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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RAYMOND COLDANI,

No. Civ. S-07-660 RRB EFB

Plaintiff,

Memorandum of Opinion
and Order

v.

JACK HAMM and PATRICIA HAMM,
individually and doing business
as LIMA RANCH/DAIRY,

Defendants.

Raymond Coldani ("Coldani") filed a citizen suit against Jack Hamm and Patricia Hamm individually and doing business as Lima Ranch/Dairy (collectively "Lima Ranch") seeking to enforce regulations promulgated under the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA"). Coldani seeks a declaration that Lima Ranch has violated the CWA. Additionally, Coldani seeks injunctive relief in the form of an order requiring Lima Ranch to comply with the regulations

1 controlling its operations and to abate the consequences of its
2 regulatory violations. Lima Ranch now moves for a dismissal of
3 the entire action for lack of subject matter jurisdiction under
4 Federal Rule of Civil Procedure section 12(b)(1). For the
5 following reasons, the court GRANTS in part, and DENIES in part,
6 the motion to dismiss.¹

8 I. BACKGROUND

9 Jack and Patricia Hamm own and operate Lima Ranch, a dairy
10 cow operation encompassing several hundred acres. Compl. ¶ 2.
11 The ranch contains at least 1,000 dairy cows and its operations
12 include milking, waste collection, waste storage and waste water
13 discharge. Compl. ¶ 3.

14 Coldani owns a substantial amount of property adjacent to
15 and in the vicinity of Lima Ranch. Compl. ¶¶ 2 & 45. Coldani
16 alleges that Lima Ranch's disposal of animal waste has caused
17 the groundwater beneath, and surrounding the ranch (including
18 his property), to become polluted by, among other things,
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23 ¹ Inasmuch as the court concludes the parties have submitted
24 memoranda thoroughly discussing the law and evidence in support
25 of their positions, it further concludes oral argument is
26 neither necessary nor warranted with regard to the instant
27 matter. See Mahon v. Credit Bureau of Placer County, Inc., 171
28 F.3d 1197, 1200 (9th Cir. 1999)(explaining that if the parties
provided the district court with complete memoranda of the law
and evidence in support of their positions, ordinarily oral
argument would not be required). As a result, the oral argument
presently scheduled for August 8, 2007, at 10:00 a.m., is hereby
VACATED.

1 nitrates. Compl. ¶ 4. Coldani alleges that the groundwater has
2 become polluted due to nitrate-containing discharges that
3 originate from leaks, percolations, infiltration and/or seepage
4 of animal waste from, among other things, the waste storage
5 ponds and irrigation water applied by Lima Ranch to its fields.
6 Compl. ¶¶ 33-34. Coldani alleges that the polluted groundwater
7 migrates onto his property and into the White Slough, which is
8 hydrologically connected to the Sacramento-San Joaquin River
9 Delta system; a navigable water located less than a mile from
10 Lima Ranch. Compl. ¶¶ 4, 32, 34 & 38.
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13 Coldani contends that Lima Ranch's discharge of animal
14 waste is in violation of federal solid waste regulations, state
15 laws and municipal ordinances. Compl. ¶¶ 5, 26-27. Coldani
16 further contends that such conduct is causing imminent and
17 substantial endangerment to health and the environment as well
18 as interfering with his use and enjoyment of the surface water,
19 groundwater, air and soils of his property. Compl. ¶¶ 26-27,
20 35-39, 45 & 47. As such, Coldani seeks relief in the form of an
21 order requiring Lima Ranch to immediately address its violations
22 of solid waste regulations, including abatement and remediation
23 of the pollution. Compl. ¶¶ 5 & 48-49.
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26 Lima Ranch now moves for dismissal of the entire action on
27 the following grounds: (1) Coldani lacks standing under the CWA
28 and the RCRA because he failed to serve notice on all required

1 parties; (2) Coldani lacks standing under the CWA because he
2 failed to allege a violation of an effluent standard or
3 limitation as defined in the CWA, or a violation of an order
4 issued by the Administrator or State regarding a CWA standard or
5 limitation; and (3) Coldani lacks standing to assert a claim
6 under the RCRA because he failed to allege that Lima Ranch
7 disposed of any "hazardous waste" as defined in the Act. Def.'s
8 Mot. at 3-15.

11 II. DISCUSSION

12 A. Legal Standard

13 The plaintiff bears the burden of establishing subject
14 matter jurisdiction and trial courts will presume a lack of
15 jurisdiction until the plaintiff proves otherwise. Kokkonen v.
16 Guardian Life Ins. Co. of America, 511 U.S. 375, 377; Ass'n of
17 American Medical Colleges v. U.S., 217 F.3d 770, 778 (9th Cir.
18 2000); Sun Microsystems Inc. v. Hynix Semiconductor Inc., 2007
19 WL 1056783, *2 (N.D. Cal. 2007).

