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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

|                              |   |  |
|------------------------------|---|--|
| INLAND EMPIRE WATERKEEPER, a | ) | Case No. ED CV 07-00480 DDP (FMOx)       |
| chapter of ORANGE COUNTY     | ) |  |
| COASTKEEPER, a non-profit    | ) | <b>AMENDED ORDER GRANTING MOTION FOR</b> |
| corporation,                 | ) | <b>PARTIAL SUMMARY JUDGMENT</b>          |
|                              | ) |  |
| Plaintiff,                   | ) | [Motion filed on March 18, 2008]         |
|                              | ) |  |
| v.                           | ) |  |
|                              | ) |  |
| UNIWEB, INC., a California   | ) |  |
| corporation,                 | ) |  |
|                              | ) |  |
| Defendant.                   | ) |  |
|                              | ) |  |

This matter is before the Court on Plaintiff Inland Empire Waterkeeper's Motion for Partial Summary Judgment. After reviewing the papers submitted by the parties and considering the arguments therein, the Court grants the motion.

**I. BACKGROUND**

This case arises out from Defendant Uniweb, Inc.'s ("Uniweb") alleged violation of the Federal Water Pollution Control Act ("Clean Water Act" or "Act"), 33 U.S.C. § 1365. Plaintiff Inland Empire Waterkeeper, a chapter of the nonprofit organization Orange

1 County Coastkeeper, filed this citizen suit against Uniweb as one  
2 of several related cases against industrial users that release  
3 wastewater into the City of Corona's Publicly Owned Treatment Works  
4 ("POTW"). Plaintiff alleges that Uniweb has exceeded the  
5 wastewater discharge limits under its permit with the City of  
6 Corona in violation of the Clean Water Act. Plaintiff seeks  
7 partial summary judgment that Uniweb violated the Act and a  
8 determination of the number of violations.

9 A. Statutory Background on the Clean Water Act

10 Section 301(a) of the Clean Water Act prohibits the discharge  
11 of pollutants into navigable waters unless in compliance with the  
12 Act. Congress directed the Environmental Protection Agency ("EPA")  
13 to promulgate regulations setting limits on the pollutant  
14 discharges from three general types of "point sources," 33 U.S.C. §  
15 1362(14) (1976), including (1) point sources discharging directly  
16 into navigable waters ("direct dischargers"); (2) POTWs treating  
17 municipal sewage or industrial wastewater; and (3) point sources  
18 discharging pollutants into POTWs rather than directly into  
19 navigable waters ("indirect dischargers"). See Nat'l Ass'n of  
20 Metal Finishers v. EPA, 719 F.2d 624, 633 (3d Cir. 1983), rev'd on  
21 other grounds, Chem. Mfrs. Ass'n v. Natural Res. Def. Council,  
22 Inc., 470 U.S. 116 (1985). Direct dischargers and POTWs are  
23 regulated through the National Pollutant Discharge Elimination  
24 System ("NPDES") permit issued to the discharger under section 402  
25 of the Act. Indirect dischargers are regulated under separate  
26 regulatory standards provided for by section 307(b)(1) of the Act,  
27 33 U.S.C. § 1317(b). Id.

28

1 Congress sought to regulate indirect dischargers in  
2 recognition that "the pollutants which some indirect dischargers  
3 release into POTWs could interfere with the operation of the POTWs,  
4 or could pass through the POTWs without adequate treatment." Nat'l  
5 Ass'n of Metal Finishers, 719 F.2d at 633. The EPA has promulgated  
6 two types of national pretreatment standards applicable to indirect  
7 dischargers: general pretreatment regulations and national  
8 categorical pretreatment standards. "It is unlawful for any  
9 indirect discharger to operate in violation of any 'effluent  
10 standard or prohibition or pretreatment standard' promulgated under  
11 section 307.'" Int'l Union et al. v. Amerace Corp., Inc., 740 F.  
12 Supp. 1072, 1079 (D.N.J. 1990), (quoting 33 U.S.C. §§ 1317(d),  
13 1311(a)).

14 40 C.F.R. 403 sets forth the permitting requirements for  
15 "industrial users" that release pollutants into POTWs.<sup>1</sup> All POTWs  
16 discharging over 5 million gallons per day ("GPD") and receiving  
17 pollutants from industrial users must develop a pretreatment  
18 program. 40 C.F.R. § 403.8. A POTW must issue individual permits  
19 to all "Significant Industrial User[s]," which includes those  
20 industrial users (1) subject to the categorical pretreatment  
21 standards; (2) discharging more than 25,000 GPD; or (3) determined  
22 to be significant by the POTW based upon "a reasonable potential  
23 for adversely affecting the POTW's operation or for violating any  
24 [p]retreatment [s]tandard or requirement." 40 C.F.R. §§ 403.8(f),  
25 403.3(v)(1)(ii). The permits must establish effluent limits, as

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28 <sup>1</sup>By definition, "[the] term Industrial User or User means a source of Indirect Discharge." 40 C.F.R. § 403.3(j).

1 well as self-monitoring, sampling, reporting, notification and  
2 recordkeeping requirements. 40 C.F.R. § 403.8(f)(1).

3 POTWs are also required to set local standards. "[W]here  
4 pollutants contributed by User(s) result in Interference or  
5 Pass-Through, and such violation is likely to recur, [POTWS must]  
6 develop and enforce specific effluent limits for Industrial  
7 User(s), and all other users, as appropriate . . . ." 40 C.F.R.  
8 403.5(c)(2). "[S]uch [local] limits shall be deemed [enforceable]  
9 Pretreatment Standards for the purposes of section 307(d) of the  
10 Act." 40 C.F.R. § 403.5(d). Local limits may be more stringent  
11 than federal pretreatment standards. 40 C.F.R. § 403.4.

