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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA OPEN LANDS,  
  
Plaintiff,  
  
v.  
  
BUTTE COUNTY DEPARTMENT OF  
PUBLIC WORKS, DENNIS SCHMIDT,  
and ERIC MILLER,  
  
Defendants.

No. 2:20-cv-00123-DJC-DMC

ORDER

Pending before the Court is Plaintiff California Open Lands’ Motion for Partial Summary Judgment on its first, third, and fourth claims for relief. (ECF No. 91.)

Having considered the Parties’ briefing and arguments, the Court hereby GRANTS the Motion in part, and DENIES it in part.

**FACTUAL BACKGROUND**

**I. Plaintiff’s Wetland Preserve**

Plaintiff is a California non-profit land trust corporation based in Chico, California. (Nielsen Decl. (ECF No. 91-5) ¶ 1.) In 2007, Butte County recorded a perpetual conservation easement grant (“Easement”) in Plaintiff’s favor that created a wetland preserve (“Preserve”) on a portion of the Neal Road Recycling and Waste Facility (“Facility”) located in Butte County. (*Id.* ¶ 2.) Plaintiff maintains the Preserve pursuant to the terms of the Easement. (*Id.* ¶ 3.)

1 **II. Defendants' Landfill Facility**

2 The Facility, located at 1023 Neal Road in Paradise, California, is a solid waste  
3 facility owned and operated by Defendant Butte County Department of Public  
4 Works.<sup>1</sup> (Pl.'s Statement Undisputed Facts ("Pl.'s SUF") (ECF No. 93-1) ¶ 12; Compl.  
5 (ECF No. 1) ¶ 10.) The Facility's primary industrial activity is the receiving, handling,  
6 and disposal of municipal solid waste. (Pl.'s SUF ¶ 13.) The Facility also manages and  
7 stores landfill leachate.<sup>2</sup> (*Id.*)

8 The Facility is approximately 229 acres, and consists of five Class III waste  
9 management units, also known as modules. (*Id.* ¶ 12.) Other significant features at  
10 the Facility include a Class II surface impoundment for landfill leachate and landfill gas  
11 condensate, storm water basins, and a primary sedimentation basin. (Defs.' Statement  
12 Undisputed Facts ("Defs.' SUF") (ECF No. 94-3) ¶ 93.) Plaintiff's Preserve is located in  
13 the primary sedimentation basin. (See *id.* ¶¶ 109-10.)

14 The Facility sits in a canyon which slopes northeast-to-southwest. (Pl.'s SUF  
15 ¶ 15.) Storm water is collected at the Facility in a series of conveyances and basins,  
16 and generally flows to the southwest. (*Id.* ¶¶ 15-16.) Before flowing off-site, storm  
17 water flows into the Preserve. (*Id.* ¶ 16.) Any off-site flow that occurs flows through  
18 the spillway for the Preserve. (*Id.*) This spillway is the only storm water sampling  
19 location at the Facility and is designated as SW-1. (*Id.*) Storm water runoff from the  
20 Facility ultimately flows to the Sacramento River. (*Id.* ¶ 17.)

21 **III. Leachate Discharges**

22 On or about November 8, 2018, a wide-spread fire, commonly known as the  
23 Camp Fire, damaged critical Facility infrastructure. (Defs.' SUF ¶ 94.) The  
24 infrastructure destroyed by the Camp Fire was being repaired by Facility personnel  
25 when a series of severe local storm events caused by atmospheric rivers impacted the

26 \_\_\_\_\_  
27 <sup>1</sup> Defendant Dennis Schmidt is the Director of the Facility, while Defendant Eric Miller is the Manager of  
the Facility. (Compl. ¶¶ 11-12.)

28 <sup>2</sup> Leachate means a liquid that has passed through or emerged from solid waste and contains soluble,  
suspended, or miscible materials removed from such waste. 40 C.F.R. § 258.2.

1 Facility beginning in late November 2018, producing over three inches of rain in three  
2 days. (*Id.* ¶ 97.) The site received over five inches of rain in January 2019, and nearly  
3 thirteen inches of rain in February 2019. (*Id.*)

4 On February 14, 2019, during these extreme weather conditions, Defendants  
5 became aware of landfill leachate seeping out of the southern face of the facility's  
6 module 4 ("Module 4"). (Pl.'s SUF ¶ 1.) The leachate seeped into a storm water basin  
7 located downstream of Module 4, Sediment Basin 4. (*Id.* ¶ 2.) Leachate commingled  
8 with storm water collected in Sediment Basin 4 and was discharged by a pump into a  
9 ditch that flowed to the Preserve. (*Id.* ¶ 3.) From the Preserve, storm water flowed  
10 over the concrete spillway along the west side of the Preserve basin, SW-1, and off the  
11 Facility into an unnamed creek. (*Id.* ¶ 4.) The unnamed creek flows to Hamlin Slough,  
12 which is a tributary to Butte Creek, which is in turn a tributary to the Sacramento River  
13 and the Sacramento-San Joaquin Delta. (*Id.* ¶¶ 4, 17.) The Delta and its tributaries are  
14 waters of the United States within the meaning of the Clean Water Act. (*Id.* ¶ 10.)

15 On February 26, 2019, leachate again seeped from Module 4 into Sediment  
16 Basin 4 where it commingled with storm water collected there. (*Id.* ¶¶ 5, 6.) Leachate-  
17 contaminated storm water was then discharged by a pump into the ditch that drained  
18 to the Preserve. (*Id.* ¶ 7.) By the following day, February 27, 2019, enough liquid had  
19 accumulated in the Preserve basin that it flowed over the concrete spillway and into  
20 the surface waters downstream. (*Id.* ¶ 8.) The Facility continued to discharge from this  
21 point for the next five days, through March 4, 2019, and again on March 6, 2019,  
22 through March 8, 2019. (*Id.*)

## 23 **LEGAL BACKGROUND**

### 24 **I. The Clean Water Act**

25 The "objective of [the Clean Water] Act (33 U.S.C. §§ 1251 et seq.) is to restore  
26 and maintain the chemical, physical, and biological integrity of [the] Nation's waters."  
27 33 U.S.C. § 1251(a). To achieve this objective, the Clean Water Act prohibits the  
28 discharge of any pollutant by any person unless in compliance with a permit issued

1 under the National Pollution Discharge Elimination System (“NPDES”). *Id.* §§ 1311(a),  
2 1342. NPDES permits impose effluent limits and other standards onto individual  
3 dischargers. *Env’tl Prot. Agency v. Cal.*, 426 U.S. 200, 205 (1976). Non-compliance  
4 with an NPDES permit is a violation of the Clean Water Act. 40 C.F.R. § 122.41.

5 The Environmental Protection Agency has delegated authority to California to  
6 issue NPDES permits. See 3 U.S.C. § 1342(b); 54 Fed. Reg. 406,64, 406,65 (Oct. 3,  
7 1989); Cal. Wat. Code § 13160. In 1991, the California State Water Resources Control  
8 Board (“State Board”) issued a single, statewide general NPDES permit applicable to  
9 all industrial storm water dischargers (the “General Permit”). Since 1991, the General  
10 Permit has been renewed several times. As is relevant here, the existing General  
11 Permit, Water Quality Order No. 97-03-DWQ, was amended in 2015 by Water Quality  
12 Order No. 2014-0057-DWQ. The 2015 General Permit was in effect from July 1, 2015  
13 to November 5, 2018. The General Permit was amended again on November 6, 2018,  
14 by Water Quality Order No. 2018-0028-DWQ, and went into effect on July 1, 2020.

