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7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
9

10 GARY LUNSFORD,

11 Plaintiff,

12 vs.

13 ARROWHEAD BRASS
14 PLUMBING and ARROWHEAD
15 BRASS & PLUMBING, LLC,

16 Defendants.
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Case No. 2:16-cv-08373-PA

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFF'S
MOTION TO ENTER CONSENT
DECREE**

Date: July 9, 2018

Time: 1:30 PM

Location: First Street Courthouse, 350
W. 1st Street, Courtroom 9A,

Complaint Filed: November 10, 2016

TABLE OF CONTENTS

1

2 TABLE OF CONTENTS..... ii

3 TABLE OF AUTHORITIES.....iv

4

5 I. INTRODUCTION.....1

6 II. STATEMENT OF FACTS AND PROCEDURAL HISTORY.....1

7 A. Parties.....1

8 B. Permit and CWA Violations.....1

9 III. LEGAL ARGUMENT.....2

10 A. Standard of Review for Approving Consent Decrees.....2

11 B. Plaintiff Is Not and Will Not be Receiving Any Monies From the

12 Revised Proposed Consent Decree.....3

13 C. Prior to the Issuance of the NOV Plaintiff Undertook

14 an Extensive Investigation.....5

15 D. Plaintiff’s NOV Detailed the Facts Supporting the CWA Permit

16 Violations.....6

17 E. The Permit Violations are Enforceable.....9

18 F. The Consent Decree Provides For Injunctive Relief That Furthers The

19 Goals of The CWA.....10

20 G. Plaintiff’s Expert Opines that Implementation of the RPCD Will Result

21 in Compliance with Water Quality Standards.....14

22 H. The RPCD Furthers The Objectives Upon Which the CWA is Based,

23 and Does Not Violate The Statute.....16

24 1. The RPCD Provides Strong Judicial Enforcement Options.....16

25 2. The RPCD Provides for an Appropriate Environmental Project

26 with a Nexus to the Alleged Violations.....16

27 3. The RPCD’s Requirements are Intelligible and Unlikely to

28 Cause Confusion.....17

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 4. The RPCD Requirements of Payments in Relation to Level 2 Status Reports are a Proper Tool to Further Incentivize Defendants’ Compliance with the IGP and the CWA.....18
- 5. The Statement of Concern is Not an Objection to this Consent Decree, But an Attempt to Limit Overall Citizen Suit Enforcement.....18
- 6. An NOV is Not a Citizens Suit.....20
- I. Plaintiff Has Standing.....21
- J. The Economic Components of the RPCD are Warranted and the RPCD Should Be Entered.....23
 - 1. Plaintiff is the Prevailing Party and Entitled to Fees.....23
 - 2. Attorneys’ Fees and Costs to Plaintiff as the Prevailing Party in the RPCD are Appropriate.....24
 - 3. The Agreed Upon Economic Components in the RPCD Are Similar to Other Court Approved Consent Decrees By This District Without Motion.....25
 - 4. The Work Performed and Lodestar Cross Check Wholly Support the Agreed Upon Attorneys’ Fees and Costs Provision in the RPCD.....25

TABLE OF AUTHORITIES

CASES

AG Indus Mfg., 375 F.3d at 917-18 7

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1 *Sierra Club v. Union Oil Co. of Cal.*, 813 F.2d 1480, 1491 (9th Cir. 1987) *vacated*
2 *and remanded on other grounds*, 485 U.S. 931, 108 S.Ct. 1102, 99 L.Ed.2d 264
(1988), *reinstated and amended* by 853 F.2d 667 (9th Cir. 1988).....5

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4 1990).....2, 3

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6 1054, 1058 (9th Cir. 2009).23

6 **STATUTES**

7 33 U.S.C. § 1365(b)6

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1 **I. INTRODUCTION**

2 Before this Court is Plaintiff Gary Lunsford’s (“Lunsford” or “Plaintiff”)
3 Motion to Enter the revised Proposed Consent Decree (“RPCD”) in this matter. The
4 Court should enter the RPCD because it is fair, reasonable, equitable, and does not
5 violate the Clean Water Act (“CWA”). The RPCD was achieved through arms’-
6 length negotiations facilitated through the Court’s ADR panel mediation program
7 (Settlement Master, David Cranston, Esquire), as well as a FRCP 34 site inspection
8 conducted by Plaintiff’s retained environmental expert, resulting in specific
9 injunctive relief, in the form of specific environmental remedies. These remedies are
10 designed to reduce pollutants in Defendants’ stormwater and are in furtherance of
11 the best interests of the CWA.

