Bryan Hurlbutt (ISB #8501)
Laurence ("Laird") J. Lucas (ISB #4733)
Advocates for the West
P.O. Box 1612
Boise, ID 83701
(208) 342-7024
(208) 342-8286 (fax)
bhurlbutt@advocateswest.org
llucas@advocateswest.org

Andrew Hawley (*pro hac vice*)
Northwest Environmental Defense Center
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6673
(503) 768-6671 (fax)
hawleya@nedc.org

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IDAHO CONSERVATION LEAGUE and NORTHWEST ENVIRONMENTAL DEFENSE CENTER, Plaintiffs, v. ATLANTA GOLD CORPORATION, Defendant.	Case No. 1:11-cv-161-MHW **OPENING BRIEF IN SUPPORT OF MOTION TO HOLD DEFENDANT IN CIVIL CONTEMPT, AND IMPOSE ADDITIONAL PENALTIES AND ENFORCEMENT REMEDIES**

INTRODUCTION

More than three and a half years after the December 15, 2012 compliance deadline set by this Court's orders, Defendant Atlanta Gold Corporation ("Atlanta Gold" or "AGC") continues to discharge excessively high concentrations of arsenic and iron from its 900 Level Adit, violating the terms of its Clean Water Act Permit. *See* accompanying Hayes Declaration (attaching discharge monitoring reports and summarizing Permit violations). These ongoing excessive discharges demonstrate that Atlanta Gold has not complied with this Court's July 22, 2012 Injunction Order (*Dkt. # 88)* and September 12, 2013 Final Judgment (*Dkt. #125*), because it has not installed and operated the treatment facilities as needed to adhere to its Permit discharge limits. In addition, Atlanta Gold has failed to make even half of the Clean Water Act civil penalty payments due within the timetable ordered by the Court. *Id.*

In light of Atlanta Gold's continuing Clean Water Act violations and persistent failure to comply with the prior orders, Plaintiffs ask the Court to step in—again—and this time hold Atlanta Gold in civil contempt. Plaintiffs also request the Court impose additional Clean Water Act penalties for the further violations documented since December 15, 2012; and impose enforcement remedies to ensure that Atlanta Gold fully complies with the Court's Order and Permit requirements, by setting new deadlines for Defendant to install treatment facilities necessary to comply the Permit effluent limits, plus (suspended) civil contempt sanctions of $1,000 per act of contempt committed by Atlanta Gold, as discussed below.

RELEVANT FACTS

A. The Court Previously Held AGC In Violation Of The Clean Water Act.

On April 18, 2011, Plaintiffs brought suit against Defendant Atlanta Gold seeking an injunction, civil penalties, and declaratory relief under the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365. *See* Complaint (*Dkt. #1*). Plaintiffs alleged Atlanta Gold was in

violation the terms of its National Pollutant Discharge Elimination System permit number ID-G91-0006 (the "Permit")[1] by discharging excessive arsenic and iron from the 900 Level Adit, located at Atlanta Gold's 2,159-acre mining site on Atlanta Hill near the town of Atlanta, Idaho.

The Environmental Protection Agency ("EPA") issued the Permit to Atlanta Gold in August 2009, regulating discharges from the Level 900 Adit to Montezuma Creek, a tributary to the Middle Fork Boise River. *See* Hawley Decl., Ex. 1 (*Dkt. 22-1*). The Permit includes requirements specific to Atlanta Gold, as well as general requirements from the NPDES General Permit for Groundwater Remediation and Discharge Facilities in Idaho (ID-G91-0000). *Id*. The Permit places effluent limitations and monitoring requirements on discharges from the Adit. Of the five effluent limitations in the Permit, the two relevant here are for arsenic and iron. The Permit limits the amount of arsenic Atlanta Gold can discharge from the Adit to 10 ug/l, and limits iron to 1,000 ug/l. *Id.* at Enclosure 1, Table 1. The Permit further requires Atlanta Gold to take weekly samples of the discharge to measure for arsenic and iron. *Id.* Discharge Monitoring Reports ("DMRs") with the results of these samples must be submitted monthly by Atlanta Gold to EPA. *Id.* at Part II.F.

On January 9, 2012, the Court granted Plaintiffs' Partial Motion for Summary Judgment, finding it was undisputed that Atlanta Gold's own DMRs showed that since August 31, 2009, the company had violated the Permit 1,447 times. *See* Mem. Decision & Order (*Dkt. # 54*). Subsequently, the Court issued its Remedies Decision on July 19, 2012, which updated the total Permit violations found to 2,004 as of May 31, 2012, based on subsequent violations after the Summary Judgment Decision. *See* Mem. Decision (*Dkt. # 87*), p. 34.

