



Watching, waiting for SR's wastewater decision

River residents have stake, but not a say

By MIKE MCCOY
Staff Writer

Thousands of Russian River residents may have the biggest stake in Santa Rosa's City Council election on Nov. 5.

It will be up to the four who are elected to Santa Rosa's council, combined with the three holdovers from the current council, to decide early next year how Santa Rosa will solve its wastewater disposal problem.

Interviews with the nine candidates indicate the news may not be good for river residents.

Most of the candidates say city ratepayers already are stretched to the limit, with monthly sewer bills averaging \$32.16 per household. That's \$12 higher than just six years ago.

And they say they're unwilling to raise those bills much higher just to keep millions of gallons of wastewater out of the river — the source of drinking water, tourism and recreation for thousands of

downtown residents.

According to the city's still unfinished \$12.3 million wastewater disposal study, the only option that would not result in a rate increase of \$24 a month or more for the average homeowner would be to increase the city's discharge into the river to 20 times its current level.

The river is the cheapest of four disposal options considered, and estimates are raising the city's discharge into river, now restricted to 1 percent of the river's wintertime flow, to 20 percent would make rate increases unnecessary.

The report says anything other than increased river discharge — massive farmland irrigation project or using the wastewater to recharge the Geysers' steam fields, would require increases ranging from \$24 to \$74 a month per household — increases all nine candidates said they're unwilling to support.

While the candidates disagree on which disposal option is best, most agree on one thing — none of them are willing to raise rates more than \$10 per household.

In fact, four candidates openly support

simply flushing the highly-treated wastewater down the Russian River or the Laguna de Santa Rosa, a main tributary to the river, to save money.

"I'm for the cheapest alternative. The bottom line is the ratepayer is going to suffer and I want to protect him," said Bob Ottensmeyer.

Hugh Coddling calls the river "the only logical solution."

"I know it's not popular with the people on the river but it puts less of a burden on the ratepayer," he said.

"It's almost good enough to drink. Homeowners are paying enough," agreed Ken Hart.

Duane Dewitt opposes any rate increases and also opposes any plan that would increase the city's discharge into the river — two mutually exclusive goals according to the wastewater study. Dewitt considers the 8,500-page study "flawed in its numbers" and said the water can be re-used without increasing ratepayers' bills.

Candidate Chris Smith also supports increased discharges into the river, at

least until new technology comes along to make the reclamation alternatives more financially appealing.

Despite that position, Smith said he'd be willing to raise sewer bills \$6 to \$10 a month — the highest supported by any of the candidates.

Candidates Mike Martini, Mike Runyan and Sharon Wright say they're willing to increase the average homeowner's sewer bill up to \$5 a month so the wastewater can be put to some constructive use.

A \$5 increase isn't enough to pursue any option other than increased river discharge, according to the study.

But city officials are attempting to determine if there is a middle ground — one that would balance increased discharges into the river at 5, 10 or 15 percent levels with less sweeping reclamation projects that could result in rate increases residents might be willing to pay.

Martini, who is pushing plans to develop a major sports facility on West Third Street — a project he suggests be irrigated with wastewater stored underground — said "wastewater is an asset. I want to see

it re-used as long as its economically feasible."

Wright said she's willing to push rates as high as residents are willing to pay to make reclamation a priority.

"Four years ago they said they'd pay \$5 to \$10 more for re-use. I don't know if that's their sentiment today. If there is, a loud public outcry that re-use has a higher priority over economic impacts, that could bump it even higher," she said.

Runyan's preference is to keep the city's river discharge at its one percent level by finding ways to put the wastewater to work for farmers.

"A lot of people would squawk at \$5 but it should be easily palatable. You get to bigger numbers and there might be hardships to seniors or low-income people," he said.

Only one candidate besides Smith is willing to raise sewer bills \$6 to \$10 more a month — Norreen Evans.

Evans said that would be a fair price to pay to protect the open space around the city from urbanization and provide the much-needed water the county's agricultural industry needs to survive.

COMPARING THE CANDIDATES

Santa Rosa City Council

Hugh Coddling

Age: 79
Occupation: Founder of Coddling Enterprises, commercial and residential development company.

Background: Builder of a dozen Sonoma County shopping centers, including Coddlingtown, Montgomery Village and the Expressway Mall. Santa Rosa City Council, 1964-72; U.S. Navy Seabee and World War II veteran; founder of Coddling Bank; 65-year resident of Santa Rosa.

Sharon Wright

Age: 53
Occupation: Owner of Wright & Associates, provider of management services

Background: Current mayor, council member 1992-present; executive director, Sonoma County Alliance; director, Leadership Santa Rosa and Tomorrow's Leaders Today; Sonoma County representative, Metropolitan Transportation Commission; member, advisory board, 100 Black Men of Sonoma County; 16-year Santa Rosa resident.

Mike Runyan

Age: 54
Occupation: Former owner, Food 4 Less stores in Santa Rosa and Rohnert Park.

Background: Leader of Santa Rosa's Guns for Groceries exchange program in 1994; former chairman, Santa Rosa Chamber of Commerce Education Division; member, Sonoma County Business Education Roundtable, Sonoma County Juvenile Justice Commission, Sonoma County Alliance Economic Committee; 11-year Santa Rosa resident.

Kea Hart

Age: 62
Occupation: Retired building contractor
Background: Former boxing coach for the Police Athletic League; native of Santa Rosa.

Duane DeWitt

Age: 41
Occupation: Respiratory therapist

Background: Community activist, founder of Roseland Action and co-founder of Santa Rosa Action, neighborhood and community-based citizen interest groups, a Santa Rosa Junior College student and life-long Santa Rosa resident.

Bob Ottensmeyer

Age: 74
Occupation: Retired naval officer and consultant

Background: Former chairman, Sonoma County Committee on Emergency Medical Services; member, 1990 Sonoma County Grand Jury; member, Sonoma County Mental Health Advisory Board, 1991; 13-year Santa Rosa resident.

Mike Martini

Age: 43
Occupation: Co-owner, Tait Street Winery

Background: Member, Santa Rosa Planning Commission, 1991-present; chairman, A Place to Play, a group developing athletic fields for youth; Boy Scout leader; soccer referee; former alternate, Sonoma County Transportation Committee; 10-year Santa Rosa resident.

Chris Smith

Age: 47
Occupation: Food 4 Less human resources manager

Background: Member, Santa Rosa Traffic Systems Management Committee, and the Santa Rosa Chamber of Commerce Wastewater Task Force; former Cub Scout leader; former member of city councils in Placer-Olivet School District; 14-year Santa Rosa resident.

Norren Evans

Age: 41
Occupation: Attorney and co-partner, Fudem & Evans law firm

Background: Member, Santa Rosa Planning Commission, 1993-present; youth soccer coach; school volunteer; co-chairman, Neighborhood Design Committee; member, Scenic Road Subcommittee; 14-year Santa Rosa resident.

THE ISSUES

	EVANS	SMITH	HART	RUNYAN	DEWITT	OTTENSMYER	MARTINI	WRIGHT	CODDING
Do you support Measure G, the ballot measure that would largely prohibit the City Council from annexing land outside the city's current expansion boundary for the next 20 years?	YES	UNDECIDED	YES	YES	NO	QUALIFIED YES	YES	YES	UNDECIDED
Do you support widening Highway 101 to six lanes?	YES	YES	YES	YES	YES	YES	YES	YES	YES
Would you support passage of a 1/4- to 1/2-cent countywide sales tax to pay for widening Highway 101?	QUALIFIED YES	YES	NO	YES	NO	YES	YES	YES	YES
Do you support reuniting the two sides of Old Courthouse Square, now divided by Mendocino Avenue, to its design of 30 years ago?	YES	YES	YES	YES	YES	NO	QUALIFIED YES	QUALIFIED YES	QUALIFIED YES
Which long-range wastewater disposal option do you support?	AGRICULTURAL RE-USE	RUSSIAN RIVER	RUSSIAN RIVER	CONSERVATION/RECLAMATION	MAXIMIZE RE-USE AND RECLAMATION	LAGUNA DE SANTA ROSA	MAXIMIZE RECLAMATION	CONSERVATION AND RE-USE	RUSSIAN RIVER
How much of an increase in Santa Rosa's average \$32.16 monthly sewer bill are you willing to support to meet reclamation needs?	\$6-10	\$6-10	\$0	\$1-5	\$0	\$0	\$1-5	\$1-5	\$0

ordinate efforts between schools and businesses for after-school and weekend activities, one aimed at mentoring kids on possible career pursuits. ... space from ever-changing political winds. ... Hart, while supportive, thinks the line should have been drawn a ... arguing the re-formation of a town square like those in Sonoma and Healdsburg will help revitalize the area. ... to follow all their whims. ... Freeway priority. ... All the candidates agreed widening Highway 101 is a top priority. ... county-wide sales tax to finance widening project. ... Past battles between business and environmental interests kill next Statewide 101 widening.

ATTACHMENT #18

COPY

1 Jack Silver, Esquire SBN#160575
 2 Paul S. Silver, Esquire, APC SBN# 078150
 3 Silver & Silver
 4 902 Stevenson Street
 5 Santa Rosa, CA 95404
 6 (707) 527-8811

5 Attorneys for Plaintiffs
 6 Russian River Watershed Protection
 7 Committee and Brenda Adelman

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA

10
 11 RUSSIAN RIVER WATERSHED
 12 PROTECTION COMMITTEE AND
 13 BRENDA ADELMAN,

13 Plaintiffs,

14 v.

