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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CENTRAL VALLEY EDEN ENVIRONMENTAL DEFENDERS, LLC,

Plaintiff,

v.

CHAMPION HOME BUILDERS, INC., ET AL.,

Defendants.

CASE NO. 2:23-cv-01273-DJC-DB

DEFENDANTS CHAMPION HOME BUILDERS, INC.'S AND SKYLINE CHAMPION CORPORATION'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date/Time: January 4, 2024, 1:30 p.m.
Judge: Hon. Daniel J. Calabretta
Courtroom: 10

TO THE HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on January 4, 2024 at 1:30 p.m., or as soon thereafter as this matter may be heard in the Courtroom of the Honorable Daniel J. Calabretta, of the District Court for the Eastern District of California, located in Courtroom 10 of the Robert T. Matsui Courthouse, 501 I St., Sacramento, California, 94814, Defendants Champion Home Builders, Inc. and Skyline Champion Corporation will and hereby do move to dismiss Plaintiff Central Valley Eden Environmental Defenders, LLC's First Amended Complaint for Injunctive and Declaratory Relief, Civil Penalties and Remediation (the "FAC") pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

This motion is brought on the grounds set forth in the attached Memorandum of Points and Authorities, including but not limited to: (1) Plaintiff's 60-day notice under the Clean Water Act is inadequate; (2) the five-year statute of limitations has passed for Plaintiff's sixth cause of action; (3) Plaintiff has not adequately pled standing; (4) the FAC fails to state a cause of action; and (5) Skyline Champion Corporation is not a permittee under the General Industrial Permit, and should therefore be dismissed.

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Declaration of Daniel Brunton, the Request for Judicial Notice, and any oral argument the Court may entertain at the hearing on this matter.

Defendants request oral argument for this matter.

Parties have had several written and oral communications to discuss Plaintiff's Complaint, the FAC, this motion, and the arguments made in this motion. Those include telephonic discussions on April 27, 2023, a written response to the 60-day notice that Defendants sent to Plaintiff on May 26, 2023, an email exchange on October 10 and 11, 2023, a telephone conference on November 9, 2023, and an email exchange thereafter. Accordingly, I certify that the parties exhausted their meet-and-confer efforts.

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Dated: November 20, 2023

Respectfully submitted,

LATHAM & WATKINS LLP

By: */s/ Daniel Brunton*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Central Valley Eden Environmental Defenders, LLC's ("Plaintiff" or "Eden") First Amended Complaint ("FAC") alleges that Defendants Champion Homebuilders, Inc. and Skyline Champion Corporation (collectively, "Champion" or "Defendants") violated the Clean Water Act and the industrial general permit for storm water ("General Permit") in nearly every conceivable way. This is despite the fact that Champion monitors its stormwater, as it must under the General Permit, and the monitoring results uniformly show compliance for the last six years. The FAC, which consists largely of a generic recitation of legal requirements under the General Permit cast as factual allegations, is inadequate and should be dismissed for five independent reasons.

First, Plaintiff's 60-day notice is inadequate. Under the Clean Water Act, before bringing a lawsuit, a plaintiff must send a defendant a 60-day notice that describes the alleged violations in sufficient detail to afford a defendant the opportunity to correct them and render a lawsuit unnecessary. The Ninth Circuit requires 60-day notices to strictly comply with the applicable regulations. Plaintiff's 60-day notice is inadequate because it fails to include information required by regulation, including the name of the person sending the notice and the name and contact information of Plaintiff's counsel.

Plaintiff's 60-day notice is also inadequate because after receiving Plaintiff's 60-day notice, Champion hired an environmental expert to completely rewrite its Stormwater Pollution Prevention Plan ("SWPPP"). Preparing and implementing an adequate SWPPP is Champion's primary obligation under the General Permit, which requires the SWPPP be designed to "demonstrate compliance with the requirements" of the General Permit. But Plaintiff's 60-day notice says nothing about the new SWPPP, and it therefore does not satisfy the jurisdictional prerequisite to bring a citizen suit challenging the SWPPP. Similarly, other than a brief reference to it in paragraph 92, the FAC says nothing of the SWPPP. Thus, Plaintiff's five causes of action that challenge the SWPPP or elements of the SWPPP are barred—First (Inadequate SWPPP), Second (Inadequate Monitoring and Reporting Program), Fourth (Failure

to Implement Best Available and Best Conventional Treatment Technologies), Fifth (Discharges of Contaminated Stormwater), and Seventh (Failure to Train Employees).

Second, the five-year statute of limitations has passed for Plaintiff's sixth cause of action. In its sixth cause of action, Plaintiff alleges that Champion failed to prepare an "Exceedance Response Action," which was allegedly due by January 1, 2018. But Plaintiff filed its Complaint on June 30, 2023—more than five years after the alleged violation. Therefore, the five-year statute of limitations and the concurrent remedy doctrine bar this claim.

