

THE HONORABLE JOHN C. COUGHENOUR

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

v.

COOKE AQUACULTURE PACIFIC LLC,

Defendant.

CASE NO. C17-1708-JCC

ORDER

This matter comes before the Court on Plaintiff’s motion for partial summary judgment (Dkt. No. 29). Having thoroughly considered the parties’ briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS in part and DENIES in part the motion for the reasons explained herein.

**I. BACKGROUND**

Defendant Cooke Aquaculture farms Atlantic salmon at net pen facilities located throughout Puget Sound. (See Dkt. No. 15 at 2.) The Clean Water Act (“CWA”) requires any entity that discharges pollutants into the waters of the United States to hold and comply with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit. 33 U.S.C. § 1342. Pursuant to the CWA, authorized state agencies may issue NPDES permits; in Washington, the Department of Ecology performs the functions necessary to “meet the requirements” of the CWA, including issuing permits. See 33 § U.S.C. 1342(b); Wash. Rev.

1 Code. § 90.48.260. A NPDES permit holder must prepare and implement certain plans to  
2 minimize and monitor the release of pollutants. *Id.* at § 1342(a)(2). Defendant operates its  
3 facilities pursuant to NPDES permits, which require, among other things, the preparation of a  
4 Pollution Prevention Plan and a Release Prevention and Monitoring Plan (“Release Prevention  
5 Plan”) (together, “the plans”) that satisfy the conditions of its permits. (*See* Dkt. No. 29-2 at 11–  
6 12.)

7 Defendant operated eight net pen facilities across Puget Sound until the collapse of its  
8 Cypress Site 2 (“Cypress 2”) facility on or about August 20, 2017. (*See* Dkt. No. 1 at 9–10.) The  
9 collapse resulted in the release of thousands of Atlantic salmon into Puget Sound. (*Id.*) While  
10 Cypress 2 is no longer operational, Defendant continues to operate its other seven net pen  
11 facilities under its NPDES permits.<sup>1</sup> On August 24, 2017, Plaintiff sent Defendant a “Notice of  
12 Intent to Sue Under the Clean Water Act” letter (“notice letter”) and sent a supplemental notice  
13 letter on September 6, 2017. (*Id.* at 22, 30.) On November 13, 2017, Plaintiff filed a complaint  
14 against Defendant asserting several CWA violations, including that Defendant’s plans are  
15 facially noncompliant with their respective permits. (*See id.* at 2.) Plaintiff’s motion for partial  
16 summary judgment asks the Court to find that Defendant’s plans violated Conditions S6 and S7  
17 of their NPDES permits. (Dkt. No. 29 at 5–6.)

## 18 **II. DISCUSSION**

### 19 **A. Legal Standards**

#### 20 1. Summary Judgment

21 “The court shall grant summary judgment if the movant shows that there is no genuine  
22 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.

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23 <sup>1</sup> The Court does not address whether Cypress 2’s plans violated the conditions of its  
24 permit in this order. Defendant asserts in its cross-motion for partial summary judgment that  
25 Plaintiff’s alleged violations with respect to its permit for Cypress 2 are not ongoing or are moot.  
26 (*See* Dkt. No. 41 at 4.) In the interest of judicial economy, this order applies to all of Defendant’s  
facilities except Cypress 2, which the Court will discuss in a separate order addressing  
Defendant’s cross-motion for summary judgment.

1 Civ. P. 56(a). In making such a determination, the Court must view the facts and justifiable  
2 inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Anderson v.*  
3 *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Once a motion for summary judgment is properly  
4 made and supported, the opposing party “must come forward with ‘specific facts showing that  
5 there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.  
6 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). Material facts are those that may affect the  
7 outcome of the case, and a dispute about a material fact is genuine if there is sufficient evidence  
8 for a reasonable jury to return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248–49.  
9 Ultimately, summary judgment is appropriate against a party who “fails to make a showing  
10 sufficient to establish the existence of an element essential to that party’s case, and on which that  
11 party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

## 12 2. Clean Water Act

13 The CWA’s purpose is to “restore and maintain the chemical, physical, and biological  
14 integrity of the Nation’s waters.” 33 U.S.C. § 1251. Private citizens may initiate actions against  
15 alleged violators of the CWA’s requirements, including violations of permit conditions. *Ass’n to*  
16 *Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1012 (9th Cir.  
17 2002). In order to bring a CWA citizen suit, a plaintiff must satisfy the procedural requirement of  
18 providing notice to: (1) the alleged violator; (2) the Environmental Protection Agency (“EPA”);  
19 and (3) the state agency tasked with enforcing the CWA where the alleged violation occurred.  
20 See 33 U.S.C. § 1365(b). The CWA “authorizes citizens to enforce all permit conditions.” *Nw.*  
21 *Envtl. Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995).