12 B. Factual Background

13 1. The City of Corona's Pretreatment Program

14 The City of Corona's pretreatment ordinance, adopted pursuant  
15 to 40 C.F.R. 403 and set forth under section 13.08 of the Corona  
16 Municipal Code, provides local prohibitions, discharge limits, and  
17 reporting and permitting requirements. The Regional Water Quality  
18 Board, which is the "Approval Authority" delegated by the EPA,  
19 approved the City's pretreatment program. See Cal. Water Code §§  
20 13000-13001. The City's permits, issued pursuant to the  
21 pretreatment ordinance and allowing industrial users to discharge  
22 pollutants into its POTW, establish the local limits specific to  
23 the user.

24 2. Defendant Uniweb

25 Defendant Uniweb manufactures retail store fixtures at a  
26 facility in Corona, California. (Def's Opp'n 5.) As part of its  
27 manufacturing operations, Uniweb cleans and rinses the steel it  
28 uses to make the store fixtures. (Pl.'s Mot. 2.) The wastewater

1 generated through this process is discharged into the City of  
2 Corona's POTW facility Number 2. (Def.'s Opp'n 5.)

3 Since 2001, the City of Corona has issued to Uniweb an annual  
4 pretreatment permit that establishes "effluent limits" for specific  
5 pollutants. (Wastewater Discharge Permits 2001-2008, Pl.'s Exhs.  
6 3-9.)<sup>2</sup> These permits identify the maximum concentration of  
7 specific types of pollution allowed per part of water. (Pl.'s Exh.  
8 3, 98-100; Exh. 4, 112-14; Exh. 5, 126-28; Exh. 6, 142-44; Exh. 7,  
9 158-160; Exh. 8, 176-78; Exh. 9, 194-96.) These permits also  
10 establish a sampling frequency for each pollutant requiring that  
11 Uniweb conduct routine water testing and report the results to the  
12 City under penalty of perjury. (Pl.s' Exhs. 3-9.)

13 3. The City of Corona's Total Dissolved Solids Offset  
14 Program

15 On January 29, 2003, the City of Corona Department of Water  
16 and Power addressed a letter to Uniweb and other industrial users  
17 that announced the completion of a new water softening facility,  
18 also called a desalter. (Pl. Exh. 14 & Uniweb Exh. 101.) The  
19 letter provided that the City had received approval from the  
20 Regional Board to operate an off-set program "to pass the salt  
21 removal benefits to industrial users, providing that the City  
22 fulfil its discharge obligation as outlined in the NPDES Permit."  
23 (Id.) The letter states:

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25 <sup>2</sup> Effluent limits can be understood as the concentration level  
26 of a specific type of pollution per part of water that a permit  
27 holder may discharge into a POTW. For example, Defendant's 2001  
28 permit indicates that Defendant may not discharge more than 332  
milligrams of sodium per liter of waste water. (Pl.'s Exh. 3, 98-  
100; Ex. 4, 112-14; Exh. 5, 126-28; Ex. 6, 142-44; Exh. 7, 158-160;  
Exh. 8, 176-78; Exh. 9, 194-96.)

1 To implement this offset program, the City is proposing to  
2 establish a surcharge fee for *total dissolved solids*,  
3 considering that the *total dissolved solids* is the summation  
4 of the *sodium, sulfate, chloride*, and *total hardness*. Offset  
5 benefits will apply to those individual mineral components as  
6 well. The surcharge fees collected will be used to assist  
7 maintenance and future expansion of the City's Desalter.

8 (Id.)

9 The City considered eligible for the off-set program those  
10 industrial users with flows less than 25 million GPD and TDS  
11 concentrations of less than 4,800 mg/l. Discharges over 850 mg/l  
12 of TDS would be subject to a \$ .05 surcharge fee per pound of TDS.  
13 On July 29, 2004, according to the aforementioned terms, Uniweb and  
14 the City entered an agreement for Uniweb's participation in the  
15 off-set program. (Pl. Exh. 15 & Uniweb Exh. 102.) On July 1,  
16 2008, the City plans to end the off-set program.

17 4. Plaintiff's Allegations and Uniweb's Defenses

18 Plaintiff maintains that many wastewater samples taken by  
19 Uniweb or the City between 2001 and 2007 exceeded the effluent  
20 limits for sulfate, nickel, sodium and TDS that are set forth in  
21 Uniweb's permit. Specifically, Plaintiff alleges Uniweb exceeded  
22 its permit limits for nickel on six occasions, for sodium on eight  
23 occasions, for sulfate on thirteen occasions, and for TDS on eleven  
24 occasions. Plaintiff argues that each violative sample should  
25 count not as a single violation, but as a violation for each day of  
26 the sampling period, which would amount to 1,333 total violations  
27 (515 for sulfate, 365 for nickel, 183 for sodium, and 270 for TDS).  
28 Plaintiff additionally asserts that Uniweb may not rely on the off-

1 set program to avoid liability because the program was not enacted  
2 pursuant to appropriate procedures under the Clean Water Act.

3 Uniweb raises several defenses based upon the TDS off-set  
4 program. The focus of these defenses are that the off-set program  
5 increased Uniweb's discharge limits, such that the majority of its  
6 alleged violations did not in fact violate the effluent limits as  
7 modified by the off-set program. Uniweb argues the off-set program  
8 was in compliance with the Clean Water Act, and if it was not,  
9 Plaintiff's complaint properly lies with the City. Uniweb also  
10 raises additional defenses: it argues that Plaintiff's pre-lawsuit  
11 notice was inadequate; that Plaintiff's claims will become moot  
12 upon the end of the off-set program on July 1, 2008; and that  
13 Plaintiff does not have standing to challenge the violations that  
14 occurred outside the scope of the off-set program because those  
15 violations are not recurring or likely to recur.