21 A jurisdictional challenge under Rule 12(b)(1) may be made
22 either on the face of the pleadings or by presenting extrinsic
23 evidence. Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136,
24 1139 (9th Cir. 2003). "In a facial attack, the challenger
25 asserts that the allegations contained in a complaint are
26 insufficient on their face to invoke federal jurisdiction. By
27 contrast, in a factual attack, the challenger disputes the truth
28

1 of the allegations that, by themselves, would otherwise invoke
2 federal jurisdiction." See Safe Air for Everyone v. Meyer,
3 373 F.3d 1035, 1039 (9th Cir. 2004) (noting that an attack was
4 factual where a defendant challenged plaintiff's contention that
5 grass residue constitutes solid waste under RCRA).
6

7 "In resolving a factual attack on jurisdiction, the
8 district court may review evidence beyond the complaint without
9 converting the motion to dismiss into a motion for summary
10 judgment." Safe Air for Everyone, 373 F.3d at 1039. The court
11 need not presume the truthfulness of the plaintiff's
12 allegations. Id. Once the moving party makes a factual attack
13 on jurisdiction by submitting affidavits or any other evidence
14 properly before the court, the opposing party must then submit
15 affidavits or any other evidence necessary to satisfy its burden
16 of establishing subject matter jurisdiction. Id.; Ass'n of
17 American Medical Colleges, 217 F.3d at 778; see also Mir v.
18 Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988) ("it
19 is proper for the district court to 'take judicial notice of
20 matters of public record outside the pleadings' and consider
21 them for purposes of the motion to dismiss.") It is not an
22 abuse of discretion for a court to look to extra-pleading
23 material in deciding subject matter jurisdiction, even if it
24 becomes necessary to resolve factual disputes. Ass'n of
25 American Medical Colleges, 217 F.3d at 778.
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1 Jurisdictional dismissals in cases premised on federal-
2 question jurisdiction are exceptional, and are only permitted
3 “‘where the alleged claim under the constitution or federal
4 statutes clearly appears to be immaterial and made solely for
5 the purpose of obtaining federal jurisdiction or where such
6 claim is wholly insubstantial and frivolous.’” Roberts, 812
7 F.2d at 1177; Safe Air for Everyone, 373 F.3d at 1039.
8

9 The district court should only rely on Rule 12(b)(1) if the
10 facts necessary to sustain jurisdiction do not implicate the
11 merits of plaintiff’s cause of action. Safe Air for Everyone,
12 373 F.3d at 1039. Put another way, a jurisdictional finding of
13 genuinely disputed facts is inappropriate when the
14 jurisdictional issue and substantive issues are so intertwined
15 that the question of jurisdiction is dependent on the resolution
16 of factual issues going to the merits’ of an action. Id.²
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19 “The question of jurisdiction and the merits of an action
20 are intertwined where ‘a statute provides the basis for both the
21 subject matter jurisdiction of the federal court and the
22 plaintiff’s substantive claim for relief.’” See Safe Air for
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25 ² Where jurisdiction is intertwined with the merits, courts
26 assume the truth of the allegations in the complaint unless
27 controverted by undisputed facts in the record. Warren, 328
28 F.3d at 1139. The court, however, does not assume the truth of
legal conclusions merely because they are cast in the form of
factual allegations. Roberts v. Corrothers, 812 F.2d 1173, 1177
(9th Cir. 1987).

1 Everyone, 373 F.3d at 1039-40 (observing that because the RCRA
2 provided the basis for both the subject matter jurisdiction of
3 the federal court and the plaintiff's substantive claim for
4 relief, the question of jurisdiction and the merits of this
5 action were intertwined).
6

7 When the question of jurisdiction and the merits of the
8 action are so intertwined that the question of jurisdiction is
9 dependent on the resolution of factual issues going to the
10 merits, the court should view the motion as one for summary
11 judgment, not for dismissal. Id. at 1040 (holding that because
12 the issue of whether a citizen suit alleged a claim within the
13 reach of the RCRA goes to the merits of the action, it reviewed
14 the dismissal of such action as a grant of summary judgment);
15 see Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir.
16 1983) (in ruling on a jurisdictional motion involving factual
17 issues which also go to the merits, the trial court employs the
18 summary judgment standard, as a resolution of the jurisdictional
19 facts which is akin to a decision on the merits).
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22 B. CWA & RCRA Jurisdiction
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24 Lima Ranch seeks to dismiss the entire action for lack of
25 subject matter jurisdiction because Coldani failed to provide
26 proper notice under the CWA and RCRA.
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1 1. CWA

2 Under the Clean Water Act, a citizen may commence a civil
3 action on his own behalf against any person who is alleged to be
4 in violation of (1) an effluent standard or limitation or (2) an
5 order issued by the Administrator or a State with respect to
6 such a standard or limitation. 33 U.S.C. § 1365 (a)(1). The
7 district courts shall have jurisdiction, without regard to the
8 amount in controversy or the citizenship of the parties, to
9 enforce such an effluent standard or limitation. 33 U.S.C. §
10 1365(a)(2).
11
12

13 No action may be commenced under § 1365 (a)(1) prior to
14 sixty days after the plaintiff has given notice of the alleged
15 violation to: (1) the Administrator; (2) the State in which the
16 alleged violation occurred; and (3) any alleged violator of the
17 standard, limitation, or order. 33 U.S.C. § 1365(b)(1)(A).
18 Notice under the CWA shall be given in such manner as the
19 Administrator shall prescribe by regulation. 33 U.S.C. §
20 1365(b)(2).
21
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23 The EPA has adopted such regulation, which mandates as
24 follows: "Notice of intent to file suit pursuant to section
25 505(a)(1) of the [Clean Water] Act shall be served upon an
26 alleged violator of an effluent standard or limitation under the
27 Act, or an order issued by the Administrator or a State with
28 respect to such a standard or limitation, in the following

1 manner: (1) If the alleged violator is an individual or
2 corporation, service of notice shall be accomplished by
3 certified mail addressed to, or by personal service upon, the
4 owner or managing agent of the building, plant, installation,
5 vessel, facility, or activity alleged to be in violation. A
6 copy of the notice shall be mailed to the Administrator of the
7 Environmental Protection Agency, the Regional Administrator of
8 the Environmental Protection Agency for the region in which such
9 violation is alleged to have occurred, and the chief
10 administrative officer of the water pollution control agency for
11 the State in which the violation is alleged to have occurred.
12 If the alleged violator is a corporation, a copy of such notice
13 also shall be mailed to the registered agent, if any, of such
14 corporation in the State in which such violation is alleged to
15 have occurred." 40 C.F.R. § 135.2.