12 **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY¹**

13 **A. Parties.**

14 Plaintiff is a citizen of the State of California and brought this citizen
15 enforcement action against Defendants Arrowhead Brass Plumbing and Arrowhead
16 Brass & Plumbing, LLC (“Defendants” or “Arrowhead”), pursuant to the CWA, to
17 stop the illegal discharges of stormwater runoff from Defendants’ industrial
18 operations at its plumbing and supply foundry in Los Angeles, California (the
19 “Facility”). *See* Declaration of Evan J. Smith in Support of Motion to Enter Consent
20 Decree (hereinafter “Smith Decl.”) at ¶ 2.

21 **B. Permit and CWA Violations.**

22 In 2011, Defendants first sought and obtained coverage under the National
23 Pollutant Discharge Elimination System (“NPDES”) General Permit No
24 CAS000001 [State Water Resources Control Board] Water Quality Orders No.
25

26 _____
27 ¹ Plaintiff submits that the procedural history in this case is relevant but due to the limitation on
28 pages in this brief, the relevant procedural history is set forth in the Smith Decl. at ¶¶ 5-9.

1 2014-0057-DWQ (encompassing previous editions thereof) (“IGP”), which is
2 ongoing. *Id.* at ¶ 3. The IGP requires Defendants to test their stormwater discharges
3 for (i) pH; (ii) Oil & Grease (“O&G”); (iii) TSS; and (iv) Total Aluminum; (v) Total
4 Iron; (vi) Total Zinc; (vii) Total Copper; and (viii) Nitrate plus Nitrite Nitrogen. *Id.*
5 The IGP requires Defendants to collect a total of four (4) stormwater samples during
6 an annual reporting period (July 1 – June 30). *Id.*

7 Plaintiff’s investigation determined that stormwater discharges at the Facility
8 contained impermissibly high levels of Aluminum, Copper, Zinc, Iron, in the 2011-
9 2012, 2014-2015, and 2015-2016 annual reporting periods, as well as impermissibly
10 high levels of Nitrate plus Nitrite Nitrogen in the 2011-2012 and 2015-2016 annual
11 reporting periods. *Id.* at ¶ 4. Additionally, Defendants failed to adequately test the
12 proper amount of Qualified Storm Events (“QSEs”) and to test for all required
13 Numeric Action Limits (“NAL”) pollutants. *Id.* Notably, Defendants failed to test
14 for any pollutants whatsoever in the 2012-2013 and 2013-2014 annual reporting
15 periods, and only tested one QSE in the 2015-2016, 2014-2015, and 2011-2012
16 annual reporting periods, instead of the required four or two QSEs as applicable. *Id.*

17 Plaintiff contends that Defendants’ discharge of polluted stormwater is a
18 result of their failure to develop and implement an adequate Stormwater Pollution
19 Prevention Plan (“SWPPP”), failure to implement best management practices
20 (“BMPs”) that achieve best available technology economically achievable (“BAT”)
21 or best conventional pollutant control technology (“BCT”), and failure to develop
22 and implement adequate Monitoring and Reporting Plans (“M&RPs”). *See*
23 Complaint generally.

24 **III. LEGAL ARGUMENT**

25 **A. Standard of Review for Approving Consent Decrees.**

26 Consent Decrees bear some of the earmarks of judgments entered after
27 litigation. *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350,1355
28

1 (9th Cir. 1990). At the same time, because their terms are arrived at through mutual
2 agreement of the parties, consent decrees also closely resemble contracts. *Id.* (citing
3 *Local 93, Int’l Ass’n of Firefighters, AFL CIO v. City of Cleveland*, 478 U.S. 501,
4 519, 106 S. Ct. 3063, 3073, 92 L.Ed.2d 405 (1986)).

5 Significantly, as long as a consent decree comes within the general scope of
6 the case made by the pleadings, furthers the objectives upon which the law is based,
7 and does not violate the statute upon which the complaint is based, the parties’
8 agreement may be entered by the Court. *Id.* Thus, because of the unique aspect of
9 settlements, a district court should enter a proposed consent judgment if the Court
10 decides that it is fair, reasonable, equitable and does not violate the law or public
11 policy. *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1444-45 (9th Cir.
12 1989).

