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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10

11 CALIFORNIA SPORTFISHING  
PROTECTION ALLIANCE; a non-profit  
12 corporation; PETALUMA RIVER COUNCIL,  
an unincorporated association,  
13

14 Plaintiffs,

15 vs.

16 SHAMROCK MATERIALS, INC.; a  
corporation; CORTO MENO SAND AND  
GRAVEL, LLC; a limited liability corporation;  
17 CORTO MENO SAND AND GRAVEL, II,  
LLC; a limited liability corporation,  
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19 Defendants.  
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Case No.: C11-02565 MEJ  
ASSIGNED TO HON. MARIA ELENA  
JAMES

**DEFENDANTS CORTO MENO SAND  
AND GRAVEL, LLC; CORTO MENO  
SAND AND GRAVEL, II, LLC;  
SHAMROCK MATERIALS, INC.'S  
NOTICE AND MOTION TO DISMISS  
PLAINTIFFS' COMPLAINT  
PURSUANT TO FED. R. CIV. P.  
12(B)(1) AND 12(B)(6) AND  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

Date: November 17, 2011  
Time: 10:00 a.m.  
Dept.: Courtroom B, Fifteenth Floor

Case Filed: 5/28/11  
Trial Date: 3/18/13

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22  
23 **I. NOTICE OF MOTION**  
24

25 Please take notice, hereby given that on November 17, 2011, Defendants SHAMROCK  
26 MATERIALS INC., CORTO MENO SAND AND GRAVEL, LLC and CORTO MENO SAND  
27 AND GRAVEL, II, LLC. (herby collectively referred to as "Defendants") will move to dismiss  
28 Plaintiffs CALIFORNIA SPORTFISHING PROTECTION ALLIANCE'S PETALUMA RIVER

1 COUNCIL'S (herby collectively referred to as "Plaintiffs") Complaint and each of the claims for  
2 relief therein pursuant to Federal Rules of Civil Procedure ("FRCP") Rule 12(b)(1) because the  
3 court lacks subject matter jurisdiction due to fatal deficiencies in the Complaint and FRCP Rule  
4 12(b)(6) because Plaintiffs' Complaint fails to state a claim for which relief may be granted. A  
5 hearing will be heard in Courtroom B., 15<sup>th</sup> Floor at 10:00 a.m. Defendants' Motion to Dismiss  
6 Plaintiffs' Complaint Pursuant To Fed. R. Civ. 12(b) (1) and 12(b) (6).  
7

## 8 II. STATEMENT OF RELIEF SOUGHT

9 Defendants' motion is based on the following grounds:

10 1) Subject matter jurisdiction is absent because the Clean Water Act ("CWA") under either  
11 a National Pollution Discharge Elimination System ("NPDES") Permit or California's General  
12 Permit does not include facilities with the Standard Industrial Classification code of the type  
13 operated by Defendants. Therefore, citizen-suit jurisdiction under 33 U.S.C. § 1365(a) is  
14 improper.  
15

16 2) The First Cause of Action for alleged violations of 33 U.S.C. §1311(a) (based on the  
17 alleged "stormwater discharges" of pollutants to waters of the United States without a permit,  
18 carried by rain falling on processed rock or aggregate material) fails to state a claim for relief  
19 because the CWA does not require a permit for such alleged "stormwater discharges".  
20

21 3) Finally, Plaintiffs "catch-all" theory that, even if alleged releases of stormwater from the  
22 Distribution Facility are not associated with industrial activity, Defendants are still obligated to obtain  
23 an NPDES permit in order to discharge pollutants from the site, fails to state a claim for relief  
24 because the theory is contrary to Ninth Circuit law.

25 Plaintiffs' CWA claim fails and should be dismissed with prejudice since there is no way  
26 for them to plead around these innate deficiencies. See *Thinket Ink Info. Res., Inc. v Sun*  
27 *Microsystems, Inc.* 368 F.3d 1053, 1061 (9th Cir. 2004)(holding that where any amendment of a  
28 complaint would be futile, the claim should be dismissed with prejudice).

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### III. FACTUAL AND PROCEDURAL BACKGROUND

On December 10, 2010, Plaintiffs sent Defendants a Notice of Violation and Intent to File Suit Under the Federal Water Pollution Control Act ("Notice Letter"). The Notice Letter is attached as Exhibit A to Plaintiffs' Complaint. The Notice Letter informed Defendants that Plaintiffs' intended to file a citizen enforcement action (known as a "citizen suit") pursuant to the CWA, 33 U.S.C. §1365(a)(1). The thrust of Plaintiffs' Notice Letter is that Defendants are discharging pollutants into the waters of the United States at Defendants' facility located at 210-222 Landing Way in Petaluma, California ("Distribution Facility") and, therefore, should have a NPDES permit.

In a letter dated February 3, 2011, counsel for Defendants responded to Plaintiffs' Notice Letter ("Response Letter")<sup>1</sup>. The Response Letter confirmed that the Distribution Facility is not an industrial plant and there is no industrial activity conducted at the Distribution Facility, no industrial waste water is generated and no activities occur that are identified in the Standard Industrial Codes ("SIC") which would require Defendants to have an NPDES permit in place. (Sell Affidavit ¶ 4, Exh. 1, Request For Judicial Notice ¶¶ 1-2, Exh. 1 and 2).

On May 26, 2011, Plaintiffs filed a Complaint against Defendants for alleged violations of the CWA. Defendants agreed to waive service resulting in Defendants' response coming due on October 10, 2011.

Plaintiffs' Complaint alleges:

- Defendants own and operate a Distribution Facility located at 210-222 Landing Way, Petaluma, California; where Defendants are "engaged in off-loading, storage, distribution, and transportation of gravel and sand" (Complaint ¶ 10)
- "Sand, gravel and other aggregate materials at the site are unloaded from barges along the Petaluma River. Sand, gravel and other aggregate materials are stored in

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<sup>1</sup> The Response Letter is attached as Exhibit 1 to Affidavit of James E. Sell.

1 large, uncovered piles in two areas and then loaded and distributed via diesel-fueled  
2 trucks.” (Complaint ¶ 14)

3 ➤ “Industrial operations” at the site include the “unloading of barges, conveying sand,  
4 gravel and aggregate materials to large, uncovered piles, loading materials using  
5 electric-powered or diesel-powered front end loaders, queuing of trucks awaiting  
6 loading and transporting material from the site on unpaved or gravel surfaces.”  
7 (Complaint ¶ 15)

8 ➤ The sand, gravel and other aggregate materials are then transported and delivered  
9 off-site to several ready mix concrete plants operated by Defendants throughout the  
10 areas of Petaluma, Novato, Napa and San Rafael, California. (Complaint. ¶ 16-17)

11 ➤ The Distribution Facility “primarily provides support services to these ready mix  
12 concrete plants” (Complaint. ¶ 17)

13 ➤ The sand, gravel and other aggregate materials are exposed to stormwater.  
14 Complaint. (Complaint ¶ 18)

15 ➤ Defendants discharge stormwater associated with industrial activity at the  
16 Distribution Facility to the Petaluma River. (Complaint. ¶ 36-41)

17  
18 To put Plaintiff's allegations into context, defendant Shamrock owns and operates several  
19 ready mix concrete batch plants in the North Bay including Petaluma, Novato, Napa, Santa Rosa  
20 and San Rafael. In general, concrete is made by mixing together water, cement, sand and rock  
21 which is known in the industry as aggregate.  
22

23  
24 Aggregate can vary in size and dimension depending on the design of the concrete mix.  
25 Shamrock's aggregate is washed, screened and "processed" in Canada. It is then loaded onto a ship  
26 in British Columbia and off-loaded onto barges in the San Francisco Bay. The barges are then  
27 pushed by tug boats up the Petaluma River to the Distribution Facility in Petaluma where the  
28 aggregate is off-loaded with an electrically powered crane. The aggregate is stockpiled according



1 to its size for a short period of time until it is loaded into trucks and taken to one of the Shamrock  
2 concrete ready-mix plants, or sold to third party customers. Likewise, processed sand is also  
3 shipped to a separate parcel located north of the Distribution Facility property and is off-loaded by  
4 a conveyor belt attached to a barge. It too is stockpiled for a short period of time until it is loaded  
5 into third party customer truck. No manufacturing, processing or storage of raw materials occurs  
6 at Defendants' Distribution Facility. Rather, it is best described as a "way station" for Shamrock's  
7 aggregate and sand. (Affidavit of David C. Ripple ¶ 3).  
8

9 Giving Plaintiffs the benefit of broad, liberal, and conclusory pleading standards, subject  
10 matter jurisdiction is absent because the Distribution Facility is not an industrial plant and  
11 Defendants conduct no activities at the Distribution Facility identified in the SIC which would  
12 require Defendants to have an NPDES permit.  
13

#### 14 IV. LEGAL STANDARD

##### 15 A. RULE 12(B)(1)

16 A complaint may be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of subject matter  
17 jurisdiction. "A jurisdictional challenge ... may be made either on the face of the pleadings or by  
18 presenting extrinsic evidence." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th  
19 Cir. 2003). In a "facial" challenge, the court assumes the truth of plaintiff's factual allegations and  
20 draws all reasonable inferences in its favor. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009).  
21 In the case of a "speaking" motion, the court is not restricted to the face of the pleadings and "may  
22 review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the  
23 existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). In that  
24 case, "[i]t then becomes necessary for the party opposing the motion to present affidavits or any  
25 other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses  
26 subject matter jurisdiction." *Colwell v. Dept. of Health and Human Servs.*, 558 F.3d 1112, 1121  
27  
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1 (9th Cir. 2009) (internal quotation marks and citation omitted); *Savage v. Glendale Union High*  
2 *Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). However, a facial attack need not be converted to a  
3 speaking motion where "the additional facts considered by the court are contained in materials of  
4 which the court may take judicial notice." *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994)  
5 (citation omitted). "Once challenged, the party asserting subject matter jurisdiction has the burden  
6 of proving its existence." *Rattlesnake Coalition v. EPA*, 509 F.3d 1095, 1102 n.1 (9th Cir. 2007).  
7

8 **B. RULE 12(B)(6)**

9 A complaint should be dismissed where it fails to state a claim upon which a court may  
10 grant relief. Fed. R. Civ. P. 12(b)(6). Although the Court must accept all well-pleaded facts as true,  
11 the Court need not accept as true conclusory allegations, unreasonable inferences, unwarranted  
12 deductions of fact or legal conclusions cast as factual allegations, if those conclusions cannot be  
13 reasonably drawn from the facts alleged. *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th  
14 Cir. 2004). The Court need not assume that plaintiff can prove facts it has not alleged, nor facts  
15 different from those it has alleged. *Assoc. Gen. Contractors, Inc. v. Cal. State Council of*  
16 *Carpenters*, 459 U.S. 519, 526 (1983). Moreover, the Court need not accept as true allegations  
17 that contradict facts which may be judicially noticed by the Court. *See Mullis v. United States*  
18 *Bank. Ct. for Dist. of Nevada*, 828 F.2d 1385, 1388 (9th Cir. 1987).  
19

20  
21 Further, the Supreme Court has held that "only a Complaint that states a *plausible* claim for  
22 relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (emphasis  
23 added) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). "Determining whether a  
24 Complaint states a plausible claim for relief ... requires the reviewing Court to draw on its judicial  
25 experience and common sense." *Id.* Facial plausibility may exist only when the "factual content" is  
26 sufficient to "allow the court to draw the reasonable inference that the defendant is liable for the  
27 misconduct alleged." *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1018 (N.D. Cal. 2009) (quoting *Iqbal*,  
28

129 S. Ct. at 1949) (internal quotation marks omitted).

V. ARGUMENT

C. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED UNDER FRCP  
RULE 12(B)(1) FOR LACK OF SUBJECT MATTER JURISDICTION  
BECAUSE THE CWA HAS NO APPLICATION HERE

1. The Interplay Between the CWA and NPDES  
Permitting Requirements

Under 33 U.S.C. §1365(a), a citizen can bring a suit against any person ...who is alleged to be in violation of "an effluent standard or limitation" under the CWA. A citizen suit may be brought against a person or entity illegally discharging a pollutant into covered waters without a NPDES permit. *Id.* Under 33 U.S.C. § 1342(p)(1)-(3), facilities that discharge storm water associated with industrial activity are specifically mandated to have obtained a NPDES permit. (Emphasis added)

Here, Plaintiffs allege that Defendants have violated the CWA by not obtaining a NPDES permit. However, as set forth below, there are no allegations of a discharge of stormwater "associated with any industrial activity" at Defendants' properties; therefore, since no industrial activities exist, there is no requirement that Defendants obtain an NPDES permit. Thus, citizen-suit jurisdiction under 33 U.S.C. § 1365(a) is improper.

The CWA generally provides that, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Discharges made in compliance with a NPDES permit, however, are excepted from this general prohibition. *See* 33 U.S.C. §§ 1311(a), 1342. The CWA authorizes qualified States to administer NPDES permitting programs. 33 U.S.C. § 1342(b). California is a qualified State and administers its own NPDES permitting program. *See Citizens for a Better Environment v. Union Oil Co.*, 83 F.3d 1111, 1114 (9th Cir. 1996), cert. denied, 117 S. Ct. 789, 136 L. Ed. 2d 731 (1997). In California, the stormwater permitting process is administered by the State Water Resources Control Board and nine Regional Water Quality Control Boards.

1 Cal. Water Code §§ 13000, 13001, 13140, 13240, 13370, 13377; *NRDC, Inc. v. County of Los*  
2 *Angeles*, 2011 U.S. App. LEXIS 14443 (9th Cir. Cal. July 13, 2011). California has established a  
3 General Permit for all stormwater releases regulated by the CWA. (Complaint ¶¶ 6-7.) *Ecological*  
4 *Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1145 (9th Cir. 2000).

5 In 1987, Congress amended the CWA to require the Environmental Protection Agency  
6 ("EPA") and participating States to establish permitting programs for certain stormwater  
7 discharges. Congress added §402(p) to the CWA, establishing a "phased and tiered approach" to  
8 NPDES permitting of stormwater discharges. *See* 33 U.S.C. §§ 1342(p)(2)(B), 1342(p)(4)(A). In  
9 §402(p), Congress required NPDES permits for the most significant sources of stormwater  
10 pollution under so-called "Phase I" regulations. Section 402(p) lists five categories of stormwater  
11 discharges, including discharges "associated with industrial activity," that are covered in Phase I.  
12 *See* 33 U.S.C. § 1342(p)(2)(B).

13  
14 Plaintiffs allege that Defendants are in violation of the CWA pursuant to 33 U.S.C.  
15 §1342(p)(2)(B): a discharge associated with an industrial activity. However, Plaintiffs' bare  
16 allegation that Defendants' Distribution Facility is engaged in "industrial activity" is not the end of  
17 the jurisdictional analysis. Plaintiffs have the burden to allege (and prove) "stormwater discharge  
18 associated with industrial activity" at Defendant's Distribution Facility to survive a Rule 12(B)(1)  
19 challenge. Plaintiffs have not and cannot do so here.

20  
21 Federal Regulations define "stormwater discharge associated with industrial activity" to  
22 mean: "The discharge from any conveyance that is used for collecting and conveying stormwater  
23 and that is *directly related to manufacturing, processing or raw materials storage areas at an*  
24 **industrial plant.**" 40 C.F.R. § 122.26(b)(14) (emphasis added). Thus, for a facility to be covered  
25 under the CWA's industrial stormwater permitting section *two* criteria must be met: the discharge  
26 must be 1) "directly related to manufacturing, processing or raw material storage" ("Activity"); and  
27 2) at an industrial plant ("Location"). In other words, one must have both Activity and Location.  
28

1 Plaintiffs' allegations fail both parts of the CWA's test. As set forth below, the Defendants'  
2 Distribution Facility does not *manufacture process or store raw materials* and is *not an industrial*  
3 *plant*. Therefore, subject matter jurisdiction is lacking in this case.

4  
5 **2. Activity: No Manufacturing, Processing or Storage**  
6 **of Raw Materials Occurs at Defendants' Distribution**  
7 **Facility**

8 Accepting all allegations of the Complaint as true, Plaintiffs cannot establish subject matter  
9 jurisdiction over actions at Defendants' Distribution Facility because Defendants' do not conduct  
10 the actions necessary to require an industrial stormwater NPDES permit.

11 Under the CWA regulations, activities at facilities subject to the stormwater permitting  
12 section must be "directly related to manufacturing, processing or storage of raw materials" at an  
13 industrial plant in order to be regulated under the NPDES program. As set forth below,  
14 Defendants' Distribution Facility is not an industrial plant. So too, Defendants are not alleged to  
15 be doing anything at this facility that is "directly related to manufacturing, processing or storage of  
16 raw materials."

17 As explained above and as alleged in the Complaint, defendant Shamrock owns and  
18 operates a number of concrete batch plants in the greater North Bay. The basic components of  
19 concrete are cement, water, processed sand and rock, also known as aggregate. Plaintiffs do not  
20 allege that Defendants are manufacturing or processing at the Distribution Facility. The only  
21 activity alleged to take place at Defendants' Distribution Facility is the loading, unloading and  
22 transportation of sand, gravel and aggregate materials. (Complaint ¶¶14-16)

23  
24 The Distribution Facility is a distribution facility- nothing more, nothing less. It serves  
25 primarily as a "way station" for the aggregate shipped from Canada. All of the aggregate shipped  
26 from Canada to the Distribution Facility is washed, screened and "processed" in Canada. It is then  
27 loaded onto a ship in British Columbia and off-loaded onto barges in the San Francisco Bay. The  
28

1 barges are then pushed up the Petaluma River by tug boats. The processed aggregate shipped to  
2 the Distribution Facility is off-loaded with an electrically powered crane. Sand is also shipped to  
3 the northern end of the property and is off-loaded by a conveyor belt attached to a barge.

4 The materials are stockpiled for a short period of time until they can be distributed to the  
5 various Shamrock concrete batch plants or sold to a third party. There is no industrial activity or  
6 "processing" conducted at the Distribution Facility. None of the stored materials are "raw  
7 material" subject to industrial stormwater permitting under the CWA because the materials arrive  
8 on the site already processed. Defendants purchase the sand, gravel and aggregate as a finished  
9 product. Nothing is washed, screened or processed at Defendants' Distribution Facility. Having  
10 been previously processed, these materials can no longer be "raw material" when they are brought  
11 to Defendants' Distribution Facility, and the act of briefly storing them for a *de minimis* period  
12 time does not trigger subject matter jurisdiction under the CWA. Plaintiffs' pleading failures are  
13 not mere drafting mistakes; nor are they flaws that can be fixed upon re-drafting. Indeed,  
14 Defendants' Distribution Facility is simply, as a matter of law, not covered subject to the  
15 permitting requirements of the CWA. Therefore, subject matter jurisdiction is lacking.  
16  
17

18 **3. Location:**

19 **a) The Defendants' Distribution Facility Is Not an**  
20 **Industrial Plant Subject To The CWA**

21 Under the CWA regulations, stormwater discharges are subject to the CWA only if these  
22 discharges are from industrial activities in one of eleven specific categories (and no more) 40  
23 C.F.R. § 122.26(b)(14)(i) - (xi). The eleven categories of industrial facilities that trigger CWA  
24 jurisdiction do not include Defendant's Distribution Facility.  
25

26 The CWA regulation further provides that, facilities are considered to be engaging in  
27 "industrial activity" if they are "classified as" any one of a number of specified "Standard  
28 Industrial Classifications", specifically identified in one of the eleven categories. Industries

1 covered by the Phase I "associated with industrial activity" regulation are defined in accordance  
2 with the SIC.<sup>2</sup>

3 The SIC Manual (1987) is published by the Office of Management and Budget. Its  
4 introduction explains:

5  
6 The Standard Industrial Classification (SIC) was developed for use in the classifications  
7 of establishments by type of activity in which they are engaged; for purposes of  
8 facilitating the collection, tabulation, presentation, and analysis of data relating to  
9 establishments; and for promoting uniformity and comparability in the presentation of  
10 statistical data collected by various agencies of the United States Government, State  
11 agencies, trade associations and private research organizations.

12 The Manual defines "establishment" as "an economic unit, generally at a single physical  
13 location, where business is conducted or where services are performed." The term "establishment"  
14 is distinguished from "enterprise (company)," which "may consist of one or more establishments."  
15 The Manual further explains that "auxiliaries" are establishments that primarily provide  
16 management or support services for other establishments that are part of the same enterprise. The  
17 Manual suggests that where an auxiliary "is located physically separate from the establishment or  
18 establishment served" it is to be "treated as a separate establishment." *Ecological Rights Found. v.*  
19 *PG&E*, 2011 U.S. Dist. LEXIS 14140, 6-7 (N.D. Cal. 2011).

20 Nowhere is it alleged in the Complaint that the Distribution Facility conducts any of the  
21 activities of the eleven industrial plants enumerated in 40 C.F.R. § 122.26(b)(14)(i)-(xi), nor have  
22 Plaintiffs alleged in their Complaint that Defendants' Distribution Facility is an industrial plant as  
23 defined in the regulations. Rather, the Complaint asserts that Defendants' Distribution Facility  
24 "primarily provides *support services* to" to Defendants' various ready-mix concrete plants located  
25 elsewhere. (Complaint ¶ 17 Emphasis added) Plaintiffs cannot "bootstrap" Defendants'  
26 Distribution Facility to industrial activities conducted at Defendants' other geographically separate

27  
28 <sup>2</sup> See generally, *Northwest Environmental Defense Center v. Brown* (2011) 640 F.3d 1063, 1083-1084.

1 facilities – which are subject to and do have a NPDES permit in place. Simply stated, providing  
2 “support services” for a geographically separate facility is not within the rubric of the above  
3 categories of industrial plants enumerated by the CWA and contemplated by the NPDES  
4 requirements. Moreover, the activities conducted at the Distribution Facility are properly  
5 classified as those *excluded* from the list of facilities subject to NPDES requirements. As such,  
6 Plaintiffs cannot meet their burden to show that the Distribution facility is an industrial plant.  
7

8 **b) There Are No Allegations of Industrial Activity At**  
9 **The Distribution Facility**

10 To put the SIC Manual (1987) and codes into context, Defendant Shamrock owns and  
11 operates an “enterprise” consisting of several ready-mix concrete industrial plants,  
12 “establishments”, in separate physical locations in Petaluma, Novato, Napa, Santa Rosa, and San  
13 Rafael. Each of these separate establishments are categorized as SIC Code 3273 and subject to a  
14 NPDES permit which is in place. (Complaint ¶17.)

15 SIC Code 3273 is defined as:

16  
17 Establishments primarily engaged in manufacturing portland cement  
18 concrete manufactured and delivered to a purchaser in a plastic and  
19 unhardened state. This includes production and sale of central-mixed  
20 concrete, shrink mixed concrete, and truck mixed concrete. (Request  
21 for Judicial Notice ¶ 1, Exh. 1)

22 Defendants’ ready-mix plants perform cement concrete manufacturing operations -  
23 concrete is made by mixing together water, cement, sand and rock. The mixed concrete cement is  
24 then loaded into trucks and distributed to various job locations where it is poured within a limited  
25 time frame. Defendants’ operations that include mixing, manufacturing, production or sale of  
26 “central-mixed concrete, shrink mixed concrete, and truck mixed concrete” occur at these ready-  
27 mix plants. It is this “processing” and/or “binding” of aggregate material into ready-mix concrete  
28 which occurs at the ready-mix plants that warrants and subjects them to the CWA. That is why



1 they are categorized as SIC Code 3273 and subject to a NPDES permit which is in place.  
2 (Complaint ¶17.) None of the activities that occur at Defendant's ready-mix plants occur at the  
3 Distribution Facility, nor do Plaintiffs contend that any of these activities occur at that Distribution  
4 Facility.

5         Rather, it is alleged that the Defendants' Distribution Facility, "primarily provides support  
6 services to these ready-mix concrete plants." (Complaint ¶17.) This allegation is insufficient. The  
7 Complaint contains no allegations that Defendants conduct any manufacturing of concrete at the  
8 Distribution Facility. That is because there is no manufacturing, processing or industrial activity  
9 performed at the Distribution Facility as described in SIC 3273. Further, no "repairs" or  
10 "maintenance" activities are conducted. No industrial waste water is generated. The Distribution  
11 Facility conducts no activities identified in the SIC which would require defendants to have a  
12 NPDES permit in place. (Ripple Affidavit at ¶¶ 3-4).

13  
14  
15                   **c)         Geographically Separate Facilities Are Separate**  
16                   **Establishments, Not Within The Same SIC Code**

17         As discussed above, the SIC Manual states that geographically separate sites are to be  
18 treated as distinct establishments. Whereas if the Distribution Facility is to be categorized based  
19 upon its own operations, it should be categorized under SIC Code 5032.

20         SIC Code 5032 is defined as:

21  
22                 Establishments primarily engaged in the wholesale distribution of  
23 stone, cement, lime, construction sand, and gravel; brick (except  
24 refractory); asphalt and concrete mixtures; and concrete, stone and  
25 structural clay products (other than refractories). Distributors of  
26 industrial sand and of refractory material are classified in Industry  
27 5085. Establishments primarily engaged in producing ready-mixed  
28 concrete are classified in manufacturing, Industry 3273.

                  Aggregate – wholesale

                  ...

                  Cement – wholesale

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- Concrete building products – wholesale
- Concrete mixtures- wholesale
- ...
- Sand – Wholesale
- Stone, building – wholesale
- Stone crushed or broken- wholesale

(Request for Judicial Notice ¶ 2, Exh. 2.)

Based upon the alleged activities conducted at the Distribution Facility, i.e. “off-loading, storage, distribution, and transportation of gravel and sand”, “loading and unloading of barges, conveying sand, gravel and aggregate materials” and “aggregate handling, storage and transportation”, combined with the fact that some of the sand and aggregate is sold and distributed to third parties, it is proper to classify the Distribution Facility as a geographically separate establishment engaged in the “wholesale distribution of stone, cement, ... construction sand, and gravel... concrete mixtures; and concrete, stone and structural clay products” pursuant to SIC 5032. SIC 5032 is not among any of those eleven specific categories of industrial plant regulated by the CWA. Again, unless Plaintiffs can establish that Defendants’ Distribution Facility falls under one of the eleven specific categories enumerated under section 402(p) of the CWA, 33 U.S.C. §1342(p), Defendants’ Distribution Facility is simply not subject to the stormwater permitting rules under the CWA.

Therefore, Plaintiffs have not and cannot satisfy their burden to show that the Distribution Facility is an industrial plant subject to the stormwater permit requirements which means subject matter jurisdiction is lacking.

**D. THE COURT SHOULD DISMISS PLAINTIFFS’ COMPLAINT FOR FAILURE TO STATE A CLAIM UNDER FRCP 12(B)(6) BECAUSE THE DEFENDANTS’ DISTRIBUTION FACILITY IS NOT SUBJECT TO THE CWA AND NPDES PROGRAM**

Plaintiffs have alleged that Defendants’ Distribution Facility is subject to the CWA and

1 that Defendants have failed to apply for a NPDES permit or for coverage under California's  
2 General Permit. However, Plaintiffs have not pled, because they cannot, any facts showing that  
3 Defendants, as a matter of law, are subject to the CWA and the NPDES program. Indeed, the facts  
4 as pled by Plaintiffs establish that Defendants' Distribution Facility is not, and cannot be, subject  
5 to the CWA.

6 Congress left it to the EPA to define a discharge associate with industrial activity,  
7 specifying only that the term refers to discharges "directly related to manufacturing, processing or  
8 raw material storage at an industrial plant, and not to "discharges associated with parking lots and  
9 administrative and employee buildings." See *Am. Mining Congress v. EPA*, 965 F.2d 759, 765 (9<sup>th</sup>  
10 Cir. 1992). Here, the alleged industrial activities are more akin to discharges associated with  
11 activities which Congress had intend that the CWA not regulate, i.e. parking lots and  
12 administrative and employee buildings.  
13

14 Plaintiffs' allegations regarding "industrial operations" at the site include the "unloading of  
15 barges, conveying sand, gravel and aggregate materials to large, uncovered piles, loading materials  
16 using electric-powered or diesel-powered front end loaders, queuing of trucks awaiting loading  
17 and transporting material from the site on unpaved or gravel surfaces." (Complaint ¶ 15.)  
18

19 Plaintiffs assert that other alleged "industrial operations" occurring at the site incident to  
20 the aggregate handling, storage and transportation, include the use and storage of lubrication  
21 products, mobile fueling of loading equipment, storage of trucks, loaders, and other heavy  
22 machinery, vehicle and machine repair and maintenance, and fueling services. (Complaint ¶¶19-  
23 21) Plaintiffs' theory requires the Court to redefine the well-understood and regulation defined  
24 "industrial activity" to mean "industrial in nature" and seeks to have the Court supplant the EPA as  
25 the entity in charge of crafting regulations to enforce the CWA. This is not within the Court's  
26 purview.  
27

28 Therefore, Plaintiffs' conclusion that Defendants' are engaging in "industrial activity" is

1 belied by the factual allegations set forth in their Complaint. Plaintiffs have not alleged any  
2 activities at Defendants' Distribution Facility that are "directly related to the manufacturing,  
3 processing or storage of raw material" as required for regulation under the CWA. 33 U.S.C.  
4 §1342(p); 40 C.F.R. § 122.26(b)(14). Even assuming, *arguendo*, that Defendants' activities were  
5 "directly related to manufacturing, processing or storage of raw materials," the Distribution  
6 Facility would still not be subject to the permitting requirements of the CWA because Plaintiffs  
7 have not, and cannot, identify any category of "industrial plant" that would subject Defendants to  
8 the CWA under the regulations. *Id.*

9  
10 Plaintiffs' claim for relief in the Complaint relates to alleged releases of stormwater  
11 without a NPDES permit in violation of CWA. Because Plaintiffs have not pled the factual basis  
12 for Defendants' Distribution Facility's coverage under the CWA, as outlined above, Plaintiffs'  
13 claim must fail as a matter of law.

14  
15 **E. PLAINTIFFS' "CATCH ALL" THEORY THAT SECTION 301(A)  
16 BARS ALL DISCHARGES REGARDLESS OF THE STORMWATER  
17 PROVISIONS OF SECTION 402 LACKS MERIT.**

18 Plaintiffs further allege that, even if alleged releases of stormwater from the Distribution  
19 Facility are not associated with industrial activity, Defendants are still obligated to obtain a NPDES  
20 permit in order to discharge pollutants from the site. Plaintiffs' "catch-all" argument is without  
21 merit.

22 First, §301 (a) prohibits the discharge of any pollutant without a permit "except as in  
23 compliance with [§ 402]." 33 U.S.C. § 1311(a). Hence, "a stormwater discharge that complies  
24 with §402(p) does not violate § 301(a)." *Conservation Law Foundation v. Hannaford Bros. Co.*,  
25 327 F. Supp. 2d 325, 332 (D. Vt. 2004). Here, as discussed above, the discharges (if any) from the  
26 Distribution Facility are not part of an industrial activity and thus comply with §402(p).

27 Second, as the Ninth Circuit explained in *Brown*, in amending the CWA in 1987,  
28

1 "Congress required NPDES permits for the most significant sources of stormwater pollution under  
2 the so called 'Phase I' regulations" (*i.e.* stormwater discharges associated with industrial activity),  
3 but left it to the EPA "to study stormwater discharges not covered by Phase 1 and to issue  
4 regulations based on its study." *Brown*, (2011) 640 F.3d 1063, 1082-1084 . Under §402(p)(6), EPA  
5 was granted "discretion to develop a program that distinguishes between those stormwater  
6 discharges that require regulation and those that do not." *Hannaford*, 327 F. Supp. 2d at 330.  
7 *Brown* held, "[i]t is within the discretion of EPA to promulgate Phase II regulations requiring, *or*  
8 *not requiring*, permits for [non-industrial] sources." *Id.* (emphasis added). Pursuant to that  
9 discretion and authority, EPA has never determined that wholesale distribution of sand, gravel and  
10 aggregate are to be regulated under § 402(p).

