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Of the Town of Hixton, U.A.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Concerned Farmers and Neighbors
of the Town of Hixton, U.A.,
a nonprofit association;

Plaintiff,

vs.

Sedelbauer Farms, Inc.,
and Lynn Sedelbauer;

Defendants.

Case No: 04-C-0491-C
**PLAINTIFF'S REPLY BRIEF IN
SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT
(LIABILITY) AGAINST
DEFENDANT SEDELBAUER
FARMS, INC.**

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INTRODUCTION

Concerned Farmers and Neighbors of the Town of Hixton, U.A. (“Plaintiff” or “Concerned Farmers”) brought this Clean Water Act citizen suit against Defendants, Sedelbauer Farms, Inc. and Lynn Sedelbauer, for violations of a Wisconsin Pollution Discharge Elimination System Permit No. WI-0062421 (“Permit”) and for violations of the Clean Water Act (“CWA”). (Complaint ¶ 6). Based on the briefs and supporting materials submitted by the parties, the Defendant in this Summary Judgment Motion, Sedelbauer Farms, Inc. (“Sedelbauer” or Defendant”) has failed to produce sufficient evidence to defeat Plaintiff’s Motion for Partial Summary Judgment on the issue of liability. Defendant fails to adequately respond to Plaintiff’s proposed facts and brief regarding point-source discharges from the Defendant’s feedlot on Holmes Road. Defendant fails to provide any contrary evidence, other than base denials, to Plaintiff’s eye-witness accounts of discharges in violation of Defendant’s Permit. In fact, Defendant fails to even deny some violations and its own evidence supports Plaintiff’s claims.

Defendant’s entire defense appears to be attacking the standing of the Plaintiff as an organization and the standing of its members. Defendant fails to sufficiently show that Plaintiff is not a membership organization representing its members’ interests in the environmental in and around the Town of Hixton, Wisconsin.

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ARGUMENT

I. CONCERNED FARMERS HAS STANDING TO BRING SUIT IN THIS CASE.

The CWA’s citizen suit provision “extends standing to the outer boundaries set by the ‘case or controversy’ requirement of Article III of the Constitution.” *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (citing *Middlesex County Sewerage Dist. v. National Sea Clammers Ass’n*, 453 U.S. 1, 16, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981)). A traditional voluntary membership organization, like Plaintiff, has standing to sue on behalf of its members if “its members would otherwise have standing to sue in their own right, the interests at

1 stake are germane to the organization’s purpose, and neither the claim asserted nor the relief
2 requested requires the participation of individual members in the lawsuit.” *Friends of the Earth, Inc.*
3 *v. Laidlaw Envt’l Servs., Inc.*, 528 U.S. 167, 181, 120 S. Ct. 693, 145 L.Ed.2d 610 (2000).

4 Defendant attempts to raise an additional hurdle for showing standing, arguing that an
5 organization prove the voracity of its members’ standing. However, Defendant fails to recognize
6 that the requirement to show that an association’s “members” have the proper “indicia of
7 membership in [the] organization,” is limited to organizations that are not traditional membership
8 organizations. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 342-344, 97
9 S. Ct. 2434, 53 L.Ed.2d. 383 (1977); see also, *Hope, Inc. v. County of Dupage*, 738 F.2d 797, 814
10 (7th Cir. 1984) (According to *Hunt* “the issue was whether the Advertising Commission’s status as a
11 state agency ‘rather than a traditional voluntary membership organization, precluded it from
12 asserting the claims of . . . its constituency.’”); *California Sportfishing Protection Alliance v. Diablo*
13 *Grande, Inc.*, 209 F.Supp.2d 1059, 1066 (E.D. Cal. 2002) (“[T]he ‘indicia of membership’
14 requirement in *Hunt* applies only to situations in which an organization is attempting to bring suit on
15 behalf of individuals who are not members.”) (Citing *Hunt*, 432 U.S. at 344; *Individuals for*
16 *Responsible Gov’t v. Washoe County*, 110 F.3d 699, 702 (9th Cir. 1997); *Doe v. Stincer*, 175 F.3d
17 879, 885 (11th Cir. 1999); *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 129 F.3d 826, 827-829
18 (5th Cir. 1997)).

19 **A. Concerned Farmers Is A Traditional Non-Profit Association with Members.**

20 One way in which an organization can be considered a traditional voluntary membership
21 organization, is by satisfying state law requirements for becoming such an organization. See
22 *Chevron Chem. Co.*, 129 F. 3d at 828; see also *California Sportfishing Protection Alliance*, 209
23 F.Supp.2d at 1066. In Wisconsin, a group can become an unincorporated non-profit association by
24 having “3 or more members joined by mutual consent for a common, non-profit purpose.” Wis.
25 Stat. § 184.01(2). A member is a person “who, under the rules or practices of a nonprofit
26 association, may participate in the selection of persons authorized to manage the affairs of the
27 nonprofit association or in the development of policy of the nonprofit association.” Wis. Stat. §
28 184.01(1). By being an unincorporated non-profit association, the organization may sue in its own

1 name on behalf of its members “if one or more members of the nonprofit association have standing
2 to assert a claim in their own right, the interests that the nonprofit association seeks to protect are
3 germane to its purposes, and neither the claim asserted nor the relief requested requires the
4 participation of a member.” Wis. Stat. § 184.07. This standing language mirrors, exactly, the
5 language used in *Hunt* and *Laidlaw* for a traditional voluntary membership organization to prove
6 standing under Article III of the Constitution. See *Laidlaw Envt’l Servs., Inc.*, 528 U.S. 167, 181,
7 120 S. Ct. 693, 145 L.Ed.2d 610 (2000); *Hunt*, 432 U.S. at 343.

8 Defendant’s opposition brief argues that Concerned Farmers, is not “a legitimate functioning
9 organization” and that there is “no functioning ‘membership’ in the sense required for associational
10 standing,” or under Wisconsin law. See Opp. Brief pp. 3-5. However, Concerned Farmers is a
11 voluntary membership organization under Wisconsin law and also in its day-to-day functions. For
12 example, Concerned Farmers’ three standing witnesses, Kevin Cain, Jeff German, and Mike
13 Helstad, have all attended meetings where they, and other members of Concerned Farmers, have
14 “participated in the selection of persons authorized to manage the affairs of the nonprofit
15 association.” (Response to Defendants’ Proposed Findings of Fact (“RDPF”) Nos. 4, 7, and cited
16 materials). Two of the standing witnesses attended the first meeting of Concerned Farmers in June,
17 2003. (*Id.* at No. 7). Kevin Cain could not attend the first meeting, but, pursuant to the group’s
18 currently established practice, he participated by proxy. (*Id.*, and cited materials) At the first
19 meeting, a group of concerned neighbors (many of whom are farmers) gathered around a kitchen
20 table and decided to officially form a group called Concerned Farmers and Neighbors of the Town
21 of Hixton. (*Id.* at Nos. 4, 7). At the meeting, the newly formed group decided to petition the
22 Wisconsin Department of Natural Resources (“WDNR” or “DNR”) for a public hearing on a
23 proposed WPDES permit for the Sedelbauer Farms, Inc. feeding operation that was expanding in
24 their neighborhood. (*Id.*). The group also decided on how the organization would run and how it
25 would pay for its activities. (*Id.*). A collection was taken from some of the founding members, and
26 a single check was written to pay the necessary fees and costs from the collected money. (*Id.* at Nos.
27 5-6). Three members, other than Kevin Cain, Jeff German and Mike Helstad and their wives, have
28 contributed towards the group’s costs. (*Id.*).

1 Concerned Farmers now has 54 members, many of whom have been members since the first
2 meeting on June 16, 2003. (*Id.* at Nos. 7-8). According to the group’s established practice, not
3 every member can make each meeting, but most if not all members influence the group’s activities
4 and decisions by passing along their input through other members. (*Id.* at Nos. 4, 7). This is not
5 only a necessary practice for smaller, comparatively informal membership organizations, it is
6 common among most organizations. Few, if any, functioning organizations have every member
7 present at each meeting. The Sierra Club never holds full meetings of its near-million members, yet
8 Sierra Club is considered a legitimate membership organization for standing purposes. *See e.g.*
9 *Laidlaw*, 528 U.S. 167 (Sierra Club found to be a voluntary membership organization and to have
10 standing). Similarly, few churches have a Sunday (or Saturday) when then entire congregation is
11 present, yet churches are quintessential membership organizations.

12 Concerned Farmers’ members “participate in... the development of policy of the nonprofit
13 association.” See Wis. Stat. § 184.01(1). More than three members were present and formed
14 Concerned Farmers on June 16, 2003. (RDPF Nos. 4, 7). All three standing witnesses, as well as
15 three others, participated in the formation of the group and contributed towards the group’s
16 expenses. (*Id.* at 4, 6, 7). All three also attended a WDNR public hearing on behalf of the
17 organization on September 17, 2003 and were present at the meeting where the group decided to
18 bring this action. (*Id.* at No. 7). Other members were also present at the WDNR hearing and at the
19 group’s meetings, and participated in making policy decisions for the organization. (*Id.* at Nos. 4, 6,
20 7).

21 The law does not-- and should not-- create insurmountable hurdles to form and manage a
22 non-profit association. Wisconsin law only requires “3 or more members joined by mutual consent
23 for a common, nonprofit purpose” to be a legitimate non-profit organization. Wis. Stat. § 184.01(2).
24 Concerned Farmers has more than 3 members who decided to come together by mutual consent for a
25 common, nonprofit purpose. They have more than 3 founding members who came together at a
26 meeting to set up and fund this organization, to register it with the state, to hire counsel to represent
27 it before WDNR and to represent it in litigation that would bring no money profits to the
28 organization. (RDPF Nos. 4, 6, 7). Concerned Farmers qualifies as a functioning membership

1 nonprofit association under Wisconsin law, and all three standing witnesses are members of the
2 association. Defendants have provided no evidence to the contrary.