15 CITY OF SANTA ROSA and
 16 DOES 1 - 10, INCLUSIVE,

16 Defendants.

CASE NO: C-95-1550-SC
 PLAINTIFFS' TRIAL BRIEF

DATE: July 24, 1996
 TIME: 9:30 A.M.
 DEPT: COURTROOM

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Plaintiff's Trial Brief
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11	<u>Chesapeake Bay Foundation v. Bethlehem Steel Corp.</u> 16,17
12	608 F. Supp. 440 (D. Md. 1985)	
13	<u>Chesapeake Bay Foundation v Bethlehem Steel Corp.</u> 17
14	652 F. Supp. 620 (D. Md. 1987)	
15	<u>Allegheny County Sanitary Auth. vs. U.S. E.P.A.</u> 17
16	557 F. Supp. 419 (W.D. Pa. 1983), aff'd,	
17	732 F. 2d 1167 (3d Cir. 1984)	
18	<u>Sierra Club v. Union Oil Co. of California</u> 17,20,21
19	716 F. Supp. 429 (N.D. Cal. 1988)	
20	<u>Chesapeake Bay Foundation v Gwaltney of Smithfield, Ltd.</u> 18,19,21
21	(Gwaltney I) 484 U.S. 49 (1987)	22,23,44,45
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23	(Gwaltney II) 844 F. 2d 170 (4th Cir. 1988)	
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25	(Gwaltney III) 890 F. 2d 690 (4th Cir. 1989)	24
26	<u>Sierra Club v Union Oil of California</u> 18,21,22
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28	<u>Atlantic States Legal Foundation v Tyson Foods, Inc.</u> 18,23,
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6	<u>United States v Michigan Nat'l Corp.</u> 419 U.S. 1 (1974) 23
7	<u>Carr v Alta Verde Indus., Inc.</u> 931 F. 2d 1055 (5th Cir.1991) 22
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10	<u>Ackels v. U.S. E.P.A.</u> 7 F. 3d. 862 (9th Cir. 1993) 38,39
11	<u>CBE v UNOCAL</u> 96 CDOS 3359 39
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13	<u>Public Interest Research Group v Yates Industries</u> 757 F Supp. 438 (D.N.J. 1991) 39,43
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3	<u>Skidmore v. Swift & Co.</u> 41
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5	<u>Public Int. Research vs. N.J. Expressway Authority</u> 41
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7	<u>Texas Municipal Power Agency v Administrator of United States</u> 41,42
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12	<u>United States v. Earth Sciences, Inc.</u> 43
13	599 F. 2d 368 (10th Circuit 1979)	
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18	<u>United States v City of Hoboken</u> 43
19	675 F. Supp. 189 (D.N.J. 1987)	
20	<u>Student Public Interest Research Group ("PIRG") v. AT&T</u> 43
21	<u>Bell Laboratories</u>	
22	617 F. Supp. 1190 (D. N.J. 1985)	
23	<u>PIRG of New Jersey v. Powell Duffryn Terminals, Inc.</u> 43
24	913 F. 2d. 64 (3rd Circuit 1990)	
25	<u>State Cases:</u>	
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3	40 CFR § 122.41(a) 43
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5	<u>Publications:</u>	
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Plaintiff's Trial Brief
Case No: C-95-1550-SC

CATALOG OF EXHIBITS

- P-1. Private Letter To: NCRWQCB, From: Stephen Norwick, Subject: The Russian River
- P-2. NCRWQCB, Waste Discharge Requirements for the City of Santa Rosa, Order No. 90-79, NPDES Permit No. CA0022764. 1990 NPDES Permit.
- P-3. NCRWQCB, Executive Officer's Summary Report, Date: March 6, 1985, Subject: City of Santa Rosa, College Avenue and Laguna Regional Wastewater Treatment Plants.
- P-4. NCRWQCB, Order No. 75-90, NPDES No. CA 0022764, Wastewater discharge permit February 27, 1975. 1975 NPDES Permit.
- P-5. NCRWQCB, ORDER NO. 83-99, NPDES NO. CA0022764, Waste Discharge Requirements. 1983 NPDES Permit.
- P-6. 1985 Sonoma County Grand Jury Report - discussing causes of "Big Spill".
- P-7. NCRWQCB, Supplement to the Executive Officer's Summary Report, January 30, 1986, Item:2, Subject: Public Hearing to Consider an Interim Basin Plan Amendment.
- P-8. Article, January 11, 1986 The Press Democrat, "Grand jury rips SR on sewage crises", By: Chris Coursey
- P-9. EPA, February 28, 1986, To: Kenneth R. Blackman, From: Frank M. Covington; Director, Water Management Division, United States Environmental Protection Agency, Subject: An Administrative Order issued to the City of Santa Rosa for violations of Sections 308 and 309 of the Clean Water Act (National Pollutant Discharge Elimination System NPDES NO. CA0022764) during January 9-15, 1986.
- P-10. Private, May 9, 1990, letter To: Ben Kor, From: Gail Culverwell, Subject: repeal of 1,000 cfs requirement.
Private, No Date, Letter To: Ben Kor, From: Kathleen Watson, Subject: repeal of 1,000 cfs requirement.
Private, May 11, 1990, letter To: Ben Kor, From: Ervin G. Suelflohn, Subject: repeal of 1,000 cfs requirement.
Private letter from Eleanor Futscher, June 29, 1990, Subject: Opposition to renewal of 1990 permit.
Private letter from Richard Stradford, May 18, 1990, Subject: Opposition to renewal of 1990 permit.
- P-11. NCRWQCB, Order No. 86-190, NPDES No. CA0022764, Waste Discharge Requirements for City of Santa Rosa Laguna Subregional and West College Wastewater, Treatment Plants. 1986 NPDES Permit.
- P-12. NCRWQCB interoffice communication, December 29, 1993, From Tuck Vath to Bob Tancreto. Subject - Inspection of Laguna and discharge into Santa Rosa Creek.
- P-13. NCRWQCB, Waste Discharge Requirements for the City of Santa Rosa, Order No. 95-18, NPDES Permit No. CA0022764. 1995 NPDES Permit.
- P-14. Depositions given by any party and/or any witness including exhibits thereto.

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- 1 P-15. NCRWQCB resolution 85-14, (City exhibit D-505).
- 2 P-16. Expert Report from John Rosenblum.
- 3 P-17. NCRWQCB, March 15, 1994, Letter From: Ben Kor, To: Brenda Adelman, Subject: Response
to allegations made by Adelman regarding the Laguna plant. (3 pgs.)
- 4 P-18. SWRCB, October 1990, State Water Resources Control Board, Administrative Procedures
5 Manual Water Quality Chapter 1 NPDES Permits, pg. 14.
- 6 P-19. Letter from Dept. Health Sciences, Bruce Burton to NCRWQCB, Ben Kor, July 17, 1990 -
Subject: discharge timing and rate to Russian River.
- 7 P-20. NCRWQCB, Resolution no. 86-22, January 29, 1986, Amending the water quality control plan
8 for the North Coastal Basin(1B) with respect to the point source, measures waste discharge
9 prohibitions for the Russian River, the Action Plan for Santa Rosa Area, and, addition of an
interim Action Plan for the Russian River.
- 10 P-21. NCRWQCB, Executive Officer's Summary Report, February 27, 1986, Item: 1, Subject:
Continued Public Hearing to Consider Interim Basin Plan Amendment.
- 11 P-22. Santa Rosa Correspondence, December 15, 1994, Memo To: File, From: Dave Smith
12 Subject: 12 December 1994 NCRWQCB meeting notes. (3 pgs.)
- 13 P-23. NCRWQCB, November 12, 1987, Letter, To: Mr. Pete Callinan, City Manager City of Rohnert
14 Park, From: Ben Kor, Subject: Thank you for minutes of August 11, 1987 RP city counsel
meeting.
- 15 P-24. NCRWQCB, Correspondence from Ben Kor, Executive Officer, to Miles Ferris, Director of
Utilities, City of Santa Rosa, Date: December 3, 1990. Subject: Discharge authorization letter.
- 16 P-25. Copies of Computer reports received from City of Santa Rosa - entitled "Laguna Plant Reports -
17 July '90 - July '95" and "Operational Curve Data 1990 - 1996" and data generated from them.
- 18 P-26. NCRWQCB, Executive Officer's Summary Report, June 27, 1986, Item: 2, Subject: Regional
Board Consideration of an Interim Basin Plan Amendment and Action Plan for the City of Santa
19 Rosa, Sonoma County (continued from May 7, 1986)
- 20 P-27. City of Santa Rosa, May 27, 1986, letter To: Ben Kor, From: Miles Ferris Subject: Proposed
resolution for amending Water Quality Control Plan for North Coastal Region.
21 (48) City of Santa Rosa Utilities Department, June 13, 1986, To: Ben Kor, From: Miles Ferris
Subject: Proposed Resolution for Amending the Water, Quality Control Plan for the North
22 Coastal Region; Interim Action Plan (1986-1990) for the Russian River Basin.
- 23 P-28. Diagram and description of Contact Chamber - Wastewater Engineering
Treatment/Disposal/Reuse by Metcalf & Eddy, Inc. 2nd. Edition 1979 McGraw Hill.
- 24 P-29. Copies of City of Santa Rosa "raw data" or self monitoring laboratory data entitled "Coliform
25 Cards".
- 26 P-30. Copies of City of Santa Rosa "raw data" or self monitoring laboratory data entitled "Analyzer
daily check sheets", 1991 to Present, and data entitled "Coliform Cards", 1990 through Present.
- 27 P-31. NCRWQCB meeting in Eureka, December 4, 1986, (City exhibit D-508)
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- 1 P-32. City of Santa Rosa, December 24, 1985, To: Ben Kor, From: Miles Ferris, Subject: Operation
of Winter Disposal System.
- 2 P-33. SWRCB, October 1990, State Water Resources Control Board, Administrative Procedures
Manual Water Quality Chapter 1, 2; NPDES Permits, sections.
- 3 P-34. Article published in the Press Democrat, June 28, 1995, Written by Robert Digitale, Subject:
Santa Rosa Creates Wastewater Media.
- 4 P-35. Political Cartoon Santa Rosa Correspondence, June 6 1995, From: Desalvio/ Independent.
Subject: Poop.
- 5 P-36. State of California, Memo, June 15, 1994, To: Bill Attwater, Office of Chief Counsel, SWRCB,
From: Gary J. Grimm, Board Legal Counsel Regional Water Quality Control Board, Subject:
Ross Liscum- Potential conflict of Interest.
- 6 P-37. NCRWQCB, May 22, 1995, Fax From: Tuck Vath, To: Brenda Adelman, Subject: Minutes from
a March 24, 1994 NCRWQCB meeting and Board vote.
- 7 P-38. NCRWQCB, Executive Officer's Summary Report, August 16, 1990, Item: 6, Subject: City of
Santa Rosa, Laguna Subregional Wastewater Treatment, Reuse, and Disposal Facilities, NPDES
Permit Renewal.
- 8 P-39. Excerpts from December 7, 1995 NCRWQCB meeting. Subject - Board member inquiry as to
how flows are calculated.
- 9 P-40. City of Santa Rosa to NCRWQCB, all discharge request letters from 1990 to present in
compliance with Effluent limitation B(3) of NPDES Permit.
- 10 P-41. NCRWQCB to City of Santa Rosa, all discharge permission letters from 1990 to present in
compliance with Effluent limitation B(3) of NPDES Permit.
- 11 P-42. Certificate of Incorporation for RRWPC.
- 12 P-43. Board of Public Utilities Minutes. February 3, 1994.
- 13 P-44. NCRWQCB minutes of meeting January 27, 1994.
- 14 P-45. Copies of City of Santa Rosa's Self-monitoring reports for years 1990-Present.
- 15 P-46. Copies of City of Santa Rosa "raw data" or self monitoring laboratory data entitled "Coliform
Cards", various examples of non-random sampling.
- 16 P-47. Specifications on probes used by City to monitor pH.

