United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ECOLOGICAL RIGHTS FOUNDATION,

Plaintiff,

v.

PACIFIC GAS AND ELECTRIC COMPANY

Defendant.

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No. C 10-0121 RS

ORDER RE CROSS MOTIONS FOR SUMMARY JUDGMENT ON CLEAN WATER ACT CLAIMS

I. INTRODUCTION

Pacific Gas and Electric Company ("PG&E") operates 31 "corporation yards and service centers" in Northern California, at which it allegedly stores vehicles, equipment, materials and supplies, and carries out various activities in support of its primary business as a provider of electricity and natural gas. Plaintiff Ecological Rights Foundation ("ERF") contends that activities conducted at these facilities, and the materials stored there, contaminate storm water discharged from the sites. ERF brings suit under the Clean Water Act to force PG&E to obtain permits for these facilities pursuant to the National Pollution Discharge Elimination System ("NPDES"), which PG&E admittedly has never done.

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PG&E previously moved to dismiss, contending that the facilities do not require permits under the Clean Water Act and the NPDES. That motion was denied on grounds that PG&E failed to establish as a matter of law that permits are not required. Discovery then commenced with respect to four specific facilities.

The parties now bring cross-motions for partial summary judgment on the Clean Water Act claims arising from PG&E's operation of those four facilities.[1] PG&E's motion rests on the same underlying argument it made at the motion to dismiss stage, namely that no permits are legally required. ERF's motion attempts not only to establish that permits are required, but also that PG&E indisputably discharges toxic pollutants into storm water runoff at the sites, and that all elements of an ongoing violation of the Clean Water Act have been established.

While ERF makes a still-tenable argument that the Clean Water Act and its implementing regulations *should* be read to require permits for these facilities, the record demonstrates that neither the EPA nor the California Water Resources Board ('the Board") interprets the statute or regulations in such a fashion. ERF has failed to show that a citizen's enforcement suit such as this, to which the regulating authorities are not party, is an available vehicle for obtaining the relief it seeks, under these circumstances. Accordingly, PG&E's motion will be granted, and ERF's cross-motion will be denied.

II. LEGAL STANDARD

Summary judgment is proper "if the pleadings and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex v. Catrett*, 477 U.S. 317, 323-24 (1986). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the

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[1] ERF also asserts claims under the Resource Conservation and Recovery Act ("RCRA"). The parties anticipate bringing subsequent summary judgment motions regarding those claims.

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pleadings and admissions on file, together with the affidavits, if any which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323 (citations and internal quotation marks omitted). If it meets this burden, the moving party is then entitled to judgment as a matter of law when the non-moving party fails to make a sufficient showing on an essential element of the case with respect to which he bears the burden of proof at trial. *Id.* at 322-23.

The non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-moving party cannot defeat the moving party's properly supported motion for summary judgment simply by alleging some factual dispute between the parties. To preclude the entry of summary judgment, the non-moving party must bring forth material facts, *i.e.*, "facts that might affect the outcome of the suit under the governing law . . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 588 (1986).

The court must draw all reasonable inferences in favor of the non-moving party, including questions of credibility and of the weight to be accorded particular evidence. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) (*citing Anderson*, 477 U.S. at 255); *Matsushita*, 475 U.S. at 588 (1986). It is the court's responsibility "to determine whether the 'specific facts' set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 631 (9th Cir. 1987). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587.

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III. DISCUSSION

A. First Claim for Relief—Clean Water Act §301(a)—discharging without permits

1. *The Regulatory Scheme*

Section 301(a) of the Clean Water Act, 33 U.S.C. §1311(a), generally prohibits the discharge of pollutants from any "point source" into waterways without an NPDES permit.[2] PG&E did not dispute in its motion to dismiss, and does not dispute for purposes of this motion, that the facilities at issue comprise point sources. In section 402(p) of the Clean Water Act, Congress provided that the permitting process for storm water discharges would be implemented in phases over time. *See generally*, *Environmental Defense Center, Inc. v. U.S. E.P.A.*, 344 F.3d 832, 841-843 (9th Cir. 2003) (describing history of EPA's implementation of "Phase I" and "Phase II" regulations under section 402(p)). Under that section, however, permits are required for any "discharge associated with industrial activity." *See* section 402(p)(2)(A), (3)(A), and (4)(A); *see also*, *Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 966 F.2d 1292 (9th Cir. 1992) (reviewing EPA's regulations applicable to "industrial activity" sources) ("*NRDC*").

