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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

SAN FRANCISCO BAYKEEPER,  
Plaintiff,  
v.  
CITY OF SUNNYVALE,  
Defendant.

Lead Case No. 5:20-cv-00824-EJD  
Consolidated with No. 5:20-cv-00826 EJD

**ORDER RE DEFENDANTS’ MOTIONS  
IN LIMINE TO EXCLUDE EXPERT  
TESTIMONY OF IAN WREN, KEVIN  
DRAGANCHUK, AND JONATHAN  
SHEFFTZ**

Re: Dkt. Nos. 112, 113, 114

SAN FRANCISCO BAYKEEPER,  
Plaintiff,  
v.  
CITY OF MOUNTAIN VIEW,  
Defendant.

Plaintiff San Francisco Baykeeper (“Plaintiff”) initiated these suits against Defendants City of Sunnyvale (“Sunnyvale”) and City of Mountain View (“Mountain View”) under the citizen suit enforcement provisions of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (“Clean Water Act” or “CWA”), to address the allegedly unlawful discharge of bacteria pollution by these Cities.<sup>1</sup> Defendants have filed motions *in limine* to exclude portions of the expert

<sup>1</sup> Sunnyvale and Mountain View are hereinafter collectively referred to as the “Cities” or “Defendants.”

1 testimony of Plaintiff’s retained experts, Ian Wren, Kevin Draganchuk, and Jonathan Shefftz,  
2 pursuant to Federal Rules of Evidence (“FRE”) 104(a) and 702, and *Daubert v. Merrell Dow*  
3 *Pharms, Inc.*, 509 U.S. 579 (1993). Dkt. Nos. 112-14. Plaintiff filed oppositions, Dkt. Nos. 115-  
4 18, and a request for judicial notice, Dkt. No. 119. The request for judicial notice of the Penalty  
5 And Financial Models From U.S. Environmental Protection Agency Website, the AACE  
6 International Recommended Practice, Cost Estimate Classification System, and the Certified  
7 Professional In Stormwater Quality From Envirocert International, Inc. Website is granted.<sup>2</sup>  
8 Defendants’ motions to exclude are granted in part and denied in part.

9 **I. BACKGROUND**

10 Plaintiff sampled for fecal indicator bacteria from several municipal separate storm sewer  
11 system (“MS4”) outfalls owned and operated by Defendants, as well as locations within Stevens  
12 Creek, Calabazas Creek, and the Sunnyvale East Channel into which the Cities’ MS4s discharge  
13 (“Receiving Waters”). According to Plaintiff, the data shows that the Cities’ stormwater  
14 discharges and the Receiving Waters downstream of MS4 outfalls vastly exceed bacteria water  
15 quality standards (“WQS”).

16 **II. STANDARDS**

17 Federal Rule of Evidence 402 provides that all relevant evidence is admissible, except as  
18 otherwise provided by the Constitution of the United States, by Act of Congress, by the Federal  
19 Rules of Evidence, or by other rules prescribed by the Supreme Court pursuant to statutory  
20 authority. Fed. R. Evid. 402. “Relevant evidence” is defined in Federal Rule of Evidence 401 as  
21 that which has “(a) any tendency to make a fact more or less probable than it would be without the  
22 evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401.

23 Federal Rule of Evidence 702 permits opinion testimony by an expert if the proponent  
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25 <sup>2</sup> Defendants filed objections to Plaintiff’s oppositions, which are essentially reply briefs. Dkt.  
26 Nos. 121-23. Among other things, Defendants object to the length of Plaintiff’s opposition briefs  
27 because they exceed the page limit established by the Court’s Standing Order § IV.D.6. The  
28 objection is well taken. All future filings not in compliance with the Court’s Standing Order will  
be stricken.

1 demonstrates that the expert is qualified and (a) the expert’s scientific, technical, or other  
2 specialized knowledge will help the trier of fact to understand the evidence or to determine a fact  
3 in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of  
4 reliable principles and methods; and (d) the expert has reliably applied the principles and methods  
5 to the facts of the case. Fed. R. Evid. 702. An expert witness may be qualified by “knowledge,  
6 skill, experience, training, or education.” *Id.* The proponent of expert testimony has the burden of  
7 proving admissibility in accordance with Rule 702. Fed. R. Evid. 702 advisory committee’s note  
8 to 2000 amendment.

9 Rule 702 “clearly contemplates some degree of regulation of the subjects and theories  
10 about which an expert may testify.” *Daubert*, 509 U.S. at 589–90. Under *Daubert*, the Court  
11 exercises a gatekeeping function to ensure an expert’s proffered testimony is relevant and reliable.  
12 *United States v. Valencia-Lopez*, 971 F.3d 891, 897–98 (9th Cir. 2020). “[K]ey question[s] to be  
13 answered in determining whether a theory or technique is scientific knowledge that will assist the  
14 trier of fact will be” whether it can be (and has been) tested; whether it was subjected to peer  
15 review and publication; the known or potential rate of error; and whether the theory is generally  
16 accepted in the scientific community. *Daubert*, 509 U.S. at 593–94. “[T]he case law—  
17 particularly Ninth Circuit case law—emphasizes that a trial judge should not exclude an expert  
18 opinion merely because he thinks it’s shaky, or because he thinks the jury will have cause to  
19 question the expert’s credibility. So long as an opinion is premised on reliable scientific  
20 principles, it should not be excluded by the trial judge.” *In re Roundup Prods. Liab. Litig.*, 390 F.  
21 Supp. 3d 1102, 1109 (N.D. Cal. 2018).

