UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

CLARKSON S. FISHER FEDERAL BUILDING & U.S. COURTHOUSE
402 EAST STATE STREET
TRENTON, N.J. 08608
609-989-2009

NOT FOR PUBLICATION

March 27, 2018

LETTER OPINION

VIA CM/ECF
All counsel of record

Re: *Raritan Baykeeper, Inc., et al. v. NL Industries, Inc., et al.*
Civil Action No. 09-4117 (MAS) (DEA)

Dear Counsel:

On July 29, 2016, the Court, among other things, denied Plaintiffs Raritan Baykeeper, Inc. ("Baykeeper") and Edison Wetlands Association, Inc.'s ("EWA" and collectively with Baykeeper, "Plaintiffs") and Defendants NL Environmental Management Services, Inc. and NL Industries, Inc.'s ("Defendants") respective motions for summary judgment on the issue of Plaintiffs' Article III standing. (Memorandum Opinion and Order, ECF Nos. 411, 412). From May 8, 2017 through May 12, 2017, the Court held a preliminary evidentiary hearing to further illuminate the record, given the technical nature of the evidence presented and the unusual factual scenario involved.[1] (Minute Entries, ECF Nos. 465-69.) On September 29, 2017, the parties submitted post-hearing briefing (Pls.' Post-Hr'g Br. on Article III Standing, ECF No. 493-1; Defs.' Post-Prelim. Evidentiary Hr'g Br., ECF No. 494) and proposed findings of fact and conclusions of law. (Pls.' Proposed Post-Hr'g Findings of Fact and Conclusions of Law, ECF No. 493; Defs.' Proposed Conclusions of Law, ECF No. 494-1; Defs.' Proposed Findings of Fact, ECF No. 494-2). The Court has carefully considered the parties' submissions and the testimony presented at the preliminary evidentiary hearing. For the reasons stated below, Plaintiffs' motion for summary judgment as to Article III standing is granted with respect to their Resource Conservation and

[1] Here, the Court held a preliminary evidentiary hearing in connection with its consideration of the parties' summary judgment motions. The Court did not style the proceeding as a trial, despite the presentation of significant testimony. At the outset of the proceedings, the Court noted that although it would hear the parties' objections, the Court "relaxed the rules of evidence," as is standard practice in the context of an evidentiary hearing. (May 8, 2017 Tr. 4:11-16, ECF No. 474.) Additionally, towards the conclusion of the fourth day of the preliminary evidentiary hearing, the Court reminded the parties that "in many regards we've kind of really gone at this in a very formal way as if it were a full-blown trial[;]" however, "[t]his hearing is basically to assist the Court, this is not a full-blown trial here." (May 11, 2017 Tr. 263:6-9, ECF No. 477.) At the summary judgment stage, plaintiffs must "set forth by affidavit or other evidence, specific facts" supporting the proposition that they have standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotations and citation omitted).

Recovery Act ("RCRA") claim, and denied with respect to their Clean Water Act ("CWA") claims and Defendants' cross-motion for summary judgment is denied with respect to the RCRA claim, and granted with respect to the CWA claims.

Article III, Section 2 of the United States Constitution "limits the federal judicial power to the resolution of "cases and controversies." *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 254 (3d Cir. 2005) (internal quotations omitted) (citing *McConnell v. FEC*, 540 U.S. 93, 225 (2003); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000)). "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Honeywell*, 399 F.3d at 254 (citing *McConnell*, 540 U.S. at 225). "Standing is a threshold jurisdictional requirement[;] . . . [p]laintiffs must have standing at all stages of the litigation . . . and they bear the burden of proving it[.]" *Pub. Interest Research Grp. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 117 (3d Cir. 1997).

A court cannot "'raise the standing hurdle higher than the necessary showing for success on the merits' under the governing statutory provision." *Honeywell*, 399 F.3d at 254 (quoting *Laidlaw*, 528 U.S. at 181). As a reference point, Section 7002(a)(1)(B) of RCRA allows citizens to bring suits against any person[2] "who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." *Honeywell*, 399 F.3d at 258. The Third Circuit has cited with approval the Eleventh Circuit's description of the claim: "[t]he operative word . . . [is] 'may' . . . [P]laintiffs need only demonstrate that the waste . . . 'may present' an imminent and substantial threat . . . [.]" *Honeywell*, 399 F.3d at 258 (quoting *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004)) (alterations in original).

With that in mind, the Court turns to its standing analysis. In reaching its decision, the Court considered the hearing testimony and other materials in the record, including the witnesses' affidavits. "[T]o satisfy Article III's standing requirements, a plaintiff must show[:] (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Laidlaw*, 528 U.S. at 180-81 (citing *Lujan*, 504 U.S. at 560-61).