13 **B. Plaintiff Is Not and Will Not be Receiving Any**
14 **Monies From the Revised Proposed Consent Decree.**

15 The DOJ should know that Plaintiff will *not be receiving any monies* from the
16 RPCD. Nevertheless, the DOJ disingenuously claims on the first page of its
17 Statement of Concern (“Statement”) [Dkt # 51] that the “proposed consent decree
18 would pay Mr. Lunsford \$15,000 – for claimed services to be rendered as an
19 environmental ‘monitor.’” Statement at p. 1. The determination to lead off its
20 Statement with such a distorted interpretation of the RPCD is nothing more than a
21 transparent attempt to color the Court’s opinion with a statement the DOJ should
22 know not to be true.

23 As required, Plaintiff supplied the DOJ with an initial proposed Consent
24 Decree (“IPCD”) on January 18, 2018. Smith Decl. at ¶ 10. The IPCD provided for
25 a payment of \$1,000 to Mr. Lunsford for time spent achieving the results set forth in
26 the IPCD and to encourage his participation in future environmental enforcement
27 actions. *Id.* There was nothing improper or unlawful about this proposed incentive
28

1 award/payment and such a payment is in accord with Ninth Circuit precedent.
2 Specifically, in *Sierra Club, Inc. v. Electronic Controls*, 909 F.2d 1350 (1990), in
3 confirming payments in a CWA Consent Decree, the Ninth Circuit stated, “The
4 Clean Water Act also does not render the proposed consent judgment unlawful. The
5 provisions of the Act provide no limitations on the type of payments to which parties
6 to a citizens’ suit can agree in a settlement.” *Id.* at 1356.

7 Nevertheless, the DOJ objected to the \$1,000 payment. Smith Decl. at ¶ 11.
8 After several meet and confers, and as a mere accommodation, Mr. Lunsford agreed
9 to have the \$1,000.00 paid directly by Defendants to the University of California as
10 part of the Supplemental Environmental Project (“SEP”). *Id.* On February 28, 2018,
11 Plaintiff submitted the RPCD for review. *Id.* See RPCD, a true and correct copy of
12 which is attached to the Smith Decl. at Exhibit “1.” The RPCD did not change the
13 language regarding monitoring costs and the DOJ had no previous objection to this
14 provision. *Id.* Nevertheless, for the first time, at a May 14, 2018 meeting, the DOJ
15 raised a concern that the monitoring provision could be interpreted as providing
16 money to Lunsford. *Id.*

17 The RPCD clearly states that Defendants are paying \$15,000.00 “to
18 compensate Plaintiff for costs and fees to be incurred for monitoring Arrowhead’s
19 compliance with this Consent Decree” and that “payment shall be made...payable to
20 ‘Brodsky & Smith, LLC.’” See RPCD at p. 23:6-10. Moreover, Plaintiff’s counsel
21 specifically advised the DOJ at the May 14, 2018 meeting that the Plaintiff was *not*
22 *receiving any of the \$15,000.00 inspection costs and that the Consent Decree*
23 *required a qualified QISP to conduct the future inspection.* Smith Decl. at ¶ 12.
24 RPCD at p. 22:27-28, p. 23:1-2.² Simply put, Plaintiff is not receiving any money in
25
26

27 ² In addition, at the May 14, 2018 meeting with the DOJ and EPA, prior to its Statement being
28

1 the RPCD. *See* Declaration of Gary Lunsford (“Lunsford Decl.”), a true and correct
2 copy of which is attached to Smith Decl. at Exhibit “2.”

3 **C. Prior to the Issuance of the NOV Plaintiff Undertook**
4 **an Extensive Investigation.**

5 The Statement claims that Plaintiff’s allegations are general and implies that
6 Plaintiff failed to conduct an adequate investigation. Statement at pp. 12, 24.
7 However, as the Statement acknowledges, Plaintiff advised the DOJ and EPA that
8 prior to the issuance of the Notice of Violation (“NOV”) Plaintiff conducted an
9 extensive investigation which included online review of California’s online Storm
10 Water Multiple Application and Report Tracking System (“SMARTS”) database,
11 review of PACER California registration records, review of EPA benchmarks and
12 water quality standards, additional internet investigation, review of National
13 Oceanic and Atmospheric Administration (“NOAA”) rain data, review of records
14 contained at the offices of the Regional Water Quality Control Board (“RWQCB”),
15 and hiring an outside expert to travel to the Facility to inspect and photograph
16 discharge points. Statement at p. 12. Smith Decl. at ¶ 14.

