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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SNAKE RIVER WATERKEEPER, an Idaho non-profit corporation,

Plaintiff,

v.

J.R. SIMPLOT COMPANY, a Nevada corporation; and SIMPLOT LIVESTOCK CO., a Nevada corporation,

Defendants.

Case No. 1:23-cv-00239-DCN

SNAKE RIVER WATERKEEPER'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, ECF No. 21

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Plaintiff Snake River Waterkeeper ("SRW") respectfully submits the following Opposition to Defendants' J.R. Simplot Company and Simplot Livestock Company (collectively, "Simplot") Motion to Dismiss and Memorandum in Support, ECF Nos. 21 and 21-1 ("MTD").

INTRODUCTION

This Clean Water Act citizen suit ("CWA" or the "Act") seeks declaratory and injunctive relief against Simplot for its unlawful pollution discharges from the Grand View Feedlot (the "Feedlot") and related Land Application fields to the Snake River. The Feedlot and its fields are collectively considered a "concentrated animal feeding operation" or "CAFO" and are a statutorily-defined "point source" under the Act. 33 U.S.C. § 1362(14) ("point source" includes "concentrated animal feeding operation"); ECF No. 1, "Complaint" Para. 20. Pursuant to the CWA, the discharge of pollutants from a point source to navigable waters like the Snake River is strictly prohibited unless such discharges are authorized by a National Pollutant Discharge Elimination System or "NPDES" permit. 33 U.S.C. § 1311(a). Defendants admit they do not presently[1] have a NPDES permit authorizing discharges of pollutants from their industrial facility, ECF No. 14, "Answer" Para. 35, meaning each and every discharge from Simplot's CAFO is an actionable violation of the statute.

Before citizen suits may be initiated, a plaintiff must serve 60-days pre-suit notice on the prospective violator and other required state and federal entities. 40 C.F.R. § 135.3(a). The notice must identify the CWA standard alleged to be violated, the activity giving rise to the violations, the location of the violations, and the suspected dates of the violations. *Id*. Congress intended the notice requirement to not place "impossible or unnecessary burdens on citizens but rather should

[1] Simplot had a NPDES permit for the CAFO, which was originally issued in 1997, but which was not renewed by Simplot in 2012. *Compare* Complaint and Answer, Paras. 35 & 36.

be confined to requiring information necessary to give a clear indication of the citizens' intent." S.Rep. No. 92-414, at 80 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3745.

Simplot now moves the Court to dismiss on the basis that the required pre-suit notice (ECF No. 1-1, the "Notice") did not describe "where, when, and how such alleged illicit discharges occur on or from Simplot's Facility." MTD at 1. Simplot also asks the Court to dismiss this case because the Complaint allegedly fails to allege a claim for unpermitted discharges under the Act. *Id*. at 16. For the reasons described herein, Simplot is wrong, and SRW respectfully requests that the Court deny the motion.

ARGUMENT

A. SRW'S NOTICE SUFFICIENTLY APPRISES SIMPLOT OF ITS UNLAWFUL ACTIVITIES

Simplot first moves to dismiss because SRW allegedly did not provide sufficient notice of the CWA violations at the CAFO. Under 40 C.F.R. § 135.3(a), notice must provide:

> [S]ufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, [and] the date or dates of such violation[.]

This regulation does not require "that plaintiffs list every specific aspect or detail of every alleged violation." *San Francisco BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1158 (9th Cir. 2002). Rather, "[t]he key language in the notice regulation is the phrase 'sufficient information to permit the recipient to identify' the alleged violations and bring itself into compliance." *Id*. As such, the notice provision "requires no more than reasonable specificity." *Id*. (quotation omitted) (citing *Catskill Mtns. Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 488 (2d Cir. 2001)). Courts reviewing pre-suit notice therefore look to the "overall sufficiency" of the notice, *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy,* 305 F.3d 943, 952 (9th Cir.

2002) ("*Bosma Dairy")*, taking into account defendant's "superior access to information about its own activities." *Klamath-Siskiyou Wildlands Ctr. v. MacWhorter*, 797 F.3d 645, 651 (9th Cir. 2015). A defendant's actions following receipt of notice can also be relevant, *id.*,—a point SRW makes in opposing Simplot's corresponding Motion to Stay Discovery (ECF No. 22).