Third, Plaintiff has not adequately pled standing. Plaintiff alleges standing based on the standing of its alleged members. But the FAC fails to plead facts (as opposed to legal conclusions) showing any of the elements of standing—including (1) an "injury in fact," (2) that is "fairly traceable" to Champion's "challenged action," and which (3) a "favorable judicial decision" will likely prevent or redress. Indeed, Plaintiff does not plead the name of a single member who allegedly has standing or any specific facts regarding standing.

Fourth, Plaintiff's vague, conclusory FAC fails to state a cause of action. Plaintiff's FAC contains no factual allegations at all regarding the rewritten, operative SWPPP. Therefore, the following five causes of action, which allege inadequacies regarding the SWPPP, have not been adequately pled: First (Inadequate SWPPP), Second (Inadequate Monitoring and Reporting Program), Fourth (Failure to Implement Best Available and Best Conventional Treatment Technologies), Fifth (Discharges of Contaminated Stormwater), and Seventh (Failure to Train Employees). Additionally, the FAC contains conclusory allegations similar to those other courts have found lacking. Indeed, a redline of the FAC in this case against a complaint Plaintiff brought recently in another case shows they are nearly identical. Plaintiff's allegations based upon information and belief are also inadequate because they are not based upon factual information that makes Plaintiff's intended inferences plausible and are contradicted by publicly available information. This sort of cookie-cutter pleading falls well short of pleading standards and the entire FAC should therefore be dismissed under Federal Rule of Civil Procedure 12(b)(6).

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Fifth, Skyline Champion Corporation is not a permittee, and should therefore be dismissed. The entire FAC alleges violations of the General Permit. But Skyline Champion Corporation is not a permittee, nor does the FAC allege that Skyline Champion Corporation has the type of extensive control over the permitted site that would make it subject to a Clean Water Act citizen suit.

In sum, Plaintiff's entire FAC should be dismissed without leave to amend.

II. BACKGROUND FACTS

Champion manufactures modular homes and buildings at its plant at 1720 East Beamer Street, Woodland, California (the "Woodland plant"). FAC ¶ 79. Champion's Woodland plant is a permittee under the General Permit. *Id.* ¶ 22.

The General Permit's primary requirement for permittees is to prepare and implement a SWPPP that meets the General Permit's requirements. Ex. 1 at 11 (¶ 54) (General Permit) ("The SWPPP must include the information needed to demonstrate compliance with the requirements of this General Permit.").[1] The General Permit contains 25 pages of detailed requirements for what a SWPPP must include, including a monitoring plan. *Id.* at 26-50. The requirements include:

- Selecting and implementing Best Management Practices ("BMPs") to "achieve compliance with this General Permit;" (*id.* at 27 (§ X.C.1.b))
- BMPs must be selected to meet technology based standards; (*id.* at 32 (§ X.H.1) ("The Discharger shall, to the extent feasible, implement and maintain all of the following minimum BMPs . . . ."); Ex. 2 at 23 (Fact Sheet) ("for the purposes of this General Permit, the requirement to implement BMPs 'to the extent feasible' means to reduce and/or prevent discharges of pollutants using BMPs that represent BAT [i.e. best available technology economically achievable] and BPT [i.e. best practicable control technology currently available] in light of best industry practice"))
- Establishing and training a Pollution Prevention Team to implement the SWPPP and ensure compliance with the General Permit; (Ex. 1 at 27 (§ X.D))
- Preparing and implementing a Monitoring and Implementation Plan to monitor compliance; (*id.* at 39 (§ X.I))

Available monitoring data shows that the facility's BMPs are adequate, are controlling stormwater pollution consistent with the General Permit, and are in full compliance with the

[1] Exhibit references are to the Declaration of Daniel P. Brunton submitted with this motion.

Clean Water Act. The General Permit requires Champion to monitor its stormwater discharges to assure that water quality is being protected. Those monitoring results are compared against the stringent Numeric Action Levels in the permit. The Numeric Action Levels are set at a stringent level, so compliance with the Numeric Action Levels indicates that a facility is in compliance. Ex. 2 (Fact Sheet) at 62 ("If [Numeric Action Level] exceedances do not occur, the State Water Board generally expects that the Discharger has implemented sufficient BMPs to control storm water pollution."). In contrast, "[Numeric Action Level] exceedances defined in [the] General Permit are not, in and of themselves, violations of [the] General Permit." Ex. 1 (General Permit) at 13; Ex. 2 (Fact Sheet) at 62. Rather, exceedances of Numeric Action Levels simply require a permittee to "evaluate the effectiveness of their BMPs being implemented to ensure they are adequate to achieve compliance with this General Permit." Ex. 1 at 13-14. In other words, compliance with the stringent Numeric Action Levels generally means a facility has adequate BMPs and is adequately controlling stormwater pollution, but exceeding the Numeric Action Levels does not mean a facility is in violation.

Under the General Permit, a facility is considered "Baseline status" where it is "demonstrating compliance with all NALs." Ex. 2 at 62-63. The Regional Water Quality Control Board's website identifies the facility as being in "Baseline Status." Ex. 3 (SMARTS Summary Report). It also indicates that there have been no exceedances in the last five years (during the statute of limitations). Ex. 3.