16

## 17 **II. LEGAL STANDARD**

18 Summary judgment is appropriate where "the pleadings, the  
19 discovery and disclosure materials on file, and any affidavits show  
20 that there is no genuine issue as to any material fact and that the  
21 movant is entitled to a judgment as a matter of law."  
22 Fed. R. Civ. P. 56(c). In determining a motion for summary  
23 judgment, all reasonable inferences from the evidence must be drawn  
24 in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc.,  
25 477 U.S. 242, 255 (1986). A genuine issue of material fact is  
26 created if "the evidence is such that a reasonable jury could  
27 return a verdict for the nonmoving party," and material facts are  
28 those "that might affect the outcome of the suit under the

1 governing law." Anderson, 477 U.S. at 248. On the other hand, no  
2 genuine issue of fact exists "[w]here the record taken as a whole  
3 could not lead a rational trier of fact to find for the non-moving  
4 party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475  
5 U.S. 574, 587 (1986).

6  
7 **III. DISCUSSION**

8 A. Plaintiff's Pre-Lawsuit Notice

9 To file a "citizen" lawsuit under the Clean Water Act, the  
10 plaintiff must first provide sixty days notice to the defendant.  
11 33 U.S.C. § 1365(b). Uniweb argues that Plaintiff's notice was  
12 insufficient because there was "no reference to a challenge to the  
13 validity of the Off-Set Program." (Def.'s Opp'n 14.) The Court  
14 disagrees.

15 A plaintiff's notice need only provide "sufficient information  
16 to permit the recipient to identify the specific standard,  
17 limitation, or order alleged to constitute a violation." 40 C.F.R.  
18 135.3(a). The Ninth Circuit has recognized the pre-lawsuit notice  
19 requirement as one of "reasonable specificity." S.F. Baykeeper v.  
20 Tosco Corp., 309 F.3d 1153, 1158 (9th Cir. 2002). There is no  
21 requirement "that plaintiffs list every specific aspect of detail  
22 of every alleged violation." Id. (citations omitted).

23 Plaintiff has complied with that requirement here.<sup>3</sup>

24 Plaintiff sent a letter to Uniweb stating that it intended to bring  
25 suit under the Clean Water Act. Plaintiff explained that it

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<sup>3</sup>There is no dispute that Plaintiff's October 31, 2006 letter  
28 was sent more than sixty days before it filed suit on April 24,  
2007.



1 believed Uniweb to have violated the Act by releasing wastewater in  
2 excess of the limits set forth in Uniweb's discharge permits.  
3 Plaintiff specifically cited to the Uniweb's wastewater discharge  
4 permits. (See Compl. Exh. A.) Attached to the letter was a  
5 document itemizing the alleged violations. The document identified  
6 the limits set forth in Uniweb's permits - not the off-set program  
7 - as the standard for finding excess discharges of wastewater. The  
8 document also included calculations of the percentage of excess  
9 over the permit limits. (Id.) The notice was a reasonably  
10 specific indication that Plaintiff was alleging violations of  
11 Uniweb's permit limits.

12 Uniweb's suggestion that Plaintiff provided inadequate notice  
13 is unconvincing. The notice was "sufficiently specific to inform  
14 [Uniweb] about what it [was allegedly] doing wrong, so that it  
15 [knew] what corrective actions [would] avert a lawsuit." ONRC  
16 Action v. Columbia Plywood, Inc., 286 F.3d 1137, 1143 (9th Cir.  
17 2002). The clear inference to be drawn from Plaintiff's notice was  
18 that it alleged violations of the permit limits and considered the  
19 off-set program inapplicable. Plaintiff did not need to  
20 specifically cite to the off-set program to comply with the notice  
21 requirement. Cf. Waterkeepers N. Cal. v. AG Indus. Mfg., 375 F.3d  
22 913, 919 (9th Cir. 2004) (finding adequate notice even in the  
23 absence of specific citation to applicable regulation). Based upon  
24 the attachment to Plaintiff's notice, Uniweb must have known that  
25 Plaintiff did not consider the off-set program to be the applicable  
26 standard. Accordingly, the Court finds that Plaintiff's notice  
27 provided Uniweb with sufficient information of the basis for its  
28 claim, and thus complied with 40 C.F.R. 135.3(a).

1           B.    Uniweb's Effluent Limits

2           Whether Uniweb violated the Clean Water Act by exceeding local  
3 pretreatment limits turns on this threshold question: was Uniweb  
4 subject to the local effluent limits set forth in its discharge  
5 permits or the modified limits specified in the TDS off-set  
6 program.

7                   1.   Modification of POTW Pretreatment Programs Under the  
8                            Clean Water Act

9           40 C.F.R. § 403.18 provides that "the Approval Authority or a  
10 POTW . . . may initiate program modification. . . ." 40 C.F.R. §  
11 403.18(a). The regulation sets forth different procedures for  
12 "substantial modifications" and "non-substantial modifications." 40  
13 C.F.R. § 403.18(c)-(d). Which procedures were applicable here  
14 requires a determination whether Corona's TDS off-set program  
15 qualified as a "substantial modification" or "non-substantial  
16 modification."

17           The regulation defines "substantial modifications" in relevant  
18 part as:

19           Modifications that relax local limits, except for the  
20 modifications to local limits for pH and reallocations of the  
21 Maximum Allowable Industrial Loading of a pollutant that do  
22 not increase the total industrial loadings for the pollutant,  
23 which are reported pursuant to paragraph (d) of this section.  
24 Maximum Allowable Industrial Loading means the total mass of a  
25 pollutant that all Industrial Users of a POTW . . . may  
26 discharge pursuant to limits developed under § 403.5(c). . . .  
27 40 C.F.R. § 403.18(b)(2).