22 As a threshold matter, a plaintiff must have statutory and Article III standing to bring a  
23 CWA claim. *Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 998 (9th Cir. 2000). A  
24 citizen has statutory standing to bring an enforcement action under the CWA for “ongoing”  
25 violations. *Id.* A citizen plaintiff can prove ongoing violations by demonstrating that either the  
26 violations continue on or after the complaint is filed, or that a reasonable trier of fact “could find

1 a continued likelihood of a recurrence in intermittent or sporadic violations.” *Id.* To establish  
2 Article III standing, a plaintiff must demonstrate that: (1) he or she has suffered a concrete  
3 injury; (2) that the injury is fairly traceable to the defendant’s conduct; and (3) that the injury can  
4 be redressed by prevailing in the case. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*  
5 *(TOC), Inc.*, 528 U.S. 167, 181 (2000).<sup>2</sup>

6 **B. Sufficiency of Plaintiff’s 60-day Notice Letter**

7 Plaintiff asserts that Defendant’s Pollution Prevention Plans violate Conditions S6.F,  
8 S6.D, and S6.E of its permits, and that its Release Prevention Plans violate Condition S7.6 and  
9 the general requirements of Condition S7 of its permits.<sup>3</sup> (*See* Dkt. No. 1 at 23–26). Defendant  
10 argues that Plaintiff’s notice letter was insufficient with respect to alleged violations of  
11 Conditions S6.D, S6.E, and S7, such that the Court lacks jurisdiction over the alleged violations.  
12 (Dkt. No. 36 at 18.)<sup>4</sup>

13 For district courts to have jurisdiction over CWA citizen suits, a plaintiff must provide  
14 notice to the alleged violator that contains “sufficient information to permit the recipient to  
15 identify the specific standard, limitation, or order alleged to have been violated,” and “the  
16 activity alleged to constitute a violation.” U.S.C. § 1365(b); 40 C.F.R. § 135.3(a). The Ninth  
17 Circuit requires that a plaintiff’s 60-day notice letter includes “reasonably specific” information,  
18 so that the alleged violator will be able to “take corrective actions [to] avert a lawsuit.” *Sw.*

19 \_\_\_\_\_  
20 <sup>2</sup> Defendant does not dispute and the Court finds that Plaintiff has representational  
21 standing to sue on behalf of its members because: “(a) its members would otherwise have  
22 standing to sue in their own right; (b) the interests it seeks to protect are germane to the  
23 organization’s purposes; and (c) neither the claim asserted nor the relief requested requires the  
24 participation of individual members in the lawsuit.” *Ecological Rights Found. v. Pac. Lumber*  
*Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (quoting *Hunt v. Wash. State Apple Advertising Com’n*,  
432 U.S. 333, 343 (1977)).

24 <sup>3</sup> The permits for all of Defendant’s seven net pen facilities were substantively identical.  
25 (*See* Dkt. No. 29-2 at 7–62.) Therefore, the Court’s analysis of Plaintiff’s claims applies to all of  
26 Defendant’s facilities, except for Cypress 2 as previously explained. *See supra*, footnote 1.

<sup>4</sup> Defendant concedes that Plaintiff provided proper notice for alleged violations of  
Conditions S6.F and S7.6. (*Id.*)

1 *Marine*, 236 F.3d at 996; *San Francisco BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1158 (9th  
2 Cir. 2002). If a plaintiff fails to provide reasonably specific notice of an alleged violation, then the  
3 Court lacks jurisdiction over the claim. *Sw. Marine*, 236 F.3d at 997.

4 The Ninth Circuit does not require a citizen plaintiff to “list every specific aspect or detail  
5 of every violation” in its notice letter, as long as it “is reasonably specific” and gives an alleged  
6 violator the “opportunity to correct the problem.” *Waterkeepers N. California v. AG Indus. Mfg.,*  
7 *Inc.*, 375 F.3d 913, 917 (9th Cir. 2004). “The key language in the notice regulation is the phrase  
8 ‘sufficient information to permit the recipient to identify’ the alleged violations and bring itself  
9 into compliance.” *Id.* at 916 (citing *Cmty. Ass’n for Restoration of the Env’t v. Henry Bosma*  
10 *Dairy*, 305 F.3d 943, 951 (9th Cir. 2002)).

