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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** **ICL'S RESPONSE IN OPPOSITION TO ATLANTA GOLD'S MOTION FOR SUMMARY JUDGMENT** (Dkt. No. 20)

INTRODUCTION

Defendant Atlanta Gold Corporation ("AGC") does not deny that the discharges from its facility—the 900 Adit—continue to violate the Clean Water Act ("CWA"). Indeed, on the very same day AGC submitted its motion for summary judgment, August 12, 2011, it submitted a discharge monitoring reports ("DMR") showing that in July, just as in every month prior, it discharged pollutants far above permitted levels. As a result, AGC cannot, and does not, dispute that its discharges from the 900 Adit site violate the CWA. Instead, AGC attempts to distract the Court with a range of arguments that lack any basis in fact or law.

AGC argues that, despite the ongoing illegal discharges at its facility, it may avoid CWA liability because since the filing of the complaint, it has "abandoned" the 900 Adit and associated pilot wastewater treatment facility ("PWTF") and unilaterally terminated its Permit. As a result, AGC argues that this case is no longer justiciable under the CWA and is moot. These desperate arguments lack legal merit and fail on the facts of this case. Far from having abandoned its interests in the 900 Adit, AGC continues to hold extensive interests in the site, continues to operate the PWTF, and remains the legal cause of the discharge of pollutants to Montezuma Creek and the Middle Fork Boise River. AGC neglects to mention to the Court that EPA *rejected* AGC's request to terminate the Permit, and thus AGC remains bound to comply with its terms. Again, even AGC does not appear to believe its own argument, since it submitted a DMR pursuant to its Permit on the very day it submitted its brief.

Perhaps recognizing its main two arguments fail, AGC resorts to listing a barrage of miscellaneous excuses, complaints about the terms of its permit, and various

understandings, intentions, and hopes the company had in the past, all of which are irrelevant. The Clean Water Act is a strict liability statute, such that excuses and intentions are immaterial to liability. Further, the Act strictly precludes defendants in an enforcement action from challenging provisions of a permit, if defendants failed to challenge the permit soon after the permit's issuance. AGC did not challenge its permit then, so cannot do so now.

EPA warned AGC over a year before this complaint was filed that AGC was in patent violation of its permit, and was obligated to take the steps necessary to come into compliance—or risk enforcement action. AGC refused to do so, and now is responsible for the consequences.

THE CLEAN WATER ACT

Section 402 of the CWA establishes the National Pollutant Discharge Elimination System ("NPDES") program, which authorizes the EPA to "issue a permit for the discharge of any pollutant, or combination of pollutants," on condition that the discharge will meet other requirements of the Act. 33 U.S.C. § 1342. At a minimum, permits must include technology-based effluent limitations, any more stringent limitations necessary to meet water quality standards, and monitoring and reporting requirements. *Id*. §§ 1342, 1311, 1318. 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 Res. 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]."). Citizens may enforce the CWA by filing a civil action in federal court against

any person alleged to be in violation of any "effluent standard or limitation." 33 U.S.C. § 1365(a)(1).

The CWA is a strict liability statute. "Courts throughout the country have held that NPDES compliance is a matter of strict liability, and a defendant's intent and good faith are irrelevant to the liability issue." *Hawaii's Thousand Friends v. City and County of Honolulu*, 821 F.Supp. 1368, 1392 (D.Haw. 1993) (citing *Stoddard v. W. Carolina Regional Sewer Authority*, 784 F.2d 1200, 1208 (4th Cir. 1986); *Atlantic States Legal Found. v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990)).

Section 509 of the Clean Water Act sets up a "now or never" system for permittees (or other interested parties) to challenge any effluent standard within a NPDES permit, or the issuance or denial of any NPDES permit. 33 U.S.C. § 1369(b)(1). Parties may do so only "within 120 days from the date of such determination, approval, promulgation, issuance or denial." *Id*. Once that period has passed, actions which could have been reviewed in that time period "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." *Id*. § 1369(b)(2).