Plaintiff sent Champion a letter dated February 16, 2023, alleging violations represented of the Clean Water Act and the General Permit. FAC ¶ 2-3; Ex. A to FAC (60-day notice letter). The letter was not signed, but was rather stamped "EDEN Environmental Defenders." Ex. A to FAC. Similarly, though plaintiff has both in-house counsel and outside counsel, the 60-day notice letter did not contain the name or contact information for Plaintiff's counsel. *Id.*

Further obscuring who is in charge of Plaintiff, Mr. Herb is currently listed as Plaintiff's agent for service of process by the California Secretary of State. Ex. 4 (Statement of Information). And Mr. Herb has another group whose name is nearly identical to Plaintiff's in

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other Clean Water Act citizen suits. *See, e.g., Eden Envtl. Citizen's Grp., LLC v. Am. Custom Marble, Inc.*, No. 19-cv-03424, 2020 U.S. Dist. LEXIS 25394 (N.D. Cal. Feb. 13, 2020).

Upon receiving Plaintiff's 60-day notice letter, Champion hired a stormwater expert to completely rewrite the SWPPP. Ex. 5 (May 23, 2023 SWPPP). Plaintiff did not send an updated 60-day notice with regard to the new SWPPP or comment on the new SWPPP at all. Instead, it filed this lawsuit. ECF No. 1.

Defendants filed a Motion to Dismiss Plaintiff's original Complaint on October 12, 2023 (ECF. No. 6). But Plaintiff merely filed objections and an Opposition to Defendants' motion based on an allegedly inadequate pre-filing meet and confer. ECF Nos. 8-9. Plaintiff again did not respond to the merits of Defendants' arguments.

Plaintiff then filed the FAC, which is nearly identical to Plaintiff's original Complaint—the substantive difference being that the FAC contains additional (and irrelevant) allegations regarding Skyline Champion Corporation's history. FAC ¶¶ 24-27. Furthermore, Plaintiff's FAC does not plead additional facts with respect to the revised SWPPP, as the FAC's sole reference to the new SWPPP remains as: "Plaintiff notes that on May 25, 2023, Defendants uploaded a revised SWPPP to SMARTS. However, the revised SWPPP is also deficient and does not comply with all mandatory elements of Section X of the General Permit." FAC ¶ 92.

On November 17, 2023, Champion updated its SWPPP to correct a clerical error that occurred in some places regarding the name of the facility. Ex. 6 at 8 (November 17, 2023 SWPPP). As described in the updated SWPPP, the update was to remove stray references to "Skyline:"

> Made cleanup changes to delete references to "Skyline." Non-substantive change to conform naming convention for facility owner and operator, Champion Home Builders, Inc. In 2018, the then-owner Skyline Homes, Inc. (also sometimes referred to as Skyline or Skyline Corp) was merged into Champion Home Builders, Inc., which remains the owner and operator of the facility.

As described in the SWPPP, the owner and operator of the facility under the General Permit remains Champion Home Builders, Inc. and not Skyline Champion Corporation.

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III. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(1) allows a defendant to seek dismissal when the court does not have subject matter jurisdiction over a case. Federal courts are courts of limited jurisdiction and "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citations omitted). The burden of establishing that the Court has subject matter jurisdiction lies with Plaintiff. *Id.* at 377. A court does not have subject matter jurisdiction over a Clean Water Act citizen suit where the plaintiff has failed to provide adequate notice of the alleged violation pursuant to 33 U.S.C. § 1365(b)(1)(a). *Nat. Res. Defense Council v. Sw. Marine, Inc.*, 236 F.3d 985, 995 (9th Cir. 2000) ("If a party seeking to bring a citizen enforcement action has not complied with the CWA's notice requirement, then the district court in which that action is brought lacks subject matter jurisdiction and must dismiss the action.").

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff pleads facts that "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations and quotations omitted). There must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* A complaint also fails to state a claim if the relief it seeks is barred as a matter of law. *Jones v. Bock*, 549 U.S. 199, 215 (2007).

In ruling on a motion to dismiss, the court accepts the plaintiff's allegations as true and draws all reasonable inferences in its favor. *See Usher v. City of L.A.*, 828 F.2d 556, 561 (9th Cir. 1987). The Court may also consider documents attached to the complaint, incorporated by reference, or relied upon by the complaint. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

A court "need not assume the truth of legal conclusions cast in the form of factual allegations." *U.S. ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986). While

Federal Rule of Civil Procedure Rule 8(a) does not require detailed factual allegations, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. A pleading is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Moreover, it is inappropriate to assume the plaintiff "can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

IV. ARGUMENT

A. Plaintiff Cannot Meet its Burden of Showing the Court has Jurisdiction Because its 60-day Notice is Inadequate

Plaintiff's 60-day notice is inadequate for two independent reasons. First, in violation of the regulations governing notice, the 60-day notice fails to include "the full name . . . of the person giving notice" and "the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice." 40 C.F.R. 135.3(a), (c). Second, upon receiving Plaintiff's 60-day notice, Champion hired a stormwater expert to completely rewrite the SWPPP. FAC ¶ 92; Ex. 6. But Plaintiff failed to issue a 60-day notice with respect to the operative, rewritten SWPPP, and instead sued based on the prior SWPPP. Because the 60-day notice does not address the current SWPPP, it is inadequate to support a lawsuit regarding the current SWPPP.