28

1           Here, the off-set program sought to "relax local limits." See  
2 40 C.F.R. § 403.18(b)(2). Local limits for purposes of the Clean  
3 Water Act include the "specific effluent limits for Industrial  
4 User(s)." 40 C.F.R. § 403.11(c) & (d). The off-set program  
5 increased TDS concentrations to 4,800 mg/l, and although it did not  
6 specifically increase the sodium, sulfate, chloride, and total  
7 hardness limits, it effectively relaxed those limits by including  
8 those constituents in the program. (See Pl. Exh. 14-15 & Uniweb  
9 Exh. 101-102.) Therefore, the Court finds that the off-set program  
10 qualified as a "substantial modification."

11           Uniweb asserts that the off-set program did not relax local  
12 limits, but only "reallocated the task of meeting a portion of the  
13 TDS limits from Uniweb, and other businesses, to the City." (Opp'n  
14 20.) Uniweb appears to base this argument on the regulation's  
15 exception which provides that "reallocations of the Maximum  
16 Allowable Industrial Loading [MAIL] of a pollutant" are not a  
17 relaxation of local limits and thus not "substantial  
18 modifications." See 40 C.F.R. § 403.18(b)(2).

19           Plaintiff responds that Uniweb's reliance on the exception is  
20 misplaced for two reasons. First, the increase of Uniweb and other  
21 industrial users' discharge limits was not a mere reallocation.  
22 Second, the exception only applies to reallocations between  
23 industrial users, not the type of reallocation between industrial  
24 users and the City that was countenanced by the off-set program.

25           The Court finds that the off-set program increased the total  
26 mass of a pollutant that industrial users could discharge into the  
27 POTW, and therefore, did not constitute a "reallocation" of the  
28 MAIL. The off-set program allowed industrial users to increase

1 their pollutant discharges into the POTW with the City assuming  
2 treatment responsibilities for those added discharges. (See Pl.  
3 Exh. 14 & Uniweb Exh. 101.) While the program shifted  
4 responsibility to the City,<sup>4</sup> the program was not the sort of  
5 "reallocation" that falls within the regulation's exception. The  
6 regulation provides that a reallocation of the MAIL which increases  
7 "the total industrial loadings for the pollutant" remains a  
8 substantial modification. 40 C.F.R. § 403.18(b)(2). As the off-  
9 set program increased the amount of pollutants that industrial  
10 users could discharge into the POTW, it did not fall within the  
11 "reallocation" exception. Whatever the reasons for adopting the  
12 off-set program, the City was required to follow the approval  
13 procedures for "substantial modifications" set forth at 40 C.F.R. §  
14 403.18(c).

15 2. Approval Procedures for Substantial Modifications to  
16 POTW Pretreatment Programs

17 In seeking approval of substantial program modifications, the  
18 POTW must submit a request to the Approval Authority that explains  
19 the reasons for program modification. 40 C.F.R. § 403.18(c)(1).  
20 The Approval Authority then reviews the program modification to  
21 ensure that the POTW pretreatment program has legal authority to  
22 regulate industrial users and enforce compliance with appropriate  
23 pretreatment standards as required by law. 40 C.F.R. §  
24 403.18(c)(2). Additionally, the regulation requires compliance

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25  
26 <sup>4</sup>Uniweb also asserts that there was no relaxation of local  
27 limits because the City still had to comply with its NPDES permit  
28 under the off-set program. However, while this may be true, the  
fact that the off-set program relaxed the permit limits of  
industrial users remains undisputed. This fact makes the off-set  
program a substantial modification.

1 with the public notice requirements of 40 C.F.R. § 403.11(b)-(f),  
2 which include publication of the modification request in "a  
3 newspaper(s) of general circulation" and set a notice period to  
4 allow interested persons to comment on the modifications and  
5 request a public hearing. 40 C.F.R. § 403.18(c)(2). The Approval  
6 Authority need not publish a notice of decision if the original  
7 public notice of the requested modification indicates that "the  
8 request will be approved if no comments are received by a date  
9 specified in the notice; no substantive comments are received; and  
10 the request is approved without change." 40 C.F.R. § 403.18(c)(3).  
11 A POTW may comply with the public notice requirements so long as  
12 the Approval Authority determines that the POTW's notice "satisfies  
13 the requirements of § 403.11." 40 C.F.R. § 403.18(c)(4).

14 Plaintiff's counsel sets forth by declaration that several  
15 public records requests were submitted to the City of Corona and  
16 the Santa Ana Regional Water Quality Board in 2005 and 2006.  
17 (Declaration of Cory J. Briggs ("Briggs Decl.") ¶ 3.) Those  
18 requests asked for documents related to the City's TDS off-set  
19 program, and more generally, documents related to modification  
20 requests by the City or modification approvals by the Board for  
21 Corona's POTW pretreatment program. (Pl.'s Exh. 16.) In response  
22 to those requests, Plaintiff's counsel reviewed files at the Board  
23 twice in 2005. Plaintiff's counsel also reviewed a number of City  
24 documents copied by the City or counsel's staff. Plaintiff's  
25 counsel states that none of the documents reviewed at the Board's  
26 offices or produced by the City showed any request for approval of  
27 the TDS off-set program or any public notice of the requested  
28 modification. (Briggs Decl. ¶ 4.)

1           There is thus no documentary evidence that the City followed  
2 the appropriate procedures for "substantial modifications" when  
3 adopting the off-set program. Plaintiff's review of files in  
4 connection with the public records requests did not uncover any  
5 record that the City sought approval for its modification or that  
6 public notice requirements were satisfied.<sup>5</sup> (See Briggs Decl. ¶  
7 4.) Uniweb does not provide documentary evidence to the contrary.

8           Rather, Uniweb argues that triable issues of fact exist  
9 regarding whether the City followed appropriate procedures. Uniweb  
10 points to the City's announcement of the off-set program and its  
11 letter of agreement with the City to participate in the off-set  
12 program. In both, the City asserts that it "requested and received  
13 the Regional Board's approval." (Uniweb's Exhs. 101 & 102.)

