Deborah R. Rosenthal (#184241)
drosenthal@simmonsfirm.com
Benjamin D. Goldstein (#231699)
bgoldstein@simmonsfirm.com
SIMMONS BROWDER GIANARIS ANGELIDES & BARNERD LLC
455 Market Street, Suite 1150
San Francisco, California 94105
Phone: (415) 536-3986
Fax: (415) 537-4120

Jessica Culpepper (*pro hac vice*)
jculpepper@publicjustice.net
Leah Nicholls (*pro hac vice*)
lnicholls@publicjustice.net
PUBLIC JUSTICE, PC
1825 K Street NW, Suite 200
Washington DC 20006
Phone: (202) 797-8600
Fax: (202) 232-7203

Elisabeth Holmes, Esq. *(pro hac vice)*
BLUE RIVER LAW, PC
P.O. Box 293
Eugene, Oregon 97440
eli.blueriverlaw@gmail.com
Phone: (541) 870-7722

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BERNADETTE BLACKWOOD, individually and as guardian ad litem for K.B. and E.B., et al.,
Plaintiffs,
v.

MARY DE VRIES, individually and dba N&M DAIRY (aka N&M DAIRY # 1 and N&M DAIRY # 2) and as trustee of the NEIL AND MARY DE VRIES FAMILY TRUST; et al.,
Defendants.

Case No.: ED CV 14-00395 JGB SPx

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS ON GROUNDS THAT THE COURT SHOULD DECLINE TO EXERCISE JURISDICTION

DATE: JULY 21, 2014
TIME: 9:00 A.M.
COURTROOM 1; HON. JESUS G. BERNAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

LEGISLATIVE HISTORY

I. INTRODUCTION

After years of harmful and unlawful waste management practices, N&M Dairy #1 and #2 ("N&M Dairy" or "Defendants") ceased operations, leaving behind a community that suffered for years and a plume of contaminated soil that, if left unremediated, will continue to expose the community to hazardous pollutants for decades to come. Enforcement and settlement actions by the Lahontan Regional Water Quality Control Board ("Water Board") have brought some relief to the community, but Plaintiffs remain aggrieved, and many of them are still unable to drink or use their well water for ordinary household purposes due to the harm that N&M Dairy caused to the source of their water, the aquifer.

Plaintiffs rightfully bring claims of environmental contamination, trespass, and nuisance before this Court, seeking redress for injuries and damages that they have suffered and are continuing to suffer as a result of the Defendants' unlawful mishandling of solid waste, in violation of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq*., and state tort law. Plaintiffs' First Amended Complaint ("FAC") asks this Court to (1) declare that Defendants' past and/or present handling, storage, and disposal of solid waste presents an imminent and substantial endangerment to health and the environment, (2) order Defendants to take all actions necessary to eliminate this endangerment, and (3) award Plaintiffs compensatory, punitive, and exemplary damages. Docket No. 26 at 44-45.

Because this Court's determination of the RCRA and state tort claims would not interfere with Water Board proceedings nor its enforcement of its Cleanup and Abatement Order ("CAO"), abstention is inappropriate in this case. For this reason, and because determination of the matters before this

court best serve the interests of justice and expedience, Defendants' motion should be denied.

II. STATEMENT OF FACTS

A. N&M Dairy

N&M Dairy is a 909-acre property in Helendale, California, comprised of two adjacent dairy facilities that operated from at least 1992. FAC ¶¶ 49-50. Defendants' dairy functioned as a concentrated animal feeding operation ("CAFO"), subject to federal and state regulations, before it closed in 2013. For years before its closure, Defendants operated their CAFO in a manner that violated numerous state and federal laws. *See, e.g.*, FAC ¶¶ 60-68, 77, 79, 89-98, 114-117, 129-133. Defendants' manure and animal management practices yielded documented, extensive groundwater and soil contamination, flies, and noxious odors. *See* FAC ¶ 60, 77, 79, 81, 89, 90, 92-98, 103-108, 114. N&M Dairy is located upgradient of Plaintiffs' properties by approximately 1/8 to 1/2 miles west. FAC ¶ 56.

The N&M Dairy and its manure disposal areas are located on the same groundwater basin from which Plaintiffs' residential wells draw. FAC ¶ 55. N&M Dairy is located on soils that have high permeability to about 140 feet deep and are considered by the State of California to be at a high risk of nitrate leakage. FAC ¶ 57.

From at least 2004, Defendants stored and dumped manure far exceeding what the property could manage. FAC ¶ 160. During operations, the 4,500-cow facility stored close to 100,000 tons of manure onsite, and waste lagoons that collected over 30 million gallons of waste water every year; manure was left in piles on the ground for months on end, dumped on fields in levels far above what the crops could absorb, and allowed to spill out and

leak beneath overflowing, unlined pits. FAC ¶¶ 61, 62, 79. These actions caused the pollutants present in the waste, such as nitrates, to contaminate the soil and leach into the groundwater—and Plaintiffs' well water—below. FAC ¶ 66. Over the years, the waste created a nitrate "plume" beneath the property that will take decades to filter out naturally from the soil and groundwater if remediation is not undertaken. FAC ¶¶ 90, 107-108.

