

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

CITIZENS DEVELOPMENT CORPORATION, INC., a California corporation,

Plaintiff,

vs.

COUNTY OF SAN DIEGO, a California municipal corporation, CITY OF SAN MARCOS, a California municipal corporation, CITY OF ESCONDIDO, a California municipal corporation, VALLECITOS WATER DISTRICT, a California municipal corporation, HOLLANDIA DAIRY, INC., a California corporation, and DOES 1 through 100, inclusive,

Defendants.

Case No.: 12CV0334 GPC KSC

**ORDER DENYING
HOLLANDIA'S MOTION FOR
JUDGMENT ON THE
PLEADINGS**

[Dkt. No. 190]

AND RELATED COUNTER-ACTIONS AND CROSS-ACTIONS.

///

1 Before the Court is Defendant Hollandia Dairy's Motion for Judgment on the
2 Pleadings. Dkt. No. 190. The motion has been fully briefed. Based upon review
3 of the moving papers, applicable law, and for the reasons that follow, the Court
4 hereby DENIES Hollandia's motion in its entirety.

5 **BACKGROUND**

6 This civil action arises out of the alleged contamination of the surface water
7 and groundwater in and around Lake San Marcos ("the Lake") located in San
8 Marcos, California. *See* First Amended Complaint ("FAC") ¶ 1, Dkt. No. 68. On
9 September 20, 2011, the California Regional Water Quality Control Board, San
10 Diego Region ("the RWQCB") issued an Investigative Order ("the IO") alleging
11 that Plaintiff Citizens Development Corporation, Inc. ("CDC") had released
12 pollutants into the Lake. *See id.* ¶ 4. In response, Plaintiff filed the present action
13 against Defendants County of San Diego ("San Diego"), City of San Marcos ("San
14 Marcos"), City of Escondido ("Escondido"), Vallecitos Water District
15 ("Vallecitos"), and Hollandia Dairy ("Hollandia"), alleging that each of them was
16 responsible for the discharges that contaminated the Lake and its surrounding
17 waters. *See generally* Complaint, Dkt. No. 1; FAC, Dkt. No. 68.

18 **1. CDC's allegations**

19 The CDC alleges that the Lake has been contaminated by discharges
20 stemming from a wide variety of sources, including but not limited to, improper
21 waste disposal, poor or unmanaged landscaping practices, sanitary sewer overflows,
22 septic system failures, groundwater infiltration, the presence and operation of "the
23 dam," and other "non-point source discharges" caused by storm events and dry
24 weather conditions. FAC ¶¶ 5-7. These discharges, CDC alleges, were generated
25 by the real property that is located within the San Marcos Creek watershed and the
26 upgradient of the Lake, which includes the farmland owned and operated by
27 Hollandia Dairy. *Id.* ¶ 26.
28

1 Based on these and other allegations, the FAC asserts seven causes of action
2 against Defendants. They include: (1) private recovery under the Comprehensive
3 Environmental Response, Compensation, and Liability Act (CERCLA); (2)
4 declaratory relief under CERCLA; (3) continuing nuisance; (4) continuing trespass;
5 (5) equitable indemnity; (6) declaratory relief under California state law; and (7)
6 injunctive relief under the Resource Conservation and Recovery Act (RCRA) as to
7 Defendant Vallecitos only. *See id.* The FAC’s CERCLA theory of liability is
8 predicated on the assertion that Hollandia, along with the other Defendants,
9 contaminated the Lake by releasing known “hazardous substances” into its
10 watershed. *Id.* ¶ 49. CDC identifies those “hazardous substances,” as “nitrogen,
11 phosphorus, and nutrients found in fertilizers, pesticides and sewage.” *Id.* ¶ 43.

12 **2. Escondido’s, Vallecitos’, and San Marcos’ crossclaims**

13 Hollandia’s answer to CDC’s initial complaint contained crossclaims against
14 Defendants Escondido, San Marcos, San Diego, and Vallecitos for (1) contribution
15 under CERCLA and (2) indemnity, offset, and contribution under state law. Dkt.
16 No. 21 at 11-16. All of Hollandia’s crossclaims were “premised upon the same
17 events, subject matter, and claims made by CDC in its complaint against
18 Hollandia.” *Id.* at 14.

19 Defendants Escondido, San Marcos, and Vallecitos responded to Hollandia’s
20 crossclaims by asserting claims of their own. Vallecitos asserted crossclaims
21 against Hollandia for (1) contribution under CERLCA; (2) indemnity offset; and (3)
22 contribution under California law. Dkt. No. 35 at 14-20. Escondido asserted
23 crossclaims against Hollandia for (1) response costs under CERCLA; (2)
24 declaratory relief under CERCLA; (3) response costs under the California
25 Superfund Act (CSA); (4) declaratory relief under the CSA; (5) contribution under
26 California law; (6) negligence; (7) equitable indemnity; and (8) unjust enrichment.
27 Dkt. No. 38 at 10-19. San Marcos asserted crossclaims against Hollandia for (1)
28

1 responses costs and contribution under CERCLA; (2) declaratory relief under
2 CERCLA; (3) negligence; (4) declaratory relief under California law; and (5)
3 equitable indemnity. Dkt. No. 44 at 8-13.