14 However, other than these assertions, there is no documentary  
15 evidence from the City or the Board to support that the off-set  
16 program was requested or approved. Uniweb has not produced any  
17 documents or declarations from the City or the Board to show that  
18 approval was granted.<sup>6</sup> Moreover, there is no documentary evidence

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19  
20           <sup>5</sup>Uniweb objects that Plaintiff's counsel lacks personal  
21 knowledge to state whether the off-set program was approved or  
22 whether there was any record of approval. Uniweb's objection is  
23 overruled because Plaintiff's counsel does not make any of those  
24 statements. Rather, Plaintiff's counsel has personal knowledge of  
25 the results of his records request and research of produced  
26 documents.

27           <sup>6</sup>At oral argument, Uniweb maintained that the Board's failure  
28 to act in approving the off-set program would result in approval of  
the program under the regulation. This argument misreads the  
regulation. For a non-substantial modification, the POTW may  
implement the modification if it does not receive a notice from the  
Approval within 45 days of the Approval Authority's decision to  
approve or deny the modification. 40 C.F.R. § 403.18(d)(3). For a  
substantial modification, however, a modification must be approved  
by the Approval Authority and satisfy various procedural

(continued...)

1 or even an assertion from the City that it complied with the  
2 requisite public notice requirements. This is insufficient to  
3 create a triable issue of fact. See McCabe v. Gen. Foods Corp.,  
4 811 F.2d 1336, 1340 (9th Cir. 1987) (a party opposing summary  
5 judgment must present evidence to create a triable issue of fact).

6 If there had been compliance with the 40 C.F.R. § 403.18(c)  
7 procedures, the Board and the City would have maintained some  
8 records of any requests for modification of Corona's POTW, any  
9 review of such requests, or any public notice issued pursuant to  
10 the procedures. In the absence of evidence that the City complied  
11 with the 40 C.F.R. § 403.18(c) procedures, the only reasonable  
12 conclusion is that the TDS off-set program was adopted in  
13 contravention of the procedures under the Clean Water Act  
14 regulations. Therefore, the off-set program's modifications to  
15 industrial users' discharge limits were invalid because they were  
16 in violation of the law.

17 3. Uniweb's Effluent Limits Were the Limits Set Forth  
18 in its Discharge Permits

19 Because the off-set program was invalid, Uniweb and other  
20 businesses in Corona were required to comply with the pollutant  
21 discharge limits set forth in their discharge permits. Whether  
22 Uniweb has violated its effluent limits will be determined by  
23 reference to the limits specified in its permit and not the invalid  
24 modifications of the off-set program. Thus, Uniweb's defenses  
25 based on the off-set program are unavailing.

26

27

28 <sup>6</sup>(...continued)  
requirements including public notice. 40 C.F.R. § 403.18(c).

1 Uniweb's additional defenses are similarly misplaced. First,  
2 Uniweb cannot assert the "permit shield" defense established under  
3 Section 402 of the Clean Water Act. The defense provides that  
4 "[c]ompliance with a permit issued pursuant to this section shall  
5 be deemed compliance [with the Act]." 33 U.S.C. 1342(k). However,  
6 Section 402 permits are the NPDES permits held by cities operating  
7 POTWs, not the permits of industrial users that discharge  
8 pollutants into the POTWs. Industrial users such as Uniweb are  
9 issued permits pursuant to section 307 of the Act, and thus,  
10 Section 402's "permit shield" defense does not apply here.

11 Second, Uniweb's "pass through"<sup>7</sup> defense has been waived. The  
12 failure to allege an affirmative defense waives the defense, and  
13 Uniweb did not raise a "pass through" defense in its answer to  
14 Plaintiff's complaint. (See Uniweb's Answer, at 9-10.) Even if  
15 the Court were to construe Uniweb's answer to include this defense,  
16 the "pass through" defense does not apply. To prove the "pass  
17 through" defense, an industrial user must show: (1) "[i]t did not  
18 know or have reason to know that its Discharge, alone or in  
19 conjunction with a discharge or discharges from other sources,  
20 would cause Pass Through . . ."; and (2) compliance with "[a] local  
21 limit designed to prevent Pass Through . . . directly prior to and  
22  
23  
24

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25 <sup>7</sup>As defined in the Clean Water Act regulations  
26 The term Pass Through means a Discharge which exits the POTW  
27 into waters of the United States in quantities or  
28 concentrations which, alone or in conjunction with a discharge  
or discharges from other sources, is a cause of a violation of  
any requirement of the POTW's NPDES permit (including an  
increase in the magnitude or duration of a violation)."  
40 C.F.R. § 403.3.



1 during the Pass Through . . .” 40 C.F.R. § 403.5(a)(2).<sup>8</sup> There is  
2 no evidence that a pass-through event occurred here. In any event,  
3 if a sample of wastewater shows that Uniweb did not exceed its  
4 permit limits, then there is no violation for that sample.

5 Finally, Uniweb argues that its good faith participation in  
6 the off-set program, even if the program was invalid, insulates it  
7 from liability. The Court disagrees. All that is required to be  
8 liable for a Clean Water Act violation is a discharge that exceeds  
9 the effluent limits specified in the industrial user’s applicable  
10 discharge permit. 33 U.S.C. 1311(a) (prohibiting pollutant  
11 discharges “except in compliance with law,” which includes the  
12 requirement that an industrial user comply with specific permit  
13 limits established under 33 U.S.C. 1317 and 40 C.F.R. 403.11).  
14 Compliance with the Clean Water Act is a matter of strict liability  
15 subject to the particular affirmative defenses set forth in the  
16 Act. See Haw.’s Thousand Friends v. City & County of Honolulu, 821  
17 F. Supp. 1368, 1392 (D. Haw. 1993).