This same excess manure (and the improper management of it) that contaminated the soil and groundwater, as well as dead animals left decomposing on the property, created a breeding ground for flies and odors, which impacted the adjacent residential community. FAC ¶¶ 1, 113, 164. Noxious odors from decomposing manure irritated Plaintiffs' eyes, noses, and lungs and caused headaches and other symptoms. FAC ¶ 113.

Similarly, flies that bred on Defendants' property routinely invaded Plaintiffs' homes to such an extent that it was impossible for Plaintiffs to live their lives normally. FAC ¶ 119. Outside, Plaintiffs were unable to work or recreate because they were bitten and disturbed by ubiquitous flies. FAC ¶¶ 119-121, 124. Inside, flies, and the sticky residue that their bodily processes create, covered Plaintiffs' food and drink, eating surfaces, walls, appliances, windows, and doors. FAC ¶¶ 121-124.

B. Administrative Proceedings

Defendants' misconduct brought years of complaints from residents in the neighboring community as well as attention from the San Bernardino County Department of Public Health and the Water Board. For years the Water Board engaged in repeated efforts to bring the facility into compliance with the California Water Code, finding that N&M Dairy's excess manure was causing nuisance conditions and contaminating the community aquifer,

but Defendants' violations continued. FAC ¶ 129. Ultimately, Defendants closed N&M Dairy. FAC ¶¶ 134-136.

The Water Board's 2013 CAO found that Defendants discharged waste into the groundwater beneath and downgradient of the N&M Dairy to such an extent that the "affected groundwater is no longer useable for drinking or domestic supply purposes." FAC ¶ 138. The Water Board ultimately entered into a settlement with Neil and Mary De Vries, and the Neil and Mary De Vries Living Trust that requires groundwater monitoring and reporting and directs the Dairy to provide replacement water to affected residents whose water measures above U.S. Environmental Protection Agency's ("EPA") maximum contaminant level ("MCL") of 10mg/L for nitrates. *Id*. The 2013 CAO also requires N&M Dairy to remove any remaining waste manure from the property, pay a fine to the State, and engage in a supplemental environmental project. FAC ¶¶ 134, 135, 138. At this time, Plaintiffs do not know whether all the manure and sludge waste has been fully removed from the facility, or whether composting is still occurring onsite.

C. This Proceeding

Plaintiffs properly filed this environmental contamination, trespass, and nuisance suit, seeking declaratory and injunctive relief and compensatory and punitive damages against the owners and operators of N&M Dairy, in the district where Defendants operated their dairy in a harmful manner.

Plaintiffs bring this suit because the Water Board's enforcement action "does not provide for the remediation of the RCRA violations identified in the notice nor does it compensate the Plaintiffs for their damages and injuries as alleged herein." FAC ¶ 12. Extensive soil and water

contamination remains, and Plaintiffs are entirely reliant on Defendants for clean drinking water—and will be for decades to come—if Plaintiffs' RCRA claim fails. FAC ¶¶ 100, 101, 105, 106, 108, 131, 138, 139, 150.

Plaintiffs obtained a copy of the 2013 CAO in the last week of August 2013, served Notices of Intent to Sue on September 6, 2013, served comments on October 4, 2013, and filed this lawsuit on March 5, 2014 after the Water Board made clear in its response to the community's comments that it could not provide them with the additional relief they sought. *See* FAC ¶ 12; Docket No. 1; Decl. of Jessica Culpepper in Supp. of Pls.' Opp'n to Defs.' Mot. to Dismiss. The agency required Defendants to provide alternative water but lacked authority to dictate the method of that provision, or to protect *Plaintiffs'* interest in the use and enjoyment of clean water from the aquifer. Furthermore, the Water Board stated that it "***does not have general authority to abate nuisance or assure the protection of public health***." FAC ¶ 118 (emphasis added).

A close comparison of the FAC and the CAO demonstrates that, contrary to Defendants' assertions, Plaintiffs bring claims and seek relief that the CAO did not and could not have addressed. The FAC requests:

- A declaration that "Defendants' past and/or present generation, handling … and/or disposal of solid waste presents, or may present, an imminent and substantial endangerment to public health and the environment." FAC at 44:11-14. ***The CAO does not, and the Water Board cannot, make such a determination***. FAC ¶ 118; Docket No. 34-1 at 7:18-21.
- Relief requiring Defendants to take all actions necessary to eliminate endangerment and nuisances, including a remediation plan to (1) stop the contaminated soil on the property from leaching nitrates into the

groundwater, and (2) to ensure that groundwater is safe to drink. FAC at 44:26-28, 45:1-3; Docket No. 34-1 at 9:1-5. ***The CAO does not require any actual remediation of soil or groundwater***, and therefore fails to abate the imminent and substantial endangerment caused by N&M Dairy and fails to ensure that Plaintiffs have access to clean well water, whether through remediation or treatment systems.