[1] A copy of the Permit is before the Court as Exhibit 1 to the Hawley Declaration, *Dkt. # 22-1*.

B. The Court's Injunction Ordered Atlanta Gold To Comply With The Permit By December 15, 2012, And Retained Jurisdiction To Allow For Contempt Enforcement If Atlanta Gold Failed To Comply.

In its July 2012 Remedies Decision, the Court granted Plaintiff's request for an injunction, explaining:

> The discharges from the Adit are of a continual nature and are, at least in part, resulting from groundwater seeps and springs that exist naturally in or near the Adit. Thus, the illegal discharges cannot be halted simply by ordering AGC to shut down its operations. Rather, AGC must take active steps to stop the discharges, such as by installing a filtration system on site, by constructing additional settling ponds, or, as a potential long term solution, by installing a bulkhead to seal off the Adit. Because of the Adit's location within the Boise National Forest, all of these measures are subject to approval by the Forest Service. Nonetheless, despite these difficulties, the Court concludes that an injunction is appropriate. Considering the longstanding, serious, and ongoing nature of the violations, and considering AGC's history of attempting to delay compliance until it had its mine up and running, an injunction may well be the only way to ensure that the company complies with the CWA in a timely fashion.

Mem. Decision (*Dkt. # 87*), p. 18. As suggested by Plaintiffs, the Court required compliance by a date certain (October 31, 2012) but left the means of compliance up to Atlanta Gold. *Id.* at 30–32. In the Remedies Decision, the Court also found that a "substantial civil penalty" was necessary "to have a deterrent effect on future pollution," and thus imposed a partial Clean Water Act civil penalty of $2 million, to be paid to the U.S. Treasury on or before October 31, 2012. *Id.* at 44. The Court underscored that this represented the "minimum" penalty the Court might impose, and warned that additional penalties might be imposed for further non-compliance. *Id.* at 41–43.

Pursuant to the Remedies Decision, the Court issued a separate Injunction Order on July 27, 2012, ordering Atlanta Gold to comply with the Permit's limits by October 31, 2012. *See* Inj. Order (*Dkt. # 88*). On October 10, 2012, the Court amended the Injunction Order to extend Atlanta Gold's deadline for achieving compliance with the prescribed limits until December 15, 2012. Am. Order (*Dkt. # 97*).

According to status reports Atlanta Gold submitted to the Court, in fall 2012 the company installed a Zero Valent Iron passive filtration system, and concentrations of arsenic discharged from the Adit were partially reduced. *Id.* at 3. However, concentrations fluctuated, and Atlanta Gold continued to violate the Permit effluent limits for arsenic on multiple occasions. *Id.*

Plaintiffs brought these initial violations to the Court's attention, but in a September 3, 2013 Order, the Court declined to order additional penalties for Atlanta Gold's failure to meet the effluent limits by the December 15, 2012 deadline because—at the time—it appeared that the company had made good faith compliance efforts under the circumstances. *See* Order (*Dkt. # 122*). The Court noted that: Atlanta Gold faced unique challenges in the fall of 2012 due to the Trinity Ridge Fire (*id.* at 1); AGC had made reductions in the amount of arsenic issuing from the Adit (*id.* at 3); AGC made additional changes to the water treatment facility that were expected to fix remaining problems (*id.* at 3–4); and the company's DMRs showed a downward trend for the first half of 2013 and showed compliance for the two most recent reporting months (*id.* at 4).

While the Court thus declined to enter additional penalties for these violations at that time, it explained it would retain jurisdiction so future violations could be addressed by sanctions for contempt of court:

> Though final judgment will be entered, the Court will retain jurisdiction to enforce the terms of the injunction, at least for the time being. Atlanta Gold's efforts to bring the effluent waters into compliance with the terms of the NPDES Permit, despite the unfor[e]seen setback of the fires, are to be commended. However, the company also has a long history of non-compliance predating the injunction, and this history convinces the Court that a continuing injunction is necessary to help ensure that Atlanta Gold continues its present commendable efforts to keep the Adit waters clean. The Court will therefore order that the case be administratively terminated upon entry of the final judgment, with instructions that it may be reopened in the event of further violations of the injunction. Future violations, if any, may be addressed pursuant to the Court's power to enter sanctions for contempt of Court.

Id. at 5 (footnote omitted) (emphasis added).

On September 12, 2013, the Court issued an order granting the United States' Motion for a Consent Judgment, establishing a schedule for payment of the civil penalty (*Dkt. # 124)*, and entered Final Judgment (*Dkt. # 125*).[2] In the Final Judgment, the Court administratively closed the case, but provided that "the Court will retain jurisdiction for purposes of enforcing the injunction entered on July 27, 2012 and Plaintiffs shall have the right to reopen the case should new violations of the arsenic or iron effluent limitations occur." *Id.* ¶ 5.