18 The Clean Water Act’s strict liability regime for enforcing  
19 compliance with discharge limits supports holding Uniweb  
20 accountable for any violations of its permits and in spite of any  
21 good faith reliance on the invalid off-set program. That Uniweb  
22 may have inadvertently violated the permit limits in believing its  
23 discharges were lawful under the invalid off-set program does not  
24 allow it to avoid a finding of liability, although this certainly  
25 could be a factor when measuring any civil penalties for  
26 violations. Haw.’s Thousand Friends, 821 F. Supp. at 1392, (citing

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27  
28 <sup>8</sup>There is also an alternative ground for the “pass through”  
defense not raised here. See 40 C.F.R. § 403.5(a)(2).

1 United States v. Ohio Edison, 725 F. Supp. 928, 934 (N.D. Ohio  
2 1989)) ("The fact that a violator is 'without fault' in committing  
3 violations of the Clean Water Act does not absolve the violator  
4 from penalties, although it may mitigate the amount of the  
5 penalties assessed."); see also 33 U.S.C. § 1319(d) (providing that  
6 a court in determining the extent of a civil penalty, shall  
7 consider the following six factors: "[t]he seriousness of the  
8 violation or violations, the economic benefit (if any) resulting  
9 from the violation, any history of such violations, any good-faith  
10 efforts to comply with the applicable requirements, the economic  
11 impact of the penalty on the violator, and such other matters as  
12 justice may require").

13       Moreover, there are significant public policy reasons for  
14 rejection of Uniweb's good faith violations defense. Where, as  
15 here, the City did not comply with approval procedures for relaxing  
16 industrial users' permit limits, the public was deprived of the  
17 opportunity to make comments, oppose the measure, or request a  
18 hearing.<sup>9</sup> There are incentives for bypassing approval procedures.  
19 Localities and businesses may seek to enter side agreements as a  
20 way to circumvent the approval process and the ever-present threat  
21 of public opposition.

22       Yet the Clean Water Act's procedures prevent such collusion.  
23 A city cannot unilaterally decide to modify its POTW without the  
24 consent of the Approval Authority. See 40 C.F.R. § 403.18(c).

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25  
26       <sup>9</sup>For this reason, Uniweb's laches defense also fails. The  
27 failure to provide public notice of the off-set program explains  
28 why no lawsuit was filed until 2007. Plaintiff cannot be faulted  
for lack of diligence in bringing this action. See Kling v.  
Hallmark Cards Inc., 225 F.3d 1030, 1036 (9th Cir. 2000).

1 Although there is no indication of collusion here, it is  
2 inconsistent with the Clean Water Act's strict liability regime to  
3 allow violators to avoid liability based upon its compliance with  
4 an unauthorized or unnoticed city program. Thus, Uniweb's argument  
5 that Plaintiff may bring a claim against the City is misplaced;  
6 rather, Uniweb may consider pursuing a claim against the City for  
7 any penalties it may incur as a result of its participation in the  
8 City's unlawful off-set program. The Court now turns to the  
9 violations.

10 C. Violations of the Clean Water Act and Local Effluent  
11 Limits

12 1. Proof of Violations

13 Plaintiff alleges a number of violations based upon the  
14 sampling data in reports submitted by Uniweb to the City. Uniweb  
15 argues that the monitoring reports show only a few, isolated Clean  
16 Water Act violations and that its participation in the off-set  
17 program eliminate Plaintiff's allegations of more significant  
18 violations. Uniweb does not dispute that the monitoring reports  
19 show discharges in excess of the permit limits.

20 A monitoring report that shows a water sample with pollutant  
21 discharges in excess of permit limits is conclusive evidence of a  
22 violation. Sierra Club v. Union Oil Co., 813 F.2d 1480, 1491 (9th  
23 Cir. 1987), vacated on other grounds, 485 U.S. 931 (1988),  
24 reinstated with minor amendment, 853 F.2d 667 (9th Cir. 1988). A  
25 defendant may not impeach its own publicly filed reports which are  
26 "submitted under penalty of perjury." Save Our Bays & Beaches v.  
27 City & County of Honolulu, 904 F. Supp. 1098, 1138 (D. Haw. 1994).  
28 Here, Corona requires industrial users like Uniweb to submit

1 monitoring reports under penalty of perjury. Corona Municipal Code  
 2 13.08.350 (providing that “[a]ll required reports” be submitted in  
 3 accordance with 40 C.F.R. 403.6(a)(2(ii), which states that reports  
 4 be submitted “under penalty of law”). Where Uniweb’s reports  
 5 demonstrate discharges in excess of its permit limits, the Court  
 6 will consider that evidence to establish a violation.

7 The Court engages in an independent review of the monitoring  
 8 reports to determine whether there are in fact violations of a  
 9 permit. The Court has compared the discharges of nickel, sodium,  
 10 sulfate, and TDS on the alleged violation dates with Uniweb’s  
 11 applicable permit limits. The Court has synthesized the relevant  
 12 data in the tables below,<sup>10</sup> and concludes that each of the  
 13 following discharges were in violation of Uniweb’s permits:

14 **VIOLATIONS<sup>11</sup>**

15

| 16 <b>Constituent</b> | 17 <b>Permit<br/>Limit</b> | 18 <b>Violation<br/>(Date)</b> | 19 <b>Sample<br/>Frequency</b> | 20 <b>No. Days<br/>Sample<br/>Period</b> |
|-----------------------|----------------------------|--------------------------------|--------------------------------|--|
| 21 Nickel             | 22 .4 mg/L                 | 23 .45 mg/L<br>(8-10-2005)     | 24 Biannually                  | 25 184                                   |
| 26 Nickel             | 27 .4 mg/L                 | 28 .42 mg/L<br>(8-18-2005)     | 29 Biannually                  | 30 Same Period                           |

31  
 32 <sup>10</sup>Plaintiff provided tables to document Uniweb’s violations in  
 33 its moving papers for this motion. However, those tables were  
 34 missing the reported discharge for each alleged violation. In the  
 35 future, Plaintiff should provide the reported discharge in excess  
 36 of applicable permit limits in any table to assist the Court with  
 its review of the monitoring reports.