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1 I. INTRODUCTION

2 The Russian River Watershed Protection Committee (RRWPC) and Brenda Adelman
3 (Adelman) filed this action on May 9, 1995, under the citizen suit provision of the Federal Water
4 Pollution Control Act (the "Clean Water Act"), 33 U.S.C. §1251 et seq., to enforce the discharge
5 limits in defendant City of Santa Rosa's National Pollution Discharge Elimination System
6 ("NPDES") permit (Permit) for its treatment facility located in Sonoma County.

7 The Clean Water Act §505(b) requires that sixty (60) prior to the initiation of a civil
8 action under §505(a), the citizen suit provision, a citizen must give notice of his intent to sue to
9 the alleged violator, to the U.S. EPA, and the State. [33 U.S.C. §1365(a)]. Plaintiffs mailed a
10 Notice Letter to the Defendant, the local Regional Water Quality Control Board, the State
11 Regional Quality Control Board, and the EPA on February 22, 1995. This suit followed seventy-
12 seven (77) days later.

13 The Plaintiffs have examined the City's self-monitoring records, including raw data, for
14 the five years prior to the Notice Letter, to the present. These investigations by Plaintiffs have
15 shown a pattern of violations. These violations have continued after the City received notice of
16 this pending suit, after the suit was filed, and, the violations continue to the present time. In its
17 declarations and actions the City has show an intent to continue violating its Permit.

18 The City has violated its NPDES permit a total of 8,973 times. These violations are:

19 A(8), A(9), B(3) Flow Violations

- 20 34 - discharges less than 5% before earliest date authorized.
21 63 - discharges larger than 1% but less than 5% before authorization.
22 74 - discharges larger than 5%.
23 242- discharges larger than 1% but less than 5% after authorization, but when storage volume
24 below operational curve.

25 B(1) Numeric Effluent Violations

- 26 2280 - Chlorine residual
27 2280 - Coliform daily maximum

28

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1 2280 - Coliform monthly median

2 75 - Hydrogen Ion (pH)

3 1350 - Turbidity 30-day average

4 92 - Turbidity daily maximum

5 90 - BOD 30-day average

6 14 - BOD 7-day average

7 15 - BOD daily maximum

8 B(4) fish toxicity tests

9 84 - 21-day average

10

11 After the service of the Notice Letter, staff from the Regional Board casually contacted
12 Plaintiff Adelman concerning the allegations in the Notice Letter. At the time of the contact, it
13 was Plaintiff's belief that the discussion concerning alleged violations should first take place
14 between Plaintiff and Defendant, City of Santa Rosa. Defendant City made no attempt to contact
15 Plaintiffs or Plaintiffs' attorneys. Approximately three weeks after the service of the Notice
16 Letter the City was contacted by Plaintiffs' attorney, but the first calls were not returned. After
17 another attempt to contact the City, attorneys for the Plaintiffs were informed by Rene Chouteau,
18 City Attorney, that Defendant was not interested in a meeting to discuss the allegations in the
19 Notice Letter, that the City did not understand the issues sufficiently, that the City relied
20 completely on the advice and experience of the staff members of the Regional Board, and, the
21 City would be more interested in just sitting in on a meeting Plaintiffs would hold with the
22 Regional Board. These arrangements were unsatisfactory with Plaintiffs, and Plaintiffs stated
23 such in a letter to the City dated March 28, 1995.

24 On April 6, 1995 the City sent a letter to Plaintiffs counsel agreeing to a meeting.
25 Plaintiffs readily accepted Defendant's offer for a meeting. However, on April 12, 1995
26 Defendant City requested that prior to any meeting, the City be supplied with a detailed list of all
27 violations. This list along with a cover letter was supplied to the City soon after the request.

28

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3

1 Unfortunately the City either misplaced or never received the communication. Another list was
2 sent, but not before the expiration of the 60 Day Notice Period.

3 Plaintiffs have found the Regional Board to be insensitive to citizen needs. In the past
4 when the RRWPC, other groups, and independent citizens have sought to make public
5 presentations at meetings before the Regional Board, they have been blocked, abused,
6 interrupted, and provided with limited time, much of which has been taken up with arguments
7 from members of the Regional Board. On one occasion Plaintiff Brenda Adelman was so rudely
8 treated by a member of the Regional Board that after the meeting, another Regional Board
9 member called Ms. Adelman to apologize.

10 The Chairman of the Board, Mr. Ross Liscum, is a real estate broker who stands to
11 benefit by continued development in Sonoma County. In addition Mr. Liscum is the Chairman
12 of the Board of Public Utilities of the City of Santa Rosa - a body charged with the responsibility
13 of overseeing the wastewater management facility which is the subject of the current action. Mr.
14 Liscum has recently become a member of the City's "Rapid Response Media Team" with a
15 mandate to "set the record straight" regarding news stories and public criticism of the City's
16 wastewater problems. Mr. Liscum has been quoted as saying "...we need to be proactive on this,
17 not to be defensive, but to set the record straight." Mr. Liscum has appeared on behalf of the
18 City of Santa Rosa at Region 1 and other Regional Board meetings allegedly wearing his "other
19 hat" and has voted on issues directly effecting the City of Santa Rosa. Plaintiffs submit that for
20 this and other reasons which will be discussed below, the Regional Board is "captive" of the City
21 of Santa Rosa.

22 Although the Regional Board has initiated enforcement actions against the City for past
23 discharge violations, the Regional Board has not taken, nor plans to take, any action concerning
24 the violations complained of by Plaintiffs.

25 Plaintiff RRWPC is a non-profit corporation run by volunteers and is supported mainly
26 through volunteer donations from over 2000 supporters whose use and enjoyment of the Russian
27 River is affected by Defendant City's violations. Founded in 1980, RRWPC has been tracking
28 and participating in Santa Rosa's wastewater affairs since 1985. RRWPC has brought suit

1 against the City of Santa Rosa only with great reluctance after more than 10 years of seeking
2 change, without success, through the administrative and political process.

3 4 II. FACTUAL BACKGROUND

5 Sometime in the 1880's Santa Rosa began discharging raw sewage into Santa Rosa Creek
6 and the Laguna de Santa Rosa, both major tributaries to the Russian River. The lawsuits which
7 followed forced the City to buy property downstream of the discharge to protect residents and set
8 important environmental precedents for the public's right to clean water in the State of
9 California. In the summer of 1947, there was a polio epidemic along the Russian River which
10 was determined by the courts to have been caused by Santa Rosa's sewage system. In the early
11 1970's it was estimated that from time to time as much as 30% of the flow of the Russian River
12 was effluent from the City of Santa Rosa.(Exhibit 1).

13 The Russian River is an extensive waterway. Along with its many tributaries it forms the
14 Russian River Basin area. The Russian River Basin area provides a habitat for myriad fish and
15 wildlife species which utilize the area for feeding and nursery grounds. The Russian River and
16 associated basin area also provides a migratory pathway for anadromous fish and is a key
17 stopping point for migratory birds on the Pacific Coast flyway. The Russian River and the
18 Laguna de Santa Rosa do not lie within the City's limits. Essentially, the City of Santa Rosa
19 dumps its effluent into a different community.

20 The California Regional Water Quality Control Board for the North Coast Region
21 (Regional Board) has determined that the Russian River is beneficially used for wildlife habitat,
22 fish migration and spawning, preservation of rare and endangered species, water contact
23 recreation, non-contact water recreation, fishing, navigation, groundwater recharge, hydropower
24 generation, and a water supply for municipal, domestic, agricultural and industrial use.(Exhibit
25 2, 1990 NPDES Permit, pg.1,2)

26 In 1971 the Regional Board adopted its interim Basin Plan. The Basin Plan recognized
27 the unique character of the Russian River and its vulnerability to discharges from a variety of
28 sources. In order to provide the maximum degree of protection to the beneficial uses of the

1 Russian River, the Basin Plan called for the institution of a seasonal discharge prohibition. The
2 prohibition required the eventual elimination of all discharges during the summer recreation
3 season from May 15 through September 30 each year - that critical period when the river flow is
4 at its lowest natural flow rate and body contact recreation is at its peak. During the winter
5 months, highly treated discharges would be allowed if they could meet the State Health
6 Department requirements for disinfection and dilution. Those requirements are contained in the
7 State Health Department document, Uniform Standards for Sewage Disinfection. The Basin
8 Plan included action plans which called for the construction of specific facilities necessary to
9 comply with the new requirements. The action plan for the Santa Rosa plains area foresaw the
10 formation of a subregional sewage collection system with a centralized treatment and disposal
11 facility. The Basin Plan also contained a list of specific facilities and projected costs required to
12 fulfill the intent of the action plans. This list formed the framework for an entire series of Clean
13 Water Grant projects for Santa Rosa and its neighboring communities as well as numerous other
14 dischargers in the Northcoast.