C. Atlanta Gold Has Violated The Injunction Order At Least 497 Times.

Despite Atlanta Gold's 2012 representations to the Court that it would bring pollution discharges from the Adit into compliance with the prescribed effluent limits, Defendant violated the Court's Injunction Order and Final Judgment by regularly and consistently discharging arsenic and iron from the Adit in excess of the effluent limits between December 2012 and May 2016, according to the company's own discharge monitoring reports. *See* Hayes Decl., Ex. 1.[3]

As discussed above, the Permit requires Atlanta Gold to submit its discharge monitoring reports to EPA every month. Between December 2012 through May 2016, these reports show repeated, ongoing violations of the arsenic and iron Permit limits, and thus violations of the Injunction Order. *Id.* Specifically, the DMRs demonstrate that Atlanta Gold exceeded the concentrations of 10 µg/L of arsenic and 1,000 µg/L of iron—the limits established in the Court's Order and the Permit—on no fewer than 497 occasions. *Id*. Atlanta Gold's reported

[2] The amended penalty payment schedule required AGC to make a series of increasingly larger quarterly payments; $850,000 in aggregate payments are due by September 30, 2016 (*Dkt. # 124)*. The United States reports, however, that AGC only paid a total of $329,549.79 through that period. *See* Hayes Decl., ¶ 8. That is less $520,450.21 less than the amount ordered by the Court, or just 38% of the total due by September 30, 2016.

[3] Plaintiffs have obtained Atlanta Gold's DMRs through May 2016. Plaintiffs have recently submitted a new Freedom of Information Act request to EPA, asking for any more recent DMRs that may now be available. *See* Hayes Decl. ¶ 7.

weekly violations of the arsenic and iron limits are as follows:[4]

Table 1.
Arsenic and Iron Exceedences Reported by AGC
From December 2012 Through May 2016
(Hayes Decl., Table 1)

Atlanta Gold DMR	# of Reported Exceedences (from weekly samples)	
	Arsenic	Iron
05/1/2016 - 05/31/2016	3	3
12/1/2015 - 12/31/2015	3	
11/1/2015 - 11/30/2015	3	
9/1/2015 - 9/30/2015	1	
8/1/2015 - 8/31/2015	2	
7/1/2015 - 7/31/2015	2	
6/1/2015 - 6/30/2015	2	3
5/1/2015 - 5/31/2015	1	1
3/1/2015 - 31/2015	1	
1/1/2015 - 1/31/2015	1	
12/1/2014 - 12/31/2014	1	
11/1/2014 - 11/30/2014	4	
7/1/2014 - 7/1/2014	2	
6/1/2014 - 6/1/2014	2	4
5/1/2014 - 5/31/2014	3	
10/1/2013 - 10/31/2013	3	
8/1/2013 - 8/31/2013	1	
7/1/2013 - 7/31/2013	4	
6/1/2013 - 6/30/2013	2	
4/1/2013 - 4/30/2013	2	
3/1/2013 - 3/31/2013	4	
2/1/2013 - 2/28/2013	4	
1/1/2013 - 1/31/2013	5	
12/1/2012 - 12/31/2012	3	1
Total	***59***	***12***

[4] The DMRs include a column labeled "PARAMETER". *See* Hayes Decl., Ex. 1 (DMRs). The sixth row is the relevant arsenic parameter, and the ninth row is the relevant iron parameter. For each parameter, the DMRs provide the sample frequency, sample type, a value of one the samples taken that month, and the Permit effluent limit. *See id.* In the column labeled "NO. EX.", the DMRs indicate the number of times the sample exceeded the effluent limit of each parameter. *Id.* For example, in the May 2016 DMR, the "NO. EX." column reports that the weekly sampling exceeded the permit limit 3 times for arsenic (row 6) and 3 times for iron (row 9). *Id.* (May 2016 DMR).

Adding Atlanta Gold's 59 weekly samples exceeding the arsenic limit to the 12 weekly samples exceeding the iron limit, and multiplying by 7 days per week, the DMRs thus show a total of 497 separate violations of the Permit—and hence 497 violations of the Clean Water Act and the Court's Injunction Order—for the period December 2012 through May 2016. *Id*. This includes 42 separate violations during the most recent month of available reports (3 weekly samples exceeding the arsenic limit, plus 3 weekly samples exceeding the iron limit, multiplied by 7 days per week during the month of May 2016).[5]

On April 19, 2016, Plaintiffs notified Atlanta Gold of these ongoing violations of the Court's orders, the Permit, and the Act. *See* Hurlbutt Decl., Ex. 1. Plaintiffs also notified Defendant of their intent to reopen this case to seek appropriate relief, including penalties, injunctive relief, and contempt of court, unless Atlanta Gold promptly ceased these violations and demonstrated its compliance with its Permit and the Court's orders. *Id.* Yet Atlanta Gold has wholly failed to respond to the notice letter. *See* Hayes & Hurlbutt Decls.