11 1. Conditions S6.D and S6.E

12 Plaintiff’s notice letter stated that Defendant was in violation of its permits for failing to  
13 “prepare a Pollution Prevention Plan for each net pen facility that addresses ‘operations, spill  
14 prevention, spill response, solid waste, and storm water discharge practices which will prevent or  
15 minimize the release of pollutants from the facility to waters of the state.’ Condition S6.” (Dkt.  
16 No. 29-2 at 11.) Condition S6.D requires that Defendant’s plans address “practices for the  
17 storage and, if necessary, disposal of disease control chemicals.” (*Id.*) Condition S6.E requires  
18 that Defendant’s plans address “how solid and biological wastes are collected, stored, and  
19 ultimately disposed. Among the solid wastes of concern are . . . blood from harvesting  
20 operations.” (*Id.*) Plaintiff alleges that Defendant’s plans failed to account for the storage and  
21 disposal of medicated feed, iodine, and the anesthetic MS-222, and that its plans contained no  
22 mention of the collection, storage, or disposal of harvest blood, in violation of Conditions S6.D  
23 and S6.E. (Dkt. No. 29 at 15.) Defendant argues that Plaintiff’s notice letter was inadequate  
24 because it did not specifically identify Conditions S6.D or S6.E as alleged violations. (Dkt. No.  
25 36 at 13.)

26 Although plaintiff’s notice letter did not specifically list Conditions S6.D and S6.E, it

1 provided sufficient information for Defendant to identify and correct the alleged violations.  
2 Condition S6 requires that Defendant’s plans address “solid waste” and practices to “prevent or  
3 minimize the release of pollutants from the facility” into the state’s waters. (Dkt. No. 29-2 at 11.)  
4 By specifically referencing that language, Plaintiff gave Defendant notice that it was allegedly in  
5 violation of sub-conditions dealing with the handling of pollutants—disease control chemicals  
6 and solid waste from harvest blood. (*See* Dkt. No. 1 at 25.) Condition S6 specifically lists  
7 substances which are pollutants, including harvest blood and disease control chemicals. (Dkt.  
8 No. 29-2 at 11.) The Plans also identify blood from harvesting operations under the category of  
9 “solid wastes of concern.” (*Id.*) By reading the language of Condition S6 in conjunction with its  
10 sub-conditions, Defendant could have reasonably identified that Plaintiff was alleging violations  
11 of Defendant’s plans’ provisions for disease control chemicals, harvest blood, or other pollutants  
12 and solid wastes listed under Condition S6.

13 Therefore, Plaintiff’s notice letter provided reasonably specific notice to allow Defendant  
14 to identify alleged violations under Conditions S6.D and S6.E.

15 2. Condition S7’s “Best Management Practices” Requirement

16 Plaintiff’s notice letter alleged that Defendant failed “to identify and implement  
17 technology that will minimize fish escapes” under a heading titled “Violations of the Fish  
18 Release Prevention & Monitoring Plan.” (Dkt. No. 1 at 4–5.) Condition S7 requires, *inter alia*,  
19 that Defendant’s Release Prevention Plan include “identification and implementation of  
20 technology . . . [and] [r]outine procedures and best management practices used” to minimize the  
21 risk of fish escapements. (Dkt. No. 29-2 at 12.)

22 Plaintiff asserts that Defendant’s mooring inspection intervals are not best management  
23 practices, as required by Condition S7, based on the annual mooring inspection requirement in  
24 Condition S6. (*See* Dkt. No. 29 at 19.) Specifically, Plaintiff argues that Defendant’s 2012 and  
25 2014 Release Prevention Plans violated its permits’ requirements by providing for inspections of  
26 the high-current-end moorings every three years and for other moorings to be inspected every six

1 years. (*Id.*) Plaintiff also asserts that Defendant’s 2017 Release Prevention Plan provides for  
2 high-current-end moorings inspections every three years and does not address inspection  
3 intervals for the other moorings. (*Id.*) Condition S7 does not require specific inspection periods.  
4 (*See* Dkt. No. 29-2 at 11.)