15 In 1972 the Regional Board adopted waste discharge requirements for Santa Rosa, and all
16 of the other dischargers along the Russian River. Each new requirement provided for the timely
17 implementation of the seasonal discharge prohibition. At the same time, projects under the new
18 Clean Water Grant Program were initiated to provide funding for needed facilities. (Exhibit 3)

19 By the fall of 1973, it became clear that sufficient progress was not being made by the
20 City to comply with the new requirements. On October 3, 1973, the Regional Board held a cease
21 and desist hearing against the City. The Board found that effluent from the City's overloaded
22 West College Avenue sewage treatment plant was causing significant degradation of the lower
23 Russian River. The Board adopted a Cease and Desist Order with a ban on new connections
24 until the City made satisfactory progress in the planning and construction of facilities necessary
25 to comply with its Waste Discharge Requirements. (Exhibit 3)

26 In 1975 the Regional Water Board issued Order 75-90, NPDES permit No. CA 0022764
27 to the City Of Santa Rosa. This permit stated:

28

1 "A. PROHIBITIONS

2 1. There shall be no discharge of waste to the Russian River or any tributary flowing
3 to the Russian River during the period of May 15 through September 30 and all other periods
4 when the flow of the Russian River as measured at Healdsburg (USGS Gage No. 11-4640.00)
5 is less than 100 times greater than the waste flow." (*emphasis added*). (Exhibit 4, 1975
6 NPDES Permit, pg. 2)

7
8 In the 1975 permit the B. effluent limitations were measured at the end of the treatment
9 system where the discharge was made to the receiving waters, in this case the Laguna de Santa
10 Rosa. (Exhibit 4, 1975 NPDES Permit, pg. 3)

11
12 "B. EFFLUENT LIMITATIONS

13 1. Waste discharged to the Laguna de Santa Rosa shall not contain constituents in
14 excess of the following:"

15
16 The Permit issued to the City in 1983 was essentially the same in regard to the above
17 restrictions as the 1975 permit. The 1983 permit stated:

18
19 "A. PROHIBITIONS

20 1. There shall be no discharge of waste from the College Avenue Treatment Plant,
21 the Laguna Regional Treatment Plant or the Regional Irrigation System to the Russian River or
22 its tributaries during the period May 15 through September 30 each year. During the period
23 October 1 through May 14 each year, effluent may be discharged to the Russian River or its
24 tributaries when the flow of the Russian River as measured at Guerneville (USGS Gage No. 11-
25 4670.00) is (a) greater than 100 times the combined waste flow of the College Avenue Plant,
26 Laguna Regional Plant, and Regional Irrigation System, and (b) greater than 1,000 cfs."
27 (*emphasis added*) (Exhibit 5, 1983 NPDES Permit, pg 7)

1 **"B. EFFLUENT LIMITATIONS**

2 **1. Waste discharges from the Laguna Plant, the College Avenue Plant, or the**
3 **Regional Irrigation System to the Laguna de Santa Rosa or Santa Rosa Creek shall not contain**
4 **constituents in excess of the following:" (Exhibit 5, 1983 NPDES Permit, pg. 7)**
5

6 In the 1983 permit, as in the 1975 permit, final effluent limitations from BOD, NFR,
7 settleable solids, chlorine residual, hydrogen ion (pH), and coliform were measured from the
8 discharge point where waste entered the receiving waters. In both permits chlorine had a limit of
9 0.1 mg/l.

10 On February 8, 1985 there was a raw sewage spill of an estimated 5 million gallons
11 (Exhibit 6, pg.133). The City reported to the Regional Board that the spill was approximately
12 1.6 million gallons (Exhibit 3). The Regional Board concluded that a number of operational
13 mishaps and errors were largely responsible for the spill. Of more concern to the Regional
14 Board, was the failure of the City to notify either the Regional Board or appropriate health
15 agencies of the spill in a timely manner so that more rapid steps could have been taken to protect
16 the public health (Exhibit 3). The Grand Jury concluded that in addition to operational
17 mishaps, that poor communications between workers and management contributed to the
18 mishap, that Regional Board staff's monitoring practices were inadequate. (Exhibit 6, 1985 pg.
19 135).

20 On February 19, 1985 the City of Santa Rosa commenced a four day illegal discharge of
21 750 million gallons of sewage to the Russian River (this was later referred to as the "Big Spill").
22 The Big Spill resulted in the Regional Board's issuance of a cease and desist order and a
23 connection prohibition. To avoid a further uncontrolled release of sewage the Board allowed
24 illegal controlled increased flows of sewage up to 0.5 million gallons per day. (Exhibit 3)

25 It became apparent to the Regional Board as early as the end of Summer in 1984 that the
26 City was irrigating at a much lower rate than what the system was designed for; and, if the City
27 had operated its system correctly there was a good chance they could have avoided the disastrous
28 and illegal discharges of 1985. Although the Regional Board had apparent knowledge of the

billion?

1 City's lack of sufficient irrigation, there is no record that the Regional Board made its concerns
2 known to the City. A grand jury report determined that the decision not to irrigate to the
3 system's full capability was driven by cost considerations.(Exhibit 6, 1985 pg.135) The Grand
4 Jury report also recommended that the Regional Board be more pro-active. Mr. Ben Kor, the
5 executive officer of the Regional Board was quoted as saying, "no excuses, but it is obvious we
6 have a limited staff." (Exhibit 8)

7 On December 5, 1985, the City requested the Regional Board to consider the approval of
8 an Advanced Wastewater Treatment Contingency Plan, and to modify the North Costal Basin
9 Water Quality Control Plan (Basin Plan) to allow implementation of the City's contingency plan.

10 This contingency plan called for an increased discharge from 1% to as much as 5% under
11 certain circumstances. The Regional Board agreed to consider approval of the City's
12 contingency plan at a public hearing conducted on January 30, 1986. (Exhibit 7)

13 Despite the lack of Board authorization for increased discharge, the City proceeded to
14 discharge above its previous 1% limit. This violation prompted action not only from the local
15 board but from EPA as well. (Exhibit 9)

16 The revised Basin Plan was a relaxation of the previous restrictions which Plaintiffs
17 contend constitutes "backsliding" as that term is defined by 33 USC §1342(o) of the Clean Water
18 Act. The 1985 changes were only meant to serve for an interim period while long range plans
19 were developed for the entire Russian River. To date (more than 10 years later), those long
20 range plans have not been completed.

21 The changes to the Basin Plan received massive opposition from the public which saw
22 these changes as not only a relaxation of previous standards but as tantamount to reward to the
23 City after gross mismanagement (Exhibit 10). Despite this massive opposition the Basin Plan
24 amendments were approved. The changes continued to restrict the rate of discharge to the
25 Russian River to a maximum of 1% of the flow of the Russian River. Under limited
26 circumstances the City could temporarily release from 1% up to a maximum of 5% of the flow of
27 the Russian River. When those temporary conditions no longer existed the City was required to
28 return to the 1% restriction. (Exhibit 11, 1986 NPDES Permit, pg 4, 5)

1 Another change in the 1986 NPDES Permit receiving little attention was the change in
2 the language of the section entitled B. EFFLUENT LIMITATIONS which set the compliance
3 measurement at the point of discharge from the Laguna treatment plant to the Laguna disposal
4 system, rather than the actual receiving waters at the Laguna de Santa Rosa or the Santa Rosa
5 Creek (Exhibit 11, 1986 NPDES Permit, pg. 7). Amid all the fervor over the 500% increase
6 discharges to the Russian River, this rather technical point was missed. Plaintiffs feel that this
7 change runs afoul of the substantive constraint on the ability of regulators to modify permits
8 found in 33 U.S.C. § 1346(o) the anti-backsliding provisions of the Clean Water Act. Plaintiff
9 can find no evidence that this change was introduced with the proper public scrutiny required by
10 law.

11 The Basin Plan requires that the discharges are to be calculated as a percentage of the
12 receiving waters. Currently, flow is calculated not on a percentage of the receiving waters, but
13 on the flow of the Russian River, to which the receiving waters are tributaries. One of the major
14 receiving waters for the City's disposal is the Laguna de Santa Rosa, an impaired waterway (one
15 of only a few so designated in the entire state). At times actual discharge to the receiving waters
16 represents more than 50% of the flow of that waterway. (Exhibit 12)

17 All parties are in agreement that the ponds specified in the 1990 NPDES Permit are not
18 the receiving waters, despite the fact they receive what the City characterizes as "final effluent".
19 (Exhibit 14, Ferris depo. 102:21-24; Kor depo. 51:10-13) Thus by continuing to make
20 compliance measurements further and further away from the points of outfall and where
21 discharge has its effect on the water of the United States, the City with Regional Board
22 compliance is rendering meaningless the Permit and the underlying intent of the Clean Water
23 Act which is - "to restore and maintain the chemical, physical, and biological integrity of the
24 Nation's waters."

25 Since the Big Spill of 1985 Plaintiff Brenda Adelman has worked tirelessly and without
26 compensation to protect the Russian River Watershed area. She founded the environmental
27 group Russian River Watershed Protection Committee (RRWPC). Since 1985 Ms. Adelman has
28 attended nearly every Regional Board meeting dealing with ^{Santa Rosa's} sewage issues. She has attended

1 meetings with the Regional Board, Board staff and representatives of the City of Santa Rosa
2 concerning sewage disposal issues and the health of the Russian River. Sometime in early 1994
3 Ms. Adelman discovered that the City was discharging treated wastewater in excess of its permit.
4 She notified the Regional Board of her concern and for the first time discovered that the staff of
5 the Regional Board, in collusion with the City, developed a method for measuring flows that
6 virtually defined away most violations. This modification of the permit was made by Regional
7 Board staff after the 1986 permit was approved.(Exhibit 14, Tancreto depo. 12:7-20) The
8 modification, which the Board staff prefers to call a permissible interpretation or means of
9 compliance, was never disclosed to the public in a hearing nor was any public comment allowed.
10 In fact Plaintiff could find no record which memorialized Staff's interpretations. (Exhibit 14 ,
11 Kor depo. 33:12-24; Vath depo. 123:4-26, 124:1)

12 After nearly a year of trying to work with the Regional Board and the City concerning
13 this issue, Ms. Adelman and the RRWPC sent the City a 60 day Notice of violations and intent to
14 file suit under the Clean Water Act. This suit was filed after the 60 Notice failed to achieve any
15 meaningful change in the City's continued violation of their NPDES Permit and the Regional
16 Board's refusal to take any independent action.