Not only has Atlanta Gold violated the requirements of the Injunction Order and Final Judgment by not bringing the Adit 900 discharges into compliance with the Permit effluent

[5] Because Atlanta Gold only provides weekly monitoring reports, it is appropriate to multiple the weekly violations by 7 days per week under the Clean Water Act, since it is presumed that the weekly monitoring reflects the daily discharges. "[W]here a violation is defined in terms of a time period longer than a day, the maximum penalty assessable for that violation should be defined in terms of the number of days in that time period," rather than treated as one day of violation. *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 314 (4th Cir. 1986), *vacated on other grounds*, 484 U.S. 49 (1987). *See also Sierra Club v. City & Cnty. of Honolulu*, 486 F.Supp.2d 1185, 1190–91 (D. Haw. 2007) ("a violation of a monthly average will be counted as a violation of every day of the month."); *Friends of Mariposa Creek v. Mariposa Pub. Utilities Dist.*, 2016 WL 1587228, Case No. 1:15-cv-00583-EPG at *12–13 (Apr. 19, 2016 E.D. Cali) (finding liability for each day of the month where average monthly limits were violated); *Oregon State Pub. Interest Research Grp. v. Pac. Coast Seafoods*, 361 F.Supp.2d 1232, 1241 (D. Or. 2005) (court "must construe a violation of a monthly average discharge limit as a violation for each day during that month that discharge occurred"); *Save Our Bays and Beaches v. City and Cnty. of Honolulu*, 904 F.Supp. 1098, 1125 (D. Haw. 1994) (assuming "violation of a 30-day average counts as a violation for every day of that month . . . and that the violation of a 7-day average counts as 7 violations.").

limits, but Defendant has also failed to adhere to the modified penalty payment schedule. *See* Hayes Decl., ¶ 9. As noted above, the United States reports that AGC made a total of $329,549.79 in penalty payments through September 2016, when the payment schedule called for it to pay a total $850,000 by that date. *Id.* This fact confirms Atlanta Gold's recalcitrance, and underscores the appropriateness of the Court finding Defendant in civil contempt and imposing enforcement remedies at this stage, as explained below.

ARGUMENT

I. THE COURT SHOULD HOLD DEFENDANT IN CIVIL CONTEMPT.

A. Legal Standards For Civil Contempt.

"There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. U.S.*, 384 U.S. 364, 370 (1966). The Ninth Circuit defines civil contempt to mean a "party's disobedience to a specific and definite court order by failure to take all reasonable steps within the party's power to comply." *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993).

In seeking civil contempt, "[t]he moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court." *In re Dyer*, 322 F.3d 1178, 1190–91 (9th Cir. 2003) (quoting *In re Bennett*, 298 F.3d 1059, 1069 (9th Cir. 2002)). *See also U.S. v. Bright*, 596 F.3d 683, 694 (9th Cir. 2010) (similar). With this test satisfied, the burden shifts to the alleged contemnor to demonstrate why it was unable to comply. *FTC v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999).

B. The Court's Injunction Order Is Enforceable By Contempt.

This Court's July 27, 2012, Injunction Order is a specific and definite order that is enforceable by the remedy of civil contempt. It required:

> By no later than **October 31, 2012,** Defendant Atlanta Gold Corporation must bring the concentrations of arsenic and iron in the waters issuing from the 900 Level Adit, and discharged into Montezuma Creek, into compliance with the levels allowed for under the terms of the National Pollution Discharge Elimination System (NPDES) Permit No. ID-G91-0006, (Dkt. 22-1), as extended, (Dkt. 85-1). Specifically, AGC is required to bring the concentrations of arsenic down to the 10 µg/L limit referenced in the Permit, and the concentrations of iron down to the 1,000 µg/L limit referenced therein.

Inj. Order (*Dkt. # 88*) ¶ 1 (emphasis in original). On October 10, 2012, the Court issued an Amended Order, granting Atlanta Gold's request to extend the deadline for achieving compliance with the prescribed limits until December 15, 2012. Am. Order (*Dkt. # 98*). As amended, the Injunction Order was incorporated into the September 2013 Final Judgment, with the Court retaining jurisdiction to enforce it, as discussed above. Final J. (*Dkt. #122)*.