FACTUAL BACKGROUND

AGC's Statement of Material Facts ("SMF") (Dkt. No. 20-2) provides an incomplete account of the facts underlying this action, which demonstrate that AGC continues to be the legal cause of the discharge of pollutants to Montezuma Creek, in violation of its NPDES Permit.

First and foremost, AGC's statements about its recent purported abandonment of the site are misleading. AGC states that it "sent notice to EPA that it terminated its

NPDES Permit." AGC SMF at 16. But AGC neglects to inform the Court that EPA refused AGC's request to terminate the permit. EPA explained:

> Coverage under the Idaho Groundwater Remediation NPDES Permit (Permit) does not automatically terminate upon notification. See Permit Part IV.A. Permit Actions. As such, EPA would like to clarify that the AGC NPDES Permit No. ID-G91-0006 *has not been terminated* at this time and the permit remains in effect.

ICL Ex. 25 (emphasis added).[1] Thus, contrary to its suggestion, AGC continues to hold and be bound by the terms of its NPDES permit. Indeed, AGC recognizes its ongoing obligations under the Permit, as it has continued to submit DMRs (as required by the Permit) well after its supposed termination. ICL Ex. 16 at 11–19, ICL Ex. 27 (DMRs submitted in May, June, July, & Aug. 2011).

AGC's statements that it "no longer ha[s] any interest in" and has "abandoned the property" at the 900 Adit and related facilities are also misleading. AGC SMF at 16, AGC Br. at 6. The Forest Service likewise rejected AGC's attempt to walk away from its ongoing legal obligations and interests at the site. ICL Ex. 5 & 26. It reminded AGC that AGC's approved plans of operations in the 900 Adit over the years "have all included provisions for treatment of the water discharged from the adit" as well as "long-term management of discharge." ICL Ex. 5 at 2. It explained that under Forest Service regulations, "AGC is clearly an operator," in light of how it "has obtained Forest Service approval of several plans of operations for operations, which include underground exploration, water treatment, and reclamation"; and how, as an operator, it is liable for reclamation. *Id*. at 3. In other words, until AGC fulfills the terms of the lease and

[1] ICL exhibits 1–26 are attached to the Declaration of Andrew Hawley (Dkt. No. 22). ICL exhibits 27+ are attached to the Declaration of Kristin F. Ruether (filed herewith). Page numbers refer to internal page numbers if the document has them, and if the document does not, to the page numbers generated by ECF at the top of the page.

operation agreements, AGC cannot abandon its interests and obligations in the site. AGC has not fulfilled these obligations, and thus its role as operator of the site continues. Additionally, the Forest Service rejected AGC's "closure plan," which consisted of a four-page letter from counsel, explaining that a far more detailed plan would be required to comply with Forest Service regulations and governing law including the Clean Water Act. ICL Ex. 5 at 3–5; Points Aff., Ex. D at 3–6 (closure plan letter from counsel).

Perhaps recognizing that its Permit is not terminated and it continues to be the "operator" of the site, AGC admits that it continues to "operate and maintain the PWTF" and will do so "until the closure plan is approved by the USFS and the PWTF is dismantled and the property reclaimed pursuant to that closure plan."[2] AGC SMF at 17. Thus, by its own admission, AGC has not abandoned the property, and cannot legally do so—making its continued operation of the PWTF far from "gratuitous[]." AGC Br. at 6.

Additionally, AGC's assertions that its activities did not worsen the pollution or volume of water discharging from the Adit are not accurate. AGC SMF at 5, 14. AGC's many past activities at the site have included "an exploration program at the Project Site, which included opening and excavating the Adit," AGC SMF at 4, and driving "1,000 feet of new drift [tunnel length] to allow underground core drilling." ICL Ex. 5 at 1 (Forest Service letter). The Forest Service has explained that all of this exploratory drilling caused "[i]ncreased opportunity for contact" between water and arsenic bearing material, which was "likely to contribute to arsenic levels in the discharge." ICL Ex. 26 at 2. An increase in the concentration of pollutants is confirmed by information

[2] This could take months or even years, judging by the Forest Service's explanation of how many additional details are needed in a closure plan, and how complex the reclamation would be. ICL Ex. 5 at 3–4.

submitted by AGC, which shows that current arsenic levels reported in AGC's DMRs are substantially higher than those reported in 1997. ICL's Statement of Facts in Dispute (filed herewith) at ¶ 11.