5 Defendant could not have reasonably identified Plaintiff’s claim that Defendant was in  
6 violation of Condition S7 based on an inspection regime imposed by Condition S6. This section  
7 of the notice letter was clearly intended to address the Release Prevention Plans, which are  
8 governed by Condition S7, not Condition S6. (*See* Dkt. No. 29-2 at 11–12.) Moreover, Condition  
9 S7 does not require specific inspection intervals. (*See id.* at 12.) Plaintiff did not provide notice  
10 that would allow Defendant to identify what alleged violation that it needed to cure in order to  
11 avoid a lawsuit. As such, the Court cannot exercise jurisdiction over this claim. *See Sw. Marine*,  
12 236 F.3d at 996.

13 The Court finds that Plaintiff’s notice letter did not provide Defendant with sufficient  
14 notice as to this claim. Therefore, Plaintiff’s motion for partial summary judgment is DENIED as  
15 to the alleged permit violations of Condition S7.

### 16 **C. Permit Requirements and Defendant’s Plans**

17 The Court has jurisdiction over Plaintiff’s claims regarding Conditions S6.D, S6.E, S6.F,  
18 and S7.6.<sup>5</sup> The Court next considers whether Plaintiff has demonstrated that no dispute of  
19 material fact exists as to whether Defendant’s plans violated these permit conditions.

#### 20 1. Condition S6.F

21 Condition S6.F requires that the plans include that Defendant will “[a]t least once per  
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23 <sup>5</sup> Plaintiff alleges that the permit violations in Defendant’s October 2017 Pollution  
24 Prevention Plan and the 2017 Release Prevention Plan are also present in Defendant’s prior plans  
25 during the five-year statute of limitations period. (Dkt. No. 29 at 7, 12.) Because violations in the  
26 prior plans can give rise to daily penalties, this order discusses alleged violations with regard to  
all of Defendant’s plans during the relevant statute of limitations period. *See Borden Ranch  
P’ship v. U.S. Army Corps of Engineers*, 261 F.3d 810, 817 (9th Cir. 2001), *aff’d*, 537 U.S. 99  
(2002).

1 year, conduct an inspection of the main cage structure and anchoring components above and  
2 below the water line.” (Dkt. No 29-2 at 11.) Plaintiff alleges that Defendant’s Pollution  
3 Prevention Plans violate Condition S6.F by failing to include adequate procedures for annual  
4 inspections of its main cage structure. (Dkt. No. 29 at 13.) Specifically, Plaintiff asserts that  
5 Defendant’s 2012, 2015, and April 2017 Pollution Prevention Plans do not contain any main  
6 cage inspection requirements and that Defendant’s October 2017 plan only requires inspection of  
7 the “cage system” as a whole after “a major storm event or any physical accident involving the  
8 farm site.” (*Id.*; Dkt. No. 29-2 at 131.)

9 Defendant does not dispute that its plans prior to October 2017 were non-compliant with  
10 Condition S6.F, but argues that its updated October 2017 plan provides for, across various  
11 sections, at least annual inspections of the components of the main cage structure. (*See* Dkt. No.  
12 36 at 18–21.) Defendant states that the “main cage structure” includes: (1) the cage system’s  
13 floating walkway; (2) the stock (fish containment) nets; and (3) the predator nets. (*Id.* at 19–20.)  
14 Defendant asserts that its “Weekly Surface Inspection Sheet,” which is attached to the October  
15 2017 plan, provides for weekly inspection of the floating walkway, in satisfaction of Condition  
16 S6.F. (Dkt. No. 29-2 at 131.) The Weekly Surface Inspection Sheet requires Defendant to  
17 visually inspect the system mooring points; surface shackles, thimbles, and hardware; mooring  
18 lines; surface chain connections; walkway hinge points; and walkway grading condition. (*Id.* at  
19 133.) The Weekly Surface Inspection Sheet does not include inspection of the floatation devices  
20 that support the walkway, which Plaintiff argues are part of the “below the water line” main cage  
21 structure. (*Id.*; Dkt. No. 29 at 14.)