17 On September 1, 1995 the City filed a Motion To Dismiss Or In The Alternative For
18 Summary Judgment. Plaintiffs opposed Defendant's Motion. The Court denied both
19 Defendant's Motion To Dismiss and its Motion For Summary Judgment.

20 21 **III. REGULATORY FRAME-WORK**

22
23 The Clean Water Act regulates the discharge of pollutants into navigable waters. The
24 statute is structured in such a way that all discharge of pollutants is prohibited with the exception
25 of several enumerated statutory exceptions. 33 U.S.C. § 1311(a). One such exception authorizes
26 a polluter who has been issued a permit pursuant to the National Pollution Discharge Elimination
27 System ("NPDES Permit" or "Permit"), to discharge designated pollutants at certain levels
28 subject to certain conditions. 33 U.S.C. § 1342. The effluent discharge standards or limitations

1 specified in an NPDES permit define the scope of the authorized exception to the 33 U.S.C. §
2 1311(a) prohibition, such that violation of a permit limit places a polluter in violation of 33
3 U.S.C. § 1311(a). Private parties may bring citizen's suits pursuant to 33 U.S.C. § 1365 to
4 enforce effluent standards or limitations, which are defined as including violations of 33 U.S.C.
5 § 1311(a). 33 U.S.C. § 1365(f)(1).

6 The Act provides that, in any given state or region, authority to administer the NPDES
7 permitting system can be delegated by the federal Environmental Protection Agency ("EPA") to
8 a state or regional regulatory agency, provided that the applicable state or regional regulatory
9 scheme under which the local agency operates satisfies certain criteria. 33 U.S.C. §1342(b). In
10 California, EPA has granted authorization to a state regulatory apparatus, comprised of the State
11 Water Resources Control Board (State Board) and several subsidiary Regional Water Quality
12 Control Boards, to issue NPDES permits. The entity responsible for issuing NPDES permits and
13 otherwise regulating discharges in the region at issue in these cases is the California Regional
14 Water Quality Control Board, North Coast Region ("Regional Board" or "Board").

15 The City of Santa Rosa owns, maintains, and operates wastewater treatment, refuse and
16 disposal facilities. The City's treatment facility is a major discharger as defined by the EPA.
17 (Exhibit 2, 1990 NPDES Permit pg. 1) This facility discharges both directly and indirectly into
18 the Russian River and its tributaries. The City is the largest discharger in the North Coast
19 (Region 1).

20 Pursuant to Section 301(a) of the Clean Water Act, 33 U.S.C. §1311(a), the
21 Environmental Protection Agency and the State of California have formally concluded that
22 discharges by the City to the Russian River of the type complained of in the attached 60 day
23 Notice Letter, are prohibited by law. Beneficial uses of most portions of the Russian River Basin
24 area are being affected in a prohibited manner by the illegal discharges of the City. Pursuant to
25 Section 304 of the Clean Water Act, 33 U.S.C. §1311, the EPA and the State have identified the
26 City's treatment facility as a point source, the discharges of which contribute to violations of
27 applicable water quality standards. The City's treatment facility is a point source under the Clean
28 Water Act.

1 Section 301(a) of the Act, 33 U.S.C. §1311(a), prohibits the discharge of pollutants from
2 a "point source" into the navigable waters of the United States, unless such discharge is in
3 compliance with applicable effluent limitations as set by the EPA and the applicable state
4 agency. These limits are to be incorporated into a National Pollution Discharge Elimination
5 System ("NPDES") permit for that point source. Section 301(a) prohibits discharges of
6 pollutants not authorized by, or in violation of the terms of, an NPDES permit issued pursuant to
7 Section 402 of the Clean Water Act, 33 U.S.C. §1342.

8 The Russian River is a navigable water of the United States within the meaning of
9 Section 502(7) of the Clean Water Act, 33 U.S.C. §1362(7).

10 The Administrator of the EPA has authorized the California Regional Water Quality
11 Control Board to issue NPDES permits, subject to specified conditions and requirements,
12 pursuant to Section 402 of the Clean Water Act, 33 U.S.C. §1342.

13 In late 1972 the California Legislature enacted a law amending the Porter-Cologne Act to
14 provide the necessary authority for the State to operate a NPDES permit program in lieu of the
15 federal system. This law is codified in Chapter 5.5, Division 7 of the California Water Code.
16 Section 13223(a) of the Porter-Cologne Water Quality Control Act provides that a Regional
17 Board may delegate any of its powers and duties to its Executive Officer. The following are
18 exempted from that delegation: (1) the promulgation of any regulation; (2) the issuance,
19 modification, or revocation of any water quality control plan; (3) the issuance, modification, or
20 revocation of any cease and desist order; and (4) the holding of any hearing on water quality
21 control plans. Through Resolution No. 85-14 the North Coast Regional Water Quality Control
22 Board has delegated those powers and duties that are delegable and not exempted to its
23 Executive Officer, Mr. Ben Kor, (Exhibit 15)

24 On August 16, 1990, the Regional Board adopted Order No. 90-79, applicable to NPDES
25 permit No. CA0022764, prescribing effluent limitations for the City's wastewater treatment
26 facility. This Permit authorizes the City to discharge limited quantities of wastewater and
27 pollutants into the Russian River.

28

1 The Permit also prescribes conditions to ensure compliance with the Clean Water Act. It
2 requires the City to establish and maintain records; to install, use and maintain monitoring
3 equipment; to regularly monitor and sample pollutants in its discharges; and to report in
4 specified ways on a regular basis to the Regional Board regarding the facility's discharge of
5 pollutants. The reports include mandatory monthly Self Monitoring Reports (SMRs).

6 On June 22, 1995, the Regional Board adopted Order No. 95-18, applicable to NPDES
7 Permit No. CA0022764. The 1995 Permit was essentially the same as the 1990 Permit in respect
8 to the flow and effluent limitations complained of in this permit. Parameters for pH however,
9 were changed from a range of 6.5 to 8.5, to a range of 6.0 to 9.0. This change was objected to as
10 backsliding, as that term is defined by 33 USC §1342(o) of the Clean Water Act, however the
11 Board approved the new permit as recommended by Staff.

12 13 IV. JURISDICTIONAL ALLEGATIONS

14
15 Subject matter jurisdiction is conferred upon this Court by Section 505(a)(1) of the Clean
16 Water Act, 33 U.S.C. §1365(a)(1).

17 The members and supporters of Plaintiff RRWPC and Plaintiff Brenda Adelman reside in
18 the vicinity of, derive livelihoods from, own property near, or recreate on, in or near or otherwise
19 use, enjoy and benefit from the Russian River and associated natural resources into which the
20 City discharges wastewater in violation of its Permit. The health, economic, recreational,
21 aesthetic and environmental interests of Plaintiff RRWPC and Plaintiff Brenda Adelman have
22 been, are being, and will continue to be adversely affected by the City's unlawful wastewater
23 discharges to the Russian River in Violation of its Permit requirements.

24 Pursuant to Section 505(b)(1)(A) of the Clean Water Act, 33 U.S.C. §1365(b)(1)(A), on
25 February 21, 1995, Plaintiff RRWPC and Plaintiff Brenda Adelman gave notice of the violations
26 alleged in this Complaint (more than sixty days prior to commencement of this lawsuit) to: (a)
27 The City, (b) the United States Environmental Protection Agency ("EPA") both in Washington,
28 DC as well as the regional office in San Francisco, California, (c) the State of California Water

1 Resources Control Board, and (d) the California Regional Water Quality Control Board, North
2 Coast Region.

3 Neither the EPA nor the State of California has commenced or is diligently prosecuting a
4 civil or criminal action in a court of the United States to require the City's compliance with the
5 standards, limitations and orders at issue in this case.

6 Pursuant to Section 505(c)(1) of the Clean Water Act, 33 U.S.C. § 1365(c)(1), venue lies
7 in this District because the City's treatment facilities, which are the sources of the violations
8 complained of in this action, are located within this District.

9 This action is not barred by any prior administrative penalty under Section 309(g) of the
10 Clean Water Act, 33 U.S.C. §1319(g).

11 The Russian River is an extensive waterway, traveling more than 110 miles from its
12 headwaters to the Pacific Ocean. The Russian River along with its many tributaries is part of the
13 Russian River Basin area. With its myriad of tributaries, the Russian River basin encompasses
14 more than two thirds of the county of Sonoma. The Russian River Basin area provides a habitat
15 for myriad fish and wildlife species which utilize the area for feeding and nursery grounds. The
16 Russian River and associated basin area also provides a migratory pathway for anadromous fish
17 and is a key stopping point for migratory birds on the Pacific Coast flyway.

18 The California Regional Water Quality Control Board for the North Coast Region
19 (Regional Board) has determined that the Russian River is beneficially used for: wildlife habitat,
20 fish migration and spawning, preservation of rare and endangered species, water contact
21 recreation, non-contact water recreation, fishing, navigation, groundwater recharge, hydropower
22 generation, and a water supply for municipal, domestic, agricultural and industrial use.

23 The City owns, maintains, and operates wastewater treatment, re-use and disposal
24 facilities. The disposal facility is a major discharger as defined by the United States EPA. The
25 disposal facility discharges both directly and indirectly into the Russian River and its tributaries.

26 Pursuant to Section 301(a) of the Clean Water Act, 33 U.S.C. §1311(a), the EPA and the
27 State of California have formally concluded that discharges by the City to the Russian River of
28 the type complained of in the Plaintiffs' Notice, are prohibited by law. Beneficial uses of most

1 portions of the Russian River Basin area, are being effected in a prohibited manner by the illegal
2 discharges of the City. Also pursuant to Section 304 of the Clean Water Act, 33 U.S.C. §1311,
3 the EPA and the State have identified the City's facility as a point source, the discharges from
4 contribute to violations of applicable water quality standards.

5
6 V. ARGUMENT

7
8 A. 60 Day Notice Was Adequate

9 Defendant contends that the Court lacks jurisdiction because Plaintiffs failed to give a
10 proper sixty-day notice. Plaintiffs respond that Defendant should be estopped from raising this
11 issue at trial since it was previously decided by this Court in its Order RE Motion to Dismiss or
12 in the Alternative, for Summary Judgment, issued September 7, 1995.

13 Plaintiffs maintain that they gave more than adequate notice to the City to satisfy the
14 requirements of law. A one-paragraph letter setting forth in conclusionary terms the alleged
15 violation, is sufficient to technically satisfy the notice requirement. (33 U.S.C. §1365,
16 Environmental Law News, Vol.4, No. 2, pg. 10). The Plaintiff's notice in this case specified in
17 detail the limits violated, the location of the violations, and a range of dates during which these
18 violations took place.

19 The sixty-day notice provisions, such as the one in the Clean Water Act, were never
20 intended to act as roadblocks to citizen's suits. Susquehanna Valley Alliance v. Three Mile
21 Island, 619 Fd. 231, 243 (3d. Cir. 1980), cert denied, 449 U.S. 1096 (1981); Kitlutsisti v. ARCO
22 Alaska, Inc., 592 F. Supp. 832, 842 (D. Ak. 1984). The purpose of the notice provision is to
23 afford violators and government agencies an opportunity to resolve disputes before court action
24 is taken. Hallstrom v. Tillamook County, 493 U.S. 20, 31 (1989). "it is not meant to provide
25 defendants with a formalistic defense to a claim of continuing violation." Chesapeake Bay
26 Foundation v. Bethlehem Steel Corp., 608 F. Supp.440 at 450-51; Kitlutsisti, 592 F. Supp. at 842
27 (1984). Even in cases where statutory requirements were met, as long as the discharger had
28 actual notice of the alleged violation for more than 60 days, there is no prejudice to defendant,

1 and dismissal of the lawsuit because statutory notice was not given is unnecessary.
2 Susquehanna, 619 Fd. at 243 (complaint filed two days after notice served, but defendant had
3 actual notice of the alleged violation for more than sixty days); Chesapeake Bay Foundation v.
4 Bethlehem Steel Corp., 652 F. Supp. 620, 628 (D. Md. 1987); Allegheny County Sanitary Auth.
5 v. U.S. E.P.A., 557 F. Supp. 419, 427 (W.D. Pa. 1983), aff'd, 732 F.2d 1167 (3d. Cir. 1984).

6 Furthermore, the Ninth Circuit has clearly held that as to allegations in a complaint that
7 are "based upon [defendant's] own records and reported by [defendant] itself, [defendant] had
8 notice of those facts." Sierra Club v. Union Oil Co. of California, 716 F. Supp. 429, 432 (N.D.
9 Cal. 1988). Chesapeake, 608 F. Supp. at 451 ("As both the defendants and the regulators were
10 aware that Bethlehem remained in violation of the Act by continuing to discharge in excess of
11 permit limitations, and reported those discharges in its own reports, the requisite statutory notice
12 was given ...").

13 In the instant action, Plaintiffs initially served the City with notice of the allegations of
14 their complaint on February 22, 1995. Plaintiffs filed their complaint on May 9, 1995, seventy-
15 seven (77) days after service of the 60 day notice letter. The City has not suggested that its
16 conduct would have been different in regard to violations of its Permit, had it received more
17 detailed notice 60 days before the suit was commenced; or, that the absence of such notice has
18 caused it prejudice. Instead, the City continues to insist that it is not in violation of the Permit
19 (Exhibit 14, Stinebaugh Dec. 3:10-11, 4:1-28).

20 According to the City, it uses a VAX computer system and program written in fourth
21 generation language (4GL) to run spreadsheets for the self-monitoring reports. This program was
22 written by the City's own Department of Administrative Services. In order to find the violations
23 alleged in Plaintiffs' complaint, the City only needed to run a limited computer search on its own
24 self monitoring reports and records. Due to the City's obvious sophistication the City could have
25 easily found the violations complained of by Plaintiffs.

26 //

27 //

28 //

1 B. Plaintiffs Can in Good Faith Allege Either Continuous or Intermittent Violations

2 Defendant contends that the Court lacks jurisdiction because Plaintiffs cannot in good
3 faith allege either continuous or intermittent violation of the Clean Water Act. Again Plaintiffs
4 believe that Defendant should be estopped from raising this issue at trial since it was previously
5 decided by this Court in its Order RE Motion to Dismiss or in the Alternative, for Summary
6 Judgment, issued September 7, 1995.

7 Defendant's contention that Plaintiffs lack standing to sue because they cannot in good
8 faith allege that there are continuing or recurrent violations in the City's Waste Treatment
9 System is without merit. The City's violations of the Act are ongoing and continuous. The City
10 admits post-complaint violations in its briefs and self monitoring data. The City asserts that the
11 majority of its violations are wholly in the past and that this Court therefore has no jurisdiction to
12 hear this citizen enforcement action. Chesapeake Bay Foundation v. Gwaltney of Smithfield,
13 Ltd., 484 U.S. 49 (1987). ("Gwaltney I") Under the Gwaltney standard, citizen plaintiffs must
14 make a "good faith allegation of continuous or intermittent violations" to establish subject matter
15 jurisdiction. 484 U.S. at 64. To determine whether violations are wholly past, a court considers
16 whether the violations of the Act were reasonably likely to continue on the date the complaint in
17 the enforcement action was filed. Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.,
18 890 F.2d 690, 693 (4th Cir. 1989)("Gwaltney III"); Atlantic States Legal Foundation v. Tyson
19 Foods Inc., 897 F.2d 1128, 1134-35 (11th Cir. 1990). Citizen plaintiffs establish that violations
20 are reasonably likely to continue by satisfying a two part test: "either (1) by proving violations
21 that continue on or after the date the complaint is filed, or (2) by adducing evidence from which
22 a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or
23 sporadic violations." Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd., 844 F.2d. 170,
24 171-2 (4th Cir 1988)("Gwaltney II"), Sierra Club v. Union Oil Co of California, 853 F.2d 667,
25 671 (9th Cir. 1988).

26 The City admits that it continues to violate its Permit after the date the complaint in this
27 action was filed, up to and including the present time. Plaintiffs' complaint was filed on May 9,
28 1995. The City's self monitoring data, after the complaint was filed, shows 41 flow violations,

1 and 790 numeric effluent violations(Exhibit 16). The City's assertion that there are no
2 continuing or recurring violations upon which the complaint may be based is not supported by
3 any facts outside of the declarations of the Regional Board's staff and the City's own employees,
4 and is contrary to the evidence presented by Plaintiffs.

5
6 C. The Evidence Establishes a Continuing Likelihood Of A Recurrence Of Intermittent or
7 Sporadic Violations.

8 In analyzing the City's likelihood of continuing to violate its NPDES permit in the future,
9 Plaintiffs looked to the City's compliance. Plaintiffs could establish little or no correlation
10 between the City's prior installation of equipment or retention of consultants and compliance
11 with its NPDES permit. The specific parameters violated by the City over this five year period
12 vary from month to month, but viewed over the longer range clearly form a pattern of
13 continuing, intermittent, and ongoing exceedences of its NPDES Permit. Based on the City's
14 pattern of continuing violations, and the City's failure to take any successful measures to abate
15 its pollution, Plaintiffs submit that the City's illegal discharges of pollutants is virtually certain to
16 recur in the future. Plaintiffs sent the City a notice of intent to sue on February 21, 1995.
17 Additional violations reported during the notice period confirmed the ongoing nature of the
18 City's violations. The City made no modifications to its treatment system during the 60-day
19 period. Plaintiffs filed their complaint in this action on May 9, 1995.

20 All of the evidence currently available to Plaintiffs, including the City's self monitoring
21 reports, raw sampling data, and information about the City's wastewater treatment process,
22 indicated that the City would continue to violate its permit after May 9, 1995. In fact, Plaintiffs'
23 conclusion has been borne out by the City's continuing violations up to and including the
24 present.

25 In order to prevail on this issue, the City must demonstrate that it is "absolutely clear that
26 the allegedly wrong behavior could not reasonably be expected to recur." Gwaltney I, 484 U.S. at
27 66. Mere voluntary cessation of allegedly illegal activity in and of itself will not be sufficient.
28 U.S. v. Concentrated Phosphate Export Assn., 393 U.S. 199, 203. The City cannot carry the

1 heavy burden of showing no possibility of violations particularly when the City will not even
2 acknowledge its past violations.

3
4 D. This Court Has Jurisdiction Over All Violations Alleged

5 1. This court has jurisdiction over all the parameters in the City's discharge permit.

6 The two part jurisdictional test applied by the Ninth Circuit applies to violations of any
7 parameter in a discharger's permit. Once the Court has found under the two part test that
8 violations of one parameter of the Permit are ongoing, jurisdiction over all violations of that
9 permit attaches.

10 The federal circuits are split over the extent of a court's jurisdiction over violations of a
11 discharge permit in a citizen enforcement action. Two federal courts have applied a strict
12 "parameter by parameter" approach to jurisdiction, holding that the citizen/plaintiff must
13 demonstrate ongoing violations of each permit parameter to establish jurisdiction over that
14 parameter. *Gwaltney III*, 890 F.2d. 690, 696 (4th Cir 1987); *Allen County Citizens for Env't v.*
15 *BP Oil Co.*, 762 F.2d. 733, 739-41. At least three district courts in the third circuit, and one in
16 the ninth circuit, have applied a "permit" test for jurisdiction, finding that where violations of
17 one parameter of a discharge permit are ongoing, the court has jurisdiction over all violations of
18 the permit, including wholly past violations. *NJPIRG v. Elf Atochem Inc.*, 817 F.Supp. 1164,
19 1176 (D.N.J. 1993); *NJPIRG v. Yates Industries*, 790 F.Supp. 511, 515-516 (D.N.J. 1991);
20 *NJPIRG v. Hercules Inc.*, 830 F.Supp 1525, 1534 (D.N.J. 1993); *Sierra Club v. Port Townsend*
21 *Paper Corp.*, 28 Env't Rep.Cases (BNA) 1676, 1678 (W.D. Wash. 1988). Finally, at least two
22 court have applied a "modified by parameter" jurisdictional test, finding jurisdiction over
23 violations of individual parameters that continue after the date of filing, or by proving that the
24 source of violations causing recurring exceedences of one or more parameters had not been
25 completely eradicated. *NRDC v Texaco Refining and Marketing, Inc.*, 2 F.3d 493, 498 (3d
26 Cir.1993); *Sierra Club v. Union Oil*, 716 F.Supp. 429, 432 (N.D. Calif., 1988).

27 Plaintiffs submits that the applying the permit test is most consistent with the purposes of the
28 Act. Congress intended that enforcement of permit violations under the Act be streamlined by

1 avoiding lengthy fact finding proceedings. The jurisdictional inquiry envisioned by the Supreme
2 Court in Gwaltney I was quick and cursory, not the detailed factual analysis required by either
3 of the parameter based tests. Permit violations in one parameter almost invariably indicate
4 recurring compliance problems with other parameters. Finally, if the causes of past violations of
5 parameters in the discharge permit have in fact been completely eradicated, in those violations
6 will be found to be moot and will be eliminated from the enforcement action at trial.

7
8 2. The Ninth Circuit Does Not Apply a Parameter by Parameter Test to Ongoing Violations.

9 In Sierra Club v. Union Oil, 853 F.2d 667, the Ninth Circuit limited its analysis to a
10 determination of when intermittent or sporadic violations stop being considered ongoing, and
11 adopted the two part Gwaltney III standard. Specifically, the Court held that a discharger's
12 violations are no longer ongoing where the risk of continued violations has been completely
13 eradicated when citizen-plaintiffs filed suit. Sierra Club at 671.

14 On remand, Northern District applied the 9th Circuit's two part standard to Union Oil's
15 violations. The District Court specifically rejected a parameter by parameter approach. Sierra
16 Club v. Union Oil, 716 F.Supp. 429, 432 (N.D.Calif.(1988)). The Court stated:

17 "The Court will find a violation "ongoing" by comparing self-reported exceedences before the
18 complaint was filed and afterward. If the same parameter is exceeded, or a violation recurs and
19 the cause has not been completely eradicated, then the violation will be deemed "ongoing" and
20 liability will attach." Id.

21 The Court then found that Union Oil had not demonstrated that its violations would never
22 be repeated, and that all seventy four violations in all parameters were ongoing.

23 The other district court in the Ninth Circuit that has addressed the scope of the federal court
24 jurisdiction over a Clean Water Act permit also rejected the parameter-by-parameter approach.
25 In Sierra Club v. Port Townsend, the Western District of Washington held that an NPDES permit
26 applies to the discharger, not a particular outfall or type of violation. As the Court explained:
27 "[T]he [defendant] also contends that the plaintiff can only pursue this action for the types of
28 violations that continue to recur at a defendant's facility. Specifically, the [defendant] argues

1 that the plaintiff cannot succeed on its claims for violations at certain outfalls where there have
2 been no permit violations since this suit was filed. There is no basis in either the [Clean Water
3 Act] or in judicial interpretations of the Act to justify the defendant's position. The [Clean
4 Water Act] permit[s] citizen suit actions against entities that are in violation of their permits, and
5 it does not limit such actions to the particular types of violations that continue to occur. As the
6 plaintiff points out, NPDES permits apply to polluters, not to Outfalls. Furthermore, the
7 Supreme Court has emphasized that intermittent violators are as significant a threat to water
8 quality as are continuous violators. See Gwaltney, 108 S.Ct. at 384."

9
10 3. Even if the Modified By Parameter Test is Adopted by This Court, the City is Liable for
11 All Violations Because the Risk of the City's Ongoing Violations Had Not Been Completely
12 Eradicated When Plaintiff Filed This Action.

13 Under the modified by-parameter approach, however, a plaintiff can establish at trial that
14 violations are continuous or intermittent in either of two ways: first, by proving a likelihood of
15 recurring violations of the same parameter; or second, by proving a likelihood that the same
16 inadequately corrected source of trouble will cause recurring violations of one or more different
17 parameters.

18 In cases decided since the Court's decision in Gwaltney I, courts of appeals have
19 consistently held that plaintiffs can establish that violations are continuous or intermittent "either
20 (1) by proving violations that continue on or after the date the complaint is filed, or (2) by
21 adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a
22 recurrence in intermittent or sporadic violations." Gwaltney II, at 171,172; Carr v. Alta Verde
23 Indus., Inc., 931 F.2d 1055, 1062 (5th Cir. 1991); Sierra Club v. Union Oil Co. of California,
24 853 F.2d 667, 671 (9th Cir. 1988). As the use of the disjunctive makes clear, a plaintiff need not
25 prove both that a post-complaint violation has occurred and that independent evidence proves a
26 continuing likelihood of recurring violations. Either method of proof will suffice. Proof of one or
27 more post-complaint violations is itself conclusive, Carr, supra at 1065.

28

1 A continuing likelihood of intermittent or sporadic violations exists until there is "no real
2 likelihood of repetition." Gwaltney II, supra at 172; Union Oil, supra at 671. A real likelihood of
3 repetition remains so long as a discharger has failed to take remedial measures that clearly
4 eliminate the causes of the violations. Gwaltney I, at 69.

5
6 E. None of the Claims Brought By Plaintiffs Are Moot

7 Principles of mootness preclude a court from adjudicating claims that no longer present a
8 concrete and substantial controversy capable of being redressed through specific relief. United
9 States v. Michigan Nat'l Corp., 419 U.S. 1, 4; 95 S. Ct. 10, 11. Thus, the doctrine of mootness
10 controls whether a citizen-plaintiff may maintain a suit if the allegations of ongoing permit
11 violations cannot be established because "the allegedly wrongful behavior [of the defendant]
12 could not reasonably be expected to recur." United States v. Concentrated Phosphate Export
13 Ass'n, 393 U.S. 199, 203; 89 S. Ct. 361, 364. The Gwaltney I Court, in dicta, observed:

14 "Longstanding principles of mootness . . . prevent the maintenance of suit when "there is no
15 reasonable expectation that the wrong will be repeated." In seeking to have a case dismissed as
16 moot, however, the defendant's burden "is a heavy one." The defendant must demonstrate that it
17 is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to
18 recur." Mootness doctrine thus protects defendants from the maintenance of suit under the Clean
19 Water Act based solely on violations wholly unconnected to any present or future wrongdoing,
20 while it also protects plaintiffs from defendants who seek to evade sanction by predictable
21 "protestations of repentance and reform." Gwaltney I, at 66-67.

22 Claims for penalties survive even though the corresponding claims for injunctive relief
23 become moot. Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corporation, 993
24 F.2d 1017 (2d Cir. 1993) "We hold . . . that a defendant's ability to show, after suit is filed but
25 before judgment is entered, that it has come into compliance with limits on the discharge of
26 pollutants will not render a citizen suit for civil penalties moot."; Atlantic States Legal
27 Foundation, Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1135-37 (11th Cir. 1990) "If the parties
28 are able to make a valid request for injunctive relief at the time the complaint is filed, then they

1 may continue to maintain a suit for civil penalties, even when injunctive relief is no longer
2 appropriate."; Gwaltney III, 890 F.2d at 696 "The penalty factor keeps the controversy alive
3 between plaintiffs and defendants in a citizen suit . . . even though the ultimate judicial remedy is
4 the imposition of civil penalties assessed for past acts of pollution."

5 In NRDC v. Texaco, 2F.3d 293; (3rd. Circuit 1993) the court found the reasoning in Pan
6 American Tanning, Tyson Foods and Gwaltney III persuasive, and held that claims for damages
7 are not moot because an intervening NPDES permit eliminates any reasonable possibility that
8 the discharger will continue to violate specified parameters. It makes no difference that the
9 City's post-complaint compliance was a result of a new, more lenient NPDES permit instead of
10 the City affirmatively taking steps to reduce its toxic discharge. While a polluter awaits changes
11 in permit conditions, it is strictly bound by the terms of the effective permit. Train v. Natural
12 Resources Defense Council, Inc., 421 U.S. 60, 92; 95 S. Ct. 1470 (1975); NRDC v. Texaco, 2F
13 3d 493, 504 (1993).

14 The language and structure of the Clean Water Act support our view. The Act states that
15 any person who violates a permit condition "shall be subject to a civil penalty." 33 U.S.C. §
16 1319(d). This mandatory language demonstrates that once a citizen plaintiff establishes an
17 ongoing violation of a parameter at the time the complaint is filed, the court is obliged to assess
18 penalties for all proven violations of that parameter. Pan American Tanning, 993 F.2d 1017;
19 Gwaltney III, 890 F.2d at 697. Allowing a polluter to escape all liability through post-complaint
20 compliance is at odds with the mandatory language of section 1319(d).

21 A citizen suit would lose much of its effectiveness if a defendant could avoid paying any
22 penalties by post-complaint compliance. Pan American Tanning, 993 F.2d 1017; Tyson Foods,
23 897 F.2d at 1136-37. If penalty claims could be mooted, polluters would be encouraged to "delay
24 litigation as long as possible, knowing that they will thereby escape liability even for
25 post-complaint violations, so long as violations have ceased at the time the suit comes to trial."
26 Tyson Foods, 897 F.2d at 1137. Moreover, whether or not damage claims are mooted would
27 depend on the vagaries of when the district court happens to set the case for trial. Such a rule
28 would weaken the deterrent effect of the Clean Water Act by diminishing incentives for citizens

1 to sue and encourage dilatory tactics by defendants. Pan American Tanning, 993 F.2d 1017;
2 Tyson Foods, 897 F.2d at 1137.

3
4 F. The Defendant has Violated its NPDES permit pursuant to 33 U.S.C. §1311(a), 33 U.S.C.
5 §1342, and 33 U.S.C. §1365(a)

6 Plaintiffs contend that five years prior to Plaintiffs' notice letter to the present,
7 Defendants violated its NPDES Permit 413 times in regard to discharge prohibition A(8), A(9)
8 and B(3) (Exhibit 16) in that it discharged wastewater prior to meeting the requirements of the
9 Permit or in excess of the amounts allowed in the Permit.

10
11 1. Release Prior to Receiving Authorization When Russian River Flow is Below 1000 CFS

12 According to its Permit the City is prohibited from discharging to the Russian River
13 between May 15 and September 30 each year. Prior to commencing discharging for any given
14 season the City must wait until the flow of the Russian River reaches 1000 cubic feet per second
15 (cfs) (Exhibit 2, 1990 NPDES Permit pg.8). Under certain circumstances the City can release
16 prior to the River flow reaching 1000 cfs. Those criteria are set forth in section B(3) of the
17 permit. If the City wishes to release prior to the Russian River reaching 1000 cfs it must obtain
18 authorization from the Regional Board or its Executive Officer. The authorization shall be based
19 on evidence that justifies the necessity for the discharge and shows that all beneficial uses of the
20 Russian River and its tributaries will continue to be protected. The permit specifies that this
21 evidence is to be in documentary form (Exhibit 2, 1990 NPDES Permit pg.8). The City submits
22 such a request in writing to the Regional Board. The Regional Board in turn sends the City
23 written authorization to begin a release. An identical process is required if the City wishes to
24 release in amounts greater than 1% and up to 5% of the flow of the Russian River (Exhibit 2,
25 1990 NPDES Permit pg.8).

26 Plaintiffs examined the dates of annual letters, from the Regional Board's Executive
27 Director to the City, authorizing releases prior to the Russian River flow of 1000 cfs and have
28

1 concluded that the City violated its NPDES Permit 34 times during the period previously
2 proscribed (Exhibit 16).

3
4 2. Releases of flow above 1% prior to authorization.

5 The Permit prohibits discharges greater than 1% of the flow of the Russian River except
6 when authorized by the Regional Board under circumstances detailed in Section B(3) of the
7 Permit. The Plaintiffs contend that the City violated its Permit by releasing at greater than 1%
8 prior to meeting this criteria at least 63 occasions.

9 The City determines the total allowable daily discharge by taking the previous day's
10 highest hourly flow as recorded by the USGS Gauge No. 11-4670.00 at Hacienda Bridge and
11 multiplying that volume by 24 (Exhibit 14, Vath depo 66:22-26, 67:1; Exhibit 17). These flows
12 are then averaged over a seven day period running from Friday to Thursday to determine
13 compliance with the terms of the NPDES Permit (Exhibit 14, Vath depo 63:17-21). Plaintiffs
14 can find no basis in proceedings leading to the 1990 Permit, previous permits, testimony,
15 specific intent of the Regional Board, or the law, which justifies this interpretation of calculating
16 flows for purposes of compliance.

17 Plaintiffs contend that releases should be made on the basis of same day average flow,
18 and compliance measured on a daily rather than weekly basis. The 1990 Permit itself states,
19 "During the period October 1 through May 14 of each year, discharge shall be limited to one
20 percent of the flow of the Russian River....." (Exhibit 2, 1990 NPDES Permit, pg. 8). This
21 language is identical to the 1986 Permit. The staff of the Regional Board when drafting permits
22 looks to guidelines set forth in State Water Resources Control Board Administrative Procedures
23 Manual ("SWRCB PM"). In that manual under water quality Chapter 1 entitled National
24 Pollutant Discharge Elimination System (NPDES) Permits, under Effluent Limitations, it states
25 "Effluent limitations shall be specified in a technically correct and precise manner." (Exhibit 18).
26 It is Plaintiffs contention that the language "discharge shall be limited to one percent of the flow
27 of the Russian River" should be interpreted on its face to mean 1% of the flow of the Russian
28

1 River at the time of discharge. Plaintiffs' interpretation is supported by substantial records from
2 the Regional Board, other agencies and the public.

3 In a letter dated March 15, 1994, for the first time the executive officer, Ben Kor,
4 revealed to Brenda Adelman how flow compliance is determined, he states that the discharge
5 rates are intended to meet the requirements contained in the State Department of Health Services
6 Uniform Guidelines for Sewage Disinfection (UGWD) (Exhibit 17).

7 In a letter dated July 17, 1990 according to the Department of Health Services, "It is the
8 intent of the UGWD that dilutions be calculated using stream flow at the time the discharge is
9 taking place rather than on an average minimum flow." (Exhibit 19)

10 Resolution No. 86-22, dated January 29, 1986, amending the water quality control plan
11 for the North Costal Basin states that, "All discharges, when permitted shall be at a ration of
12 Russian River to treatment effluent of not less than 100:1." (*emphasis added*) (Exhibit 20). Not
13 less than 100:1 is the same as no greater than 1%.

14 The Executive Officer's Summary Report, 9:00 a.m., February 27, 1986 states, "To
15 emphasize the fact that discharges of wastewater must be minimized, staff is recommending that
16 the combined discharge of advanced treated effluent and secondary effluent should not exceed
17 one percent of the river's flow at anytime. Accordingly, we have incorporated the following
18 language into proposed Resolution No. 86-45.

19 In no case when secondary treated wastewater is discharged in combination with advanced
20 treated wastewater shall the total discharge exceed one percent of the flow of the Russian River."
21 (*emphasis added*) (Exhibit 21)

22 The 1990 Permit contained the same discharge restrictions despite the fact that only
23 advanced treated waste water was allowed to be discharged.

24 In a meeting between the Regional Board Staff, the City, and City consultants, it was
25 discussed and acknowledged that the current discharge basis was not formally adopted or
26 approved. "Discharge amount is based on peak flow from the previous [day]. Concern has been
27 expressed that this basis may be inappropriate and not protective of beneficial uses. Further, this
28

1 in favor of average flow in the 1995 permit (Exhibit 14, Vath depo 69:1-4). The reason given
2 was the Regional Board staff's recognition that average flow was more accurate than peak flow
3 and peak flow would always lead to greater discharges. (Exhibit 14, Vath depo 69:24-26; 129:1-
4 9)

5 In January of 1986 the EPA determined that the City of Santa Rosa violated its NPDES
6 Permit by discharging at greater than 1% of the flow of the Russian River. From the EPA's
7 Findings of Violation and Order for Compliance it is clear that the EPA considered the 1% a
8 daily limit and not a weekly average (Exhibit 9).

9 "At anytime", "each discharge" cannot be construed to mean "peak flow, averaged over 7
10 days measured from Friday to Thursday". In light of the plain language of the Permit, its clear
11 intent, and the City's prior history, it is Plaintiffs' contention that the City's calculation
12 discharges that exceeded 1% of the flow of the Russian River (discharged prior to the City
13 receiving authorization for higher releases) constituted 63 violations of the City's permit in
14 regard to this one limitation.

15
16 3. Discharges larger than 5% of the Russian River Flow.

17 The Permit carries an absolute prohibition against discharges of wastewater in excess of
18 5% of the flow of the Russian River (Exhibit 2, 1990 NPDES Permit pg. 6). The Plaintiffs
19 contend that the City violated its Permit by releasing at greater than 5% on at least 74 occasions.

20 As with the 1% limitation, the City interprets the 5% daily flow limitation to mean 5% of
21 the previous day's hourly peak flow. Since the City takes the previous day's peak flow their
22 daily allowable release would be equivalent to taking this peak flow and multiplied by 24. The
23 City does not consider itself in violation for any exceedences over 5% unless we take the peak
24 flow, averaged over seven days, measured from a Friday to the following Thursday of any given
25 week. This interpretation is given despite the explicit language of Discharge Prohibition A(9) on
26 the Permit which states, "In no case shall any discharge of wastewater exceed 5% of the flow of
27 the Russian River." (*emphasis added*) (Exhibit 11, 1986 NPDES Permit, pg. 6; Exhibit 13, 1995
28 NPDES Permit pg.7) The permit does not say discharge volume, or total discharge volume, or

1 weekly averaged discharge, it specifically says "any discharge" and "in no case". Plaintiffs can
2 find no basis in the proceedings leading to the 1990 Permit, previous permits, testimony, specific
3 intent of the Regional Board, or the law which justifies this interpretation of calculating flows for
4 purposes of compliance.

5 Prior to the 1986 permit the City was restricted to discharges no greater than 1% of the
6 flow of the Russian River. The evidence will show that this increased allowance[?] was given to
7 the City over enormous public protest. (Exhibit 10) As discussed previously, after the Big Spill,
8 the City of Santa Rosa was required to come up with a Long Range Plan for waste disposal.
9 After the Big Spill the City promised it would get out of the River altogether and as part of an
10 interim solution pending the finalization of a Long Range Plan, the City was allowed to
11 discharge up to 5% under very limited circumstances. In a typical authorization letter the
12 Executive Officer for the Regional Board stated the Board's conditional authority as follows, "I
13 have reviewed your November 30, 1990 report requesting authorization to discharge effluent
14 from the Laguna Subregional Wastewater Reclamation Facilities to the Laguna de Santa Rosa at
15 rates up to 5% of the flow of the Russian River. I am hereby authorizing increased effluent
16 discharges in accordance with your request. Discharges exceeding 1% of the River's flow
17 should be made at the minimum rates necessary to assure consistent compliance. In no case
18 shall effluent discharges exceed 5% of the flow of the River." (*emphasis added*)(Exhibit 24)

19 The Uniform Guidelines for Wastewater Disinfection (UGWD) recommends that no
20 discharge take place to a fresh water river used as a domestic water source when the discharge
21 would make up more than 5% of the total flow. This five percent is intended to be an upper limit
22 not to be exceeded. (Exhibit 19). When the City discharges on successive days the river might
23 already contain 5% (and sometimes more under the peak flow/ Friday to Thursday average) and
24 successive discharges even staying below 5% on a daily basis will exceed the UGWD guidelines.

25 The City's interpretation leads to absurd results and an opportunity for gross abuse. As
26 an example, under the City's interpretation it could release at 35% of the flow of the Russian
27 River on Thursday and again release 35% on Friday, provided no releases were made the
28 previous 6 days, and no releases were made for the rest of the week. The evidence will show