As to the volume of water flowing out of the Adit, the Forest Service reviewed flow data from 1994 to the present, and explained "there is a trend demonstrated that, as AGC continued with approved underground exploration drilling, the water quantity issuing from the adit has increased." ICL Ex. 5 at 2. It explained this was because "it is highly likely that exploratory underground drilling operations have offered additional conduits for groundwater encountering the shear/fracture zone(s) through additional bore holes introduced by AGC to the system." *Id*.

Additionally, AGC's complaints that its Permit's arsenic standard is somehow unfair are inaccurate. AGC SMF at 12, 13. EPA issued AGC's coverage (i.e., site-specific NPDES Permit) under the General Permit for Groundwater Remediation Discharge Facilities in Idaho. ICL Ex. 1 at 7. EPA promulgated this General Permit over two years before AGC received coverage. *Id*. (dated 2007). This General Permit set the *statewide* arsenic effluent limit for this type of facility at 10 ug/L. *Id*. at 26. AGC's implication that it should have a much less stringent standard than every other facility in the state lacks any basis.

AGC's complaint that its arsenic standard is not properly based on a "cold water biota" standard, AGC SMF at 12, 13, is incorrect because NPDES permits must ensure that *all* applicable water quality standards will be met. 33 U.S.C. § 1311(b)(1)(C). Here, the designated uses used to set water quality standards in the Middle Fork Boise River

and Montezuma Creek include *primary contact recreation*,[3] which is more protective than aquatic life. The applicable arsenic standard for primary contact recreation is 10 ug/L.[4] Thus, AGC's Permit complies with the proper statewide standard.

AGC complains that the PWTF was only ever intended to be a temporary facility and that attaining the arsenic effluent limit is not technologically attainable with the technology employed by the PWTF. AGC SMF at 8, 10, 13. But this is because AGC was supposed to have replaced it with a *permanent facility* long ago. ICL Ex. 28 at 1 (Forest Service stating the PWTF was "scheduled for replacement with the long-term operation by 2008."). Thus, the problem lies with AGC's failure to upgrade or build a permanent treatment system, not with the standard.

Finally, AGC's insistence that a permanent facility can "only" be constructed after it has finalized a "mine plan" is not accurate. AGC SMF at 15, AGC Br. at 3. AGC cites to no fact or law establishing this. Of course AGC, as a mining company, would prefer to have its full mine approved before it has to expend more money on cleanup. But such a preference has no bearing on its actual obligations under its NPDES permit. Furthermore, after withdrawing its mine plan to conduct cyanide heap-leach mining on public lands, its present proposal is to conduct mining and processing on its private land. ICL Ex. 29 at 2. This means that AGC's argument that "no mine plan has been submitted

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[3] IDAPA 58.01.02.140.09 (establishing designated use for Middle Fork Boise River to include primary recreational contact); IDAPA 58.01.02.101.01.a (establishing primary recreational contact as designated use for Montezuma Creek because it is not designed otherwise in the rules); *see also* ICL SSF at 2–3 (reviewing designated uses).

[4] IDAPA 58.01.02.210 (establishing 10 ug/L as the Water Quality Standard for arsenic on water bodies with designated use as primary recreational contact).

to USFS for consideration," AGC Br. at 8, is a red herring, because if the mine is on private land, there may never be a mine plan submitted to the Forest Service.

Indeed, the agencies have informed AGC for years that it must improve its treatment facility, *regardless* of any full mine. The Forest Service informed AGC in February 2011 that it "must develop, and commit to, a long-term, comprehensive plan for treating 900 Level discharges," and that this need "is directly tied to current activity and cannot be addressed as a new action under separate Plan of Operations" (i.e., waiting for a mining plan). ICL Ex. 28 at 2. EPA informed AGC in its first Notice of Violation sent in February 2010, over a year before this action was filed, "[w]e strongly encourage Atlanta Gold to continue its efforts to become familiar with the terms of any relevant permits and *to take appropriate measures to ensure full compliance*." ICL Ex. 19 at 3 (emphasis added). In EPA's second notice, it again "strongly encourage[d] Atlanta Gold to *explore and implement treatment technologies that allow the facility to meet the effluent limits* as specified in its NPDES permit"—or face enforcement actions. ICL Ex. 20 at 3–4 (emphasis added). AGC has failed to do so.

ARGUMENT

AGC does not dispute that its discharges violate the CWA. Rather, it argues that the violations are somehow not "ongoing," and that this case is moot. It also offers excuses as to why enforcement is unfair, and complains about the terms of its Permit. Aside from being internally inconsistent, AGC's arguments fail. AGC continues to this day to violate its Permit, so this suit is neither barred nor moot; and its excuses are not relevant.

I. ATLANTA GOLD'S VIOLATIONS WERE ONGOING WHEN THE COMPLAINT WAS FILED, AND ARE STILL ONGOING.

The CWA authorizes citizen suits against dischargers that are "alleged to be in violation of" the Act. 33 U.S.C. § 1365(a)(1). Pursuant to this provision, citizen-plaintiffs can properly bring an enforcement action by making a "good-faith allegation of continuous or intermittent violation," but not where the violations are "wholly past." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987) ("*Gwaltney*"). To establish jurisdiction, citizen-plaintiffs' "allegations need only satisfy the good-faith pleading requirements set forth in Rule 11 of the Federal Rules of Civil Procedure. . . . [They] must be based on good-faith beliefs, 'formed after reasonable inquiry,' that are 'well grounded in fact.'" *Sierra Club v. Union Oil Co.*, 853 F.2d 667, 671 (9th Cir. 1988) (quoting *Gwaltney*). If a defendant challenges jurisdiction on this basis, it "must move for summary judgment and demonstrate that 'the allegations were sham and raised no genuine issue of fact.'" *Id*. (quoting *Gwaltney*). This low bar "reflects a conscious sensitivity to the practical difficulties of detecting and proving chronic episodic violations of environmental standards." *Gwaltney*, 484 U.S. at 64 (quotation omitted).[5]

ICL easily meets this test. The complaint makes a good-faith allegation of continuous violations. Compl. ¶¶ 56, 58 (Dkt. No. 1). ICL's allegation was based upon the facts that: AGC had reported violations of its permit in every DMR submitted since

[5] Additionally, to prevail on the *merits*, a citizen plaintiff must prove ongoing violations, "either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." *Sierra Club*, 853 F.2d at 671 (internal quotations omitted). ICL has also met this standard, as discussed in its motion for summary judgment.

receiving its Permit; AGC openly admitted that the treatment facility was incapable of meeting the Permit requirements; AGC had failed, despite multiple warnings from EPA, to upgrade its facility or otherwise take steps necessary to comply with the permit; and the violations of the effluent limits were increasing in severity over time. *See* Compl. at ¶¶ 54–58, ICL SSF at ¶¶ 20, 26–36, 38, 40. In fact, even AGC *concedes* that the violations were ongoing when the complaint was filed, as it only began its attempted abandonment ten days following the filing of the complaint. AGC Br. at 7. This should end the *Gwaltney* analysis.

Grasping at straws, AGC argues that ICL's allegation of continuing violations was somehow not in "good faith"—notwithstanding that the allegation has subsequently been proven true through AGC's own DMRs. ICL Ex. 16 at 11–19 (May, June, and July 2011 DMRs showing continuing violations from April through June); ICL Ex. 27 (Aug. 2011 DMR showing continued violations through July). To support this puzzling argument, AGC lists a series of excuses as to why it has never complied with its NPDES permit. AGC Br. at 8. But these excuses only serve to support the likelihood of continuing violations, and therefore the reasonableness of ICL's allegation. They fail to demonstrate in any way that the allegations "were sham and raised no genuine issue of fact." *Sierra Club*, 853 F.2d at 671.

For example, AGC implies that the facts that "the PWTF was intended to serve as an interim and temporary experimental water treatment facility" and was constructed with a "goal" of a more lenient arsenic standard than the standard in its Permit are somehow relevant to the good-faith analysis. AGC Br. at 8. But AGC's intentions, goals, and name for its treatment facility do not show that the allegation of ongoing

violations lacked a basis in fact. In fact, if anything, AGC's frank admissions that its facility is inadequate and cannot meet its permit standards only confirms the reasonableness of ICL's allegation of continuing violations.

Further, AGC's post-complaint attempt at abandonment and its representations as to what it may (or may not) do in the future are wholly irrelevant. AGC Br. at 8–9. Under *Gwaltney*, the only relevant question is whether violations are ongoing *on the date the complaint was filed*. *Gwaltney*, 484 U.S. at 64 (discussing whether defendant continued to violate permit "when plaintiffs filed suit") (quoting district court); *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1153 (9th Cir. 2000) (district court retained subject matter jurisdiction where plaintiffs "alleged violations of the Clean Water Act that were ongoing at the time the complaint was filed") (citing *Gwaltney*); *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 953 (9th Cir. 2002) (affirming finding of ongoing violations where, "as of the date of the filing of the complaint, January 15, 1998, there was a continuing violation and a reasonable likelihood of recurrent violations."). Again, AGC admits the violations were ongoing when the complaint was filed, and thus *Gwaltney* does not absolve AGC of its CWA violations. AGC Br. at 7. Any arguments about post-complaint compliance go to mootness, not to the *Gwaltney* analysis. *Gwaltney*, 484 U.S. at 66 (issue of whether allegations of noncompliance become false "at some later point in the litigation" (i.e., following the complaint) should be addressed by principles of mootness).

Because ICL's allegations of ongoing violations at the time it filed the Complaint were well-founded, and have in fact subsequently been proven true by AGC's own DMRs, AGC's argument that this case is barred by *Gwaltney* fails.

II. ICL'S CLAIMS ARE NOT MOOT, AS EFFECTIVE RELIEF IS AVAILABLE.

ICL's claims are not moot because AGC continues to violate the terms of its permit, continues to operate the facility at the 900 Adit site, and retains extensive interests in the site. As a result, this Court can order effective relief to abate the ongoing violations. A case is only moot if no effective relief can be granted. *N.W. Envt'l Defense Center v. Gordon*, 849 F.2d 1241, 1244–45 (9th Cir. 1988). "The burden of demonstrating mootness is a heavy one." *Id*. at 1244 (citations omitted). Mootness principles will "prevent the maintenance of suit when there is no reasonable expectation that the wrong will be repeated," or if the defendant demonstrates it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Gwaltney*, 484 U.S. at 66 (quotations omitted). Here, by contrast, it is absolutely clear that the violations are ongoing and are likely to continue.

A. AGC Retains Extensive Interests in the Adit Site.

AGC's mootness argument is based on an inaccurate factual premise: that is has supposedly "abandoned the property." AGC Br. at 6. Specifically, AGC states it has:

> produced undisputed evidence that it *no longer has any interest* in the Adit or the PWTF, and that it is *proceeding with* closing and reclaiming the site on which the PWTF is located. The *notice of termination and surrender* of AGC's NPDES permit, together with the relinquishment of AGC's interest in the property, demonstrates that AGC can not or will not legally or physically commit the 'wrongful conduct' alleged in the Complaint.

AGC Br. at 10 (emphases added). These assertions are both internally inconsistent and inaccurate.

Again, AGC has not in fact terminated or surrendered its NPDES permit. When it attempted to do so, EPA responded by pointing out that AGC cannot unilaterally walk

away from its permit obligations by sending a letter to that effect. ICL Ex. 25. AGC's Permit confirms this: the permit may only be modified or "terminated for cause" pursuant to regulations, and the mere "filing of a request by the permittee for a permit . . . termination . . . does not stay any permit condition." ICL Ex. 1 at ECF page no. 38); ICL Ex. 25 (permit coverage "does not automatically terminate upon notification."). Notably, AGC has continued to submit DMRs pursuant to the Permit. ICL Ex. 16 at 11–19, ICL Ex. 27 (May, June, July, & Aug. 2011 DMRs).

In addition to holding a legally binding NPDES permit, AGC retains extensive additional interests in the site—even if it has relinquished a lease and a mining claim on the property. [6] It continues to be an "operator" of the site, and is thus liable for any violations of the CWA at the site. As the Forest Service explained to AGC in detail this spring, under Forest Service mining regulations, "AGC is clearly an operator" in light of how it "has obtained Forest Service approval of several plans of operations for operations, which include underground exploration, water treatment, and reclamation." ICL Ex. 5 at 3. As such, it is responsible for reclaiming the site. *Id*. It has not yet begun to do so, because it has not yet submitted any adequate plan to reclaim the site. *Id*. As explained above, reclamation could take months or even years, because of the inadequacy of AGC's current "closure plan" and the complexity of the reclamation. *Id*. at 3–5.

AGC admits it is "maintaining and operating the PWTF until such time as a closure plan is approved and the site on which the PWTF is located is reclaimed." AGC Br. at 9. As such, it is responsible for complying with the CWA at the site.

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[6] AGC does not actually produce the evidence establishing it relinquished a lease and mining claim, only producing letters to agencies stating this. *See* Points Aff. ¶¶ 4–6.

Finally, AGC remains a legal cause of the discharges to Montezuma Creek by virtue of conducting exploratory drilling in the Adit for years, which exacerbated the discharge. ICL Ex. 5 at 2–3; *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, No. Civ. S-91-1372-LKK, 1993 U.S. Dist. LEXIS 8364, at *38 (E.D. Cal. Mar. 2, 1993), *aff'd*, 13 F.3d 305 (9th Cir. 1993) ("all that is required to establish liability is proof that the discharge occurred and that a given defendant was a legal cause of discharge.").

Thus, AGC's argument is that it has no interest in the site is simply false: it continues to hold a legally binding NPDES Permit for the 900 Adit site, submits DMRs documenting ongoing discharges pursuant to this Permit, is an "operator" of the site, is liable for site reclamation (which has not yet begun), and must maintain and operate the PWTF for the foreseeable future. As a result, its argument that this case is moot must fail; these interests are more than enough to allow for effective relief to still be granted.

B. Effective Relief Can Be Granted.

AGC has more than enough interest in the site to be held liable for its CWA violations. A NPDES permit holder is liable for violating the CWA if a plaintiff proves that: "defendants (1) discharged, i.e., added (2) a pollutant (3) to navigable waters (4) from (5) a point source." *Comm. to Save Mokelumne v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993). Thus, holding an ownership interest in the land on which the discharge occurs is not a required element for CWA liability. As the Ninth Circuit recently put it, the CWA "bans the discharge of any pollutant by any person regardless of whether that 'person' was the root cause *or merely the current superintendent of the discharge*." *NRDC v. County of L.A.*, 636 F.3d 1235, 1253 (9th Cir. 2011) (internal quotation omitted). *See also* ICL Ex. 8 (1992 EPA letter to Forest Service explaining

that, for active operations, the Adit *operator* must obtain a NPDES permit). Indeed, if ownership was determinative, AGC never would have applied for or been granted a NPDES permit in the first instance, as the Adit mouth has been on Forest Service land at all relevant times.

Because AGC still holds the permit, controls and operates the treatment facility, and as an operator is responsible for reclaiming the site, ICL's requested injunctive and declaratory relief, as well as civil penalties, would all be effective in redressing ICL's injuries and abating AGC's ongoing violations.

ICL's requested injunctive relief includes requesting the Court to "[p]ermanently enjoin Atlanta Gold from discharging pollutants into Montezuma Creek in violation of its NPDES permit." Compl. at 17. This relief remains effective because, as the undisputed operator of the PWTF, if ordered to do so, AGC could finally upgrade its facility or modify its operations in such a way as to bring its discharges into compliance with the effluent limits in its permit. ICL also requested that the Court "[i]ssue injunctive relief requiring Atlanta Gold to remediate the environmental damage and ongoing impacts resulting from Atlanta Gold's illegal discharges to Montezuma Creek." *Id*. This relief remains effective because, as the operator and the party responsible for reclaiming the site, if ordered to do so, AGC could take steps to do so. These forms of relief would directly redress ICL's injuries. *See* Declarations of Justin Hayes & John Robison (describing injuries to their interests in Montezuma Creek and Middle Fork Boise River from Permit violations).

ICL also requested that the Court "[d]eclare that Defendant Atlanta Gold Corporation violated and continues to violate section 301(a) of the Clean Water Act, 33

U.S.C. § 1311(a), by discharging pollutants in violation of its NPDES permit." Compl. at 17. This request for relief is effective, as a court's grant of declaratory judgment "delineates important rights and responsibilities and can be a message not only to the parties but also to the public and has significant educational and lasting importance." *Natural Res. Def. Council v. U.S. EPA*, 966 F.2d 1292, 1299 (9th Cir. 1992); *Skysign Int'l v. City & County of Honolulu*, 276 F.3d 1109, 1114 (9th Cir. 2002) ("An action for a declaratory judgment is live, not moot, if the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.")(internal quotations omitted). Because the violations are ongoing, this case certainly possesses the requisite immediacy and reality, and this relief remains effective.

Finally, ICL requested that the Court assess civil penalties against AGC. Compl. at 17. Civil penalties can be effective because "[t]o the extent that they encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct." *Laidlaw*, 528 U.S. at 185–86. Civil penalties are likely to redress injuries even where a defendant has closed and dismantled its facility, but retains its permit and could rebuild the facility and again violate the Act. *Id*. at 186, 179, 194–95. *See also Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1153 (9th Cir. 2000) (civil penalties effective even where original permit expired, as new permit did not make "permit violations any less likely, deterrence any less necessary, or the deterrent effect of civil penalties any less potent."). Because AGC

continues to hold the permit and operate the PWTF, it is very likely that civil penalties would spur AGC to halt its violations, in turn redressing ICL's injuries.

The three district court cases relied upon by AGC are easily distinguishable because they all involved defendants who had lost *all* control over the discharges at issue, and thus no order available to the courts could have remedied the violations. For example, AGC cites *Friends of Sakonnet v. Dutra* for the proposition that a person can avoid CWA liability by "relinquishing ownership of the polluting source although the violation continues." 738 F. Supp. 623, 632 (D.R.I. 1990). There, two past operators of a sewage treatment plant had sold the property years before the suit was brought. *Id*. at 626–28. The court held the current owner liable, but found that the past owners, having sold the facility years ago, "have no control over the pollution source." *Id*. at 633. This logic is irrelevant here, as AGC is the current operator of the facility. The same was true in *Brossman Sales v. Broderick*, where a former owner had "relinquished ownership of the source of the alleged violation and no longer ha[d] the control to abate it." 808 F.Supp. 1209, 1214 (E.D. PA 1992). In *Riverkeeper, Inc. v. Mirant Lovett, LLC*, the court found certain claims moot where the power plant at issue had been completely demolished and its NPDES permit terminated by the state. 675 F. Supp. 2d 337, 347–48 (S.D.N.Y. 2009).

Here, in stark contrast to all three cases, AGC continues to have direct control over the pollution source and the power to abate it. AGC still holds a NPDES permit for the pollution source, continues to submit DMRs, continues to maintain and operate the PWTF, and as an operator of the site, is responsible for reclamation. AGC continues to report violations in its DMRs, and continues to deny responsibility in its briefing before

this Court. As a result, this Court can provide direct and effective relief through myriad remedies, and this case is not moot.

III. ATLANTA GOLD'S MULTITUDE OF EXCUSES AND COMPLAINTS ARE IRRELEVANT.

AGC raises a multitude of excuses as to why it is in violation of its NPDES Permit and complaints about its Permit, all of which are legally or factually irrelevant, as the Clean Water Act is a strict liability statute and AGC is precluded from challenging its Permit terms in this enforcement action.

A. The Clean Water Act is a Strict Liability Statute.

AGC's excuses include that "AGC did not intend to maintain any interest in the property," that the PWTF was "intended" to be an interim facility, and that it is not the party that originally drove the Adit. AGC Br. at 8, 9, 13. As noted, the CWA is a strict liability statute, and thus intent is not relevant for CWA liability. *Hawaii's Thousand Friends v. City and County of Honolulu*, 821 F.Supp. at 1392. The Ninth Circuit rejected similar complaints in a case where the defendant operated a facility to capture and treat abandoned mine runoff, and was challenged for its failure to hold a NPDES permit. *Comm. to Save Mokelumne River*, 13 F.3d at 306–307. The Ninth Circuit explained that "[t]he Act does not impose liability only where a point source discharge creates a net increase in the level of pollution. Rather, the Act categorically prohibits any discharge of a pollutant from a point source without a permit." *Id.* (citing 33 U.S.C. §§ 1311(a), 1342(a); *Nat'l Wildlife Fed'n v. Consumers Power Co.,* 862 F.2d 580, 582 (6th Cir.1988)). Rejecting complaints from defendants who claimed certain permit terms should not be enforced against them, the Court recently held:

> 'The plain language of CWA § 505 authorizes citizens to enforce *all* permit conditions.' *Nw. Envtl. Advocates*, 56 F.3d at 986 (emphasis in original). We used these words and emphasized *all* permit conditions because the language of the Clean Water Act is clear in its intent to guard against all sources and superintendents of water pollution and 'clearly contemplates citizen suits to enforce 'a permit or condition thereof.'' *Id.* (citing 33 U.S.C. § 1365(f)(2), (f)(6)); *see also W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 167 (4th Cir. 2010) ('In other words, the statute takes the water's point of view: water is indifferent about who initially polluted it so long as pollution continues to occur.').'

NRDC v. County of L.A., 636 F.3d at 1248. Likewise, AGC's excuses are not relevant to its liability.

B. Atlanta Gold is Precluded from Challenging its Permit Terms.

As noted, the Clean Water Act provides for review of any portion of a permit within 120 days of permit issuance—but subsequently precludes judicial review of permits in enforcement proceedings. 33 U.S.C. § 1369(b). "Congress intended that anyone wishing to challenge the terms of an NPDES permit must do so within the period prescribed by section 509(b)(1) or lose forever the right to do so, even though that action might eventually result in the imposition of severe civil or criminal penalties. The rule is 'now or never.'" *Texas Mun. Power Agency v. Admin. of U.S. EPA*, 836 F.2d 1482, 1484 (5th Cir. 1988) (quotations omitted). *See also Pub. Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3rd Cir. 1990) (same).

Here, AGC's NPDES Permit was issued on August 6, 2009. ICL Ex. 1. AGC had 120 days in which to challenge any and all aspects of that Permit, including its complaint that the arsenic limit is unfairly stringent, AGC Br. at 8, and its complaint that EPA issued the wrong kind of permit. AGC SMF at 13. AGC did not do so. *See* AGC SMF (no mention of permit challenge). Thus, it cannot do so here.

CONCLUSION

For the foregoing reasons, ICL respectfully requests that the Court deny AGC's motion for summary judgment.

DATED this 16th day of September, 2011.

Respectfully submitted,

s/ Kristin F. Ruether
Kristin F. Ruether
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 2011, I caused the foregoing DECLARATION OF KRISTIN F. RUETHER to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the opposing counsel of record listed below:

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s/ Kristin F. Ruether
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