- An Order providing a permanent independent source of safe drinking water.[1] ***The CAO mandates clean water delivery but cannot not dictate the method of delivery.*** Defendants have chosen to deliver bottled water. This leaves Plaintiffs dependent on the Defendants for clean water for decades to come, which is precisely what Plaintiffs contest.[2]
- An Order implementing heightened control of flies, odors, and other pests that come from N&M Dairy. FAC at 45:7-10; FAC ¶¶ 110-113, 118, 160, 161. ***The Water Board has no authority to require Defendants to implement measures to stop this nuisance beyond enforcing removal of the manure***. FAC ¶ 118.
- A damages award to Plaintiffs for their loss of use and enjoyment of their property. FAC at 45:10-11. ***The CAO provides no compensation to Plaintiffs for their injuries and damages***.

Plaintiffs' federal lawsuit thus seeks relief outside the scope of the CAO, and this Court's adjudication of the matters alleged in Plaintiffs' FAC will

[1] This relief could, for example, be in the form of reverse osmosis systems (and a fund to pay for necessary maintenance), remediating the groundwater, or installing a deeper well.

[2] Defendants' bottled water delivery has been unreliable and quantitatively insufficient in the past, which interferes with their free use and enjoyment of their property, including their well water.

not disrupt nor interfere with the Water Board proceedings. Defendants argue that the terms of the CAO, the closure of the dairy, and provision of bottled water somehow moot out all of Plaintiffs' claims, but the CAO will not stop the plume beneath N&M Dairy from continuing to pollute the groundwater for decades to come.

III. STATUTORY BACKGROUND

A. RCRA

The purpose of RCRA is "to promote the protection of health and environment," and it seeks to accomplish that goal by "prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health." 42 U.S.C. § 6902(a).

Section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B), provides that citizens may commence a citizen suit against "any person," as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6972(a)(1), "including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment."

RCRA citizen suits alleging endangerment are subject to only two limitations—(1) written notice prior to filing suit, and (2) preclusion where a state or federal agency is diligently prosecuting a civil action, engaged in a cleanup or removal action under CERCLA, or brought an imminent hazard action under RCRA. 42 U.S.C. § 6972(b)(2)(B), (C). The Water Board's

actions do not constitute "diligent prosecution." *See Gilroy Canning Co. v. California Canners & Growers*, 15 F. Supp. 2d 943, 946-47 (N.D. Cal. 1998) (holding that an agency's orders, including settlements, under state law are considered state administrative action, and do not constitute diligent prosecution under 42 U.S.C. § 6972(a)(1)(B)).

EPA regulations set the MCL for nitrates at 10 mg/L. 40 C.F.R. § 257, App. I (RCRA's MCLs for solid waste). EPA determined that consuming water above 10 mg/L of nitrates in water can cause adverse health effects. *See* 56 Fed. Reg. 3526-01 (1991) (recognizing that nitrates are toxic because it can cause a number of health conditions, which can, among other things, leave infants seriously ill or even kill them). Thus, unlike the California Water Code, RCRA's focus is exclusively on health and the environment, without the restraints on human health posed by the "total values" (including economic values) considered by the Water Board. *See* Cal. Water Code § 13000.

B. California Water Code

The California Water Code regulates the "conservation, control, and utilization of the water resources of the state" and "protect[s] the quality of waters in the state." Cal. Water Code §§ 13000, 13001. The State Water Resources Control Board and its regional arms, derive their authority from, and implement the provisions of, the Water Code. Cal. Code Regs. tit. 23, § 641; Cal. Water Code § 13000 *et seq*. The Water Board works with the California Department of Toxic Substances Control to regulate hazardous substance releases from a water quality standpoint. *See, e.g.*, Cal. Health & Safety Code § 33459; Cal. Water Code § 13307. But water quality is distinct from human health; it refers to the "chemical, physical, biological,

bacteriological, radiological, and other properties and characteristics which affect its use." Cal. Water Code § 13050(g).

The Water Code specifically states that "No provision of this division or any ruling or the state board or a regional board is a limitation . . . on the right of any person to maintain at any time any appropriate action for relief against any private nuisance as defined in the Civil Code or for relief against any contamination or pollution." Cal. Water Code § 13002.

IV. LEGAL ARGUMENT

A. Standard of review on Rule 12 motion to dismiss.

In resolving a motion to dismiss, the Court must identify the well-pled facts and then determine if those facts, accepted as true, state a claim that is plausible. If so, dismissal is improper. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007); *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013).

However, Defendants do not challenge the sufficiency of the factual allegations here. Instead, they contend that the Water Board proceedings to bring the N&M Dairy owners into compliance with California Water Code provisions create a basis for this Court to abstain from determining the Plaintiffs' claims under RCRA and pendent state tort claims of trespass and nuisance.

B. Abstention is inappropriate in this case.

Federal courts have a "virtually unflagging obligation" to exercise the jurisdiction vested in them by Congress. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The abstention doctrine exists to allow federal courts to refrain from exercising jurisdiction "where denying a federal forum would clearly serve an

important countervailing interest." *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 174 (1997). Circumstances where abstention is permissible are "carefully defined" and "remain the exception, not the rule." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989) ("*NOPSI*").

Abstention is particularly inappropriate in this context because where plaintiffs seek relief to "complement and enhance" the efforts of an administrative agency, "as citizen suits brought under RCRA should," abstention should not be "used to block the plaintiffs from pursuing the avenues that Congress gave them in RCRA." *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 506-07 (7th Cir. 2011); *see* H.R. Rep. No. 98-198, pt. I, at 53 (1983) (citizen suits "complement, rather than conflict with" agency enforcement of the law). "Congress has not provided that citizen suits are barred whenever an administrative action is underway or simply because there may be some duplication with a government proceeding." *Arkansas Wildlife Fed'n v. Bekaert Corp.*, 791 F. Supp. 769, 775 (W.D. Ark. 1992) (in context of CWA). This "careful structure of federal court jurisdiction under RCRA makes [courts] distinctly reluctant to countenance abstention." *Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 31 (1st Cir. 2011). Given that Congress specifically envisioned that RCRA, a federal law, would be adjudicated via suit in federal court, "the circumstances justifying abstention will be exceedingly rare." *Id.* at 32.

1. *Burford* abstention is inappropriate because the federal and state claims can be resolved without disrupting the Water Board proceedings.

Burford abstention permits federal courts, in narrow circumstances, to

decline to exercise jurisdiction where the federal court's adjudication would grossly interfere with a state administrative regime. *Burford v. Sun Oil Co.*, 319 U.S. 315, 334 (1943). *Burford* "does not require abstention whenever there exists such [a complex administrative] process, or even in all cases where there is a potential for conflict with state regulatory law or policy." *NOPSI*, 491 U.S. at 362 (internal quotation omitted).

In the Ninth Circuit, *Burford* abstention has been limited to cases in which the facts closely resemble those of *Burford* itself, which involved direct review of a state agency decision on a complex, novel issue of state law, review that state-law funneled into a particular state court. *Burford*, 319 U.S. at 325, 332, 334; *see, e.g., Int'l Bhd. of Elec. Workers v. Pub. Serv. Comm'n,* 614 F.2d 206, 211 (9th Cir.1980). In this Circuit, *Burford* abstention is only appropriate where: (1) "the state has chosen to concentrate suits challenging the actions of the agency involved in a particular court;" (2) "the federal issues could not be separated from the complex state law issues with respect to which state courts might have special competence;" and (3) "federal review might disrupt state efforts to establish a coherent policy." *City of Tucson v. U.S. W. Commc'ns, Inc*., 284 F.3d 1128, 1133 (9th Cir. 2002). If any one of these factors is lacking, a district court may not abstain based on the *Burford* doctrine.

Here, none of the elements necessary for *Burford* abstention are met. First, California has not concentrated Water Board appeals into one specialized court. Water Board decisions may be appealed in California's Superior Courts generally, Cal. Water Code § 13330, which allows for the possibility of contradictory decisions. Because no state-law structural assurance of uniformity exists here, applying *Burford* abstention to this case

would be improper. *See Adkins*, 644 F.3d at 504 (no *Burford* abstention of RCRA claims because state regulatory scheme sent claims to state courts of general jurisdiction, not to "state courts *with specialized expertise*[,] . . . a prerequisite to *Burford* abstention") (emphasis in original); *Kirkbride v. Continental Cas., Co.*, 933 F.2d 729, 734 (9th Cir. 1991) ("The fact that California has not established a specialized court system to resolve disputes over insurance policy coverage convinces us that application of the *Burford* doctrine to this case is unwarranted.").

Second, Plaintiffs' federal RCRA claim does not require the court to address any complex state-law issues, does not require the Court to review state agency actions, and is altogether separate from the state-law issues addressed in the Water Board proceedings. *See City of Tucson*, 284 F.3d at 1133; *see also Chico Serv. Station*, 633 F.3d at 33, 34 (no *Burford* abstention where RCRA claim was not a review of state agency action and claim predominantly based on federal law); *White & Brewer Trucking, Inc. v. Donley*, 952 F. Supp. 1306, 1312 (C.D. Ill. 1997) (*Burford* abstention of RCRA claim unwarranted because it involved a purely federal-law question).

Third, whether or not Defendants violated RCRA, and whether Plaintiffs are entitled to relief under RCRA, is not a question that interferes with California's water policy. *See City of Tucson*, 284 F.3d at 1133. As explained above, RCRA and the state water regulations have different purposes and are *complementary* systems designed to coexist. Plaintiffs' RCRA action does not attack the CAO nor seek to command (or prohibit) the Water Board from acting in a certain way. Rather, "exercise of federal jurisdiction in these circumstances will further federal and state

environmental policy goals without any real risk of disruption of regulatory efforts by the concerned governmental agencies." *Adkins*, 644 F.3d at 506; *see Baykeeper v. NL Indus. Inc.*, 660 F.3d 686, 694 (3d Cir. 2011) (no *Burford* abstention because plaintiffs could not have brought their RCRA claims under the state's environmental statute).

Coalition for Health Concern v. LWD, Inc., 60 F.3d 1188 (6th Cir. 1995), relied on by Defendants, is distinguishable. In that case, the state agency, with approval of the EPA, enforced RCRA licensing requirements within the state in lieu of the federal government doing so. *Id.* at 1190. Displeased with the progress of the state's licensing process for a hazardous waste incinerator, the plaintiffs sued the facility (as well as the head of the state agency) for violations of RCRA and state law. *Id.* at 1192. The Sixth Circuit held that abstention was warranted because the RCRA claims could not be decided without passing on *state* RCRA requirements and *state* permitting processes. *Id.* at 1194-95 (explaining that "plaintiffs' claims cannot arise in isolation from state-law issues nor are they premised on solely on allegations of federal law"). Unlike *Coalition for Health Concern*, the Court in this case does not have to interpret *any* state law relied on by the Water Board in order to adjudicate Plaintiffs' RCRA claim.

Similarly, Defendants' reliance on *Space Age Fuels, Inc. v. Standard Oil Co. of California*, 1996 WL 160741 (D. Or. Feb. 29, 1996), is misplaced because *Space Age*, unlike this case, effectively required the federal court to revisit the order of the state environmental agency. *See also Morton Coll. Bd. of Trustees of Illinois Cmty. Coll. Dist. No. 527 v. Town of Cicero*, 18 F. Supp. 2d 921, 928 (N.D. Ill. 1998) (distinguishing *Space Age* and *Coalition for Health Concern* because those cases required courts to review state

processes and enforcement actions).[3]

2. *Younger* abstention is unwarranted.

Defendants' arguments that this Court should abstain from adjudicating Plaintiffs' RCRA claim under *Younger* also fail. *Younger* abstention is based on the notion that, as a matter of federalism, it is improper for federal courts to enjoin state court proceedings. *NOPSI*, 491 U.S. at 364. *Younger* has since been interpreted to require abstention when a "state-initiated proceeding is ongoing," it is judicial in nature and implicates important state interests, the litigants have an adequate opportunity to raise the federal claim in state court, and a federal-court decision would have the effect of enjoining the state proceeding. *Gilbertson v. Albright*, 381 F.3d 965, 977-78 (9th Cir. 2004) (en banc).

Plaintiffs are unaware of any case in which a court has abstained from adjudicating a RCRA action based on *Younger*. Meanwhile, both the district courts in this Circuit to address the question have held that *Younger* abstention does not apply to RCRA claims, even when there are also state environmental enforcement actions pending. *See Remington v. Mathson*, 2010 WL 1233803, at *8-9 (N.D. Cal. Mar. 26, 2010) (noting that, in the context of federal environmental claims, courts "generally conclude that [*Younger*] abstention is not appropriate"); *Space Age Fuels*, 1996 WL 160741, at *5, *9 (state environmental agency's investigation and order requiring remediation not the "kind of 'state proceedings' to which *Younger*

[3] Not only is *Space Age Fuels* distinguishable, it was wrongly decided as to *Burford* abstention. Under the first prong of the Ninth Circuit's test, *Burford* abstention was plainly inappropriate because the state scheme did not funnel review into any particular court. *See Space Age Fuels*, 1996 WL 160741, at *3.

abstention applies"); *see also Citizens for a Better Env't-Cal. v. Union Oil Co. of California*, 83 F.3d 1111, 1119 (9th Cir. 1996) (in a CWA citizen suit, court found that *Younger* doctrine is "simply not relevant where the federal action is not seeking a ruling on the validity of the state action").

Younger abstention is inappropriate here because no relief sought in the RCRA suit would have the effect of enjoining the Water's Board's oversight. Plaintiffs do not seek to challenge or otherwise modify the Water Board's order, and the relief they seek would require action on the part of the Defendants, not on the part of the Water Board. *See AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1148-49 (9th Cir. 2007) (court abstains only if the court's action would enjoin "ongoing state proceedings").

Younger abstention also is improper because federal courts have exclusive jurisdiction over RCRA citizen-suits, and, therefore, Plaintiffs cannot obtain RCRA relief in state court. Although the Sixth Circuit held to the contrary, the Sixth Circuit is in a very small minority—the "overwhelming majority" of courts to consider the question have held that RCRA's citizen-suit provision, 42 U.S.C. § 6972(a), grants the federal courts exclusive jurisdiction over RCRA citizen suits. *Litgo N.J. Inc. v. Comm'r N.J. Dep't of Envtl. Prot.*, 725 F.3d 369, 394-95 (3d Cir. 2013) (holding that federal court jurisdiction is exclusive and collecting cases); *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1098 (8th Cir. 1989) (federal court jurisdiction is exclusive); *see also Adkins*, 644 F.3d at 500 n.7 (noting that "majority" of courts have held there is exclusive federal jurisdiction and collecting cases). And, *every* district court in this Circuit to have addressed this question has held that federal courts have exclusive jurisdiction over RCRA citizen suits. *Keller Transp., Inc. v. Wagner Enters., LLC*, 873 F.

Supp. 2d 1342, 1357 (D. Mont. 2012); *Remington*, 2010 WL 1233803, at *8-9; *Space Age Fuels*, 1996 WL 160741, at *5.

These decisions rely on the plain language of the statute, 42 U.S.C. § 6972(a), which states that RCRA claims "shall be brought in the district court." As the Third Circuit explained in *Litgo*, "shall" means "must," and the plain meaning of "must" is that there are no other options, such as the option to file a RCRA claim in state court. *Litgo*, 725 F.3d at 394-97; *see also id.* at 396 n.16 (dismantling the Sixth Circuit's reasoning and citing criticisms of the court's approach in that case).

3. *Colorado River* abstention would improperly preclude plaintiffs from obtaining relief.

In *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 815 (1976), the Supreme Court held that federal courts may stay a case involving a question of federal law where a substantially similar case is pending in state court.

Defendants' *Colorado River* argument suffers from several threshold bars. First, the Ninth Circuit has made clear that when there is no actual state-court proceeding, there is no *Colorado River* abstention, and there is no state-court proceeding here. *See Kirkbride*, 933 F.2d at 734. And "[t]he mere possibility of piecemeal litigation" cannot justify abstention. *R.R. Street & Co. v. Trans. Ins. Co.*, 656 F.3d 966, 979 (9th Cir. 2011). Second, as explained above, federal courts have exclusive jurisdiction over Plaintiffs' RCRA claims, and, in the Ninth Circuit, "[t]he district court has no discretion to stay proceedings as to claims within *exclusive* federal jurisdiction." *Minucci v. Agrama*, 868 F.2d 1113, 1115 (9th Cir. 1989) (emphasis in original). Third, the Water Board proceedings are not

"substantially similar" to the Plaintiffs' claims here—also as explained above, Plaintiffs' claims here seek different relief under a different set of laws. *See Holder v. Holder*, 305 F.3d 854, 868, 870 (9th Cir. 2002) (if there is "substantial doubt" that a state proceeding could resolve all of plaintiffs' federal-court claims, the cases are not substantially similar, and that fact is "dispositive").

If a case makes it past the threshold requirements, the Ninth Circuit considers the following factors in deciding whether *Colorado River* abstention is appropriate: (1) which court has assumed jurisdiction over the res; (2) which forum is more convenient; (3) whether abstention would avoid piecemeal litigation; (4) which court obtained jurisdiction first; (5) whether federal or state law provides the basis for the merits decision; (6) whether state-court proceedings can adequately protect the rights of litigants; (7) whether parties are forum-shopping; and (8) "whether the state court proceedings will resolve all issues before the federal court." *R.R. Street*, 656 F.3d at 978-79. "If there is any doubt as to whether a particular factor weights in favor of, or against a stay or dismissal, the factor should be resolved against staying or dismissing the actions." *Keller Transport*, 873 F. Supp. 2d at 1356 (citing *R.R. Street*, 656 F.3d at 979).

None of these factors come out in favor of abstention here. There are no pending state court proceedings to consider (negating the first, third, fourth, and sixth factors). Defendants fail to show that San Bernardino Superior Court would be a more convenient forum than the local federal district court (second factor). Federal and not state law forms the basis of the RCRA issue (fifth factor). And RCRA claims cannot be heard in state court (negating the sixth, seventh, and eighth factors). *See id*. at 1356-58 (applying the

Colorado River factors and holding that no abstention of RCRA claims where state-court action would not resolve all the RCRA issues).

In short, Plaintiffs' case does not fall into the narrow set of "exceptional circumstances" that would allow this Court to properly decline its "virtually unflagging obligation" to preside over the RCRA claim presented here.

C. The Water Board does not have primary jurisdiction over Plaintiffs' RCRA claims.

The primacy doctrine allows a district court, in its discretion, to either retain jurisdiction over a case that is properly before it, or stay or dismiss the action in favor of referral of the issue to an administrative body that has "special competence" to adjudicate the matter. *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). A court should not dismiss a case before it if doing so would "unfairly disadvantage" the parties. *Id*. at 268-69.

Primary jurisdiction applies where "Congress, in enacting a regulatory scheme, intends an administrative body to have the first word on issues arising in judicial proceedings." *U.S. v. General Dynamics Corp*., 828 F.2d 1356, 1362 (9th Cir. 1987). "[U]niformly present" in cases where the primary jurisdiction doctrine has been applied is clear evidence of (1) "Congressional intent to imbue an administrative agency with total responsibility to resolve or address the particular issue;" and (2) "the need for expertise or uniformity in the administration of such a decision," to safeguard the agency's power, vested in it by Congress, "to resolve the issues in question." *U.S. v. Culliton*, 328 F.3d 1074, 1082 (9th Cir. 2003) (citing *General Dynamics*, 828 F.2d at 1323).

The current action does not raise primacy issues because federal courts are plainly competent to address the types of questions raised by the present

citizen suit, such as whether N&M Dairy "has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). The Ninth Circuit addressed these precise RCRA issues in *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994), and other courts in this jurisdiction have followed suit. *See, e.g., N. Cal. River Watch v. Honeywell Aerospace*, 830 F. Supp. 2d 760, 769-70 (N.D. Cal. 2011) (determining whether plaintiffs sufficiently plead RCRA imminent and substantial endangerment claim).

The very existence of the citizen suit provision in RCRA indicates that Congress intended for the federal courts to have jurisdiction. *See Coho Salmon v. Pac. Lumber Co.*, 30 F. Supp. 2d 1231, 1245 (N.D. Cal. 1998) (holding citizen suit provisions in ESA were indicative of Congressional intent); *California Sportfishing Prot. Alliance v. City of W. Sacramento*, 905 F. Supp. 792, 807 n.21 (E.D. Cal. 1995) (primary jurisdiction inapplicable to CWA citizen suit because "Congress has expressly set forth the ground rules for citizen suits and only bars penalty actions in specified circumstances"); *Apalachicola Riverkeeper v. Taylor Energy Co., LLC*, 954 F. Supp. 2d 448, 460 (E.D. La. 2013) (holding that primary jurisdiction doctrine could not bar citizen suits, because the doctrine was not included "among the specifically delineated circumstances under which citizen suits are barred").

In asking this Court to abstain from hearing Plaintiffs' RCRA claim based on primacy, Defendants conflate state dairy regulation with the significant public health issues addressed by RCRA, over which the Water Board lacks the special competence to preside. Docket 34-1 at 19:7-9.

Where, as here, Congress has not imbued the Water Board with total responsibility to resolve RCRA claims, it would be an abuse of discretion for this Court to abstain from adjudicating Plaintiffs' claims based on primacy.

D. Plaintiffs' Lawsuit is Not a Collateral Attack on the Water Board's Actions.

The collateral attack doctrine comes into play where a federal action is filed to challenge an agency decision in a judicial forum that otherwise could not review the administrative action. Plaintiffs' lawsuit is not a collateral attack on the Water Board's actions because Plaintiffs' suit does not seek to set aside the CAO.

In *Adkins*, 644 F.3d at 487, plaintiffs brought a RCRA citizen-suit after a state agency had filed a "much narrower enforcement action" against the same defendants. The Seventh Circuit rejected Defendants' argument that the federal action collaterally attacked the agency order, concluding that the relief sought by the plaintiffs "complement[ed] and enhance[ed] [the state environmental department]'s efforts, as citizen suits brought under RCRA should." *Id*. In *Adkins*, plaintiffs were prevented from intervening in the state agency action, but this was not the determining factor in the Court's decision. *Id*. While this factual scenario does not exist here, the claims plaintiffs are asserting in this lawsuit are outside of the Water Board's authority, and so a challenge to the settlement and CAO to assert the RCRA claims would have been without merit.

Similarly, in *Interfaith Community Organization Inc. v. PPG Industries, Inc*., 702 F. Supp. 2d 295 (D.N.J. 2010), plaintiffs initiated a RCRA substantial and imminent endangerment citizen suit against a chromium plant. *Id*. at 298. The state agency proposed a settlement with the plant for

remediation of soils and removal of contamination sources to 20 ppm of chromium. *Id*. at 301. The *Interfaith* plaintiffs filed a RCRA suit, rather than sue the agency, for remediation to 6 ppm as well as remediation of groundwater and indoor contamination. *Id*. at 300. [4]

The District Court of New Jersey held that while "in some sense, that Plaintiffs are 'attacking' the [state agency]'s actions and standards, this the very nature of an imminent and substantial endangerment citizen suit: it allows citizens to seek judicial remedies where, allegedly, an agency has failed to protect people or the environment from danger. To abstain on the basis of collateral attack here would defeat plaintiffs' statutory right to a citizen suit." *Id.* at 314.

In reaching this decision, the court distinguished *Sugarloaf Citizens Ass'n v. Montgomery County, Maryland*, 33 F.3d 52 (4th Cir. 1994), and *Palumbo v. Waste Technologies Industries*, 989 F.2d 156, 157 (4th Cir. 1993)—both relied on by Defendants here—because in those cases, the federal citizen suits directly challenged the validity of a facility's permits, issued by the states' environmental protection agencies that the plaintiffs had also challenged via appeal. *See Palumbo*, 989 F.2d at 158; *Sugarloaf*, 33 F.3d at 52.

Here, Plaintiffs do not challenge the Water Board settlement. On the contrary, Plaintiffs explicitly stated, in their Comments on the Proposed CAO, that they "applaud the efforts of the Lahontan Water Board for finally,

[4] The Court held that barring Plaintiffs' suit for their failure to intervene in the settlement "would undermine the goal of fairness that is served by the jurisdictional competency requirement in preclusion rules." *Interfaith*, 702 F. Supp. 2d at 313.

after years of requests from the community, taking meaningful action to deal with the odor and fly nuisances and the nitrate pollution that has kept the Residents fearful for their health and safety and unable to use and enjoy their property." Docket 35-1, Ex. F at 3 (Bates No. 000084). Only after the Water Board made clear in its response to Plaintiffs' comments that it had no "general authority to abate nuisance or assure the protection of public health," did Plaintiffs rightfully bring this federal action to complement the Water Board's efforts. FAC ¶ 118.

Plaintiffs seek expanded remediation on the basis of RCRA's endangerment standard, which is a broader public health standard, *in addition to* the relief provided by the CAO. Just as the broader relief sought by the plaintiffs in *Adkins* was a proper effort to "enhance" the agency's efforts, the remediation and other relief sought by the Plaintiffs in this case seek to enhance the Water Board's actions. *Adkins*, 644 F.3d at 506-07; *see also Interfaith*, 702 F. Supp. 2d at 314 (seeking broader remediation in no way "circumvent[s] a prescribed appeals process for permits"). Where Plaintiffs ask for relief that broadens the agency's orders without supplanting them, no collateral attack occurs, and Plaintiffs should be permitted to pursue their citizen suit.

E. Exercising supplemental jurisdiction over Plaintiffs' state-law tort claims conserves judicial and party resources.

The federal court's power to exercise "supplemental jurisdiction over all other claims that . . . form part of the same case or controversy" as a federal claim, is set forth in 28 U.S.C. § 1367(a). This statute has been broadly interpreted to give the federal courts jurisdiction over all claims that share "a common nucleus of operative facts," where a plaintiff "would ordinarily be

expected to try" in a single judicial proceeding. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966); *see also Baer v. First Options of Chi., Inc.*, 72 F.3d 1294, 1299 (7th Cir. 1995) ("loose factual connection between the claims is generally sufficient").

Where state and federal claims arise from common operative facts, significant time and cost savings occurs by having the claims tried together. For this reason, before declining supplemental jurisdiction, a district court must identify the reason for dismissal and explain how declining jurisdiction serves the objectives of economy, convenience and fairness to the parties, and comity." *Trustees of Constr. Indus. & Laborers Health & Welfare Trust v. Desert Valley Landscape & Maint., Inc.*, 333 F.3d 923, 926 (9th Cir. 2003) (citation omitted). Where factors of judicial economy, convenience, and fairness strongly weigh in favor of retaining jurisdiction, it may be an abuse of discretion to decline such jurisdiction. *Id.* at 925-26.

A district court should only decline to exercise supplemental jurisdiction where the state law claims involve novel or complex issues of state law, "substantially predominate" over the federal claim, or "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(1)-(4). None of those conditions exists here.

First, as discussed at length above, this case does not involve novel or complex issues of state law. Rather, the only state law claims are fundamental common law tort claims for nuisance and trespass.

Second, the state law claims do not "substantially predominate" over the RCRA claim. Substantial predomination can exist "'in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought.'" *Kohler v. Rednap, Inc.*, 794 F. Supp. 2d 1091, 1095 (C.D. Cal.

2011) (quoting *Gibbs*, 383 U.S. at 726). State law claims do not substantially predominate over federal claims when they are based on the same conduct as the federal claim, where they will share similar evidentiary presentation at trial as the federal claim, or where the remedies between the claims are similar. *Picard v. Bay Area Regional Transit Dist.*, 823 F. Supp. 1519, 1526-27 (N.D. Cal. 1993).

Here, Plaintiffs' RCRA and state law claims are both based on Defendants' mismanagement of manure; and the claims will share evidentiary presentation as to this and related factual issues, with only an additional showing through witness testimony for the odors and flies element. The remedies sought also overlap: the basis for Plaintiffs' request for an injunction comes from RCRA as well as California nuisance law, and the injunctive relief sought is nearly identical. *See State of N.Y. v. Shore Realty Corp.*, 759 F.2d 1032, 1050 (2d Cir. 1985) (exercising supplemental jurisdiction appropriate where a plaintiff relies on state public nuisance law and CERCLA as alternate grounds for injunctive relief); *Lentino v. Fringe Emp. Plans, Inc.*, 611 F.2d 474, 479 (3d Cir. 1979) (supplemental jurisdiction proper where the federal and state claims are alternative theories of recovery based on the same acts). Although the state tort claims also seek monetary relief, this alone is insufficient to support a finding that the state tort claims "substantially predominate."

Third, even if this Court dismissed Plaintiffs' RCRA claims based on abstention, the Court should not decline to exercise supplemental jurisdiction over the state tort claims. In the Ninth Circuit, "our cases upholding the exercise of discretion under Section 1367(c)(3) have all involved dismissals for failure to state a claim or a grant of summary

judgment to the defendant on the federal claim." *Trustees of Constr.*, 333 F.3d at 926 (citations omitted). Thus, where the federal claim concluded in a default judgment for plaintiff, the Ninth Circuit held that the district court had abused its discretion in declining supplemental jurisdiction over transactionally related state claims, since the default judgment "represents its determination that the federal claim was well-founded. The simple fact that there was nothing left to litigate on the merits of that claim does not mean that claim was dismissed." *Id.*

Here, Defendants do not ask this Court to dismiss for failure to state a claim. If the Court abstains on the RCRA issue, it will not and cannot find that the RCRA claim lacks merit. Dismissal of a federal claim based on application of an abstention principle thus is not the type of dismissal that properly supports declination of supplemental jurisdiction in this Circuit.

V. CONCLUSION

For the reasons set forth above in this brief, Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss.

DATED: June 30, 2014

SIMMONS BROWDER GIANARIS ANGELIDES & BARNERD LLC

By: _____
Deborah R. Rosenthal
Attorneys for Plaintiffs