1. A 60-Day Notice Must Strictly Comply with Regulatory Requirements

A 60-day notice is a jurisdictional prerequisite to bring a lawsuit. *Nat. Res. Defense Council*, 236 F.3d at 995. It must be specific, so that the recipient can address its allegations and render a lawsuit unnecessary. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59, 60 (1987) ("[L]ogically . . . the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit."); *Ctr. for Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d

794, 801 (9th Cir. 2008) (finding 60-day notice was inadequate and ordering dismissal of case; "[W]e have never abandoned the requirement that there be a true notice that tells a target precisely what it allegedly did wrong, and when. The target is not required to play a guessing game in that respect.").

In addition, a legally sufficient 60-day notice must strictly comply with the applicable regulations. *Wash. Trout v. McCain Foods*, 45 F.3d 1351, 1354 (9th Cir. 1995) (finding 60-day notice inadequate for failing to give name of party sending it; "notice requirement under the regulations [are] to be strictly construed"). "Because a notice letter is a jurisdictional prerequisite to suit, [the plaintiff] cannot pursue allegations its notice letter does not contain." *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 511 (9th Cir. 2013); *ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1143 (9th Cir. 2002) (finding that 60-day notice alleging defendant's permit renewal application untimely was insufficient notice for plaintiff to bring lawsuit on alternative theories).

2. The 60-Day Notice Fails to Include the Name of the Person Giving Notice and Their Attorney's Name and Contact Information

Under the applicable regulations, a 60-day notice must include "the full name . . . of the person giving notice" and "the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice." 40 C.F.R. 135.3(a), (c).

Plaintiff's 60-day notice fails to include the full name of the person giving the notice or the name, address, and telephone number of Plaintiff's counsel. Instead, Plaintiff's 60-day notice was simply stamped "EDEN Environmental Defenders," with no name of the person giving the notice and no name, address, or telephone number for Plaintiff's legal counsel. Ex. A of FAC (60-day notice) at p. 53.

Strict compliance is required. *Wash. Trout*, 45 F.3d at 1354 (finding 60-day notice inadequate for failing to give name of party sending it; "notice requirement under the regulations [are] to be strictly construed"). Thus Plaintiff's 60-day notice is inadequate, and its entire Complaint should be dismissed.

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In *Washington Trout*, the Ninth Circuit identified two important policy reasons for the 60-day notice: "to allow the parties time to resolve their conflicts in a nonadversarial time period" and "the notice alerts the appropriate state or federal agency, so administrative action may initially provide the relief the parties seek before a court must become involved." *Id.* at 1354. The Court held that a notice that failed to name all of the plaintiffs "fails to satisfy either purpose." *Id.*

The same policy concerns apply here. Plaintiff appears to be somehow affiliated with another entity with a similar name. There appear to be overlapping (and sometimes conflicting) personnel working with Plaintiff and another similarly named party. Ex. 4 (Statement of Information listing Hans Herb as Plaintiff's agent for process); *Am. Custom Marble, Inc.*, 2020 U.S. Dist. LEXIS 25394 (another plaintiff with similar name as Plaintiff represented by Hans Herb).

Plaintiff stifled the opportunity for settlement by failing to strictly comply with the notice requirements for a 60-day notice. Concerns about Plaintiff's identity are understandably heightened given questions about Plaintiff's leadership. Indeed, Champion to this day has no way of knowing who has authority to settle for Plaintiff or what purpose any settlement funds would be put to. Is Mr. Herb in charge of Plaintiff, or someone else? If Mr. Herb represents Plaintiff, why is there a separate entity with a nearly identical name? Given that Plaintiff did not identify who was sending the notice, there is no way for Champion to know. By failing to identify the full name of the "person giving notice" and "the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice," Eden stifled the opportunity for settlement discussions.

3. The 60-Day Notice Says Nothing at All About the Operative SWPPP and Is Therefore Inadequate to Challenge the SWPPP

Because the 60-day notice simply does not address the current SWPPP, it is inadequate with respect to the current SWPPP. *See, e.g., ONRC Action*, 286 F.3d at 1143 (Plaintiff cannot bring lawsuit on theories not in 60-day notice).

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Champion's main requirement under the General Permit is to prepare and implement a SWPPP that meets the requirements of the General Permit. Ex. 1 at 11 (¶ 54) (General Permit). The following causes of action all challenge the adequacy or implementation of the SWPPP, or elements of the SWPPP:

First Cause of Action: Failure to Prepare, Implement, Review, and Update an Adequate Storm Water Pollution Prevention Plan. FAC ¶¶ 84-93, 113-116.