As described below, SRW's Notice more than satisfies the low bar of the regulation.[2]

1. The Notice Identifies the Specific CWA Standard Simplot is Violating

First, the Notice informs Simplot that its Feedlot and Application Fields are collectively a point source under the Act because they are a concentrated animal feeding operation that "confines…more than 1,000 cattle for a total of 45 days or more in any 12-month period." Notice at 2 (citing applicable EPA regulations). The Notice describes that discharges of pollutants from a CAFO without first obtaining a NPDES permit are illegal. *Id*. (citing Sections 301 and 402 of the CWA). The Notice therefore informs Simplot of the specific statutory standard it is violating, and how to remedy those violations: obtain a NPDES permit for the discharges. *Id*. at 1 (discharging pollutants from a CAFO without first obtaining NPDES permit is unlawful under 33 U.S.C. § 1311(a)); 33 U.S.C. § 1342 (establishing NPDES program to authorize discharges).

2. The Notice Identifies the Activities that Violate the CWA, and the Location of the Alleged Violations

Next, the Notice outlines the legal requirements for CAFOs under the CWA, explaining how the United States Environmental Protection Agency ("EPA") defines CAFOs as having two primary components: the "production area" and the "land application area." *Id*. at 3. It describes that discharges from the production area are strictly prohibited except in limited circumstances, and that the Feedlot must ensure that clean water is diverted away from the production area

[2] There is no dispute that SRW's Notice letter sufficiently identifies Defendants as the persons allegedly violating the CWA.

pursuant to 40 C.F.R. § 122.42(e)(1)(iii). *Id*. As to the land application areas, the Notice explains that discharges of manure or process wastewater are strictly prohibited, unless such discharges are precipitation-caused and the CAFO maintains adequate records showing agricultural utilization of manure nutrients. *Id*. at 3, 4.

Under the heading "**VIOLATIONS OF THE CLEAN WATER ACT**," SRW identifies the ways Simplot violates the Act: discharging manure and process wastewater from its CAFO, from both the Feedlot production area and its Application Fields. *Id.* at 4–5. While Simplot splits these two components up in its Motion to Dismiss and argues that notice was insufficient as to each, a proper review of the sufficiency of SRW's Notice must take into account that the Feedlot and Application Fields compose one, singular CAFO and thus one, singular point source.[3] Accordingly, SRW's Opposition addresses the sufficiency of the Notice as a whole.

For discharges from the production area, SRW alleges that precipitation and run-on from upgradient areas comingles with manure and process wastewater at the Feedlot, where it subsequently discharges into the Snake River as well as tributaries that flow into the Snake River. As evidence, SRW cited aerial Google imagery showing the lack of clean water "diversion structures, wastewater containment structures, or alternative conservation measures such as wastewater treatment facilities to control precipitation falling on the Grand View Feedlot site and any related stormwater entering the site." *Id.* at 5. SRW also cited Simplot's own comments to EPA concerning the re-issuance of Idaho's CAFO NPDES permit, noting Simplot's admission that it does not divert clean water from the Feedlot because Defendants believe such an endeavor "is not appropriate or feasible…due to the enormous volume of run on water from

[3] SRW pleads in the alternative that the Middle Line Canal, Low Line Canal, Jack Creek, Corder Creek, and other canals, tributaries, and conduits are themselves point sources from which manure pollutants are discharged by Defendants. Complaint Para. 79.

thousands of acres" of upgradient property, which includes both BLM land and land owned and operated by Simplot. *Id*. n. 4.

For discharges from the Application Fields, the Notice alleges that Simplot applies manure generated by the tens of thousands of cattle at the Feedlot "in quantities, and at rates and times" that are not compliant with Simplot's nutrient management plan(s), if any, which in turn causes manure pollutants to discharge "through pipes, culverts, drains, and other conduits into the irrigate ditches and canals that are tributaries to the Snake River." Notice at 6. SRW included photographs taken from public vantage points of some of the infrastructure, presumably Simplot's as they own the land, through which these discharges occur. *Id*. SRW also included its water quality testing, showing that the waters into which Simplot discharges are contaminated with manure pollutants.

To ensure that Simplot understood SRW's allegations, the Notice letter also included aerial images, a map depicting Simplot's ownership of the parcels at issue, including upgradient parcels, and a flow map of the Snake River and conduits "presently suspected by SRW that transport Grand View's pollutants[.]" *Id*. at 5, Exs. A & B. All water quality results taken by SRW, spanning a 5-year time frame, were also included.