17 The investigation is in accordance with the IGP, which fundamentally relies
18 upon self-monitoring. *Sierra Club v. Union Oil Co. of Cal.*, 813 F.2d 1480, 1491
19 (9th Cir. 1987) *vacated and remanded on other grounds*, 485 U.S. 931, 108 S.Ct.
20 1102, 99 L.Ed.2d 264 (1988), *reinstated and amended by* 853 F.2d 667 (9th Cir.
21 1988). For example, permit holders must file periodic discharge monitoring reports,
22 which must contain the results of all monitoring of discharges, and must indicate
23 where those discharges exceed permit limitations. *Natural Resources Defense*
24 *Council, Inc. v. County of Los Angeles*, 725 F. 3d 1194, 1208 (9th Cir. 2013). This

25
26
27 filed, Plaintiff provided the name and CV of a qualified expert who would likely be performing
28 the future monitoring and inspection, as well as an example of the expected expert costs that would
be incurred as a result of the future monitoring and inspection. Smith Decl. ¶ 13.

1 information is contained in the SMARTS database, and was reviewed by both
 2 Plaintiff's counsel and their expert. Smith Decl. at ¶ 15.

3 Congress' purpose in adopting this self-monitoring mechanism was to
 4 promote straightforward enforcement of the Act. *Sierra Club* at 1492. Thus,
 5 enforcement actions may be based on little, if anything, more than self-reported
 6 discharge monitoring reports. *National Resource Defense Council* at 1208. While
 7 Plaintiff's investigation was based upon much more than these self-reported
 8 discharge monitoring reports, they do, in part, form the basis of the NOV.

9 **D. Plaintiff's NOV Detailed the Facts Supporting the CWA**
 10 **Permit Violations.**

11 Plaintiff's NOV provides specific detail regarding Defendants' permit
 12 violations and, in fact, provides the same type of information that is provided in
 13 virtually every CWA NOV filed in California by a Citizen Enforcer. Smith Decl. at
 14 ¶ 16.³ The Statement nevertheless makes the erroneous claim that the allegations
 15 are unclear, incorrectly alleging that Plaintiff has failed to 1) identify Defendants'
 16 permit monitoring frequency requirements, 2) show when monitoring occurred, and
 17 3) cross-reference said information regarding qualifying rainfall events, in order to
 18 demonstrate that Defendants' monitoring was inadequate. Statement at pps. 24-26.
 19 This contention is so patently incorrect that it can only have resulted from a failure
 20 to read the NOV. *Id.* at ¶ 17.

21 The CWA specifically provides that actions can be brought by private persons
 22 for the purposes of enforcing the CWA. *Ctr. For Biological Diversity v. Marina*
 23

24 _____
 25 ³ It should be noted that the instant NOV is similar to the vast majority of NOVs that have been
 26 issued under the CWA in this District for the past 10 years. Smith Decl. at ¶ 16. Plaintiff attaches
 27 20 examples of NOVs from 2009-2018. True and correct copies of these CWA NOVs are attached
 28 to the Smith Decl. as Exhibits "16-30."

1 *Point Dev. Co.*, 566 F.3d 794, 799 (9th Cir. 2009). However, before an action may
 2 be brought, the citizen must give a 60-day notice of intent to sue or NOV. *Id.* at 800.
 3 *See also*, 33 U.S.C. § 1365(b). Absent such notice, an action is prohibited. *Id.*
 4 “Compliance with the 60-day notice provision is a mandatory, not optional,
 5 condition precedent for suit. “ *Hallstrom v. Tillamook County*, 493 U.S. 20, 26
 6 (1989). “The notice is not just an annoying piece of paper intended as a stumbling
 7 block for people who want to sue; it is purposive in nature and the purpose is to
 8 accomplish corrections where needed without the necessity of a citizen action.” *Ctr.*
 9 *For Biological Diversity*, 566 F.3d at 800. In order for Plaintiff’s 60-day notice to
 10 be adequate it was required to include:

11 Sufficient information to permit the recipient to identify the specific
 12 standard, limitation, or order alleged to have been violated, the activity
 13 alleged to constitute a violation, the person or persons responsible for
 14 the alleged violation, the location of the alleged violation, the date or
 15 dates of such violations, and the full name, address, and telephone
 number of the person giving notice.