Second Cause of Action: Failure to Develop and Implement an Adequate Monitoring Program. FAC ¶¶ 94-99, 117-120. The monitoring plan is a required part of the SWPPP. Ex. 1 at 39-41 (§ X.I) ("The Monitoring Implementation Plan shall be included in the SWPPP . . ."). The revised SWPPP includes the required Monitoring Implementation Plan. Ex. 6 at 174-185. But the 60-day notice says nothing of the revised monitoring plan, and it is thus inadequate for Plaintiff's second cause of action.

Fourth Cause of Action: Failure to Implement the Best Available and Best Conventional Treatment Technologies. FAC ¶¶ 102-105, 127-130. The General Permit requires a permittee to implement a SWPPP to implement BMPs "to the extent feasible," which is defined as Best Available and Best Conventional Treatment (respectively "BAT" and "BCT"). Ex. 1 at 32 (§ X.H.1) ("The Discharger shall, to the extent feasible, implement and maintain all of the following minimum BMPs . . . ."); Ex. 2 at 23 ("for the purposes of this General Permit, the requirement to implement BMPs 'to the extent feasible' means to reduce and/or prevent discharges of pollutants using BMPs that represent BAT and BPT in light of best industry practice"). The revised SWPPP includes extensive BMPs designed to comply with the General Permit, including the best available and best conventional treatment technologies. Ex. 6 at 18-22, Appendix C at 53-134 (Best Management Practices). But the 60-day notice says nothing of the revised SWPPP or the revised BMPs, and it is thus inadequate for Plaintiff's fourth cause of action.

Fifth Cause of Action: Discharges of Contaminated Storm Water in Violation of Permit Conditions and the Clean Water Act. FAC ¶¶ 106-107, 131-137. The General Permit requires a permittee to "ensure a SWPPP is prepared to: . . . Identify and describe the minimum BMPs . . .

implemented to reduce or prevent pollutants in industrial storm water discharges and authorized [non-stormwater discharges]. BMPs shall be selected to achieve compliance with this General Permit." Ex. 1 at 27 (X.C.1.b). Again, the revised SWPPP includes extensive BMPs specifically designed to comply with the General Permit. *See* Ex. 6 at 18-22, Appendix C at 53-134. But the 60-day notice says nothing of the revised SWPPP or the revised BMPs, and it is thus inadequate for Plaintiff's fifth cause of action.

Seventh Cause of Action: Failure to Properly Train facility Employees and Pollution Prevention Team. FAC ¶¶ 111-12, 142-147. The employee training program is a required part of the SWPPP. Ex. 1 at 34 (X.H.1.f). The revised SWPPP has a training program. Ex. 6 at 21, Appendix B and C at 52-134. But the 60-day notice says nothing of the revised SWPPP or the revised training program, and it is thus inadequate for Plaintiff's seventh cause of action.

Thus, Plaintiff's first, second, fourth, fifth, and seventh causes of action all challenge the SWPPP or elements of the SWPPP. But the 60-day notice says nothing of the revised, operative SWPPP and is inadequate to serve as a "jurisdictional prerequisite" to challenge the SWPPP. *Ecological Rights Found.*, 713 F.3d at 511. Therefore, Plaintiff's first, second, fourth, fifth, and seventh causes of action should all be dismissed. To the extent Plaintiff had any concerns about the prior SWPPP, they are now moot. *Gwaltney of Smithfield, Ltd.*, 484 U. S. at 64 (Clean Water Act "does not permit citizen suits for wholly past violations").

B. Plaintiff's Sixth Cause of Action Is Barred by the Statute of Limitations and the Concurrent Remedy Doctrine

Plaintiff's sixth cause of action (Failure to Comply with Required Exceedance Response Actions) is barred by the Clean Water Act's five-year statute of limitations. FAC ¶¶ 108-110, 138-141. The FAC alleges that "Defendants' Level I ERA [Exceedance Response Action] Report was due to be prepared and uploaded into SMARTS [the Water Board's online database] by January 1, 2018" and "[t]o date, Defendants has failed to submit a Level I ERA Report." *Id.* ¶¶ 109, 110. The FAC further alleges that the alleged "violations are ongoing and continuous." *Id.* at ¶ 141.

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The five-year statute of limitations applicable to government penalty actions, 28 U.S.C. § 2462, governs citizen suits for civil penalties under the Clean Water Act. *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1521 (9th Cir. 1987). Section 2462 requires commencement of a suit for civil penalties within five years from the date when the claim "first accrued." Under Section 2462, a claim first accrues on the date of the underlying violation, rather than the date of discovery. *Gabelli v. S.E.C.*, 568 U.S. 442, 447-48 (2013) ("[A] claim accrues when the plaintiff has a complete and present cause of action[.]" (*quoting Wallace v. Kato*, 549 U.S. 384, 388 (2007)); *see also Clarke v. Pac. Gas & Elec. Co.*, 501 F. Supp. 3d 774, 786 (N.D. Cal. 2020) ("The date when the claim first accrues under section 2462 is the date of the underlying violation, not the date of discovery."). Plaintiff filed its Complaint on June 30, 2023—more than five years after the accrual date—and the sixth cause of action is therefore barred by the statute of limitations.

