United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO HERRING ASSOCIATION, et al.,

Plaintiffs,

v.

PACIFIC GAS AND ELECTRIC COMPANY, et al.,

Defendants.

Case No. 14-cv-04393-WHO

ORDER DENYING MOTION TO DISMISS SECOND AMENDED COMPLAINT; GRANTING IN PART AND DENYING IN PART MOTION TO STRIKE; DENYING MOTION FOR SANCTIONS

Re: Dkt. No. 214

Plaintiffs Dan Clarke and the San Francisco Herring Association ("SFHA") sued defendants Pacific Gas and Electric Company and PG&E Corporation (collectively, "PG&E") for hazardous waste left behind in the Marina district area of San Francisco by its plants roughly one hundred years ago. After six years of litigation, a consent decree between SFHA and PG&E, and a settlement agreement between Clarke and PG&E on some of his claims, the only claim that remains is Clarke's claim under the Resource Conservation and Recovery Act ("RCRA").

Before me is Clarke's Second Amended Complaint ("SAC") and PG&E's motion to dismiss, strike and for sanctions. Because Clarke has plausibly alleged standing based on his recreational and aesthetic interests, PG&E's motion to dismiss is DENIED. Its remaining grounds for dismissal are premature at the pleadings stage. Its motion to strike allegations based on lead contamination and other non-polycyclic aromatic hydrocarbons ("PAHs") contamination is GRANTED, but its motion to strike other irrelevant and scandalous allegations is DENIED. Its motion for sanctions is also DENIED.

BACKGROUND

My previous order on PG&E's motion for summary judgment describes the factual background of this six-year old case. *See* Order Granting Motion for Summary Judgment in Part

and Denying in Part; Denying Motions to Seal; Granting Motion to File Sur-Reply ("MSJ Order") [Dkt. No. 208] 2-4. I briefly recount the procedural posture here.

On February 4, 2016, Clarke, Maureen Laney, the Laney Clarke Family Trust, and PG&E reached an on-the-record settlement of the "Known Clarke Property Claims", *i.e.*, his state law damages claims for private nuisance, trespass, negligence, and strict liability. Settlement Agreement, Release and Covenant Not to Sue ("Clarke Settlement Agreement") attached as Exhibit A to the Declaration of Stuart G. Gross in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment [Dkt. No. 185-3]. PG&E purchased Clarke's property at 1625 North Point Street, San Francisco, California (the "Clarke Property"), in exchange for Clarke's release and discharge of PG&E from:

> any and all claims, demands, obligations, actions, causes of action, damages, costs, expenses, incidental, consequential, ensuing or resulting damages, loses, punitive damages, attorney's fees and expenses of every kind and nature whatsoever, known and unknown, fixed or contingent, which [Clarke] may not have or may hereafter have against PG&E by reason of any matter, cause or thing arising out of and/or connected with the Clarke Property Environmental Conditions or Disputes.

Id. at § 2.1(a). The release excepted "Clarke's Broader Environmental Claims, except any claim by Clarke for damages pursuant to the Broader Environmental Claims." *Id.*

On September 27, 2018, I entered a revised consent decree (the "Consent Decree") that constituted a full and final compromise of all claims by SFHA against PG&E. Revised Consent Decree Between the Plaintiff San Francisco Herring Association and Defendants [Dkt. No. 176]. The Consent Decree requires PG&E to investigate, monitor, and report on the level of PAHs within a hundred-foot band along a defined portion of the San Francisco shoreline. *Id.* at § 4. PG&E must evaluate the results of the monitoring and submit for approval a remedial action plan to address groundwater conditions to the Regional Water Quality Control Board – San Francisco Region. *Id.* PG&E is also required to make a number of payments, totaling $4,200,000, toward a number of supplemental environmental projects to restore and enhance the quality of the waters and subtidal ecosystem in the San Francisco Bay. *Id.* at § 3. Additionally, PG&E must reimburse SFHA for its reasonable attorneys' fees and costs and pay $400,000 into the SF Herring Monitoring Qualified Settlement Fund. *Id.* at § 3.6. The Consent Decree shall continue in effect

under my jurisdiction until September 27, 2028. *Id.* at §§ 11.4, 11.7.

