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-REB **REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO HOLD DEFENDANT IN CIVIL CONTEMPT, AND IMPOSE ADDITIONAL PENALTIES AND ENFORCEMENT REMEDIES** *(Docket No. 128)*

INTRODUCTION

Atlanta Gold's response (*Docket No. 132*) does not contest Plaintiffs' showing that Defendant violated the Clean Water Act and this Court's prior orders on no fewer than 497 occasions between December 2012 and May 2016, by discharging pollutants from the 900 Level Adit in excess of the concentrations allowed in its Clean Water Act permit. Recently obtained monitoring reports show AGC committed 7 additional violations this year—or 504 violations in total. *See* Second Hurlbutt Decl., Exh. 1, filed herewith. Further, AGC admits violations will continue because its water treatment facility is inadequate to handle annual high water flows.

Rather than contest the facts presented by Plaintiffs, AGC argues that it is doing the best it can and lacks resources to do anything more. Yet it submits no factual support for these arguments, which are identical to arguments Judge Williams previously rejected. In truth, AGC can improve its treatment facilities, and it can afford to do so. As revealed in its latest public financial documents, AGC and its parent company (Atlanta Gold Inc.) claim nearly $50 million in assets and have received several infusions of financing in the last four years since Judge Williams entered the Remedies Order. *See* Second Hurlbutt Decl., Exhs. 3 to 6.

Accordingly, based on the record before it, the Court should grant Plaintiffs' motion to hold AGC in contempt, impose additional penalties for its further CWA violations, and order additional enforcement remedies as Plaintiffs have requested.

I. IT IS UNDISPUTED THAT AGC HAS NOW COMMITTED 504 FURTHER VIOLATIONS, WHICH ARE LIKELY TO CONTINUE.

In their Opening Brief (pp. 5-8), Plaintiffs documented 497 violations of the effluent limits for arsenic and iron in AGC's Clean Water Act Permit. These 497 violations were based on monthly discharge monitoring reports (DMRs) from December 2012 through May 2016 that AGC filed with EPA and Plaintiffs obtained. *Id.*

AGC does not dispute these 497 violations. *See* AGC Resp., pp. 2-6 & Table. But instead of taking responsibility, AGC tries to suggest—wrongly—that it bears no responsibility for the pollution[1] and that the Permit violations are not that bad.[2] Even so, AGC concedes these arguments are irrelevant for purposes of determining Clean Water Act liability, stating "AGC is aware that any exceedance is a 'strict liability' violation'". *Id.,* p. 4.

AGC also argues that its only violations in 2016 were during the month of May, when the company committed 42 violations of its Permit limits. AGC Resp., p. 4. However, Plaintiffs have now obtained AGC's DMRs for the months of June through October 2016, which document 7 more violations of the Permit's iron discharge limit in June 2016, bringing AGC's total violations to 504. *See* Second Hurlbutt Decl., Exh. 1.

AGC's violations are likely to continue. Even if 2016 was an improvement over previous years, the company still violated its permit limits *at least 49 times* in 2016, based on the 10 months of reporting disclosed so far. And AGC admits that violations will continue because the

[1] AGC argues that "naturally occurring" arsenic and iron in Montezuma Creek is "nearly 5 times higher" than the effluent limits in its NPDES Permit. AGC Resp., p. 2. This statement is inaccurate and misleading, since other non-natural adits and mine workings upstream of the 900 Level Adit contribute to the high levels of arsenic and iron to Montezuma Creek. Moreover, the alleged 140 ug/L average iron level in the creek is *substantially below* the 1,000 ug/L iron limit in the Permit. The undisputed facts are that the Adit discharges additional arsenic and iron into Montezuma Creek, which AGC is obligated to treat to meet the Permit limits.

[2] AGC wrongly describes its exceedances as "with very few exceptions . . . literally microscopic." AGC Resp., p. 3. The Table in Atlanta Gold's Response (pp. 3–4) displays weekly sample levels for each exceedance from December 2012 through May 2016. The table displays 59 arsenic exceedances, which represents 413 days of violations. On 168 of those days, or *40% of all days in violation*, AGC's arsenic discharges were *at least 2 times higher* than what the Permit allows (10 ug/L). And on 105 of those days, or *25% of all days in violation*, AGC's arsenic discharges were *at least 3 times higher* than the Permit limit. Likewise, AGC's table displays 11 iron exceedances, representing 77 days of violation; and on 56 of those days, or *73% of all days in violation*, AGC's iron discharges were *at least 2 times higher* than what the Permit allows (1,000 ug/L). And on 36 of those days, or *55% of all days in violation*, AGC's iron discharges were *at least 3 times higher* than the Permit limit.

facility is inadequate at handling higher flows that occur during spring/summer runoff. AGC Resp., p. 6; Simmons Decl. (*Dkt. No. 132-1*), ¶ 3. *See also* Second Hurlbutt Decl., Exh. 6, p. 6 (Atlanta Gold "interim management discussion" stating: "The issue of flow control during high runoff seasons caused by naturally occurring events is beyond the design capacity of the PWTF.").

Increased runoff during spring/summer occurs annually, and must be anticipated and incorporated into the Adit wastewater treatment facility's design and operation. Annual high runoff will continue to overwhelm AGC's existing treatment facility and cause further violations every year, unless the Court orders Defendant to improve the treatment facility as requested.

II. AGC'S ALLEGED FINANCIAL DIFFICULTIES DO NOT CONDONE ITS VIOLATIONS OR PREVENT THE COURT FROM FINDING ADDITIONAL VIOLATIONS AND IMPOSING ENFORCEMENT REMEDIES.

AGC represents to the Court that its financial condition is "grim." AGC Resp., p. 6; Simmons Decl. (*Dkt. No. 132-1*) ¶ 6. Defendant admits it has not made the Court-ordered penalty payments, and asserted to the Department of Justice in April 2016 that lacks funds to do so. *See Dkt. No. 132-5*. Remarkably, however, AGC did not file any up-to-date financial documents with the Court to support its characterization of its finances.

In the 2012 Remedies Decision, Judge Williams considered AGC's alleged inability to pay a Clean Water Act penalty or pay for improvements to, and operation of, its wastewater treatment facility. *See Dkt. No. 87*, pp. 43-44. Plaintiffs submitted the Shefftz Expert Opinion (*Dkt. No. 67-4*) in support of their remedies motion. Mr. Shefftz reviewed AGC's public financial documents, found that AGC and its parent corporation Atlanta Gold, Inc. (AGI) had over $41.4 million in exploration and evaluation assets, and concluded AGC "has shown itself capable of raising significant funds from its investors to finance its ongoing exploration and development activities, and should therefore be capable of financing the water treatment plant and a civil penalty." Shefftz Expert Opinion, pp. 2, 3, 14-16. Judge Williams agreed, finding it

was appropriate to consider the assets of both AGC and AGI, and concluding that the reported assets of over $41.4 million dollars showed AGC could handle the $2 million penalty and the costs of complying with the Clean Water Act. Remedies Decision (*Dkt. No. 87*), pp. 43-44.

Now, AGC is no worse off financially. According to their public consolidated financial reports for the 9 months ending September 2016, AGC and its parent company AGI claim to have more assets than before, totaling $48,351,885 (including $47,934,761 in exploration and evaluation assets). *See* Second Hurlbutt Decl., Exh. 3, p. 2. Furthermore, AGI's financial statements show the company issued notes from 2013 through 2015 to raise $6,100,000. *Id.* at 16. And in a related document, AGI states: "Management believes it will ultimately be successful in obtaining additional financing." Second Hurlbutt Decl., Exh. 4, p. 7.

Thus, while AGC claims its finances are grim, recent financial reports indicate AGC has access to more assets than it did when Judge Williams previously determined it had sufficient assets to comply with the Clean Water Act and pay penalties. The Court should thus reject AGC's arguments that its financial condition precludes it from upgrading its facility or from making penalty payments.

This is confirmed by the June 2016 Factsheet on AGI's website, which claims the company recently achieved the following milestones: raising $824,000 in capital from equity financings; creating new limited partnerships (LPs) to advance the company's properties and improve its balance sheet; bringing in new "major institutional shareholder" Jipangu Inc.; and providing additional "blue sky" to company shareholders through its patent-pending HydroClean technology. Second Hurlbutt Decl., Exh. 4. Notably, AGI formed HydroClean LP in 2015, and HydroClean has since obtained financing and submitted an international patent application for AGC's passive water treatment system from arsenic. Second Hurlbutt Decl., Exh. 5, pp. 17-19

& Exh. 6, p. 6. Thus, while AGC claims that it has incurred substantial costs related to the wastewater treatment facility (AGC Resp., p. 5), the facility has in fact created business opportunities, and further investment in the facility may prove fruitful for HydroClean.

III. BASED ON THE ONGOING CLEAN WATER ACT PERMIT VIOLATIONS, THE COURT SHOULD ORDER A COMPLIANCE PLAN.

To bring about Clean Water Act compliance, the Court should order a new July 1, 2016 compliance deadline and should order AGC to submit a Plan for Compliance by April 1, 2016, as Plaintiffs have requested. *See* Pls.' Mot. for Contempt (*Dkt. No. 128*), pp. 3-4.

The Court can grant this relief whether or not it finds Atlanta Gold in contempt. Courts have discretion to fashion injunctive relief necessary to achieve prompt Clean Water Act compliance. As Judge Williams stated in the Remedies Decision:

> The Clean Water Act authorizes the district court "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." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320, 102 S.Ct. 1798, 1087 (1982). Discretion is vested in the district court to either grant or deny a request for injunctive relief, depending upon its view of the range of public interests at issue. *Id.*

See Dkt. No. 87, p. 14.

Courts also have equitable authority to modify injunctions. "A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *U.S. v. Swift & Co.*, 286 U.S. 106, 114 (1932). "The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." *Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961). A modification is appropriate when a court, faced with new facts, must make a change "to effectuate . . . the basic purpose of the original" injunction. *Chrysler Corp. v. U.S.*, 316 U.S. 556, 562 (1942).

In the Remedies Decision, Judge Williams included injunctive relief ordering AGC to come into compliance with the Permit by December 15, 2012, but left the means of compliance up to AGC. *See Dkt. No. 87*, p. 30. This has not worked; AGC continues to regularly violate the Permit and is unwilling to do more. This Court should, therefore, grant Plaintiffs' requested modification of the injunction, which keeps to the purpose of the original injunction (prompt compliance, with the means of compliance up to AGC) while providing the added requirement that AGC develop and submit a Plan for Compliance detailing further steps AGC will take.

In its response, AGC does not disagree that something more needs to be done to achieve compliance. AGC has plenty of options for upgrading its facility and/or improving its operations. *See* Remedies Decision, pp. 23-33 (discussing expert proposals, and other reports before the Court, providing options for treating the Adit water). But AGC has been unwilling to do more, and asks the Court to allow the company to indefinitely delay compliance with the Clean Water Act until some future date when it might be more convenient or less costly. Judge Williams already rejected AGC's requests to delay compliance for financial reasons when he issued the compliance deadline injunction. *See* Remedies Decision, pp. 25-30 ("AGC's history of attempting to delay compliance until it could actively start mining operations suggests that its financial motivations may have blinded it to the needs of the environment and to its legal obligations under the CWA, and is another factor suggesting that an injunction is necessary."). The Court should again reject AGC's excuses and order prompt compliance.

IV. BASED ON THE ONGOING PERMIT VIOLATIONS, THE COURT SHOULD ALSO IMPOSE CLEAN WATER ACT CIVIL PENALTIES.

As the Court recognized in the 2012 Remedies Decision (pp. 14-15), once Clean Water Act violations are found, the imposition of civil penalties is mandatory under the Clean Water Act, 33 U.S.C. § 1319(d). Judge Williams imposed $2 million in civil penalties after carefully

weighing the criteria set forth in the Clean Water Act for determining penalties. *Id.*, pp. 35-44. This penalty equates to approximately $1,000 per violation. For the 504 new violations at issue now, the Court should again impose $1,000 penalty per violation, as there is no reason to depart from the previous weighing of the penalty criteria.

In the 2012 Remedies Decision, this Court considered the economic benefit AGC gained by avoiding compliance. *Id.*, pp. 35-38. Now, AGC has accrued further financial gains by continuing to avoid expenditures on compliance over the last four years.

In 2012, this Court also considered the seriousness and history of AGC's violations, finding any excess arsenic is toxic to aquatic life and renders the impacted stretch of Montezuma Creek unfit for primary contact recreation, finding arsenic is likely to remain in the food web, and concluding AGC's violations were "quite serious." *Id.*, p. 38. Now, while AGC's violations are less frequent and less severe on average than they were previously, the number of violations is still high and frequent, the concentrations of arsenic and iron discharged substantially higher than what the Permit allows, and the violations regularly occurring for four more years on top of the previous years of violations, all of which has serious adverse impacts on water quality.

In 2012, this Court also considered whether AGC made good faith efforts at compliance, finding it had not because AGC simply continued its inadequate operations of the treatment facility without addressing the inadequacies. *Id.* at 38-40. Similarly now, after initial improvements to the facility came up short, AGC has done virtually nothing to come into compliance for four years. While AGC's DMRs do suggest that the company took some discrete actions to respond to specific instances of violations, AGC cannot show it has corrected the underlying deficiencies at the facility. Instead making a good faith effort to comply with Permit,

AGC focused its resources on illegally mining at a different location, called the Neal Property.[3] This is not a good faith effort to comply.

In 2012, the Court considered whether AGC was entitled to any offsets (which it was not), and then considered the sums that AGC would be required to expend on compliance. *Id.* at 40-41. Finally, the Court considered AGC's ability to pay a $2 million penalty on top of compliance costs. *Id* at 43-44. The Court found that Atlanta Gold and its parent AGI had over $41 million in assets and could, therefore, pay the penalty. *Id*. Plaintiffs' requested additional penalty of $1,000 per violation amounts to $504,000 total, consistent with the Court's prior rulings. As set forth above, Atlanta Gold and its parent company now have closer to $50 million in assets, expect to obtain further financing, and can afford this penalty.

V. THE COURT SHOULD ALSO HOLD AGC IN CONTEMPT.

Because of AGC's recalcitrance, the Court should hold AGC in contempt and impose suspended civil sanctions of $1,000 per future violation this Court's orders, as requested by Plaintiffs. *See* Contempt Mot. (*Dkt. No. 128*), p. 5. This relief is necessary to help ensure AGC finally complies with the Court's orders and the Clean Water Act.

A. AGC Has Not Taken All Reasonable Steps to Insure Compliance.

In response, AGC claims it has substantially complied with Court's orders. It has not. "A contemnor in violation of a court order may avoid a finding of civil contempt only by showing it took *all* reasonable steps to comply with the order." *Kelly v. Wengler*, 822 F.3d 1085, 1096 (9th Cir. 2016) (emphasis in original). Arguably, AGC took *a* reasonable step when it upgraded its wastewater treatment facility in 2012. AGC also made some minor changes to its

[3] In February 2015, AGC formed Mineral Point LLC to conduct operations on the Neal Property, where it holds a lease and has staked additional mining claims on adjoining public land. *See* Second Hurlbutt Decl., Exh. 3, p. 12. The Idaho Deparment of Lands recently issued a cease-and-desist letter to halt unauthorized surface mining at the Neal Property for violations of Idaho Code. *Id.*, Ex. 2.

operations in response to specific instances of violation over the last four years. But violations have continued year after year, and—as AGC admits—the wastewater treatment facility remains inadequate to handle flows during spring/summer runoff and will continue to cause violations.

The Ninth Circuit has found these types of half measures fall short of the effort needed to show substantial compliance. In *Kelly,* the Ninth Circuit considered the defendants' appeal of whether they violated a prison settlement agreement, in which this Court found Defendants in contempt, in part, because they falsified staffing records over a seven-month period following the settlement agreement. 822 F.3d at 1091-93. On appeal, the defendants pointed to the numerous steps they had taken to address the issue, from increasing the number of budgeted security staff positions, to holding meetings to review staffing requirements. *Id.* at 1096. However, as the Ninth Circuit pointed out, the Defendants often failed take the next, reasonable step towards ensuring compliance. *Id.* For example, Defendants never hired the additional security staff they had budgeted for, and never acted on the information about staffing difficulties. *Id.* As a result, the Ninth Circuit held that the Defendants failed to take all reasonable steps that necessary to come into compliance. *Id.* at 1096–97. The same came be said here—it is not enough that AGC has taken some steps without taking further steps to address the underlying inadequacies of its facility operations.

AGC has options. Earlier in this litigation, the parties submitted reports identifying a variety of new/additional treatment options. *See* Remedies Decision, pp. 23-33. And there may be others, but AGC has refused to take reasonable steps to explore and implement improved or additional treatment methods, and as a result, has now violated the Court's compliance order 504 times, including many days when AGC discharged at least 2 and 3 times the allowable concentrations of arsenic and iron to Montezuma Creek. This is not substantial compliance.

AGC also admits that it has failed to make all court-ordered Clean Water Act civil penalty payments to the U.S. Treasury, and as of September 2016, had paid *less than half* of the approximately $800,000 due at that time. This is not substantial compliance, either. AGC has access to assets and financing, but instead of taking reasonable steps to make penalty payments, AGC has spent money on other things, including unlawfully mining at its separate Neal Property.

B. The Court Should Impose Suspended Sanctions.

Courts have "broad equitable power to order appropriate relief in civil contempt proceedings." *SEC v. Hickey*, 322 F.3d 1123, 1128 (9th Cir. 2003). "Generally, the minimum sanction necessary to obtain compliance is to be imposed." *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 514 (9th Cir. 1992). Here, AGC has shown an unwillingness to comply with this Court's prior orders, so civil contempt sanctions are necessary. Plaintiffs request a sanction of $1,000 per day if AGC fails to comply with the Court's new deadlines.

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 December 22, 2016

Respectfully submitted,

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

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

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2016, I caused the foregoing REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO HOLD DEFENDANT IN CIVIL CONTEMPT, AND IMPOSE ADDITIONAL PENALTIES AND ENFORCEMENT REMEDIES, and the accompanying SECOND DECLARATION OF BRYAN HURLBUTT (and all exhibits thereto) to be electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected in the Electronic Notice of Filing:

Michelle R. Points
mpoints@pointslaw.com

William M. Humphries
US Attorney's Office, District of Idaho
bill.humphries@usdoj.gov

/s/ Laird Lucas
Laird Lucas