22 **III. DISCUSSION**

23 **A. Mr. Draganchuk**

24 Plaintiff engaged Mr. Draganchuk, an engineer, (1) to evaluate the potential that sanitary  
25 sewage (“sewage”) is exfiltrating from Defendants’ respective sanitary sewer systems (“SSS”) and  
26 infiltrating into their respective MS4s for subsequent discharge from the MS4s’ outfalls to

1 receiving surface waters, and (2) to recommend remedies to minimize the potential for exfiltrated  
2 sewage, if needed. Expert Report of Kevin Draganchuk (“Draganchuk Report”), Dkt. No. 113-1,  
3 at 4. Mr. Draganchuk holds a Bachelor of Science in chemical engineering from Rensselaer  
4 Polytechnic Institute of Troy, New York. *Id.* He is a registered professional engineer in New  
5 York, New Jersey, and Florida and has 14 years of experience in environmental engineering. *Id.*  
6 He is also board certified by the American Academy of Environmental Engineers and Scientists,  
7 with a specialty in water supply and wastewater. *Id.* He is certified by the National Association of  
8 Sewer Service Companies (“NASSCO”) in its Pipeline, Manhole, and Lateral Assessment  
9 Certification Program (“PACP”). *Id.* He is also a member of the Water Environment Federation’s  
10 Collection System Committee (“CSC”) and a member of the CSC Technical Practice Group. *Id.*  
11 Mr. Draganchuk is currently President of CEA Engineers, P.C. (“CEAPC”) of Bloomingburg, NY,  
12 an environmental engineering firm. *Id.*

13 Mr. Draganchuk’s experience includes “designing stormwater treatment and management  
14 systems; stormwater permitting; analyzing the operation, maintenance, asset management, and  
15 design of sanitary and combined sewer systems; designing and cost estimating for site  
16 remediation; and reviewing Wastewater Treatment Plant (“WWTP”) design, operations and  
17 performance and National Pollutant Discharge Elimination System (“NPDES”) permits.” *Id.* He  
18 “analyzes facilities, causes, remedies, and costs for litigation support on sanitary sewer overflows  
19 (‘SSOs’) and combined sewer overflows (‘CSOs’), WWTP and industrial discharge violations,  
20 stormwater management, flooding, and industrial chemical discharge litigations.” *Id.* He also  
21 “develops stormwater pollution prevention plans (SWPPPs) and obtain[s] stormwater and surface  
22 water discharge New York State Pollutant Discharge Elimination System (SPDES) permits for  
23 construction and industrial activities.” *Id.* He is the Professional Engineer of record for a  
24 “brownfield site,” for which he oversees the operation, maintenance, and testing of its remediation  
25 systems, analyzes monitoring results, and performs construction and environmental oversight  
26 during site remediation activities. *Id.* He also has experience providing technical engineering

27 **CASE NO.: 5:20-CV-00824-EJD**  
28 **ORDER RE DEFENDANTS’ MOTIONS IN LIMINE TO EXCLUDE EXPERT**  
**TESTIMONY OF IAN WREN, KEVIN DRAGANCHUK, AND JONATHAN SHEFFTZ**

1 support for settlement and litigation in cases related to SSOs and/or CSOs, wastewater collection  
2 and conveyance systems, and wastewater treatment for environmental advocacy groups in a  
3 number of states, including California. *Id.* at 5.

4 There are fourteen opinions in Mr. Draganchuk’s report. First, Mr. Draganchuk concludes  
5 that:

The existence of potential sources of FIB, including human-specific  
6 bacteria loads, to receiving surface waters other than Exfiltration in  
7 Sunnyvale and the fact that Sunnyvale is actively working to prevent  
8 bacteria loads from sources of FIB other than Exfiltration from  
9 contributing to bacteria loads, including human-specific bacteria  
loads, to receiving surface waters in Sunnyvale does not preclude  
Exfiltration, for which Sunnyvale has not investigated, as a bacteria  
loading source to receiving surface waters in Sunnyvale.

10 *Id.* at 29 (Opinion No. 1). Opinion 2 is directed to Mountain View and is otherwise identical to  
11 Opinion 1. Mr. Draganchuk next opines that it is “highly probable” that exfiltration from the  
12 Sunnyvale sanitary sewer system (“SSS”) is discharging from the Sunnyvale MS4 to Stevens  
13 Creek, Sunnyvale East Channel, and Calabazas Creek and other receiving surface waters, and  
14 subsequently to their downstream receiving waters, including South San Francisco Bay, and that  
15 the discharges are contributing to *E.coli* and enterococci water quality objectives (“WQOs”)  
16 exceedances, human-specific molecular markers loads, and overall pollutant loads that increase  
17 risks to human health and the environment. *Id.* at 34-37, 40 (Opinion Nos. 3, 5). He renders  
18 similar opinions regarding Mountain View’s SSS and MS4. *Id.* at 38-40, 41 (Opinion Nos. 4, 6).  
19 Mr. Draganchuk opines that Defendants need to perform an investigation to identify sources of  
20 exfiltration (“Exfiltration Investigation”) and that this Exfiltration Investigation needs to include a  
21 desktop and Geographic Information System (“GIS”) analysis to identify SSS pipes that are  
22 capable of exfiltration based on their location relative to MS4 pipes. *Id.* at 41-43 (Opinion Nos. 7-  
23 8). Next, Defendants need to: inspect the pipes capable of exfiltration; grade the pipes using the  
24 NASSCO PACP standard; investigate the pipes with PACP 5 and PACP 4 structural defects  
25 through dye testing and/or human-specific molecular markers analysis to identify if exfiltration is  
26 occurring; and “rehabilitate” the pipes that are exfiltrating. *Id.* Mr. Draganchuk opines that