The terms of the Injunction Order, as amended, are specific and definite: AGC must bring down the concentrations of arsenic and iron discharged from the Adit to 10 ug/L and 1,000 ug/L respectively by December 15, 2012. There is no question that the Court was clear in what AGC was required to do; and it may now enforce that order through civil contempt.

The Court's order to comply with specified concentration limits, by a date certain, is a typical order in this type of Clean Water Act case, and such orders are routinely enforced. *See, e.g., Little Tchefuncte River Ass'n v. Artesian Utility Co.*, 155 F.Supp.3d 637, 657–660 (E.D. Louisiana 2015) (consent judgment to comply with Clean Water Act permit was specific and definite such that defendant could be held in contempt); *Ohio Valley Envtl. Coal. v. Apogee Coal*, 744 F.Supp.2d 561, 565 (S.D. West Virginia 2010) (finding contempt where defendant failed to comply with consent decree requiring compliance with NPDES permit limits by date certain); *U.S. v. City of Providence*, 492 F.Supp. 602 (D. Rhode Is. 1980) (finding contempt where defendant failed to comply with consent decree requiring meeting NPDES permit effluent limits by date certain); *Pub. Interest Research Group of New Jersey v. Top Notch Metal*

Finishing, No. 87-3894, 1988 WL 156725 (D. New Jersey, Dec. 23, 1988) (defendant in contempt for failing to meet Clean Water Act pretreatment limits for multiple pollutants).

C. Atlanta Gold's Self-Reported Violations Are Clear and Convincing Evidence Of Its Contempt of the Injunction Order.

Once regulated by an NPDES permit, discharges must strictly comply with all of the terms and conditions of that permit. *EPA v. Cal. ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 (1976) ("In short, the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the [CWA]."). Based on the monthly DMRs Atlanta Gold submitted to EPA from December 1, 2012, through May 31, 2016, Atlanta Gold violated the arsenic effluent limit of the Permit in 59 of its weekly samples, and violated the iron effluent limit in 12 of its weekly samples. *See* Hayes Decl., Ex. 1 (DMRs). These weekly violations, depicted in Table 1 above, translate into approximately 497 daily violations of the Permit and of the Court's Injunction Order, as discussed above.

The exceedances recorded in Atlanta Gold's monitoring data and reports submitted to the EPA are conclusive evidence of the Defendant's contempt of the Injunction Order. Courts have consistently treated self-monitoring reports showing discharges in excess of permit limits as conclusive evidence of Clean Water Act violations. *See Sierra Club v. Union Oil*, 813 F.2d 1480, 1492 (9th Cir. 1987) (not allowing permittee to impeach its own discharge reports, because the "NPDES program fundamentally relies on self-monitoring"), *vacated on other grounds,* 485 U.S. 931 (1988), *reinstated with minor amendment,* 853 F.2d 667 (9th Cir. 1988); *United States v. ConAgra*, No. CV 96-0134-S-LMB, 1997 WL 33545777, at *12 (D. Idaho Dec. 31, 1997) (granting summary judgment where permittees discharge monitoring reports showed violations of effluent limits). *See also Friends of Mariposa Creek v. Mariposa Pub. Utilities Dist.*, No. 1:15-cv-00583-EPG, 2016 WL 1587228, at *11 (E.D. Cal. Apr. 19, 2016) (*quoting San*

Francisco Baykeeper v. W. Bay Sanitation Dist., 791 F.Supp.2d 719, 755 (N.D. Cal. 2011) ("A monitoring report that shows a water sample with pollutant discharges in excess of permit limits is conclusive evidence of a violation."); *Save Our Bays & Beaches v. City & Cnty. of Honolulu*, 904 F.Supp. 1098, 1124 n.42 (D. Haw. 1994) (defendant's DMRs are "binding admissions usable for summary judgment purposes").

In sum, Atlanta Gold's DMRs and weekly monitoring data provide conclusive evidence of the Defendant's pattern and practice of routinely violating the Court's Injunction Order, sufficient to warrant the civil contempt finding and remedial relief requested by Plaintiffs. *Union Oil Co.,* 813 F.2d at 1492.

D. Atlanta Gold Has Failed To Take All Reasonable Steps To Ensure Compliance With The Injunction Order.

In some cases, courts have excused technical violations of orders when concluding that perfect compliance is not necessary to effectuate the goals of the order. In all cases, however, the courts have held that "substantial compliance" is sufficient only where the offending party has taken "all reasonable steps" to achieve compliance. *Vertex Distributing v. Falcon Foam Plastics*, 689 F.2d 885, 891 (9th Cir. 1982); *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1378–79 (9th Cir. 1986).

Here, Atlanta Gold cannot find safe harbor in this exception. Atlanta Gold has not taken all reasonable steps to achieve compliance with the Injunction Order, as evidenced by the fact that the company violated the Court's order nearly 500 times over the last three and a half years.

In its September 3, 2013 Order, this Court found that Atlanta Gold had violated the terms of the Injunction Order after the December 15, 2012 deadline, but the Court chose not to impose further civil penalties based on the steps the company took up to that point in time. *Dkt. 124*. The Court noted that Atlanta Gold "faced unique challenges in the summer and fall of 2012 due

to the Trinity Ridge fire"; "[s]ome amount of trial and error is to be expected"; "[t]hough perfect compliance was not achieved in the months immediately following December 15, 2012, the arsenic numbers for the first half of 2013 still reflect a steady downward trend"; "when the arsenic numbers continued to exceed the 10 ug/L standard, AGC took timely additional steps to bring those numbers in line"; and "the company has now demonstrated a record of full compliance for at least two months." *Id.* at 4.

Now, however, the record before the Court shows that Atlanta Gold has repeatedly violated the terms of the Injunction Order for over three and a half years, without taking sufficient action to remedy the problem. Atlanta Gold can no longer point to a downward trend in its pollution discharges, nor can it show full compliance with the Permit effluent limits. Between December 2012 and May 2016, Atlanta Gold violated the Injunction Order and Permit limits 497 times. These are not isolated, past violations that are simply the result of expected trial and error, or the result of unique challenges. Rather, these violations are a continuation of Atlanta Gold's chronic failure to take the steps necessary to comply with the Clean Water Act.

Additionally, Atlanta Gold's violations of the Court's order are not merely technical. Atlanta Gold is repeatedly discharging excessive quantities of arsenic and iron, which are harmful pollutants that threaten Montezuma Creek and the aquatic species and people that use Montezuma Creek and the Boise River. In its July 19, 2012 Remedies Decision, the Court recognized arsenic and iron are harmful pollutants and found the facts of this case "are more than sufficient to demonstrate that irreparable harm to the environment will occur if the illegal discharges continue." *See* Remedies Decision (*Dkt. # 87*), pp. 18–23.

To prevent such harm in the future, the Court's Injunction Order requires compliance with the Permit's effluent limits. These effluent limits represent the concentration that may be

discharged from the facility without endangering human health or the environment. The limits in question, 10ug/L of arsenic and 100ug/L of iron, are based on Idaho's water quality standards. Water quality standards are set to ensure the "protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation." 40 C.F.R. § 131.2. Thus, violating a water quality-based effluent limit places the environment and human health at risk.

That is precisely what Atlanta Gold has done by exceeding the effluent limits and violating the Court's Injunction Order repeatedly since December 2012. As a result, Atlanta Gold's violations are not the type of "technical" violations that courts have previously excused. *See, e.g.*, *San Diego Baykeeper v. U.S. Department of Defense*, No. 02-CV-0499-IEG (AJB), 2010 WL 1838293 (S.D. Cal. May 6, 2010) (finding "substantial compliance" as the term was used in a CWA consent decree where defendant violated permit monitoring requirements, but not effluent limits, and had only been out of compliance during only 1 of 12 months and could demonstrate recent compliance); *Vertex Distributing*, 689 F.2d at 891–92 (affirming the district court's decision not to find the defendant in contempt when the plaintiff introduced evidence of a single violation of order, and the defendants introduced evidence of their attempts to correct the violation before the application for an order holding defendants in contempt).

Finally, Atlanta Gold cannot now claim in contempt proceedings that it is unable to comply with the Court's Injunction Order. *See U.S. v. Bright*, 596 F.3d 683, 695 (9th Cir. 2010) ("Lack of custody or control is a defense to enforcement and 'may not be raised for the first time in a contempt proceeding'") (quoting *U.S. v. Rylander*, 460 U.S. 752, 757 (1983)); *U.S. v. Bright*, Civil No. 07-00311 ACK-KSC, 2008 WL 5687440, at *3 (D. Haw. Dec. 24, 2008) (a party "may

not argue for the first time in a contempt hearing" that it is unable to comply with a court order); *In re Crystal Palace Gambling Hall*, 817 F.2d 1361, 1365 (9th Cir. 1987) (inability is not available as a defense when the party disobeys a court order before claiming that exceptional circumstances prevented compliance).

In sum, Atlanta Gold has not taken reasonable steps to come into compliance with the Injunction Order. Instead, Atlanta Gold took initial steps toward coming into compliance but has substantially failed to do so over the last three and a half years, causing nearly 500 violations during that time and putting Montezuma Creek and the Boise River at risk. Coupled with the fact that Atlanta Gold has also failed to make Court-ordered penalty payments to the United States, the record demonstrates clearly and convincingly that Atlanta Gold is in civil contempt of this Court's orders. The Court should, therefore, hold Atlanta Gold in contempt.