Nor does the legal conclusion Plaintiff pled as a fact help Plaintiff: "Each day since May 1, 2018, that Defendants have failed to comply with the Exceedance Response Actions required by the General Permit is a separate and distinct violation . . ." FAC ¶ 141. Even if each day Champion failed to submit an Exceedance Response Action to the Regional Board were considered a separate act, the statute of limitations accrued a single time on January 1, 2018. *See, e.g., Sierra Club v. Okla. Gas & Elec. Co.*, 816 F.3d 666, 672 (10th Cir 2016) ("In other words, one violation continues when 'the conduct as a whole can be considered as a single course of conduct.'") (citation omitted). To constitute a separate legal act for purposes of the statute of limitations, a "violation must involve some affirmative conduct within the limitations period and 'not merely the abatable but unabated inertial consequences of some pre-limitations action.'" *Id.* (citation omitted); *Clarke*, 501 F. Supp. 3d at 786 (finding that even migration of chemicals from a contaminated site "constitutes a series of separate discharges," those discharges would be one violation for purpose of the statute of limitations).

Additionally, where a claim for penalties is barred by section 2462, equitable remedies based on the same set of facts are barred by the concurrent remedy doctrine. *See Clarke*, 501 F. Supp. 3d at 786 ("Because the Complaint fails to allege a timely CWA claim for penalties under

section 2462, the related CWA claim for injunctive relief is likewise barred by the concurrent remedy doctrine."); *Fed. Election Comm'n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) ("[E]quity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy.") (*quoting Cope v. Anderson*, 331 U.S. 461, 463-464 (1947)). Thus, because Plaintiff's claim for penalties under its sixth cause of action is untimely under section 2462, its claims for equitable remedies are likewise barred by the concurrent remedy doctrine. As such, Plaintiff's entire sixth cause of action should be dismissed.

C. Plaintiff Has Failed to Adequately Plead Standing

Plaintiff failed to plead sufficient facts to show it has standing, and its entire FAC should be dismissed for lack of standing.

Plaintiff has asserted standing to sue on behalf of its members. FAC ¶ 14. The burden of alleging and establishing the facts necessary to support standing rests with the party seeking to avail itself of federal jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 518 (1975). To demonstrate standing, a plaintiff must demonstrate (1) an "injury in fact," (2) that is "fairly traceable" to the defendant's "challenged action," and which (3) a "favorable [judicial] decision" will likely prevent or redress. *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-181 (2000). An organization has standing to sue on behalf of its members where: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (*quoting Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

The Supreme Court requires that plaintiff organizations "make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). As such, an organization must show that at least one of its members has "standing to sue in [his] own right." *Ecological Rights Found.*, 230 F.3d at 1147. "The '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." *Id.* (citations omitted).

Thus, for Plaintiff to have standing to sue, the FAC must identify a specific member of Eden that has suffered a concrete injury traceable to activities at Champion's facility that a favorable judicial decision would like redress. *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1156 (9th Cir. 2019) (at motion to dismiss stage, a court "must determine whether any of the [plaintiff] Association's members have standing to sue in their own right"); *United States v. AVX Corp.*, 962 F.2d 108, 117 (1st Cir. 1992) (finding standing of organization members was not adequately plead because "[t]he averment has no substance: the members are unidentified; their places of abode are not stated; the extent and frequency of any individual use of the affected resources is left open to surmise. . . . A barebones allegation, bereft of any vestige of a factual fleshing-out, is precisely the sort of speculative argumentation that cannot pass muster where standing is contested.") (citation omitted); *Heart of Am. Nw. v. Westinghouse Hanford Co.*, 820 F. Supp. 1265, 1270 (E.D. Wash. 1993). Plaintiff must plead facts supporting each element of standing, and the Court is not required to accept as true "allegations that are merely conclusory." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir.2008).

Plaintiff fails to meet its burden to plead facts establishing standing. Instead of identifying a specific member and pleading facts showing (1) an "injury in fact," (2) that is "fairly traceable" to the defendant's "challenged action," and which (3) a "favorable [judicial] decision" will likely prevent or redress—Plaintiff makes only the vaguest, conclusory allegations regarding standing. Compl. ¶¶ 9-20. Accordingly, the FAC should be dismissed in its entirety.

D. Plaintiff's First Amended Complaint Fails to State a Cause of Action

1. The FAC fails to meet the minimal pleading standard of *Twombly* and *Iqbal* and fails to state a cause of action. Instead, the FAC consists of mere "labels and conclusions" and "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555.