37 <sup>11</sup>The Court has synthesized information from Uniweb’s permits  
 38 and monitoring reports in these tables. (See Pl.’s Exhs. 3-9, 17-  
 36.)

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|--------|---------|-------------------------|------------|-------------|
| Nickel | .4 mg/L | .63 mg/L<br>(9-13-2005) | Biannually | Same Period |
| Nickel | .4 mg/L | .41 mg/L<br>(3-23-2006) | Biannually | 181         |
| Nickel | .4 mg/L | .41 mg/L<br>(4-13-2006) | Biannually | Same Period |
| Nickel | .4 mg/L | .44 mg/L<br>(4-24-2006) | Biannually | Same Period |

| Constituent | Permit Limit | Violation (Date)        | Sample Frequency | No. Days Sample Period |
|-------------|--------------|-------------------------|------------------|------------------------|
| Sodium      | 332 mg/L     | 470 mg/L<br>(9-12-2002) | Monthly          | 30                     |
| Sodium      | 332 mg/L     | 348 mg/L<br>(7-14-2005) | Monthly          | 31                     |
| Sodium      | 332 mg/L     | 420 mg/L<br>(8-10-2005) | Monthly          | 31                     |
| Sodium      | 332 mg/L     | 428 mg/L<br>(8-18-2005) | Monthly          | Same Period            |
| Sodium      | 332 mg/L     | 510 mg/L<br>(9-13-2005) | Monthly          | 30                     |
| Sodium      | 332 mg/L     | 374 mg/L<br>(3-15-2006) | Monthly          | 31                     |
| Sodium      | 332 mg/L     | 390 mg/L<br>(3-23-2006) | Monthly          | Same Period            |
| Sodium      | 332 mg/L     | 490<br>(4-13-2006)      | Monthly          | 30                     |

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| Constituent | Permit Limit | Violation (Date)   | Sample Frequency | No. Days Sample Period |
|-------------|--------------|--------------------|------------------|------------------------|
| Sulfate     | 300 mg/L     | 386<br>(9-13-2005) | Monthly          | 30                     |
| Sulfate     | 300 mg/L     | 421<br>(2-15-2006) | Monthly          | 28                     |
| Sulfate     | 300 mg/L     | 481<br>(3-15-2006) | Monthly          | 31                     |
| Sulfate     | 300 mg/L     | 476<br>(4-13-2006) | Monthly          | 30                     |
| Sulfate     | 300 mg/L     | 825<br>(7-27-2006) | Monthly          | 31                     |
| Sulfate     | 227 mg/L     | 369<br>(1-12-2007) | Biannually       | 181                    |
| Sulfate     | 227 mg/L     | 297<br>(2-16-2007) | Biannually       | Same Period            |
| Sulfate     | 227 mg/L     | 324<br>(4-13-2007) | Biannually       | Same Period            |
| Sulfate     | 227 mg/L     | 342<br>(5-11-2007) | Biannually       | Same Period            |
| Sulfate     | 227 mg/L     | 316<br>(6-08-2007) | Biannually       | Same Period            |
| Sulfate     | 227 mg/L     | 305<br>(7-18-2007) | Biannually       | 184                    |
| Sulfate     | 227 mg/L     | 362<br>(8-17-2007) | Biannually       | Same Period            |
| Sulfate     | 227 mg/L     | 340<br>(9-18-2007) | Biannually       | Same Period            |

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| Constituent | Permit Limit | Violation (Date)          | Sample Frequency | No. Days Sample Period |
|-------------|--------------|---------------------------|------------------|------------------------|
| TDS         | 1,844 mg/L   | 2200 mg/L<br>(9-12-2002)  | Monthly          | 30                     |
| TDS         | 1,844 mg/L   | 1942 mg/L<br>(2-10-2005)  | Monthly          | 28                     |
| TDS         | 1,844 mg/L   | 2600 mg/L<br>(07-14-2005) | Monthly          | 31                     |
| TDS         | 1,844 mg/L   | 2500 mg/L<br>(8-10-2005)  | Monthly          | 31                     |
| TDS         | 1,844 mg/L   | 2510 mg/L<br>(8-18-2005)  | Monthly          | Same Period            |
| TDS         | 1,844 mg/L   | 3220 mg/L<br>(9-13-2005)  | Monthly          | 30                     |
| TDS         | 1,844 mg/L   | 2400 mg/L<br>(2-15-2006)  | Monthly          | 28                     |
| TDS         | 1,844 mg/L   | 3850 mg/L<br>(3-15-2006)  | Monthly          | 31                     |
| TDS         | 1,844 mg/L   | 2200 mg/L<br>(3-23-2006)  | Monthly          | Same Period            |
| TDS         | 1,844 mg/L   | 4234 mg/L<br>(4-13-2006)  | Monthly          | 30                     |
| TDS         | 1,556 mg/L   | 2220 mg/L<br>(7-27-2006)  | Monthly          | 31                     |

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1                   2.     Number of Violations

2             A remaining issue is the number of violations. Plaintiff  
3 argues that each day of a sampling period when a violation occurred  
4 should be counted as a distinct violation. Applying this approach,  
5 Plaintiff calculates 1,333 total violations: 365 violations of  
6 nickel limits, 183 violations of sodium limits, 515 violations of  
7 sulfate limits, and 270 violations of TDS limits. Uniweb does not  
8 address this issue.