1 Sunnyvale and Mountain View need to create a “Complete GIS database.” *Id.* at 43-44 (Opinion  
2 Nos. 9, 10). He also opines that Sunnyvale and Mountain View avoided costs by not performing  
3 an Exfiltration Investigation and by not maintaining a Complete GIS database. *Id.* at 44 (Opinion  
4 Nos. 11 and 12). According to Mr. Draganchuk, the “order of magnitude estimate of the costs  
5 avoided by” not performing an Exfiltration Investigation and by not maintaining a Complete GIS  
6 database is \$1,950,000 for Sunnyvale, and \$1,000,000 for Mountain View. *Id.*, Table 9. Lastly,  
7 Mr. Draganchuk opines that Sunnyvale and Mountain View “potentially avoided costs by not  
8 performing SSS main pipes rehabilitation to eliminate Exfiltration sources identified during an  
9 Exfiltration Investigation.” *Id.* at 45 (Opinion Nos. 13-14). Mr. Draganchuk estimates that the  
10 order of magnitude estimate of the potential range of costs avoided by not performing the SSS  
11 main pipes rehabilitation is \$0 - \$59,136,000 for Sunnyvale, and \$0 - \$7,392,000 for Mountain  
12 View. *Id.*, Table 10.

13 Defendants seek exclusion of Mr. Draganchuk’s opinions set forth in Section 3.3 of his  
14 Expert Report and Opinion Nos. 9 through 14. *See* Defs.’ Proposed Order, Dkt. No. 113-2.

15 **1. Mr. Draganchuk’s Opinions re Cost Estimates**

16 Defendants first contend that Mr. Draganchuk is not qualified to give the cost estimates in  
17 Opinion Nos. 11-14 and Tables 9 and 10 because he is not an economist. Mr. Draganchuk’s  
18 resumé supports finding that he has sufficient knowledge, skill, and experience to provide Opinion  
19 Nos. 11-14. He has over thirteen years of experience working as an environmental engineer. This  
20 experience includes wastewater collection design, operations and maintenance, and condition  
21 assessment; stormwater evaluation, design, and permitting; and pollutant discharge quantification  
22 and environmental impacts. Engineers are often tasked with providing cost estimates. *See e.g.*,  
23 *United States v. 14.3 Acres of Land*, No. 07-886 W(NLS), 2008 WL 4079272, at \*7 (S.D. Cal.  
24 Aug. 29, 2008) (civil engineer developed costs of road project). Moreover, the lack of  
25 specialization in a particular field goes to the weight of the expert’s opinion, not admissibility.  
26 *Avila v. Willits Env’tl. Remediation Trust*, 633 F.3d 828, 839 (9th Cir. 2011).

27 **CASE NO.: 5:20-CV-00824-EJD**  
28 **ORDER RE DEFENDANTS’ MOTIONS IN LIMINE TO EXCLUDE EXPERT  
TESTIMONY OF IAN WREN, KEVIN DRAGANCHUK, AND JONATHAN SHEFFTZ**

1           Although Mr. Draganchuk has sufficient knowledge, skill, and experience to provide cost  
2 estimates, Table 9 must be excluded because it is not supported by sufficient facts. *United States*  
3 *v. Various Slot Machines on Guam*, 658 F.2d 697, 700 (9th Cir. 1981) (“[A]n expert must back up  
4 his [or her] opinion with specific facts.”). Mr. Draganchuk acknowledged during his deposition  
5 that he “did not have actual direct cost data to rely on” for Table 9. *See* Decl. of Melissa A.  
6 Thorme in Support of Mot. to Exclude the Expert Test. of Kevin Draganchuk, Ex. B, Dkt. No.  
7 113-1, at 136:6-12. He testified that the numbers in Table 9 were “partially based on deposition  
8 testimony” for the cost of an exfiltration study, and on the relative sizes of Defendants’ sanitary  
9 systems. *Id.* at 136:9-12. But Plaintiff fails to identify the deponent, the substance of the  
10 deponent’s testimony, and the exfiltration study upon which Mr. Draganchuk relied. Lacking this  
11 support, Table 9 is excluded.

12           In contrast to Table 9, there is a factual basis for the cost estimates in Table 10. Mr.  
13 Draganchuk testified that the cost estimates in Table 10 were “based on unit prices for removal  
14 and replacement of eight-inch HDPE sewer main pipes and eight-inch PCV sewer via open trench  
15 from the City of Mountain View Villa Street –Water and Sewer Main Replacement Project” from  
16 June of 2018. *Id.* at 135:23-136:5. Mr. Draganchuk used Mountain View data for Sunnyvale  
17 because “Sunnyvale is right next door likely using the same or similar contractors, same and  
18 similar soil types, same or similar pipe types, so the costs would be very comparable.” *Id.* at  
19 137:23-138:1. Defendants fault Mr. Draganchuk for failing to take into consideration potential  
20 cost differentials, such as the differences between in-house and outside contractors. *Id.* at 137:21-  
21 138:7. Defendants also make much of Mr. Draganchuk’s admission that his cost estimates were  
22 AACE Level 5 cost estimates, which have the highest levels of uncertainty and are the least  
23 reliable. *Id.* at 139:5-139:20. These purported deficiencies, however, go to the weight, not the  
24 admissibility of Table 10. The court should screen for “unreliable nonsense opinions, but not  
25 exclude opinions merely because they are impeachable.” *Alaska Rent-A-Car, Inc. v. Avis Budget*  
26 *Grp., Inc.*, 738 F.3d 960, 696-70 (9th Cir. 2013).