An injury in fact must satisfy the requirements set forth above; however, "an identifiable trifle is enough." *Honeywell*, 399 F.3d at 254 (quoting *United States v. Students Challenging Recruiting Agency Procedures*, 412 U.S. 669, 689 n.14 (1973)); *Gen. Instrument Corp. v. Nu-Tek Elecs. & Mfg.*, 197 F.3d 83, 87 (3d Cir. 2005); *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 71 (3d Cir. 1990). In the environmental context, "[t]he relevant showing . . . is not injury to the environment but injury to the *plaintiff*." *Laidlaw*, 528

[2] Persons subject to suit include "the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and . . . any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility." 42 U.S.C. § 6972(a)(1)(B).

U.S. at 181 (emphasis added). "[S]tanding is generally an inquiry about the plaintiff: is this the right person to bring this claim[?]" *Davis v. Wells Fargo, U.S. Bank Nat'l Ass'n*, 824 F.3d 333, 348 (3d Cir. 2016). Nevertheless, "neither a bald assertion of . . . a harm nor a purely subjective fear that an environmental hazard may have been created is enough to ground standing." *Me. People's All. and Nat. Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 284 (1st Cir. 2005).

At the evidentiary hearing, Plaintiffs' witnesses included: William Schultz, the Raritan Riverkeeper, which is a Baykeeper program (May 8, 2017 Tr. 212:7, 213:6-8); Robert Spiegel, co-founder and Executive Director of EWA (May 9, 2017 Tr. 114:13-14, 114:25-115:2, ECF No. 475); and John Shersick, co-founder and board member of EWA (May 8, 2017 Tr. 164:10, 165:1-8).[3]

Mr. Schultz, as Riverkeeper, acts as a "neighborhood watch" on the water and a "citizen conservation advocate." (*Id.* at 224:21-23, 226:4-10.) He patrols the water to observe the river environment. (*Id.* at 228:2-12.) He is concerned about the condition of the sediments (*id.* at 227:20-228:1), and has been aware of the NL site since childhood, when he saw "two large ponds [on the site] that had a tropical appearance[] . . . of a bright aquamarine color" (*id.* at 213:22-214:3, 216:4-6). Mr. Schultz used to lead the organization's kayak ecotours past the NL site; however, there was decreased demand for the tours because of the public's perception of the area's history. (*Id.* at 254:6-255:6.) In addition to his activities as Riverkeeper, Schultz previously led underwater scuba recovery operations in which recovery teams came into contact with the sediment and after which the divers conducted decontamination procedures. (*Id.* at 220:7-9, 220:22-221:6.) These operations still take place today—Mr. Schultz testified to photographs of recovery operations in 2016 and 2017 in the area. (*Id.* at 221:11-22, 223:7-224:7.) Schultz has also observed boaters getting stuck in the mud and "kick[ing] up a lot of sediment." (*Id.* at 247:15-25.) He testified that the NL site is being redeveloped into Luxury Pointe, which includes plans for "boat ramps and a small marina," over "a thousand housing units, a large retail market, . . . [and] waterfront restaurants." (*Id* at 250:17-251:14.) Mr. Schultz is concerned about kayakers and paddlers coming into the area and the increased activity disturbing the sediments. (*Id.* at 251:15-25.) Additionally, he testified that installation of a marina or boat ramp redevelopment will likely require that the river be dredged to increase the depth of the water, disturbing decades-old sediments. (*Id.* at 252:19-25, 253:1-19.)[4]

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[3] Deborah Mans, then-Executive Director of Baykeeper and Baykeeper, also testified. (*See generally* May 8, 2017 Tr.) Plaintiffs, however, informed the Court that it should no longer rely on Ms. Mans' testimony to support associational standing, except as to the organization's purpose, because as of February 13, 2018, Ms. Mans was no longer a member of Baykeeper. (Pls.' February 21, 2018 Correspondence 2, ECF No. 498.) Regardless of the accuracy of this assessment, the Court need not address Ms. Mans' testimony as to her personal injury because Mr. Schultz's testimony as a member of Baykeeper suffices.

[4] The Court notes that "[t]he Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III standing requirements . . . . Threats or increased risk thus constitutes cognizable harm." *Honeywell*, 399 F.3d at 257 (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000)).