16 40 C.F.R. Section 135.3(a). These requirements carry out important public policies.
 17 *Ctr. For Biological Diversity*, 566 F.3d at 802.⁴

18 Here, Plaintiff served the NOV on Defendants on August 22, 2016. Smith
 19 Decl. at ¶ 17.⁵ The NOV provided 1) substantial detailed allegations regarding

20 _____
 21 ⁴ Of note, the Ninth Circuit has approved substantially similar notices to the instant one, wherein,
 22 the notice informed the entity of “improper discharges during each and every rain event of a certain
 23 intensity, and the days of that rain event intensity were listed.” *San Francisco Herring Association*
v. Pacific Gas and Electric Company, 81 F.Supp.3d 847, 857 (N.D. Cal. 2015).

24 ⁵ A true and correct copy of the Notice is attached to the Complaint [Dkt # 1] as Exhibit 1, but is
 25 attached for the Court’s convenience to the Smith Decl. at Exhibit “3.” The NOV was also
 26 properly served on all requisite governmental entities, including the Administrator of the United
 27 States Environmental Protection Agency (“EPA”); the Regional Administrator of EPA Region
 IX; the Executive Director of the State Water Resources Control Board (“State Board”); the
 28 Executive Officer of the Regional Water Quality Control Board, Los Angeles Region (“Regional
 Board”) (collectively, “state and federal agencies”) and Defendants. Smith Decl. at ¶ 18.

1 Defendants' alleged unlawful conduct; 2) provided citations to each provision of the
2 IGP, the U.S. EPA 2008 Multi-Sector General Permit for Stormwater Discharges
3 Associated With Industrial Activity (the "2008 MSGP"), and the CWA alleged to
4 have been violated; 3) the identity of those responsible for the violations
5 (Defendants); 4) the dates of the alleged violations (as set forth in the NOV,
6 violations occurred on of each date of a qualified storm event); and 5) the Plaintiff's
7 contact information. *Id.* Similar to the NOV approved by the Ninth Circuit in *AG*
8 *Indus Mfg.*, the NOV here contains allegations of improper discharges during all
9 dates of rain events in the area of the Facility of a certain intensity, and includes a
10 list of all such dates. *Id.*

11 In addition, the NOV provides detailed information regarding the Defendants'
12 permit violations stemming from the failure to conduct the required stormwater
13 monitoring/testing. *Id.* at ¶ 19. Specifically, the NOV states:

14 As a part of the MRP, the Industrial Stormwater Permit specifies that
15 Facility operators shall collect a total of four (4) stormwater samples
16 throughout an annual reporting period. Specifically the Industrial
17 Stormwater Permit requires the discharger to collect and analyze
18 samples from two (2) Qualifying Storm Events ('QSE's) within the
19 first half of each reporting year (July 1 to December 31), and two (2)
20 QSEs within the second half of each reporting year (January 1 to June
21 30)." Industrial Stormwater Permit § XI B(2) ...Furthermore, should
22 facility operators fail to collect samples from the first storm event of
the wet season, they are still required to collect samples from two other
storm events during the wet season, and explain in the annual report
why the first storm event was not sampled.

23 Despite this requirement Arrowhead Brass has submitted the annual
24 report for the 2013-2014 and 2012-2013 reporting periods with no
25 testing data whatsoever, and submitted the annual report for the 2015-
26 2016, 2014-2015, and 2011-2012 reporting periods with testing data
from only one (1) QSE. Additionally, Arrowhead Brass has failed to
adequately explain why such sampling was not included.

1 *Id.* Smith Decl. at Exhibit “3.”

2 **E. The Permit Violations are Enforcable.**

3 A permittee violates the CWA when it discharges pollutants in excess of the
4 levels specified in the permit, or where the permittee otherwise violates the permit’s
5 terms. *Natural Resources Defense Council, Inc. v. County of Los Angeles*, 725 F.
6 3d 1194, 1204 (9th Cir. 2013) (citing *Russian River Watershed Prot. Comm. v. City*
7 *of Santa Rosa*, 142 F.3d 1136, 1138 (9th Cir. 1998). “Any permit noncompliance
8 constitutes a violation of the Clean Water Act and is grounds for an enforcement
9 action.” *Id.* citing *NW Env’tl. Advocates v. City of Portland*, 56 F.3d 979, 986 (9th
10 Cir. 1995) (“noting that the plain language of the CWA citizen suit provision
11 authorizes citizens to enforce all permit conditions”). Moreover, as the 9th Circuit
12 has stated, “In fact, permit conditions that courts commonly enforce under section
13 505(a) are not effluent limitations, but rather, requirements for retaining records of
14 discharge sampling and for filing reports.”⁶

15 Therefore, Plaintiff has clearly established both specific permit violations and
16 his right to sue under the CWA. These permit violations are not general or unclear.
17 As set forth in the NOV, they are not a one-time issue, but instead have reoccurred
18 every year since at least 2011. Plaintiff has specifically identified permit monitoring
19 frequency requirements, established when monitoring occurred and failed to occur,
20 and cross-referenced information regarding qualifying rainfall events to demonstrate
21 the Defendants’ lack of monitoring and permit violations.⁷

23 ⁶ See, eg. *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1115 (4th Cir. 1988) (“Simkins
24 reporting requirements are expressly made conditions of its permit, and therefore violations of
25 those conditions, by operation of section 1365(f)(6) CWA section 505(f)(6), are violations of an
26 effluent standard or limitation of section 1365, *cert denied*, 491 U.S. 904, 109 S.Ct. 3185, 105
L.Ed.2d 694 (1989).

27 ⁷ The NOV cross-references relevant rain data taken from NOAA’s National Climatic Data Center
28 to show dates of when stormwater testing was required.

1 **F. The Consent Decree Provides For Injunctive Relief That**
2 **Furthers The Goals of The CWA.**

3 The Statement fails to acknowledge the injunctive relief already obtained by
4 the litigation and the additional injunctive relief that will be obtained by the entry of
5 the RPCD. In fact, the RPCD provides injunctive relief which is described in detail
6 over *17 pages*. See RPCD at pps. 6-22, Smith Decl. at Exhibit “1.” All of this
7 injunctive relief is aimed at reducing the pollutant levels in the stormwater
8 discharged from the Facility, and is geared toward compliance with the IGP - the
9 exact relief Plaintiff sought when serving the NOV and filing the Complaint. Smith
10 Decl. at ¶ 20.

11 To be clear, Plaintiff filed the Complaint on November 10, 2016. Smith Decl.
12 at ¶ 21. As a result of the Complaint, on January 31, 2017, Arrowhead’s QISP issued
13 an updated SWPPP. *Id.* The updated SWPPP included the following revisions (more
14 fully described in the updated SWPPP) intended to reduce the pollutants in their
15 stormwater:

16 Creation of Second Discharge Point

17 The Updated SWPPP adds a second Discharge Point (“DP2”) to the
18 Facility. DP2 is reflected both in narrative description in several
19 sections of the Updated SWPPP as well as being readily identified in
20 the Facility Site Map included in the Updated SWPPP.

21 Revisions to Assessment of Potential Pollutant Sources

22 The Updated SWPPP amends and revises its Assessment of Potential
23 Pollutant Sources to reflect the narrative description of the potential
24 pollutants that could result from several areas of the Facility, the
25 industrial activities that take place therein, and what BMPs have been
26 put in place to address them. The following changes were made, in
27 both narrative form and in Table 3 addressing these issues: (i) the
28 removal of a previously installed Aqueous Machine Parts Cleaner; (ii)
the renaming of the “Component Part Storage” area to the “Cutting
Oil and Used Oil Storage” area to more adequately describe the
purpose and industrial processes occurring therein; and (iii) the
addition of a “Pre-Assembly Area” and potential pollutant sources

1 resulting therein from the industrial process of soldering, including
2 Nitrate plus Nitrite Nitrogen and Metal Particulates, and that the
3 BMPs of sweeping and inspections were implemented to address such
4 potential pollutants in this area of the Facility.

5 Revision of the Sampling and Analysis Section

6 The Updated SWPPP includes major revisions to its Sampling and
7 Analysis Section, including a more accurate description of each
8 discharge point, including the newly created DP2. Specifically, the
9 following new procedures and information was added to the Updated
10 SWPPP: (i) information on the industrial activities in close proximity
11 to each discharge point; (ii) information regarding the physical
12 characteristics of each discharge point; (iii) information regarding the
13 BMPs implemented near each discharge point to address applicable
14 potential pollutants.

15 In addition the Updated SWPPP also lists all pollutant parameters
16 considered impairments to the receiving water body to which
17 stormwater discharges from the Facility Flow, and whether such
18 pollutant parameters are present at the Facility. Notably, this section
19 lists (i) Copper, (ii) Zinc, (iii) Copper (dissolved), (iv) Nitrate, Nitrite,
20 total Nitrogen, (v) oil, and (vi) pH, as “present at the facility” and thus
21 required to be included in the Facility’s Sampling and Analysis
22 program, in addition to any other sampling required pursuant to the
23 IGP (notably, Copper (dissolved) was not previously included in this
24 regimen, but was added as a result of the Updated SWPPP).

25 The Updated SWPPP also makes note that the Facility is in Level 1
26 for Nitrate + Nitrite, Aluminum, Copper, Iron, and Zinc based upon
27 results from storm water sampling for the year 2015-2016.

28 Revision to Table 1: Inventory of Industrial Materials Stored or
Handled on Site

The Updated SWPPP revises the above referenced Table to include
information that the materials of “Filter Cake Sludge – F006” and
“Slag” are shipped to the Facility.

Revisions to the Pollution Prevention Team

The Updated SWPPP revises the Pollution Prevention Team to reflect
updates in personnel assigned to the Pollution Prevention Team.

1
2 Revisions to the Storm Drain System Description

3 The Updated SWPPP includes additional information regarding the
4 physical characteristics of the Facility including the nature of the
5 neighboring facility from which stormwater run-on occurs, the
6 percentage of imperviousness of the Facility, and the amount of
7 acreage of industrial materials exposed to precipitation.

8
9 Revisions to Sample Chain-of-Custody Form

10 The Updated SWPPP includes the Facility address on the sample
11 chain-of-custody form.

12 Revisions to Company Name

13 The Updated SWPPP revised the Company name to reflect a merger
14 transaction as between Arrowhead and Champion Irrigation. *Id.*

15 While Plaintiff believed this injunctive relief was substantial and would bring
16 the Facility closer to compliance with the IGP and CWA, Plaintiff still required a
17 site inspection to determine which advanced BMPs would be required to reduce
18 Defendants' stormwater pollutants and achieve full compliance with the IGP and
19 CWA. Smith Decl. at ¶ 22. To that end, on October 27, 2017, Plaintiff's expert
20 conducted a thorough site inspection of the Facility. *Id.* Following the site
21 inspection, Plaintiff's expert recommended several additional BMPs to further
22 reduce pollutants in stormwater discharges at the Facility and achieve full
23 compliance with the IGP and CWA. *Id.* These additional BMPs, read into the record
24 at the last status conference, which are not in the Defendants revised SWPPP and
25 are to be implemented upon entry of the Consent Decree, are stated in § III of the
26 revised proposed Consent Decree (pps. 10-13) as follows:

27 Additional BMP 1 – Baghouse Dust Collection

28 Arrowhead will ensure that the connection between the baghouse dust
collector and the drums are sealed and that BMPs are employed
related thereto. Maintenance logs will be kept for events related to
dust collector maintenance including changing the filter cartridges and
ensuring that the connection between the dust collector and the

1 containers are sealed after every quarterly container change-out event.
2 Maintenance log notes will be kept indicating that all connections
3 between the dust containers and the drop chutes of the dust collector
4 are sealed and secured. Additionally, monthly BMP inspections
5 include verifications that all container connections are sealed and
6 secured. The contents of the containers are managed and disposed of
7 in accordance with all applicable state and federal regulations. The
8 SWPPP will be amended to include the above descriptions in the
9 appropriate BMP sections.

10 Arrowhead will purchase a HEPA Wet/Dry Shop Vacuum, the dust
11 collector area will be HEPA-vacuumed and wet mopped after each
12 Dust Collector maintenance event (on an as-needed basis) or quarterly
13 container change-out. In addition, the area will be observed daily and
14 vacuumed as needed. Monthly BMP inspection documentation forms
15 will be used to document the implementation and maintenance of this
16 BMP. The Facility SWPPP will be revised as needed to reflect these
17 changes. During the interim, whenever maintenance is performed on
18 the unit or material is removed, the containment area will be
19 thoroughly swept.

20 Additional BMP 2 – Roof Sweeping

21 Arrowhead will engage in weekly inspections of the rooftop over the
22 Facility, and sweep it no less than monthly, unless a weekly inspection
23 reveals the need for additional sweeping. The Facility's SWPPP will
24 be revised to reflect this additional BMP.