## 15 **II. California’s General Permit**

16 The General Permit has three basic requirements: (1) discharge prohibitions;  
17 (2) Storm Water Pollution Prevention Plan (“SWPPP”) requirements; and (3) monitoring  
18 and reporting requirements, including a requirement to prepare an annual report.  
19 (Pl.’s Request for Judicial Notice<sup>3</sup> (“Pl.’s RJN”), Ex. 1 (“General Permit”) (ECF No. 92),  
20 §§ III, X, XI.)

21 In order to discharge storm water lawfully in California, industrial operations  
22 subject to the General Permit must comply with its terms. 33 U.S.C. § 1311(a). The  
23

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24 <sup>3</sup> Plaintiff requests the Court take judicial notice of (1) a true and correct copy of NPDES General Permit  
25 No. CAS000001, State Water Resources Control Board Water Quality Order 2014-0057-DWQ as  
26 amended by Order 2015-0122-DWQ and Order 2018-0028-DWQ (“Exhibit 1”), and (2) a true and  
27 correct copy of NPDES General Permit No. CAS000001, State Water Resources Control Board Water  
28 Quality Order No. 92-12-DWQ, as amended by Order Nos. 97-03-DWQ and 2014-0057-DWQ (“Exhibit  
2”)”. (Pl.’s RJN at 4.) Courts may take judicial notice of matters of public record, including records and  
reports of administrative bodies. See *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282  
(9th Cir. 1986). Accordingly, the Court grants Plaintiff’s request, and will take judicial notice of both  
Exhibits 1 and 2.

1 General Permit prohibits the discharge of storm water to waters of the United States  
2 except as authorized by the General Permit or another NPDES permit. (General  
3 Permit § III.A.) The General Permit also prohibits discharges of liquids or materials  
4 other than storm water to waters of the United States unless authorized by the General  
5 Permit or another NPDES permit. (*Id.* § III.B.) Finally, the General Permit prohibits  
6 storm water and authorized non-storm water discharges that cause or threaten to  
7 cause pollution, contamination, or nuisance. (*Id.* § III.C.)

8 The General Permit also mandates that permittees develop and implement a  
9 SWPPP, which is filed online with the State Board. The SWPPP is a facility-specific plan  
10 to develop and execute state-of-the-art practices designed to prevent or reduce  
11 pollution from industrial storm water discharges. SWPPPs must include: (1) a  
12 description and assessment of potential pollutant sources; (2) a site map; (3) a  
13 description and assessment of Best Management Practices (“BMPs”); and (4) a  
14 Monitoring Implementation Plan (“MIP”). (*Id.* § X.) Permittees must upgrade,  
15 whenever necessary, the SWPPP and Monitoring Implementation Plan with any Best  
16 Management Practices necessary to comply with the General Permit. (*Id.* § VI.H.)

17 Finally, the General Permit requires that permittees develop and implement  
18 their Monitoring Information Plan. (*Id.* § XI.) As part of the MIP, permittees must  
19 collect storm water samples at discharge points during specified times; analyze these  
20 samples for specific contaminants that are likely to be present at the facility and  
21 compare them to levels set forth in the General Permit; conduct monthly visual  
22 observations of sources of storm water pollution throughout the entire wet season;  
23 and maintain records of these observations. (*Id.* §§ XI.A-B.) The permittee must file  
24 annual reports summarizing the visual observations, results of sampling analyses, and  
25 General Permit compliance. (*Id.*)

## 26 **PROCEDURAL BACKGROUND**

27 Plaintiff brought this action on January 16, 2020, alleging four causes of action  
28 for violations of the Clean Water Act and the General Permit: (1) Failure to Develop

1 and Implement an Adequate SWPPP For the Facility, (2) Failure to Develop and  
2 Implement the Best Available And Best Conventional Treatment Technologies at the  
3 Facility, (3) Failure to Develop and Implement an Adequate MIP for the Facility, and  
4 (4) Discharges of Contaminated Storm Water From The Facility. (See Compl.)

5 Plaintiff subsequently brought this Motion for Partial Summary Judgment on  
6 January 18, 2024, seeking judgment as to liability on counts one, three, and four. (See  
7 Mot. Partial Summ. J. ("Mot. PSJ") (ECF No. 91).) The Court held a hearing on  
8 February 29, 2024, with William Carlon appearing for Plaintiff, and Glen Hansen  
9 appearing for Defendants. Following the hearing, the Court ordered supplemental  
10 briefing from the Parties as to count three. (ECF No. 99.) The Parties filed the  
11 requested briefing (ECF Nos. 100, 101, 102) and the matter is now submitted.

### 12 **SUMMARY JUDGMENT STANDARD**

13 Summary judgment may be granted when the evidence shows that there is no  
14 genuine issue as to any material fact and the moving party is entitled to a judgment as  
15 a matter of law. Fed. R. Civ. P. 56(c). The principal purpose of summary judgment is  
16 to dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477  
17 U.S. 317, 325 (1986). Therefore, the "threshold inquiry" is whether there are any  
18 factual issues that could reasonably be resolved in favor of either party, or conversely,  
19 whether the facts are so one-sided that one party must prevail as a matter of law.  
20 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-52 (1986). However, "[o]nly  
21 disputes over facts that might affect the outcome of the suit under the governing law  
22 will properly preclude the entry of summary judgment." *Id.* at 248.

23 In a summary judgment motion, the moving party must inform the court of the  
24 basis for the motion and identify the portion of the record which it believes  
25 demonstrates the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at  
26 323. If the moving party meets its initial burden, the burden then shifts to the  
27 opposing party, which must establish that there is a genuine issue of material fact.  
28 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986). To meet

1 their burden, parties must either cite to materials in the record supporting their  
2 position or show that the materials cited do not establish the absence or presence of a  
3 genuine dispute. Fed. R. Civ. P. 56(c)(1).

4 For the opposing party to succeed and avoid summary judgment, they “must  
5 do more than simply show that there is some metaphysical doubt as to the material  
6 facts.” *Matsushita*, 475 U.S. at 586. Rather, the opposing party must produce enough  
7 evidence such that the specific facts set forth by the nonmoving party, coupled with  
8 undisputed background or facts, are such that a reasonable jury might return a verdict  
9 in their favor. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 631  
10 (9th Cir. 1987). In other words, for the moving party to succeed, the court must  
11 conclude that no rational trier of fact could find for the opposing party. *Matsushita*,  
12 475 U.S. at 587. However, so as not to usurp the role of the jury, “[c]redibility  
13 determinations, the weighing of the evidence, and the drawing of legitimate  
14 inferences from the facts are jury functions,” and so the court draws all reasonable  
15 inferences and views all evidence in the light most favorable to the opposing party.  
16 *Anderson*, 477 U.S. at 255; *Matsushita*, 475 U.S. at 587-88.

## 17 **DISCUSSION**

### 18 **I. Discharges of Contaminated Storm Water From The Facility** 19 **(Fourth Claim for Relief)**

20 The Clean Water Act prohibits any person from discharging pollutants into  
21 navigable waters from a point source without a permit. 33 U.S.C. §§ 1311(a), 1342.  
22 Further, the General Permit prohibits the discharge of storm water or other liquids to  
23 waters of the United States except as specifically authorized by the General Permit or  
24 another NPDES permit. (General Permit §§ III.A-III.B.)

25 Plaintiff alleges that, on at least ten days between February 14, 2019, and  
26 March 8, 2019, Defendants discharged leachate-contaminated storm water from the  
27 Facility. (Mot. PSJ at 15-16.) Plaintiff argues that there is no dispute (1) the discharges  
28 occurred, (2) leachate is a pollutant under the Clean Water Act, (3) the waters into

1 which Defendants discharged the leachate are waters of the United States,  
2 (4) Defendants discharged the leachate from a point source within the meaning of the  
3 Clean Water Act, and (5) Defendants did not have a permit authorizing these  
4 discharges. (*Id.* at 15-19.) Accordingly, Plaintiff argues each of the ten days  
5 Defendants discharged leachate is a violation of the Clean Water Act and the General  
6 Permit, and summary judgment should be granted in their favor. (*Id.* at 16.)