In light of the two agreements, PG&E moved for summary judgment against Clarke. I granted summary judgment on all of Clarke's claims except his RCRA claim, and allowed Clarke leave to amend his RCRA claim after PG&E's bankruptcy stay is lifted. *See* MSJ Order at 16. On March 11, 2020, Clarke filed notice that Judge Dennis Montali of the U.S. Bankruptcy Court, Northern District of California, entered an Order Approving Stipulation and Agreement for Order between Debtors and Dan Clarke for Relief from the Automatic Stay. *See* Plaintiff Dan Clarke's Notice of Order Granting Relief from Automatic Bankruptcy Stay [Dkt. No. 211].

On March 18, 2020, Clarke filed the SAC, which PG&E moves to dismiss, strike and for sanctions. Second Amended Complaint ("SAC") [Dkt. No. 212]; PG&E's Motion to Dismiss, Strike and for Sanctions ("MTD") [Dkt. No. 214]. The SAC describes efforts PG&E took before this lawsuit to address the terrestrial contamination caused by its manufactured gas plants in Fillmore and North Beach (collectively the "Subject MGPs"). In particular, Clarke alleges that PG&E's strategy of investigation and remediation conducted pursuant to the Voluntary Clean-Up Agreement between it and the California Department of Toxic Substance Control ("DTSC") is deficient. SAC ¶¶ 8-13.

Although PG&E has been compelled to take more action as a result of this lawsuit, Clarke claims that "large gaps still remain that may present an imminent and substantial endangerment to human health or the environment if not addressed." *Id.* ¶¶ 14-15. Specifically, he points to "three major gaps" that will not be filled without court intervention:

- Lead contamination in the MGP wastes. *Id.* ¶ 16a.
- A large number of contaminated properties that have not been investigated yet because the information PG&E provides to homeowners understates the health risks presented by the MGPs. *Id.* ¶ 16b.
- Public properties and right-of-ways in the vicinity of contaminated private properties that are themselves also contaminated and therefore "construction and utility workers working on these properties, as well as other members of the public, are routinely exposed to hazardous MGP Wastes." *Id.* ¶ 16c.

Clarke seeks declaration of PG&E's violation of the RCRA and "establishment of an independent environmental remediation trust (the "ERT") that will be responsible for remediating the MGP Waste contamination of the Subject Sites and their vicinity" as alleged in the SAC and which PG&E will fund over time. *See id.*

LEGAL STANDARD

I. MOTION TO DISMISS UNDER RULE 12(B)(1)

"Because standing and ripeness pertain to federal courts' subject matter jurisdiction, they are properly raised in a [Federal] Rule [of Civil Procedure] 12(b)(1) motion to dismiss." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121–22 (9th Cir. 2010). The party invoking the jurisdiction of the federal court bears the burden of establishing that the court has the authority to grant the relief requested. *Id.*

A challenge pursuant to Rule 12(b)(1) may be facial or factual. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial attack, the jurisdictional challenge is confined to the allegations pled in the complaint. *See Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). The challenger asserts that the allegations in the complaint are insufficient "on their face" to invoke federal jurisdiction. *See Safe Air Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). To resolve this challenge, the court assumes that the allegations in the complaint are true and draws all reasonable inference in favor of the party opposing dismissal. *See Wolfe*, 392 F.3d at 362.

II. MOTION TO STRIKE UNDER RULE 12(F)

Federal Rule of Civil Procedure 12(f) allows the Court to strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. P. 12(f). "The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Whittlestone, Inc. v. Handi–Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (citation and alteration omitted). In most cases, a motion to strike should not be granted unless "the matter to be stricken clearly could have no possible bearing on the subject of the litigation." *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004).

DISCUSSION

I. MOTION TO DISMISS

A. Standing to Bring the RCRA Claim

Article III standing requires that a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

"Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Spokeo*, 136 S. Ct. at 1547 (quoting *Warth v. Seldin*, 422 U.S. 490, 518, (1975)). "[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citation omitted).

Clarke raises three primary bases for his standing to bring a RCRA claim. I agree that he has adequately alleged standing based on recreational and aesthetic interests. And I will discuss why his other two theories are insufficient, to ward off future argument in this matter.

1. Standing Based on Recreational and Aesthetic Interests

The Supreme Court has held that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Cantrell v. City of Long Beach*, 241 F.3d 674, 680 (9th Cir. 2001) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000)). In other words, "[t]he 'injury in fact' requirement in environmental cases is satisfied if an individual adequately shows that she has an aesthetic or recreational interest in a particular place, or animal, or plant species and that that interest is impaired by a defendant's conduct." *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 874 F.3d 1083, 1093 (9th Cir. 2017) (hereinafter "*ERF*") (quoting *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000)). An environmental plaintiff need not live

nearby to establish a concrete injury; "[r]epeated recreational use itself, accompanied by a credible allegation of desired future use, can be sufficient, even if relatively infrequent, to demonstrate that environmental degradation of the area is injurious to that person." *Pac. Lumber Co.*, 230 F.3d at 1149.

Clarke contends that he "habitually visits areas affected by the contamination alleged in this action for aesthetic and recreational enjoyment" and that he intends to do so in the future. SAC ¶ 19. His "custom" is to "drive to the Marina Green and leave his car there, while [he] or [he] and his visitors, walk along the shoreline and through the Marina." *Id.* While there, he "likes to show off the area he used to call home" and thinks about the "amazingly interconnected world we live in and how we share this beautiful environment with all God's creatures." *Id.* ¶¶ 19, 20. But his "enjoyment of the affected area is diminished" by "the harm that the complained of contamination is causing to the environment of the affected area" and by "knowledge that the affected area is contaminated by chemicals toxic to human health and the environment." *Id.* ¶¶ 21, 22. He claims that "such enjoyment would be substantially increased if the contamination alleged in this action is addressed." *Id.* ¶ 23.

PG&E argues that there is a line between an allegation that someone is enjoying an activity less (what Clarke alleges) and an allegation that someone's ability to enjoy an activity is decreased (what it argues is sufficient for standing). To draw this distinction, it seeks judicial notice of an underlying declaration in *ERF* from the member who claimed the alleged pollution "decreases my enjoyment of . . . viewing birds and other wildlife in the San Francisco Bay." *ERF*, 874 F.3d at 1093; *see* PG&E's Supplemental Request for Judicial Notice in Support of Motion to Dismiss Second Amended Complaint ("Suppl. RJN") [Dkt. No. 228-2], Ex. S. According to PG&E, the declaration explains that this was because of her decreased ability to see such wildlife due to the alleged contamination of the wildlife's habitat, not because the activities stayed the same but were less enjoyable.

PG&E's argument is unpersuasive and its request for judicial notice of the underlying

declaration is DENIED.[1] Its articulation of the standard narrows what the Ninth Circuit has found sufficient for standing based on recreational and aesthetic interests. Clarke alleges that he regularly walks in the Marina neighborhood but his "enjoyment of the affected area is diminished by the harm that the complained of contamination is causing to the environment of the affected area." SAC ¶¶ 19-23. As with the plaintiffs in *ERF*, Clarke's diminished enjoyment of his recreational and aesthetic activities in the Marina neighborhood is sufficient to allege standing. *See ERF*, 874 F.3d at 1093-94 (association members alleged concrete and particularized injuries from PG&E's waste disposal practices in the San Francisco Bay, including "reduced ability to enjoy eating local seafood in Bay Area restaurants, observing birds and other wildlife . . . , or sailing and swimming safely in San Francisco Bay, among other harms"; another member alleged she "gain[ed] significant personal feelings of well-being . . . from time spen[t] in unspoiled natural environments," but her "enjoyment of the Bay and its tributaries [had] been substantially diminished by . . . increasing knowledge of how polluted the Bay is, including from storm water runoff pollution").

PG&E similarly attempts to narrow the applicable standard regarding Clarke's aesthetic injuries. It argues that Clarke is required to allege a "direct sensory impact" for standing under the Ninth Circuit's decision in *Animal Lovers Vol. Ass'n v. Weinberger*, 765 F.2d 937 (9th Cir. 1985). In that case, the Animal Lovers Volunteer Association ("ALVA") brought an action to enjoin the Navy from shooting feral goats on San Clemente island. The Ninth Circuit affirmed summary judgment for the Navy because ALVA lacked standing. ALVA alleged that it would suffer "distress if the goats are shot" because of its "dedication to preventing inhumane treatment of animals." *Id.* In dismissing this insufficient allegation, the Ninth Circuit stated that such an abstract psychological injury is not enough to confer standing unless it "arises out of direct sensory impact of a change in the plaintiff's physical environment." *Id.* It therefore concluded that ALVA alleged no cognizable injury to its members because a "mere assertion of

[1] While publicly available documents filed in another case may be subject to judicial notice, it is inappropriate for PG&E to rely on it to introduce a gloss over the Ninth Circuit opinion in *ERF*.

organizational interest in a problem, unaccompanied by allegations of actual injury to members of the organization, is not enough to establish standing." *Id.* It did not hold, contrary to PG&E's contention, that "direct sensory impact" is required for aesthetic injuries. In fact, it found that "[i]f ALVA showed that the Navy's program would affect its members' aesthetic or ecological surroundings, its position [] might be different." *Id.* at 938.

As discussed above, Clarke has sufficiently alleged a concrete and particularized aesthetic interest that is impaired due to PG&E's conduct. *See Pac. Lumber*, 230 F.3d at 1150 (plaintiffs used creek for recreational activities and alleged that defendants' conduct has impaired their aesthetic interest in those activities); *W. Watersheds Proj. v. Grimm*, 921 F.3d 1141, 1147 (9th Cir. 2019) (defendant's alleged wolf-killing activities "threaten[ed] [plaintiffs'] aesthetic and recreational interests in tracking and observing wolves in the wild"). He has standing to bring a RCRA claim based on concrete and particularized injuries to his recreational and aesthetic interests.

2. No Standing Based on Fear of Injury or Illness

Clarke alleges that while he lived in Marina District for eighteen years, he and his wife "routinely handled 'black rocks' that they found in the backyard." SAC ¶ 24. He later discovered that these rocks contained "high levels of cancer-causing chemicals," which puts them "at an increased risk of developing cancer and other health problems." *Id.* Knowing this causes them "significant stress and anxiety" due to the "lack of uncertainty" regarding the "nature and extent of the MGP Wastes." *Id.* ¶¶ 24-25. He claims that a comprehensive investigation of MGP Wastes would "lessen the stress and anxiety." *Id.* ¶ 25.

As an initial matter, Clarke has released any claims or causes of action "arising out of and/or connected with the Clarke Property Environmental Conditions or Disputes." MSJ Order at 3. Therefore, a RCRA claim based on his fear and anxiety regarding potential exposure at his former property is barred. The SAC focuses on the "black rocks" Clarke and his wife handled in their backyard; it does not allege exposures elsewhere in the Marina. SAC ¶ 25.

Even if not barred by his settlement agreement, Clarke's allegations are insufficient. While standing may be based on a latent increased risk of injury where there is a credible risk of

harm, Clarke has failed to establish that the alleged risk of developing cancer is both credible and substantial. *See Cent. Delta Water Agency v. U.S.*, 306 F.3d 938, 948-950 (9th Cir. 2002); *Riva v. Pepsico, Inc.*, 82 F. Supp. 3d 1045, 1050, 1053 (N.D. Cal. 2015) (allegations of "increased risk of cancer," supported by references to animal studies did not show either "credible threat" or "substantial risk of harm"). His allegations are merely speculative. *See Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010) ("If a plaintiff faces a credible threat of harm, and that harm is both real and immediate, *not conjectural or hypothetical*, the plaintiff has met the injury-in-fact requirement for standing under Article III.") (emphasis added).

Because Clarke has not alleged a concrete and particularized current injury, his health risk theory cannot support standing. He points out that in the MSJ Order, I "agree[d] with PG&E that Clarke's claim of potential harm to his health and the attendant stress will not constitute a 'credible threat of harm' without detailed scientific evidence at a potential *future motion for summary judgment*." MSJ Order at 13 n.9 (emphasis added). By extension, he argues that his allegations of harm are sufficient at the pleading stage. I agree that he need not *prove* his allegations at this juncture, but he is still required to *allege facts* demonstrating each element of standing. Clarke has failed to do that here with respect to his health risk theory.

3. No Standing to Address Injuries to Third Parties

While Clarke sufficiently alleges standing based on his own recreational and aesthetic interests, his attempt to further bolster standing based on potential injuries to third parties is improper. For example, the SAC contains allegations regarding soil and groundwater contamination beneath schools (SAC ¶¶ 22, 95), properties owned by third parties in the Marina District (SAC ¶¶ 16b, 84-85, 90-94, 96-102), and subsurface conditions in public rights-of way (SAC ¶¶ 16c, 10-113).

These allegations do not show an impeding injury to Clarke. He does not allege that he owns or occupies any of these properties, or that he suffers any aesthetic or recreational enjoyment of any of these properties. Nor does he allege that he himself has been exposed to any harm at

third parties' properties.[2]

Moreover, two of the alleged "three major gaps" in PG&E's investigation of the Marina, which Clarke contends necessitate court intervention, are based on alleged risks to third parties. *See* SAC ¶¶ 16b-c, 17 (alleging risks to current Marina homeowners and guests and alleging exposures of "construction and utility workers" in rights of way and other public properties).[3] He fails to explain how these issues relate to his own legal rights and interests. His concern for the health and welfare of residents, school children, and construction workers is not a "particularized" injury to him, but a "generalized grievance" that is inadequate to establish standing. *See Lexmark.*, 572 U.S. at 127 n. 3; *Lance v. Coffman*, 549 U.S. 437, 439-40 (2007); *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1016 (9th Cir. 2010).

These allegations also do not establish redressability for purposes of standing. Clarke has not alleged that he has control or authority to grant access to any properties for which he seeks injunctive relief, or that each of the private property owners or City would allow any such relief. While he has adequately pleaded his own injuries (based on recreational and aesthetic interests, but not on fear of injury or illness), he has not alleged how redressing third-party harms necessarily relates to his own injuries. He may not seek redressability that would loop in non-parties. *See Sierra Club v. Chesapeake Operating, LLC*, 248 F. Supp. 3d 1194, 1204 (W.D. Okla. 2017) (dismissing RCRA case; injunctive relief could not be awarded as to structures "owned by third parties who are not before the court seeking that relief.").

Therefore, while Clarke sufficiently alleges standing based on his own recreational and aesthetic interests, he cannot establish injury in fact based on subsurface soil or groundwater

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[2] PG&E's request for judicial notice of the motion for summary judgment hearing transcript in this case is GRANTED. *See* PG&E's Request for Judicial Notice in Support of Motion to Dismiss Second Amended Complaint ("RJN") [Dkt. No. 214-2], Ex. B. At that hearing, Clarke represented that his intent is not to seek to require private property owners to do anything in particular on their properties (which, presumably, includes not requiring them to provide access for work Clarke thinks should be done on their properties), but to instead require the completion of the investigation of public areas. *See id.* at 13:18-14:1.9. Yet, PG&E argues, the SAC includes allegations about other property owners in the Marina. *See, e.g.*, SAC ¶ 16b.

[3] The third alleged "gap" is the purported lack of lead investigation. As discussed below in Section II.A of this Order, Clarke admits that he erroneously added allegations regarding lead contamination and agrees to remove it from his SAC.

contamination at third parties' properties; the redressability he seeks for these claims goes beyond his own purported injuries. As discussed in the next section, dismissal based on the redressability of his recreational and aesthetic interests in the Marina area is premature.

4. Redressability and Mootness of Clarke's Claims

A claim lacks redressability (or becomes moot) when the relief has already been provided. *See All. for the Wild Rockies v. U.S. Dep't of Agric.*, 772 F.3d 592, 601 (9th Cir. 2014). PG&E contends that Clarke cannot establish redressability for his RCRA claims because environmental investigations and actions to address MGP residues in the Marina have been actively ongoing and/or completed under DTSC's active regulatory oversight. MTD 14. In support of its argument, it seeks judicial notice of a number of documents. *See* RJN, Exs. C-P; Suppl. RJN, Exs. Q and R.

Both parties spend much time debating whether PG&E has done enough to moot Clarke's RCRA claim. This dispute is factual in nature, and improper to consider at the pleading stage. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (discussing RCRA action under Rule 12(b)(1), a "[j]urisdictional finding of genuinely disputed facts is inappropriate when the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits of an action") (internal quotation marks and citation omitted).

Accordingly, PG&E's motion to dismiss on this ground is DENIED. Its request for judicial notice of documents pertaining to this argument is also DENIED; PG&E seeks to offer them for the truth of a highly contested fact – that it has extensively investigated and remediated" wastes in the Marina neighborhood so as to remove any redressability of Clarke's claims. *See Patel v. Parnes*, 253 F.R.D. 531, 546 (C.D. Cal. 2008) ("[I]t is appropriate for the court to take judicial notice of the content of the [filings with a government agency] and the fact that they were filed with the agency. The truth of the content, and the inferences properly drawn from them, however, is not a proper subject of judicial notice under Rule 201.").

B. Lack of Jurisdiction Over Requested Relief of Trust

As I previously held, Clarke cannot seek civil penalties for his RCRA claim as a matter of

law, and may only seek injunctive relief. MSJ Order at 15. In the SAC, he seeks establishment of an independent environmental remediation trust (the "ERT") that will be responsible for remediating the MGP Waste contamination of the Subject Sites and their vicinity and which PG&E will fund over time. PG&E contends that, under Section 7002 of the RCRA, I have no statutory jurisdiction over his requested relief. MTD 16.

Section 7002 provides in relevant part that in any action brought under paragraph (a)(1), the district court shall have jurisdiction "to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste…*to order such person to take such other action as may be necessary*, or both…" 42 U.S.C. § 6972(a)(1) (emphasis added). PG&E argues that this provision does not allow funding of a trust so that a third-party trustee or consultant could take necessary action. Instead, it contends that ERTs are typically established pursuant to consent decrees. *See, e.g.*, *Avila v. Willits Envtl. Remediation Trust*, 633 F.3d 828, 831 (9th Cir. 2011). Clarke responds that the RCRA grants the court broad authority to craft remedies, including ERTs.

Although it is unclear what relief may be granted at this stage, a flawed requested remedy is not sufficient basis for dismissal. *Doe v. U.S. Dep't of Justice*, 753 F.2d 1092, 1104 (D.C. Cir. 1985) ("[I]t need not appear that the plaintiff can obtain the specific relief demanded as long as the court can ascertain from the face of the complaint that some relief can be granted."). At the hearing, PG&E clarified that it did not seek dismissal on this ground, but rather sought to have the ERT requested relief struck. Given the parties' dispute, it is premature to resolve it at the pleading stage. PG&E's request is DENIED.

II. MOTION TO STRIKE AND MOTION FOR SANCTIONS

Alternatively, if the action is not dismissed in its entirety, PG&E seeks to strike particular allegations in the SAC as immaterial, impertinent and scandalous. MTD 17.

A. Allegations Based on Lead Contamination and Other Non-PAH Contamination

In allowing Clarke's RCRA claim to go forward, I noted that "lead contamination and indoor vapor plumes" "cannot form a basis for [his] claims" because the "[Notice of Intent to Sue

("NOI")] in this case focused on the alleged discharged of PAHS into soil, groundwater, and the San Francisco Bay," and therefore "[his] RCRA claims are necessarily restricted to those based on the discharge of PAHs.". MSJ Order at 12 n.6.[4] In contravention of the MSJ Order, PG&E argues that Clarke impermissibly predicates much of his RCRA claim on allegations (in 26 paragraphs) regarding lead, cyanide and vapor intrusion. MTD 5; *see* SAC ¶¶ 10, 16(a), 41, 48-50, 56, 62, 65-67, 73-84, 91, 95, & 100.

Clarke admits he mistakenly included claims related to lead contamination. He clarifies that allegations related to cyanide are only offered as background and are not the basis for his RCRA cause of action. *See* SAC ¶¶ 41, 48. But he argues that his references to vapor intrusion should be allowed because vapor intrusion results from the discharge of PAHs into soil and groundwater. This is unconvincing. I explicitly barred Clarke from including RCRA claims that are absent from the NOI, including "indoor vapor plumes." MSJ Order at 12. PG&E's motion to strike these allegations is GRANTED because they go beyond the scope of the NOI.

PG&E also asks that I impose sanctions on Clarke and his counsel for disregarding my previous order by including allegations regarding lead, cyanide, and indoor air in the SAC. MTD 23.[5] Although Clarke claims that he erroneously overlooked footnote 6 of the MSJ Order, I repeatedly cautioned him that his RCRA claims are limited by the NOI. *See* MSJ Order at 13 ("Further, the RCRA claims must stem from the NOI and cannot be based on conduct not described in the NOI."); *id.* at 16 ("Clarke is limited to the NOI filed before suit was brought."). Nonetheless, I find Clarke's conduct is not enough to impose sanctions in this instance. PG&E's motion for sanctions is DENIED.

B. Irrelevant and Scandalous Allegations

PG&E also seeks to strike other paragraphs of the SAC. Two dozen paragraphs of the

[4] PG&E's request for judicial notice of the NOI is GRANTED as it is a matter of public record. RJN, Ex. A; *see Jamul Action Comm. v. Stevens*, No. 2:13-CV-01920-KJM, 2014 WL 3853148, at *2 n.1 (E.D. Cal. Aug. 5, 2014).

[5] PG&E filed a notice of errata clarifying that it is not moving for sanctions under Federal Rule of Civil Procedure 11(b) but based on Rule 11(c)(3) which allows courts to order an attorney to show cause why conduct specifically described in the order has not violated Rule 11(b). [Dkt. No. 220].

SAC relate only to third parties whose claims Clarke lacks standing to raise. MTD 5; SAC ¶¶ 16(a)-(c), 22, 83-85, & 90-113. Because Clarke does not allege any basis for asserting the rights of others—and has no standing to do so— it argues that these allegations are immaterial and impertinent and should struck. *See Skydive Arizona, Inc. v. Quattrochi*, No. CV 05-2656-PHX-MHM, 2006 WL 2460595, at *11 (D. Ariz. Aug. 22, 2006) (striking allegations regarding "Defendants' conduct with other third-parties and businesses" as immaterial; allegations regarding non-parties "would likely cause unnecessary confusion and potential prejudice" against the defendant); *Smith v. AVSC Int'l, Inc.*, 148 F. Supp. 2d 302, 317 (S.D.N.Y. 2001) (striking allegations of defendant's conduct toward third parties).

While it is improper for Clarke to rely on these allegations to confer standing, *see supra* Section I.A.3, I cannot conclude that these allegations have "no possible bearing on the subject matter of the litigation" such that it would be appropriate to strike them altogether. *See San Francisco Herring Ass'n v. Pac. Gas & Elec. Co*., No. 14-CV-04393-WHO, 2015 WL 8482187, at *1 (N.D. Cal. Dec. 10, 2015) (quoting *Platte*, 352 F. Supp. 2d at 1057).

PG&E points to four dozen more paragraphs that it contends consist of superfluous historical allegations and irrelevant claims of misconduct unrelated to the elements of Clarke's RCRA claim. SAC ¶¶ 5, 7-13, 16(b), 84-102, 114-146, 148, & 152-154. It argues that some of these paragraphs also include scandalous invective, included only to inflame. But Clarke asserts that these allegations are relevant because they describe how PG&E has handled the issue to date, and further explains why his requested relief of establishing an ERT is warranted. PG&E's motion to strike these allegations is DENIED.

CONCLUSION

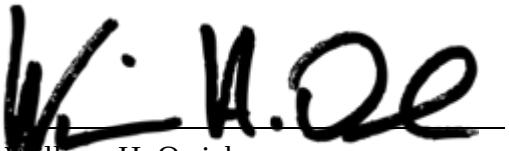
PG&E's motion to dismiss the SAC for lack of standing is DENIED. Although Clarke insufficiently pleads standing based on fear of personal illness and based on third-party harms, he adequately pleads standing based on his own recreational and aesthetic interests. Its motion to dismiss on other grounds is also DENIED. Whether PG&E has done enough to moot Clarke's RCRA claim is a factual issue that cannot be considered at this stage. Dismissal based on Clarke's flawed requested remedy, the ERT, is also not sufficient basis for dismissal and I decline to strike

it at this time.

PG&E's motion to strike allegations based on lead contamination and other non-PAH contamination is GRANTED, but its motion for sanctions based on this is DENIED. PG&E's motion to strike other allegations are irrelevant and/or scandalous is also DENIED.

IT IS SO ORDERED.

Dated: June 15, 2020



William H. Orrick
United States District Judge

United States District Court
Northern District of California