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//////**The FAC Includes no Factual Allegations Regarding the Operative SWPPP**

As discussed above in Section IV.A.3, five of Plaintiff's causes of action attack the SWPPP or elements of the SWPPP—First (Inadequate SWPPP), Second (Inadequate Monitoring

and Reporting Program), Fourth (Failure to Implement Best Available and Best Conventional Treatment Technologies), Fifth (Discharges of Contaminated Stormwater), and Seventh (Failure to Train Employees). Upon receiving the 60-day notice letter, Champion hired stormwater experts to completely rewrite the SWPPP. Ex. 5 (May 23, 2023 SWPPP). But Plaintiff's FAC challenges the old SWPPP.

The FAC's sole allegation regarding the current, operative SWPPPP is: "Plaintiff notes that on May 25, 2023, Defendants uploaded a revised SWPPP to SMARTS. However, the revised SWPPP is also deficient and does not comply with all mandatory elements of Section X of the General Permit." FAC ¶ 92. This conclusory legal allegation falls short of the requirement of *Twombly* and *Iqbal*, and Plaintiff has therefore failed to adequately plead its first, second, fourth, fifth, and seventh causes of action.

2. None of the Allegations in Plaintiff's Cookie-Cutter Complaint Meet the Pleading Standard of *Twombly* and *Iqbal*

Independently, Plaintiff has failed to adequately plead any of its causes of action. Plaintiff's entire FAC is full of generic citations and legal conclusions. Indeed, the vague formulaic manner of the allegations in the FAC is demonstrated by a comparison of the FAC to another recent complaint Plaintiff's filed with respect to another, completely unrelated site. Ex. 7 (Complaint against Woodland Biomass Power, LLC). An electronic comparison shows that the complaint in that case and the Complaint in this case are nearly identical. Ex. 8 (Woodland Complaint redline). The main substantive differences are paragraphs 97-101 in the FAC in this case, which allege on "information and belief," in conclusory fashion, that Champion did not adequately monitor stormwater. This sort of "formulaic recitation of the elements of a cause of action"—indeed, so formulaic that Plaintiff can recycle the complaint for unrelated sites—does not adequately plead a cause of action. Thus, Plaintiff's entire FAC should be dismissed.

Indeed, the FAC's allegations in the Fourth (Failure to Implement Best Available and Best Conventional Treatment Technologies), Fifth (Discharges of Contaminated Stormwater), and Seventh (Failure to Train Employees) causes of action are similar to conclusory allegations courts have rejected as inadequate in other cases. Plaintiff's allegations in the Fourth, Fifth, and

Seventh causes of action are nearly identical to the allegations in Fifth, Sixth, and Seventh causes of action in *Eden Environmental Citizen's Group, LLC v. American Custom Marble, Inc.*, Northern District of California, Case No. 19-cv-03424 (hereinafter, "*American Custom Marble*"). Ex. 9 (*American Custom Marble* first amended complaint). A redline of excerpts of the complaints shows that the allegations are nearly word-for-word identical. Ex. 10 (redline of Fourth, Fifth, and Seventh causes of action in FAC against Fifth, Sixth, and Seventh causes of action in first amended complaint in *American Custom Marble*). The Court in *American Custom Marble,* easily found that generic allegations nearly identical to those in Plaintiff's Fourth, Fifth, and Seventh causes of action were insufficient. *Am. Custom Marble, Inc.*, 2020 U.S. Dist. LEXIS 25394, at *23 ("Plaintiffs do not allege a single specific discharge event, nor do they specify how many times stormwater discharge events occurred"; "the fifth cause of action (relating to failures to implement the best available and best conventional treatment technologies) and the seventh cause of action (relating to training facility employees) are alleged only in general terms that merely 'recite the elements of a cause of action'") (citation omitted). Indeed, the allegations in the complaint in *American Custom Marble*, were actually more detailed than those here. In the complaint in *American Custom Marble*, for example, the plaintiffs at least listed the chemicals that the defendant was alleged to have discharged and the elements of the training plan that the defendants were alleged to have violated. Ex. 10 (redline of Fourth, Fifth, and Seventh causes of action in FAC against Fifth, Sixth, and Seventh causes of action in first amended complaint in *American Custom Marble*); *see also* Ex. 9 at 25 ¶¶ 127, 133 (*American Custom Marble* complaint). Plaintiff's FAC here is utterly lacking in any factual allegations regarding Fourth, Fifth, and Seventh causes of action, and those causes of action should be dismissed with prejudice.

3. Plaintiff's Allegations Based Upon "Information and Belief" are Inadequate

In addition to recycling complaints from unrelated matters, Plaintiff's allegations that are based upon information and belief are insufficient to meet the pleading standard for *Twombly* and *Iqbal*. A plaintiff may plead "facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant or where the belief is based on

factual information that makes the inference of culpability plausible." *Soo Park v. Thompson, 851 F.3d 910*, 928 (9th Cir. 2017) (quoting *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010). However, "a fact ascertainable from a public record may not be alleged on information and belief." *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1161 (9th Cir. 2022) (citing *Bertucelli v. Carreras*, 467 F.2d 214, 215 n.4 (9th Cir. 1972) (noting that the plaintiff could not allege on information and belief that the warrant issued to secure his arrest was not signed by a magistrate)).