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**2. Mr. Draganchuk’s Engineering Evaluations**

Defendants next contend that Mr. Draganchuk’s engineering evaluations must be excluded because he is not qualified to provide engineering opinions in California, even though he is a registered engineer in New York, New Jersey, and Florida. The argument is unpersuasive as “an expert need not have official credentials in the relevant subject matter to meet Rule 702’s requirements.” *See United States v. Garcia*, 7 F.3d 885, 889–90 (9th Cir. 1993); *see also Tarrant v. Leatt Corp.*, No. 13-1230 DMG, 2014 WL 12558297, at \*4 n.1 (C.D. Cal. Dec. 9, 2014) (finding that the restricted nature of expert’s California license did not preclude him from proffering expert testimony). Defendants have not presented a persuasive policy reason why an out-of-state expert retained to render opinions in this court must be registered or licensed under California law as a per se condition precedent to testifying as an expert, and regardless of the expert’s other qualifications. “If there is any relevance to being a local licensee, that fact or the absence of it may be adduced to the trier of fact.” *Geophysical Sys. Corp. v. Seismograph Serv. Corp.*, 738 F. Supp. 348, 350 (C.D. Cal. 1990).

**3. Mr. Draganchuk’s Opinions Regarding Defendants’ “High Risk” Sewer Lines**

Defendants contend that Mr. Draganchuk’s other opinions regarding Defendants’ “high risk” sewer lines are not supported by the underlying facts and data and/or are not reliable or relevant under *Daubert* and its progeny. Defendants’ argument rests on Mr. Draganchuk’s acknowledgment that there are a number of “gaps and limitations” with the underlying data he used to conduct his analysis. *See Draganchuk Report* at 25-28. Again, Defendants’ argument fails to persuade.

Although Mr. Draganchuk noted gaps in the Cities’ data, he was still able to use the available data to identify the main pipes that have a high risk for exfiltration (“High Risk Pipes”). He used the following criteria to identify High Risk Pipes in Sunnyvale:

- 1. constructed of VCP



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2. installed prior to 1960 (e.g. at least 60 years old)
3. SSS main pipe located at an elevation higher than the adjacent MS4 pipe
4. the adjacent MS4 pipe is located no more than one meter radially from the SSS main pipe
5. structural condition assessment severity based on NASSCO PACP grades of four or five based on the PACP Quick Rating.
- 6.

Draganchuk Report at 25. For Mountain View, he used the first and fifth criteria above and one additional criterion: “the adjacent MS4 is located no more than one meter horizontally from the SSS main pipe.” *Id.* at 27. Based on the criteria above, he identified 13 High Risk Pipes in the Sunnyvale SSS and 142 potential High Risk Pipes in the Mountain View SSS. *Id.* at 26, 28. He then extrapolated his analyses to portions of Defendants’ SSSs where there is no condition assessment data available, and estimated that there are “potentially 81 High Risk Pipes” in the Sunnyvale SSS and “500 potential High Risk Pipes” in the Mountain View SSS. *Id.* at 27-28. Hence, contrary to Defendants’ assertion, Mr. Draganchuk’s opinions are based on sufficient facts and reflect “more than subjective belief or unsupported speculation.” *Daubert*, 509 U.S. at 590. It is unfortunate that Defendants do not maintain comprehensive data regarding the installation dates, location and condition of their pipes. But gaps in Defendants’ data is not a reason to exclude Mr. Draganchuk’s opinions. The factual basis of Mr. Draganchuk’s opinion “goes to the credibility of [his] testimony, not the admissibility.” *See Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1017 n.14 (9th Cir. 2004) (quoting *Children’s Broad. Corp. v. Walt Disney Co.*, 357 F.3d 860, 865 (8th Cir. 2004)).

Defendants next contend that Mr. Draganchuk’s analyses and opinions regarding High Risk Pipes lack reliability based on the opinions of their rebuttal experts. Defendants’ expert, Mansour Nasser, investigated some of the High Risk Pipes identified by Mr. Draganchuk, and concluded that most of the pipes identified for Sunnyvale did not meet the definition of High Risk Pipe, and the others had no indication of exfiltration. Rebuttal Expert Report of Mansour Nasser

1 (“Nasser Rebuttal Report”), Dkt. No. 93-1, at 6-9. Another rebuttal expert, Mike Vasquez,  
2 reached similar conclusions regarding Mountain View’s pipes. Rebuttal Expert Report of Mike  
3 Vasquez, Dkt. No. 94-1. Nasser also disagreed with Mr. Draganchuk’s opinions regarding the  
4 necessity of a complete GIS database. Nasser Rebuttal Report at 15.

