or city in which the
15 nuisance exists. Each of those officers shall have concurrent right to bring an
16 action for a public nuisance existing within a town or city.

17 In the Court’s September 28, 2016, Order on Monsanto’s Motion to Dismiss the Port
18 District’s FAC, the Court concluded that “the Port District has standing to bring a
19 representative cause of action under section 731.” (ECF No. 81 at 10-11). The Court
20 explained:

21 In 1963, through the Port Act, the State of California and the cities of San
22 Diego, Chula Vista, Coronado, National City, and Imperial Beach granted and
23 conveyed “all right, title and interest” in the tidelands and submerged lands
24 around San Diego Bay to the Port District. *See* Harb. & Nav. Code App. 1 §§
25 4, 5, 5.5. The Port District was granted the authority over “control, regulation,
26 and management of the harbor of San Diego upon the tidelands and lands
27 lying under the inland navigable waters of San Diego Bay.” *Id.* § 4. The Port
28 Act provides the authority to “sue and be sued in all actions and proceedings
in all courts and tribunals of competent jurisdiction.” *Id.* § 23. The Port
District was given the power to “protect, preserve, and enhance,”

(1) The physical access to the bay.

1 (2) The natural resources of the bay, including plant and animal life.

2 (3) The quality of water in the bay.

3 *Id.* § 4.

4

5
6 The Legislature granted the Port District “all powers theretofore vested in the
7 county or each such city or exercisable by its officers, which are by the
8 provisions of this act granted to the district or are exercisable by its officers.”
9 Harb. & Nav. Code App. 1 § 70. This includes, the power to “protect,
10 preserve, and enhance” the Bay. *Id.* § 4. Before the conveyance of the Bay to
11 the Port District, the State of California and the cities of San Diego, Chula
12 Vista, Coronado, National City, and Imperial Beach had the authority to bring
13 a public nuisance claim to protect the Bay. Because the authority of the State
14 and cities to bring a public nuisance claim was specifically transferred to the
15 Port District, the Court concludes that the Legislature expressed its intention
16 in specific and clear terms to grant the Port District the power to abate a
nuisance. *See Lamont*, 93 Cal. Rptr. 2d at 291 (“[W]hen the Legislature has
intended to grant the power to abate a nuisance, it has done so specifically and
in clear terms.”). The Court concludes that the Port District has standing to
bring a representative cause of action under section 731.

17 (*Id.*).

18 The Court’s conclusion has not changed. The Port Act grants the Port District the
19 power to “protect, preserve, and enhance” the “animal life” in the Bay, in addition to the
20 water quality. Cal. Harb. & Nav. Code App. 1 § 4. As of January 1, 2020, the Port District
21 holds the title in trust to a majority of the water acres of the Bay. (S.B. 507 Legislative
22 Counsel’s Digest, Ex. A, Port District’s Supplemental Authority, ECF No. 454-1 at 2, 4;
23 Monsanto’s Nuisance Facts, ECF No. 424-2 ¶ 93; Port Master Plan, Ex. 29 to 30(b)(6)
24 Deposition of David Michael Johns, Ex. 43, Howard Decl., ECF No. 425-48 at 19; *see also*
25 Cal. Harb. & Nav. Code Appx. 1 § 5 (providing that the Port has “power and authority”
26 over the areas of the Bay conveyed to it)). To the extent that the Port District seeks relief
27 related to a portion of the Bay that physically falls outside the portion of the Bay the Port
28

1 holds title to in trust, that inquiry is relevant to the abatement remedy. The Court finds that
2 the Port District has standing to bring this representative cause of action under section 731.

3 Monsanto's Motion for Summary Judgment (Public Nuisance) (ECF No. 424) is
4 denied.

5 **VI. MOTION FOR SUMMARY JUDGMENT - PURPRESTURE**

6 Monsanto contends that the Court should grant summary judgment in its favor on
7 the Port District's "representative purpresture claim to the extent [the Port District] seeks
8 'damages,' which are unavailable as a matter of law." (ECF No. 423-1 at 2). Monsanto
9 contends that the Port District's purpresture claim "is simply a type of representative public
10 nuisance claim." (*Id.* at 5). Monsanto contends that the Port District may not recover
11 damages on its purpresture claim because abatement is the only remedy in a representative
12 public nuisance action. Monsanto further contends that the Port District cannot succeed on
13 the merits of its purpresture claim. Monsanto contends that PCBs do not physically intrude
14 into the Bay, and case law does not support a purpresture claim based on "the presence of
15 dilute chemicals in water bodies." (*Id.* at 23). Monsanto contends that neither the Convoir
16 Lagoon nor Campbell Shipyard sediment cap is a purpresture because the Port District and
17 state approved the construction of the caps.