7 In opposition, Defendants do not dispute that (1) landfill leachate is a pollutant,  
8 (2) that the waters which the discharges are alleged to have reached are waters of the  
9 United States, or (3) that the discharges were made from a point source at the Facility.  
10 (Opp'n Partial Summ. J. ("Opp'n PSJ") (ECF No. 93) at 9-14.) However, Defendants do  
11 dispute (1) whether the leachate was actually discharged from the Facility, (2) the  
12 number of days that discharges occurred, and (3) whether Defendants had a permit  
13 that authorized such discharges. (*Id.*)

14 For the reasons set forth below, the Court denies summary judgment on  
15 Plaintiff's fourth cause of action.

16 **A. Whether Leachate was Discharged from the Facility**

17 A "discharge" under the Clean Water Act means the "discharge of a pollutant,"  
18 33 U.S.C. § 1362(16), which, in turn, is defined as "any [1] addition of any [2] pollutant  
19 or combination of pollutants to [3] waters of the United States from any [4] point  
20 source." *Id.* § 1362(12).

21 Defendants admit that leachate-contaminated storm water was pumped from  
22 Storm Water Basin 4 into a ditch which then flowed into the east side of the Preserve,  
23 which is the primary sedimentation basin. (Opp'n PSJ at 10-11.) Defendants also  
24 concede that storm water from the primary sedimentation basin then flowed over an  
25 earthen embankment into the wetlands situated on the west side of the Preserve. (*Id.*)  
26 Finally, Defendants agree that the storm water in the wetlands then flowed over the  
27 spillway on the west side of the Preserve, thereby leaving the Facility, into downstream  
28 waters. (*Id.*)



1           However, Defendants maintain there is a genuine dispute as to whether the  
2 storm water discharged from the Facility via the spillway was contaminated with  
3 leachate. (*Id.*) Defendants point to a report prepared by their experts, Formation  
4 Environmental, LLC (“Formation”), which found based on water samples drawn from  
5 the Preserve’s spillway, SW-1, that “the storm water data indicates that there were *no*  
6 *leachate discharges* that flowed off-site or into the tributary to Hamlin Slough . . . .”  
7 (Defs.’ App., Ex. F (“Investigative Final Report”) (ECF No. 93-8), at 245<sup>4</sup> (emphasis  
8 added).)

9           This conclusion was expounded upon by Defendants’ expert Sean Covington,  
10 one of the authors of Formation’s Investigative Final Report,<sup>5</sup> who opined that “[t]here  
11 were no leachate discharge concentrations of [Chemicals of Potential Concern  
12 (“COPCs”)] in storm water that flowed off-site or into the unnamed tributary to Hamlin  
13 Slough in 2019 that exceeded [environmental screening levels] or background  
14 concentrations,” and “[t]here were no leachate discharge concentrations of COPCs in  
15 storm water that flowed off-site or into the tributary to Hamlin Slough that exceeded  
16 human health [screening levels] or background concentrations.” (Defs.’ App., Ex. G  
17 (“Covington Dep. and Report”) (ECF No. 93-8), at 334, 338.)

18           The Court finds that this presents a close, but genuine, dispute of fact as to  
19 whether leachate was in fact discharged from the Facility. This is a close dispute  
20 because the Parties agree that leachate-contaminated storm water was pumped into  
21 the Preserve. (Pl.’s SUF Nos. 3, 7.) Plaintiff argues this fact is sufficient to grant  
22 summary judgment in their favor as it supports a reasonable inference that if the  
23 Preserve contained contaminated storm water, the discharges from the Preserve were  
24 also contaminated storm water. In further support of this inference, Plaintiff points to

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25 \_\_\_\_\_  
26 <sup>4</sup> Citations to all appendices refer to the page numbering of the appendix, not the page numbering of  
the documents themselves.

27 <sup>5</sup> Covington explains that he represents the Texas office of Formation, was “retained to serve as an  
expert witness relative to Formation’s participation in developing the [Investigative Final Report],” and  
28 was “asked to provide my opinions and the bases for those opinions based on the contents of the  
[Investigative Final Report] sections developed by Formation.” (Defs.’ App., Ex. G, at 329.)

1 the testimony of Covington, who stated he was “under the impression” the discharges  
2 from the Preserve were a mixture of storm water and leachate. (Pl.’s Supp. App.<sup>6</sup>, Ex.  
3 31 (ECF No. 94-1) at 859:9-16, 861:9-22, 863:5-25.) Plaintiff argues this testimony  
4 demonstrates that Covington’s opinion, as stated in his report, was not “that the  
5 discharges of storm water from the Preserve did not have any leachate in them, but  
6 rather that there were no concentrations of chemicals of potential concern that  
7 exceeded Environmental Screening Levels or background levels.”<sup>7</sup> (Reply Partial  
8 Summ. J. (“Reply PSJ”) (ECF No. 94) at 10.) In other words, Covington was not opining  
9 on “whether leachate had left the Facility, but rather how much had left, and what the  
10 impacts of that were.” (*Id.*)

11 However, Plaintiff has not provided definitive proof that the storm water  
12 discharged from the Preserve contained leachate. Rather, Plaintiff has provided  
13 evidence that Covington believed, or assumed, the storm water he was testing  
14 contained leachate. This was a rational assumption based on the evidence before the  
15 Court, which includes: (1) a report confirming the leachate seep from Module 4  
16 occurred on February 14, 2019, and February 26, 2019, (Pl.’s App., Ex. 1 (ECF No. 91-  
17 2) at 7-8); and (2) deposition testimony of Defendant Miller, who confirmed that  
18 leachate from Module 4 entered Sediment Basin 4 and mixed with storm water, this  
19 mixture was then pumped to the Preserve, and that the water within the Preserve was

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21 <sup>6</sup> Defendants object to the additional exhibits submitted along with Plaintiff’s Reply to the Motion for  
22 Partial Summary Judgment, arguing Plaintiff has impermissibly introduced new facts or evidence. (Obj.  
23 Reply Evid. (ECF No. 95).) However, parties can file “rebuttal evidence to contravene arguments first  
24 raised by the non-moving party in its opposition.” *TSI Inc. v. Azbil BioVigilant Inc.*, No. CV-12-00083-  
25 PHX-DGC, 2014 WL 880408, \*1 (D. Ariz. 2014). Here, the Court agrees with Plaintiff that the evidence  
26 was submitted in response to arguments raised in Defendants’ Opposition, and is thus not  
27 impermissible “new” evidence, but rather permissible “rebuttal” evidence. (See Resp. Obj. Reply Evid.  
28 (ECF No. 96) at 3 (“Exhibit 30 provides deposition testimony that directly rebuts Defendants’ opening to  
their Opposition. Exhibits 31 and 32 provide additional context to Defendants’ experts’ statements.  
Exhibit 33 rebuts a claim made by Defendants about the authenticity of a document submitted in  
support of the Motion.”).) Accordingly, the Court will consider the evidence submitted by Plaintiff as  
part of their Reply.

<sup>7</sup> Covington clarifies in his expert report that “[t]he objective of the [Investigative Final Report] was to  
determine the impacts to water quality that could affect public and wildlife health from the  
unauthorized leachate discharge to the onsite wetland preserve and offsite tributaries during February  
and March 2019.” (Covington Dep. and Report at 328-29.)