Here, for each of its causes of actions (except for its Sixth), Plaintiff pleads upon information and belief. *See* FAC ¶¶ 79-87, 88-89, 91, 93-102, 105-106, 112, 133, 135-136. But Plaintiff's allegations fail to indicate "factual information that makes the inference of culpability plausible"—indeed, Plaintiff pleads no actual facts and simply relies on broad sweeping legal conclusions. *Soo Park*, 851 F.3d at 928. Nor can Plaintiff's FAC be saved by Plaintiff's references to the also inadequate 60-day notice letter.[2] *See Ecological Rights Found. v. Pac. Gas & Elec. Co.*, No. C 10-0121 RS, 2011 U.S. Dist. LEXIS 14140, at *15-16 (N.D. Cal. Feb. 4, 2011) ("[T]he complaint itself contains virtually no factual allegations to support the claim" and "[w]hile ERF may be correct that the contents of the letter are thereby technically part of the complaint, the result is a pleading that cannot be meaningfully evaluated to determine if the factual allegations are sufficient to state a claim.").

Furthermore, with respect to its Fifth Cause of Action, Plaintiff contends that "Plaintiff is informed and believes, and thereupon alleges, that since at least May 1, 2018, Defendants have been discharging polluted storm water from its facility, in excess of applicable water quality standards in violation of Receiving Water Limitation VI(A) and Discharge Prohibition III(D) of the General Permit." FAC ¶ 133. Plaintiff's allegation based upon information and belief is contradicted by Regional Water Board records (i.e. facts ascertainable from a public record),

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[2] Plaintiff also purports to attach to its FAC as Exhibit B "photographs of Defendant CHAMPION HOME BUILDERS' facility as of February 5, 2023" to support its argument that Defendants' BMPs are deficient. FAC ¶ 104. However, there is no Exhibit B and even if there was, Plaintiff does not explain how photos of the Woodland plant would support such an argument or why they were not in the 60-day notice.

which indicate that the Woodland plant has been monitoring stormwater and has not had any exceedances. Ex. 3.

Therefore, Plaintiff's First through Fifth, and Seventh causes of actions should be dismissed.

E. Skyline Champion Corporation Is Not Subject to the General Permit

Each of Plaintiff's alleged causes of action pleads violations of the General Permit. FAC ¶¶ 113-116, 117-120, 121-126, 127-130, 131-137, 138-141, 142-145. But Skyline Champion Corporation is not subject to the General Permit, and should therefore be dismissed.

Rather, Champion Home Builders, Inc. is subject to the General Permit and Plaintiff's insinuation that Skyline Champion Corporation is also subject to the General Permit is wrong. FAC ¶¶ 22-27. Some cases have held a non-permittee can liable for violations of a Clean Water Act permit when they exercise extensive control over a permitted facility. *Assateague Coastkeeper v. Alan & Kristin Hudson Farm,* 727 F. Supp. 2d 433, 442 (D. Md. 2010)). But Plaintiff fails to allege facts showing that Skyline Champion Corporation is in fact "Skyline Corp" and exercises the type of extensive control over a site that would make it subject to a Clean Water Act lawsuit. *Id.* (complaint adequately named non-permittee when it made "specific factual allegations as to the control Defendant . . . exercises over" the permittee).

Plaintiff's FAC also alleges that plaintiff "is informed and believes" that "since October 1, 2018, Defendant SKYLINE CHAMPION CORPORATION has been identified under the pseudonym of 'Skyline Corp' in the Regional Water Board's records as the owner and operator of Defendant CHAMPION HOME BUILDERS, INC.'s Facility located at 1720 East Beamer Street, Woodland, California." FAC ¶ 26. But the updated SWPPP is clear that Champion Home Builders, Inc. is the owner and operator of the site and the sole permittee under the General Permit. Ex. 6 at 8 ("Made cleanup changes to delete references to 'Skyline'. Non-substantive change to conform naming convention for facility owner and operator, Champion Home Builders, Inc. In 2018, the then-owner Skyline Homes, Inc. (also sometimes referred to as Skyline or Skyline Corp) was merged into Champion Home Builders, Inc., which remains the owner and operator of the facility.").

Plaintiff's allegations that it is "is informed and believes" Skyline Champion Corporation is the owner and operator of the facility cannot defeat the actual public documents required under the permit that show Champion Home Builders, Inc. is the sole permittee and the owner and operator. *See Waln*, 54 F.4th at 1161 ("It is true that a fact ascertainable from a public record may not be alleged on information and belief.").

Therefore, the entire First Amended Complaint should be dismissed as to Skyline Champion Corporation.

V. CONCLUSION

For all of the foregoing reasons, Champion respectfully requests that the Court dismiss Plaintiff's First Amended Complaint in its entirety.

Dated: November 20, 2023

Respectfully submitted,

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