Simplot argues that the Notice is vague because Simplot's Feedlot covers a 2.5-square mile area, and the Application Fields another 7.4-square mile area, meaning Simplot cannot determine exactly where discharges are occurring. *See* MTD at 9-10 (Notice "fails to identify where in this expansive area discharges are occurring" or how discharges reach Snake River), 12. SRW agrees with Defendants that their Feedlot and associated Application Fields collectively constitute a (very) large point source under the Act, being a concentrated animal feeding operation that confines up to ***150 times*** more cattle than 1,000 head necessary to qualify as a

"large" CAFO. 40 C.F.R. § 122.23(b)(4)(iii); Answer at Para. 2 (admitting Grandview Feedlot has capacity of up to 150,000 head). But SRW disagrees with Simplot's interpretation of the CWA notice regulation, which does not require SRW to identify where "discharges" are occurring. Instead, the language of the regulation only requires SRW to specify the "location of the alleged violation." 40 C.F.R. § 135.3(a). It does not require SRW to identify locations of exact discharge points, nor does it require SRW to identify exact discharging locations. It simply requires an identification of the *location* of the alleged violations.

For instance, in *Puget Soundkeeper Alliance v. Cruise Terminals of America, LLC,* 216 F.Supp.3d 1198, 1209–10 (W.D. Wash. 2015), a CWA notice was sufficient where it alleged that defendants were discharging pollutants from their "water transportation facility located at or about Pier 66…to waters of the United States…The facility subject to this notice includes any contiguous or adjacent properties owned or operated by [defendants] as a cruise terminal." The defendants argued this allegation was insufficient because it did not identify specific discharge locations or points. *Id*. at 1210. The court disagreed, finding that a notice letter "need not identify every specific discharge point at a facility[.]" *Id*. (citing *San Francisco BayKeeper*, 309 F.3d at 1158). Identifying the facility and adjacent properties, as SRW has done here, was sufficient.

Similarly, a notice letter was sufficient where it alleged that every electrical pole "located in San Francisco, Alameda, Contra Costa, and Marin counties, to the extent the Pole has been treated" with specific preservatives was a point source when significant precipitation occurred. *Ecological Rights Found. v. Pacific Gas and Elec. Co.*, 713 F.3d 502, 519 (9th Cir. 2013). The citizens in that case included a map identifying some of the alleged point sources—similar to SRW's maps in its Notice—and the Court reasoned that defendant's superior position and knowledge about where its other poles were located meant the notice was sufficient, as the

locations of the alleged violations were identified with reasonable sufficiency. *Id. See also San Francisco BayKeeper v. Town of Hillsborough*, 2008 WL 5130418, at *2 (N.D. Cal. 2008) (there is no requirement to identify "the specific locations and dates of violations" in a notice letter; "a reasonably specific indication of the area and time-frame of the violations is sufficient[.]").

Here, SRW's Notice identifies the location where violations occur: Defendants' CAFO. *See, e.g.,* Notice at 2 (providing address of CAFO and identifying parcels), Ex. A (property map showing location of Defendants' Feedlot and Application Field parcels). To be sure, the location covers a large area; but equally sure, that entire location is statutorily defined as a singular "point source" under the Act, as SRW explains. *Id.* at 2–4. The notice regulation requires no more.

Nonetheless, SRW went further by identifying where discharges from the CAFO are suspected to be occurring to the Snake River: "via tributaries such as the Middle Line Canal, Low Line Canal, Jack Creek, Corder Creek, and other tributaries and conduits." *Id.* at 5. SRW attached a flow map to its Notice showing how these canals and conduits flow directly through Simplot's parcel ownership. *Id.* at Exs. A (parcel ownership) & B (flow map). And SRW provided Simplot with its corresponding surface water quality monitoring from public access points around the CAFO, showing how contamination moves from the site and into the Snake River. One of the identified tributaries, the Low Line Canal, flows directly south of the production area of the Feedlot and travels westerly, through more of Simplot's application fields, where it discharges into the Snake River. That location directly corresponds to SRW's water quality sampling point "SBG," which stands for "Snake River Below Grand View." *Id.* at 7.

Any reasonable entity in Simplot's position would review that Notice, its flow map and parcel ownership, and related water quality monitoring data, and understand SRW's allegations: discharges from the CAFO are entering these canals and tributaries and flowing to the Snake

River. At that point, it was incumbent upon Simplot to utilize its superior access to information about its own facility and property ownership to identify the sources leading to the discharges. *See, e.g., Cebollero-Bertrain v. Puerto Rico Aqueduct & Sewer Auth.*, 4 F.4th 63, 76–77 (1st Cir. 2021) (notice sufficient where it identified seven instances of discharges from manholes into creek but did not identify origin of discharge, as defendant possessed "maps, plans, and investigative tools" to track the discharge, and "thus should be able to identify the source").

Simplot complains that the Notice does not identify the date, time, or place that SRW "allegedly witnessed such a discharge occurring" from the Feedlot. MTD at 10. The CWA notice regulation has no such requirement, and Simplot's interpretation suggests that citizen-plaintiffs must trespass onto private property to personally witness an unlawful discharge of pollutants before bringing suit. Instead, SRW did what citizen-plaintiffs in the CWA context frequently do when they suspect unlawful discharges: they took water quality samples from public access points around Simplot's CAFO, both "upstream" and "downstream." In fact, SRW's sampling effort includes testing of a piped discharge from Simplot's property into the Trueblood Wildlife area, which SRW identified to Simplot. Notice at 7. The combined sampling results show the Snake River is cleaner upstream of Defendants' CAFO than it is downstream, where levels of manure pollution such as E. coli exceed Idaho's water quality standards.

Simplot next argues that SRW's notice letter is just like the one rejected in *Center for Biological Diversity v. Marina Point Development Co.*, 566 F.3d 794 (9th Cir. 2009). There, multiple iterations of notices were provided to a prospective defendant alleging violations of the Act consequent to the dumping of fill material into a lake. *Id*. at 802. The notices failed whatsoever to identify any "wetlands" that were allegedly being affected by the fill material, making the notices defective. *Id.* 803. Here, by contrast, SRW's Notice identifies the navigable

water to which pollutants are discharged (the Snake River) and the suspected path of those pollutants from the CAFO ("contaminated water then discharges to the Snake River via tributaries such as the Middle Line Canal, Low Line Canal, Jack Creek, Corder Creek, and other tributaries and conduits). Notice at 5.[4] Again, the Notice also provided maps showing Simplot's parcel ownership and the flow of these named tributaries and conduits. *Id.* at Exs. A & B. SRW's Notice is far more specific than the ones rejected in *Marina Point Development Corps.*

With regard to Application Fields, Simplot argues the Notice is insufficient because it does not identify a single field to which manure was over-applied, or a specific instance of manure over-application. MTD at 12-13. Simplot again misreads the notice regulation: all SRW is required to provide is notice of the "activity alleged to constitute a violation." 40 C.F.R. § 135.3(a). That activity, per the Notice, is Simplot's application of manure to its fields at the CAFO "in quantities, and at rates and times, that are not compliant" with any nutrient management plan. Notice at 6, n.6 (identifying specific agricultural parcels). Such plans are used by CAFOs to ensure that their application of manure wastes do not lead to surface water discharges. *See* 40 C.F.R. § 412.4(c)(1) (nutrient management plans required for CAFOs subject to CWA to ensure field-specific utilization of manure nutrients "while minimizing nitrogen and phosphorus movement to surface waters"). Simplot is aware of this fact given that it held a prior version of a NPDES permit for discharges from its CAFO.[5]

But once again, SRW went beyond the notice regulation by providing Simplot with years' of water quality sampling taken from the same public access points at locations near

[4] SRW informed Simplot in its Notice that it would also allege in the Complaint that these tributaries and conduits are also "waters of the United States." Notice at 5 n.5; Complaint Paras. 37, 40, 77-79.

[5] SRW also presently lacks access to Simplot's field-specific manure application records, if any. Such records are publicly-available only to the extent a CAFO maintains a NPDES permit.

Simplot's Application Fields. Notice at 7, Ex. C. The sampling points include locations within the CAFO itself, *e.g.,* BR2 and BR3, as well as locations where discharges occur directly to the Snake River, *e.g.,* TPD (a piped discharge point from Simplot's fields located at the Trueblood Wildlife Area). The results of this water quality data show very high levels of pollutants—E. coli, fecal coliform, nitrogen, and phosphorus compounds—that are synonymous with discharges of cow manure. *Id.* at 6. Thus, SRW's Notice sufficiently identifies the "activity alleged to be a violation" by tying the alleged improper application and overapplication of manure to Application Fields with discharges to specified waterways, along with water quality monitoring evidencing that those waterways are polluted by cow manure. Such specificity is not required by the notice regulations, yet SRW provided it anyway.

3. The Notice Sufficiently Identifies the Dates of Violation

The Ninth Circuit recognizes that precise dates of violations may not always be available to a citizen-plaintiff. As such, the Court interprets the CWA notice regulation as not requiring an identification of "the exact dates of alleged violations." *San Francisco BayKeeper, Inc.*, 309 F.3d at 1159. Rather, notice is sufficient if it permits "the recipients to identify…the dates or dates" of violation. *Id*. (citing 40 C.F.R. § 135.3(a)). For instance, where a notice letter identifies some dates of violation, but a complaint later adds additional dates, notice will be sufficient so long as the violations were "from the same source, were of the same nature, and were easily identifiable." *Bosma Dairy*, 305 F.3d at 953. Similarly, notice was sufficient where it included no specific dates other than a general date range because the notice "clearly identified the alleged violation—namely, that during that time when the coke piles remained uncovered, wind blew coke into the slough." *San Francisco BayKeeper, Inc.*, 309 F.3d at 1159. Because that defendant was apprised as to what it was doing wrong—failing to cover coke piles—plaintiff's notice was

sufficient, as defendant could ascertain which dates its coke piles were uncovered.

Here, SRW's Notice informs Simplot that violations of the CWA occurred at its CAFO "on or around the dates" on which SRW conducted water quality sampling, the results of which showed cow manure pollution: "June 11, 2017; June 12, 2017; August 25, 2017; May 5, 2022; June 28, 2022; September 29, 2022; September 30, 2022; October 3, 2022; October 4, 2022; October 5, 2022; October 6, 2022; and October 7, 2022." Notice at 6. While these dates may be approximate, they are all based on the same activities alleged to be violations of the Act: "lack of clean water diversions, and improper operational practices" at the Feedlot, such as failing to install "diversion structures, adequate wastewater containment structures, or alternative conservation measures such as wastewater treatment facilities to control precipitation falling on the site," *id.* at 5; and by overapplying manure to Application Fields "in quantities, and at rates and times" that cause Simplot's fields to "discharge excess manure[.]" *Id.* at 6. The Notice further alleges, based on the "breadth of the sampling data—data taken nearly five years apart—that discharges from Grand View Feedlot are ongoing and continuous, and have occurred each day for at least the past five years." *Id*. Because these additional discharges are "from the same source" and "of the same nature," SRW's Notice is sufficient. *Bosma Dairy*, 305 F.3d at 953.

Defendants argue that SRW should have "sampled a pipe or conduit on Simplot's Facility[.]" MTD at 13. But SRW obtained surface water quality samples from as close to Simplot's facility as it could reach without engaging in trespass. The sampling map SRW includes in its Notice shows the nine different locations where water quality sampling occurred, noting that some locations are "upstream," some located close to the Feedlot and Application Fields, and some "downstream." Notice at 7. Based on the presence of manure pollution in those samples—E.coli, fecal coliform, and high levels of nitrogen and phosphorus—and the fact that

Defendants own virtually all nearby upgradient agricultural fields and the Feedlot, there is only one inescapable conclusion: the cow manure pollution showing up in the Snake River is being discharged by Simplot's 150,000-head cattle CAFO.

Simplot further argues that SRW's Notice is akin to that rejected by the court in *Cal. Sportfishing Prot. All. v. City of West Sacramento*, 905 F.Supp. 792, 800 (E.D. Cal. 1995). The notice in that case suffered from multiple problems, including a generalized claim that: "For the previous five years on hundreds of occasions you have violated your NPDES permit. Further, you have consistently misreported and/or failed to report the results of your testings [sic]." *Id*. The district court held that such an allegation failed to comply with the notice regulation "because it is vague as to which portions of the permit have been violated and which test results were not reported…[and] does not give sufficient notice of the date or dates on which the violations" allegedly occurred. *Id*.

Cal. Sportfishing Prot. All. is plainly distinguishable. First, it deals with a notice letter for discharges *in violation of a NPDES permit*. By contrast, this is an unpermitted discharge case, meaning there is no NPDES permit and hence no formal pollution testing or discharge monitoring provisions that Simplot could allegedly violate. Second, the portion of the case which Simplot relies upon pertains to a generalized assertion about hundreds of violations of a NPDES permit without any citation to the NPDES permit's effluent limitations or testing requirements. Here, SRW's Notice makes specific allegations about violations from Simplot's CAFO—violations that are all of the same type and cause the same pollution. Under the Ninth Circuit's *Bosma Dairy* and *San Francisco BayKeeper* decisions, these allegations in the Notice are sufficient.