3 An organization does not need to have bylaws, have a meeting of the full membership, have
4 a president, or directors. Wis. Stat. ch. 184. It does not need to have its own bank account. *Id.* In
5 the case of Concerned Farmers, the group keeps track of its membership with a membership list,
6 keeps track of its funds separate from any individuals', has periodic meetings where any member is
7 welcome, and where more than 3 members come together to make important decisions regarding the
8 organization. In fact, Concerned Farmers provided 3 members to Defendant's Deposition of the
9 organization to supply information regarding the organization and Sedelbauer deposed all three.
10 (Dec. Michael Hughes Ex. A; German Dep.; Cain Dep.)¹.

11 Contrary to Defendant's assertion, at his deposition, Michael Helstad's statements support
12 the fact that this is a functioning voluntary membership organization. He states that in order for an
13 important decision, like whether to bring a lawsuit were made, "there would have to be a large
14 portion of the group that would be in favor." (Dec. Michael Hughes Ex. A, p. 23). He also states
15 "there was a group of people that had mutual concerns that formed the organization," that Concerned
16 Farmers has entered into a contract with attorneys, that he talked to "a group of people" including
17 Kevin Cain and Jeff German, the standing witnesses, all of whom he considers to be members of the
18 organization when they chose to hire an attorney. (RDPF Nos. 4, 6, 7). (Dec. Michael Hughes Ex.
19 A, at pp. 26, 101-103).

20 Sedelbauer's attempt to establish April, 2004 as the date that the group officially formed is
21 both misleading and irrelevant. The deposition testimony cited to by Sedelbauer in its attempts to
22 establish April, 2004 as the origination time for Concerned Farmers made a distinction between
23 when the group was formed and the date on which the group registered an agent for service of

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25 ¹ This Court has instructed parties to refer to proposed findings of fact, rather than supporting materials, when referring
26 to facts in a brief for summary judgment. *See U.S. v. Murphy Oil, USA*, 143 F.Supp.2d 1054, 1064 (W.D.Wis. 2001).
27 Plaintiff has attempted to do so whenever possible. However, Plaintiff finds it necessary to cite to the actual materials
28 for a few points within this Reply. References to supporting materials in this Reply Brief are limited to those cases
where it is necessary to point out a mischaracterization of the supporting materials by Defendant, point out deficiencies
in Defendant's supporting materials, or to point out when Defendant's supporting materials support Plaintiff's proposed
facts and, therefore, that summary judgment is appropriate. In these circumstances Plaintiff is unable to point to a
proposed fact because these issues are not properly "facts" proposed by either side.

1 process with the State of Wisconsin Department of Financial Institutions. (RDPF No. 7). An
2 unincorporated non-profit organization is created by function of the definition of such group in Wis.
3 Stat. § 184.01. There is no formal requirement to create articles of incorporation, file a charter, or
4 take any affirmative step, other than to join three members “by mutual consent for a common,
5 nonprofit purpose.” Wis. Stat. § 184.01(2). Wisconsin law allows an unincorporated association to
6 register an agent for service of process with the Wisconsin Department of Financial Institutions, but
7 this act is optional and does not signify the date of origination for the group. *See* Wis. Stat. §
8 184.10(1) (association may register an agent for service of process).

9 The cases cited by Sedelbauer are inapposite to the facts in this case. In *American Legal*
10 *Foundation v. Federal Communications Comm’n*, 808 F.2d 84 (D.C. Cir. 1987), the plaintiff
11 organization had no members. In fact, “the Foundation’s corporate charter expressly prohibit[ed] it
12 from having any.” *Id.* at 88 (emphasis added). Instead of representing its members, American Legal
13 Foundation “purports to represent the interest of all members of the public who regularly watch
14 ABC News.” *Id.* It is not surprising that the American Legal Foundation court determined that an
15 organization cannot claim the entire television watching public as members. However, in this case,
16 Concerned Farmers is a distinct group of individuals who are members of a voluntary membership
17 organization. Unlike *American Legal Foundation*, Concerned Farmers has identified members who
18 have specifically requested to be considered members and to be put on the list of members. (RDPF
19 No. 8). There are meetings where members gather, discuss the issues before the group, and vote on
20 the desired course of action. (*Id.* at 4, 6, 7).

21 Defendant also cites *Hope, Inc. v. County of Dupage*, as support for its argument that
22 Concerned Farmers must demonstrate some unidentified formality to have standing on behalf of its
23 members. 738 F.2d 797, 814 (7th Cir. 1984). However, the decision in *Hope* distinguishes between
24 the facts in *Hunt*, where “the issue was whether the Advertising Commission’s status as a state
25 agency ‘rather than a traditional voluntary membership organization, precluded it from asserting the
26 claims of . . . its constituency,’” and a membership organization such as Concerned Farmers. *Id.*
27 (*quoting Hunt*, 432 U.S. at 344 (emphasis added)). The problem in *Hope*, was that no members of
28 the corporation suffered an injury in fact. *Hope, Inc.*, 738 F.2d at 814. The *Hope* plaintiff then

1 attempted to show that all persons for whom Hope sought housing were “members.” *Id.* Not
2 surprisingly, the court found that this loosely-identified category of persons for whom Hope, Inc.
3 was advocating lacked the indicia of a membership in the organization. *Id.* The important aspect of
4 *Hope* for this case is: if even one of Hope’s actual members had suffered injury in fact, the “indicia
5 of membership” analysis would not have applied. *Id.*

6 **B. Even If Concerned Farmers Were Not A “Traditional Voluntary Membership**
7 **Organization,” Its Members Still Show Adequate “Indicia Of Membership”.**

8 When an association does not have members in the traditional sense, the court may
9 determine whether the people claiming standing have the requisite “indicia of membership” to allow
10 the association to sue on their behalf. *Hunt*, 432 U.S. at 344. Courts have found that “indicia of
11 membership” can include such factors as: 1) whether the members alone finance the organization’s
12 activities, including the costs of the lawsuit; 2) whether there is a linkage between the organization’s
13 interest in the outcome of the litigation and the interests of the individuals claiming standing; 3)
14 whether the organization provides a means by which the “members” express their collective views
15 and protect their collective interest; and 4) whether the individuals with standing voluntarily
16 associate themselves with the organization as members. See *Chevron Chem. Co.*, 129 F.3d at 828-
17 829 (5th Cir. 1997); see also *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1110-1112 (9th Cir.
18 2003); *Hope, Inc. v. County of Dupage*, 738 F.2d 797, 814 (7th Cir. 1984).

19 Concerned Farmers’ members, alone, have financed this litigation and all the organization’s
20 activities. (RDPF Nos. 5, 6). The organization’s interest and Concerned Farmers’ members’
21 interested in this case is to stop Sedelbauer from continuing to violate its NPDES Permit. (Am.
22 Compl. ¶ 7 and Request for Relief; Repl. to Def. Rep. to Pl’s Prop. Fact Nos. 51-92). Concerned
23 Farmers’ members have the same interest in this litigation. The members, including the standing
24 witnesses decided to bring this litigation in the name of and through Concerned Farmers, rather than
25 as individuals. (RDPF Nos. 4, 7). Finally, in order to become a member of Concerned Farmers, a
26 person must voluntarily and affirmatively express a desire to become a member. (RDPF No. 8).

27 Concerned Farmers’ members demonstrate sufficient “indicia of membership.” Defendant’s
28 cases are not to the contrary. *American Legal Foundation* was a case where the plaintiff

1 organization had no members. *American Legal Foundation*, 808 F.2d at 88. In fact, “the
2 Foundation’s corporate charter expressly prohibit[ed] it from having any.” *Id.* The organizations’
3 attempt to characterize every unspecified, unnamed, unknown person who watches ABC News as a
4 member was- of course- insufficient. *Id.* These members of the public who watch ABC News do
5 not play any role financing American Legal Foundation’s activities, or that particular litigation, they
6 do not guide the Foundation’s activities and there is no link between the Foundation’s interest in the
7 outcome of the litigation and the so called members’ interests. This is exactly the opposite of the
8 facts in this case. (RDPF Nos. 4-8).

9 *Hope* also does not support Defendant’s argument. In *Hope*, an advocacy group attempting
10 to find housing for low and moderate income persons tried to characterize any person for whom the
11 organization seeks or sought housing for was a member. *Hope*, 738 F.2d at 814. The so-called-
12 members in *Hope* did not finance the litigation, the organization was not the means by which they
13 expressed their collective views, and they did not show any desire or show any interest in becoming
14 voluntary members of the organization. *Id.* at 814-815. This is simply not the case with Concerned
15 Farmers. (RDPF Nos. 4-8).

16 Even if Concerned Farmers were not a traditional membership organization, the facts in this
17 case would be similar to those in *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 129 F.3d 826,
18 827-829 (5th Cir. 1997)). In *Chevron Chem.*, the plaintiff organization, Friends of the Earth, was
19 found to have the requisite “indicia of membership,” because the organization’s members financed
20 the groups’ activities and financed the litigation, the members “voluntarily associated themselves
21 with FOE,” the individuals testified to the fact that they were members, the organization had a
22 recognized method of becoming a member, and members of the group were a discreet and
23 recognizable group. *Chevron Chem.*, 129 F.3d at 829.