II. THE COURT SHOULD IMPOSE ADDITIONAL PENALTIES AND ENFORCMENT REMEDIES.

In order to remedy Atlanta Gold's ongoing Clean Water Act violations, and to correct the company's continued failure to comply with this Court's orders, the Court should impose additional Clean Water Act penalties and contempt remedies, as set forth below.

A. Additional Clean Water Act Penalties.

The Clean Water Act mandates civil penalties if violations of the Act are found. 33 U.S.C. § 1319(d) (any person who violates the Act "shall be subject to a civil penalty not to exceed $25,000 per day" (emphasis added)). *See also Natural Resources Def. Counsel v. Sw. Marine*, 236 F.3d 985, 1001 (9th Cir. 2000) (penalties are mandatory if violation of the Clean Water Act is found); Mem. Decision, p. 14 (*Dkt. # 87*) (same). The maximum civil penalty has increased and is currently set at $37,500.00 per violation per day. 40 C.F.R. § 19.4.

The Court should impose a penalty of $1,000 per violation per day for Atlanta Gold's additional Clean Water Act violations that have occurred since December 15, 2012. This includes the 497 violations identified herein (totaling $497,000 in penalties), plus any additional violations Plaintiffs discover and prove to the Court during these proceedings.

A $1,000 penalty per violation is appropriate in this situation. In its earlier Remedies Decision, this Court evaluated the Clean Water Act's penalty factors in this case and imposed $2 million in civil penalties for Atlanta Gold's 2,004 violations at that time. Mem. Decision (*Dkt. # 87*), pp. 34, 41. Dividing that total penalty by the number of violations equals $998 per violation, and thus supports the $1,000 per violation additional penalties requested now.

B. Enforcement Remedies For AGC's Contempt.

Atlanta Gold's recalcitrance shows a threat of continued contumacy that merits enforcement remedies, including imposition of contempt sanctions. "Courts . . . have 'broad equitable power to order appropriate relief in civil contempt proceedings.'" *Kelly v. Wengler*, 979 F.Supp.2d 1104, 1108 (D. Idaho 2013) (quoting *SEC v. Hickey*, 322 F.3d 1123, 1128 (9th Cir. 2003)). A court may impose civil contempt sanctions to coerce compliance with a court order. *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303–04 (1947); *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 778 (9th Cir. 1983). Such relief is warranted here to coerce Atlanta Gold's long overdue compliance with the Injunction Order.

To enforce its Injunction Order and ensure that Atlanta Gold stops violating the Clean Water Act, Plaintiffs request the Court to impose the following Enforcement Remedies:

1. **<u>New Compliance Deadline</u>**: First, the Court should set a new deadline ordering Defendant to come into full compliance with the Permit by no later than July 1, 2017, through the measures set forth in Paragraph 2 below.

The proposed July 1, 2017 deadline is intended to allow Atlanta Gold adequate time to design and install the new or upgraded treatment facilities needed to ensure full compliance with the Permit effluent limitations. This deadline is reasonable in light of the fact that the Court previously ordered Defendant to install treatment facilities in fall 2012, and then extended it to December 15, 2012. Over three and a half years later, Atlanta Gold still has not complied, so a new, firm deadline should be set by the Court for full compliance.

2. Plan for Compliance: Second, to demonstrate its ability and intent to fully comply with the Permit by that date, the Court should order Atlanta Gold to file with the Court no later than April 1, 2017, a Plan for Compliance prepared by a certified engineer, which includes:

1. Treatment Facilities Plan: A Treatment Facilities Plan to install and/or upgrade water treatment facilities with sufficient capacity to adequately treat all potential discharges from the 900 Level Adit to achieve compliance with the Permit, along with a sworn certification from Atlanta Gold that will invest the financial and technical resources needed to fully implement the Facilities Installation Plan by July 1, 2017;
2. Operations and Maintenance Plan: An Operations and Maintenance Plan demonstrating that Atlanta Gold has adequate resources and will utilize them to operate and maintain the water treatment facilities to meet the Permit discharge limits, for so long as the Permit is in place and/or discharges are occurring from the Adit; and
3. Monitoring and Reporting: In addition to the monitoring and reporting required under the Permit, order Atlanta Gold to gather and certify as accurate monitoring information demonstrating compliance with the Operations and Maintenance Plan; and requiring

Atlanta Gold to provide Plaintiffs every 6 months all reporting to EPA under the Permit, as well as the operations compliance monitoring, for the previous 6 months.