4 **3. Motion for Judgment on the Pleadings**

5 On January 8, 2014, the Court granted the parties' joint motion to stay the
6 action pending mediation. Dkt. No. 94. On October 11, 2016, the Court lifted the
7 stay in order to permit Hollandia to file a motion for judgment on the pleadings.
8 Dkt. No. 180. Hollandia's motion challenges all of the claims asserted against it,
9 including those lodged by CDC, Vallecitos, Escondido, and San Marcos
10 (collectively "the Opposing Parties"). Dkt. No. 190 at 9.

11 **LEGAL STANDARD**

12 Under Federal Rule of Civil Procedure ("Rule") 12(c), "[a]fter the pleadings
13 are closed but within such time as not to delay the trial, any party may move for
14 judgment on the pleadings." Fed. R. Civ. P. 12(c).

15 The principal difference between motions filed pursuant to Rule 12(b) and
16 Rule 12(c) is the time of filing — a motion for judgment on the pleadings is
17 typically brought after an answer has been filed whereas a motion to dismiss is
18 typically brought before an answer has been filed. *See Dworkin v. Hustler*
19 *Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). Because the motions are
20 functionally identical, the same standard of review applicable to a Rule 12(b)
21 motion applies to its Rule 12(c) analog. *Id.*; *see also Chavez v. United States*, 683
22 F.3d 1102, 1108 (9th Cir. 2012) ("Analysis under Rule 12(c) is 'substantially
23 identical' to analysis under Rule 12(b)(6), because, under both rules, a court must
24 determine whether the facts alleged in the complaint, taken as true, entitle the
25 plaintiff to a legal remedy.") (internal quotations and citation omitted).

26 When deciding a Rule 12(c) motion, "the allegations of the non-moving party
27 must be accepted as true, while the allegations of the moving party which have been
28

1 denied are assumed to be false.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.,*
2 *Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989). Courts, therefore, construe all material
3 allegations in the light most favorable to the non-moving party. *Deveraturda v.*
4 *Globe Aviation Sec. Servs.*, 454 F.3d 1043, 1046 (9th Cir. 2006). “Judgment on the
5 pleadings is proper when the moving party clearly establishes on the face of the
6 pleadings that no material issue of fact remains to be resolved and that it is entitled
7 to judgment as a matter of law.” *Hal Roach Studios*, 896 F.2d at 1550. “[F]actual
8 challenges to a plaintiff’s complaint,” however, have no bearing on the legal
9 sufficiency of the allegations.” *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th
10 Cir. 2001). As such, judgment on the pleadings in favor of a defendant is not
11 appropriate if the complaint raises issues of fact that, if proved, would support the
12 plaintiff’s legal theory. *Gen. Conference Corp. of Seventh-Day Adventists v.*
13 *Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989).
14 In sum, a motion for judgment on the pleadings is proper “only if it is clear that no
15 relief could be granted under any set of facts that could be proved consistent with
16 the allegations.” *Turner v. Cook*, 362 F.3d 1219, 1225 (9th Cir. 2004).

17 The mere fact that a motion is couched in terms of Rule 12(c) does not
18 prevent the district court from disposing of the motion by dismissal rather than
19 judgment. *Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 311 F. Supp. 2d 898,
20 903 (S.D. Cal. 2004) (citing *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1038
21 (6th Cir. 1979)). Courts have discretion to grant Rule 12(c) motions with leave to
22 amend. *In re Dynamic Random Access Memory Antitrust Litig.*, 516 F. Supp. 2d
23 1072, 1084 (N.D. Cal. 2007). Courts also have discretion to grant dismissal on a
24 12(c) motion, in lieu of judgment, on any given claim. *Id.*; see also *Amersbach*,
25 598 F.2d at 1038.

26 ////

27 ////

28

DISCUSSION

1
2 The gravamen of Hollandia’s motion for the judgment on the pleadings is
3 that the Opposing Parties have failed to state valid claims under CERCLA because
4 they have not plead the release of any actionable “hazardous substances.”¹ This
5 argument is without merit. CDC’s pleadings, upon which all of the crossclaims are
6 based, identifies phosphorus, ammonia as nitrogen,² and nutrients found in
7 fertilizers, pesticides, and sewage as CERCLA-qualifying “hazardous substances.”
8 FAC ¶ 44, Dkt. No. 68 at 11. “Phosphorus” and “ammonia,” in turn, are listed as
9 “hazardous substances” in EPA regulations. *See* 42 U.S.C. §§ 9601(14); 40 C.F.R.
10 § 302.4. The FAC, therefore, has adequately named “hazardous substances” for
11 purposes of pleading a CERCLA violation and surviving a motion for judgment on
12 the pleadings.

