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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

INLAND EMPIRE WATERKEEPER, a)	Case No. ED CV 07-00480 DDP (FMOx)
chapter of ORANGE COUNTY)	
COASTKEEPER, a non-profit)	ORDER GRANTING MOTION FOR PARTIAL
corporation,)	SUMMARY JUDGMENT
)	
Plaintiff,)	[Motion filed on March 18, 2008]
)	
v.)	
)	
UNIWEB, INC., a California)	
corporation,)	
)	
Defendants.)	
)	

This matter is before the Court on Plaintiff Inland Empire Waterkeeper's Motion for Partial Summary Judgment. After reviewing the papers submitted by the parties and considering the arguments therein, the Court grants the motion.

I. BACKGROUND

This case arises out from Defendant Uniweb, Inc.'s ("Uniweb") alleged violation of the Federal Water Pollution Control Act ("Clean Water Act" or "Act"), 33 U.S.C. § 1365. Plaintiff Inland Empire Waterkeeper, a chapter of the nonprofit organization Orange

1 County Coastkeeper, filed this citizen suit against Uniweb as one
2 of several related cases against industrial users that release
3 wastewater into the City of Corona's Publicly Owned Treatment Works
4 ("POTW"). Plaintiff alleges that Uniweb has exceeded the
5 wastewater discharge limits under its permit with the City of
6 Corona in violation of the Clean Water Act. Plaintiff seeks
7 partial summary judgment that Uniweb violated the Act and a
8 determination of the number of violations.

9 A. Statutory Background on the Clean Water Act

10 Section 301(a) of the Clean Water Act prohibits the discharge
11 of pollutants into navigable waters unless in compliance with the
12 Act. Congress directed the Environment Protection Agency ("EPA")
13 to promulgate regulations setting limits on the pollutant
14 discharges from three general types of "point sources," 33 U.S.C. §
15 1362(14) (1976), including (1) point sources discharging directly
16 into navigable waters ("direct dischargers"); (2) POTWs treating
17 municipal sewage or industrial wastewater; and (3) point sources
18 discharging pollutants into POTWs rather than directly into
19 navigable waters ("indirect dischargers"). See Nat'l Ass'n of
20 Metal Finishers v. EPA, 719 F.2d 624, 633 (3rd Cir. 1983), rev'd on
21 other grounds, Chemical Mfrs. Ass'n v. Natural Resources Defense
22 Council, Inc., 470 U.S. 116 (1985). Direct dischargers and POTWs
23 are regulated through the National Pollutant Discharge Elimination
24 System ("NPDES") permit issued to the discharger under section 402
25 of the Act. Indirect dischargers are regulated under separate
26 regulatory standards provided for by section 307(b)(1) of the Act,
27 33 U.S.C. § 1317(b). Id.

28

1 Congress sought to regulate indirect dischargers in
2 recognition that "the pollutants which some indirect dischargers
3 release into POTWs could interfere with the operation of the POTWs,
4 or could pass through the POTWs without adequate treatment." Nat'l
5 Ass'n of Metal Finishers, 719 F.2d at 633. The EPA has promulgated
6 two types of national pretreatment standards applicable to indirect
7 dischargers: general pretreatment regulations and national
8 categorical pretreatment standards. "It is unlawful for any
9 indirect discharger to operate in violation of any 'effluent
10 standard or prohibition or pretreatment standard' promulgated under
11 section 307.'" Id., quoting 33 U.S.C. § 1317(d).

12 40 C.F.R. 403 sets forth the permitting requirements for
13 "industrial users" that release pollutants into POTWs.¹ All POTWs
14 discharging over 5 million gallons per day ("GPD") and receiving
15 pollutants from industrial users must develop a pretreatment
16 program. 40 C.F.R. § 403.8. A POTW must issue individual permits
17 to all "Significant Industrial User[s]," which includes those
18 industrial users (1) subject to the categorical pretreatment
19 standards; (2) discharging more than 25,000 GPD; or (3) determined
20 to be significant by the POTW based upon "a reasonable potential
21 for adversely affecting the POTW's operation or for violating any
22 [p]retreatment [s]tandard or requirement." 40 C.F.R. §§ 403.8(f);
23 403.3(v)(1)(ii). Individual pretreatment permits "must be
24 enforceable." The permits must establish effluent limits, as well
25 as self-monitoring, sampling, reporting, notification and
26 recordkeeping requirements. 40 C.F.R. § 403.8(f)(1).

27
28 ¹By definition, "[the] term Industrial User or User means a
source of Indirect Discharge." 40 C.F.R. § 403.3(j)

1 POTWs are also required to set local standards: "where
2 pollutants contributed by User(s) result in Interference or
3 Pass-Through, and such violation is likely to recur, [POTWS must]
4 develop and enforce specific effluent limits for Industrial
5 User(s), and all other users, as appropriate. . . ." 40 C.F.R.
6 403.5(c)(2). "[S]uch [local] limits shall be deemed [enforceable]
7 Pretreatment Standards for the purposes of section 307(d) of the
8 Act." 40 C.F.R. § 403.5(d). Local limits may be more stringent
9 than federal pretreatment standards. 40 C.F.R. § 403.4.