18 The Port District contends that "PCBs in the San Diego Bay are both a public
19 nuisance and a purpresture." (ECF No. 453 at 10). The Port District contends that it brings
20 its purpresture claim "in its own right as a title holder" in "trust of the tidelands and
21 submerged lands in and along the San Diego Bay." (*Id.* at 11, 13). The Port District
22 contends it can maintain separate claims for purpresture and public nuisance because it
23 brings only the public nuisance claim in its representative capacity. The Port District
24 contends that its "purpresture claim is not simply a representative action for abatement.
25 While Monsanto's pollution of the Bay with PCBs does, indeed, impair the public's right
26 to free use of the Bay and its resources, it undeniably also encumbers and has damaged
27 property [held] by the Port District." (*Id.* at 13-14). The Port District contends that PCBs
28 have contaminated the sediment, water, and fish of the Bay and constitute a purpresture.

1 The Port District contends that damages are an available remedy for purpresture. The Port
2 District contends that an encroachment need not be visible to be a purpresture. The Port
3 District contends that the sediment caps are necessary efforts to address the PCBs, which
4 obstruct the free use of the Bay and caused the Port District to lose revenue.

5 “A purpresture exists where one incloses or makes several to himself that which
6 ought to be common to many.” *People ex rel. Britton v. Park & O. R. Co.*, 76 Cal. 156,
7 160 (1888). A purpresture is an unlawful encroachment, intrusion, or obstruction of a
8 public highway, navigable waterway, or other public land. *People v. Gold Run Ditch &*
9 *Mining Co.*, 66 Cal. 138, 146-47 (1884). A purpresture is often a public nuisance; however,
10 it is possible to have a purpresture that is not a public nuisance. *People by Pixley ex rel.*
11 *Teschemacher v. Davidson*, 30 Cal. 379, 390 (1866); *see Park & O. R. Co.*, 76 Cal. at 161
12 (holding that a railroad unlawfully constructed in a public park is a purpresture but “may
13 or may not be a nuisance”). A purpresture is a physical obstruction. *See, e.g., Davidson*, 30
14 Cal. at 383, 387 (wharf erected in San Francisco Bay was purpresture); *Coburn v. Ames*,
15 52 Cal. 385, 391, 399 (1877) (road, wharf, and chute on shore of Pacific Ocean beyond the
16 high-water mark was a purpresture); *Park & O. R. Co.*, 76 Cal. at 161 (railroad tracks
17 constructed over Golden Gate Park was a purpresture); *Gold Run Ditch & Mining Co.*, 66
18 Cal. 138 at 146-47 (discharge of mining debris consisting of boulders, sand, earth, and
19 waste materials in the Sacramento River was a purpresture); *Cty. of Lake v. Smith*, 228 Cal.
20 App. 3d 214, 229 (1991) (dredge and fill encroaching on lake was a purpresture); *Marshall*
21 *v. Standard Oil Co.*, 17 Cal. App. 2d 19, 30 (1936) (oil derricks and wells on public street
22 was a purpresture). By contrast, physical obstruction is not necessary for a public nuisance.
23 *See Cal. Civ. Code* § 3480; *Gold Run Ditch & Mining Co.*, 66 Cal. at 146 (“An
24 unauthorized invasion of the rights of the public to navigate the water flowing over the soil
25 is a public nuisance; and an unauthorized encroachment upon the soil itself is known in
26 law as a purpresture.”). A purpresture is also a public nuisance where it “unlawfully
27 obstructs the free passage or use in the customary manner” of the land by the public. *Park*
28 *& O. R. Co.*, 76 Cal. at 161; *Marshall*, 17 Cal. App. 2d at 30.