13 Notwithstanding the straightforward nature of this argument, Hollandia
14 argues that the pleadings fall short because they cannot be true. Hollandia, the
15 motion explains, is only responsible for releasing “nutrients” from “cow manure,”
16 into the Lake and, thus, it contends that it is not liable under CERCLA because
17 “nutrients” from “manure” are not “hazardous substances” as a matter of law.
18 The Court emphatically rejects this conclusion. As this order explains in further
19 detail below, Hollandia’s line of argument is both procedurally and substantively
20

21 ¹ This order’s discussion of the sufficiency of the Opposing Parties’ CERCLA pleadings will
22 focus exclusively on the CDC’s FAC, as all of the crossclaims are rooted in the CDC’s
23 underlying allegations against Hollandia. The Court will limit its analysis to this central claim
24 because Hollandia’s additional arguments challenging the sufficiency of Escondido’s, Vallecitos’,
25 and San Marcos’ CERCLA pleadings are too cursory to enable any meaningful review. *See, e.g.,*
26 Dkt. No. 190 at 10-12. Accordingly, the Court notes that any argument made by Hollandia in
27 reference to the Opposing Parties’ CERCLA claims that is omitted, here, has been considered and
28 rejected.

² The “ammonia as nitrogen” language does not appear in the text of the FAC, but appears in
Exhibit 1 of the FAC, the Investigative Order. *Compare* FAC ¶ 43, Dkt. No. 68 at 11 (hazardous
substances “included, but are not limited to, nitrogen, phosphorus, and nutrients found in
fertilizers, pesticides, and sewage.”) *with* FAC, Ex. 1, Dkt. No. 68-1 (hazardous substances are
“ammonia as nitrogen, phosphorus, and nutrients.”). The Court concludes, however, that this
inconsistency is inconsequential as Hollandia’s moving papers do not contest that “ammonia as
nitrogen” has been plead.

1 defective. Hollandia's contentions are substantively defective because the
2 pleadings have identified actionable "hazardous substances" under CERCLA.
3 Hollandia's argument is also procedurally defective because it improperly
4 challenges the facts in the complaint and relies upon factual allegations absent in
5 the pleadings. Accordingly, and for the reasons set forth below, the Court **DENIES**
6 Hollandia's Motion for Judgment on the Pleadings.

7 **A. Defendant Hollandia's Request for Judicial Notice**

8 The Court will first address Defendant's numerous requests for judicial
9 notice, as those requests inform the scope of the Court's review on a motion to
10 dismiss.

11 As a general rule, "a district court may not consider materials not originally
12 included in the pleadings in deciding a Rule 12 motion." *U.S. v. 14.01 Acres of*
13 *Land More or Less in Fresno Cnty.*, 547 F.3d 943, 955 (9th Cir. 2008). When
14 "matters outside the pleading are presented to and not excluded by the court, the
15 motion shall be treated as one for summary judgment and disposed of as provided
16 in Rule 56." Fed. R. Civ. P. 12(b)(6). Two exceptions to this rule exist. *Lee*, 250
17 F.3d at 688. The first provides that "a court may consider material which is
18 properly submitted as part of the complaint on a motion to dismiss without
19 converting the motion to dismiss into a motion for summary judgment." *Id.*
20 (quotations omitted). And "[i]f the documents are not physically attached to the
21 complaint, [then] they may be considered if the documents' authenticity . . . is not
22 contested and the plaintiff's complaint necessarily relies on them." *Id.* (quotations
23 omitted). The second provides that a court may take judicial notice of matters of
24 public record. *Id.* (citing *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th
25 Cir. 1986)).

26 While the *Lee* standard lays out the circumstances under which judicial
27 notice may be taken in a Rule 12 proceeding, the Federal Rules of Evidence dictate
28

1 what facts are properly subject to judicial notice. Courts may judicially notice facts
2 that are “not subject to reasonable dispute.” Fed. R. Evid. 201(b). A fact is not
3 subject to reasonable dispute if “it is either (1) generally known within the
4 territorial jurisdiction of the trial court or (2) capable of accurate and ready
5 determination by resort to sources whose accuracy cannot reasonably be
6 questioned.” *Id.* “[A] high degree of indisputability is the essential prerequisite to
7 taking judicial notice of adjudicative facts.” *Rivera v. Philip Morris, Inc.*, 395 F.3d
8 1142, 1151 (9th Cir. 2005) (citing Fed. R. Evid. 201(a) & (b) advisory committee’s
9 notes) (internal quotations omitted). Accordingly, a court must proceed cautiously
10 before granting judicial notice and do so only when a matter is “beyond reasonable
11 controversy.” *Id.* (citing Fed. R. Evid. 201(a) & (b)).

12 **1. Hollandia’s Request for Judicial Notice Generally**

13 Hollandia has requested that the Court take judicial notice of over sixty-two
14 exhibits, totaling almost 300 pages in length. *See generally* Dkt. Nos. 191-192.
15 Hollandia, however, has failed to carry its burden of persuading the Court that the
16 facts and exhibits identified are the proper subjects of judicial notice. *See Newman*
17 *v. San Joaquin Delta Cmty. Coll. Dist.*, 272 F.R.D. 505, 516 (N.D. Cal. 2011) (“a
18 party requesting judicial notice bears the burden of persuading the trial judge that
19 the fact is a proper matter for judicial notice”). Hollandia’s moving papers
20 summarily seek to judicially notice facts and exhibits. *See, e.g.*, Dkt. No. 192.
21 They do not, for instance, explain how the various requests conform to controlling
22 law (i.e., the *Lee* exceptions and Fed. R. Evid. Rule 201) and they do not
23 substantiate their requests with legal authority. *See id.* Absent specific arguments
24 demonstrating why each of the sixty-two exhibits should be judicially noticed, the
25 Court cannot possibly rule in favor of Hollandia. It is Hollandia’s responsibility,
26 and not the Court’s, to demonstrate that the judicial notice requirements have been
27 satisfied. *See Newman*, 272 F.R.D. at 516 (faulting the proponent for failing to
28

1 provide any legal or factual basis for its assertion of judicial notice). It is also
2 Hollandia's responsibility, and not the Court's, to explain why a judicially
3 noticeable fact or document is relevant to the underlying issues presented by the
4 motion. *See Wham-O, Inc. v. Manley Toys Ltd.*, 2009 WL 6361387, at *5 (C.D.
5 Cal. Aug. 13, 2009) (judicially noticeable documents must be relevant to the issues
6 in the case). As Hollandia has failed to do either, here, the Court will not grant its
7 requests.

8 The Court further notes that Hollandia's requests are also defective because
9 of the content they seek to notice. Hollandia does not seek judicial notice of the
10 fact that these sixty-two exhibits exist, but for the truth of the matters asserted
11 therein. *See generally* John H. Reaves Decl., Dkt. No. 191 (making arguments
12 premised on the contents of the exhibits sought to be noticed). Courts do not
13 generally accept judicially noticed facts for their truth at this stage of the
14 proceeding. *See Gerritsen v. Warner Bros. Entm't Inc.*, 12 F. Supp. 3d 1101, 1029
15 (C.D. Cal. 2015) (observing that it could take judicial notice on a motion to dismiss
16 only to "indicate what was in the public realm at the time, not whether the contents
17 of those articles were in fact true."); *Gammel v. Hewlett-Packard Co.*, 905 F. Supp.
18 2d. 1052, 1061 (C.D. Cal. 2012) (refusing to take judicial notice of SEC filings for
19 the truth of the matter asserted on a motion to dismiss); *In re Tyrone F. Conner*
20 *Corp., Inc.*, 140 B.R. 771, 782 (E.D. Cal. 1992) (declining to take judicial notice of
21 documents offered for the truth of the matter because doing so would violate
22 procedural due process owed to plaintiff). If the Court were to take judicial notice
23 of the truth of the facts that Hollandia has proffered, it would deprive the Opposing
24 Parties of "the opportunity to use rebuttal evidence, cross-examination, and
25 argument to attack [Hollandia's] contrary evidence." *Rivera v. Philip Morris, Inc.*,
26 395 F.3d 1142, 1151 (9th Cir. 2005). Such a result, however, is impermissible as it
27 directly contravenes the Court's Rule 12 responsibility to take the plaintiffs'
28

1 pleadings as true. *See Gerritsen*, 112 F. Supp. 3d at 1022. The Court, therefore,
2 declines Hollandia’s improper invitation to conduct a mini-trial at this juncture of
3 the litigation.

4 **2. Request as to the Investigative Order and the RI/FS**

5 At oral argument, Hollandia asserted that the Investigative Order and the
6 Remedial Investigation/Feasibility Study Report (RI/FS) should nonetheless be
7 judicially noticed as a matter of law under the doctrine of incorporation by
8 reference.³ Incorporation by reference applies to situations “in which the plaintiff’s
9 claim depends on the contents of a document, the defendant attaches the document
10 to its motion to dismiss, and the parties do not dispute the authenticity of the
11 document, even though the plaintiff does not explicitly allege the contents of that
12 document in the complaint.” *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir.
13 2005).

14 CDC has incorporated the Investigative Order by reference into its
15 complaint. CDC specifically discusses the Investigative Order in the FAC and
16 attaches it as an Exhibit. *See* Dkt. No. 68-1. There can, therefore, be little doubt
17 that CDC’s claim depends upon the IO or that the authenticity of the document has
18 been established. The Court, accordingly, finds it proper to rely upon the
19 Investigative Order in reaching its decision on the merits. As for the RI/FS and its
20 appendices (*see* Exs. 1-11, Dkt. No. 191-1), the Court finds that they are not
21 incorporated by reference under *Knievel*. The FAC could not possibly have relied
22 upon the RI/FS, or its contents, in making its claims because the RI/FS did not exist
23 at the time the complaint was filed. *See* Ex.1, Dkt. No. 191-2. Plaintiff filed its
24 complaint on October 11, 2012 and four years later, on September 20, 2016, the
25 RI/FS was published. Given this timeline, Hollandia has no legal basis for arguing
26 that *Knievel* permits the Court to incorporate the RI/FS into the FAC by reference.

27 _____
28 ³ The Court notes that Hollandia did not include the Investigative Order in its “Request for
Judicial Notice.” *See* Dkt. No. 192.

1 **3. Conclusion**

2 In sum, Hollandia has failed to persuade the Court that it is either appropriate
3 or relevant to take judicial notice of any of the sixty-two exhibits, including the
4 RI/FS and its appendices, that it lists in its Request for Judicial Notice.
5 Accordingly, the Court **DENIES** Hollandia’s Request for Judicial Notice, Dkt. No.
6 192. In addition, the Court finds that the RI/FS does not qualify for consideration
7 under the “incorporation by reference” doctrine either. The only document outside
8 of the complaint that the Court will consider is the Investigative Order, as it has
9 been attached to the complaint and, therefore, been incorporated by reference

10 **B. CERCLA Liability**

11 “Congress enacted the Comprehensive Environmental Response,
12 Compensation, and Liability Act (CERCLA[]) in response to the serious
13 environmental and health risks posed by industrial pollution . . . The Act was
14 designed to promote the ‘timely cleanup of hazardous waste sites’ and to ensure
15 that the costs of such cleanup efforts were borne by those responsible for the
16 contamination.” *Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 602
17 (2009). “Courts,” therefore, “must construe the statute liberally in order to effect
18 these congressional concerns.” *Asarco LLC v. Atl. Richfield Co.*, 73 F. Supp. 3d
19 1285, 1293 (D. Mont. 2014) (internal citations omitted)

20 To establish a prima facie case under CERCLA, a plaintiff must plead facts
21 establishing four elements: (1) that “the property at issue is a ‘facility’ as defined”
22 in the Act; (2) that “a ‘release’ or ‘threatened release’ of a ‘hazardous substance’
23 has occurred; (3) that the ‘release’ or ‘threatened release’ has caused the plaintiff to
24 incur response costs that were ‘necessary’ and ‘consistent with the national
25 contingency plan’; and (4) that the defendants are in one of four classes of persons
26 subject to liability under CERCLA. *Carson Harbor Vill., Ltd. v. Cty. of L.A.*, 433
27
28

1 F.3d 1260, 1265 (9th Cir. 2006).⁴

2 **1. Hazardous substances**

3 Section 102 of CERCLA defines “hazardous substances,” in part, as “any
4 element, compound, mixture, solution or substance designated pursuant to section
5 9602 of this title.” 42 U.S.C. §§ 9601(14) (emphasis added). Section 9602, in turn,
6 delegates the determination of “hazardous substances” to the EPA. *Id.* § 9602. The
7 EPA has designated “[t]he elements and compounds and hazardous wastes
8 appearing in table 302.4 as hazardous substances under section 102(a) of the Act
9 [CERCLA].” 40 C.F.R. § 302.4.

10 The FAC identifies phosphorus, ammonia as nitrogen, and nutrients found in
11 fertilizers, pesticides, and sewage as qualifying “hazardous substances.” FAC ¶ 44,
12 Dkt. No. 68 at 11. Both “phosphorus” and “ammonia” are listed as “hazardous
13 substances” in Table 302.4. CDC, therefore, has adequately pled “hazardous
14 substances” for purposes of CERCLA liability.

15 **a. Hollandia’s Factual Challenges**

16 Notwithstanding the simplicity of this application of law to facts, Hollandia
17 vehemently argues that the Opposing Parties have nonetheless failed to plead
18 actionable “hazardous substances” because the IO addresses “[n]utrients, not
19 CERCLA ‘hazardous substances,’” and because the RWQCB issued the IO for
20 “‘*nutrient impairment*’ by nitrates and phosphates in [the] Creek and Lake” not for
21 “phosphorus” and “ammonia.” Dkt. No. 190 at 15 (emphasis in original). Stated
22 differently, Hollandia is arguing that the Court should disregard the CDC’s
23 allegations because Hollandia was not responsible for the release of “phosphorus”
24 and “ammonia,” but for other non-hazardous materials.

25 There are, however, two obvious defects with this argument that prevent the
26 Court’s consideration of it. The first is that Hollandia has misread the Investigative
27

28 ⁴ The Court will only address the second and third factors of this test as they are the only factors challenged in Hollandia’s motion.