5 Although the results of Defendants’ investigation into High Risk Pipes identified by Mr.  
6 Draganchuk are significant, they do not establish that Mr. Draganchuk’s opinions are so  
7 fundamentally unreliable as to warrant exclusion. The investigation into Sunnyvale’s pipes was  
8 limited to twelve locations. The investigation into Mountain View’s pipes was limited to forty  
9 pipelines. Furthermore, “[t]he relative weakness or strength of the factual underpinnings of the  
10 expert’s opinion goes to weight and credibility, rather than admissibility.” *See, e.g., Bergen v. F/V*  
11 *St. Patrick*, 816 F.2d 1345, 1352 n.5 (9th Cir. 1987), *opinion modified on reh’g*, 866 F.2d 318 (9th  
12 Cir. 1989); *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales Practices and Prods. Liab.*  
13 *Litig.*, No. MDL 10–02172, 2012 WL 4904412, at \*3 (C.D. Cal. Sept. 20, 2012) (finding whether  
14 an expert’s reasonable assumptions are true and whether his opinions should be accepted are  
15 issues going to the weight of his testimony and report and not to their admissibility).

16 In sum, Defendants’ motion to exclude the opinions of Mr. Draganchuk is granted as to  
17 Table 9, and denied in all other respects.

18 **B. Mr. Wren**

19 Plaintiff designated Mr. Wren to offer expert opinions related to: (1) Defendants’ alleged  
20 contribution to exceedances of bacteria WQOs; (2) whether certain water bodies are waters of the  
21 United States (“WOTUS”) under the CWA; and (3) the proposed remediation methods and costs  
22 related to alleged violations of bacteria objectives. Mr. Wren holds a Bachelor of Arts in  
23 Integrative Biology from the University of California, Berkeley and a Master in Hydrology from  
24 the Imperial College of Science Technology and Medicine in the United Kingdom. Expert Report  
25 of Ian Wren (“Wren Report”), Dkt. No. 92-10, at 2. Mr. Wren is a Certified Professional in  
26 Stormwater Quality (CPSWQ), a California Construction General Permit Qualified Stormwater

1 Pollution Prevention Plan (SWPPP) Developer and Qualified SWPPP Practitioner (QSD/QSP),  
2 and a California Industrial General Permit Qualified Industrial Storm Water Practitioner (QISP).  
3 *Id.* Since 2010, Mr. Wren has been the Staff Scientist at Baykeeper. *Id.* at 4. Mr. Wren is also an  
4 independent consultant for several non-profit environmental organizations and public sector  
5 clients. *Id.*

6 First, Mr. Wren opines that he performed stormwater sampling efforts on behalf of  
7 Plaintiff in accordance with a Quality Assurance Program Plan (“QAPP”) and associated Standard  
8 Operating Procedures prepared by him. *Id.* at 3. The samples he collected were analyzed by a  
9 state-certified laboratory for fecal coliforms (“FC”), total coliforms (“TC”), *E.coli*, and  
10 Enterococci (collectively referred to as fecal indicator bacteria, or “FIB”). *Id.* at 6. Second, he  
11 opines that discharges from Defendants’ MS4s contribute to exceedances of applicable WQOs.  
12 *Id.* at 8-15. Third, he concludes (a) that Stevens Creek and Calabazas Creek meet the definition of  
13 a WOTUS under the CWA; and (b) that Sunnyvale East Channel serves as a point source of  
14 pollution to San Francisco Bay. *Id.* at 15-19. Fourth, Mr. Wren concludes that the alternative  
15 compliance programs developed under the Los Angeles County MS4 Permit represent an  
16 applicable model for Defendants to come into compliance with FIB standards for their MS4  
17 systems. *Id.* at 19-22. The process developed under this Los Angeles County MS4 Permit has  
18 four steps: (1) initial planning, such as conducting a “water quality characterization” based on  
19 available data, identifying highest priority pollutants, performing source identification for the  
20 pollutants, and establishing a set of compliance milestones; (2) identifying control measures such  
21 as stormwater infiltration; (3) conducting a reasonable assurance analysis (“RAA”) to demonstrate  
22 that the control measures will ensure compliance with applicable WQS; and (4) implementing the  
23 control measures over a reasonable period of time. *Id.*

24 Mr. Wren’s report also includes an approach for estimating the cost of compliance with  
25 WQOs. *Id.* at 22. He relies on the cost of the Los Angeles County MS4 Permit, Ballona Creek  
26 Enhanced Watershed Program (“EWMP”). *Id.* According to Mr. Wren, the cost to Defendants to

1 comply with WQOs would be similar to the cost of the Ballona Creek EWMP, scaled to the  
2 smaller size of the Cities. *Id.* In other words, the \$2.72 billion cost of the Ballona Creek EWMP  
3 should be scaled to account for the fact that Sunnyvale is 17.8% and Mountain View is 9.6% of  
4 the size of the Ballona Creek watershed.

5 Defendants seek exclusion of Mr. Wren’s second, third and fourth opinions. Defendants  
6 argue that these opinions should be excluded because Mr. Wren is not qualified to provide these  
7 opinions; he applied the wrong standards and lacked sufficient data to form his opinions; and he  
8 used unreliable methodology to form his opinion on remediation.

9 **1. Mr. Wren’s Opinions on Whether a Water is a WOTUS**

10 Defendants argue that (1) Mr. Wren does not have any qualifications that make him an  
11 expert on WOTUS, and (2) whether a water body is a WOTUS is a legal conclusion. Defendants  
12 are correct that an expert may not give testimony regarding a legal conclusion. Whether a water is  
13 a WOTUS is ultimately a question for the Court. *Nationwide Transp. v. Cass Info. Sys., Inc.*, 523  
14 F.3d 1051, 1058 (9th Cir. 2008) (“[A]n expert witness cannot give an opinion as to her *legal*  
15 *conclusion*, i.e., an opinion on an ultimate issue of law.”). Thus, the Court grants Defendants’  
16 motion to the extent they seek exclusion of Mr. Wren’s opinions that Stevens Creek and  
17 Calabazas Creek are WOTUS, and that Sunnyvale East Channel is a point source.