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19 The purpose of this rule is "to give [the alleged
20 violator] an opportunity to bring itself into compliance with
21 the Act and thus likewise render unnecessary a citizen suit.'" Community Ass'n for Restoration of the Environment v. Henry
22 Bosma Dairy, 305 F.3d 943, 950 (9th Cir. 2002) ("Bosma")
23 (quoting Gwaltney of Smithfield, Ltd. v. Chesapeake Bay
24 Foundation, Inc., 484 U.S. 49, 60 (1987)). Compliance with the
25 sixty-day notice requirements in the Clean Water Act is a
26 mandatory precondition to suit. Washington Trout v. McCain
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1 Foods, Inc., 45 F.3d 1351, 1354 (9th Cir. 1995) (citing
2 Hallstrom v. Tillamook County, 493 U.S. 20, 26 (1989)
3 (interpreting the notice requirements under the RCRA)); see also
4 New Mexico Citizens for Clean Air and Water v. Espanola
5 Mercantile Co., 72 F.3d 830, 833 (10th Cir. 1996) (citing
6 cases). If notice is insufficient as required by the
7 regulations promulgated under the CWA, dismissal for lack of
8 subject matter jurisdiction is appropriate. Washington Trout,
9 45 F.3d at 1354-55.
10
11

12 In the instant case, Lima Ranch argues that Coldani's
13 notice is defective because Coldani failed to serve notice on
14 the State Water Resources Control Board or the Regional Board.
15 Coldani argues that he satisfied the pre-suit notice
16 requirements under the CWA because he sent notice to the
17 Secretary of CAL/EPA,³ who is the state's highest ranking
18 environmental official serving as the head of all the state's
19 environmental agencies, including the Integrated Waste
20 Management Board and State Water Resources Control Board. Thus,
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23
24 ³ Coldani asserts that in 1991, the governor created the
25 California Environmental Protection Agency ("CAL/EPA") and
26 consolidated the following branches under one umbrella: the
27 Office of the Secretary for Environmental Protection, the Air
28 Resources Board, the Integrated Waste Management Board, the
State Water Resources Control Board (including the Regional
Water Quality Control Boards), the Department of Toxic
Substances Control, the Department of Pesticide Regulation, and
the Office of Environmental Health Hazard Assessment. Pl.'s
Request for Judicial Notice, Exh. A.

1 the issue is whether serving notice to the Secretary of CAL/EPA
2 satisfies the notice requirements of the CWA. That is, does it
3 satisfy the Act's requirement that notice be sent to "the chief
4 administrative officer of the water pollution control agency for
5 the State in which the violation is alleged to have occurred."

6
7 See 40 C.F.R. § 135.2.

8 In the present case, Lima Ranch does not dispute that
9 notice was sent to the Secretary of CAL/EPA. Rather, Lima Ranch
10 contends that Coldani's failure to serve notice to the chief
11 administrator of the State Water Resources Board violates the
12 pre-suit notice requirements of the CWA. Thus, the task of this
13 court is to determine whether notice to the Secretary of CAL/EPA
14 is sufficient to satisfy the notice requirements of the CWA.
15 The court finds that such notice is sufficient because it
16 fulfills the purpose of the CWA's notice requirements.
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19 The Governor's 1991 Reorganization Plan states that the
20 Secretary of CAL/EPA fulfills the Agency Secretary rolls for the
21 Boards, Departments and Offices within CAL/EPA, including Agency
22 Secretary oversight over the Water Resources Control Board.
23 Pl.'s Request for Judicial Notice, Exh. A. The plan also states
24 that the Secretary of CAL/EPA serves as the primary point of
25 accountability to the governor and is responsible for bringing
26 together functions which cut-across the various programs
27 designed to address pollution, including water and ground water
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1 pollution. Pl.'s Request for Judicial Notice, Exh. A. Finally,
2 the plan states that one of the primary objectives of the
3 CAL/EPA agency is to ensure the vigorous, predictable
4 enforcement of environmental regulations.
5

6 Based on the foregoing, the court concludes that Coldani
7 has satisfied the notice requirements of the CWA because he
8 served notice to the Secretary of CAL/EPA, the official who has
9 been charged with fulfilling the Agency Secretary role of the
10 State Water Resource Board. Moreover, such notice is sufficient
11 because it fulfills the purpose of the CWA's notice requirements
12 by giving the state an opportunity to take administrative action
13 and therefore render a citizen suit unnecessary.
14

15 2. RCRA

16 Under the RCRA, any person may commence a civil action on
17 his own behalf against any person, "who has contributed or who
18 is contributing to the past or present handling, storage,
19 treatment, transportation, or disposal of any solid or hazardous
20 waste which may present an imminent and substantial endangerment
21 to health or the environment[.]" 42 U.S.C. § 6972(a)(1)(B).
22

23 "The district court shall have jurisdiction, without regard to
24 the amount in controversy or the citizenship of the parties, . .
25 . to restrain any person who has contributed or who is
26 contributing to the past or present handling, storage,
27 treatment, transportation, or disposal of any solid or hazardous
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1 waste referred to in paragraph (1)(B), to order such person to
2 take such other action as may be necessary, or both, . . . and
3 to apply any appropriate civil penalties under section 6928(a)
4 and (g) of this title." 42 U.S.C. § 6972(a)(2).
5