1 Order. Hollandia argues that the Court should disregard the FAC’s “hazardous
2 substances” allegations because they are contradicted by the Investigative Order
3 attached to the complaint. *See* Dkt. No. 190 at 14 (citing *Steckman v. Hart*
4 *Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998) for the proposition that courts
5 are “not required to accept as true conclusory allegations which are contradicted by
6 documents referred to in the complaint”). Yet contrary to what Hollandia
7 represents to the Court, there is no contradiction between the “hazardous
8 substances” allegations in the complaint and the Investigative Order. The
9 Investigative Order reads as follows:

10 . . . The Lake is listed as impaired in that the water quality does not
11 attain beneficial uses of the Lake designated in the San Diego Water
12 Board’s Water Quality Control Plan due to *ammonia as nitrogen*,
13 *phosphorus* and *nutrients*. These excessive nutrients contribute to
14 eutrophication problems such as periodic algal blooms, confirmed
presence of cyanobacteria toxins, and occasional fish kills at the Lake.

15 FAC, Ex.1, Dkt. No. 68-1 at 30 (emphasis supplied). That the Investigative Order
16 specifically singles out “ammonia as nitrogen” and “phosphorus” as pollutants
17 undermines Hollandia’s argument that “nutrients” formed the exclusive basis for
18 the Investigative Order. The Court, therefore, declines Hollandia’s invitation to
19 disregard the FAC’s pleadings as contradictory and, therefore, deficient.

20 The second obvious issue with Hollandia’s line of argument is that it
21 amounts to an improper factual challenge of the pleadings. Hollandia avers that it
22 could not have caused the release of “phosphorus” or “ammonia as nitrogen” into
23 the Lake, because cows produce nitrates, phosphates, and “naturally occurring
24 ammonia” and none of those substances are listed as “hazardous substances” under
25 CERCLA. Dkt. No. 190 at 17. The pleadings, however, do not identify
26 “phosphates” and “nitrates” and “naturally occurring ammonia” as the “hazardous
27 substances” at issue. *See generally* FAC. The pleadings also do not identify cow
28 manure as the source of Hollandia’s contamination. Instead, the pleadings simply

1 claim that Hollandia, through the use of its land, released “phosphorus” and
2 “ammonia as nitrogen” into the Lake.

3 It is this assertion, and not Hollandia’s, that governs the Court’s analysis at
4 this stage of the proceedings. “[T]he allegations of the non-moving party must be
5 accepted as true, while the allegations of the moving party which have been denied
6 are assumed to be false.” *Hal Roach Studios*, 896 F.2d at 1550; *see also Lee*, 250
7 F.3d at 690. While Hollandia may ultimately be correct that it only released
8 “phosphates” and “nitrates” into the Lake through its “cow manure,” those facts are
9 procedurally irrelevant. It is simply not proper to use a Rule 12 motion to challenge
10 factual matter in the complaint or to proffer competing factual allegations. The
11 Court’s sole focus is on the sufficiency of the pleadings, not whether the pleadings
12 will ultimately prove to be true. Accordingly, because the FAC has correctly
13 named “phosphorus” and “ammonia as nitrogen” as “hazardous substances,” the
14 Court rejects Hollandia’s attempts to evade liability by attacking facts not stated in
15 the complaint.⁵

16 **b. Hollandia’s Legal Challenges**

17 The Court is likewise unpersuaded by Hollandia’s legal arguments
18 challenging the sufficiency of the “hazardous substances” pled in the FAC.

19 Hollandia argues that it is “absurd” to conclude that “nitrogen, phosphorus,
20 and nutrients” are “hazardous substances” because doing so “would expose
21 everyone in the watershed [of the Lake] for fertilizer runoff, wild and domestic
22 animal droppings and plant materials.” Dkt. No. 190 at 16. “Under this logic,”
23 Defendant goes on to state, “the entire planet is a Superfund site since all life forms
24 excrete waste.” Whatever wisdom there is to this argument, however, it is no
25 longer tenable after the Ninth Circuit’s decision in *A & W Smelter & Refiners, Inc.*
26 *v. Clinton*. *A & W Smelter* squarely addressed — and rejected — the “absurdity” of

27 _____
28 ⁵ Indeed, much of Hollandia’s brief is dedicated to arguing that phosphates, nitrates, and cow manure are not “hazardous substances” as a matter of law. *See, e.g.*, Dkt. No. 190 at 17-20.

1 reading CERCLA liability too broadly. *See* 146 F.3d 1107, 1110 (9th Cir. 1998).

2 Read as the EPA suggests, CERCLA seems to give the agency *carte*
3 *blanche* to hold liable anyone who disposes of just about anything.
4 Drop an old nickel that actually contains a nickel? A CERCLA
5 violation. Throw out an old lemon? It's full of citric acid, another
6 hazardous substance. It's not surprising that an agency would urge an
7 interpretation which gives it such broad discretion. Perhaps more
8 surprising is that CERCLA leaves us little choice but to agree . . .

9 *Id.* The court went on to conclude, albeit reluctantly, that Section 9601's list of
10 "hazardous substances" did not contain any "minimum level requirement" because
11 the plain language of the statute left no room for a limiting interpretation. *Id.*
12 Section 9601, it noted, states in no uncertain terms that "any substance" designated
13 as a "hazardous substance" under one of the EPA's various regulations is
14 actionable. *Id.* As such and to the extent that a substance appears in Table 302.4,
15 that fact is dispositive of whether there is a "hazardous substance" in issue.
16 Accordingly, Hollandia's argument fails.

17 The Court further notes that the *A&W Smelter* holding is also fatal to
18 Hollandia's argument that there must be some minimum concentration level of
19 ammonia before liability can be found. Dkt. No. 190 at 22. Hollandia contends
20 that ammonia must be present in certain quantities before liability can attach
21 because Table 302.4 lists "reportable quantities" for different types of ammonia.
22 *Id.* This argument, however, belies the plain import of the statute. As the *A&W*
23 *Smelter* court observed:

24 The table in 40 C.F.R. § 302.4 does list reportable quantities, but this
25 refers to notification requirements under 42 U.S.C. §§ 9602 & 9603.
26 Under these sections, anyone who owns a facility which stores
27 hazardous substances and releases a quantity of a substance above the
28 reportable level must notify the EPA. *Nothing in the law suggests that*
quantities of a hazardous substance below its reportable level render it
no longer hazardous.

A&W Smelter, 146 F.3d at 1110 (emphasis added). Accordingly, Hollandia cannot

1 escape liability by pointing to the minimum reportable quantities present in Table
2 302.4, as those quantities have no effect on whether a substance is or is not
3 “hazardous” under the regulations. Hollandia’s argument, therefore, fails.

4 Yet another erroneous legal argument that Hollandia flings at the Court
5 concerns Section 9604 of CERCLA. The relevant section reads as follows:

6 *The President shall not* provide for a removal or remedial action under
7 this section in response to a release or threat of release – (A) of a
8 naturally occurring substance in its unaltered form, or altered solely
9 through naturally occurring processes or phenomena, from a location
where it is naturally found.

10 42 U.S.C. § 9604(a)(3)(A) (emphasis added). Hollandia contends that this statutory
11 provision curbs CERCLA liability for “naturally occurring substance[s],” such as
12 cattle waste excretions, as a matter of law. Dkt. No. 190 at 16. This conclusion,
13 however, patently does not follow from the statutory language cited. Section 9604
14 gives the President the authority to act to remove and provide remedial action for
15 hazardous substances at any time. 42 U.S.C. § 9604(a). Subsection (a)(3)(A) limits
16 that authority by prohibiting the President from providing for a remedial action in
17 response to a release of a “naturally occurring substance in its unaltered form”
18 That the President does not have the authority to institute a removal or remedial
19 action against an entity that is responsible for the release of naturally occurring
20 substances in no way demonstrates that naturally occurring substances cannot be
21 hazardous substances as a matter of law. Hollandia’s argument, therefore, fails.

22 **2. Causation**

23 Defendant Hollandia also seems to challenge the third prong of CERCLA
24 liability, that is, whether a defendant *caused* response costs to the plaintiff. Dkt.
25 No. 190 at 16. Hollandia argues that “CDC claims nutrients settled in the lake, but
26 that is something *it* caused.” *Id.* (citing *Lake Madrone Wtr. Dist. V. State Wtr. Res.*
27 *Control Bd.*, 209 Cal. App. 3d 163, 168-170 (Cal. Ct. App. 1989)).
28

1 True or not, this assertion has no legal significance at this stage of the
2 proceedings. *See Hal Roach Studios*, 896 F.2d at 1550 (“the allegations of the non-
3 moving party must be accepted as true, while the allegations of the moving party
4 which have been denied are assumed to be false.”). CDC’s FAC states that
5 “Defendants’ Sites released and/or disposed of . . . hazardous substances or wastes
6 which caused contamination and pollution . . . in the vicinity of the Lake
7 These discharges have caused and threaten to continue causing a condition of
8 pollution and nuisance in the Lake.” FAC ¶¶ 11-12, Dkt. No. 68 at 3. Taking this
9 assertion as true, as the Court must on a Rule 12 motion, CDC has adequately pled
10 that Hollandia caused the contamination of the Lake. To the extent that Defendant
11 disagrees with this allegation, it must wait until a later stage of litigation in order to
12 properly challenge this fact.

13 **C. Response Costs & Recovery**

14 The motion for judgment on the pleadings also makes a handful of arguments
15 concerning limitations on liability, limitations on recovery, appropriate allocation of
16 response costs, and availability of remediation costs. *See* Dkt. No. 190 at 27-28.
17 The Court rejects each of these arguments as they are patently inappropriate to raise
18 on a motion for judgment on the pleadings. To state a CERCLA cause of action,
19 the Opposing Parties need only plead the four prongs identified above. Legal
20 arguments concerning remedies, therefore, are not ripe for discussion or review.

21 **D. State Law Claims**

22 Hollandia’s arguments against the Opposing Parties’ state law claims contain
23 many of the same procedural defects identified above. *See, e.g.*, Dkt. No. 190 at
24 28-29 (relying on CDC’s use of the Lake and surrounding waters, CDC’s alleged
25 mismanagement of the Lake, and conclusions of the RWQCB concerning whether
26 nutrients from Hollandia could have reached the Lake as reasons for dismissing the
27 state law claims). Accordingly, and to the extent that Hollandia’s state-law
28

1 contentions rely upon factual challenges and assertions absent in the pleadings, the
2 Court rejects those arguments as procedurally improper.

3 That fact notwithstanding, the Court will briefly address Hollandia’s
4 contentions concerning the sufficiency of CDC’s continuing nuisance and
5 continuing trespass allegations, as those arguments find some support in the law.

6 **1. Continuing trespass and continuing nuisance**

7 Hollandia argues that CDC’s continuing nuisance and trespass claims must
8 fail because they are barred by the statute of limitations and because they are not
9 “reasonably abatable.” For the following reasons, the Court disagrees with both
10 assertions.

11 “California law recognizes that there are two types of trespass and nuisance:
12 those that are permanent and those that are continuing.” *See F.D.I.C. v. Jackson-*
13 *Shaw Partners No. 46, Ltd.*, 850 F. Supp. 839, 842 (N.D. Cal. 1994). Whether a
14 nuisance or trespass is “continuing” or “permanent” turns on whether it can “be
15 discontinued or abated.” *Mangini v. Aerojet-General Corp.*, 281 Cal. Rptr. 827,
16 841 (Cal. Ct. App. 1991). A “continuing” nuisance or trespass is abatable, whereas
17 a “permanent” one is not. *Id.*

18 The nature of the nuisance or trespass alleged is critical because it determines
19 how the statute of limitations is applied. *Wilshire Westwood Assocs. v. Atl.*
20 *Richfield Co.*, 24 Cal. Rptr. 2d 562, 569 (Cal. Ct. App. 1993). The statutory period
21 for a continuing nuisance does not begin to run when the defendant’s harmful
22 conduct ends, but when the damages resulting from that conduct cease. *See*
23 *Mangini*, 281 Cal. Rptr. at 841. This is so because a “continuing” nuisance or
24 trespass is present whenever the *offensive condition* causes continuing damage to
25 the plaintiff, irrespective of when the “acts causing the offensive conditions []
26 occur[red].” *Id.* (emphasis supplied). As such, pleading a continuing nuisance or
27 trespass allows a plaintiff to effectively bypass the tort’s three-year statute of
28

1 limitations and to bring suit for offensive conduct that ended years ago. *Id.*

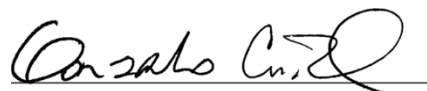
2 Here, CDC has pled a continuing nuisance and continuing trespass cause of
3 action against Hollandia. The three-year statute of limitations does not, therefore,
4 bar Plaintiff's claims. Accordingly, Hollandia's first argument fails.

5 As for Hollandia's second argument — that is, that CDC has nonetheless
6 failed to plead a continuing tort — that contention also fails. Hollandia argues that
7 CDC's "continuing" claims are not sufficiently stated because they fail to plead that
8 the offensive conditions are "reasonably abatable" as required by the California
9 Supreme Court's decision in *Mangini v. Aerojet-General Corp. (Mangini II)*, 51
10 Cal. Rptr. 2d 272 (Cal. 1996). The Court, however, disagrees that the *Mangini II*
11 court's holding is fatal to CDC's pleadings. In *Mangini II*, the California Supreme
12 Court concluded that "abatable," for purposes of the "continuing" theory of
13 liability, means that the nuisance can be "remedied at a reasonable cost by
14 reasonable means." *Id.* at 281. Contrary to what Hollandia suggests, however, this
15 holding addresses the standard for *proving* abatability, not the standard for *pleading*
16 abatability. Accordingly and absent some indication that California courts have
17 converted *Mangini II*'s holding into a pleading requirement, the Court will not find
18 CDC's allegations faulty for that reason. As such, the Court finds CDC's alleged
19 failure to plead "reasonable abatability" inapposite to the sufficiency of its stated
20 claim.

21 CONCLUSION

22 Having considered, and rejected, all of Hollandia's arguments offered in
23 support of its Motion for Judgment on the Pleadings, the Court hereby **DENIES**
24 Defendant Hollandia's motion in its entirety.

25 Dated: March 23, 2017

26 
27 Hon. Gonzalo P. Curiel
28 United States District Judge