1 discharged off site (Pl.'s App., Ex. 2 ("Miller Dep.") (ECF No. 91-2) at 105:12-106:5,  
2 107:9-25). The inference that Covington undoubtedly drew, and that Plaintiff asks this  
3 Court to draw, is that because leachate-contaminated storm water was pumped into  
4 the Preserve, any water then discharged from the Preserve was also contaminated.  
5 However, this is an inference that the finder of fact, not the Court, must make. See  
6 *Anderson*, 477 U.S. at 255 (explaining that "[c]redibility determinations, the weighing  
7 of the evidence, and the drawing of legitimate inferences from the facts are jury  
8 functions").

9 In order for Plaintiff to prevail, the Court must conclude that no rational trier of  
10 fact could find for Defendants. *Matsushita*, 475 U.S. at 587. The Court cannot make  
11 such a finding here. The reports cited by Defendants undermine the assumption that  
12 the storm water discharged from the Preserve was contaminated with leachate. A  
13 rational jury could view those reports as evidence that no leachate was in fact leaked  
14 from the Preserve, and Plaintiff has not provided any definitive evidence to the  
15 contrary. In addition, as Defendants explained at oral argument, the primary  
16 sedimentation basin is designed to allow suspended particles to settle out of water as  
17 it flows through the basin. Accordingly, some contaminants may have been removed  
18 from the storm water that entered the primary sedimentation basin on the dates in  
19 question before it was discharged from the Facility. Therefore, the evidence is not so  
20 one sided that Plaintiff must prevail as a matter of law.

21 The Court finds there is a genuine dispute of fact precluding summary  
22 judgment as to whether leachate was discharged.

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1 **II. Failure to Develop and Implement an Adequate SWPPP (First**  
2 **Claim for Relief)**

3 Plaintiff argues there is no dispute that each of the four SWPPPs in effect during  
4 the relevant limitations period<sup>8</sup> fail to comply with section X of the General Permit in  
5 three main ways: (1) their site maps do not include all required information; (2) they  
6 do not accurately describe and locate all industrial materials handled at the Facility;  
7 and (3) they are missing required updates. (Mot. PSJ at 19.) As Plaintiff argues, each  
8 day Defendants fail to comply with the General Permit is a violation of the Clean Water  
9 Act. 33 U.S.C. §§ 1311(a), 1365(a)(1), 1365(f).

10 As detailed below, the Court finds that the 2014, 2015, 2019, and 2021 SWPPPs  
11 fail to comply with the requirements of the General Permit section X in several ways.  
12 Accordingly, the Court will grant summary judgment in Plaintiff's favor as follows.

13 **A. Adequacy of the 2019 60-Day Notice**

14 Defendants generally challenge Plaintiff's claims regarding the adequacy of the  
15 2021 SWPPP, arguing Plaintiff's claims were never included in the 60-day notice that  
16 Plaintiff provided to Defendants on November 15, 2019 ("2019 Notice"), and were  
17 never made a part of any subsequent 60-day notice, meaning they cannot be  
18 considered as part of the Motion. (Opp'n PSJ at 15-18, 20-21.) However, the Court  
19 agrees with Plaintiff that under *Natural Resources Defense Council v. Southwest*  
20 *Marine, Inc. ("NRDC")*, 236 F.3d 985 (9th Cir. 2000) and *WaterKeepers Northern*  
21 *California v. AG Industrial Manufacturing*, 375 F.3d 913 (9th Cir. 2004), Plaintiff was  
22 not required to send a second notice letter in order to pursue claims regarding the  
23 2021 SWPPP because the 2019 Notice put Defendants on sufficient notice of the  
24 continuing violations in the SWPPPs.<sup>9</sup> As the Court in *NRDC* reasoned:

25 \_\_\_\_\_  
26 <sup>8</sup> During the relevant statute of limitations period, November 15, 2014, to the present, there have been  
27 four successive SWPPPs in effect at the Facility. (Pl.'s App., Ex. 5 (ECF No. 91-2) ("2021 SWPPP"); Pl.'s  
28 App., Ex. 4 (ECF No. 91-2) ("2019 SWPPP"); Pl.'s App., Ex. 11 (ECF No. 91-3) ("2015 SWPPP"); Pl.'s App.,  
Ex. 12 (ECF No. 91-3) ("2014 SWPPP").

<sup>9</sup> This reasoning does not apply to Plaintiff's claim Defendants failed to update the 2021 SWPPP per a  
2022 state court settlement for the reasons discussed in Section II.B.4 *infra*.

1 If a defendant receives a proper notice letter alleging that it  
2 has failed to prepare and implement an adequate plan and,  
3 in response, prepares a new plan and begins to implement  
4 it before the complaint is filed, is the otherwise proper notice  
5 letter defective for failing to identify and discuss the new plan  
6 and its implementation? In those circumstances, must a  
7 citizen-plaintiff send a new notice letter? We think not.  
8 Subject matter jurisdiction is established by providing a  
9 notice that is adequate on the date it is given to the  
10 defendant.

11 *See NRDC, 236 F.3d at 997; see also WaterKeepers N. Cal., 375 F.3d 920* (“[W]e hold  
12 that WaterKeepers was not required to send a second notice letter in order to pursue  
13 specific claims regarding the inadequacies of [defendant’s] post-notice compliance  
14 efforts.”).

15 Here, the 2019 Notice advises Defendants that (1) the “Facility’s SWPPP  
16 contains a site map that lacks all required information”; (2) “the Facility’s pollutant  
17 source description and assessment fails to capture all potential pollutants at the  
18 Facility”; and (3) Defendants are required to “revise their SWPPP whenever necessary”  
19 and each day Defendants “failed to develop and implement an adequate SWPPP is a  
20 violation of the General Permit.” (Compl., Ex. A (ECF No. 1) at 9.) Defendants do not  
21 argue that Plaintiff’s notice letter was inadequate, or that the 2021 SWPPP brought  
22 Defendants into compliance such that Plaintiff’s claims regarding the 2021 SWPPP are  
23 barred for lack of standing. Accordingly, the Court will consider Plaintiff’s claims  
24 regarding the 2021 SWPPP below.

#### 25 **B. Failure to Include Adequate Site Maps**

26 The General Permit requires SWPPPs to contain a site map that meets certain  
27 criteria. (General Permit § X.E.) These criteria include, among other things, that the  
28 site map include information such as the “location(s) of nearby water bodies (such as  
rivers, lakes, wetlands, etc.),” (*id.* § X.E.3.a); “[a]reas of industrial activity subject to [the]  
General Permit, (*id.* § X.E.3.f); and “[i]dentification of all impervious areas of the facility,

1 including paved areas, buildings, covered storage areas, or other roofed structures,”  
2 (*id.* § X.E.3.d).

3 **1. The Preserve and Wetlands**

4 First, Plaintiff argues that the SWPPP maps fail to identify the Preserve and the  
5 presence of wetlands at the Preserve, despite these being “nearby water bodies (such  
6 as rivers, lakes, wetlands, etc.)” that must be identified under the General Permit.

7 (Mot. PSJ at 20.)

8 Defendants respond that the SWPPP maps identify the primary sedimentation  
9 basin, which is the Preserve. (Defs.’ SUF ¶ 110.) Further, Defendants point out that  
10 the SWPPPs include information identifying the primary sedimentation basin on the  
11 maps as the Preserve and wetlands. For example, Table 4.3 in the 2015 SWPPP  
12 identifies the primary sedimentation basin as the “Constructed wetland” BMP used at  
13 the Facility, while the text of the 2019 SWPPP states: “The primary sedimentation basin  
14 was designed to serve as both a storm water sedimentation basin and a Preserve Area  
15 (the Neal Road Preserve mentioned above) as part of an environmental mitigation  
16 program.” (See Defs.’ Resp. to Pl.’s SUF ¶ 21.)