18 Although the Court is precluding Mr. Wren from rendering legal conclusions, the facts  
19 underpinning those conclusions are not necessarily subject to exclusion. *See Zeiger v. WellPet*  
20 *LLC*, 526 F. Supp. 3d 652, 680 (N.D. Cal. 2021) (“District courts may, accordingly, preclude  
21 witnesses from relating legal conclusions, but not the facts underpinning those conclusions (so  
22 long as they are otherwise admissible).”). Accordingly, Defendants’ motion is denied to the extent  
23 they seek exclusion of Mr. Wren’s factual assessment of the waters at issue, including for  
24 example, the hydrological characteristics of the waters at issue. Mr. Wren’s education and  
25 experience as a hydrologist qualify him to opine on the hydrological characteristics of a  
26 waterbody.

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**2. Mr. Wren’s Opinions Related to Defendants’ Alleged Contribution to Exceedances of Bacteria Objectives**

Defendants contend that Mr. Wren’s opinions as to their alleged contribution to exceedances of bacteria objects are based on flawed data and methodology. The Court rejects Defendants’ arguments for the reasons stated in the Order Granting Plaintiff’s Motion For Partial Summary Judgment; Denying Defendants’ Cross-Motion For Summary Judgment; And Denying Motion For Leave To File Supplemental Brief.

**3. Mr. Wren’s Opinions on Remedial Plan and Associated Costs**

Section 6 of Mr. Wren’s Report is entitled “Process for Establishing a Remedy for Exceedances of Water Quality Objectives.” Wren Report at 19. Section 6, subsection (a) sets forth Mr. Wren’s recommended process for developing a Watershed Management Program to address exceedances of bacteriological WQOs, and subsection (b) sets forth his approach for estimating cost compliance with WQOs.

Defendants argue that Mr. Wren used an unreliable methodology to form his opinions on remedial actions. Defendants also contend that Mr. Wren is not qualified to offer opinions as to the costs and benefits of remediation, and that his cost evaluation is fundamentally flawed.

**a. Methodology For Forming Opinions on Remedial Actions (Section 6(a))**

Defendants take issue with Mr. Wren relying on the Los Angeles County MS4 Permit, Ballona Creek EWMP as a compliance model. Defendants point out that the Ballona Creek EWMP is in a different part of the state, with different rainfall and different expectations for bacteria, and furthermore, the program has yet to be fully implemented. Defendants also point out that the regulatory landscape in Los Angeles is different than for the Cities, and that the Ballona Creek watershed is much larger and has a much more expansive level of urbanization in it than in the vicinity of the Cities. Defendants also contend that Mr. Wren assumes, without any basis, that implementing a program such as the Ballona Creek EWMP will enable the Cities to meet bacteria water quality objectives.

These purported shortcomings in Mr. Wren’s analysis are not a basis to exclude the

1 entirety of Mr. Wren’s opinions in Section 6, subsection (a). Mr. Wren is qualified to render those  
2 opinions. He “has performed technical and litigation support on over fifty matters related to  
3 municipal and industrial stormwater, involving sampling and sample design, review of SWPPPs,  
4 and identification of best management practices.” Wren Report at 2. Locally, Mr. Wren was  
5 involved in developing a remedial program for the City of San Jose. Rebuttal Expert Report of  
6 Ian Wren, Dkt. No. 92-11, at 12. When deciding whether to admit expert testimony, the Court is  
7 “concerned not with the correctness of the expert’s conclusions but the soundness of his  
8 methodology.” *Estate of Barabin*, 740 F.3d 4 at 463. Here, Mr. Wren offers a reasonably sound  
9 basis for his methodology for establishing a remedy for exceedances of WQS: He relies on the  
10 programs developed under the 2012 Los Angeles County MS4 Permit. Wren Report at 19-22.  
11 There may be strong, and perhaps persuasive, reasons why the programs developed for Los  
12 Angeles County cannot or should not be implemented by the Cities. Nevertheless, Mr. Wren’s  
13 methodology is not so unsound as to warrant total exclusion of Section 6, subsection (a).  
14 Defendants’ critiques as to Mr. Wren’s methodology may be raised at trial. *See Daubert*, 509 U.S.  
15 at 596 (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction  
16 on the burden of proof are the traditional and appropriate means of attacking shaky but admissible  
17 evidence.”).

18 **b. Cost of Remediation (Section 6(b))**

19 Defendants next contend that Mr. Wren is not an economist, and therefore not qualified to  
20 offer an opinion on the cost of remediation. As stated previously, however, an expert witness may  
21 be qualified by “knowledge, skill, experience, training, *or* education.” Fed. R. Evid. 702  
22 (emphasis added). Mr. Wren has experience, but arguably minimal experience, estimating costs  
23 for remediation. Mr. Wren testified that he has “scoped out costs for treatments systems.” Decl.  
24 of Melissa A. Thorme in Support of Mot. to Exclude Expert Test. of Ian Wren (“Thorme Decl.  
25 ISO Wren MIL”), Exh. A, Dkt. No. 114-1, at 10:18-25. The sufficiency of Mr. Wren’s training  
26 and experience in estimating the cost of remediation bears more on the weight of his opinion than

1 its admissibility. *See Abaxis, Inc. v. Cepheid*, No. 10-02840 LHK, 2012 WL 2979019 (N.D. Cal.  
2 July 19, 2012) (“Rule 702 imposes no requirement that experts have personal experience in an  
3 area to offer admissible testimony relating to that area.”).