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4. There is No Requirement to Allege Ongoing Violations in a Notice Letter

As a final argument, Simplot claims that SRW's Notice must allege facts establishing an "ongoing" discharge to be sufficient under the Supreme Court's *Gwaltney* decision. MTD at 15. SRW is aware of no case law or regulation requiring such a showing in a notice letter, and Simplot cites none. *Gwaltney* pertains to the jurisdictional grant in 33 U.S.C. 1365(a), which authorizes citizen suits in federal court against any person "who is alleged to be in violation" of an effluent standard or limitation. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987). *Gwaltney*'s ruling applies to complaints, not notice letters. Here, the Complaint alleges that Defendants "continue to discharge pollutants into waters of the United States from the Grand View Feedlot, inclusive of Grandview Farms." *See* Complaint Paras. 66 (sampling shows nature of ongoing violations); 80-83 (alleging ongoing violations). And even if *Gwaltney* somehow applied to notice letters, SRW's Notice alleges ongoing violations. Notice at 4 (alleging Simplot "has discharged and continues to discharge" manure and process wastewater); *id*. at 6 (sampling data shows that discharges "are ongoing and continuous").

B. NOTICE IS NOT A JURISDICTIONAL REQUIREMENT UNDER THE SUPREME COURT'S "CLEAR STATEMENT" TEST

Simplot argues throughout its brief that pre-suit notice under the CWA is jurisdictional. *See, e.g.,* MTD at 8. While the Ninth Circuit has previously stated that notice is jurisdictional, *see, e.g., Marina Point Dev. Co.*, 566 F.3d at 800 (citing *Hallstrom v. Tillamook Cnty*, 493 U.S. 20, 26 (1989)), that precedent predates the Supreme Court's "clear statement" test, as first articulated in *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006). Under that test, a statutory provision will only be construed as "jurisdictional" if Congress "clearly states" so. *Id*. In applying this test, courts "look[] to the condition's text, context, and relevant historical treatment." *Reed Elsevier, Inc. v. Muchnick*, 599 U.S. 154, 166 (2010).

Applying the clear statement test, multiple Circuit Courts have held that statutory pre-suit notice requirements in citizen suits contexts are *not* jurisdictional. *See, e.g., Grp. Against Smog & Pollution, Inc. v. Shenango Inc.*, 810 F.3d 116, 125 (3d Cir. 2016) (Clean Air Act notice provision is a "procedural rule…similar to [a] claim processing rule"); *La. Env't Action Network v. City of Baton Rouge*, 677 F.3d 737, 748 (5th Cir. 2012) (CWA notice requirement is not jurisdictional but rather "a typical claims-processing rule"); *Cebollero-Bertran*, 4 F.4th at 72 (CWA notice provision not jurisdictional because the "statutory text…does not refer to jurisdiction, and it is located in the CWA notice subsection, rather than the jurisdiction subsection [and t]here is no Supreme Court precedent holding that similar notice requirements are jurisdictional"); *Am. Canoe Ass'n, Inc. v. City of Attalla*, 363 F.3d 1085, 1088 (11th Cir. 2004) (same).

This Court should so similarly hold. The notice provision of the CWA is not located within the jurisdictional grant to the district courts, but instead in a *different* subsection. *Compare* 33 U.S.C. § 1365(a) (jurisdictional grant) *with* § 1365(b) (notice provision). Nowhere in the Act's notice provision is there use of the term "jurisdiction." And there is no Supreme Court precedent holding that the CWA's notice provision is jurisdictional, as *Hallstrom* explicitly declined to hold notice was "jurisdictional in the strict sense of the term[.]" 493 U.S. at 31.

C. SRW PLEADS A PLAUSIBLE UNPERMITTED DISCHARGE CLAIM

Simplot next asserts that SRW's Complaint fails to state a claim upon which relief may be granted. Simplot argues its motion on this score is brought pursuant to Fed. R. Civ. P. 12(c)(1)—a rule that SRW has searched for, but cannot find. MTD at 16 n. 12. Fed. R. Civ. P. 12(c) has no enumerated subsections and pertains to a motion for judgment on the pleadings, not presenting a defense for failure to state a claim. In any event, SRW proceeds with the

understanding that Simplot relies upon Fed. R. Civ. P. 12(b)(6).

Fed. R. Civ. P. 8(a)(2) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). A claim is plausible when the complaint alleges facts that allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*.