Section 402(p) does not define the phrase "discharge associated with industrial activity" or the term "industrial activity." In invalidating an attempt by the EPA to exclude "light industry" from the permitting requirements, the Ninth Circuit characterized the language as "very broad." *NRDC*, 966 F.2d at 1304. EPA's current implementing regulation provides a detailed definition of "discharge associated with industrial activity" that describes discharges from an "industrial plant" or "industrial facility." 40 C.F.R. § 122.26(b)(14). The regulation then provides that, "facilities are considered to be engaging in 'industrial activity'" if they are "classified as" any one of a number of specified "Standard Industrial Classifications." Accordingly, the underlying question both in the prior motion to dismiss and now is whether PG&E's facilities should be "classified as" any of the Standard Industrial Classifications listed in 40 C.F.R. § 122.26(b)(14).

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[2] A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

2. *Standard Industrial Classification Codes*

As noted in the prior order, the Standard Industrial Classification Manual (1987) is published by the Office of Management and Budget. Its introduction explains that:

> The Standard Industrial Classification (SIC) was developed for use in the classifications of establishments by type of activity in which they are engaged; for purposes of facilitating the collection, tabulation, presentation, and analysis of data relating to establishments; and for promoting uniformity and comparability in the presentation of statistical data collected by various agencies of the United States Government, State agencies, trade associations and private research organizations.

The Manual defines "establishment" as "an economic unit, generally at a single physical location, where business is conducted or where services are performed." The term "establishment" is distinguished from "enterprise (company)," which "may consist of one or more establishments." The Manual further explains that "auxiliaries" are establishments that primarily provide management or support services for other establishments that are part of the same enterprise. Auxiliaries that are not treated as separate establishments are assigned SIC codes, "on the basis of the primary activity of the operating establishments they serve."

The Manual suggests that where an auxiliary "is located physically separate from the establishment or establishment served" it is to be "treated as a separate establishment." Elsewhere, however, the Manual lists examples of auxiliary establishments such as warehouses, automotive repair and storage facilities that likely are quite often located at a geographic distance from the establishments they serve. The Manual also provides for the sub-classification of auxiliaries by an additional one digit code that follows that of the primary establishment. Accordingly, it is not entirely clear from the Manual when geographically separate facilities that provide support services to other establishments within the same enterprise should be classified according to the primary activities taking place at those facilities and when they should not.[3]

[3] As previously observed, the SIC appears to have been designed primarily for statistical data collection and analysis by governmental and private entities largely in the economic context. As such, even if the Manual set out the rules more clearly, they might not be well-suited for determining whether or not a particular facility is engaged in "industrial activity" for purposes of the

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3. *Classification of the PG&E facilities in dispute*

The parties are in agreement that PG&E's primary business is to provide electricity and natural gas to business, private, and governmental customers. Viewed as an "enterprise" under the SIC, there is no dispute that PG&E is classified in Group 49, which "includes establishments engaged in the generation, transmission, and/or distribution of electricity or gas or steam." SIC Code 49, explanatory note. ERF acknowledges that Group 49 codes are not among those listed in 40 C.F.R. § 122.26(b)(14), and that therefore, if Group 49 applies to the specific sites in issue, they do not qualify as facilities that are "considered to be engaging in 'industrial activity'" under the regulation.