11  
12 Third, Plaintiffs' interpretation would render provisions of §402(p) superfluous, thereby  
13 violating one of the "most basic interpretive cannons." *Corley v. U.S.*, 129 S. Ct. 1558, 1566  
14 (2009). For example, under section 402(p)(6) of the CWA, the EPA is authorized to designate  
15 other stormwater discharge activities for regulation (*i.e.*, activities other than those "associated  
16 with industrial activity"). Under section 402(p)(5), EPA is authorized to identify stormwater  
17 discharges for which permits are not required. If, as contended by Plaintiffs, all stormwater  
18 discharges containing pollutants are automatically covered by section 301(a), this would render  
19 meaningless section 402(p)(5) and (6).

20  
21 Plaintiffs' interpretation is also directly contrary to Congress' intent in amending the CWA  
22 to include its limiting stormwater provisions. As *Brown* explained, Congress amended the CWA  
23 to *prevent* the "administrative nightmare" caused by the original Act's regulation of all stormwater  
24 discharges. *Brown*, at 1082; *accord Hannaford*, 327 F. Supp. 2d at 332. See 131 Cong. Rec.  
25 15616, 15657 (Jun. 13, 1985) (Statement of Sen. Wallop) ("[The regulations] can be interpreted to  
26 require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to  
27 get a permit from EPA as a point source. . . . Requiring a permit for these kinds of stormwater  
28

1 runoff conveyance systems would be an administrative nightmare." *NRDC, Inc. v. County of Los*  
2 *Angeles*, 2011 U.S. App. LEXIS 14443 (9th Cir. Cal. July 13, 2011)

3 Plaintiffs' "catch-all" argument that §301 (a) imposes a blanket prohibition on all non-  
4 industrial stormwater discharges is contrary to *Brown* and other Ninth Circuit authority  
5 establishing that section §301(a) does not impose a blanket prohibition on all stormwater  
6 discharges. See *Brown*, supra, at 1082-1083.; see also *Defenders' of Wildlife v. Browner*, 191 F.3d  
7 1159, 1163 (9<sup>th</sup> Cir. 1999) (holding that §402(p) contains provisions that "undeniably exempt  
8 certain other discharges from the permit requirements altogether" (and therefore from [301(a)]).

9  
10 Furthermore, to the extent that Plaintiffs contend that §402(p) does not apply to discharges  
11 which are combined with pollutants that theory has been rejected by other courts and is foreclosed  
12 by *Brown*, which explained that discharges from urban rain gutters, small construction sites, and  
13 other sources that would necessary include a mix of pollutants and storm water would only be  
14 regulated at EPA's discretion. See *Brown* at 1083.

15 Here, Plaintiffs' Complaint alleges in part:

- 16
- 17 ➤ Vehicle and machine maintenance activities occur at the Distribution Facility;
  - 18 ➤ The machinery and equipment leak contaminants such as oil, grease diesel fuel,  
19 anti-freeze and hydraulic fluids which are exposed to stormwater flows.
  - 20 ➤ These fluids and other pollutants are carried by stormwater to storm drains  
21 throughout the facility;
  - 22 ➤ Stormwater contact then washes this pollution into the receiving waters.
  - 23 ➤ (Complaint ¶¶ 22-25)
- 24

25 As noted above, this type of discharge is not associated with any industrial activity at the  
26 Distribution Facility. Rather, this is the exact type of alleged stormwater discharge, comingled  
27 with alleged pollutants, that is noted by *Brown* as being covered by the Phase II regulations; which  
28 the EPA has the discretion to determine for which NPDES permits are or *are not* required. It is not

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within this Court's purview to usurp the EPA's authority on this matter, contrary to Plaintiffs' "catch-all" argument. As such, Plaintiffs' claim must fail as a matter of law.


**VI. CONCLUSION**

For the foregoing reasons, Defendants respectfully request that the Court dismiss with prejudice Plaintiffs' Complaint in its entirety.

Defendants certify that they contacted Plaintiffs prior to filing this Motion and requested that Plaintiffs agree to stipulate to the dismissal of the Complaint for the reasons set forth herein. Plaintiffs declined to do so. WHEREFORE, Defendants request this Court dismiss the Complaint with prejudice for lack of subject matter jurisdiction and for failure to state a claim for any and all of the reasons stated herein.

DATED: 10/10/11

PARTON | SELL | RHOADES  
A Professional Corporation

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