9             Courts have found that "where a violation is defined in terms  
10 of a time period longer than a day, the maximum penalty assessable  
11 for that violation should be defined in terms of the number of days  
12 in that time period." Chesapeake Bay Found. v. Gwaltney of  
13 Smithfield, 791 F.2d 304, 314 (4th Cir. 1986), vacated on other  
14 grounds, Gwaltney v. Smithfield, Ltd., 484 U.S. 49 (1987); see also  
15 United States v. Allegheny Ludlum Corp., 366 F.3d 164, 188 (3rd  
16 Cir. 2004). The Court accepts this proposition as a statement of  
17 the law. However, the Court defers ruling on the precise number of  
18 Uniweb's violations. That issue is interrelated with the Court's  
19 discretionary assessment of appropriate civil penalties. See 33  
20 U.S.C. § 1319(d). The parties are yet to provide briefing or  
21 evidence on civil penalties. The Court, therefore, considers it  
22 prudent to rule on the precise number of Uniweb's violations in  
23 conjunction with its discretionary determination of the appropriate  
24 civil penalties.

25                   D.     Standing and Mootness

26             Uniweb argues that Plaintiff's lawsuit is moot because the  
27 City has announced that the off-set program will be discontinued as  
28 of July 1, 2008. Uniweb also argues that Plaintiff lacks standing



1 because the violations are not recurring nor are they likely to  
2 recur.<sup>12</sup>

3 The Clean Water Act contains a "citizen suit" provision that  
4 confers standing to bring a civil action "against any person who is  
5 alleged to be in violation of . . . an effluent standard or  
6 limitation under th[e] Act . . . ." 33 U.S.C. § 1365(a); see also  
7 Gwaltney, 484 U.S. at 58-61. In Gwaltney, the U.S. Supreme Court  
8 held that citizens bringing suit for Clean Water Act violations  
9 "may seek civil penalties only in a suit brought to enjoin or  
10 otherwise abate an ongoing violation." Gwaltney, 484 U.S. at 59.  
11 A plaintiff may show an ongoing violation "'either (1) by proving  
12 violations that continue on or after the date the complaint is  
13 filed, or (2) by adducing evidence from which a reasonable trier of  
14 fact could find a continuing likelihood of a recurrence in  
15 intermittent or sporadic violations.'" Natural Res. Def. Council  
16 v. Sw. Marine, Inc., 236 F.3d 985, 998 (9th Cir. 2000) (quoting  
17 Sierra Club v. Union Oil Co., 853 F.2d at 671 (quoting Chesapeake  
18 Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 844 F.2d 170,  
19 171-72 (4th Cir. 1988))).

20 Here, there is evidence of ongoing sulfate violations since  
21 Plaintiff filed its complaint in April 2007. See supra 18-20.  
22 Plaintiff argues that there is also evidence from which it is  
23 reasonable to infer that intermittent or sporadic violations for  
24

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25 <sup>12</sup>Uniweb does not argue that there has been no injury, no  
26 causation, or that Plaintiff's claims would not redress the alleged  
27 harm. Nor does Uniweb challenge Plaintiff's "organizational  
28 standing" as an environmental organization. See Friends of the  
Earth v. Laidlaw Env'tl. Servs., Inc., 528 U.S. 167, 181 (2000). The  
Court notes that Uniweb's standing argument is limited to whether  
violations are likely to recur.

1 the other constituents are likely to recur. The Ninth Circuit has  
2 explained that “[i]ntermittent or sporadic violations do not cease  
3 to be ongoing until the date when there is no real likelihood of  
4 repetition.” Sierra Club, 853 F.2d at 671 (quoting Chesapeake Bay  
5 Found., Inc. v. Gwaltney of Smithfield, Ltd., 844 F.2d 170, 172  
6 (4th Cir. 1988)). Plaintiff indicates that Uniweb’s operations  
7 have not substantially changed during the period of its violations,  
8 nor has Uniweb shown that the violations will not persist after the  
9 off-set program.

10 As to sodium and TDS, the Court cannot conclude that there “is  
11 no real likelihood of repetition” of violations under these  
12 circumstances. It is not clear that Uniweb will comply with its  
13 permit limits independent of the off-set program. As for the  
14 nickel discharges in 2005 and 2006, Uniweb presents evidence that  
15 it replaced filtration equipment after those excess nickel  
16 discharges, and that there have been no excess nickel discharges  
17 since that time. (McDonnell Decl. ¶ 17; Uniweb Exh. 106.) This is  
18 enough to at least create an issue of fact whether nickel  
19 discharges are likely to recur. However, the Court does not  
20 consider Uniweb’s “best guess” that faulty filtration equipment was  
21 the source of the excess nickel to preclude a reasonable trier of  
22 fact from finding that nickel violations could recur. (See Def.’s  
23 Opp’n 9.)

24 The Court does not consider Plaintiff’s claims moot because it  
25 is not “absolutely clear” that Uniweb’s violations will not recur  
26 after the off-set program. See Friends of the Earth, Inc., 528  
27 U.S. at 189. Uniweb presents its vice president’s declaration,  
28 where he states that Uniweb is “preparing for the end of the

1 Program and will have alternative arrangements in place when the  
2 Program ends." (Declaration of John McDonnell ¶ 26.) While  
3 McDonnell does offer tentative plans for compliance after the off-  
4 set program, there is no concrete evidence that these plans will be  
5 implemented or that implementation will prevent future violations.  
6 Therefore, the Court finds that Plaintiff's claims are not moot.

7

8 **IV. CONCLUSION**

9 For the foregoing reasons, the Court GRANTS the motion for  
10 partial summary judgment. The remaining issues in this case are  
11 standing with respect to the nickel violations, the number of  
12 violations, and proof of civil penalties.

13

14 IT IS SO ORDERED.

15

16 Dated: August 6, 2008

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DEAN D. PREGERSON  
United States District Judge

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