ERF argues, however, that the activities carried out at the four sites plainly are "industrial" in nature, and it identifies numerous other SIC codes, which *are* among those listed in the regulation, that it contends can and should be applied. PG&E argues it would be incorrect to assign separate classifications to its service facilities, and also challenges each of the classifications ERF suggests would be implicated were the sites considered independently. Nevertheless, the basic facts regarding the nature of activities that take place on the four sites are undisputed, and those activities include many with decidedly industrial characteristics. Accordingly, the underlying dispute is whether, as PG&E contends, facilities are not "industrial" within the meaning of the regulation because their "primary activity" is supporting PG&E's provision of gas and electric services to California customers, or whether, as ERF contends, one or more codes other than those in Group 49 should be applied to each facility.

As explained in the order on the motion to dismiss, PG&E failed to establish as a matter of law that the individual facilities necessarily should be classified under Group 49, primarily because nothing in the SIC Manual, Section 402(p), or 40 C.F.R. § 122.26(b)(14), plainly and unambiguously required such a result. Much of the parties' present briefing is devoted to reiterating and in some instances amplifying their prior arguments on this issue. Because the answer simply is not spelled out clearly in either the regulation or the SIC Manual, both sides' proposed

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Clean Water Act. Nevertheless, the EPA routinely uses SIC classifications when promulgating environmental regulations.

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interpretations are at least plausible, and neither emerges as plainly more persuasive. At this juncture, however, the issue is no longer how the facilities might be classified in the abstract, looking only to the statute, the regulation, and the manual, but also how the regulatory authorities view the matter.

4. *EPA and California Water Resources Board positions*

In the present motions, PG&E has shown that neither the EPA nor the Board supports ERF's position that NPDES permits are required for the facilities at issue. PG&E points to various guidance materials issued by the EPA, including the EPA Industrial Fact Sheet Series for Activities Covered by EPA's Multi-Sector General Permit, that show EPA does not view it appropriate to classify individual facilities in the manner advocated by ERF. In response, ERF half-heartedly questions the weight that should be given to such guidance materials, but effectively concedes that permits would not be required under EPA's interpretation of the Clean Water Act and its regulations, standing alone. Instead, ERF argues that the Board has the *authority* "to adopt a more expansive approach to storm water regulation than EPA and to require NPDES permit coverage for facilities that may be exempted by EPA." ERF insists the Board in fact has adopted such a broader approach, because its General Permit includes an example of treating a school district's bus yard separately from the overall business of the school district.

Whatever theoretical power the Board might have to adopt its own approach to regulating storm water, the record demonstrates that its actual practices and regulations are substantively identical to the EPA's. Indeed, on reply, PG&E offers evidence that an organization known as "Humboldt Baykeeper," which it contends is merely another name under which ERF operates, recently urged the Board to "clarify that, by attaching a list of specific categories of industrial facilities that are covered under the Draft Permit, the Board is not excluding any industrial activities from the permitting requirements" and to "include all discharges that are industrial in nature." In response, the Board declared, "[t]he Permit only covers dischargers as defined in the federal regulations. Authority to add additional categories is limited to a formal designation process." Regardless of the relationship between Humboldt Bay Keeper and ERF, if any, this clear rejection

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by the Board of essentially the same arguments ERF is making here demonstrates that neither the federal nor state regulators apply the Clean Water Act and its regulations to require NPDES permits for these facilities.

Moreover, PG&E submitted with its motion papers inspection reports for two of the facilities in which state regulators affirmatively and explicitly stated that those operations "do[] not need coverage" for a storm water permit. ERF has offered no response other than its general argument that the regulatory bodies may not adopt rules or procedures that are contrary to the Clean Water Act. While that may be true as a general principle, it is also the case that (1) "Congress left it up to EPA to define a 'discharge associated with industrial activity.'" *American Mining Congress v. EPA*, 965 F.2d 759, 765 (9th Cir. 1992), and (2) deference to agency determinations is mandated under *Chevron, U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). *See also, Auer v. Robbins*, 519 U.S. 452 (1997) (deference extends to informal, non-regulatory materials).