This suit presents one claim under the CWA: unpermitted discharges to waters of the United States by Simplot. To state a claim for unpermitted discharges, a plaintiff must allege that a defendant is a (1) person that (2) discharged (3) a pollutant (4) to navigable waters (5) from a point source (6) without first obtaining a NPDES permit. *Puget Soundkeeper All. v. Whitley Mfg. Co.*, 145 F.Supp.3d 1054, 1055 (W.D. Wash. 2015) (citing *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001)). SRW's Complaint pleads each of these elements:

(1) Person. Defendants are "persons" within the Act because they are corporations and thus subject to the discharge prohibition at 33 U.S.C. § 1311(a). Complaint Paras. 18–19, 75.

(2) Discharge. Defendants "discharge" by making "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (defining "discharge of a pollutant"). SRW alleges in the Complaint that Simplot adds manure pollutants from its CAFO to navigable waters. *E.g.,* Complaint Para. 37. The causes of these discharges from the Feedlot are alleged to be "improper manure and process wastewater management, lack of clean water diversions, and improper operational practices." *Id.* Paras. 42–44, 49–50. The causes of these discharges from the Application Fields are alleged to be Simplot's application of manure "to their fields in quantities, and at rates and times, that are not compliant with" nutrient management

plans. *Id*. Para. 57. SRW pled specific facts supporting its discharge allegation, namely the five years' worth of water quality sampling, photographs of the piping infrastructure that transports manure pollution, and a flow map showing the suspected conduits, canals, and tributaries through which pollution flows. *Id*. Para. 58. These are not mere threadbare recitals.

(3) Pollutant. The Complaint alleges that Simplot discharges manure pollutants into navigable waters. *Id.* Paras. 39, 76 (manure, facility wastewater, process wastewater, wastewater, liquid and solid animal manure and wastes, debris, sediment, and chemicals such as hormones and antibiotics that are discharged are "pollutants" under CWA); *id*. Para. 64 (describing SRW's water quality sampling, which shows "consistently high levels of total coliform and E. coli" and "nitrogen and phosphorus compounds," all indicators of pollution from cattle manure).

(4) Navigable Waters. The Complaint pleads that Simplot's discharges are to the Snake River, a navigable water. *Id.* Para. 50, 77. The Complaint further pleads that the Middle Line Canal, Low Line Canal, Jack Creek, Corder Creek, and other tributaries and conduits are also navigable waters of the United States. *Id*. Para. 78.

(5) Point Source. Simplot's Grand View Feedlot and Application Fields are collectively a concentrated animal feeding operation and thus a statutorily-defined point source. *Id*. Paras. 19–20, 26. Alternatively, SRW pleads that the ditches, canals, and conduits that flow into the Snake River from the Grand View Feedlot are themselves "discernable, confined and discrete conveyance[s]" and thus point sources. *Id*. Para. 41.

(6) NPDES Permit. The Complaint alleges that Simplot lacks a NPDES permit authorizing these discharges, which Simplot admits. Answer Para. 35.

These well-pled allegations are sufficient to state a claim upon which relief may be granted. They contain far more than "threadbare" recitals of a cause of action. Where SRW's

allegations are "based upon information and belief," as Simplot complains, MTD at 18, they are supported by facts such as Simplot's parcel ownership, the flow map SRW prepared, SRW's water quality sampling map, SRW's water quality sampling results, and Simplot's own admissions. Such pleading is entirely proper. *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1161 (9th Cir. 2022) (plaintiff may plead facts upon "information and belief" where belief is based on factual information that makes the inference of culpability plausible) (external citation and quotation omitted).

Simplot argues the Complaint does not plead facts identifying the location of a discharge, the cause of a discharge, or the pathway by which manure pollutants enter waters of the United States from the Feedlot. MTD at 16–17. As previously discussed, the Complaint does all of those things. It alleges that Simplot discharges from the production area of the Feedlot, due to Simplot's "improper manure and process wastewater management, lack of clean water diversions, and improper operational practices." Complaint Paras. 42, 47 (alleging Feedlot is not designed or nor operated in manner to contain 25-year, 24-hour stormwater event, or related recordkeeping requirements). It states that precipitation runs on to the Feedlot from upgradient areas—as Simplot admits in a letter to EPA, *id.* Para. 49—and comingles with animal waste and other pollutants. *Id*. Paras. 43, 48 (aerial imagery). The Complaint describes that Simplot is the owner of real property located upgradient from the Feedlot. *Id.* Para. 51. It then alleges the pathway by which discharges occur: the "contaminated water then discharges to the Snake River via tributaries such as the Middle Line Canal, Low Line Canal, Jack Creek, Corder Creek, and other tributaries and conduits." *Id*. Para. 45. To ensure Simplot was fully informed, SRW again referenced its flow map and parcel ownership exhibits. *Id.* Para. 46. Thus, contrary to Simplot's argument, the Complaint provides factual support for allegations of discharges from the Feedlot.