1 In this case, the Port District has not come forward with evidence that PCBs “inclose[
 2] or make[] several to [Monsanto] that which is common to many.” *Park & O. R. Co.*, 76
 3 Cal. at 160. The EPA website states, “PCBs are a group of man-made organic chemicals
 4 consisting of carbon, hydrogen, and chlorine atoms.” (Ex. 17, Corley Decl., ECF No. 450-
 5 24 at 2). PCBs “range in consistency from an oil to a waxy solid.” (*Id.*). Once released into
 6 the environment, “the composition of PCB mixtures changes.” (*Id.* at 9). PCBs “cycl[e]
 7 between air, water, and soil,” bioaccumulate in small organisms and fish, and bind to
 8 sediments. (*Id.* at 3, 9). The Port District has not presented evidence that PCBs prevent
 9 physical access to any water, sediment, or fish in the Bay. *See Coburn*, 52 Cal. at 394
 10 (explaining that “defendants had no authority in law to appropriate [public highways] to
 11 *their exclusive use and dominion* to the exclusion of the public” (emphasis added)). To the
 12 extent the Port District seeks to prove that the sediment caps at Campbell Shipyard and
 13 Convair Lagoon constitute a purpresture, the Port District approved erection of the caps.
 14 (*See Monsanto’s Purpresture Facts*, ECF No. 423-2 ¶ 53 (“Following a lengthy
 15 environmental review process, the Port approved and permitted the sediment caps at
 16 Campbell Shipyard and Convair Lagoon.”)). The caps are not an “erection [] without
 17 license . . . upon the property of the sovereign” and do not constitute a purpresture. *Alaska*
 18 *Pac. Fisheries v. United States*, 240 F. 274, 284 (9th Cir. 1917).

19 Monsanto’s Motion for Summary Judgment (Purpresture) (ECF No. 423) is granted.

20 **VII. MOTION FOR SUMMARY JUDGMENT – ABATEMENT**

21 Monsanto moves for summary judgment in its favor “regarding any ‘abatement
 22 fund’ the Port seeks, and any effort to seek a declaratory judgment about Defendants’
 23 responsibility for unknown future costs.” (ECF No. 422-1 at 10). Monsanto contends that
 24 the remedy requested is displaced by the Porter-Cologne Act and is not ripe.

25 The Port District contends that its request for an abatement remedy is not displaced
 26 by the Porter-Cologne Act, and its claims are ripe for adjudication.

27 ///

28 ///

1 **a. Porter-Cologne Act Displacement**

2 Monsanto contends that the Port District’s request for an “abatement fund” is
3 displaced by the Porter-Cologne Act. Monsanto contends that the Regional Board has “the
4 exclusive role of determining whether and when dredging and filling operations in the Bay
5 are or are not appropriate, including to abate any alleged nuisance.” (*Id.* at 22). Monsanto
6 contends that the Porter-Cologne Act does not allow recovery of an abatement fund for
7 prospective dredging. Monsanto contends the Port District is not entitled to declaratory
8 relief regarding Monsanto’s responsibility for future costs because the Regional Board has
9 the exclusive authority to determine the party responsible for remediation.

10 The Port District contends that it seeks “an equitable order requiring Monsanto to
11 prospectively abate the damage it created . . . indirectly through setting up a fund . . . [or]
12 to abate directly.” (ECF No. 452 at 6). The Port District contends that the Porter-Cologne
13 Act does not displace the Port District’s authority to seek abatement; rather, it “recognizes
14 and protects the Port District’s right to seek abatement.” (*Id.* at 18). The Port District
15 contends that it “only seeks declaratory relief in the alternative.” (*Id.* at 22). The Port
16 District contends that declaratory relief is an appropriate remedy, and the Port District “will
17 be prepared to present evidence demonstrating the appropriate scope of such relief at trial.”
18 (*Id.* at 14-15).

19 “The general rule is that statutes do not supplant the common law unless it appears
20 that the Legislature intended to cover the entire subject or, in other words, to ‘occupy the
21 field.’” *I. E. Assocs. v. Safeco Title Ins. Co.*, 39 Cal. 3d 281, 285 (1985). “[G]eneral and
22 comprehensive legislation, where course of conduct, parties, things affected, limitations
23 and exceptions are minutely described, indicates a legislative intent that the statute should
24 totally supersede and replace common law dealing with the subject matter.” *Id.* (quotation
25 omitted). “[T]he common law is not repealed by implication or otherwise, if there is no
26 repugnancy between it and the statute, and it does not appear that the legislature intended
27 to cover the whole subject.” *Gray v. Sutherland*, 124 Cal. App. 2d 280, 290 (1954) (quoting
28 15 C.J.S., Common Law, § 12, p. 620).