10 B. Factual Background

11 1. The City of Corona's Pretreatment Program

12 The City of Corona's pretreatment ordinance, adopted pursuant
13 to 40 C.F.R. 403 and set forth under section 13.08 of the Corona
14 Municipal Code, provides local prohibitions, discharge limits, and
15 reporting and permitting requirements. The Regional Water Quality
16 Board, which is the "Approval Authority" delegated by the EPA,
17 approved the City's pretreatment program. See Cal. Water Code §§
18 13000-13001. The City's permits, issued pursuant to the
19 pretreatment ordinance and allowing industrial users to discharge
20 pollutants into its POTW, establish the local limits specific to
21 the user.

22 2. Defendant Uniweb

23 Defendant Uniweb manufactures retail store fixtures at a
24 facility in Corona, California. (Def's Opp'n 5, April 7, 2008).
25 As part of its manufacturing operations, Uniweb cleans and rinses
26 the steel it uses to make the store fixtures. (Pl.'s Mem. P & A 2,
27 March 31, 2008). The wastewater generated through this process is
28

1 discharged into the City of Corona's POTW facility Number 2.
2 (Def.'s Opp'n 5).

3 Since 2001, the City of Corona has issued to Uniweb an annual
4 pretreatment permit that establishes "effluent limits" for specific
5 pollutants. (Wastewater Discharge Permits 2001-2008, Pl.s' Exs. 3-
6 9.).² These permits identify the maximum concentration of specific
7 types of pollution allowed per part of water. (Pl.'s Exh. 3, 98-
8 100; Exh. 4, 112-14; Exh. 5, 126-28; Exh. 6, 142-44; Exh. 7, 158-
9 160; Exh. 8, 176-78; Exh. 9, 194-96.). These permits also
10 establish a sampling frequency for each pollutant requiring that
11 Uniweb conduct routine water testing and report the results to the
12 City under penalty of perjury. (Pl.s' Exhs. 3-9.)

13 3. The City of Corona's Total Dissolved Solids Offset
14 Program

15 On January 29, 2003, the City of Corona Department of Water
16 and Power addressed a letter to Uniweb and other industrial users
17 that announced the completion of a new water softening facility,
18 also called a desalter. (Pl. Exh. 14 & Uniweb Exh. 101.) The
19 letter provided that the City had received approval from the
20 Regional Board to operate an off-set program "to pass the salt
21 removal benefits to industrial users, providing that the City
22 fulfil its discharge obligation as outlined in the NPDES Permit."
23 (Id.) The letter states:

24
25 ² Effluent limits can be understood as the concentration level
26 of a specific type of pollution per part of water that a permit
27 holder may discharge into a POTW. For example, Defendant's 2001
28 permit indicates that Defendant may not discharge more than 332
milligrams of sodium per liter of waste water. (Pl's Exh. 3, 98-
100; Ex. 4, 112-14; Exh. 5, 126-28; Ex. 6, 142-44; Exh. 7, 158-160;
Exh. 8, 176-78; Exh. 9, 194-96).

1 To implement this offset program, the City is proposing to
2 establish a surcharge fee for *total dissolved solids*,
3 considering that the *total dissolved solids* is the summation
4 of the *sodium, sulfate, chloride*, and *total hardness*. Offset
5 benefits will apply to those individual mineral components as
6 well. The surcharge fees collected will be used to assist
7 maintenance and future expansion of the City's Desalter.

8 (Id.)

9 The City considered eligible for the off-set program those
10 industrial users with flows less than 25 million GPD and TDS
11 concentrations of less than 4,800 mg/l. Discharges over 850 mg/l
12 of TDS would be subject to a \$.05 surcharge fee per pound of TDS.
13 On July 29, 2004, according to the aforementioned terms, Uniweb and
14 the City entered an agreement for Uniweb's participation in the
15 off-set program. (Pl. Exh. 15 & Uniweb Exh. 102.) On July 1,
16 2008, the City plans to end the off-set program.

17 4. Plaintiff's Allegations and Uniweb's Defenses

18 Plaintiff maintains that many wastewater samples taken by
19 Uniweb or the City between 2001 and 2007 exceeded the effluent
20 limits for sulfate, nickel, sodium and TDS that are set forth in
21 Uniweb's permit. Specifically, Plaintiff alleges Uniweb exceeded
22 its permit limits for nickel on six occasions, for sodium on eight
23 occasions, for sulfate on thirteen occasions, and for TDS on eleven
24 occasions. Plaintiff argues that each violative sample should
25 count not as a single violation, but as a violation for each day of
26 the sampling period, which would amount to 1,333 total violations
27 (515 for sulfate, 365 for nickel, 183 for sodium, and 270 for TDS).
28 Plaintiff additionally asserts that Uniweb may not rely on the off-

1 set program to avoid liability because the program was not enacted
2 pursuant to appropriate procedures under the Clean Water Act.

3 Uniweb raises several defenses based upon the TDS off-set
4 program. The focus of these defenses are that the off-set program
5 increased Uniweb's discharge limits, such that the majority of its
6 alleged violations did not in fact violate the effluent limits as
7 modified by the off-set program. Uniweb argues the off-set program
8 was in compliance with the Clean Water Act, and if it were not,
9 Plaintiff's complaint properly lies with the City. Uniweb also
10 raises additional defenses: it argues that Plaintiff's pre-lawsuit
11 notice was inadequate; that Plaintiff's claims will become moot
12 upon the end of the off-set program on July 1, 2008; and that
13 Plaintiff does not have standing to challenge the violations that
14 occurred outside the scope of the off-set program because those
15 violations are not recurring or likely to recur.

16

17 **II. LEGAL STANDARD**

18 Summary judgment is appropriate where "the pleadings, the
19 discovery and disclosure materials on file, and any affidavits show
20 that there is no genuine issue as to any material fact and that the
21 movant is entitled to a judgment as a matter of law."
22 Fed. R. Civ. P. 56(c). In determining a motion for summary
23 judgment, all reasonable inferences from the evidence must be drawn
24 in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc.,
25 477 U.S. 242, 255 (1986). A genuine issue of material fact is
26 created if "the evidence is such that a reasonable jury could
27 return a verdict for the nonmoving party," and material facts are
28 those "that might affect the outcome of the suit under the

1 governing law." Anderson, 477 U.S. at 248. On the other hand, no
2 genuine issue of fact exists "[w]here the record taken as a whole
3 could not lead a rational trier of fact to find for the non-moving
4 party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475
5 U.S. 574, 587 (1986).

6

7 **III. DISCUSSION**

8 A. Plaintiff's Pre-Lawsuit Notice

9 To file a "citizen" lawsuit under the Clean Water Act, the
10 plaintiff must first provide sixty days notice to the defendant.
11 33 U.S.C. § 1365(b). Uniweb argues that Plaintiff's notice was
12 insufficient because there was "no reference to a challenge to the
13 validity of the Off-Set Program." (Opp'n 14.) The Court
14 disagrees.

15 A plaintiff's notice need only provide "sufficient information
16 to permit the recipient to identify the specific standard,
17 limitation, or order alleged to constitute a violation." 40 C.F.R.
18 135.3(a). The Ninth Circuit has recognized the pre-lawsuit notice
19 requirement as one of "reasonable specificity." San Francisco
20 Baykeeper v. Tosco Corp., 309 F.3d 1153, 1158 (9th Cir. 2002).
21 There is no requirement "that plaintiffs list every specific aspect
22 of detail of every alleged violation." Id. (citations omitted).

23 Plaintiff has complied with that requirement here.³
24 Plaintiff sent a letter to Uniweb stating that it intended to bring
25 suit under the Clean Water Act. Plaintiff explained that it

26

27 ³There is no dispute that Plaintiff's October 31, 2006 letter
28 was sent more than sixty days before it filed suit on April 24,
2007.

1 believed Uniweb to have violated the Act by releasing wastewater in
2 excess of the limits set forth in Uniweb's discharge permits.
3 Plaintiff specifically cited to the Uniweb's wastewater discharge
4 permits. (See Compl. Exh. A.) Attached to the letter was a
5 document itemizing the alleged violations. The document identified
6 the limits set forth in Uniweb's permits - not the off-set program
7 - as the standard for finding excess discharges of wastewater. The
8 document also included calculations of the percentage of excess
9 over the permit limits. (Id.) The notice was reasonably specific
10 that Plaintiff would allege violations of Uniweb's permit limits.

11 Uniweb's suggestion that Plaintiff provided inadequate notice
12 is unconvincing. The notice was "sufficiently specific to inform
13 [Uniweb] about what it [was allegedly] doing wrong, so that it
14 [knew] what corrective actions [would] avert a lawsuit." ONRC
15 Action v. Columbia Plywood, Inc., 286 F.3d 1137, 1143 (9th Cir.
16 2002). The clear inference to be drawn from Plaintiff's notice was
17 that it alleged violations of the permit limits and considered the
18 off-set program inapplicable. Plaintiff did not need to
19 specifically cite to the off-set program to comply with the notice
20 requirement. Cf. Waterkeepers Northern California v. AG Industrial
21 Mfg., 375 F.3d 913, 919 (9th Cir. 2004) (finding adequate notice
22 even in the absence of specific citation to applicable regulation).
23 Based upon the attachment to Plaintiff's notice, Uniweb must have
24 known that Plaintiff did not consider the off-set program to be the
25 applicable standard. Accordingly, the Court finds that Plaintiff's
26 notice provided Uniweb with sufficient information of the basis for
27 its claim and complied with 40 C.F.R. 135.3(a).

28 B. Uniweb's Effluent Limits

1 Whether Uniweb violated the Clean Water Act by exceeding local
2 pretreatment limits turns on this threshold question: was Uniweb
3 subject to the local effluent limits set forth in its discharge
4 permits or the modified limits specified in the TDS off-set
5 program.

6 1. Modification of POTW Pretreatment Programs Under the
7 Clean Water Act

8 40 C.F.R. § 403.18 provides that "the Approval Authority or a
9 POTW . . . may initiate program modification. . . ." 40 C.F.R. §
10 403.18(a). The regulation sets forth different procedures for
11 "substantial modifications" and "non-substantial modifications." 40
12 C.F.R. § 403.18(c-d). Which procedures were applicable here
13 requires a determination whether Corona's TDS off-set program
14 qualified as a "substantial modification" or "non-substantial
15 modification."

16 The regulation defines "substantial modifications" in relevant
17 part as:

18 Modifications that relax local limits, except for the
19 modifications to local limits for pH and reallocations of the
20 Maximum Allowable Industrial Loading of a pollutant that do
21 not increase the total industrial loadings for the pollutant,
22 which are reported pursuant to paragraph (d) of this section.
23 Maximum Allowable Industrial Loading means the total mass of a
24 pollutant that all Industrial Users of a POTW . . . may
25 discharge pursuant to limits developed under § 403.5(c). . . .
26 40 C.F.R. § 403.18(b)(2).