24 The requirements of associational standing are not a high hurdle. The point and purpose of
25 the standing requirement, including associational standing, is to ensure that federal courts hear only
26 those cases where there is a palpable “case and controversy.” *Lujan v. Defenders of Wildlife*, 504
27 U.S. 555, 559-60, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Standing is merely a surrogate test to
28 ensure that the parties have a personal stake in the outcome of the case to satisfy the Article III “case

1 or controversy” requirement. *Id.* Standing should not be used to create hyper-technical pleading or
2 proof requirements of Constitutional proportion, beyond those necessary to ensure a proper case and
3 controversy. For example, in *Oregon Advocacy Center v. Mink*, the Ninth Circuit held that a
4 federally funded law office that represents the rights of people with disabilities has associational
5 standing, despite not meeting many of the *Hunt* requirements, because the law firm could show
6 sufficient “indicia of membership.” 322 F.3d 1101, 1111-1112 (9th Cir. 2003). The *Oregon*
7 *Advocacy Center* court held that the law firm satisfied the purposes behind associational standing:
8 “that the organization is sufficiently identified with and subject to the influence of those it seeks to
9 represent as to have a ‘personal stake in the outcome of the controversy.’” *Id.*

10 **II. INDIVIDUAL MEMBERS OF CONCERNED FARMERS HAVE STANDING**
11 **UNDER ARTICLE III OF THE CONSTITUTION.**

12 Concerned Farmers can show that its individual members have standing under Article III
13 because its members (1) “suffered an ‘injury in fact’ that is (a) concrete and particularized and (b)
14 actual and imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the
15 challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the
16 injury will be redressed by a favorable decision.” *Laidlaw Env’tl Servs., Inc.*, 528 U.S. at 180.

17 **A. Concerned Farmers’ Members’ Economic, Aesthetic And Recreational**
18 **Enjoyment Have Been Impaired By Defendants’ Conduct And Therefore**
19 **Plaintiff’s Members Suffer An “Injury In Fact” and Have Article III Standing.**

20 It is apparent from Sedelbauer’s brief that it either misunderstands the requirements of injury
21 in fact and causation, or refuses to accept them. Sedelbauer spends a good portion of its brief, and
22 most of its argument, repeating the claim that “no environmental harm [has] occurred.” Def. Br. at
23 7-12 (“[T]he Declaration of Lynn Sedelbauer . . . directly refutes the notion that environmental harm
24 has been caused by Sedelbauer”), p. 8 (“Because there is no evidence of actual injury to the
25 environment, Plaintiff’s members cannot prove injury to themselves”), p. 9 (“DNR documents . . .
26 report no fish kills associated with the alleged discharges”), p. 10 (“In sum, the DNR has
27 consistently stated that Defendant’s conduct created no adverse environmental affects.”). Whatever
28 Sedelbauer is attempting to prove by its statements, it cannot prove lack of standing by showing lack

1 of quantified environmental harm. The Supreme Court in *Laidlaw* explicitly rejected the argument
2 that standing requires proof of harm to the environment. In fact, the Court made clear that:

3 The relevant showing for purposes of Article III standing,
4 however, is not injury to the environment but injury to the plaintiff.
5 To insist upon the former rather than the latter as part of the
6 standing inquiry . . . is to raise the standing hurdle higher than the
 necessary showing for success on the merits in an action alleging
 noncompliance with an NPDES permit.

7 *Laidlaw Env'tl Servs., Inc.*, 528 U.S. at 181 (emphasis added). A citizen suit plaintiff is not required
8 to show harm to the environment to succeed on the merits and requiring proof of harm to the
9 environment in order to show standing would create a hurdle “higher than the necessary showing for
10 success on the merits in an action alleging noncompliance with an NPDES permit.” *Id.*; *see also*.
11 *Heartwood, Inc. v. United States Forest Service*, 230 F.3d 947, 951-952 (7th Cir. 2000) (finding that
12 plaintiff had standing before finding that the Forest Service had violated the National Environmental
13 Policy Act); *California Sportfishing Protection Alliance v. Diablo Grande, Inc.*, 209 F.Supp.2d
14 1059, 1066 (E.D. Cal. 2002) (finding that plaintiff had standing without finding that they had proved
15 violations of the CWA).

16 Sedelbauer attempt to avoid the clear holding in *Laidlaw* by relying on lower court cases
17 decided before *Laidlaw*. See Def. Br. at 7-9². By conveniently omitting the seminal Clean Water
18 Act standing case, *Laidlaw*, and *Laidlaw*'s progeny, Sedelbauer misleads the Court about the
19 requirements of standing. Sedelbauer ignores the settled law that: “environmental plaintiffs
20 adequately allege ‘injury in fact’ when they aver that they use the affected area and are persons ‘for
21 whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.”
22 *Laidlaw*, 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735, 92 S. Ct. 1361 (1972);
23 *see also Lujan*, 504 U.S. at 562-563. “Requiring the plaintiff to show actual environmental harm as
24 a condition for standing confuses the jurisdictional inquiry (does the court have power under Article
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26 ² For example, Defendant cites *Public Interest Research Group v. Magnesium Electron, Inc.*, 123 F.3d 111, 121 (3d Cir.
27 1997). This case was decided before *Laidlaw*, and the proposition for which Defendant cites it for is directly contrary to
28 the holding in *Laidlaw*: that “the relevant showing for purposes of Article III standing, however, is not injury to the
environment but injury to the plaintiff.” *Friends of the Earth, Inc. v. Laidlaw Env'tl Servs., Inc.*, 528 U.S. 167, 181, 145
L.Ed.2d 610, 120 S. Ct. 693 (2000); *see also Friends of the Earth Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149,
163-64 (4th Cir. 2000); *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000).

1 III to hear the case?) with the merits inquiry (did the defendant violate the law?).” *Ecological Rights*
2 *Foundation v. Pacific Lumber Co.*, 530 F.3d 1141, 1151 (9th Cir. 2000).

3 Neither the magnitude of the injury, nor the nature of the injury, is important in determining
4 standing; an "identifiable trifle" is sufficient. *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 557
5 (5th Cir. 1996). A showing of actual or potential harm to health, aesthetic or recreational interests
6 due to environmental pollution satisfies the injury-in-fact prong of the standing test. Since 1972 the
7 Supreme Court has accepted allegations of harm to aesthetic interests as sufficient to show standing.
8 *Morton*, 405 U.S. at 734. This only requires a threat to a plaintiff's interest, not proof of actual
9 harm. “The Supreme Court has consistently recognized that threatened, rather than actual injury can
10 satisfy Article III standing requirements.” *Pacific Lumber Co.*, 230 F.3d at 1151 (emphasis added)
11 (citing *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir.
12 2000)). It is “not necessary for a plaintiff challenging violations of rules designed to reduce the *risk*
13 of pollution to show the presence of *actual* pollution in order to obtain standing.” *Ecological Rights*
14 *Found.*, 230 F.3d at 1152 [emphasis in original]. A citizen’s reasonable concern about the presence
15 of pollution in a water body the citizen uses is sufficient to establish the requisite injury-in-fact.
16 *Laidlaw*, 528 U.S. at 181-85; see also *Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001).

17 In *Laidlaw*, members of the plaintiff organizations averred in affidavits that they lived close
18 to the waterbodies and facility in question, that they no longer fished, camped, hiked, recreated or
19 picknicked in or near the river, that one member “was concerned that the water was polluted by
20 Laidlaw’s discharges” because “the river looked and smelled polluted,” and that plaintiffs’ members
21 would like to- and intended to- engage in recreational activities on the river if and when the
22 pollution in the river was removed. *Laidlaw*, 528 U.S. at 181-183. In *Laidlaw* the Sierra Club
23 sufficiently demonstrated standing by showing a single member who canoed approximately 40
24 miles downstream of the facility and would like to canoe closer to the facility, but did not do so
25 because he was concerned that the water contained harmful pollutants. *Id.* at 181-185. The standing
26 requirement for Concerned Farmers’ members is no more stringent.

27 Sedelbauer’s attempts to mislead the Court does not stop with its omission of the *Laidlaw*
28 decision. Sedelbauer also cites *Friends of the Earth v. Gaston Copper Recycling Corp.*, 9 F.Supp.2d

1 589 (D.S.C. 1998), as support for its arguments that Plaintiff must show that there was harm to the
2 environment and that generalized grievances shared by the public do not provide individuals
3 standing. This case, however, was overturned by the Fourth Circuit in *Friends of the Earth v.*
4 *Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000) (*en banc*). This only adds to the
5 likelihood that Sedelbauer chose to simply ignore *Laidlaw* and its progeny. The Fourth Circuit
6 unequivocally states that an environmental group plaintiff has standing when one of its members
7 shows that a threatened injury to a waterway impacts his interest in that waterway, in that case
8 because he lived nearby. *Id.* at 156-157. The Fourth Circuit decision rejects and therefore lays
9 waste to Defendant’s argument that there must be actual harm to the environment and that
10 “grievances shared by the public at large do not provide individual plaintiff’s standing.” Def. Br. at
11 7-8. As long as an organization member shows that he suffers an injury in fact to his aesthetic or
12 recreational interests in or near a waterway, including a threat to that interest, the member and the
13 group shows standing under *Laidlaw*. 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S.
14 727, 735, 92 S. Ct. 1361 (1972); see also *Defenders of Wildlife*, 504 U.S. at 562-563 (“Lujan”).³

15 To require Concerned Farmers to show that the permit violations harmed the environment
16 as a prerequisite to standing would require more than is required by the CWA to show a violation of
17 the CWA itself. The Court must determine that the plaintiff has Article III standing, but requiring
18 Concerned Farmers to prove both the violations at issue and a resulting environmental harm to show
19 standing prior to deciding the merits, Sedelbauer asks the Court to require more than is required by
20 Article III or the Clean Water Act. See e.g. *Heartwood, Inc. v. United States Forest Service*, 230
21 F.3d 947, 951-952 (7th Cir. 2000) (finding that plaintiff had standing before finding that the Forest
22 Service had violated the National Environmental Policy Act); *California Sportfishing Protection*
23 *Alliance v. Diablo Grande, Inc.*, 209 F.Supp.2d 1059, 1066 (E.D. Cal. 2002) (finding that plaintiff
24 had standing without finding that they had proved violations of the CWA).