As to the Application Fields, Simplot complains that SRW only proffers a legal conclusion that Defendants apply manure to their fields in quantities, and at rates and times, that are not compliant with Simplot's nutrient management plans. MTD at 17–18. SRW agrees that discharges from application fields caused solely by precipitation, supported by appropriate documentation showing agronomic applications, could be exempt under EPA regulation. *See* 40 C.F.R. § 122.23(e). But SRW's Complaint makes clear that Simplot has not adhered to any such nutrient management plans or application restrictions, and that its applications of manure are causing discharges of pollutants. The Complaint specifically alleges that manure generated at the Feedlot is applied by Simplot on its Application Fields, and that Defendants apply manure to their fields "in quantities, and at rates and times, that are not compliant with the nutrient management plans[.]" Complaint Paras. 56–57. SRW then describes that Simplot's improper applications "cause manure pollutants to discharge through pipes, culverts, drains, and other conduits into the irrigation ditches and canals that are tributaries to the Snake River[.]" *Id.* Para. 57. SRW included photographs of Simplot's piping infrastructure in its Notice and Complaint. *Id*. Simplot misleadingly argues that SRW makes no allegations that these photographs are from Defendants' property, but Para. 57 leaves little doubt that SRW alleges these photographs are from Simplot's property, obtained by public vantage points. *Id.* ("as depicted below").

To substantiate SRW's allegations, Plaintiff undertook substantial water quality testing from publicly-accessible locations in and around Simplot's facility, as well as from the Snake River itself. Simplot dismisses this data for two reasons. First, Simplot argues that the data does not show a "single discharge point" from Defendants' CAFO. MTD at 19. Again, Defendants miss the mark: their massive CAFO *is the point source*. SRW need not identify every single exact discharge location in its Complaint to state a claim upon which relief may be granted; to

the contrary, the law is clear that SRW must only allege discharges from a "point source," which is exactly what the Complaint does here.

Second, Simplot blusters that SRW's sampling data is only "consistent" with cow manure pollution, and that SRW was required to allege that Simplot is the sole source of this pollution. MTD at 20. Simplot offers no legal support for this position, because there is none. Liability under the CWA does not require a defendant to be the sole source of pollution, but rather turns on whether Simplot is discharging pollutants from its CAFO without a NPDES permit. *Comm. To Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993) ("The Act does not impose liability only where a point source discharge creates a net increase in the level of pollution. Rather, the Act categorically prohibits any discharge of a pollutant from a point source without a permit."); *Sierra Club v. Union Oil of California*, 813 F.2d 1480, 1490–91 (9th Cir. 1987), *vacated*, 485 U.S. 931, (1988), *reinstated*, 853 F.2d 667 (9th Cir.1988) (liability under the Act is strict and there is no *de minimis* defense).

The evidence SRW has obtained thus far shows the existence of cow manure pollution (which Simplot does not seem to contest) from locations in and around Simplot's CAFO and in the Snake River. *E.g.,* Complaint Para. 58 (map showing sampling locations close to Simplot's facility, such as BR1, BR2, BR3, and SR1). The sampling data, obtained over the course of five years, shows significantly elevated manure pollutants entering the Snake River downstream of Simplot's CAFO. Based on aerial imagery and parcel ownership, Simplot is the predominant property owner of all upgradient areas where SRW conducted its sampling. Thus, SRW's water quality sampling bolsters SRW's allegations of unpermitted discharges of cow manure pollution from Simplot's CAFO.

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CONCLUSION

For the reasons stated herein, SRW respectfully requests that the Court deny Simplot's Motion to Dismiss and allow this case to proceed to discovery.

RESPECTFULLY SUBMITTED THIS 26TH DAY OF JULY, 2023.

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CERTIFICATE OF SEVICE

I hereby certify that on July 26, 2023, I filed the foregoing brief electronically through the Court's CM/ECF system, which caused the following parties or counsel to be served by electronic means:

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