17 The Court finds there is no genuine dispute of fact that none of the SWPPP  
18 maps adequately identify the location of the wetlands within the Facility, despite a  
19 clear directive from the General Permit to do so. While the maps identify the primary  
20 sedimentation basin, and other portions of some SWPPPs refer to the primary  
21 sedimentation basin as encompassing the Preserve and/or wetlands, the Preserve and  
22 wetlands are not reflected on the maps, and the maps do not reference the  
23 descriptions located elsewhere in the SWPPPs. Readers cannot be expected to scour  
24 the SWPPPs to understand the primary sedimentation basin on the map is also the  
25 Preserve and wetlands.

26 Accordingly, summary judgment is appropriate as to the 2014, 2015, 2019, and  
27 2021 SWPPPs’ maps failure to identify all nearby bodies of water.

28

1                                   **2.      Locations of Industrial Activity and Material**

2                   Second, Plaintiff argues the SWPPPs fail to include maps identifying all “areas of  
3 industrial activity subject to the General Permit” (General Permit § X.E.3.f) and list the  
4 locations where each industrial “material is stored, received, shipped, and handled, as  
5 well as the typical quantities and handling frequency” (*id.* § X.F).

6                   The primary industrial activity at the Facility is the disposal of municipal solid  
7 waste in waste module units. (Pl.’s SUF ¶ 25.) Waste module units are made up of  
8 several phases, one or two of which may be active at any time. (*Id.* ¶ 26.) Waste is  
9 placed in the working face of the active module. (*Id.* ¶ 27.) The working face moves  
10 daily and is closed at the end of each day with material known as daily cover. (*Id.*  
11 ¶ 28.) Plaintiff argues that the Facility has changed the active phase where municipal  
12 solid waste has been disposed at least eight times during the relevant period, and the  
13 active waste module has changed at least once (so that waste was placed in Module 5  
14 in addition to Module 4), but “[n]one of the SWPPPs were revised or amended to  
15 reflect the changes to the locations of where the main industrial activities were  
16 conducted at the Facility.” (Mot. PSJ at 21.)

17                   Defendant replies that all areas of industrial activity conducted at the Facility are  
18 sufficiently identified in the SWPPPs’ maps. (Opp’n PSJ at 16-17; Defs.’ Response to  
19 Pl.’s SUF ¶ 32 (citing 2021 SWPPP at 178-81, 208-12; 2019 SWPPP at 132-33, 158-60;  
20 2015 SWPPP at 356-57, 408; 2014 SWPPP at 593, 684).) Defendants cite their expert  
21 Travis Peterson,<sup>10</sup> who opines that “the requirement of [the] general permit is to  
22 identify all areas of industrial activity and that is sufficiently identified” in the SWPPPs at  
23 issue here; Peterson further opines that the areas of industrial activity identified in a  
24 SWPPP must not be so specific that it becomes outdated and inaccurate immediately,  
25 and that therefore a change in the module at the Facility, for example, would not  
26

27 \_\_\_\_\_  
28 <sup>10</sup> Peterson is an environmental scientist consultant and a California Qualified Industrial Storm Water  
Practitioner. (Defs.’ App., Ex. E (“Peterson Dep. and Reports”) (ECF 93-8) at 211.)

1 necessitate an update to the SWPPP. (Defs.' App., Ex. E ("Peterson Dep. and Reports")  
2 (ECF 93-8) at 198:7-17, 199:12-199a:2.)

3 Concerning the site maps, the Court will not grant summary judgment in  
4 Plaintiff's favor. Section X.E.3.f of the General Permit requires SWPPP maps to:

5 Identify all industrial storage areas and storage tanks,  
6 shipping and receiving areas, fueling areas, vehicle and  
7 equipment storage/maintenance areas, material handling  
8 and processing areas, waste treatment and disposal areas,  
9 dust or particulate generating areas, cleaning and material  
reuse areas, and other areas of industrial activity that may  
have potential pollutant sources.

10 The primary industrial activity takes place in the waste module units. Plaintiff disputes  
11 whether the site maps adequately identify which waste module units and phases are  
12 active. However, there is no clear requirement in the General Permit that the site  
13 maps distinguish between active and non-active waste modules, and the areas of  
14 industrial activity, including the waste module units, are clearly marked in the maps for  
15 each SWPPP. (See 2021 SWPPP at 208-12; 2019 SWPPP at 158-60; 2015 SWPPP at  
16 408; 2014 SWPPP at 684.) Accordingly, the Court cannot conclude that the SWPPPs'  
17 maps fail to comply with section X.E.3.f.

18 As to Plaintiff's related claim that the SWPPPs do not comply with General  
19 Permit section X.F because they do not clearly list the locations where each industrial  
20 "material is stored, received, shipped, and handled," the Court will not grant summary  
21 judgment as to the 2014 SWPPP, which identifies Module 4 as the active waste  
22 module. (2014 SWPPP at 588; Pl.'s SUF ¶ 33.) The Court will also not grant summary  
23 judgment as to the 2015 SWPPP, which identifies the location of the industrial activity  
24 as the "WMUs" (i.e., waste module units), and "Drainage Areas A and E." (2015  
25 SWPPP at 356.) While this is not a precise location of the solid waste, the General  
26 Permit does not appear to require more specificity on its face, and the Court will not  
27 impose such a requirement at this stage.

28



1           However, the Court will grant summary judgment as to the 2019 and 2021  
2 SWPPPs. The 2021 and 2019 SWPPPs state “[t]he major area of industrial activity at  
3 the Facility is the active working face of the landfill. The location of this area changes  
4 over time as part of normal landfill operations.” (2021 SWPPP at 179; 2019 SWPPP at  
5 132). They also identify the location of solid waste as the “Working Face,” the location  
6 of which “Varies.” (2021 SWPPP at 181; 2019 SWPPP at 133.) The Court agrees with  
7 Plaintiff that the 2021 and 2019 SWPPPs fail to specify any identifiable location for  
8 solid waste, instead pinpointing a vague location which is often changeable and  
9 unidentifiable on the SWPPPs’ maps. Defendants do not explain why they cannot  
10 identify the location of solid waste as, for example, one or more of the waste module  
11 units, the location of which does not shift daily. Instead, Defendants rely on the  
12 opinion of their expert Peterson that they are not legally required to do so. However,  
13 Defendants’ experts may not testify to legal conclusions. *Crow Tribe of Indians v.*  
14 *Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) (“Expert testimony is not proper for issues  
15 of law.”).

16           Accordingly, the Court grants summary judgment on this point as to the 2021  
17 and 2019 SWPPPs only.

### 18                           **3. All Impervious Areas**

19           Third, Plaintiff argues there are impervious areas at the Facility where Posi-  
20 Shell<sup>11</sup> has been applied that should be identified on the 2019 and 2021 SWPPPs’  
21 maps but are not. (Mot. PSJ at 22.) Defendants respond that that their expert  
22 Peterson identified Posi-Shell as being only “semi-permanent” and “temporary,”  
23 therefore its inclusion in the maps was not necessary. (Opp’n PSJ at 17-18; Pl.’s SUF  
24 ¶ 55; Defs.’ SUF ¶ 115.)

25           However, as Plaintiff points out, Peterson also opines that despite Posi-Shell  
26 being temporary, it should have been identified on the SWPPPs. (Pl.’s App., Ex. 9

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27  
28 <sup>11</sup> Posi-Shell is a spray-on product that dries in the form of a thin durable stucco. (Mot. PSJ at 22 n.6.)