Mr. Spiegel testified that when he visited the NL site in the past, he experienced a "horrible smell" and burning eyes, and observed chemical discharges being emitted into the river. (May 9, 2017 Tr. 118:1-9.) He has also viewed an aerial photograph of the site and when flying over the site in a small aircraft, saw similar discharges. (*Id.* at 125:21-126:20, 128:8-13.) Mr. Spiegel enjoys various recreational activities in and near the river (*id.* at 169:12-25), but refrains from conducting certain activities, including boating, crabbing, and eating fish caught near the NL site because of his fear of contamination. (*Id.* at 172:21-23, 172:2-7, 180:22-181:7.) Watercraft sometimes get stuck in the mudflats near the NL site, and people may exit their vessel and step out into the mud to dislodge it. (*Id.* at 141:6-9, 143:3-9.) He believes that a six-inch soil depth may not provide "a completely accurate picture" of the condition of the sediment, particularly in areas with a history of contamination problems. (*Id.* at 161:8-13.) Mr. Spiegel also testified that "when the tide goes out, . . . the sediments still have a smell to them, even to this day [a]nd it's something that prevents [him] from enjoying the Raritan River in that area." (*Id.* at 173:1-4.)

Mr. Shersick corroborated Mr. Speigel's recollection of the visit to the NL site and saw orange liquid being discharged from pipes into the river and the bank of the site also appeared orange. (May 8, 2017 Tr. 169:12-170:13.) Mr. Shersick's use and enjoyment of the river is diminished because he enjoys eating snapping turtles, crabs and fish but will not eat any from the Raritan River. (*Id.* at 166:20-167:4, 173:16-174:5, 177:23-178:9.) Mr. Shersick believes the sediment in the river is in poor condition because it looks like "Vasoline and oil bubbling up" and "the mud there [is] black, [a]nd . . . it's what's in [the] mud that comes bubbling up . . . that [is visibly] polluted." (*Id.* at 174:13-23.) Here, the Court need not consider whether the 2000 and 2002 sediment data or the 2011 sediment data—taken from the top two centimeters of the sediment—reflect the current level of contaminants in the soil, as the witnesses have testified that their interests extend beyond that depth.

The Supreme Court has held similar showings to be sufficient to support injury in fact. For example, in *Laidlaw*, the court noted that a Friends of the Earth member stated "that he lived a half-mile from Laidlaw's facility; that he occasionally drove over the [river in question], and that it looked and smelled polluted; and that he would like to fish, camp, swim, and picnic in and near the river between 3 and 15 miles downstream from the facility, as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by Laidlaw's discharges." *Laidlaw*, 528 U.S. at 181-82. Accordingly, Misters Schwartz, Spiegel, and Shersick are persons "for whom the aesthetic and recreational values of the area will be lessened by the challenged activity" and have demonstrated injury-in-fact that is "concrete and particularized and actual or imminent." *Laidlaw*, 528 U.S. at 180, 183 (quotations and citations omitted).

As to the second element of standing, "the injury has to be fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] some third party not before the court." *McConnell*, 540 U.S. at 225 (internal quotations and citations omitted). This requirement, however, "'does not mean that plaintiffs must show to a scientific certainty that defendant's [actions], and defendant's [actions] alone, caused the precise harm suffered by plaintiffs . . . . [This] . . . is not the equivalent . . . of tort causation.'" *Honeywell*, 399 F.3d at 257 (quoting *Powell Duffryn*, 913 F.2d at 72). Instead, the injuries must "relate directly" to the NL site. *See Honeywell*, 399 F.3d at 257. Mindful of the requirements to prove a RCRA claim on the merits, the correspondingly low threshold for standing, and the unusual amount of historical data regarding

the NL site, the Court finds this prong of the standing analysis to be satisfied. For example, when asked whether prior to the 1950s, NL contributed metals to the local river sediments, Defendants' expert, Dr. Kuhlmeier, responded in the affirmative. (May 12, 2017 Tr. 77:11-14, ECF No. 478.) Dr. Kuhlmeier testified that he consulted the "History of the Sayreville Plant" or Ross and Peters report, which he deemed reliable.[5] (*Id.* at 78:21-79:6.) In his report, he stated that the plant's strong waste acid stream included sulfuric acid, titania and heavy metals including arsenic, lead, copper, and zinc. (*Id.* at 78:4-9.) Additionally, Defendants' January 26, 1977 internal correspondence attached October 8, 1976 correspondence from the United States Environmental Protection Agency collecting information regarding the plant's effluent, among other things. (*Id.* at 85:7-86:5.) The form requested identification of "significant metals" and Defendants' response indicated that discharge from the north outfall into the Raritan River contained arsenic, lead, and zinc, albeit arsenic in an amount of less than seven pounds per day. (*Id.* at 87:12-88:4.) The Court, however, declines to conduct a full-blown scientific inquiry in its analysis of the "fairly traceable" requirement. *See Gaston*, 204 F.3d at 162 ("We decline to transform the 'fairly traceable' requirement into the kind of scientific inquiry that neither the Supreme Court nor Congress intended.").