6 No action may be commenced under subsection (a)(1)(B) of
7 this section prior to ninety days after the plaintiff has given
8 notice of the endangerment to: (1) the Administrator; (2) the
9 State in which the alleged endangerment may occur; and (3) any
10 person alleged to have contributed or to be contributing to the
11 past or present handling, storage, treatment, transportation, or
12 disposal of any solid or hazardous waste referred to in
13 subsection (a)(1)(B) of this section. 42 U.S.C. §
14 6972(b)(2)(A)(i-iii).
15

16 The EPA has adopted a notice regulation, which mandates as
17 follows: "Notice of intent to file suit under subsection
18 7002(a)(1) of the [Solid Waste Disposal] Act shall be served
19 upon an alleged violator of any permit, standard, regulation,
20 condition, requirement, or order which has become effective
21 under this Act in the following manner: (1) If the alleged
22 violator is a private individual or corporation, service of
23 notice shall be accomplished by registered mail, return receipt
24 requested, addressed to, or by personal service upon, the owner
25 or site manager of the building, plant, installation, or
26 facility alleged to be in violation. A copy of the notice shall
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1 be mailed to the Administrator of the Environmental Protection
2 Agency, the Regional Administrator of the Environmental
3 Protection Agency for the region in which the violation is
4 alleged to have occurred, and the chief administrative officer
5 of the solid waste management agency for the State in which the
6 violation is alleged to have occurred. If the alleged violator
7 is a corporation, a copy of the notice shall also be mailed to
8 the registered agent, if any, of that corporation in the State
9 in which such violation is alleged to have occurred." 40 C.F.R.
10 254.2.
11

12
13 Compliance with the notice requirements of the RCRA is a
14 mandatory, not optional, condition precedent for suit.
15 Hallstrom, 493 U.S. at 26. If notice is insufficient as
16 required by the regulations promulgated under the RCRA,
17 dismissal for lack of subject matter jurisdiction is
18 appropriate. Id. at 33.
19

20 In the instant action, Lima Ranch argues that Coldani's
21 notice is defective because Coldani failed to send a copy of the
22 notice to the California Integrated Waste Management Board.⁴ As
23 discussed above, the court concludes that Coldani's notice to
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26 ⁴ The California Waste Management Board is designated as the
27 "state solid waste management agency for all purposes stated in
28 the Federal Resource Conservation and Recovery Act of 1976 (42
U.S.C. Sec. 6901 et seq.) and any other federal act heretofore
or hereafter enacted affecting solid waste." Cal. Pub. Res.
Code § 40508.

1 the Secretary of CAL/EPA is sufficient to satisfy the notice
2 requirements of the RCRA because the Secretary of CAL/EPA has
3 been charged with fulfilling the Agency Secretary role of the
4 Integrated Waste Management Board. Moreover, such notice is
5 sufficient because it fulfills the purpose of the RCRA's notice
6 requirements by giving the state an opportunity to take
7 administrative action and therefore render a citizen suit
8 unnecessary.
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11 C. CWA Standing

12 Lima Ranch argues that Coldani lacks standing to assert a
13 claim under the CWA because he failed to plead facts sufficient
14 to satisfy the "navigable water" and "point source" elements of
15 a CWA claim. See Headwaters, Inc. v. Talent Irrigation Dist.,
16 243 F.3d 526, 532 (9th Cir. 2001) ("To establish a violation of
17 the CWA's NPDES permit requirement, a plaintiff must show that
18 defendants (1) discharged (2) a pollutant (3) to navigable
19 waters (4) from a point source").
20

21 1. Navigable Waters

22 "The primary objective of the CWA is to 'restore and
23 maintain the chemical, physical and biological integrity of the
24 Nation's waters.' To effectuate this objective, one of the
25 CWA's principal sections strictly prohibits discharges of
26 pollutants into the 'navigable waters of the United States'
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1 without an NPDES⁵ permit from the Environmental Protection Agency
2 ("EPA")." Northern California River Watch v. City of
3 Healdsburg, 457 F.3d 1023, 1025-26 (9th Cir. 2006) (citations
4 omitted and footnote added); see Bosma, 305 F.3d at 946
5 (observing that it is unlawful to discharge any pollutant into
6 the waters of the United States except those discharges made in
7 compliance with the CWA, i.e., discharges made pursuant to a
8 NPDES permit).

9
10 "Navigable waters" are defined under the CWA to mean
11 "'waters of the United States.'" Northern California River
12 Watch, 457 F.3d at 1026 (quoting 33 U.S.C. § 1362(7)). The CWA
13 is a broad statute, reaching waters and wetlands that are not
14 navigable or even directly connected to navigable waters. See
15 United States v. Riverside Bayview Homes, Inc., 474 U.S. 121,
16 133-35 (1985) (agreeing with the Army Corp of Engineers that
17 wetlands adjacent to navigable waters should be included within
18 the purview of the CWA because water moves in hydrologic cycles,
19 and the pollution of one part of the aquatic system, will affect
20 the water quality of the other waters within that aquatic
21 system).⁶

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27 ⁵ National Pollution Discharge Elimination System.