1 “The federal Clean Water Act [] (33 U.S.C. § 1251 et seq.) places primary reliance
 2 for developing water quality standards on the states.” *San Joaquin River Exch. Contractors*
 3 *Water Auth. v. State Water Res. Control Bd.*, 183 Cal. App. 4th 1110, 1115 (2010).
 4 California implements the Clean Water Act through the Porter-Cologne Act, California
 5 Water Code §§ 13000 *et seq.*, which establishes “a statewide program for the control of the
 6 quality of all the waters of the state.” Cal. Wat. Code § 13000; *San Joaquin River Exch.*,
 7 183 Cal. App. 4th at 1115. Through the Porter-Cologne Act, the legislature intended “that
 8 the state board and each regional board shall be the principal state agencies with the
 9 primary responsibility for the coordination and control of water quality.” Cal. Wat. Code
 10 § 13001.

11 The Porter-Cologne Act “gives the Board the authority and responsibility to abate
 12 nuisances affecting the state’s water resources.” *Karuk Tribe of N. Cal. v. Cal. Reg’l Water*
 13 *Quality Control Bd.*, 183 Cal. App. 4th 330, 351 (2010) (citing Cal. Wat. Code §§
 14 13050(h), (m); 13225; 13241; 13263(a); 13340; 13377). The Porter-Cologne Act
 15 establishes a regulatory process and certification standards for environmental dredging. *See*
 16 Cal. Wat. Code § 13377 (“[T]he state board or the regional boards shall, as required or
 17 authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge
 18 requirements and dredged or fill material permits which apply and ensure compliance with
 19 all applicable provisions of the act . . . together with any more stringent effluent standards
 20 or limitations . . . to prevent nuisance.”). The Port District must obtain “certification
 21 pursuant to Section 401 of the Clean Water Act” from the Regional Board in order to
 22 perform dredging in the Bay. Cal. Wat. Code § 13396.

23 Although the Regional Board’s authority is broad, the Porter-Cologne Act provides:

24 No provision of this division or any ruling of the state board or a regional
 25 board is a limitation: . . .

26 **(b)** On the power of any city or county or city and county to declare, prohibit,
 27 and abate nuisances. . . .

28 **(e)** On the right of any person to maintain at any time any appropriate action

1 for relief against any private nuisance as defined in the Civil Code or for relief
2 against any contamination or pollution.

3 Cal. Wat. Code § 13002. The term “person” includes “any city, county, district, the state,
4 and the United States” Cal. Wat. Code § 13050(c). California courts and courts in this
5 circuit have consistently held that “[t]here is nothing in the [Porter-Cologne Act] which
6 expressly or impliedly places in the state board or any regional board the exclusive power
7 to declare that a nuisance exists or to take action to abate a nuisance.” *People v. City of Los*
8 *Angeles*, 160 Cal. App. 2d 494, 502 (1958) (discussing the previous iteration of the Porter-
9 Cologne Act, the “Dickey Act”), *superseded by statute on other grounds*.

10 To the contrary the power of any city or county to declare, prohibit or abate
11 nuisances is expressly reserved to them by Water Code, section [13002]
12 This express reservation of the rights of the plaintiff cities to prosecute the
13 subject action clearly negatives any intent to give the control boards the
14 exclusive right to determine either what does or does not constitute a nuisance
or to invoke the equity powers of the courts of this state to abate a public
nuisance.

15 *Id.* at 502-03; *see also People of Cal. v. Kinder Morgan Energy Partners, L.P.*, 569 F.
16 Supp. 2d 1073, 1081-82 (S.D. Cal. 2008) (“[T]he Water Boards’ administrative authority,
17 while extensive, does not displace the court’s own substantial jurisdiction to declare
18 nuisances and grant damages to injured property owners The fact that the Regional
19 Board has the power to order a defendant to do something does not deprive a court the
20 power to enjoin the same acts.” (citing *City of Los Angeles*, 160 Cal. App. 2d at 502)). The
21 Porter-Cologne Act does not displace this Court’s authority to declare a nuisance and take
22 action to abate the nuisance.

23 Nothing in the Porter-Cologne Act provides that the state or Regional Board is the
24 only authority that may determine the party responsible for remediation. *See* Cal. Wat.
25 Code § 13002(e) (“No provision of this division . . . is a limitation . . . [o]n the right of any
26 person to maintain at any time an appropriate action for relief against any private nuisance
27 . . . or for relief against any contamination or pollution.”). The Court may grant declaratory
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1 relief, where appropriate, regardless of whether the Port District requested declaratory
2 relief. *Arley v. United Pac. Ins. Co.*, 379 F.2d 183, 187 (9th Cir. 1967); *see* Fed. R. Civ. P.
3 54(c) (“Every . . . final judgment . . . should grant the relief to which each party is entitled,
4 even if the party has not demanded that relief in its pleadings.”). The Porter-Cologne Act
5 does not displace the Court’s ability to issue a declaratory judgment.

6 **b. Ripeness**

7 Monsanto contends that the Court lacks jurisdiction because the Port District’s
8 “request for an abatement fund is . . . not ripe.” (ECF No. 422-1 at 28). Monsanto contends
9 that the Port District’s requested remedy will require the Court to speculate that the
10 Regional Board will permit dredging in the Bay. Monsanto contends that the costs of
11 abatement are speculative. Monsanto further contends that the Port District is not entitled
12 to declaratory relief because the requested remedy is unripe and speculative.

13 The Port District contends that “the injury to the public—PBCs throughout the Bay
14 well above levels that pose a risk to human health and the environment is not some future
15 possibility, the injury exists today.” (ECF No. 452 at 23). The Port District contends that
16 its requested abatement remedy is ripe because the Port District does not need Regional
17 Board approval for sampling and studying PCBs in the Bay or for implementing mitigation
18 projects. The Port District contends that its experts’ cost estimates are reasonable
19 approximations of the cost of abatement.

20 The case or controversy clause of Article III of the United States Constitution “limits
21 federal courts’ subject matter jurisdiction by requiring, inter alia, that plaintiffs have
22 standing and that claims be ‘ripe’ for adjudication.” *Chandler v. State Farm Mut. Auto. Ins.*
23 *Co.*, 598 F. 3d 1115, 1121 (9th Cir. 2010) (quoting *Allen v. Wright*, 468 U.S. 737, 750
24 (1984)). “Standing addresses whether the plaintiff is the proper party to bring the matter to
25 the court for adjudication.” *Id.* (citing ERWIN CHERMERINSKY, FEDERAL JURISDICTION §
26 2.3.1 (5th ed. 2007)). “The related doctrine of ripeness is a means by which federal courts
27 may dispose of matters that are premature for review because the plaintiff’s purported
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1 injury is too speculative and may never occur.”³ *Id.* (citing CHEMERINSKY, *supra*, § 2.4.1).
2 In determining whether an action is ripe for judicial review, the court is required to evaluate
3 “the fitness of the issues for judicial decision” and “the hardship to the parties of
4 withholding court consideration.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). “The
5 ‘central concern [of the ripeness inquiry] is whether the case involves uncertain or
6 contingent future events that may not occur as anticipated, or indeed may not occur at all.’”
7 *Richardson v. City & Cty. of Honolulu*, 124 F.3d 1150, 1160 (9th Cir. 1997) (alteration in
8 original) (quoting 13B CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND
9 PROCEDURE § 3532, at 112 (2d ed. 1984)), *cert. denied*, 1998 U.S. LEXIS 5627 (Oct. 5,
10 1998) and 1998 U.S. LEXIS 7622 (Nov. 30, 1998).