These measures are necessary and appropriate for the Court to impose in order to ensure that Atlanta Gold commits the financial, technical, and staff resources necessary to identify and install the new or upgraded treatment facilities necessary to ensure Permit compliance under Step 1 above, while giving Defendant adequate time to do so during the winter/spring 2016 and early 2017. Moreover, the requested Plan of Compliance, with the components of the Treatment Facilities Plan and the Operation and Maintenance Plan, will provide Plaintiffs and the Court sufficient details in advance of the July 1, 2017 compliance deadline to review and evaluate whether Atlanta Gold's proposed steps forward will be adequate to ensure compliance with the Injunction, Permit terms, and Clean Water Act.

3. Civil Contempt Sanctions: In response to Atlanta Gold's contempt of the Court's orders, and to ensure that the company comes into compliance with the Injunction Order and Permit, the Court should impose (suspended) civil sanctions of $1,000 for each and every act of contempt Plaintiffs show Atlanta Gold has committed between December 15, 2012, and the date this Court's contempt order. This would include 497 acts of contempt identified herein (totaling $497,000 in sanctions), plus any additional violations Plaintiffs discover and prove to the Court during these proceedings.

The civil contempt sanctions would be suspended pending Atlanta Gold's compliance with the timelines and steps requested in Paragraphs 1-2 above, in order to allow Atlanta Gold to purge its civil contempt. Upon successful completion of the above actions, Atlanta Gold will have purged its contempt and, thus, need not pay the suspended sanctions to the Court. However, should Atlanta Gold fail to comply with any of the above actions, the suspended

sanctions will become immediately due to the Court, and Atlanta Gold will be subject to further contempt sanctions thereafter of $1,000 per day until it complies with the above actions.

Coercive sanctions "are, by their very nature, conditional sanctions; they only operate if and when the person found in contempt violates the order in the future." *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 517 (9th Cir. 1992). Accordingly, "sanctions imposed in civil contempt proceedings must always give to the alleged contemnor the opportunity to bring himself into compliance, the sanction cannot be one that does not come to an end when he repents his past conduct and purges himself." *Id.* at 518. The Supreme Court has identified two acceptable types of fines for civil contempt: (1) per diem fines imposed each day a contemnor fails to comply with an affirmative court order; and (2) fixed fines suspended pending future compliance with a court order. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829–30 (1994). "Generally, the minimum sanction necessary to obtain compliance is to be imposed." *Whittaker Corp.*, 953 F.2d at 514.

Plaintiffs respectfully request that the Court impose suspended civil sanctions payable to the court of $1,000 for each and every act of contempt Plaintiffs show Atlanta Gold has committed between December 15, 2012, and the date of this Court's contempt order. These suspended civil sanctions would be on top of the $1,000 Clean Water Act additional penalties requested by Plaintiffs, which are a result of AGC's further legal violations. The amount of the suspended civil contempt sanctions would include the 497 acts of contempt identified herein (totaling $497,000 in sanctions), plus any additional violations Plaintiffs discover and prove to the Court during these proceedings. A fine of $1,000 fine per act of contempt is reasonable. *See*, *e.g.*, *Shell Offshore v. Greenpeace*, 815 F.3d 623, 630 (9th Cir. 2016) (upholding $2,500 per hour civil contempt fine, that increases incrementally up to $10,000 per hour, against activists for

violating court order to cease hanging from a bridge); *Inst. of Cetacean Research v. Sea Shephard Conserv. Soc'y*, 2015 WL 3539563 at *9–10, No. C11-2043JLR (W.D. Wash. Jun 4, 2015) (imposing $5,000 and $10,000 civil sanctions for future acts of contempt).

The contempt sanctions would be suspended pending Atlanta Gold's compliance with new deadlines and other enforcement remedies set forth above. Upon successful completion of the above actions, thereby fully complying with the Permit and Injunction Order, Atlanta Gold will have purged its contempt and, thus, need not pay the suspended sanctions to the Court. However, should Atlanta Gold fail to comply with any of the above actions, the suspended sanctions will become immediately due to the Court, and Atlanta Gold will be subject to further contempt sanctions thereafter of $1,000 per day until it complies with the above actions.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion To Hold Defendant In Civil Contempt, And Impose Additional Penalties And Enforcement Remedies; and enter the relief requested by Plaintiffs, or such other remedial relief as the Court deems appropriate.

DATED this November 3, 2016

Respectfully submitted,

/s/ Laird J. Lucas
Bryan Hurlbutt (ISB #8501)
Laurence ("Laird") J. Lucas (ISB #4733)

Andrew Hawley (*pro hac vice*)
Northwest Environmental Defense Center

Attorneys for Plaintiffs