28 ⁶ In Riverside Bayview, the Court concluded that "'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." Riverside Bayview, 474

1 The EPA has defined waters of the United States to include:
2 "all other waters such as intrastate lakes, rivers, streams
3 (including intermittent streams) . . . [and] sloughs, . . . the
4 use, degradation, or destruction of which would affect or could
5 affect interstate or foreign commerce[,]" and "tributaries of
6 [those] waters." 40 C.F.R. 122.2(c), (e)); see Headwaters, 243
7 F.3d at 533 (citing cases) (holding that irrigation canals are
8 "waters of the United States" because they are tributaries to
9 the natural streams with which they exchange water); Bosma, 305
10 F.3d at 954-55 (holding that a drain discharging manure waste
11 qualified as a navigable water tributary because it drained into
12 an irrigation canal which in turn discharged into a river (i.e.,
13 navigable water)); United States v. Phillips, 367 F.3d 846, 851-
14 52 (9th Cir. 2004) (holding that CWA jurisdiction could be
15 exercised over a creek which emptied into a larger creek, which
16 in turn flowed into a navigable river).

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20 Recently, in Rapanos v. United States, 126 S.Ct. 2208
21 (2006), the United States Supreme Court set forth the standard
22 by which a wetland is covered by the CWA. There, the Court held
23 that only wetlands with a significant nexus to a navigable-in-

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25
26 U.S. at 135. This is because "wetlands adjacent to lakes,
27 rivers, streams, and other bodies of water may function as
28 integral parts of the aquatic environment even when the moisture
creating the wetlands does not find its source in the adjacent
bodies of water." Id.

1 fact waterway are covered under the CWA. Rapanos v. United
2 States, 126 S.Ct. 2208, 2248 (2006) (Kennedy, J., concurring).⁷
3 Justice Kennedy explained that "wetlands possess the requisite
4 nexus, and thus come within the statutory phrase 'navigable
5 waters,' if the wetlands, either alone or in combination with
6 similarly situated lands in the region, significantly affect the
7 chemical, physical, and biological integrity of other covered
8
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11 ⁷ Two recent Ninth Circuit cases have applied Rapanos. See
12 San Francisco Baykeeper v. Cargill Salt Div., 481 F.3d 700, 707
13 (9th Cir. 2007) (applying Rapanos and noting that Justice
14 Kennedy's concurrence is the controlling opinion); Northern
15 California River Watch, 457 F.3d at 1029 (applying Rapanos and
16 observing that because Justice Kennedy's vote constituted the
17 fifth vote for reversal, and because he only concurred in the
18 judgment, his opinion provides the controlling rule of law). In
19 San Francisco Baykeeper, the court concluded that a pond
20 adjacent to a navigable slough was not a water of the United
21 States because a significant nexus did not exist between the
22 pond and the slough. San Francisco Baykeeper, 481 F.3d at 707-
23 08. This is because the evidence of the effect of the pond on
24 the slough was speculative or insubstantial insofar as there was
25 no evidence demonstrating that the pond significantly affected
26 the integrity of the slough, (e.g., there was no evidence that
27 any water ever flowed from the pond to the slough). Id. at 708.
28 In Northern California River Watch, the court concluded that a
substantial nexus existed between a pond, its wetlands and a
navigable water to justify CWA protection because water from the
pond seeps directly into the adjacent Russian River and
therefore significantly affects the chemical, physical, and
biological integrity of a navigable water. Id. at 1030. In
finding a substantial nexus the court noted the following: (1)
there are surface and groundwater hydrological connections
between the wetlands and river, affecting the physical integrity
of the river; (2) the wetlands and the river are ecologically
connected insofar as the wetlands are an integral part of and
indistinguishable from the rest of the river's ecosystem; and
(3) chloride seeps from the pond and its wetlands into the
river, significantly affecting the chemical integrity of the
river. Id. at 1030-31.

1 waters more readily understood as 'navigable.' When, in
2 contrast, wetlands' effects on water quality are speculative or
3 insubstantial, they fall outside the zone fairly encompassed by
4 the statutory term 'navigable waters.'" Id.⁸
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8 ⁸ The court notes that Lima Ranch's reliance on Rapanos to
9 support its argument for dismissal is misplaced. Rapanos
10 involved whether a wetland lying near ditches or man-made drains
11 that eventually empty into navigable waters were within the
12 purview of the CWA. Rapanos, 126 S.Ct. 2208. There, the Court
13 ultimately remanded the consolidated cases for further
14 proceedings on the grounds that the Sixth Circuit applied the
15 incorrect standard for determining whether the wetlands at issue
16 were covered "waters" within the scope of the CWA because it
17 failed to consider all the factors necessary to determine
18 whether the wetlands at issue had the requisite nexus. Id. at
19 2250-52. In his concurrence, Justice Kennedy stated that the
20 Army Corps of Engineers assertion of jurisdiction - adjacency to
21 tributaries, however remote and insubstantial - was insufficient
22 to establish jurisdiction because the Corps was required to
23 establish a significant nexus when seeking to regulate wetlands
24 based on adjacency to nonnavigable tributaries. Id. at 2249.
25 Justice Kennedy explained that the requisite nexus could be
26 established if the Corps showed that the wetlands, alone or in
27 combination with similarly situated lands in the region,
28 significantly affect the chemical, physical, and biological
integrity of other covered waters understood as navigable in the
traditional sense. Id. at 2248. Justice Kennedy further
explained that a "mere hydrologic connection should not suffice
in all cases [to establish the substantial nexus test]" because
"the connection may be too insubstantial for the hydrologic
linkage to establish the required nexus with navigable waters as
traditionally understood." Id. at 2251. Rather, the "required
nexus must be assessed in terms of the statute's goals and
purposes," which are to "restore and maintain the chemical,
physical, and biological integrity of the Nation's waters." Id.
at 2248 (internal quotations and citations omitted). With
respect to the instant matter, there is nothing in Rapanos
mandating a dismissal of this action. Coldani has alleged that
Lima Ranch has discharged pollutants into groundwater that has
discharged into a navigable water. As such, as a matter of