25
26
27 ³ *Laidlaw* and its progeny have also made clear that the injury to the plaintiff may also be an injury suffered by the
28 public at large; but as long as the plaintiff is a “member” of the organization and can show an aesthetic or recreational
harm to himself, then he has met the first prong and shown an injury in fact. *Laidlaw*, 528 U.S. at 183; *Gaston Copper
Recycling Corp.*, 204 F.3d 149.

1 Here, contrary to Defendant's allegations, Concerned Farmers' standing members, Mike
2 Helstad, Kevin Cain and Jeff German, have actually seen Sedelbauer's violations of its permit. (Pl.
3 Prop. Fact Nos. 56-57, 59, 65-66, 71-72, 77, 82, 92). They have also seen the Notice of Violation
4 from WDNR documenting those violations. (Helstad Dep. at 108-110). They have averred that the
5 waterbodies and the runoff from the facility looked and smelled to be polluted and have seen what
6 they reasonably perceived to be manure enter the waterbodies. ((Pl. Prop. Fact Nos. 56-57, 59, 65-
7 66, 71-72, 77, 82, 92; Helstad Dep. at 108-110) The DNR has also documented violations of the
8 permit and that the waterbodies in question contained pollutants similar to those found in manure.
9 (See Pl. Prop. Fact Nos. 127-169, and cited materials). All three standing members, therefore, had
10 reasonable concern[s] about the presence of pollution in a water body the citizen uses. *Laidlaw*, 528
11 U.S. at 181-185.

12 Similar to *Laidlaw*, Concerned Farmers' standing members aver through affidavits that their
13 recreational and aesthetic enjoyment of the waterways and areas surrounding Sedelbauer have
14 diminished due to Defendant's activities. (Pl. Prop. Fact Nos. 51-93, and cited materials). All three
15 members live near the facility and recreate in and around the waterbodies near Sedelbauer's facility.
16 (*Id.*). All three members have stated that their enjoyment of the rural area in which they live is
17 diminished by the manure runoff from the facility. (*Id.*). Mr. Cain used to enjoy taking his family
18 to an area just downstream from where Sedelbauer now discharges manure, to watch for frogs and
19 wood ducks that were once prevalent there. (Pl. Prop. Fact Nos. 78-79). Mr. Cain and his family no
20 longer enjoy this activity since Sedelbauer's polluted discharges. (Pl. Prop. Fact Nos. 80).
21 Additionally, Mr. Cain no longer enjoys the waterways in the area after seeing Sedelbauer's manure
22 flow into them. (Pl. Prop. Fact Nos. 77-80). Similarly, Sedelbauer's discharges has diminished Mr.
23 German's enjoyment of hunting and wildlife watching- two activities he enjoys near Hixton. (Pl.
24 Prop. Fact Nos. 85-93). Finally, Mr. Helstad is concerned that Sedelbauer's discharges have caused
25 a decrease in wildlife in and around the facility. (Pl. Prop. Fact Nos. 63-74). Mr. Helstead has seen
26 dead fish in the waterways, worries that Sedelbauer's discharges are harming the ecology in the
27 area, and enjoys the waterways less than he used to. (RDPF No. 18; Helstad Dep. pp. 106-107,
28 attached at Hughes Ex. A). Mr. Helstad read the WDNR documents discussing Sedelbauer's permit

1 violations, including the water quality tests, and is further concerned about Sedelbauer's runoff.
2 (Helstad Dep. pp. 108-110). All three standing witnesses, therefore, are able to show an injury in
3 fact under the Supreme Court's requirements for environmental cases.

4 **B. Concerned Farmers' Members' Harm Is Fairly Traceable To the Challenged**
5 **Action of the Defendant.**

6 Sedelbauer argues that there is no proof of harm to the environment, and that "Sedelbauer is
7 not 100 percent responsible" for whatever harm claimed by Plaintiff. Def. Br. at 10-11. However,
8 Concerned Farmers are simply not required to prove actual harm to show standing. Instead,
9 Plaintiff must merely show "that a defendant discharges a pollutant that causes or contributes to the
10 kinds of injuries alleged in the specific geographic area of concern." *Natural Resources Defense*
11 *Council v. Southwest Marine, Inc.*, 236 F.3d 985, 995 (9th Cir. 2000). (Citing *Sierra Club v. Cedar*
12 *Point Oil Co.*, 73 F.3d 546, 558 (5th Cir. 1996); *Public Interest Research Group of New Jersey, Inc.*
13 *v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3^d Cir. 1990)). Courts have expressly rejected
14 Defendant's argument, that standing requires demonstrated environmental damages, because such a
15 requirement would "virtually emasculate the citizen's suit provision by making it impossible for any
16 plaintiff to demonstrate standing." *Natural Resources Defense Council v. Outboard Marine Corp.*,
17 692 F.Supp. 801, 808 (N.D. Ill. 1988) (quoting *Chesapeake Bay Found. v. Bethlehem Steel Corp.*,
18 608 F. Supp. 440, 446 (D. Md. 1985). Put simply: it is "not necessary for a plaintiff challenging
19 violations of rules designed to reduce the *risk* of pollution to show the presence of *actual* pollution
20 in order to obtain standing." *Ecological Rights Found.*, 230 F.3d at 1151 (emphasis in original).
21 The potential or likelihood of pollution is enough. *Id.*

22 Plaintiff in this case also satisfies the causation element of standing because the Defendant's
23 discharges were into waterways that Plaintiff's members have an interest in, and the threatened
24 pollution is a type that would lead to negative impacts to the member's interests. *Powell Duffryn*
25 *Terminals, Inc.*, 913 F.2d at 72. Courts have noted that the requirement that an injury be "fairly
26 traceable" to a defendant's violations is not equivalent to the causation element of a tort action. *Id.*
27 Unfortunately, there are often more than one party discharging into any affected waterway. *Id.*
28 Article III standing does not require a single lawsuit to remedy all threatened harm by, for example,

1 suing every discharger in one suit. A plaintiff can bring an enforcement case such as this against
2 one discharger to abate part of the problem. *Id.*

3 In this case, both the WDNR and Concerned Farmers have seen and documented Defendant's
4 NPDES permit violations. (Pl's Prop. Facts Nos. 131-208, and cited materials). WDNR water
5 quality tests show the presence of farm runoff pollutants in the discharges. (Pl. Prop. Fact Nos. 135-
6 140, 155-162, and cited materials). Defendant's discharges flowed into waterways used by
7 Concerned Farmers' members for recreation- or tributaries to those waters. (Pl's Prop. Fact Nos.
8 54-93, and cited materials). Concerned Farmers' members have personally seen and smelled
9 manure and other pollutants running off Defendant's facilities as those pollutants entered the
10 waterways they use for recreation. *Id.* The types of pollutants Sedelbauer discharges, such as
11 manure, sawdust, sediment and other animal feeding pollutants, are the types that cause or
12 contribute to the pollution that harms the Plaintiff's standing members. (RDPF Nos. 14, 25, 30).
13 Moreover, Concerned Farmers need not prove that Sedelbauer's violations have specifically caused
14 harms to the waterbodies, only that discharges are of the type that would cause harm to their
15 recreational interests in the waterbodies. *Ecological Rights Found.*, 230 F.3d at 1151-52.

16 Although it cites the cases, Sedelbauer's arguments find no support in *Public Interest*
17 *Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir.
18 1990) and *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000).
19 (Def. Br. at 10-11). In *Ecological Rights Foundation*, the court held that the alleged injuries were
20 fairly traceable to the defendant when the standing witnesses "have claimed that their enjoyment of
21 various activities they take part in on Yager Creek and waterways downstream is lessened due to
22 Pacific Lumber's alleged violations of various provisions of the Clean Water Act designed precisely
23 to prevent the irreparable environmental degradation of the nation's waters before it occurs." 230
24 F.3d at 1151; Compare Pl's Prop. Fact Nos. 56-93. In fact, the Ecological Rights Foundation court
25 held that:

26 the threshold question of citizen standing under the CWA is
27 whether an individual can show that *she* has been injured in her use
28 of a particular area because of concerns about violations of
environmental laws, not whether the plaintiff can show there has
been actual environmental harm.

1 *Id.*, citing *Laidlaw*, 120 S.Ct. at 704, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*,
2 204 F.3d 149, 163-64 (4th Cir.2000) (en banc).

3 Similarly, in *Powell Duffryn* the court held that the plaintiff sufficiently showed standing--
4 despite affidavits from experts stating that “to ‘a reasonable scientific certainty . . . [the defendant's]
5 operations do not adversely affect water quality in the Kill Van Kull at or about the Kill Van Kull
6 Park” and that “that the poor water conditions complained of by the plaintiffs did "not originate
7 from Powell Duffryn nor are they related to Powell Duffryn's discharges.”” 913 F.2d at 71-72.

8 **C. The Members’ Injuries Will Be Redressed If The Court Grants Concerned**
9 **Farmers The Relief It Has Requested.**

10 Sedelbauer also misunderstands, or misstates, the requirements for redressability. Sedelbauer
11 erroneously cites to *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49
12 (1987), for the standard for Article III standing.⁴ Article III standing is satisfied by Concerned
13 Farmers’ plea for an injunction against Sedelbauer’s future discharges. (1st Am. Compl. at 16-17).
14 “Where a plaintiff complains of harm to water quality because defendant exceeded its permit limits,
15 an injunction will redress that injury at least in part.” *Powell Duffryn Terminals, Inc.*, 913 F.2d at
16 73; *see also Defenders of Wildlife*, 504 U.S. at 560-61 (1992); *Catron County Bd. of Comm’ns v.*
17 *United States Fish and Wildlife Serv.*, 75 F.3d 1429, 1433 (10th Cir. 1996); *Committee to Save the*
18 *Rio Hondo v. Lucero*, 102 F.3d 445, 452 (10th Cir. 1996); *Yates Indus.*, 757 F.Supp. at 444.
19 “Plaintiffs need not show that the waterway will be returned to pristine condition in order to satisfy
20 the minimal requirements of Article III.” *Id.* Even when a waterway is polluted by many different
21 sources, compliance by one is sufficient to satisfy the redressability requirement because polluted
22 waterways “must be redressed one illegal discharger at a time, even though the impact of a
23 favorable decision may not itself be readily noticeable.” *Public Interest Research Group v. Yates*
24 *Indus.*, 757 F.Supp. 438, 444 (D.N.J. 1991); *see also Public Interest Research Group v. Rice*, 774
25 F.Supp. 317, 324 (D.N.J. 1991) (“If the defendant complies with the injunction, the harm to water
26 quality will be redressed, because the pollution in the Delaware River will decrease.”). Civil

27 _____
28 ⁴ *Gwaltney* deals with the requirement of ongoing violation. Concerned Farmers discusses this requirement below.