27 Here, the off-set program sought to "relax local limits." See
28 40 C.F.R. § 403.18(b)(2). Local limits for purposes of the Clean

1 Water Act include the "specific effluent limits for Industrial
2 User(s)." 40 C.F.R. § 403.11(c) & (d). The off-set program
3 increased TDS concentrations to 4,800 mg/l, and although it did not
4 specifically increase the sodium, sulfate, chloride, and total
5 hardness limits, it effectively relaxed those limits by including
6 those constituents in the program. (See Pl. Exh. 14-15 & Uniweb
7 Exh. 101-102.) Therefore, the Court finds that the off-set program
8 qualified as a "substantial modification."

9 Uniweb asserts that the off-set program did not relax local
10 limits, but only "reallocated the task of meeting a portion of the
11 TDS limits from Uniweb, and other businesses, to the City." (Opp'n
12 20.) Uniweb appears to base this argument on the regulation's
13 exception which provides that "reallocations of the Maximum
14 Allowable Industrial Loading [MAIL] of a pollutant" are not a
15 relaxation of local limits and thus not "substantial
16 modifications." See 40 C.F.R. § 403.18(b)(2). Plaintiff responds
17 that Uniweb's reliance on the exception is misplaced for two
18 reasons. First, the increase of Uniweb and other industrial users'
19 discharge limits was not a mere reallocation. Second, the
20 exception only applies to reallocations between industrial users,
21 not the type of reallocation between industrial users and the City
22 that was countenanced by the off-set program.

23 The Court finds that the off-set program increased the total
24 mass of a pollutant that industrial users could discharge into the
25 POTW, and therefore, did not constitute a "reallocation" of the
26 MAIL. The off-set program allowed industrial users to increase
27 their pollutant discharges into the POTW with the City assuming
28 treatment responsibilities for those added discharges. (See Pl.

1 Exh. 14 & Uniweb Exh. 101.) While the program shifted
2 responsibility to the City,⁴ the program was not the sort of
3 "reallocation" that falls within the regulation's exception. The
4 regulation provides that a reallocation of the MAIL which increases
5 "the total industrial loadings for the pollutant" remains a
6 substantial modification. 40 C.F.R. § 403.18(b)(2). As the off-
7 set program increased the amount of pollutants that industrial
8 users could discharge into the POTW, it did not fall within the
9 "reallocation" exception. Whatever the reasons for adopting the
10 off-set program, the City was required to follow the approval
11 procedures for "substantial modifications" set forth at 40 C.F.R. §
12 403.18(c).

13 2. Approval Procedures for Substantial Modifications to
14 POTW Pretreatment Programs

15 In seeking approval of substantial program modifications, the
16 POTW must submit a request to the Approval Authority that explains
17 the reasons for program modification. 40 C.F.R. § 403.18(c)(1).
18 The Approval Authority then reviews the program modification to
19 ensure that the POTW pretreatment program has legal authority to
20 regulate industrial users and enforce compliance with appropriate
21 pretreatment standards as required by law. 40 C.F.R. §
22 403.18(c)(2). Additionally, the regulation requires compliance
23 with the public notice requirements of 40 C.F.R. § 403.11(b-f),
24 which include publication of the modification request in "a

25 _____
26 ⁴Uniweb also asserts that there was no relaxation of local
27 limits because the City still had to comply with its NPDES permit
28 under the off-set program. However, while this may be true, the
fact that the off-set program relaxed the permit limits of
industrial users remains undisputed. This fact makes the off-set
program a substantial modification.

1 newspaper(s) of general circulation" and set a notice period to
2 allow interested persons to comment on the modifications and
3 request a public hearing. 40 C.F.R. § 403.18(c)(2). The Approval
4 Authority need not publish a notice of decision if the original
5 public notice of the requested modification indicates that "the
6 request will be approved if no comments are received by a date
7 specified in the notice; no substantive comments are received; and
8 the request is approved without change." 40 C.F.R. § 403.18(c)(3).
9 A POTW may comply with the public notice requirements so long as
10 the Approval Authority determines that the POTW's notice "satisfies
11 the requirements of § 403.11." 40 C.F.R. § 403.18(c)(4).

12 Plaintiff's counsel sets forth by declaration that several
13 public records requests were submitted to the City of Corona and
14 the Santa Ana Regional Water Quality Board in 2005 and 2006.
15 (Declaration of Cory J. Briggs ("Briggs Decl.") ¶ 3.) Those
16 requests asked for documents related to the City's TDS off-set
17 program, and more generally, documents related to modification
18 requests by the City or modification approvals by the Board for
19 Corona's POTW pretreatment program. (Pl.'s Exh. 16.) In response
20 to those requests, Plaintiff's counsel reviewed files at the Board
21 twice in 2005. Plaintiff's counsel also reviewed a number of City
22 documents copied by the City or counsel's staff. Plaintiff's
23 counsel states that none of the documents reviewed at the Board's
24 offices or produced by the City showed any request for approval of
25 the TDS off-set program or any public notice of the requested
26 modification. (Briggs Decl. ¶ 4.)