4 Lastly, Defendants challenge Mr. Wren’s methodology for estimating the cost of  
5 remediation. His methodology is simple. He opines that the costs for remediation in this case  
6 should be “downscaled, based on area, from estimates for members of the Ballona Creek  
7 Watershed Management Group.” Wren Report at 22. He then compares the 128 square miles in  
8 the Ballona Creek watershed and the 22.8 and 12.3 square miles in Sunnyvale and Mountain  
9 View, respectively. *Id.* Mr. Wren does not provide a numerical estimate in his Report, but  
10 testified that a downscaled estimate for Sunnyvale would be approximately 17.8 percent of \$2.7  
11 billion. Thorne Decl. ISO Wren MIL, Exh. A, at 99:2-5. A downscaled estimate for Mountain  
12 View would be approximately 9.6 percent of \$2.7 billion.

13 Defendants raise several reasons why Mr. Wren’s methodology is unreliable. For  
14 example, Defendants contend that Mr. Wren did not make any adjustments to his cost estimate  
15 based on the fact that the Ballona Creek EWMP included remediation for more pollutants than  
16 bacteria. However, even if the Ballona Creek EWMP is an imperfect comparator, and Mr. Wren  
17 should have used more or different data to calculate a more accurate remediation cost estimate,  
18 Mr. Wren’s methodology is not “junk science” under *Daubert*. Accordingly, the Court denies  
19 Defendants’ motion to exclude Mr. Wren’s opinions on a remedial plan and associated costs.

20 In sum, Defendants’ motion to exclude the opinions of Mr. Wren is granted as to WOTUS,  
21 but denied in all other respects.

22 **C. Mr. Schefftz**

23 Plaintiff designated Mr. Shefftz as its expert to offer opinions related to: (1) the Cities’  
24 economic burdens and compliance costs if they were required to modify their wastewater and  
25 stormwater infrastructure, and (2) the penalties the Cities should pay for delaying modifications to  
26 their infrastructure, if any. Mr. Shefftz holds a Bachelor of Arts in Economical and Political

1 Economy from Amherst College. Expert Op. of Jonathan S. Shefftz (“Shefftz Report”), Ex. A.,  
2 Dkt. No. 112-1, at A-1. He also holds a Master of Public Policy with concentrations in  
3 Government & Business and Energy & Environmental Policy. *Id.* He has been qualified as an  
4 expert witness on numerous economic matters in federal court and other contexts and has  
5 extensive experience analyzing the economic benefit received through delayed compliance with  
6 regulatory requirements and a defendant’s ability-to-pay penalties. *Id.* at 60-62. Report at 3. Mr.  
7 Shefftz provides four opinions:

- 8 • Based on my analysis of compliance measures and associated cost estimates  
9 that Plaintiff’s counsel provided to me from their experts – Kevin  
10 Draganchuk, P.E. and Ian Wren – in response to my requests, the City’s  
11 economic benefit from failing to implement these measures at an earlier  
12 point in time is in the millions of dollars, with the exact figure dependent  
13 upon the ultimately chosen measure.
- 14 • My economic benefit results are present value figures calculated as of July  
15 2, 2021 (i.e., the date of this report). Therefore the economic benefit will  
16 continue to grow after this date until the City effectively pays back its  
17 economic benefit in the form of a civil penalty. I provide details in my  
18 report for the monthly increase in my economic benefit results for each  
19 month of delay in paying any penalty past my present value date.
- 20 • For the economic impact of a penalty payment and injunctive relief costs,  
21 the U.S. Environmental Protection Agency’s sewer overflow financial  
22 capability assessment places the City only in the “low burden” category  
23 even with future projected rate increases to pay for the injunctive relief  
24 costs and the imposition of a large civil penalty.
- 25 • For civil penalties to achieve financial deterrence, their value must exceed  
26 the economic benefit that defendants realize by delaying and/or avoiding  
27 adequate pollution control. Because not all violations are detected,  
28 prosecuted, and ultimately penalized, to achieve adequate deterrence, a civil  
penalty should also be adjusted by probability of detection, prosecution, and  
ultimate payment, as explained in further detail in my report. This is  
necessary to achieve a goal to deter further violations.

22 Shefftz Report at 1-2.

23 Defendants seek to exclude Mr. Shefftz’s opinions for two reasons: (1) they are based on  
24 Mr. Wren’s and Mr. Draganchuk’s purportedly unreliable Reports; and (2) they are unreliable.

25 **1. Reliance on Mr. Wren and Draganchuk’s Data**

26 In general, an expert whose proffered testimony relies on another expert’s theories that



1 have been or may be excluded as unreliable should also be excluded. *Sims v. Kia Motors of*  
2 *America, Inc.*, 839 F.3d 393, 404–406. (5th Cir. 2016) (excluding engineer’s theory about fuel  
3 tank straps, because engineer relied on another expert’s inadmissible downward displacement  
4 theory); *see also In re Chathode Ray Tube (CRT) Antitrust Litig.*, No. 07-5944 JST, 2017 WL  
5 10434367, at \*2 (N.D. Cal. Jan. 23, 2017) (“Where an expert bases her opinion on – or simply  
6 repeats – the unreliable opinion of another expert, a district court may properly exclude the first  
7 expert’s testimony.”). Here, the Court excluded Draganchuk Report, Table 9. Therefore, Mr.  
8 Shefftz’s opinions are excluded to the extent they are based on Table 9.