22 With respect to the fish and predation nets, Defendant argues that the October 2017  
23 plan’s provisions for cleaning and repairing its nets satisfy Condition S6.F. (Dkt. No. 36 at 19.)  
24 Defendant’s plan states that fish containment nets are “typically pulled to the surface once per  
25 year” and that fish containment nets and predator nets are removed at the end of a growing cycle  
26 for repair and cleaning. (Dkt. No. 29-2 at 129.) However, the plan’s net cleaning procedures,



1 included under the section titled “Net Washing Practices,” do not provide for annual inspection  
2 of the fish or predator nets, only that the nets are “to be pulled from the water and transported to  
3 a land based cleaning and repair facility” after a growing cycle. (*Id.*) Defendant’s plan does not  
4 specify how often a growing cycle ends, or whether the cleaning and repair of nets represent the  
5 inspection that is required by Condition S6.F. (*See id.*) Facially, it appears that Defendant’s net  
6 washing provisions are intended to satisfy the permit’s requirement to include net cleaning  
7 procedures, not for annual “inspection of the main cage structure and anchoring components  
8 above and below the water line.” (*Id.* at 11.)

9 The Court finds that Defendant’s 2012, 2015, April 2017, and October 2017 Pollution  
10 Prevention plans failed to include annual inspection of the main cage system as required by  
11 Condition S6.F. Therefore, Plaintiff’s motion for partial summary judgment is GRANTED as to  
12 Defendant’s permit violations of Condition S6.F.

13 2. Condition S6.D

14 Condition S6.D requires that the plan address “[p]ractices for storage, and if necessary,  
15 disposal of disease control chemicals.” (Dkt. No. 29-2 at 11.) Plaintiff argues that Defendant  
16 failed to include provisions to store and dispose of disease control chemicals in its 2012, 2015,  
17 April 2017, and October 2017 Pollution Prevention Plans. (Dkt. No. 29 at 15–16.) Plaintiff  
18 asserts that Defendant used medicated fish feed, iodine, and the anesthetic MS-222 as disease  
19 control chemicals, which its plans do not properly address. (*Id.*)

20 With respect to medicated fish feed, Plaintiff asserts that while Defendant’s 2012 and  
21 2015 Pollution Prevention Plans provided that the feed must be stored in leak proof containers,  
22 the plans failed to account for the disposal of medicated feed. (*Id.*) Defendant’s 2012 and 2015  
23 plans provide that “[a]ny medicated feed will be clearly marked on the label . . . [and] stored in  
24 leak-proof containers while at the facility.” (Dkt. No. 29-2 at 113, 121.) Defendant’s plans do  
25 not account for the disposal of medicated feed, which is required by Condition S6.D. (*See id.* at  
26 11, 113, 121.) Defendant’s April and October 2017 Pollution Prevention Plans discuss medicated

1 feed under the section “Disease Control Chemicals.” (*See id.* at 125, 130.) Defendant’s April and  
2 October 2017 plans provide that “any unused medicated feed that remains after the treatment  
3 period ends will be removed from the net pen site and transported back to an upland facility for  
4 covered storage” and that expired feed “will be disposed of at a solid waste facility.” (*Id.*)  
5 Defendant’s 2017 plans provided for storage of the feed *after* it is no longer at the facility, but do  
6 not address how it is stored when it is used to treat the fish at the facility.

7 Defendant argues that iodine and MS-222 are not disease control chemicals and therefore  
8 do not need to be addressed in its plans. (Dkt. No. 36 at 25.) With respect to iodine, Defendant  
9 states that “[i]odine is used as a disinfectant, primarily of boots.” (*Id.*) Defendant’s 2012, 2015,  
10 and April 2017, and October 2017 Pollution Prevention Plans list “disinfectants used for  
11 footbaths, dive nets, and other equipment” under the heading of “Disease Control Chemicals.”  
12 (Dkt. No. 29-2 at 113, 121, 125, 130.) In response to an interrogatory asking it to “[d]escribe all  
13 efforts to treat, reduce, and/or prevent diseases . . . including the method and/or substances  
14 used,” Defendant responded by stating, “[a]s with all biosecurity measures at the net pens, the  
15 mortality extraction bags used to collect the dead fish are disinfected after each use, using a 24  
16 hour soak in an iodine solution.” (*Id.* at 258–261.) Additionally, Defendant listed iodine and MS-  
17 222 on the 2016 “Annual Disease Control Chemical Use Report” required by its permits. (*Id.* at  
18 247–55.) None of Defendant’s Pollution Prevention Plans include procedures for the storage of  
19 iodine. (*See id.* at 113, 121, 125, 130.) Defendant’s 2012 and 2015 plans addressed the disposal  
20 of iodine, but Defendant’s April and October 2017 plans do not. (*See id.*) Defendant’s plans do  
21 not mention MS-222. (*See id.*)

22 The Court finds that Defendant failed to address the storage and disposal of disease  
23 control chemicals in its 2012, 2015, April 2017, and October 2017 Pollution Prevention Plans.  
24 Therefore, Plaintiff’s motion for partial summary judgment is GRANTED as to Defendant’s  
25 permit violations of Condition S6.D.