As to redressability, it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560. A remedy, even if "in part," is sufficient. *See Powell Duffryn*, 913 F.2d at 73; *see also Massachusetts v. EPA*, 549 U.S. 497, 525-26 (2007) ("While it may be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it. . . . A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."). "[P]sychic satisfaction," however, is not enough. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). Here, although a potential "study may find that there is no endangerment or, if endangerment exists, that it cannot be rectified[,]". . . the information the study could provide is adequate redress. *Mallinckrodt*, 471 F.3d at 283 n.5. This litigation was initiated in 2009, with the most recent data set at issue, regardless of its significance, obtained in 2011. The remedial investigation Plaintiffs seek would redress their injuries, at least in part.

Finally, "[a]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Laidlaw*, 528 U.S. at 181 (citing *Hunt v. Wa. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). Here, the Court finds that the witnesses discussed above are members of their respective organizations and would have standing to sue. The interests at stake in this litigation are "germane" to both Baykeeper's and EWA's purposes. Baykeeper's mission is "to protect, preserve, and restore the New York/New Jersey harbor

[5] The Ross and Peters report was written by employees with "very sophisticated knowledge of what went on at the plant" and were "extremely interested in detail," as there is "a running commentary from the startup of the plant through 1950 on a month-by-month basis describing every process, problem, [and] action taken in the plant." (May 10, 2017 Tr. 29:22-30:5, ECF No. 476.)

estuary" and to "work on water quality issues, contaminated sediment, access to the water . . . [getting] what's impacting the estuary and . . . [any] obstacles." (May 8, 2017 Tr. 55:3-6, 55:17-25.) The Raritan Riverkeeper's mission is:

> to protect, preserve, and restore the ecological integrity and productivity of the Raritan River, its tributaries and watershed. As the citizen conservation advocate for the river and its shores, [R]iverkeeper stops polluters, champions public access, and influences land-use decisions. Riverkeeper pursues opportunities for land preservation and habitat restoration and helps advance the Raritan River's environmental and biological importance as well as its value as a recreational and cultural resource.

(*Id.* at 225:18-226:3.) When asked whether the Riverkeeper's mission relates to the sediments in the river, Mr. Schultz responded that its "concern is the overall health and wellbeing of the river and its occupants and its users. So anything that would have an effect, including sediments, water quality, public access . . . [is] all part of [its] purview." (*Id.* at 227:20-228:1.) "EWA's mission is to protect and restore the environment in central New Jersey and beyond through action, education, and public awareness." (May 9, 2017 Tr. 115:18-20.) EWA "started the Raritan River project officially in 1995 . . . with the goal of identifying and cleaning up impaired areas along the Raritan River Estuary." (*Id.* at 116:2-7.) Finally, neither the claim asserted, nor the relief sought, requires participation of the individual members. Thus, Baykeeper and EWA have established associational standing. *See, e.g.*, *Honeywell*, 399 F.3d at 257-58. The Court need not consider whether the organizations have standing in their own right, as they have established standing through their members.

The Court notes that Plaintiffs' post-hearing submissions did not discuss potential standing under the CWA and addresses only the dispositive element of its analysis. To demonstrate standing to bring a CWA claim, plaintiffs must demonstrate, among other things, "that there is a substantial likelihood that defendant's conduct caused plaintiffs' harm." *Powell Duffryn*, 913 F.2d at 72 (citing *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 75 n.20 (1978)). This may be established by:

> showing that a defendant has (1) discharged some pollutant in concentrations greater than allowed by its permit (2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that (3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

Id. Here, Plaintiffs have not carried this burden, as they not presented evidence that Defendants' discharge exceeded the amount allowed by any discharge permit. (*See* May 10, 2017 Tr. 98:8-19; 115:15-116:12; *see also* May 8, 2017 Tr. 45:8-15.)

Accordingly, the Plaintiffs' motion for summary judgment as to Article III standing is GRANTED with respect to their RCRA claim, and DENIED with respect to their CWA claims. Defendants' cross-motion for summary judgment as to Article III standing is DENIED with respect to the RCRA claim, and GRANTED with respect to the CWA claims. The Court notes that it has made all factual findings for the purposes of standing only, and the merits of Plaintiffs' claims will be analyzed separately. An order consistent with this Letter Opinion will be entered.

s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE