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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

IDAHO CONSERVATION LEAGUE and **NORTHWEST ENVIRONMENTAL DEFENSE CENTER**, Plaintiffs, v. A**TLANTA GOLD CORPORATION,** Defendant.	**Case No. 1:11-cv-161-MHW** **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR REMEDIES**

INTRODUCTION

Plaintiffs Idaho Conservation League and Northwest Environmental Defense Center (collectively, "ICL" or "Plantiffs") respectfully request that the Court order the following remedies for Defendant Atlanta Gold Corporation's ("AGC") adjudicated violations of the Clean Water Act, as set forth in the Memorandum Decision and Order of January 9, 2012 (Dkt. No. 54) (hereafter, "liability opinion"): an injunction prohibiting AGC from discharging pollutants in violation of the effluent limitations set forth in the Idaho Groundwater Remediation Discharge General Permit, and from discharging pollutants in violation of Idaho Water Quality Standards, effective 90 days from this order; and civil penalties in the amount of $3,545,000 (an amount which may rise if additional violations accrue prior to hearing on the motion).

As discussed below, the requested injunction is narrowly tailored to redress the legal violations found here, and is necessary to halt the irreparable harm to water quality and other values that AGC's discharge continues to cause. Without such relief, all signs suggest that AGC will not comply with the Clean Water Act in a timely fashion. Of note, the requested injunction does not dictate how AGC will achieve compliance. Rather it simply sets a deadline by which AGC, in cooperation with the U.S. Forest Service, must install and implement an improved treatment system that will reduce pollutants below the permitted levels. As detailed below, such options are available and feasible. The injunction is thus appropriate in the sound exercise of the Court's equitable discretion. *See Weinberger v. Romero-Barcelo,* 456 U.S. 305 (1982); *Winter v. NRDC,* 555 U.S. 7 (2008); *Monsanto v. Geerston Seed,* 130 S. Ct. 2743 (2010).

Additionally, the requested penalties are needed to deter further violations by AGC and disgorge the financial benefit AGC has realized over the past three years by failing to install an effective treatment facility.

LEGAL BACKGROUND

The Clean Water Act ("CWA" or "Act") authorizes district courts "to order that relief it considers necessary to secure prompt compliance with the Act. That relief can include, but is not limited to, an order of immediate cessation." *Romero-Barcelo*, 456 U.S. at 320. *See* 33 U.S.C. § 1319(b), 1365(a) (authorizing injunctions). The CWA's citizen suit provision provides that "[t]he district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation," which is defined to include the conditions in a National Pollutant Discharge Elimination System ("NPDES") permit issued under section 402 of the Act. 33 U.S.C. § 1365(a), 1365(f)(6).

In addition, the Act mandates civil penalties for those who violate the Act. 33 U.S.C. § 1319(d) (any person who violates the Act "shall be subject to a civil penalty not to exceed [$37,500.00] [1] per day for each violation"); *Natural Res. Defense Council v. Sw. Marine, Inc.*, 236 F.3d 985, 1001 (9th Cir. 2000) ("*Sw. Marine*") ("If a district court finds a violation, then civil penalties under 33 U.S.C. § 1319(d) are mandatory."). *See also* 33 U.S.C. § 1365(a) (authorizing imposition of penalties in citizen suits).

ARGUMENT

I. AN INJUNCTION IS NEEDED TO ENSURE COMPLIANCE WITH THE CLEAN WATER ACT.

Because AGC's violations of the CWA are ongoing, and AGC, to ICL's knowledge, has submitted no firm plan or timeline to this Court or the Forest Service to come into compliance with the Act, it is vital that the Court issue an injunction ordering AGC to cease its violations. ICL requests a narrowly-tailored injunction prohibiting AGC from further violating the terms of the Idaho Groundwater Remediation Discharge General Permit and Idaho Water Quality

[1] *See* 40 C.F.R. § 19.4 (the current maximum penalty per violation is $37,500.00).

Standards within 90 days. Again, this injunction does not prevent AGC, in cooperation with the U.S. Forest Service, from determining what specific treatment mechanisms to employ at the 900 Adit site. Rather, it allows AGC to expeditiously select the most appropriate method for the site.

A. Standards for Injunctive Relief.

The standard for a permanent injunction is essentially the same as for a preliminary injunction, but it is not necessary for the plaintiff to show a likelihood of success on the merits because actual success has been achieved. *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 546 & n.12 (1987). As the Supreme Court recently reiterated, a plaintiff seeking a permanent injunction must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto*, 130 S. Ct. at 2756 (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

It is well established that "[e]nvironmental injury can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) (quoting *Amoco*, 480 U.S. at 545). Violations of NPDES permits; violations of Water Quality Standards set to protect aquatic life, recreation, and other uses; and the subsequent environmental damage can be irreparable harm. *Ore. State Pub. Interest Research Group v. Pac. Coast Seafoods Co.*, 374 F.Supp.2d 902, 904-07 (D.Or. 2005) ("*OSPIRG*") (where defendant's discharges caused violations of water quality standards and were likely to kill or harm some of a river's wildlife, plaintiffs established irreparable harm).

In assessing the balance of hardships, the Court must weigh "the competing claims of injury . . . and the effect on each party of the granting or withholding of the requested relief." *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995). Again, "if environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Sierra Club*, 510 F.3d at 1033 (quoting *Amoco*, 480 U.S. at 545).

In assessing the public interest, the courts have recognized that ensuring protection of the environment serves an important public purpose. *The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc) ("preserving environmental resources is certainly in the public's interest"); *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006) ("The preservation of our environment . . . is clearly in the public interest"); *Sierra Club*, 510 F.3d at 1033 (similar). Finally, where a defendant has failed to comply with environmental laws, the plaintiff rarely has any other adequate remedy except an injunction.

In crafting the terms of an injunction under the Clean Water Act, courts have "broad latitude in fashioning equitable relief when necessary to remedy an established wrong." *Alaska Ctr. for Env't v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994) (citing *Romero-Barcelo*, 456 U.S. at 305). Although the "district court's equitable powers under the CWA are limited to enforcing standards, limitations, and orders that have been violated . . .[s]o long as the district court's equitable measures are reasonably calculated to 'remedy an established wrong,' they are not an abuse of discretion." *Sw. Marine*, 236 F.3d at 1000. In analogous CWA cases, courts have ordered defendants to come into compliance. *PIRG of New Jersey v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 83 (3rd Cir. 1990) (affirming portion of injunction prohibiting defendant from discharging in violation of its permit); *Sw. Marine*, 236 F.3d at 994 (upholding detailed

injunctive relief); *Hawaii's Thousand Friends v. City & Cnty. of Honolulu*, 820 F.Supp. 1368, 1397 (D.Haw. 1993) (ordering defendant to operate equipment needed for compliance).

B. An Injunction is Necessary to Prevent Irreparable Harm.

Dr. Shawn Benner, a Boise State University professor of Geosciences with a particular specialty in arsenic contamination, explains that "[a]rsenic is highly toxic to humans and the environment." Declaration of Shawn Benner, ¶ 6 (filed herewith). Dr. Benner describes the effects of varying arsenic concentrations on human health and on aquatic organisms, *id*. ¶¶ 9–13, and concludes that AGC's exceedances of its permit represent a serious risk to both human and aquatic health. *Id*. ¶ 22. *See also* 3rd Declaration of Justin Hayes (filed herewith), ¶¶ 7–30 (reviewing applicable arsenic and iron standards, explaining why they were set, and concluding the same).

An injunction prohibiting AGC from violating the effluent limitations set forth in the Idaho Groundwater Remediation General Permit, and from violating Idaho Water Quality Standards, is needed to cease this ongoing harm. ICL has no adequate remedy at law, as the payment of money damages, even if available, would not redress the environmental, human health, and aesthetic injuries resulting from AGC's prolonged violations of the Act.

1. Harm to Aquatic Life and the Waters of the Region

Lower Montezuma Creek is home to aquatic life including rainbow trout, sculpin, and tailed frog larvae. ICL Ex. 42 (fisheries survey);[2] 3rd Hayes Decl. ¶¶ 25-26. The EPA and Idaho have established aquatic life limits for both acute and chronic exposure to arsenic of 340 ug/L and 150 ug/L, respectively, which are "strongly supported in the scientific literature."

[2] ICL Exhibits 40–55 are attached to the Third Declaration of Kristin F. Ruether (filed herewith). ICL Exhibits 1–39 refer to those exhibits so labeled during the liability phase.

Benner Decl. ¶ 11.[3] Chronic exposure to arsenic in the water has a "measurable health impact on fish," inhibiting enzymatic and metabolic function and immune response, and dramatically increasing susceptibility to disease. *Id.* ¶ 12 (citing literature). Arsenic that has settled in stream sediments also poses risks to fish: it is passed to them through consumption of invertebrates, resulting in "depressed growth rates and negatively impacted gallbladder and liver function." *Id.* ¶ 13 (citing literature).

Dr. Benner notes that from May 2010 through January 2012 AGC's discharges exceeded the chronic aquatic life criteria of 150 ug/L on all but two sampling events, and exceeded EPA's acute aquatic life standard of 340 ug/L on 15 separate sampling events. *Id.* ¶ 18, Figure 1. He notes that these discharges have increased the concentration of arsenic in Montezuma Creek from an average of 41 ug/L upstream of the discharge site to 125 ug/L below, a three-fold increase. *Id.* ¶ 16. He further explains that downstream of the discharge site, the creek itself exceeded the chronic aquatic life criteria of 150 ug/L on eight occasions, including on five consecutive samples; and exceeded EPA's acute aquatic life standard of 340 ug/L on two occasions. *Id.* ¶ 18, Figure 2. He notes that because sampling upstream of the discharge site never exceeded the chronic life criterion of 150 ug/L, "it is appropriate to attribute all of these violations of the chronic life criteria to the Atlanta Gold discharge." *Id.* ¶ 19.

Dr. Benner concludes that due to the violations of the chronic life criteria, it is "highly likely that these levels have negatively impacted fish populations in Montezuma Creek," and that

[3] *See also* 3rd Hayes Decl. ¶¶ 10–11 (Explaining that the acute criteria was developed to protect aquatic life from the lethal impact of a significant short-term, defined as "instantaneous or up to one hour," exposure to a toxic substance. The chronic criteria, in turn, is meant to protect aquatic life from the harmful impacts of a four day exposure to a toxic substance. For both standards, it is assumed that aquatic life will be protected only if such exposure is limited to less than once every three years).

"[s]uch impacts will continue to occur unless concentrations of arsenic in the discharge waters are dramatically reduced." *Id.* ¶ 22. The arsenic loading "may also negatively impact fish populations in downstream ecosystems, including the Boise River." *Id.* Additionally, "[s]ome fraction of the released arsenic is likely now associated with the stream sediments, where it can impact fish that feed on macroinvertebrates," an impact that will continue for years. *Id.* For these reasons, AGC's violations are causing irreparable harm to ICL's interests in the health of fish and other aquatic organisms in Montezuma Creek and the Middle Fork Boise River.

2. Harm to Human Health

Montezuma Creek is meant to support a variety of uses in which people will come into contact with its water. Under the Idaho Water Quality Standards, Montezuma Creek, like most waterbodies in Idaho, is regulated to ensure that it can support "primary contact recreation," meaning the water quality should be "appropriate for prolonged and intimate contact by humans or for recreational activities when the ingestion of small quantities of water is likely to occur." IDAPA 58.01.02.101.01(a) (applying cold water aquatic life and primary or secondary contact recreation criteria to "undesignated waters" such as Montezuma Creek). In addition, the Water Quality Standards recognize that Montezuma Creek could be used as an agricultural water supply and as such the "water quality [must be] appropriate for the irrigation of crops or as drinking water for livestock." IDAPA 58.01.02.100.03(b) (applying the Agricultural Water Supply designation to all surface waters of the state). Indeed, there are several withdrawals from Montezuma Creek for such agricultural uses, and residents of the town of Atlanta divert water from the creek to water their yards. 3rd Hayes Decl. ¶ 29.

Dr. Benner explains that arsenic is a "particular versatile toxin, causing a suite of adverse health impacts including hypertension, cardiovascular disease, diabetes, immunity suppression,

and a suite of cancers including cancer of the skin, bladder, skin, lung, kidney, and liver, all of which can lead to early death." Benner Decl. ¶ 9. For this reason, "there is no well-established minimal risk level for arsenic." *Id*. ¶ 10. EPA's arsenic drinking water standard is 10 ug/L; however, that standard "is not based on minimal risk, but rather a balance of risk and the predicted cost of treatment." *Id*. Instead, the health-based goal for all drinking water is 0 µg/L. 3rd Hayes Decl. ¶ 13.

Again, Dr. Benner explains that AGC's discharge water exceeded EPA's drinking water standard (as well as the permit limitation and the Water Quality Standards) of 10 ug/L on every occasion monitored, and that "the average concentration over the monitoring period exceeded the allowable level by >20 times while the maximum observed concentration in the discharge water exceeded the allowable limit by >300 times." Benner Decl. ¶ 18. These discharges caused the concentration of arsenic in Montezuma Creek to increase three-fold, and to be over an order of magnitude higher than the limits during over half the sampling events. *Id*. ¶¶ 16, 19, Figure 2. For these reasons, Montezuma Creek is utterly unfit for human contact, and AGC's violations are causing irreparable harm to ICL's interest in protecting human health.

3. Harm to Plaintiffs' Aesthetic and Recreational Interests

Finally, AGC's discharges are irreparably harming Plaintiffs' members' aesthetic and recreational interests in Montezuma Creek, the Middle Fork Boise River, and surrounding areas. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 982 (8th Cir. 2011) ("Irreparable harm to the environment necessarily means harm to the plaintiffs' specific aesthetic, educational and ecological interests"), *Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (logging project that would "harm [plaintiff's] members' ability to 'view, experience, and utilize' the areas in their undisturbed state" will result in "actual and irreparable injury").

As this Court noted in its liability opinion, "AGC's violations have altered [Plaintiffs'] enjoyment of the Middle Fork of the Boise River, [and altered] their enjoyment of Montezuma Creek," and these injuries are "specific and actual." Liability opinion at 19–20 (citing Declarations of Justin Hayes (Dkt. No. 23) and John Robison (Dkt. No. 24)). These injuries are irreparable as there is no substitute for the areas that have been impacted by AGC. In addition, these injuries are irreparable due to their long duration. As documented in the liability phase, AGC has consistently violated its permit since August 2009, a period of over two years and seven months as of this writing. Prior to that, since at least 1985 when AGC commenced operations at the site, AGC discharged its effluent with no permit at all. Thus the harm caused by AGC is of "long duration" and therefore "irreparable." *See Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 833 (9th Cir. 2002) *abrogated on other grounds by Winter v. NRDC*, 555 U.S. 7 (environmental harm occurring over fifteen years and likely to occur for six more absent an injunction is irreparable).

An injunction prohibiting AGC from discharging at levels in violation of its permit and Idaho Water Quality Standards will reduce the concentration of arsenic and iron in the water. In turn, this will reduce the ongoing harm to Plaintiffs' interests in fish and other aquatic organisms, human health, and recreational and aesthetic interests.

B. The Requested Injunction is Narrowly Tailored and Supported by the Balancing of the Harms and the Public Interest.

While ICL's requested injunction is needed to avoid irreparable harm to fish and other resources, it is tailored to the legal violations found by the Court, and will not cause irreparable harm on any countervailing scale. Again, ICL is not seeking to dictate what type of wastewater treatment facility AGC will install on the Level 900 Adit site. Instead, AGC and the Forest Service may work together, expeditiously, to select the best system.

The requested injunction simply orders AGC to do what it has stated it will do for years—install a more effective treatment facility. For example, in response to one of the Notices of Violation from EPA in 2010, AGC assured EPA that it had purchased a more effective type of treatment facility and that construction would be complete by December 2012. ICL Ex. 30. However, the proposal appears to have been abandoned. Dkt. No. 51-1 (AGC proposal to Forest Service in October 2011, with no mention of treatment facility). The requested injunction will cause AGC to finally install a facility that will comply with the Clean Water Act.

AGC's installation of a compliant facility is feasible. A remarkable set of reports commissioned by AGC over time, produced to ICL this month through the discovery process, demonstrate that several consultants have independently concluded that the addition of a filtration system would vastly improve the performance of the PWTF. A 1997 report informed AGC that a sequence of treatments, including "sand filtration," would improve the then-existing treatment system. ICL Ex. 45 at 5 (Montgomery Watson Report). A 2005 report indicates that a company called Blue Water Technologies set up a sample sand filtration treatment system on the 900 Adit site that succeeded in lowering arsenic levels to far below the permit standard of 10 ug/L. ICL Ex. 46 at 2, 4. Similarly, in two in-house reports from 2005, AGC's own staff concludes that a filtration system would be effective. ICL Ex. 43, 44. Next, a 2009 report from another company indicates that it, too, set up a pilot test at the 900 Adit site consisting of a filtration system that successfully reduced arsenic levels to "between non-detectable and 10 ppb [parts per billion, or ug/L]." ICL Ex. 47 at 4, 6. Finally, just last month, AGC commissioned a cost estimate from Blue Water for purchase of such a filtration system. The estimate concludes

that equipment and field engineering for a filtration system would cost $298,360 and could be shipped in 12–18 weeks from the receipt of approved drawings and submittals. ICL Ex. 48.[4]

Consistent with AGC's own reports, mining expert James Kuipers likewise concludes that a filtration system would be the most effective and most economical system to achieve compliance. *See* Kuipers Decl. ¶ 17 (citing literature). He explains that this type of system is used in similar mining operations around the western United States and Canada, and that it could be installed by this fall if AGC was serious about compliance. *Id.*

AGC has known for years that it needed to comply with the terms of the General Permit. Instead of working expeditiously to install the type of filtration system that even its own experts identified as necessary, it wasted years by making excuses and proposing ineffectual, inadequate modifications to its PWTF. *See* ICL Statement of Facts in Dispute (Dkt. No. 37) (reviewing history of noncompliance). When sued for its violations, it responded by attempting to walk away from the site and foist responsibility upon others, risking more damage to the environment from completely untreated discharges. ICL Ex. 24 (AGC letter to EPA). Thus, any inconvenience AGC has in complying with the Court's injunction is a direct result of the company's failure to take the steps necessary to comply with its Permit and the law, and cannot tip the scales in AGC's favor. *See OSPIRG*, 374 F.Supp.2d at 908 ("balance clearly weighs in favor of plaintiffs because harm to the environment and to the public outweigh financial interests defendant may have," and because "[d]efendants ha[d] squandered opportunities during the course of these proceedings to comply with the Act" absence issuance of injunction). AGC's "bottom line" should not be placed above compliance with the CWA, which is designed to protect Idaho's water for the good of all of its citizens. Accordingly, the Court should grant

[4] This estimate is only a portion of the cost of installing a filtration treatment system. See Kuipers Decl. ¶ 23.

ICL's request for a permanent injunction requiring AGC's prompt compliance with the terms of its permit and Idaho's Water Quality Standards.

II. CIVIL PENALTIES MUST BE ASSESSED TO REDRESS THE VIOLATIONS FOUND AND TO DETER FUTURE VIOLATIONS.

"Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties." *Tull v. United States*, 481 U.S. 412, 422 (1987) (citing 123 CONG. REC. 39,191 (1977)). "To the extent that they encourage defendants to discontinue current violations and deter them from committing future ones, [civil penalties] afford redress to citizen plaintiffs [who are injured by] ongoing unlawful conduct." *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 186 (2000). "To achieve the goal of deterrence, a penalty must be high enough so that the discharger cannot 'write it off' as an acceptable environmental trade-off for doing business." *Hawaii's Thousand Friends*, 821 F.Supp. at 1394.

The CWA provides that:

> In determining the amount of a civil penalty the court shall consider [1] the seriousness of the violation or violations, [2] the economic benefit (if any) resulting from the violation, [3] any history of such violations, [4] any good-faith efforts to comply with the applicable requirements, [5] the economic impact of the penalty on the violator, and [6] such other matters as justice may require.

33 U.S.C. § 1319(d). When considering these factors, district courts generally employ either a "top-down" or "bottom-up" approach. *Compare Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 573-74 (5th Cir.1996) (employing a top-down approach) *with United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 528-29 (4th Cir.1999) (taking a bottom-up approach). The top-down approach calls on the court to calculate the maximum penalty and reduce that penalty in consideration of the statutory factors. *Cedar Point*, 73 F.3d at 573. The bottom-up method begins with the economic benefit realized by the defendant as a result of its non-compliance and adjusts that amount based on the court's evaluation of the six statutory factors. *Smithfield Foods*,

191 F.3d at 528. The approaches are not mutually exclusive, as they both involve qualitative assessment of the factors. Here, under either method, the Court must impose a significant penalty to redress the egregious violations of the Act and deter future violations. As explained below, the court should impose a civil penalty of $3,545,000.

A. Penalties are Needed for 1,875 Violations.

The CWA imposes a maximum penalty "per day for each violation." 33 U.S.C. § 1319(d). In its opening summary judgment brief, ICL explained how many violations had accrued. ICL Opening Br. (Dkt. No. 21-1) at 13–20. The calculations were explained in more detail in an accompanying Declaration of Mark Torf. Dkt. No. 25. ICL updated the violations count prior to the merits hearing in a Supplement filed on October 31, 2011. Dkt. No. 52. The total at that time was 1,569 violations. *Id*. at 3.

Since that time, AGC has submitted five additional DMRs covering October 2011 through February 2012. ICL Ex.40. These DMRs, along with AGC's weekly monitoring data, indicate that AGC's violations of its NPDES permit have continued unabated since this Court's ruling on the merits. ICL Ex.41 (weekly data), 55 (chart of violations). These five additional months of discharges in excess of the permit's effluent limits bring the total number of violations to 1,875. This total reflects the 934 days in the period, the daily violations of the arsenic and iron effluent limits, the six reported violations of the pH effluent limit, and one reported violation of the total suspended solids effluent limit. *See* ICL Ex. 55.

Multiplying the number of violations by $37,500 results in the maximum penalty available in this case: $70,312,500.[5]

[5] If AGC remains in violation through May 2012, this will increase to more than $77,500,000 by the date of the Court's hearing on this motion. ICL will update the figure as needed.

B. The Penalty Factors Indicate a Substantial Penalty is Warranted.

A substantial civil penalty is justified. Although a maximum penalty of over $70,000,000 is authorized, ICL believes that a penalty of $3,545,000 (less than 5% of the maximum) will effectuate the goals of the Act. ICL calculated this amount by beginning with the $1,670,000 in economic benefit that AGC has realized as a result of its noncompliance, as determined by its economic expert Mr. Jonathan Shefftz. ICL Ex. 54. ICL then added $1,875,000, or approximately $1,000 per violation, in consideration of the statutory penalty factors, all of which serve to aggravate, not mitigate, the penalty.[6]

Leading cases addressing analogous violations have imposed similar penalties. For example, in *Smithfield Foods*, a swine processor was liable for thousands of violations. 191 F.3d at 520. The maximum penalty was $174.55 million. *Id*. at 529. The district court, using the bottom-up method, began with the defendant's $4.2 million in economic benefit from non-compliance. *Id*. at 528. After balancing the factors, and making several decisions favorable to defendant, the court imposed a $12.6 million penalty, 7.2% of the maximum. *Id*. at 529. In *Powell Duffryn*, the district court, using the top-down method, began with a maximum penalty of $4,205,000 for a defendant's 386 violations polluting a river and reduced the fine to $3,205,000 because the government had failed to diligently prosecute the defendant. 913 F.2d at 69–70. On appeal, the reduction was found to be unsupported and district court was ordered to recalculate the penalty without it. *Id*. at 81. In *Hawaii's Thousand Friends*, a city committed 9,870 violations related to sewage treatment. 821 F.Supp. at 1369. Using the top-down method, the district court imposed a total of $718,000 in civil penalties, which it explained was less than the

[6] This amount reflect an appropriate civil penalty. However, because AGC continues to violate its permit daily and as discussed below will continue to realize an ever growing economic benefit from its noncompliance, the total civil penalty imposed should reflect the violations that have occurred prior to the Court's order on the instant Motion.

statutory maximum due to a lack of quantifiable harm, absence of economic benefit, and limited good faith efforts. *Id*. at 1395–97.

1. AGC's Discharges into Montezuma Creek were Serious Violations of the CWA.

In evaluating the first statutory factor, the seriousness of a violation, courts consider the frequency and severity of violations, as well as the effect that the violations will have on the environment and on the public. *United States v. Smithfield Foods, Inc*., 972 F. Supp. 338, 343 (E.D. Va. 1997), *aff'd in part, rev'd in part on other grounds* 191 F.3d 516 (4th Cir. 1999). Proof of specific environmental harm is not required to impose substantial penalties, as it would encourage a permittee to ignore the requirements of its permit "with impunity so long as it discharged into already polluted [areas]." *United States v. Gulf Park Water Co.*, 14 F.Supp.2d 854, 860 (S.D. Miss. 1998).

Here, AGC's violations of its Permit have been frequent and severe. AGC has held its permit since August 6, 2009. ICL Ex. 1. AGC violated the permit *every day, twice a day* since that day, a period of over two years and seven months as of this writing, totaling 1,875 violations: a large number and a long duration. *See Hawaii's Thousand Friends*, 821 F.Supp. at 1384 (finding 1645 daily violations "significantly high," and violations that lasted six weeks and four and a half years to both be of long duration). Moreover, as discussed in detail above, and as AGC has documented in its own monitoring reports, the exceedances of established effluent limits have at times been stunning, and have caused or contributed to violations of Water Quality Standards. *See* Benner Decl. ¶ 18; 3rd Hayes Decl. ¶¶ 21–24. Such violations are severe by any measure. Moreover, as discussed in detail above, it is "highly likely that these levels have negatively impacted fish populations in Montezuma Creek." Benner Decl. ¶ 22.

2. AGC Derived Economic Benefit from the Violations by Avoiding Necessary Costs of Compliance.

Under the second statutory factor, courts must consider "the economic benefit (if any) resulting from the violation." 33 U.S.C. § 1319(d). Under this factor, courts must endeavor to reach a "rational estimate of [the violator's] economic benefit, resolving uncertainties in favor of a higher estimate." *United States v. Mun. Auth*., 929 F. Supp. 800, 806 (D. Pa. 1996). Such an analysis is necessary "to keep violators from gaining an unfair competitive advantage by violating the law." *Smithfield Foods*, 191 F.3d at 529. *See also United States v. Mun. Auth.*, 150 F.3d 259, 263 (3d Cir. 1998) (the goal is "to remove or neutralize the economic incentive to violate environmental regulations."). Because of the difficulty in exactly assessing the economic benefit in some instances, court has have recognized that "reasonable approximations of economic benefit will suffice." *Powell Duffryn*, 913 F.2d at 80 (quoting S. Rep. No. 50, 99th Cong., 1st Sess. 25 (1985)). Economic benefit refers to the financial gains that accrue through a defendant's delayed and/or avoided expenditures that resulted in its violations of the Act. *Friends of the Earth, Inc. v. Laidlaw Envt'l Services (TOC), Inc*., 890 F.Supp. 470, 481 (D.S.C. 1995) (economic benefit of noncompliance is "the after-tax present value of avoided or delayed expenditures on necessary pollution control measures").

To determine the economic benefit AGC has realized as a result of over two and a half years of noncompliance with its Permit, Plaintiffs retained Mr. Jonathan Shefftz, who helped develop and is an expert on EPA's models of calculating economic benefit for environmental enforcement. ICL Ex. 54 at 2–3. In a manner consistent with EPA's model, Mr. Shefftz analyzed the "the capital investments that Atlanta Gold has incurred or can be expected to incur to prevent future violations; and, [] the capital investments and annually recurring costs that would have been necessary had Atlanta Gold undertaken them at an earlier point in time so as to

prevent the violations that actually have occurred." *Id*. at 8. Adjusting these values for inflation and possible tax implications, Mr. Shefftz determines the "present value of the costs, or 'cash flows.'" *Id.* Finally, subtracting the present value of the delayed compliance from the present value of the on-time compliance and adding the after-tax net present value of avoided annual maintenance and operations costs determines the economic benefit the violator has gained. As Mr. Shefftz explains, this analysis relies on "standard financial cash flow and net present value analysis techniques, based on modern and generally accepted financial principles. Such an approach is the underpinning of any capital budgeting exercise, and is the standard approach by which alternative investments should be judged according to any financial economics or corporate finance text." *Id.*

Mr. Kuipers estimates the capital and operating costs of an effective filtration treatment system, utilizing standard cost estimation methods and consistent with current federal guidance. Kuipers Decl, ¶¶ 20–24, Exhibits 1, 2. Based on these estimates, Mr. Shefftz determined that AGC has realized an economic benefit of between $1,016,143 and $1,679,411. *Id.* at 11–12.[7] The lower of these values reflects a very conservative estimate applying the highest state and federal corporate tax rates, while the higher value represents a more likely scenario given avenues available to AGC to avoid such taxes. *Id*. at 13. Thus, AGC has likely realized an economic benefit of nearly $1.7 million.

This value of $1.7 million must be considered the absolute minimum appropriate civil penalty, as otherwise, AGC "will retain a gain from failing to undertake measures that were necessary to prevent noncompliance." ICL Ex. 54 at 7. But again, "[t]o achieve the goal of deterrence, a penalty must be high enough so that the discharger cannot 'write it off' as an

[7] Mr. Shefftz explains that these values will increase monthly, by approximately $6,000 and $10,000 respectively, until this economic benefit is disgorged by a civil penalty payment. *Id.*

acceptable environmental trade-off for doing business." *Hawaii's Thousand Friends*, 821 F. Supp. at 1394. *See also* ICL Ex. 54 at 5–7 (Mr. Shefftz explaining same). Indeed, a penalty equal to the economic benefit signals a potential benefit to noncompliance, given the possibility that violations will not be detected and that even if they are, the scofflaw will be in no worse position as a result of the enforcement.

3. AGC Has a Substantial History of Violations.

As documented at length during the liability phase and as admitted by AGC through its DMRs and weekly data, AGC has continuously violated the terms of its Permit since receiving it in August 2009. This is a substantial history of violations. *See accord Municipal Auth.*, 929 F. Supp. at 807 (2,360 violations of the Act over 6 years a "very large number of violations").

4. AGC Has Demonstrated a Lack of Good Faith Efforts to Comply with its Permit.

Good faith efforts to comply with applicable requirements may reduce civil penalties. Good faith should not be found when "defendant's efforts at compliance could have been more vigorous." *Smithfield Foods*, 972 F. Supp. at 352. That is certainly the case here.

To date, AGC has taken no meaningful steps to comply with the Permit. It is indeed notable that in response to this suit AGC did not act to reduce the number, frequency or severity of its violations by putting in measures on the ground in an effort to comply. Rather, AGC responded by "notif[ying] the applicable agencies that it has abandoned the property and terminat[ing] its NPDES permit." AGC Opening Br. at 6. AGC's unsuccessful efforts to terminate its permit and walk away from the site demonstrated a lack of good faith or consideration for the environment. AGC's commitment to this course is further revealed by its failure to reapply for coverage under its existing Permit or to apply or a new NPDES permit. 3rd Hayes Decl. ¶ 31.

Moreover, AGC has repeatedly admitted that the PWTF, as currently designed, cannot comply with the Permit's effluent limits. *See* Def. Br. in Support of Motion for SJ, at 8 (Dkt. No. 21) (acknowledging that the system was nothing more than a temporary facility designed to achieve an effluent concentration of 190 µg/L); see also Kuipers Decl. ¶ 26 ("None of the information in the literature that I am aware of suggests that ponds could be used to effectively treat arsenic or iron."). Despite this fact, and the resulting years of predictable noncompliance, AGC has yet to propose a timely, credible solution that will result in discharges that meet the established effluent limits and protect water quality.[8] Indeed, as detailed above, AGC has repeatedly ignored the recommendations of numerous consultants that have offered advice on how to come into compliance. *See Smithfield Foods*, 972 F. Supp. at 351 (Defendants cannot claim to have acted in good faith when "expert advice was often ignored and the implementation of suggestions was often delayed.").

In addition to the inherent inadequacy of the PWTF, AGC has failed to operate the facility correctly by taking repeated maintenance short-cuts that have further reduced the effectiveness of the PWTF. Kuipers Decl. ¶ 15. In sum, AGC's repeated excuses, shortcuts and efforts to shift the blame to others demonstrate a lack of good faith efforts to comply with its Permit.

5. A Substantial Penalty Will Not Impose an Undue Burden on AGC.

Finally, a court may reduce the civil penalty against a party if the court determines that imposing the maximum statutory penalty would work an undue burden on the defendant. *Atlantic States Legal Found., Inc. v. Universal Tool & Stamping Co., Inc*., 786 F. Supp. 743, 753-54 (N.D. Ind. 1992). Conversely, courts may increase the penalty if loss of the economic

[8] AGC's currently pending proposal to install a "bulkhead" is no exception. Dkt. No. 51-1. The Forest Service has already identified several concerns with the proposal. ICL Ex. 53.

benefit alone would not deter the defendant, or others, from violating the CWA in the future. *Id.* at 753. This factor will not reduce the amount of the civil penalty unless the violator can show that the penalty will have a ruinous effect. *Gulf Park Water Co.*, 14 F. Supp. 2d at 868. A defendant bears the burden of proving its inability to pay a civil penalty. *PIRG v. Powell Duffryn Terminals, Inc*, 720 F.Supp. 1158, 1165–66 (D.N.J. 1989).

Here, AGC and its parent company Atlanta Gold, Inc. have the ability to pay the requested civil penalty.[9] Indeed, as of September 30, 2011, the companies claimed assets of $41.4 million. ICL Ex. 54 at 14. In addition, from January 2009 through September 2011, the companies raised over $16.3 million from investors, and invested over $12.4 million in property. *Id.* at 15 (Table 4). Because AGC has shown itself to be successful in raising significant sums of money from investors, it "would appear to have the ability to pay for the required compliance costs [] and to pay a civil penalty based upon the economic benefit from the delay and avoidance of those costs." *Id.* at 16.

As a result, a substantial civil penalty is both mandated and justified.

CONCLUSION

For the foregoing reasons, the Court should grant ICL's Motion for Remedies.

DATED this 22nd day of March, 2012.

Respectfully submitted,

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[9] Courts may consider the financial condition of a parent company when considering a defendant's ability to pay. *Powell Duffryn*, 720 F.Supp. at 1166. Here, AGC is a wholly owned subsidiary, and Mr. Shefftz explains that because the companies themselves consolidate their finances, consideration of the parent company's finances is appropriate. ICL Ex. 54 at 14.