27 There is no documentary evidence that the City followed the
28 appropriate procedures for "substantial modifications" when

1 adopting the off-set program. Plaintiff's review of files in
2 connection with the public records requests did not uncover any
3 record that the City sought approval for its modification or that
4 public notice requirements were satisfied.⁵ (See Briggs Decl. ¶
5 4.) Uniweb does not provide documentary evidence to the contrary.
6 Uniweb argues that triable issues of fact exist regarding whether
7 the City followed appropriate procedures. Uniweb points to the
8 City's announcement of the off-set program and its letter of
9 agreement with the City to participate in the off-set program. In
10 both, the City asserts that it "requested and received the Regional
11 Board's approval." (Uniweb's Exhs. 101 & 102.) However, other
12 than these assertions, there is no documentary evidence from the
13 City or the Board to support that the off-set program was requested
14 or approved. Uniweb has not produced any documents or declarations
15 from the City or the Board to show that approval was granted.⁶
16 Moreover, there is no documentary evidence or even an assertion
17 from the City that it complied with the requisite public notice
18 requirements. This is insufficient to create a triable issue of

19
20 ⁵Uniweb objects that Plaintiff's counsel lacks personal
21 knowledge to state whether the off-set program was approved or
22 whether there was any record of approval. Uniweb's objection is
23 overruled because Plaintiff's counsel does not make any of those
24 statements. Rather, Plaintiff's counsel has personal knowledge of
25 the results of his records request and research of produced
26 documents.

27 ⁶At oral argument, Uniweb maintained that the Board's failure
28 to act in approving the off-set program would result in approval of
the program under the regulation. This argument misreads the
regulation. For a non-substantial modification, the POTW may
implement the modification if it does not receive a notice from the
Approval within 45 days of the Approval Authority's decision to
approve or deny the modification. 40 C.F.R. § 403.18(d)(3). For a
substantial modification, however, a modification must be approved
by the Approval Authority and satisfy various procedural
requirements including public notice. 40 C.F.R. § 403.18(c).

1 fact. See McCabe v. General Foods Corp., 811 F.2d 1336, 1340 (9th
2 Cir. 1987) (a party opposing summary judgment must present evidence
3 to create a triable issue of fact).

4 If there had been compliance with the 40 C.F.R. § 403.18(c)
5 procedures, the Board and the City would have maintained some
6 records of any requests for modification of Corona's POTW, any
7 review of such requests, or any public notice issued pursuant to
8 the procedures. In the absence of evidence that the City complied
9 with the 40 C.F.R. § 403.18(c) procedures, the only reasonable
10 conclusion is that the TDS off-set program was adopted in
11 contravention of the procedures under the Clean Water Act
12 regulations. Therefore, the off-set program's modifications to
13 industrial users' discharge limits were invalid because in
14 violation of the law.

15 3. Uniweb's Effluent Limits Were the Limits Set Forth
16 in its Discharge Permits

17 Because the off-set program was invalid, Uniweb and other
18 businesses in Corona were required to comply with the pollutant
19 discharge limits set forth in their discharge permits. Whether
20 Uniweb has violated its effluent limits will be determined by
21 reference to the limits specified in its permit and not the invalid
22 modifications of the off-set program. Thus, Uniweb's defenses
23 based on the off-set program are unavailing.

24 First, Uniweb cannot assert the "permit shield" defense
25 established under Section 402 of the Clean Water Act. The defense
26 provides that "[c]ompliance with a permit issued pursuant to this
27 section shall be deemed compliance [with the Act]." 33 U.S.C.
28 1342(k). However, Section 402 permits are the NPDES permits held

1 by cities operating POTWs, not the permits of industrial users that
2 discharge pollutants into the POTWs. Industrial users such as
3 Uniweb are issued permits pursuant to section 307 of the Act, and
4 thus, Section 402's "permit shield" defense does not apply here.

5 Second, Uniweb's "pass through"⁷ defense has been waived.
6 Uniweb did not raise a "pass through" defense in its answer to
7 Plaintiff's complaint. See Uniweb's Answer, at 9-10.
8 The failure to allege an affirmative defense waives the defense.
9 Even if the Court construed Uniweb's answer to include this
10 defense, the "pass through" defense does not apply. To prove the
11 "pass through" defense, an industrial user must show: (1) "[i]t did
12 not know or have reason to know that its Discharge, alone or in
13 conjunction with a discharge or discharges from other sources,
14 would cause Pass Through . . ."; and (2) compliance with "[a] local
15 limit designed to prevent Pass Through . . . directly prior to and
16 during the Pass Through . . ." 40 C.F.R. § 403.5(a)(2).⁸ There is
17 no evidence that a pass-through event occurred here. In any event,
18 if a sample of wastewater shows that Uniweb did not exceed its
19 permit limits, then there is no violation for that sample.

20 Finally, Uniweb argues that its good faith participation in
21 the off-set program, even if the program was invalid, insulates it
22 from liability. The Court disagrees. All that is required to be

23
24 ⁷As defined in the Clean Water Act regulations, "[t]he term
25 Pass Through means a Discharge which exits the POTW into waters of
26 the United States in quantities or concentrations which, alone or
27 in conjunction with a discharge or discharges from other sources,
is a cause of a violation of any requirement of the POTW's NPDES
permit (including an increase in the magnitude or duration of a
violation)." 40 C.F.R. § 403.3.

28 ⁸There is also an alternative ground for the "pass through"
defense not raised here. See 40 C.F.R. § 403.5(a)(2).

1 liable for a Clean Water Act violation is a discharge that exceeds
2 the effluent limits specified in the industrial user's applicable
3 discharge permit. 33 U.S.C. 1311(a) (prohibiting pollutant
4 discharges "except in compliance with law," which includes the
5 requirement that an industrial user comply with specific permit
6 limits established under 33 U.S.C. 1317 and 40 C.F.R. 403.11).
7 Compliance with the Clean Water Act is a matter of strict liability
8 subject to the particular affirmative defenses set forth in the
9 Act. Cf. Hawaii's Thousand Friends v. City & County of Honolulu,
10 821 F. Supp. 1368, 1392 (D. Haw. 1993).

11 The Clean Water Act's strict liability regime for enforcing
12 compliance with discharge limits supports holding Uniweb
13 accountable for any violations of its permits in spite of any good
14 faith reliance on the invalid off-set program. That Uniweb may
15 have inadvertently violated the permit limits in believing its
16 discharges were lawful under the invalid off-set program does allow
17 it to avoid a finding of liability, although this certainly could
18 be a factor when measuring any civil penalties for violations.
19 Hawaii's Thousand Friends, 821 F. Supp. at 1392, (citing United
20 States v. Ohio Edison, 725 F. Supp. 928, 934 (N.D. Ohio 1989))
21 ("The fact that a violator is 'without fault' in committing
22 violations of the Clean Water Act does not absolve the violator
23 from penalties, although it may mitigate the amount of the
24 penalties assessed."); see also 33 U.S.C. § 1319(d) (providing that
25 a court in determining the extent of a civil penalty, shall
26 consider the following six factors: "[t]he seriousness of the
27 violation or violations, the economic benefit (if any) resulting
28 from the violation, any history of such violations, any good-faith

1 efforts to comply with the applicable requirements, the economic
2 impact of the penalty on the violator, and such other matters as
3 justice may require").

4 Moreover, there are significant public policy reasons for
5 rejection of Uniweb's good faith violations defense. Where, as
6 here, the City did not comply with approval procedures for relaxing
7 industrial users' permit limits, the public was deprived of the
8 opportunity to make comments, oppose the measure, or request a
9 hearing.⁹ There are incentives for this approach. Localities and
10 businesses may seek to enter side agreements as a way to circumvent
11 the approval process and the ever-present threat of public
12 opposition. Yet the Clean Water Act's procedures prevent such
13 collusion. Neither may a city unilaterally decide to modify its
14 POTW without the consent of the Approval Authority. See 40 C.F.R.
15 § 403.18(c). Although there is no indication of collusion here, it
16 is inconsistent with the Clean Water Act's strict liability regime
17 to allow violators to avoid liability based upon its compliance
18 with an unauthorized or unnoticed city program. Thus, Uniweb's
19 argument that Plaintiff may bring a claim against the City is
20 misplaced; rather, Uniweb may consider pursuing a claim against the
21 City for any penalties it may incur as a result of its
22 participation in the City's unlawful off-set program. The Court
23 now turns to the violations.

24

25

26 ⁹For this reason, Uniweb's laches defense also fails. The
27 failure to provide public notice of the off-set program explains
28 why no lawsuit was filed until 2007. Plaintiff cannot be faulted
for lack of diligence in bringing this action. See Kling v.
Hallmark Cards Inc., 225 F.3d 1030, 1036 (9th Cir. 2000).

1 C. Violations of the Clean Water Act and Local Effluent
2 Limits

3 1. Proof of Violations

4 Plaintiff alleges a number of violations based upon the
5 sampling data in reports submitted by Uniweb to the City. Uniweb
6 argues that the monitoring reports show only a few, isolated Clean
7 Water Act violations and that its participation in the off-set
8 program eliminate Plaintiff's allegations of more significant
9 violations. Uniweb does not dispute that the monitoring reports
10 show discharges in excess of the permit limits.

11 A monitoring report that shows a water sample with pollutant
12 discharges in excess of permit limits is conclusive evidence of a
13 violation. Sierra Club v. Union Oil Co., 813 F.2d 1480, 1491 (9th
14 Cir. 1987), vacated on other grounds, 485 U.S. 931 (1988),
15 reinstated with minor amendment, 853 F.2d 667 (9th Cir. 1988). A
16 defendant may not impeach its own publicly filed reports which are
17 "submitted under penalty of perjury." Save Our Bays & Beaches v.
18 City & County Honolulu, 904 F. Supp. 1098, 1138 (D. Haw. 1994).
19 Here, Corona requires industrial users like Uniweb to submit
20 monitoring reports under penalty of perjury. Corona Municipal Code
21 13.08.350 (providing that "[a]ll required reports" be submitted in
22 accordance with 40 C.F.R. 403.6(a)(2(ii), which states that reports
23 be submitted "under penalty of law"). Where Uniweb's reports
24 demonstrate discharges in excess of its permit limits, the Court
25 will consider that evidence to establish a violation.

26 The Court engages in an independent review of the monitoring
27 reports to determine whether there are in fact violations of a
28 permit. The Court has compared the discharges of nickel, sodium,

1 sulfate, and TDS on the alleged violation dates with Uniweb's
 2 applicable permit limits. The Court has synthesized the relevant
 3 data in the tables below,¹⁰ and concludes that each of the
 4 following discharges were in violation of Uniweb's permits:

5 **VIOLATIONS¹¹**

6

7

8 Constituent	9 Permit Limit	10 Violation (Date)	11 Sample Frequency	12 No. Days Sample Period
13 Nickel	.4 mg/L	14 .45 mg/L 15 (8-10-2005)	16 Biannually	17 184
18 Nickel	.4 mg/L	19 .42 mg/L 20 (8-18-2005)	21 Biannually	22 Same Period
23 Nickel	.4 mg/L	24 .63 mg/L 25 (9-13-2005)	26 Biannually	27 Same Period
28 Nickel	.4 mg/L	.41 mg/L (3-23-2006)	Biannually	181
Nickel	.4 mg/L	.41 mg/L (4-13-2006)	Biannually	Same Period
Nickel	.4 mg/L	.44 mg/L (4-24-2006)	Biannually	Same Period

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24 ¹⁰Plaintiff provided tables to document Uniweb's violations in
 25 its moving papers for this motion. However, those tables were
 26 missing the reported discharge for each alleged violation. In
 27 future, Plaintiff should provide the reported discharge in excess
 28 of applicable permit limits in any table to assist the Court with
 its review of the monitoring reports.

¹¹The Court has synthesized information from Uniweb's permits
 and monitoring reports in these tables. (See Pl.'s Exhs. 3-9, 17-
 36.)

Constituent	Permit Limit	Violation (Date)	Sample Frequency	No. Days Sample Period
Sodium	332 mg/L	470 mg/L (9-12-2002)	Monthly	30
Sodium	332 mg/L	348 mg/L (7-14-2005)	Monthly	31
Sodium	332 mg/L	420 mg/L (8-10-2005)	Monthly	31
Sodium	332 mg/L	428 mg/L (8-18-2005)	Monthly	Same Period
Sodium	332 mg/L	510 mg/L (9-13-2005)	Monthly	30
Sodium	332 mg/L	374 mg/L (3-15-2006)	Monthly	31
Sodium	332 mg/L	390 mg/L (3-23-2006)	Monthly	Same Period
Sodium	332 mg/L	490 (4-13-2006)	Monthly	30

Constituent	Permit Limit	Violation (Date)	Sample Frequency	No. Days Sample Period
Sulfate	300 mg/L	386 (9-13-2005)	Monthly	30
Sulfate	300 mg/L	421 (2-15-2006)	Monthly	28

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Sulfate	300 mg/L	481 (3-15-2006)	Monthly	31
Sulfate	300 mg/L	476 (4-13-2006)	Monthly	30
Sulfate	300 mg/L	825 (7-27-2006)	Monthly	31
Sulfate	227 mg/L	369 (1-12-2007)	Biannually	181
Sulfate	227 mg/L	297 (2-16-2007)	Biannually	Same Period
Sulfate	227 mg/L	324 (4-13-2007)	Biannually	Same Period
Sulfate	227 mg/L	342 (5-11-2007)	Biannually	Same Period
Sulfate	227 mg/L	316 (6-08-2007)	Biannually	Same Period
Sulfate	227 mg/L	305 (7-18-2007)	Biannually	184
Sulfate	227 mg/L	362 (8-17-2007)	Biannually	Same Period
Sulfate	227 mg/L	340 (9-18-2007)	Biannually	Same Period

Constituent	Permit Limit	Violation (Date)	Sample Frequency	No. Days Sample Period
TDS	1,844 mg/L	2200 mg/L (9-12-2002)	Monthly	30

1	TDS	1,844 mg/L	1942 mg/L	Monthly	28
2			(2-10-2005)		
3	TDS	1,844 mg/L	2600 mg/L	Monthly	31
4			(07-14-2005)		
5	TDS	1,844 mg/L	2500 mg/L	Monthly	31
6			(8-10-2005)		
7	TDS	1,844 mg/L	2510 mg/L	Monthly	Same Period
8			(8-18-2005)		
9	TDS	1,844 mg/L	3220 mg/L	Monthly	30
10			(9-13-2005)		
11	TDS	1,844 mg/L	2400 mg/L	Monthly	28
12			(2-15-2006)		
13	TDS	1,844 mg/L	3850 mg/L	Monthly	31
14			(3-15-2006)		
15	TDS	1,844 mg/L	2200 mg/L	Monthly	Same Period
16			(3-23-2006)		
17	TDS	1,844 mg/L	4234 mg/L	Monthly	30
18			(4-13-2006)		
19	TDS	1,556 mg/L	2220 mg/L	Monthly	31
20			(7-27-2006)		

21 2. Number of Violations

22 A remaining issue is the number of violations. Plaintiff
23 argues that each day of a sampling period when a violation occurred
24 should be counted as a distinct violation. Applying this approach,
25 Plaintiff calculates 1,333 total violations: 365 violations of
26 nickel limits, 183 violations of sodium limits, 515 violations of
27
28

1 sulfate limits, and 270 violations of TDS limits. Uniweb does not
2 address this issue.