1 penalties will also redress Plaintiff's harm, because of the deterrent effect of civil penalties.

2 *Laidlaw*, 528 U.S. at 185; see also 1st Am. Compl. at 16-17 (requesting penalties).

3 **III. SEDELBAUER'S VIOLATIONS OF THE CLEAN WATER ACT AND ITS NPDES**
4 **PERMIT.**

5 Sedelbauer has violated its Permit under the CWA, as well the CWA itself by discharging
6 from a point source without a permit. *Stone v. Naperville Park Dist.*, 38 F.Supp.2d 651, 655 (N.D.
7 Ill. 1999) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 308, 72 L. Ed. 2d 91, 102 S. Ct.
8 1798 (1982) and *Atlantic States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 818 (7th
9 Cir. 1997). A violation of the permit is a violation of the Clean Water Act- regardless of resulting
10 damage to the environment. The Clean Water Act was designed to lend itself to speedy and simple
11 enforcement; it is a strict liability statute. *Kelly v. EPA*, 203 F.3d 519, 522 (7th Cir. 2000); *Natural*
12 *Resources Defense Council v. Outboard Marine Corp.*, 692 F.Supp. 801, 821 (N.D. Ill. 1988) (citing
13 *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979)). To establish a violation
14 of the Act, a plaintiff need only prove that the defendant violated the terms and conditions of the
15 CWA or its NPDES permit. *Atlantic States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d
16 814, 818 (7th Cir. 1997); *Outboard Marine*, 692 F.Supp. at 821; see also 33 U.S.C. §§ 1311(a),
17 1342(k); *Hawaii's Thousand Friends v. City and County of Honolulu*, 821 F.Supp. 1368, 1392
18 (D.Ha 1993) ("Courts throughout the country have held that NPDES compliance is a matter of strict
19 liability and a defendant's intent and good faith are irrelevant"); *Sierra Club v. Union Oil Co. of*
20 *Cal.*, 813 F.2d 1480, 1490-91 (9th Cir. 1988); *vacated for reconsideration*, 485 U.S. 931 (1988),
21 *reinstated & amended*, 853 F.2d 667 (9th Cir. 1988). It is no defense to a Clean Water Act violation
22 that the violation is *de minimis*, "technical," "rare" or insignificant. *Id.* at 1491.

23 Sedelbauer has violated Section 1.1 of its NPDES permit, which states that "there shall be no
24 discharge of pollutants to navigable waters from the animal production area except in the event a
25 25-year, 24-hour rainfall event, or a chronic rainfall event." (Compl. Ex. B, at 1; Pl's Prop. Fact
26 Nos. 129-189). A 25-year, 24-hour rainfall event in Jackson County is established in the Permit as
27 4.8 inches. (Permit § 1.1, attached as Ex. B to 1st Am. Compl.; see also Pl's Prop. Fact No. 179).
28 Chronic rainfall events are "a series of wet weather conditions that preclude removal of manure or

1 process wastewaters from a properly designed, operated and maintained structure.” *Id.* In addition,
2 Section 1.1 expressly prohibits Sedelbauer from allowing “direct runoff from a feedlot or stored
3 manure to waters of the state” and from allowing “overflow of manure storage facilities.” *Id.*

4 Sedelbauer has also violated Section 3.2.11, which prohibits surface applied manure from
5 running off the intended site at any time, or pond on the intended site at any time. (Permit § 3.2.11).
6 Finally, the Clean Water Act prohibits Sedelbauer from discharging pollutants from any point
7 source without a permit. This prohibition, unlike the two mentioned above, applies generally to
8 every source by operation of the Clean Water Act rather than any permit. 33 U.S.C. 1311(a).
9 Relevant to this case, the Clean Water Act prohibition on un-permitted point source discharges
10 applies to any farm that discharges any pollutant (see 33 U.S.C. § 1362(6)) from a point source. 33
11 U.S.C. § 1311(a). It does not matter whether the farm is a huge 3,000 animal CAFO or a single
12 animal. The relevant issues are whether there is a discharge of a pollutant and whether it originated
13 from a point source. *Id.* In this case, Sedelbauer violated the no-discharge requirement by
14 discharging through a point source opening in a fence, from a smaller feedlot at its Holmes Road
15 facility. (Pl’s Prop. Fact Nos. 209-221).

16 **A. Sedelbauer Has Violated Section 1.1 Of The Permit And The Clean Water Act**
17 **On At Least Eleven Instances By Discharging Pollutants From Animal**
18 **Confinement Areas Into Navigable Waters.**

19 Sedelbauer’s “animal production area” includes, but is not limited to, “(1) any storage,
20 containment or treatment structures, facilities or areas for manure, raw materials, mortality
21 management and process wastewaters, (2) animal confinement areas including outdoor animal lots
22 and (3) unconfined storage areas (such as headland stacking), if approved.” (Compl. Ex. B at 1).

23 **1. Sedelbauer violated Section 1.1 of the Permit on February 27, 28 and 29,**
24 **2004, and March 1 and 2, 2004, because polluted runoff flowed from the**
25 **large open lot to Tank Creek, a navigable water.**

26 Sedelbauer argues that Concerned Farmers has not supported its motion with admissible
27 evidence as to these discharge events. (Def. Br. at 14). Defendant also argues that the documents
28 and declarations submitted by Concerned Farmers do not support the claims that there was a

1 violation of Section 1.1, and that Lynn Sedelbauer in his declaration is able to refute these claims.
2 (Def. Br. at 14-15).

3 In the Parties' Joint Pre-Trial Report filed on August 27, 2004, Sedelbauer and Concerned
4 Farmers stipulated to the authenticity of documents obtained from the WDNR files. (See Joint Pre-
5 Trial Report ¶ 8). Further, in their declarations, Warden Jon Bronsdon, Mark Schraufnagel, Robert
6 Rohland and Daniel Helsel, all properly lay the foundation for the documents they submitted with
7 their declarations. (Pl's Reply to Def's Resp. to Pl's Prop. Fact Nos. 131-167). As the WDNR
8 representatives stated in their declarations, the respective documents are WDNR documents and
9 were produced or obtained by them in their course of duties at WDNR, or are photos that accurately
10 depict what they saw from their own personal knowledge when acting in their course of duties at
11 WDNR, or are reports of investigations they conducted as WDNR field staff. (*Id.*, and cited
12 materials); see also Fed. R. Evid. 803(8). In fact, Sedelbauer produced WDNR documents in a
13 similar manner in opposition to the Motion for Summary Judgment. (See e.g. Rohland Aff and
14 Rohland Supp. Aff, dated February 10 and February 11, 2005; Hughes Dec., Ex. E).

15 Sedelbauer argues in its Response to Plaintiff's Proposed Findings of Fact that many of the
16 WDNR investigation documents produced by Plaintiff to support summary judgment are not
17 admissible. Sedelbauer opposes summary judgment as to the February 27 through March 2, 2004
18 violations witnessed and documented by WDNR by asserting that the documents are not admissible.
19 (Def. Resp. to Pl. Proposed Finding of Fact Nos. 131-151). It is not clear what exactly Sedelbauer
20 objects to since it admits that the documents are authenticated WDNR documents (Def. Resp. to Pl.
21 Proposed Fact No. 134), but still claims that the hearsay rule applies. (*Id.*). For example, one of
22 Sedelbauer's attempts to create a contested fact states:

23 As for the various documents cited, Bronsdon Exhibit A, Rohland
24 Exhibit D and Helsel Exhibits A and B, are all hearsay documents
25 that have not been supported by proper foundation. While the
26 authenticity of the documents as DNR records has been
27 established, Plaintiff provides no evidence of the truth of the
28 matters stated in those documents as has not created the proper
foundations for any exception to the hearsay rule.

1 (Def. Resp. to Pl. Prop. Fact No. 131). Sedelbauer contests numerous other proposed facts that are
2 supported by WDNR documents, including reports of WDNR investigations, with similar
3 “objections.”

4 Defendant confuses the Rules of Evidence. Once a document is authenticated as a
5 government document, such as a document recording the activities of the agency, recording
6 observations done under the color of law, or results of investigations done by the agency, the
7 document is admissible hearsay. Fed. R. Evid. 803(8). The burden to show that a document is
8 admissible as a government document is light. “Since the assurances of accuracy are generally
9 greater for public records than for regular business records, the proponent is usually not required to
10 establish their admissibility through foundation testimony.” Weinstein’s Federal Evidence §
11 803.10[2] at 803-91 (2nd Ed., current through 2004); see also *Major v. Treen*, 574 F.Supp. 325, 330
12 n. 6 (E.D. La 1993) (oral and written statements made at public hearings before legislative
13 committees were admissible as public records without foundational testimony), *cited with approval*
14 *Schultz v. Thomas*, 649 F.2d 620, 622 (E.D. Wis. 1986); see also *Karlin v. Foust*, 975 F.Supp. 1177,
15 1211 (W.D. Wis. 1997) (out of court statements by government official in a government document
16 is admissible), *rev’d in part on other grounds* 188 F.3d 446 (7th Cir. 1999). A government
17 document can contain both facts and conclusions, and both are admissible under Fed. R. Evid.
18 803(8). *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988);
19 *accord U.S. v. Sutton*, 337 F.3d 792 (7th Cir. 2003). Moreover, in the Seventh Circuit, a document
20 admissible under Fed. R. Evid. 803(8) may contain hearsay and may, in fact, contain multiple levels
21 of hearsay. *In re Oil Spill by Amoco Cadiz off Coast of France on Mar. 16, 1978*, 954 F.2d 1279
22 (7th Cir. 1992).

23 If the Defendant wishes to contest the accuracy or honesty of a WDNR document, it is the
24 Defendant’s burden to set forth affirmative, admissible, “significant probative evidence” showing
25 the WDNR document to be false. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct.
26 2505, 91 L.Ed.2d 202 (1986) (evidence must be significantly probative to defeat summary
27 judgment); *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 118 (5th Cir. 1990) (non-movant
28 must provide “significantly probative evidence,” equal to “substantial evidence,” to defeat summary

1 judgment). Because Sedelbauer rests its defense on erroneous interpretations of the Rules of
2 Evidence, it fails to sufficiently establish contested facts as required to defeat Plaintiff’s Motion for
3 Summary Judgment. See Fed. R. Civ. P. 56(e) (judgment appropriate when non-movant fails to
4 oppose summary judgment with “specific facts showing that there is a genuine issue for trial”);
5 *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (Rule 56(e)
6 “requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the
7 depositions, answers to interrogatories, and admissions on file, designate specific facts showing that
8 there is a genuine issue for trial”).⁵

9 Moreover, far from establishing a contested fact, many of the Defendant’s own documents
10 show that there were violations of section 1.1 on February 27 through March 2, 2004. WDNR staff
11 member Rohland states, in a document produced by Defendant, that “[t]he other items, runoff from
12 the lots/walkway and discharge from the filter strips, seem pretty definite and will constitute 2
13 separate violations.” (Rohland Aff., Ex. A at 1)⁶. Defendant authenticated this document and used
14 it as proof for what was said in the document, and they should therefore have no objection to the
15 part of the document that states that Mr. Rohland found that there were at least 2 separate violations
16 of Section 1.1 from discharges from the filter strips and from the animal feeding operations.
17 Further, WDNR staff member Gail Lisse’s affidavit, also submitted by Sedelbauer, states that “there
18 was a violation of the “no discharge” condition in the existing permit issued to Sedelbauer Farms,
19 Inc” and that it was from the animal production area. (Lisse Dec., Ex. C). Both of these documents
20 were produced by Sedelbauer, but support Plaintiff’s Motion. Sedelbauer does not contest these

21
22 ⁵ Defendant has attempted to create contested facts by pointing to its own denials submitted in response to Plaintiff’s
23 Requests for Admission. (See e.g. Def. Resp. to Pl’s Prop. Fact No. 133, citing Def’s Resp. to First Set of Requests for
24 Admission No. 91-98). The Court in *Celotex* held that “admissions on file” could be used in opposition to summary
25 judgment. *Celotex*, 477 U.S. at 324. However, the Court did not hold that denials could be used to create a contested
26 fact and defeat summary judgment. *Id.* Moreover, Rule 56(e) does not provide for this method of opposing summary
judgment either. Fed. R. Civ. P. 56(e). Allowing a party to oppose summary judgment with its own denials would
circumvent the purpose of Rule 56(e), which requires a non-moving party to “set forth specific facts showing that there
is a genuine issue for trial,” rather than “rest upon the mere allegations or denials of the adverse party’s pleading.” In
this case, especially, Defendant should not be allowed to rest upon its denials in response to Requests for Admission,
because Defendant’s denials were based on its lack of information. (See Hughes Dec, Ex. G at pp. 27-30).

27 ⁶ There are three affidavits (or declarations) by Robert Rohland in the record. The affidavit referred to here was
28 produced by Defendant and is dated February 10, 2005. The statement produced by Plaintiff is referred to herein as the
Rohland Dec. The third statement, dated February 11, 2004, was produced by Defendant and is referred to at the
Supplemental Affidavit of Robert Rohland or “Rohland Supp. Aff.”

1 findings of runoff violations, except to assert in unqualified, expert-type opinions by Mr. Sedelbauer
2 and legal conclusions that WDNR’s proof is insufficient to show that the runoff from Sedelbauer’s
3 operation contained manure. (Def. Resp. to Pl’s Prop. Fact Nos. 131-133, 135, 146, 148, citing
4 Sedelbauer Dec. at ¶¶ 2-8). Moreover, Sedelbauer is implementing modifications to its runoff
5 controls, pursuant to plans submitted to WDNR to address the violations noted in the Notice of
6 Violation. (See Lisse Dec. ¶¶ 3-4, Ex C).

7 Sedelbauer does not present evidence that contaminated runoff from the animal production
8 areas did not flow of the feedlots and into a roadside ditch leading to Tank Creek. Rather than
9 producing any evidence to contest the facts established by the WDNR’s investigation documents,
10 Sedelbauer attempts to contest WDNR’s findings by speculating as to what might have happened.
11 For example, Sedelbauer provides affidavits stating that that the brown colored liquid is most likely
12 colored by “dirt and soil from the ground” or “plant materials, dung or manure from non-farm
13 animals and wildlife and from discarded trash.” (Def. Resp. to Pl’s Prop. Fact No. 131-135, citing
14 Sedelbauer Dec. ¶¶ 2-8). This is, of course, mere speculation by Mr. Sedelbauer as to what WDNR
15 agents actually saw. Mr. Sedelbauer already admitted that he was not present when WDNR agents
16 were conducting their investigations. (Pl’s Reply to Def. Resp. to Pl’s Prop. Fact Nos. 131-135).
17 Sedelbauer does not state that the brown liquid was “plant material, dung or manure from non-farm
18 animals and wildlife and from discarded trash,” only that it might have been. This is specifically the
19 type of “merely colorable” defense that is insufficient to defeat summary judgment. *Wildman v.*
20 *Edelson*, 859 F.2d 553, 556 (7th Cir. 1988).

21 Moreover, all the possible non-manure things Mr. Sedelbauer speculates could have been in
22 the runoff (as possible sources for the discoloration) are all pollutants under the CWA. 33 U.S.C. §
23 1362(6) (defining “pollutant” to include “garbage... rock, sand, cellar dirt and industrial, municipal,
24 and agricultural waste discharged into water). Sediment and soil sediments are also both pollutants
25 under the CWA. See *Natural Resources Defense Council v. EPA*, 966 F.2d 1292, 1305 (9th Cir.
26 1992); *Mississippi River Revival, Inc. v. City of Minneapolis*, 319 F.3d 1013, 1017 (8th Cir. 2003);
27 *Sierra Club v. Cedar Point Oil, Co.*, 73 F.3d 546, 567 (5th Cir. 1996). Therefore, even if Mr.
28 Sedelbauer’s speculation is correct, and the runoff from Defendant’s operation contains these

1 pollutants, rather than manure, Defendant still violated Section 1.1 of Sedelbauer’s NPDES permit.
2 (See WPDES/NPDES Permit WI-0062421-01-0 § 1.1, attached as Ex. B to 1st Am. Compl.
3 (“Permit”). Any violation of an NPDES permit, no matter how *de minimis*, "technical," "rare" or
4 insignificant is irrelevant to liability. *Sierra Club v. Union Oil Co. of Cal.*, 813 F.2d 1480, 1490-91
5 (9th Cir. 1988); *vacated for reconsideration*, 485 U.S. 931 (1988), *reinstated & amended*, 853 F.2d
6 667 (9th Cir. 1988).

7 Dan Helsel also states in a correspondence to Robert Rohland, attached as Exhibit F to the
8 Rohland December 17, 2004 Declaration submitted by Concerned Farmers, that Mike Goehring and
9 Gaylord Olson of the Jackson County Land Conservation Department were present on February 27,
10 2004 to witness the runoff. (RDPF No. 49). Yet, in their defense of this Motion and in his
11 declaration, Michael Goehring does not dispute a single thing stated by the WDNR employees
12 regarding the violations on the date he was present. Finally, WDNR staff followed the polluted
13 discharge on February 27, 2004 from the ditch to its source at the Sedelbauer animal production
14 area. (RDPF No. 41-42).

15 **2. Sedelbauer further violated Section 1.1 of the Permit on May 13, 14, 21,**
16 **24, and December 5, 2004, when polluted runoff discharged from the**
17 **large open lot and feedlots to the Trempealeau river.**

18 Sedelbauer does not contest Plaintiff’s facts showing violations of Permit section 1.1 during
19 May, 2004, except those already mentioned above an unsupported conclusion that the May 13 and
20 May 21, 2004 events were during “chronic rainfall event[s].” This is, of course, a legal conclusion
21 that Defendant satisfies the requirements for the permit exception for discharges during chronic
22 rainfall events. (See Permit at § 1.1). Defendant provides no facts to support this conclusion.
23 Nowhere does Sedelbauer claim that it could not remove manure on those dates, or any evidence at
24 all that a chronic rainfall event occurred on May 13 or May 21, 2004. Sedelbauer cannot claim
25 coverage under the permit’s exception for chronic rainfall events without providing sufficient,
26 uncontested facts showing that it is entitled to such exception. *United States v. First City Nat’l Bank*
27 *of Houston*, 386 U.S. 361, 366, 87 S.Ct. 1088, 18 L.Ed.2d 151 (1967) (a defendant has the burden to
28

1 prove that it qualifies for an exemption); *United States v. Ohio Edison Co.*, 276 F.Supp.2d 829, 855
2 (S.D. Ohio 2003) (same).

3 Apparently believing that its permit allows discharges, Sedelbauer not only fails to provide
4 sufficient evidence in opposition to summary judgment, it admits that there were discharges and that
5 “these discharges ran mostly through the filter strips.” (Def. Br. at p. 16). Moreover, whether
6 Defendant’s discharges caused a large impact to the environment is irrelevant. *Friends of the Earth,*
7 *Inc. v. Laidlaw Env’tl Servs., Inc.*, 528 U.S. 167, 181, 145 L.Ed.2d 610, 120 S. Ct. 693 (2000);
8 *Sierra Club v. Union Oil Co. of Cal.*, 813 F.2d 1480, 1490-91 (9th Cir. 1988); *vacated for*
9 *reconsideration*, 485 U.S. 931 (1988), *reinstated & amended*, 853 F.2d 667 (9th Cir. 1988). In
10 summary, Defendant fails to adequately contest its violations on May 13 and 21, 2004.

11 At other places in its materials Defendant asserts that it discharged sawdust and other debris,
12 rather than manure and therefore did not violate its permit. (Def. Prop. Fact No. 65, and cited
13 materials). Defendant appears to be confused about what the permit prohibits. Section 1.1 of
14 Defendant’s permit states that “there shall be no discharge of pollutants to navigable waters from the
15 animal production area...” (Permit § 1.1) “Pollutant” is defined under the Clean Water Act to
16 include almost every foreign material.

17 The term “pollutant” means... solid waste... garbage... biological
18 materials... wrecked or discharged equipment, rock, sand, cellar
19 dirt and industrial, municipal, and agricultural waste discharged
 into water.

20 33 U.S.C. § 1362(6); 40 C.F.R. 122.2; Wis. Admin. Code § NR 205.03(28). Sawdust and
21 “sediment” are solid waste, garbage, biological material, industrial and/or agricultural waste and
22 therefore pollutants under the CWA and the Defendant’s NPDES permit. *Id.* Therefore, rather than
23 creating a contested fact regarding whether it violated Permit Section 1.1 by discharging a pollutant,
24 Defendant merely contests which pollutant it discharged. Regardless of the pollutant, Defendant
25 violated Section 1.1.

26 Plaintiff shows that all discharges from the animal production area at Sedelbauer-Main
27 reached navigable waters and waters of the state, and therefore violate Section 1.1 of Sedelbauer’s
28

1 NPDES permit. (Pl. Prop. Fact Nos. 41, 141-143, 145, 151, 153, 200-205, 208); *Atlantic States*
2 *Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 818 (7th Cir. 1997).

3 **B. Sedelbauer Violated Section 3.2.11 Of The Permit On At Least Five Days By**
4 **Field Spreading Manure That Either Poned On The Intended Site Or Ran Off**
5 **The Intended Site.**

6 Plaintiff moved for summary judgment regarding Defendant's violations of Permit section
7 3.2.11, which states that "[s]urface applied manure shall not: run off the intended site at any time
8 [or] pond on the intended site at any time." (Permit § 3.2.11). Sedelbauer attempts contest the facts
9 showing its violation (including the testimony, investigation reports and photographs WDNR
10 employees) by asserting that "the alleged 'runoff' occurred not because of anything Sedelbauer did
11 wrong." (Def. Br. at 17). As stated above, however, the CWA is a strict liability statute. *Kelly v.*
12 *EPA*, 203 F.3d 519, 522 (7th Cir. 2000); *Natural Resources Defense Council v. Outboard Marine*
13 *Corp.*, 692 F.Supp. 801, 821 (N.D. Ill. 1988) (citing *United States v. Earth Sciences, Inc.*, 599 F.2d
14 368, 374 (10th Cir. 1979)). A defendant's intent and good faith are irrelevant. *Hawaii's Thousand*
15 *Friends*, 821 F.Supp. 1368, 1392 (; *Sierra Club v. Union Oil Co. of Cal.*, 813 F.2d 1480, 1490-91
16 (9th Cir. 1988); *vacated for reconsideration*, 485 U.S. 931 (1988), *reinstated & amended*, 853 F.2d
17 667 (9th Cir. 1988) (violations that are *de minimis*, "technical," "rare" or insignificant is irrelevant to
18 liability). The Permit does not say, "shall not run off the site except when the manure is applied
19 properly" as Sedelbauer wishes to read it. (Def. Br. at 17). Instead, Sedelbauer should not have
20 applied manure in a way that could potentially "run off the intended site at any time [or] pond on the
21 intended site at any time." (Permit § 3.2.11). This means proving adequate controls or not applying
22 manure in the winter months, when manure is prone to pond and run off the field. (Pl. Prop. Fact
23 Nos. 259-261).

24 Defendant also argues that it can allow manure to run off its fields and discharge such runoff
25 as long as the manure was spread properly- according to a manure management plan and other
26 spreading requirements of the WPDES permit. Def. Opp. p. 17. However, this ignores the
27 overlapping requirements of the WPDES permit and the plain language of the permit provision
28 expressly forbidding surface applied manure such that it can "run off the intended site at any time

1 [or] pond on the intended site at any time.” (See Permit § 3.2.11). The prohibition on runoff and
2 ponding applies at all times to all to surface applied manure. Moreover, Sedelbauer admits that he
3 was still spreading manure on the Laufenberg field up until January 31, 2004, less than a month
4 before the runoff occurred, not months before the event as Defendant suggests. Sedelbauer Dec. ¶
5 4; Def. Br. 18.

6 Defendant’s own submitted affidavits support the fact that there was manure runoff from
7 Laufenberg Field. A WDNR email communication submitted by Sedelbauer states “[w]hen I and
8 Mark Schaufnagel walked the fields, it was clearly snowmelt caring [sic] manure with it.” (RDPF
9 No. 45). In response to this email communication submitted by Defendant, another WDNR
10 employee, Ted Johnson, states that “[s]olid manure did runoff from Sedelbauer fields.” (Rohland
11 Supp. Aff., Ex. D). Sedelbauer’s attempt to use these documents to create a contested fact regarding
12 runoff from the Laufengberg field is inapposite. Further, Defendant admits runoff of “brown liquid”
13 from the Laufenberg field when Lynn Sedelbauer states that “more than 95% of the ‘brown liquid’
14 running through the ditch came from the Laufenberg Field.” (Pl. Reply Def. Prop. Fact 146).⁷

15 Sedelbauer provides no colorable evidence to dispute the WDNR and Concerned Farmers’
16 findings. It certainly does not provide significant probative evidence to show that there is a genuine
17 issue of material fact, or that their evidence is outcome determinative. *Wildman v. Edelson*, 859
18 F.2d 553, 557 (7th Cir. 1988) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 91
19 L.Ed.2d 202, 106 S.Ct. 2505 (1986)). Defendant hides behind the defense of “lack of intent” and its
20 faulty interpretation of the permit. Defendant’s attempt fails. Intent is not a requirement for
21 liability under the CWA and the permit is clear in its prohibitions. Plaintiff’s evidence has been
22 properly authenticated and meets the exceptions to hearsay for government documents, Fed. R.
23 Evid. 803(8), which means that is allowed to be used for the truth of the matter asserted.

24 **C. Sedelbauer Is Operating Its Holmes-Road Site Without An NPDES Permit In**
25 **Violation Of The Clean Water Act.**

26
27 ⁷ It is also interesting to note that Mike Goehring and Gaylord Olson, both of the Jackson County Land Conservation
28 Department, were present on February 27, 2004 to witness the runoff. (RDPF No. 49) The Defendant solicited and
provided an affidavit in opposition to summary judgment from Mr. Goehring. However, Mr. Goehring does not dispute
a single thing stated by the WDNR employees regarding the violations on the date he was present. Nor does he contest
that manure ponded and ran off the Laufenberg field, where it was spread less than a month before.

1 Concerned Farmers has provided evidence that pollutants have been discharged from the
2 Sedelbauer Holmes-Road site, from a point source into a navigable water, without a permit. (Pl’s
3 Prop. Fact Nos. 209-221, and cited materials). On May 14, May 21 and July 7, 2004, Defendant
4 discharged manure-water through an opening in a corrugated steel fence and into Holmes Creek.
5 (Pl. Prop. Fact Nos. 216-219, 221). These observations were photographed and documented. (Id.,
6 citing Cain Dec. ¶¶ 33-42, 62-67, 82-84, Exs. E, F, G, N, T). Every discharge from a point source
7 discharge requires an NPDES permit. 33 U.S.C. §§ 1311(a), 1362(12). A point source is “any
8 discernable, confined and discrete conveyance” and specifically includes any “ditch, channel...
9 conduit... discrete fissure... from which pollutants are or may be discharged.” 33 U.S.C. §
10 1362(14). The opening in the corrugated steel screen, through which pollutants ultimately
11 discharged into Holmes Creek, is a “point source” under the CWA because it is a “conduit,”
12 “channel” or “discrete fissure” regardless of whether the discharges occurred at an animal feeding
13 operation, industrial facility, or a persons backyard. 33 U.S.C. 1362(14); *United States v. West*
14 *Indies Transp., Inc.*, 127 F.3d 299, 300 (3rd Cir. 1997) (same), *cert. den.* 522 U.S. 1052, 118 S.Ct.
15 700 (1998); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (point source
16 definition covers every activity that emits pollution from an identifiable point). A discharge of
17 pollutants includes “additions of pollutants into waters of the United States from: surface runoff
18 which is collected or channeled by man... which do not lead to a treatment works.” 40 C.F.R. §
19 122.2 (defining “discharge of a pollutant”). Moreover, a “point source” need only convey pollutants
20 through a definable opening or channel. *South Florida Water Management Dist. v. Miscoosukee*
21 *Tribe*, 124 S.Ct. 1537, 1543, 158 L.Ed. 2d. 264 (2004).

22 Sedelbauer in its brief, misstates and misunderstands Plaintiff’s argument. Defendant
23 attempts to torch its own straw man by rewriting Plaintiff’s Motion as one claiming that the Holmes
24 Road Facility is part of the Sedelbauer-Main CAFO operation. (Def. Br. at 18-21). Although
25 Plaintiff reserves the right to introduce evidence at trial that Holmes Road is part of the same
26 operation as Sedelbauer-Main, that is not the issue for this Motion for Summary Judgment. The
27 only issue here is whether Defendant discharged through a point source. The Clean Water Act
28 prohibits discharges from a point source without a permit, regardless of whether the point source is

1 part of a larger point source (i.e., a CAFO). 33 U.S.C. § 1311(a). In fact, if Defendant had only one
2 heifer, or no heifers, it could not allow manure and other pollutants to discharge through any point
3 source into a navigable water. *Id.*

4 Contrary to Defendant’s argument, 40 C.F.R. § 122.23(d) does not exempt a non-CAFO farm
5 that is also a point source from the requirements of 33 U.S.C. § 1311(a). Rather, that section
6 designates which facilities must obtain a NPDES permit, regardless of whether such facility
7 discharges through a point source. This is because a CAFO is explicitly designated by Congress to
8 be a point source, regardless of whether it discharges through a discrete conveyance or otherwise
9 falls within the definition of “point source.” 33 U.S.C. § 1362(14) (“point source” means “any
10 discernible, confined and discrete conveyance, including but not limited to... concentrated animal
11 feeding operation”). Moreover, Defendant is incorrect in its characterization of 33 U.S.C. § 1342(f).
12 That section does not allow EPA to permit point source discharges without a permit, it allows the
13 EPA to designate categories that do not require an issuing state to notify EPA under 33 U.S.C. §
14 1343(d), when the state issues a permit. 33 U.S.C. §§ 1342(f) (EPA can establish categories which
15 are not subject to 33 U.S.C. § 1342(d)), 1342(d) (requiring notice to EPA when state receives
16 NPDES permit application and of state’s permitting activities). In other words, EPA has never
17 exempted small animal feeding operations from the requirement of 33 U.S.C. § 1311(a) when there
18 is a point source discharge on site. Otherwise, a small animal feeding operation could dredge and
19 fill a wetland on site, because it is exempt from getting an NPDES permit.

20 Defendant also relies on Mr. Sedelbauer’s declaration, which provides no colorable evidence,
21 but merely his opinion that “[i]t was probably just discolored water that Cain mistook for manure.”
22 (Pl. Prop. Facts No . 170). The factual opinion and supposed dispute provided by Lynn Sedelbauer
23 do not provide significant probative evidence to show that there is a genuine issue of material fact,
24 or that their evidence is outcome determinative, in light of the evidence provided by Concerned
25 Farmers. *Wildman v. Edelson*, 859 F.2d 553, 557 (7th Cir. 1988) (quoting *Anderson v. Liberty*
26 *Lobby, Inc.*, 477 U.S. 242, 252, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986)).

27 Also, even if Sedelbauer’s opinion is to be taken to be true, he states that the brown liquid
28 flowing from the Holmes-Road Site was soil erosion, mud, plant materials, dung or manure from

1 non-farm animals, or from discarded trash. Again, these are pollutants under the Clean Water Act
2 and Defendant can no more discharge these pollutants than it can discharge manure. See 33 U.S.C.
3 1362(6). Once again Defendant is arguing that it discharged a different pollutant, not that it did not
4 discharge a pollutant. No matter what pollutant Defendant discharged, it is a violation of 33 U.S.C.
5 § 1311(a).

6 **IV. SEDELBAUER’S VIOLATIONS ARE ONGOING AND CONTINUOUS AND**
7 **EXISTED AT THE TIME CONCERNED FARMERS FILED ITS COMPLAINT.**

8 Defendant misstates the requirements of the Supreme Court decision in *Gwaltney of*
9 *Smithfield v. Chesapeake Bay Found., Inc.* 484 U.S. 49. Defendant appears to argue that there
10 is no “reasonable likelihood” of violations due to changes that it has proposed and is in the process
11 of implementing. However, under *Gwaltney*, a plaintiff is only required to prove that violations
12 were likely to recur on or after the date the complaint was filed. *Atlantic States Legal Found., Inc.*
13 *v. Stroh Die Casting Co.*, 116 F.3d 814, 820-21 (7th Cir. 1997); *see also Atlantic States Legal*
14 *Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1136 (11th Cir. 1990). Specifically, *Gwaltney*
15 requires a plaintiff to show either: (1) that violations continue on or after the date the complaint is
16 filed, *or* (2) evidence exists from which a reasonable trier of fact could find a continuing likelihood
17 of a recurrence in intermittent or sporadic violations. *American Canoe Assoc., Inc. v. Murphy*
18 *Farms, Inc.*, 326 F.3d 505, 521 (4th Cir. 2003) (citing *Chesapeake Bay Found., Inc. v. Gwaltney of*
19 *Smithfield, Ltd.*, 844 F.2d 170, 171-172 (4th Cir. 1988) (“*Gwaltney II*”)); *see also Stroh Die Casting*
20 *Co.*, 116 F.3d at 821 (at trial or when proving the substantive case, plaintiff must only prove that the
21 defendant was either a continuous or intermittent violator at the time of suit); *Sierra Club v. Union*
22 *Oil Co.*, 853 F.2d 667, 671 (9th Cir. 1988); *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1062 (5th
23 Cir. 1991). Plaintiff shows both in this case.

24 Defendant argues that they submitted plans to WDNR to deal with the violations that
25 occurred in the spring of 2004 and that WDNR has approved those plans. However, even if these
26 statements are taken as true, the fact that Sedelbauer submitted such plans, any environmental
27 compliance measures proposed in the plans were not put into place by the time the Complaint was
28 filed and still have not entirely been put into practice. (DPFF Nos. 109-115). WDNR did not

1 approve Sedelbauer's plans until September 19, 2004, and that was only a conditional approval.
2 (DPFF No. 112).

3 Sedelbauer also denies that it violated its permit on September 15, 2004 and December 5,
4 2004, because WDNR found "no evidence of either manure or silage leachate." Def. Br. at 13.
5 However, the documents and affidavit they rely on to support this argument say nothing of the sort.
6 On September 16, 2004, the day after the rain event, Mr. Rohland went to Sedelbauer Farms to
7 check on the complaint made by Midwest Environmental Advocates. Mr. Rohland did not find any
8 ongoing runoff, but found "accumulation of sediment, sand, sawdust, and haylage in the northwest
9 and southeast corners of the ditches" where the complaint stated there was runoff. (DPFF No. 65,
10 citing Rohland Aff, Ex. C at 1). Sediment, sand, sawdust and haylage are all pollutants. 33 U.S.C.
11 § 1362(6). Defendant is prohibited from discharging these pollutants, as well as being prohibited
12 from discharging manure. See Permit § 1.1 (prohibiting discharge of pollutants); 33 U.S.C. §
13 1362(6) (defining pollutant to include soil, rock, sand, garbage, solid waste, and industrial,
14 municipal and agricultural waste). Even though DNR did not investigate until a day after the
15 reported runoff violation, it found ample evidence that pollutants were discharged, since the
16 pollutants had accumulated in the ditch. (DPFF No. 65, citing Rohland Aff, Ex. C at 1). Moreover,
17 the materials submitted by Defendant contain a memo by WDNR stating that "[t]he
18 sediment/sawdust noted" from the September 16, 2004 investigation will not be controlled at least
19 until November 1, 2004 when stormwater controls are to be completed. (Rohland Aff., Ex. C; see
20 also Pl. Reply Def. Prop. Fact No. 122).

21 Similarly for the December 5, 2004 violation, Mr. Rohland visited the site three days after
22 the incident. On December 8, 2004 he noted "[t]here had apparently been runoff from the road and
23 some of the Sedelbauer farm yard into the ditch." (Pl's Reply to Def. Prop. Fact No. 204). These
24 conclusions by WDNR staff, days after the fact, do not refute Plaintiff's claims as Defendant
25 implies. If anything, they tend to support Plaintiff's claims. Further, Defendant fails to mention the
26 violations photographed and witnessed on July 7, 2004, except to offer the insufficient, unsupported
27 denial that Mr. Sedelbauer "dispute[s] these claims for the reasons stated above" regarding the May
28 and February violations. This is not colorable, significant probative evidence to show that there is a

1 genuine issue of material fact, or that their evidence is outcome determinative, in light of the
2 evidence provided by Concerned Farmers. *Wildman v. Edelson*, 859 F.2d 553, 557 (7th Cir. 1988)
3 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 91 L.Ed.2d 202, 106 S.Ct. 2505
4 (1986)). Because there were violations occurring after the filing of the Complaint in this action,
5 Plaintiff proved a likelihood of ongoing violations pursuant to the holding in *Gwaltney*. *American*
6 *Canoe Assoc.*, 326 F.3d at 521; *Gwaltney II*, 844 F.2d at 171-172.

7 Defendant attempts to contest the expert testimony of Dr. Byron Shaw, which demonstrates
8 that Sedelbauer will continue to violate its permit on an intermittent basis until it installs adequate
9 controls. Although Defendant inadequately contests the facts submitted by Dr. Shaw, those facts are
10 not necessary to find a likelihood of ongoing violation. Even if Sedelbauer were correct and the
11 runoff controls it proposed to WDNR will prevent all future runoff violations, those runoff controls
12 were not in place when the Complaint was filed in this case. (DPFF Nos. 109-115). Therefore,
13 even if Defendant's attack on the expert's opinions of Dr. Shaw were sufficient, and even if
14 Defendant had not violated its permit after the Complaint was filed, Plaintiff still satisfies the
15 requirements of *Gwaltney* because there was a likelihood of continuing violations on the date the
16 Complaint was filed.

17 **CONCLUSION**

18 For all the foregoing reasons, Concerned Farmers' Motion for Partial Summary Judgment on
19 Liability should be granted.

20
21 Dated: February 28, 2005

Respectfully submitted,

22
23 LAW OFFICES OF NOAH GOLDEN-KRASNER

24 By: _____
25 Noah Golden-Krasner
26 Attorney for Plaintiff
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28