1 (“Peterson Dep.”) (ECF No. 91-2) at 311:3–312:9.) The 2021 SWPPP also explicitly  
2 identifies areas with Posi-Shell as impervious areas at the Facility. (2021 SWPPP at  
3 178.) Defendants do not otherwise explain why Posi-Shell’s temporary nature excused  
4 it from being identified in the SWPPP maps. As Plaintiff’s evidence supports the  
5 conclusion that areas where Posi-Shell was applied were impervious and should have  
6 been identified in the SWPPPs’ maps, the Court finds there is no dispute of fact that  
7 the 2019 and 2021 SWPPPs’ maps failed to identify all impervious areas.

8 **4. 2021 SWPPP and Site Maps Failure to Identify the Advanced**  
9 **BMPs Implemented as a Result of the Parties’ State Court**  
10 **Settlement Agreement**

11 Finally, Plaintiff argues the Parties entered into a settlement in Butte County  
12 Superior Court in 2022 which required Defendant Butte County Department of Public  
13 Works to install certain advanced BMPs at the Facility. (Mot. PSJ at 23.) These BMPs  
14 were installed by June 2023. (*Id.*) Plaintiff alleges the Defendants have not revised or  
15 amended the 2021 SWPPP to reflect the installation of these BMPs. (*Id.* at 23–24.)  
16 Defendants argue that this claim should not be considered because it (1) was not  
17 included in the 2019 Notice provided to Defendants, (2) was never listed in Plaintiff’s  
18 discovery responses, (3) did not fully accrue until June 2023, after the applicable non-  
19 expert discovery cutoff, and (4) was never included as a claim in the Complaint.  
20 (Opp’n PSJ at 18–19.)

21 “It is axiomatic that violations not pled in the complaint cannot be considered  
22 by this court at the summary judgment stage.” *Feezor v. Patterson*, 896 F. Supp. 2d  
23 895, 903 (E.D. Cal. 2012); *see also Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963,  
24 968–69 (9th Cir. 2006) (affirming a district court’s refusal to consider at the summary  
25 judgment stage factual allegations not pled in the complaint). While the Complaint  
26 makes general allegations concerning the Defendants failure to include advanced  
27 BMPs in the SWPPPs (*see* Compl. ¶ 44), the Court is concerned that neither the  
28 Complaint nor Plaintiff’s later disclosures reference the BMPs in the 2022 settlement,

1 and Plaintiff's claims concerning those BMPs only fully accrued after the close of non-  
2 expert discovery. Therefore, even if Defendants had some notice of the claim, the  
3 Court is not convinced they had an adequate opportunity to address the claim in  
4 discovery and prepare for defense of this Motion. Accordingly, the Court will not  
5 consider Plaintiff's claims concerning Defendants' failure to update the 2021 SWPPP in  
6 light of the 2022 state court settlement agreement in this Motion. *Cf. Wilson v. Pier 1*  
7 *Imps. (US), Inc.*, 439 F. Supp. 2d 1054, 1064 (E.D. Cal. 2006) ("Where, as here, plaintiff  
8 discovered new alleged violations during the discovery period that were not pled in  
9 the complaint, but disclosed to defendants in sufficient time to permit defendants to  
10 address them in discovery and by way of law and motion, the court concludes plaintiff  
11 is not precluded from raising these allegations on a motion for summary judgment or  
12 at trial.").

13 **C. Failure to Accurately Describe the Locations of All Industrial**  
14 **Materials**

15 Plaintiff argues that the SWPPPs are also required to include "a list of industrial  
16 materials handled at the facility, and the locations where each material is stored,  
17 received, shipped, and handled, as well as the typical quantities and handling  
18 frequency." (General Permit § X.F.) Plaintiff argues that, in addition to the SWPPPs'  
19 failure to identify the specific locations of solid waste, as discussed in Section II.B.2  
20 *supra*, the 2021 SWPPP also fails to accurately identify the locations where  
21 construction and demolition debris and green waste are located, as well as the  
22 location of leachate. (Mot. PSJ at 24.)

23 Concerning the location of construction and demolition debris and green  
24 waste, which the 2021 SWPPP identifies as industrial materials, the 2021 SWPPP lists  
25 the location for construction and demolition debris, green waste, recyclable materials,  
26 and waste tires as "Varies and See Drawing 1." (Miller Dep. at 95:10-12; 2021 SWPPP  
27 at 181.) Drawing 1 does not identify construction and demolition debris, nor does it  
28 identify green waste, although it does identify tires and recyclables. (Miller Dep. at

1 97:4-7; 2021 SWPPP at 208.) Defendants argue that, while Miller testified it would  
2 have been more appropriate or helpful to separate out locations for the different  
3 materials, this is not an admission Defendants were legally required to do so. (Opp'n  
4 PSJ at 20.) However, this argument does not rebut the fact that the 2021 SWPPP fails  
5 to list the location where the construction and demolition debris and green waste are  
6 stored, as the purported location of these materials refers to a map which does not, in  
7 fact, identify their location. The General Permit requires "a list of industrial materials  
8 handled at the facility, and the locations where *each* material is stored." (General  
9 Permit § X.F (emphasis added).) The Court finds that under the plain language of the  
10 General Permit, Defendants failed to meet this requirement, and will grant summary  
11 judgment on this point.

12 Further, Plaintiff argues the location of leachate is insufficiently identified as  
13 "Class II Surface Impoundment - See Drawing 2." (Mot. PSJ at 24 (citing 2021 SWPPP  
14 at 181).) Plaintiff also argues the leachate collection and removal system is not  
15 properly identified as a location where leachate is "stored, received, shipped, and  
16 handled" in the 2021 SWPPP. (*Id.*) However, the location of leachate is clearly  
17 identified in Drawing 3 of the 2021 SWPPP. (2021 SWPPP at 212.) Further, Drawing 2  
18 shows the leachate conveyance pipes. (2021 SWPPP at 209.) Thus, the Court cannot  
19 say as a matter of law that Defendants have failed to identify the location of leachate at  
20 the Facility. Accordingly, the Court will deny summary judgment on this point.

#### 21 **D. Failure to Revise the SWPPPs when Necessary**

22 The General Permit requires dischargers to "[r]evise their on-site SWPPP  
23 whenever necessary," and to "[c]ertify and submit via [Stormwater Multiple Application  
24 and Tracking System ("SMARTS")] their SWPPP within 30 days whenever the SWPPP  
25 contains significant revisions." (General Permit §§ X.B.1-2.) SWPPPs must also  
26 "[i]dentify and describe conditions or circumstances which may require future  
27 revisions to be made to the SWPPP." (*Id.* § X.C.2.)

28

1 Plaintiff identifies several ways in which Defendants have failed to update the  
2 SWPPPs when necessary, including (1) failing to update the 2021 SWPPP to account  
3 for the installation and repair of approximately five acres of rain fly over Module 4,  
4 (2) failing to remove a covered aerated static pile (“CASP”) facility from the 2021  
5 SWPPP that was never implemented due to budget constraints, and (3) a failure to  
6 revise the SWPPPs to incorporate amendments uploaded to SMARTS in 2017. (See  
7 Mot. PSJ at 25-26.)

8 Defendants do not contest that they failed to update the 2021 SWPPP to  
9 account for the rain fly over Module 4. (Pl.’s SUF ¶¶ 71-72.) Accordingly, the Court  
10 will grant summary judgment to Plaintiff on that claim.

11 Concerning the CASP facility, Plaintiff argues it must be removed from the  
12 SWPPP because it “does not exist, and will never exist, at the Facility.” (*Id.* ¶ 75.)  
13 Defendants argue that the evidence does not show the CASP will never exist, and the  
14 2021 SWPPP need not be revised if the CASP project has simply not yet been  
15 installed. However, Miller testified that, “as of today,” the SWPPP was “inaccurate”  
16 because “[t]here is no proposed CASP facility.” (Miller Dep. at 98:2-6.) While Miller’s  
17 testimony does not definitively foreclose the possibility of a future CASP facility, his  
18 testimony also does not support the conclusion that the CASP project is still a realistic  
19 possibility, and Defendants provide no evidence the CASP project is still in progress.  
20 Indeed, Defendants admit that the “proposed CASP project was wholly abandoned,  
21 with no prospect of it being implemented at the Facility, due to financial limitations.”  
22 (Pl.’s SUF ¶ 74.) Accordingly, the Court finds there is no dispute of fact that  
23 Defendants failed to update the 2021 SWPPP to remove the CASP facility.

24 Finally, Plaintiff argues that a document detailing a series of amendments  
25 purportedly made to the SWPPP were uploaded to SMARTS in 2017. (Mot. PSJ at 25.)  
26 Plaintiff argues the “amendments appear to be significant and would warrant  
27 certification and submission of a revised SWPPP via SMARTS within 30 days” under  
28 General Permit section X.B.2. (*Id.* at 26.) However, Plaintiff argues these amendments

1 were never incorporated into a revised SWPPP. (*Id.*) Defendants do not contest that a  
2 revised SWPPP was never submitted. Rather, they point to evidence that that 2017  
3 amendments were never uploaded to SMARTS in the first place. (Peterson Decl. (ECF  
4 No. 93-7) ¶ 4.) Accordingly, Defendants argue there is a genuine dispute of fact as to  
5 whether these amendments were aspirational, or whether they were concrete  
6 amendments Defendants were required to incorporate into a revised SWPPP. (Defs.’  
7 Response to Pl.’s SUF ¶ 77.) While Defendants were required to submit an updated  
8 SWPPP within 30 days if the SWPPP contained significant revisions (see General Permit  
9 § X.B.2), it is not clear to the Court whether the 2017 amendments identified here  
10 were finalized revisions to the SWPPP, or merely proposed revisions. Plaintiff has not  
11 demonstrated that any revisions to the SWPPP were required if these amendments  
12 were merely proposed revisions. Accordingly, the Court declines to grant summary  
13 judgment on this point.

### 14 **III. Failure to Develop and Implement an Adequate MIP (Third** 15 **Claim for Relief)**

16 The General Permit requires dischargers to develop and implement a MIP as  
17 part of the SWPPP. (General Permit §§ X.I, XI.) One of the monitoring requirements is  
18 to collect representative samples of storm water discharges and have those samples  
19 analyzed for various pollutants. (*Id.* § XI.B.6.) Facilities are required to analyze the  
20 samples for pollutants that are typically associated with their industry; pollutants  
21 identified on a site-specific basis that are likely to be present in discharges; pollutants  
22 associated with downstream impairments; additional parameters required by the  
23 Regional Water Board; and parameters required under Subchapter N, 40 C.F.R.  
24 sections 401–471. (*Id.* §§ XI.B.6.c–g.) Failure to comply with the monitoring  
25 requirements of the General Permit is a violation of the Clean Water Act. 33 U.S.C.  
26 §§ 1311(a), 1365(a)(1), 1365(f).

27 Within Subchapter N, 40 C.F.R. section 445 governs effluent limitations for  
28 discharges of wastewater from landfill units. Non-hazardous waste landfills such as

1 the Facility that discharge landfill wastewater must analyze samples for specific  
2 regulated parameters (“Regulated Parameters”), which include biochemical oxygen  
3 demand, total suspended solids, ammonia (as nitrogen),  $\alpha$ -Terpineol, benzoic acid, p-  
4 Cresol, phenol, zinc, and pH. (General Permit § XI.B.6.g;) 40 C.F.R. §§ 445.20–445.21.  
5 Landfill wastewater includes leachate and contaminated storm water. 40 C.F.R.  
6 § 445.2(f). Thus, discharges of leachate-contaminated storm water from the Facility  
7 are subject to Subchapter N.

8 Plaintiff argues that, under Subchapter N, the Facility was required to analyze  
9 the 2019 storm water discharges for the Regulated Parameters. (Mot. PSJ at 27.) Yet,  
10 Plaintiff argues “there is no dispute that Defendants’ Monitoring Implementation Plan  
11 does not require analysis of the Regulated Parameters,” and that when Defendants  
12 discharged contaminated storm water in February of 2019, and collected samples on  
13 February 14, 2019, and February 26, 2019, “they did not have those samples analyzed  
14 for all of the Regulated Parameters,” *i.e.*, “biochemical oxygen demand, ammonia (as  
15 nitrogen),  $\alpha$ -Terpineol, benzoic acid, or p-Cresol.” (*Id.* at 28.) Accordingly, Plaintiff  
16 argues the Defendants have violated the General Permit and the Clean Water Act.

17 As the Court noted in its order for supplemental briefing, the 2015 MIP, which  
18 was in place at the time of the alleged storm water discharges in 2019, did not require  
19 testing for the Regulated Parameters. (See 2015 SWPPP at 391-971 (no required  
20 testing of biochemical oxygen demand, ammonia (as nitrogen),  $\alpha$ -Terpineol, benzoic  
21 acid, or p-Cresol).) The 2019 and 2021 MIPs remedy this, however, by requiring the  
22 Facility to test landfill wastewater for the Regulated Parameters. (See 2019 SWPPP at  
23 153-54 (stating that “if the Facility discharges landfill wastewater, as defined in Part  
24 445.2(f), then it will be subject to the storm water EGLs” and will analyze samples for  
25 the Regulated Parameters); 2021 SWPPP at 202 (same).) Plaintiffs may not sue to  
26 remedy “wholly past” violations of the Clean Water Act; the Act only confers  
27 jurisdiction over citizen suits that allege continuous or intermittent violations.  
28 *Waterkeepers N. Cal.*, 375 F.3d at 921. Thus, the Court ordered Plaintiff to

1 demonstrate why Defendants' alleged failures to develop and implement an adequate  
2 MIP are continuous or intermittent such that the Court could grant summary judgment  
3 on Plaintiff's claim. (ECF No. 99 at 3.)

4 In their supplemental briefing, Plaintiff concedes that the 2019 and 2021 MIPs  
5 require Defendants to analyze for the Regulated Parameters if the Facility discharges  
6 landfill wastewater. (Supp. Br. (ECF No. 100) at 3.) However, Plaintiff now presents an  
7 entirely new basis for summary judgment,<sup>12</sup> arguing that the 2019 and 2021 MIPs are  
8 deficient because they do not comply with a different section of the General Permit –  
9 Section XI.B.6.c – that requires dischargers to “analyze all collected samples” for  
10 “[a]dditional parameters identified by the Discharger on a facility-specific basis that  
11 serve as indicators of the presence of all industrial pollutants identified in the pollutant  
12 source assessment (Section X.G).” (*Id.* at 4.) Plaintiff argues that Defendants have  
13 identified leachate as an industrial pollutant likely to be present in industrial storm  
14 water discharges from the Facility. (*Id.*; see 2019 SWPPP at 137; 2021 SWPPP at 186.)  
15 Yet, Plaintiff argues the MIPs do not require testing for specific parameters that serve  
16 as indicators of the presence of leachate, a fact which was confirmed by Defendants'  
17 expert Peterson. (Supp. Br. at 5.) When Peterson was asked whether “any of the  
18 monitoring implementation plans include pollutants that are indicators of leachate in  
19 the storm water sampling requirements,” Peterson responded “[n]o, I don't believe  
20 so.” (Peterson Dep. at 316:18-22.)

21 Defendants respond that the 2019 and 2021 MIPs did not add any additional  
22 testing parameters under section XI.B.6.c of the General Permit because the MIPs  
23 already identified parameters under section XI.B.6 parts a, b, d, e, and g that were  
24 sufficient to serve as indicators of leachate. (Opp'n Supp. Br. (ECF No. 101) at 4.)  
25 Specifically, the MIPs require storm water be sampled for total suspended solids

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26  
27 <sup>12</sup> Defendants do not argue that Plaintiffs waived this argument by not raising it in their initial briefing.  
28 Given that Defendants had an opportunity to respond to this argument in their opposition to the  
supplemental briefing and given that Plaintiff's third cause of action is broad enough to encompass this  
theory of liability, the Court will decide Plaintiff's claim on the merits.



1 (“TSS”), oil and grease (“O&G”), pH, iron, lead, aluminum, zinc, and chemical oxygen  
2 demand (“COD”). (2019 SWPPP at 151-52; 2021 SWPPP at 200.) TSS, O&G, and pH  
3 are parameters required for all industrial facilities, while iron, lead, aluminum, zinc,  
4 and COD are pollutants associated with the Facility’s Standard Industrial Classification  
5 codes. (See General Permit §§ XI.B.6.a, XI.B.6.b, XI.B.6.d, Table 1.) Defendants argue  
6 that COD and O&G, which are organic indicators, and iron, lead, aluminum, and zinc,  
7 which are inorganic indicators, are sufficient to detect leachate because leachate leaks  
8 can contain a “wide variety of inorganic and organic pollutants.” (Opp’n Supp. Br. at  
9 4; 2019 SWPPP at 137; 2021 SWPPP at 185.)

10 However, Defendants do not point to evidence in the record supporting these  
11 arguments. They conclude that COD, O&G, iron, lead, aluminum, and zinc are  
12 sufficient to detect leachate because they are indicators of inorganic and organic  
13 pollutants, but do not point to any expert testimony or other source for why these  
14 parameters are sufficient such that any further duty to identify additional parameters  
15 under section XI.B.6.c of the General Permit is excused. Unsupported conclusory  
16 statements in a brief are insufficient to create an issue of fact. *Comite de Jornaleros de*  
17 *Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 950 n.9 (9th Cir. 2011) (en  
18 banc), cert. denied, 565 U.S. 1200 (2012); *Barnes v. Indep. Auto. Dealers Ass’n Health*  
19 *& Benefit Plan*, 64 F.3d 1389, 1396 n.3 (9th Cir. 1995).

20 The closest support for Defendants’ arguments that the Court can find is in  
21 Peterson’s rebuttal report, wherein he opines that the “[s]ample parameters required  
22 by the Facility,” i.e., pH, TSS, O&G, COD, iron, aluminum, lead, and zinc, are based on  
23 “primary and secondary Standard Industrial Code<sup>5</sup> (SIC) numbers 4953, Landfills and  
24 Land Application Facilities, and 5093, Scrap and Waste Materials” which “take into  
25 account relevant industry considerations based on the operation of such facilities,  
26 including the presence of leachate.” (Peterson Dep. and Reports at 220-22.) This still  
27 does not explain, however, why the Facility is not required to identify any *additional*  
28 parameters that indicate the presence of leachate.

1 Support for Defendants' position is further undermined by the 2014 and 2015  
2 MIPs, which do identify and require testing for specific inorganic and organic  
3 constituents that indicate the presence of leachate. (See 2014 SWPPP at 608, 613-14  
4 (stating storm water samples shall be analyzed for constituents listed in Table 3, which  
5 in turn requires testing for inorganic and organic constituents from the leachate-  
6 monitoring program listed in Table 2); 2015 SWPPP at 358, 391-96 (requiring  
7 sampling for potential organic and inorganic pollutants in leachate listed in Table  
8 3.2).) The 2019 and 2021 MIPs, on the other hand, do not. This shows that  
9 Defendants could, but did not, comply with section XI.B.6.c of the General Permit.  
10 Accordingly, the Court finds that summary judgment is appropriate in Plaintiff's favor  
11 as to the inadequacy of the 2019 and 2021 MIPs.

12 Alternatively, Plaintiff argues summary judgment is proper because it is  
13 undisputed the storm water samples collected in 2019 were not tested for the  
14 Regulated Parameters. (Supp. Br. at 3.) Plaintiff argues this failure is likely to be  
15 repeated in future, even under the 2021 MIP, because the 2021 MIP only requires  
16 discharges of landfill wastewater be tested for the Regulated Parameters. (*Id.* at 5-6.)  
17 Plaintiff argues it is not always obvious if discharged storm water qualifies as landfill  
18 wastewater (i.e., whether the storm water is contaminated). (*Id.*) Thus, because the  
19 2021 MIP does not require that all storm water be tested for the Regulated  
20 Parameters, Defendants will likely fail to test contaminated storm water for the  
21 Regulated Parameters in future.

22 The Court declines to grant summary judgment on this basis. Plaintiff provides  
23 no evidence that any failure to test contaminated storm water samples for the  
24 Regulated Parameters continued after the 2019 and 2021 MIPs were implemented.  
25 Rather, Plaintiff argues that any failure is "likely" to reoccur because Defendants might  
26 not always be aware of leachate in their storm water discharges. (See *id.* at 3.) Such  
27 speculation is insufficient to support Plaintiff's burden of proof at summary judgment.  
28 *Loomis v. Cornish*, 836 F.3d 991, 997 (9th Cir. 2016) ("Mere allegation and speculation

1 do not create a factual dispute for purposes of summary judgment.” (quoting *Nelson*  
2 *v. Pima Community College*, 83 F.3d 1075, 1081-82 (9th Cir. 1996)).)

3 Therefore, the Court grants summary judgment on Plaintiff’s third cause of  
4 action as to the 2019 and 2021 MIPs only.

5 **IV. Standing**

6 Finally, Plaintiff argues they have standing to bring this action under *Lujan v.*  
7 *Defenders of Wildlife*, 504 U.S. 555 (1992), because (1) Defendants’ violations of the  
8 Clean Water Act harm the Preserve as well as Plaintiff, (2) these injuries are fairly  
9 traceable to Defendants, and (3) Plaintiff’s injuries will likely be redressed by a  
10 favorable decision. (Mot. PSJ at 28-31.)

11 Defendants object to Plaintiff’s standing argument on the basis it was not raised  
12 at the Parties’ meet and confer prior to the filing of this Motion. (Opp’n PSJ at 24.)  
13 However, Plaintiff does not seek summary judgment on the issue of standing. Rather,  
14 Plaintiff argues that implicit in any dispositive motion is the question of standing, and  
15 Plaintiff simply “provided the facts that would provide sufficient basis to determine  
16 that Plaintiff has standing to prevail on its Motion.” (Reply PSJ at 20.)

17 The Court finds for the purposes of this Motion that Plaintiff has satisfied the  
18 Article III standing requirement.

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**CONCLUSION**

In accordance with the above, the Court hereby GRANTS in part and DENIES in part Plaintiff’s Motion for Partial Summary Judgment. (ECF No. 91.)

Specifically, the Court denies summary judgment as to Plaintiff’s fourth cause of action. However, the Court grants summary judgment on Plaintiff’s first cause of action as to the 2014, 2015, 2019, and 2021 SWPPPs. The Court further grants summary judgment on Plaintiff’s third cause of action as to the 2019 and 2021 MIPs.

IT IS SO ORDERED.

Dated: April 17, 2024

  
Hon. Daniel J. Calabretta  
UNITED STATES DISTRICT JUDGE

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