9 **2. Reliability**

10 Defendants raise two reliability issues regarding Mr. Shefftz’s opinions. First, Defendants  
11 argue that he impermissibly relies on the Wren and Draganchuk Reports in forming his opinions.  
12 Second, Defendants assert that his opinions regarding Defendants’ economic benefit from failing  
13 to implement remedial measures contains significant analytical gaps.

14 **a. Relying on Other Experts’ Information**

15 Defendants cite several cases in support of their assertion that Mr. Shefftz cannot rely on  
16 the costs estimates stated in Wren and Draganchuk Reports, but none of the cases are analogous.  
17 For example, in *In re Imperial Credit Indus., Inc. Sec. Litig.*, 252 F. Supp. 2d 1005, 1012 (C.D.  
18 Cal. 2003), the court rejected an expert opinion because it relied on excerpts from an opinion by  
19 another expert generated for the purposes of another litigation. Unlike in *In re Imperial Credit*  
20 *Indus.*, Mr. Wren and Draganchuk prepared the cost estimates for this litigation, not for another  
21 litigation. Defendants’ reliance on *American Key Corp. v. Cole Nat’l Corp.*, 762 F.2d 1569, 1580  
22 (11th Cir. 1985), is also misplaced. In *American Key Corp.*, the Ninth Circuit found that the  
23 district court properly gave little weight to an expert’s affidavit because it relied on inadmissible  
24 lay opinion testimony regarding relevant geographic market and monopoly power. Unlike in  
25 *American Key Corp.*, Mr. Shefftz is relying on admissible expert opinions, which is permissible.  
26 *See Holbrook v. Lykes Bros. S.S. Co., Inc.*, 80 F.3d 777, 781–82 (3rd Cir. 1996) (overturning order

1 excluding a doctor’s testimony because it was routine for doctors to rely on reports prepared by  
2 other doctors); *Hynix Semiconductor Inc. v. Rambus Inc.*, No. 00-20905 RMW, 2008 WL 73689,  
3 at \*11 (N.D. Cal., Jan. 5, 2008) (expert on market power may properly rely on manufacturers’  
4 engineering experts); *O2 Micro Intern. Ltd. v. Monolithic Power Sys., Inc.*, 420 F. Supp. 2d 1070,  
5 1088-89 (N.D. Cal. 2006) (admitting expert testimony that relied on another expert’s tests because  
6 “an expert is not required to testify only upon data the expert has personally gathered or tested”).  
7 Notably, Mr. Shefftz is not merely copying Mr. Wren’s and Mr. Draganchuk’s opinions and  
8 offering them as his own, which distinguishes this case from other cases Defendants rely on. *See*  
9 *United States v. Tran Trong Cuong*, 18 F.3d 1132, 1143 (4th Cir. 1994) (“it is insufficient for an  
10 expert to simply rely on or parrot another expert’s report”); *Crescenta Valley Water Dist. v. Exxon*  
11 *Mobile Corp.*, No. 07-2630 JST, 2013 WL 12120533, \*2 n. 4 (C.D. Cal. Mar. 14, 2013) (same).  
12 Furthermore, that Mr. Wren’s and Mr. Draganchuk’s opinions were prepared for litigation does  
13 not mean Mr. Shefftz cannot rely on them. *See United States v. Marine Shale Processors*, 81 F.3d  
14 1361, 1370, (5th Cir. 1996) (“That a research protocol or method was conducted in anticipation of  
15 litigation does not mean that it cannot be the type of study an expert would rely upon in expressing  
16 his opinion.”).

17 **b. Purported Analytical Gaps**

18 Defendants next contend that Mr. Shefftz’s opinions are unreliable because there are  
19 significant analytical gaps. Specifically, Defendants fault Mr. Shefftz for using the highest  
20 possible compliance costs when there are more reasonable approaches available. Mr. Shefftz  
21 explained during his deposition, however, that he was trying to assess the highest possible figure  
22 because he was being conservative. Dkt. No. 112-1 at 29-30. In other words, “[i]n using the  
23 maximum potential costs for this evaluation, Shefftz determined that the Cities can readily afford  
24 to stop polluted discharges to area creeks and the Bay even under the worst possible costs  
25 scenario.” Pl.’s Opp’n at 10. Mr. Shefftz explained his approach at his deposition:

26 So I come up with a number that’s almost certainly too high, but I’m  
27 trying to be conservative in the sense of being especially cautious in

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assessing the economic impact by coming up with numbers that if anything are unrealistically high, and therefore resulting in the very high upper end for the impact on household sewer bills.

Dkt. No. 112-1 at 30. Mr. Shefftz’s conservative approach is not an analytical gap. Therefore, the Court rejects Defendants’ argument.

**IV. CONCLUSION**

For the reasons discussed above, the Court orders as follows:

- Defendants’ motion to exclude the expert testimony of Mr. Draganchuk is GRANTED as to Table 9. The motion is DENIED in all other respects.
- Defendants’ motion to exclude portions of the expert testimony of Mr. Wren is GRANTED only as his ultimate opinions that Stevens Creek and Calabazas Creek are WOTUS and that Sunnyvale East Channel serves as a point source. The motion is DENIED in all other respects.
- Defendants’ motion to exclude the expert opinions of Mr. Shefftz is GRANTED to the extent his opinions are based on Table 9. The motion is DENIED in all other respects.

**IT IS SO ORDERED.**

Dated: September 12, 2022



EDWARD J. DAVILA  
United States District Judge