1 In the instant case, Coldani alleges that animal waste from
2 Lima Ranch's dairy has infiltrated and polluted groundwater that
3 discharges into the White Slough, which in turn empties into
4 navigable waters, the San Joaquin River Delta System. Compl. ¶¶
5 32-34. In short, Coldani alleges that Lima Ranch has polluted
6 groundwater that is hydrologically connected to navigable
7 waters. Such pleading is sufficient to survive a motion to
8 dismiss.
9

10 While Lima Ranch makes much of the fact that Coldani is
11 alleging that groundwater is causing the contamination and
12 pollution of the White Slough, it cites no binding authority
13 supporting the proposition that the discharge of pollutants into
14 groundwater that is hydrologically connected to navigable water,
15 is outside the scope of the CWA.⁹ Moreover, the court is not
16 convinced that precluding such circumstances from the regulatory
17 purview of the CWA serves Congress' declared goal "to restore
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21 pleading, dismissal is not warranted for a lack of subject
22 matter jurisdiction under the CWA.

23 ⁹ The court acknowledges that other courts have found that
24 the CWA does not regulate discharges into groundwater whether
25 groundwater is hydrologically connected to surface waters or not.
26 See Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d
27 962, 965-66 (7th Cir. 1994); Town of Norfolk v. United States
28 Corps of Engineers, 968 F.2d 1438, 1451 (1st Cir. 1992);
Umatilla Water Quality Protective Ass'n, Inc. v. Smith Frozen
Foods, Inc., 962 F.Supp. 1312, 1318 (D. Ore. 1997). However,
the court does not find the reasoning of these cases persuasive
given the declared objectives of the CWA and the broad
definition that Congress intended with respect to waters within
the purview of the CWA.

1 and maintain the chemical, physical and biological integrity of
2 the Nation's waters." Nor is the court convinced that
3 precluding such circumstances squares with the broad
4 construction given to "waters of the United States." As such,
5 the court finds that because Coldani has alleged that Lima Ranch
6 polluted groundwater that is hydrologically connected to surface
7 waters that constitute navigable waters, he has sufficiently
8 alleged a claim within the purview of the CWA. See Washington
9 Wilderness Coalition v. Hecla Min. Co., 870 F.Supp. 983, 990-991
10 (E.D. Wash. 1994) (holding that allegations were sufficient to
11 support a claim under the CWA because they alleged a
12 hydrological connection between seepage into groundwater and the
13 nearby surface waters of a creek and lake); Sierra Club v.
14 Colorado Refining Co., 838 F.Supp. 1428, 1434 (D. Colo. 1993)
15 (holding that allegations that a defendant has and continues to
16 discharge pollutants into the soils and groundwater beneath its
17 property which then make their way to a navigable water through
18 the groundwater state a cause of action under the CWA); Williams
19 v. PipeLine Co. v. Bayer Corp., 964 F.Supp. 1300, 1320 (holding
20 that discharge of petroleum into groundwater that is
21 hydrologically connected to surface waters is a violation of the
22 CWA); Idaho Rural Council v. Bosma, 143 F.Supp.2d 1169, 1180 (D.
23 Idaho 2001) (holding that the CWA extends federal jurisdiction
24 over groundwater that was allegedly polluted by a dairy that is

1 hydrologically connected to surface waters that are waters of
2 the United States).¹⁰

3 Accordingly, as a matter of pleading, the court concludes
4 that the allegations of the complaint are sufficient to survive
5 dismissal. However, the court cautions that Coldani bears the
6 burden of demonstrating that pollutants from a point source
7 affect surface waters of the United States, and that an
8 allegation of groundwater pollution coupled with an assertion of
9 a general hydrological connection between all waters, is
10 insufficient to come within the purview of the CWA. See
11 Washington Wilderness Coalition, 870 F.Supp. at 990.
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16 ¹⁰ In Washington Wilderness Coalition, the court concluded
17 that because the goal of the CWA is to protect the quality of
18 surface waters, any pollutant which enters such waters, whether
19 directly or through groundwater, is subject to regulation by
20 NPDES permit. Id. at 990. The court explained that applying
21 effluent limitations to tributary groundwater does not change
22 the nature of CWA monitoring because plaintiffs must still
23 demonstrate that pollutants from a point source affect surface
24 waters of the United States, i.e., in order to come within the
25 purview of the CWA, plaintiffs must trace pollutants from their
26 source to surface waters. Id. In Sierra Club, the court
27 concluded that because the CWA is interpreted broadly to give
28 full effect to Congress' declared goal and policy "to restore
and maintain the chemical, physical and biological integrity of
the Nation's waters[,]" the Clean Water Act's preclusion of the
discharge of any pollutant into "navigable waters" includes such
discharge which reaches "navigable waters" through groundwater.
Sierra Club, 838 F.Supp. at 1434. There, the court determined
that allegations alleging that a refinery discharged pollutants
into the soils and groundwater, which then made their way to a
navigable river through the groundwater, are sufficient to state
a claim under the CWA. Id. The court is persuaded by the
reasoning of these cases.