26 3. Condition S6.E

1 Condition S6.E requires that the Pollution Prevention Plans address “[h]ow solid and  
2 biological wastes are collected, stored, and ultimately disposed. (Dkt. No. 29-2 at 11.) Plaintiff  
3 argues that Defendant’s Pollution Prevention Plans fail to account for the collection, storage, and  
4 disposal of harvest blood. (Dkt. No. 29 at 16–17.) Defendant claims that its plan “adequately  
5 addresses how harvest blood is collected, stored, and disposed” because it does not bleed fish at  
6 the facilities. (Dkt. No. 36 at 26.) Defendant’s plans do not address how it collects, stores, and  
7 disposes of harvest blood. (*See id.* at 113, 121, 125, 130.) Even if Defendant does not bleed fish  
8 at its facilities, its plans still had to address procedures for blood generated from harvesting  
9 operations. (Dkt. No. 29-2 at 11.) The plans’ complete silence on this issue places it in facial  
10 violation of the permits. Therefore, Plaintiff’s motion for partial summary judgment is  
11 GRANTED as to Defendant’s permit violations of Condition S6.E.

12 4. Condition S7.6

13 Condition S7.6 requires that Defendant’s plans include procedures for “routinely tracking the  
14 number of fish within the pens, the number of fish lost due to predation and mortality, and the  
15 number of fish lost due to escapement.” (Dkt. No. 29-2 at 12.) Plaintiff argues that Defendant’s  
16 plans fail to address procedures to routinely track the number of fish lost to predation or  
17 escapement. (Dkt. No. 29 at 17–18.) Defendant argues that its plans provide for routine tracking  
18 of mortalities in a variety of systems and that “[p]redation losses are simply a variety of  
19 mortalities at the site.” (Dkt. No. 36 at 22.)

20 Defendant’s 2012, 2014, and 2017 Release Prevention Plans state under the heading  
21 “Procedures for Routinely Tracking the Number of Fish” that fish are observed from the surface  
22 and that mortalities are removed and accounted for in a database (2012), log books (2014 plan),  
23 or an inventory system (2017 plan) after removal. (Dkt. No. 29-2 at 142, 157, 187.) Even if  
24 Defendant does track predation and escapement routinely, its permits state that the plan “must  
25 include . . . the following elements . . . “[p]rocedures for routinely tracking . . . the number of  
26 fish lost due to predation and mortality and the number of fish lost due to escapement.” (*Id.* at

12.) Defendant’s Release Prevention Plans fail to provide for such tracking. (*See id.* at 142, 157, 187.) Thus, Defendant’s argument is based on what it was allegedly doing in practice, not what was included in the plans.

The Court finds that Defendant’s 2012, 2014, and 2017 Release Prevention Plans did not satisfy Condition S7.6 of the permits. Therefore, Plaintiff’s motion for partial summary judgment is GRANTED as to Defendant’s permit violations of Condition S7.6.

**III. CONCLUSION**

For the foregoing reasons, Plaintiff’s motion for partial summary judgment (Dkt. No. 29) is:

- (1) GRANTED as to permit violations relating to Condition S6.F;
- (2) GRANTED as to permit violations relating to Condition S6.D for Defendant’s 2012, 2015, April 2017, and October 2017 Pollution Prevention Plans;
- (3) GRANTED as to permit violations relating to Condition S6.E for Defendant’s 2012, 2015, April 2017, and October 2017 Pollution Prevention Plans;
- (4) GRANTED as to permit violations relating to Condition S7.6 for Defendant’s 2012, 2014, and 2017, and Release Prevention Plans; and
- (5) DENIED as to permit violations relating to Condition S7.

DATED this 26th day of April 2019.



John C. Coughenour  
UNITED STATES DISTRICT JUDGE