Whether the positions of the EPA and the Board ultimately could be shown to be so inconsistent with the Clean Water Act as to override the deference due under *Chevron* and/or *Auer* or not, presents a further question. The problem, however, is that neither EPA nor the Board are parties to this suit, or have even participated as *amici.* This action has been brought as a citizen's suit to *enforce* the regulations, not to alter them or how the agencies apply them. In none of the cases cited by ERF has a similar challenge been brought without participation of the relevant regulatory bodies.

In *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063, 1086 (9th Cir. 2011), cert. granted *sub nom. Decker v. Nw. Env. Def. Ctr.*, Sup. Ct. Case No. 11-338 (June 25, 2012), the EPA had not been named as a party, but did participate as an *amicus.* The EPA initially took the position that the Court *lacked jurisdiction* to invalidate an EPA rule, because the matter had been brought as a citizen's suit rather than as a challenge to the rule itself under 30 U.S.C. § 1369(b).[4] The Ninth Circuit ultimately held that the strictures of 30 U.S.C. § 1369(b) did not divest it of jurisdiction, because the regulation was ambiguous when enacted, and the plaintiff could not have

[4] Challenges under 30 U.S.C. § 1369(b) must be initiated in the circuit courts, and are subject to strict time limits.

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known the EPA would offer an interpretation that arguably conflicted with the Clean Water Act until it appeared in the citizen's suit as an *amicus.* 640 F.3d at 1069.[5] The *Brown* court then proceeded to reach the merits of the validity of the rule. *Id.* at 1070 *et seq.* While the court apparently was untroubled by the fact that the EPA was still not a *party* to the action, unlike here it at least had the benefit of the EPA's participation in the suit.

In short, ERF's suit, although styled as an action to force PG&E to obtain NPDES permits for its facilities, actually seeks to compel the EPA and/or the Board to revise their interpretations of the Clean Water Act and the implementing regulations. Although a decision by the court that PG&E must apply for permits might have some persuasive effect on the regulators, they would not plainly be bound by it, not having participated in the action.[6] At least in theory, the Board could respond to any court-ordered application by PG&E for permits by advising PG&E that no permit is required. Accordingly, ERF has not shown it has a viable claim under the citizen's suit provision of the Clean Water Act. While that provision allows private parties to bring actions to enforce the Act or regulations adopted thereunder it does not authorize a court to compel the regulators to implement the Act differently without their participation in the suit. Accordingly, PG&E's motion for summary judgment on the first claim for relief with respect to the four facilities currently in issue must be granted.

B. Second Claim for Relief—Clean Water Act §402(p)—failure to apply for permits

ERF's second claim for relief asserts that PG&E's failure to apply for permits for the sites at issue constitutes a daily "separate and distinct" violation of the Clean Water Act and regulations thereunder. In light of the conclusions above that permits are not required by the regulating authorities, this claim necessarily fails. Additionally, ERF concedes that the claim is not viable in

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[5] The *Brown* court concluded the action was not *time-barred* under § 1369(b) because of an exception for "suits based on grounds arising after the 120–day filing window." *Id.* It did not explain, however, how the action could properly proceed as a citizen suit under § 1365(a) rather than as a challenge to agency action under § 1369(b), and appears not to have considered that issue.

[6] There may also be at least an argument that any challenge to the regulations is barred by the timing or procedural requirements of 30 U.S.C. § 1369(b), but that need not be decided here.

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1 any event, in light of *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 751-53 (5th Cir. 2011),
2 which held any failure to apply for a permit is not separately actionable. Accordingly, summary
3 judgment on this claim will enter for both reasons.
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5 ## IV. CONCLUSION

6 PG&E's motion for summary judgment on Claims I and II with respect to the four identified
7 facilities is granted.[7] ERF's motion is denied.
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9 IT IS SO ORDERED.
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12 Dated: 3/1/13

13 RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE
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[7] While it seems likely the reasoning of this order will apply equally to all of the other facilities involved in this action, the motion is limited to the four as to which discovery has gone forward.