1 2. "Point Source"

2 "The CWA regulates the discharge of pollutants and defines
3 'discharge of pollutant' as 'any discernable, confined and
4 discrete conveyance from any point source.' 33 U.S.C. §
5 1362(12)." Bosma, 305 F.3d at 955. "Point source is defined to
6 include a CAFO, and animal feeding operations come within the
7 definition of a CAFO by having specified quantities of animals
8 and discharging pollutants into navigable waters. 33 U.S.C. §
9 1362(14)." Id.¹¹ "The term 'pollutant' means dredged spoil,
10 solid waste, incinerator residue, sewage, garbage, sewage sludge,
11 munitions, chemical wastes, biological materials, radioactive
12 materials, heat, wrecked or discarded equipment, rock, sand,
13 cellar dirt and industrial, municipal, and agricultural waste
14 discharged into water." 33 U.S.C. § 1362(6).

15 If a dairy meets the requirements of a CAFO, it is
16 considered a point source subject to "effluent guidelines" and
17 is considered to be engaged in industrial activities. Bosma,
18 305 F.3d at 947, 955. A CAFO is subject to the NPDES permit
19 requirement and therefore cannot discharge animal wastes without
20 a permit or in violation of a permit. Id. at 955.

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26 ¹¹ In Bosma, the court observed that a CAFO is an animal
27 feeding operation where animals are stabled or confined for a
28 total of forty-five days or more in any twelve month period in
an area where neither crops, vegetation or crop residue is
sustained. A CAFO also includes animal feeding operations with
more than 700 mature dairy cattle). Bosma, 305 F.3d at 955.

1 In the instant case, the allegations in the complaint are
2 sufficient to establish that Lima Ranch is a CAFO. Coldani has
3 alleged that Lima Ranch is a diary ranch engaging in the
4 following operations: feeding and stabling of 1,000 or more
5 dairy cows, milking, collecting animal waste, storing animal
6 waste, and discharging waste water onto open lands (i.e., manure
7 spreading). Compl. ¶ 3. Moreover, Lima Ranch does not dispute
8 that its dairy cows are stabled or confined for a total of
9 forty-five days or more in any twelve month period. Nor does
10 Lima Ranch contend that crops, vegetation or crop residue is
11 sustained on its ranch. Finally, Lima Ranch does not dispute
12 that it has more than 700 dairy cattle or that it engages in
13 manure spreading operations. As such, the court concludes that
14 Coldani has sufficiently pled that Lima Ranch is a point source
15 within the meaning of the CWA. Accordingly, dismissal is not
16 warranted on this ground. See Bosma, 305 F.3d at 955 (because
17 agricultural waste discharged into water is a pollutant
18 constituting a large threat to the quality of the waters of the
19 nation, the EPA is empowered to regulate CAFOs as point
20 sources).

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25 D. NPDES Permit

26 Lima Ranch argues that Coldani cannot maintain an action
27 under the CWA because he has failed to allege a violation of an
28 order issued by the Administrator or State regarding a CWA

1 standard or limitation. More particularly, Lima Ranch contends
2 that dismissal is warranted with respect to Coldani's CWA claim
3 because it has been operating under a valid NPDES permit and
4 Coldani has not alleged a violation thereof. The court
5 disagrees.
6

7 The NPDES permit that Lima Ranch relies on relates to
8 discharges of storm water associated with industrial activities.
9 Exh. 3, attached to Def.'s Mot. for Dismissal. As such, it is
10 of no consequence to Coldani's CWA claim because this claim is
11 based on Lima Ranch's discharge of a pollutant (i.e., discharge
12 of animal waste) into groundwater that migrates into navigable
13 waters, not discharge of a pollutant into navigable waters from
14 storm water run-off.¹² Moreover, to the extent that the permit
15 authorizes non-storm discharges, including irrigation drainage
16 in compliance with Regional Water Board requirements, Coldani
17 has stated a claim under the CWA. This is because, even
18 assuming that Coldani's allegations only pertain to irrigation
19 drainage, he has alleged that Lima Ranch's discharge of animal
20 waste is in violation of Regional Water Board Requirements.
21 Thus, to the extent that this permit is applicable, Coldani has
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27 ¹² Indeed, the permit referred to by Lima Ranch defines "storm
28 water" as "storm water runoff, snow melt runoff, and storm water
surface runoff and drainage. It excludes infiltration and
runoff from agricultural land." See Exh. 3, attached to Def.'s
Mot. for Dismissal.

1 alleged a violation of it. Therefore, he has properly stated a
2 claim under the CWA.¹³

3 For these reasons, dismissal of Coldani's CWA claim is not
4 warranted.

6 E. RCRA Standing

7 Lima Ranch argues that Coldani lacks standing because he
8 failed to properly allege that Lima Ranch disposed of any
9 "hazardous waste" as defined by the Act.
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13 ¹³ To the extent that Lima Ranch seeks dismissal on the ground
14 that Coldani failed to allege a violation of a CWA standard or
15 limitation because he alleged violations of Water Discharge
16 Requirements ("WDRs") established by Regional Board orders, the
17 court rejects this argument. This is because violations of WDRs
18 are equivalent to violations of the CWA. See City of Burbank v.
19 State Water Resources Control Bd., 35 Cal.4th 613, 620 (2005)
20 (citations omitted) (noting that "[u]nder the federal Clean
21 Water Act, each state is free to enforce its own water quality
22 laws so long as its effluent limitations are not 'less
23 stringent' than those set out in the Clean Water Act." The
24 court also noted that in California, wastewater discharge
25 requirements established by the regional boards are the
26 equivalent of the NPDES permits required by federal law for
27 enforcing effluent limitations and standards under the CWA.);
28 Environmental Protection Information Center, 469 F.Supp.2d at
810, n.4 ("The EPA delegated its permit-issuing authority to
California on May 14, 1973. See 39 Fed.Reg. 26,061 (July 16,
1974). California administers its portion of the NPDES program
through the Porter-Cologne Water Quality Control Act ("Porter-
Cologne Act"), Cal. Water Code § 13000 *et seq.*, which, in turn,
created a group of Regional Water Quality Control Boards charged
with the responsibility of issuing Waste Discharge Requirements
("WDRs"). By every relevant measure, WDRs are equivalent to CWA
permits, and in every relevant sense for this action, the
Porter-Cologne Act imports its definitions from the CWA,
including those for 'pollutants,' 'discharge,' and 'point
source.' See Cal. Water Code § 13373.")