11 In this case, the purported injury to the public exists today. Monsanto’s asserted role
12 in creating the injury is ready for adjudication. The “abatement alternatives” proposed by
13 the Port District require further study. (Port District’s Second Amended Damages and
14 Abatement Disclosures, Ex. 35, Declaration of Micheal W. Dobbs in Support of Port
15 District’s Opposition to Monsanto’s Motions for Summary Judgment (Abatement &
16 Purpresture) (“Dobbs Decl.”), ECF No. 452-63 at 12 (“The group of projects finally
17 proposed by the Port District may differ after a full scoping and analysis is performed.”);
18 *see* Expert Report of Paul Fuglevand, Ex. 3, Dobbs Decl., ECF No. 452-5 at 4 (“Any actual
19 remediation would require feasibility studies and design evaluations which may change the
20 assumptions and impact the cost estimates up or down.”)). However, a final abatement plan
21 is not necessary before the case proceeds to trial. *See People v. ConAgra Grocery Prods.*
22 *Co.*, 17 Cal. App. 5th 51, 133-34 (2017) (“[T]he court’s estimate of the amount that would
23 be necessary for [abatement] was just that: an estimate The abatement fund . . . was a
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25
26 ³ On January 27, 2020, Monsanto submitted a Notice of Supplemental Authority in support of its Motion
27 for Summary Judgment (Abatement), attaching the Court of Appeals for the Ninth Circuit’s decision in
28 *Juliana v. United States*, No. 18-36082 (9th Cir. Jan. 17, 2020). (ECF No. 478). In *Juliana*, the court
addressed standing and held that the plaintiffs’ claimed injuries were not redressable by an Article III
court. *See* No. No. 18-36082, slip op. at 21, 32. The court did not address ripeness.

1 reasonable method of prefunding the remediation . . . [and] an appropriate abatement
2 injunction.”).

3 The Court concludes that the issues in this case are “fit[] . . . for judicial decision.”
4 *Abbott Labs.*, 387 U.S. at 149. The Port District has proposed funds for investigation to
5 determine the scope of a final abatement remedy, which may or may not include dredging
6 and/or capping. The record demonstrates that the Regional Board has previously approved
7 investigation, dredging, and capping to abate PCBs in the Bay. (*See generally* Regional
8 Board Order No. R9-2004-0294, Ex. 10, Corley Decl., ECF No. 450-16). Requiring a final
9 abatement plan prior to trial would force the Port District to incur costs that it will be unable
10 to recoup in the event it prevails at trial. “A public entity may not recover in a
11 representative public nuisance action any funds that it has already expended to remediate
12 a public nuisance.” (*See* Order on Port District’s Motion for Leave to File Supplement to
13 FAC, ECF No. 245 at 8 (quoting *ConAgra Grocery Prods.*, 17 Cal. App. 5th at 132)).
14 Under the facts of this case, the doctrine of ripeness does not prevent the Port District from
15 proceeding to trial and attempting to prove that abatement is necessary and feasible and
16 that an abatement fund is a proper remedy.

17 Monsanto’s Motion for Summary Judgment (Abatement) (ECF No. 422) is denied.⁴
18 The Port District is entitled to proceed to a bench trial on its “suit to abate a public
19 nuisance.” *See People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 298 (1951) (“The
20 right of trial by jury did not exist at common law in a suit to abate a public nuisance. Hence
21 it is not a constitutional right now.” (quotation and internal citation omitted)).

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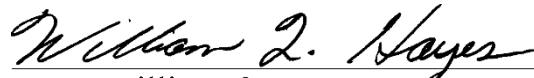
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26 ⁴ The Port District moves to strike the Expert Reports of Jason Conder, Ph.D., Gary H. London, and
27 Richard G. Luthy, Ph.D. (ECF No. 451). Monsanto moves to strike the Declaration of David Gibson.
28 (ECF No. 462). The Court does not rely on the Expert Reports of Jason Conder, Gary H. London, or
Richard G. Luthy or the Declaration of David Gibson in ruling on the Motions for Summary Judgment.
Accordingly, the Motions to Strike are denied as moot.

1 **VIII. CONCLUSION**

2 IT IS HEREBY ORDERED that Monsanto's Motion for Summary Judgment
3 (Public Nuisance) (ECF No. 424) is denied. Monsanto's Motion for Summary Judgment
4 (Purpresture) (ECF No. 423) is granted. Monsanto's Motion for Summary Judgment
5 (Abatement) (ECF No. 422) is denied. The Port District's Motion to Strike (ECF No. 451)
6 is denied as moot. Monsanto's Motion to Strike (ECF No. 462) is denied as moot.

7 IT IS FURTHER ORDERED that the final pretrial conference is set for October 15,
8 2020, at 10:00 a.m. in Courtroom 14B before the Honorable William Q. Hayes. The parties
9 shall lodge the proposed pretrial order on or before September 1, 2020.

10 Dated: March 26, 2020

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12 Hon. William Q. Hayes
13 United States District Court
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