3 Courts have found that "where a violation is defined in terms
4 of a time period longer than a day, the maximum penalty assessable
5 for that violation should be defined in terms of the number of days
6 in that time period." Chesapeake Bay Found. v. Gwaltney of
7 Smithfield, 791 F.2d 304, 314 (4th Cir. 1986), vacated on other
8 grounds, Gwaltney v. Smithfield, Ltd., 484 U.S. 49 (1987); see also
9 United States v. Allegheny Ludlum Corp., 366 F.3d 164, 188 (3rd
10 Cir. 2004). The Court accepts this proposition as a statement of
11 the law. However, the Court defers ruling on the precise number
12 of Uniweb's violations. That issue is interrelated with the
13 Court's discretionary assessment of appropriate civil penalties.
14 See 33 U.S.C. § 1319(d). The parties are yet to provide briefing
15 or evidence on civil penalties. The Court, therefore, considers it
16 prudent to rule on the precise number of Uniweb's violations in
17 conjunction with its discretionary determination of the appropriate
18 civil penalties.

19 D. Standing and Mootness

20 Uniweb argues that Plaintiff's lawsuit is moot because the
21 City has announced that the off-set program will be discontinued as
22 of July 1, 2008. Uniweb also argues that Plaintiff lacks standing
23 because the violations are not recurring nor are they likely to
24 recur.¹²

25 _____
26 ¹²Uniweb does not argue that there has been no injury, no
27 causation, or that Plaintiff's claims would not redress the alleged
28 harm. Nor does Uniweb challenge Plaintiff's "organizational
standing" as an environmental organization. See Friends of the
Earth v. Laidlaw Env'tl. Servs., Inc., 528 U.S. 167, 181 (2000). The
(continued...)

1 The Clean Water Act contains a "citizen suit" provision that
2 confers standing to bring a civil action "against any person who is
3 alleged to be in violation of . . . an effluent standard or
4 limitation under th[e] Act. . . ." 33 U.S.C. § 1365(a); see also
5 Gwaltney, 484 U.S. at 58-61. In Gwaltney, the U.S. Supreme Court
6 held that citizens bringing suit for Clean Water Act violations
7 "may seek civil penalties only in a suit brought to enjoin or
8 otherwise abate an ongoing violation." Gwaltney, 484 U.S. at 59.
9 A plaintiff may show an ongoing violation "'either (1) by proving
10 violations that continue on or after the date the complaint is
11 filed, or (2) by adducing evidence from which a reasonable trier of
12 fact could find a continuing likelihood of a recurrence in
13 intermittent or sporadic violations.'" Natural Resources Defense
14 Council v. Southwest Marine, Inc., 236 F.3d 985, 998 (9th Cir.
15 2000) (quoting Sierra Club v. Union Oil Co., 853 F.2d at 671
16 (quoting Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield,
17 Ltd., 844 F.2d 170, 171-72 (4th Cir. 1988))).

18 Here, there is evidence of ongoing sulfate violations since
19 Plaintiff filed its complaint in April 2007. See supra 18-20.
20 Plaintiff argues that there is also evidence from which it is
21 reasonable to infer that intermittent or sporadic violations for
22 the other constituents are likely to recur. The Ninth Circuit has
23 explained that "[i]ntermittent or sporadic violations do not cease
24 to be ongoing until the date when there is no real likelihood of
25 repetition." Sierra Club, 853 F.2d at 671 (quoting Chesapeake Bay

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¹²(...continued)

28 Court notes that Uniweb's standing argument is limited to whether
violations are likely to recur.

1 Found., Inc. v. Gwaltney of Smithfield, Ltd., 844 F.2d 170, 172
2 (4th Cir. 1988)). Plaintiff indicates that Uniweb's operations
3 have not substantially changed during the period of its violations,
4 nor has Uniweb shown that the violations will not persist after the
5 off-set program.

6 As to sodium and TDS, the Court cannot conclude that there "is
7 no real likelihood of repetition" of violations under these
8 circumstances. It is not clear that Uniweb will comply with its
9 permit limits independent of the off-set program. As for the
10 nickel discharges in 2005 and 2006, Uniweb presents evidence that
11 it replaced filtration equipment after those excess nickel
12 discharges, and that there have been no excess nickel discharges
13 since that time. (McDonnell Decl. ¶ 17; Uniweb Exh. 106.) This is
14 enough to at least create an issue of fact whether nickel
15 discharges are likely to recur. However, the Court does not
16 consider Uniweb's "best guess" that faulty filtration equipment was
17 the source of the excess nickel to preclude a reasonable trier of
18 fact from finding that nickel violations could recur. (See Def.'s
19 Opp'n 9.)

20 The Court does not consider Plaintiff's claims moot because it
21 is not "absolutely clear" that Uniweb's violations will not recur
22 after the off-set program. See Friends of the Earth, Inc., 528
23 U.S. at 189. Uniweb presents its vice president's declaration,
24 where he states that Uniweb is "preparing for the end of the
25 Program and will have alternative arrangements in place when the
26 Program ends." (Declaration of John McDonnell ¶ 26.) While
27 McDonnell does offer tentative plans for compliance after the off-
28 set program, there is no concrete evidence that these plans will be

1 implemented or that implementation will prevent future violations.
2 Therefore, the Court finds that Plaintiff's claims are not moot.

3

4 **IV. CONCLUSION**

5 For the foregoing reasons, the Court GRANTS the motion for
6 partial summary judgment. The remaining issues in this case are
7 standing with respect to the nickel violations, the number of
8 violations, and proof of civil penalties.

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11 IT IS SO ORDERED.

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14 Dated: June 5, 2008



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DEAN D. PREGERSON
United States District Judge

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