1 "RCRA is a comprehensive environmental statute that governs
2 the treatment, storage, and disposal of solid and hazardous
3 waste. Congress' overriding concern in enacting RCRA was to
4 establish the framework for a national system to insure the safe
5 management of hazardous waste." Safe Air for Everyone, 373 F.3d
6 at 1041 (internal quotation marks and citation omitted).
7

8 In the present case, Coldani seeks relief under the
9 "citizen suit" provision of the RCRA. Thus, in order to state a
10 claim, Coldani must allege that Lima Ranch is contributing to
11 the handling, storage, treatment, transportation, or disposal of
12 solid or hazardous waste which may present an imminent and
13 substantial endangerment to health or the environment. 42
14 U.S.C. § 6972(a)(1)(B). Coldani does not allege that Lima
15 Ranch's discharge of animal waste is "hazardous waste" within
16 the meaning of the RCRA. Rather, Coldani simply alleges that
17 animal waste is "solid waste" within the meaning of the RCRA.
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20 "Hazardous waste" is defined under the RCRA as: "a solid
21 waste, or combination of solid wastes, which because of its
22 quantity, concentration, or physical, chemical, or infectious
23 characteristics may-- [¶] (A) cause, or significantly contribute
24 to an increase in mortality or an increase in serious
25 irreversible, or incapacitating reversible, illness; or [¶] (B)
26 pose a substantial present or potential hazard to human health
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1 or the environment when improperly treated, stored, transported,
2 or disposed of, or otherwise managed." 42 U.S.C. § 6903(5).
3 "Solid waste" is defined under the RCRA as: "any garbage,
4 refuse, sludge from a waste treatment plant, water supply
5 treatment plant, or air pollution control facility and other
6 discarded material, including solid, liquid, semisolid, or
7 contained gaseous material resulting from industrial,
8 commercial, mining, and agricultural operations, and from
9 community activities, but does not include solid or dissolved
10 material in domestic sewage, or solid or dissolved materials in
11 irrigation return flows or industrial discharges which are point
12 sources subject to permits under section 1342 of Title 33,
13 [i.e., Clean Water Act]" 42 U.S.C. § 6903(27). "The
14 term 'point source' means any discernible, confined and discrete
15 conveyance, including but not limited to any . . . concentrated
16 animal feeding operation . . . from which pollutants are or may
17 be discharged." 33 U.S.C. § 1362(14).
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22 In the instant action, Coldani has alleged that Lima Ranch
23 is a concentrated animal feeding operation discharging solid
24 waste (i.e., animal waste) into navigable waters from a point
25 source (i.e., concentrated animal feeding operation). As such,
26 Lima Ranch is subject to a NPDES permit. Therefore, the court
27 concludes that because the animal waste discharged by Lima Ranch
28 constitutes industrial discharge from a point source subject to

1 NPDES permits under the CWA, it is excluded from the definition
2 of "solid waste" under 42 U.S.C. § 6903(27). See Williams, 964
3 F.Supp. at 1328-29 (holding that petroleum discharged into
4 groundwater was excluded from the definition of "solid waste"
5 under the RCRA because it constituted industrial discharge from
6 a point source subject to NPDES permits. The court therefore
7 declined to exercise jurisdiction under the RCRA to avoid
8 duplicative regulation under the CWA); State v. PVS Chemicals,
9 Inc., 50 F.Supp.2d 171, 177-78 (W.D.N.Y. 1998) (holding that
10 that RCRA's industrial wastewater exclusion applied to
11 unauthorized discharges of pollutants from a point source
12 subject to permit under the CWA because to hold otherwise would
13 subject the discharges to duplicative regulation under both the
14 CWA and RCRA. The court explained that the purpose of the
15 industrial point source discharge exclusion is to avoid
16 duplicative regulation of point source discharges under the RCRA
17 and CWA because, without such a provision, the discharge of
18 wastewater into navigable waters would be "disposal" of solid
19 waste, and potentially subject to regulation under both the CWA
20 and RCRA); Inland Steel Co. v. Environmental Protection Agency,
21 901 F.2d 1419, 1423 (7th Cir. 1990) (observing that the purpose
22 of the exception in section 6903(27) of the RCRA is to avoid
23 duplicative regulation, not to create a regulatory hole through
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1 which billions of gallons of hazardous wastes can be pumped into
2 the earth).

3 Accordingly, in order to avoid duplicative regulation, the
4 court declines to exercise jurisdiction over Coldani's RCRA
5 claim. Therefore, Coldani's RCRA claim is dismissed.
6

7 III. CONCLUSION

8 For above stated reasons, the Court GRANTS in part, and
9 DENIES in part, the motion to dismiss.
10

11 IT IS SO ORDERED.

12 ENTERED this 14th day of August, 2007.

13 s/RALPH R. BEISTLINE
14 United States District Judge
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