25 Additional BMP 3 – East Yard

26 Arrowhead will discontinue the use of the plating line adjacent to the
27 East Yard beginning on January 1, 2018. The existing plating line
28 permit will remain in effect, although actual use will be dormant. If
the plating line is restarted in the future (under the existing permit),
Arrowhead Brass will implement "housekeeping" BMPs (e.g.,
inspections, vacuuming, maintenance logs, etc.).

29 Additional BMP 4 – Shipping Area

30 Arrowhead will clean the shipping area daily after each work shift
with a HEPA shop vacuum and include this area in a daily sweep log.
In addition to the aforementioned sweeping, daily observations should
be sufficient to ensure the protection from releases into storm water

1 run-off from this area. Daily sweep logs of this and other areas of the
 2 facility will be added to the SWPPP and the BMP descriptions for
 3 Good Housekeeping will be revised accordingly.

4 Additional BMP 5 – Materials

5 Arrowhead produces castings from purchased alloy ingots made of
 6 ASTM alloy C83470. According to the C83470 specifications
 7 provided by the Copper Development Association, Inc., this material
 8 contains lead (Pb) at 0-0.09% by weight and aluminum (Al) at 0-
 9 0.01% by weight. Therefore, Pb and Al are present only in trace
 10 amounts as impurities. This content is not significant enough to
 11 impact storm water quality. Yet, since Arrowhead is required to
 12 sample Al based on their Standard Industrial Classification (“SIC”)
 13 code, the company will continue to sample for Al. However, due to
 14 the relevant information outlined above, Arrowhead will not analyze
 storm water samples to determine concentrations of lead and the
 sampling and analysis program for Arrowhead will not change. In the
 event Arrowhead changes to an alloy that is not lead free, Arrowhead
 will supplement its testing to include testing for lead and will revise
 the SWIPP accordingly.

15 Based upon the above, this litigation and the entry of the RPCD will provide
 16 real, tangible injunctive relief that will reduce the pollution in the
 17 Defendants’ stormwater, all in furtherance of the goals of the CWA.⁸

18 **G. Plaintiff’s Expert Opines that Implementation of the RPCD**
 19 **Will Result in Compliance with Water Quality Standards.**

20 Plaintiff’s expert, George Caamano, of Water414, Inc., QISP, TOR
 21 (“Caamano”), personally inspected the Facility and reviewed Defendants’ SMARTS
 22 filings. *See* May 30, 2018 Expert Report of George Caamano (“Caamano Report”)

23 _____
 24 ⁸ It should be noted that the RPCD provides for similar relief as several other court-approved CWA
 25 consent decrees, all of which were unopposed by the DOJ. Smith Decl. at ¶ 23. Therefore, the
 26 filing of this Statement may reflect a change in enforcement policy. Regardless, this change in
 27 enforcement policy does not affect the Court’s ability to determine that the RPCD is fair,
 28 reasonable, equitable, and does not violate the CWA. True and correct copies of four (4) court
 approved CWA Consent Decrees from this District in the past 2 years are attached as Exhibits “5-
 8” to the Smith Decl.

1 at p. 1, a true and correct copy of which is attached to the Smith Decl. at Exhibit “4.”
2 It is Caamano’s expert opinion that the Facility is not in compliance with the IGP or
3 the CWA. *Id.* He also opines that Arrowhead does not currently have adequate
4 BMPs and/or has not implemented current BMPs effectively to comply with the IGP.
5 *Id.*

6 This failure has caused or contributed to exceedances of receiving water
7 contamination levels as outlined in California water quality standards. *Id.* Caamano
8 further opines that Arrowhead was not meeting the BAT/ BCT requirements for
9 example, as the “control of fugitive dust and particulates appear to be leading to the
10 NAL exceedances and that methods that were being employed by Arrowhead were
11 not addressing these contaminant sources adequately.” *Id.*

12 Consequently, it is Caamano’s expert opinion that the implementation of the
13 additional BMPs written into the RPCD will achieve compliance with the IGP, and
14 will meet water quality standards. *Id.* As such, based upon his review of the Notice,
15 Complaint, his site inspection, and terms of the Consent Decree, Caamano opines
16 that the RPCD “is fair, reasonable and adequate, and serves to further the goals of
17 the Clean Water Act.” *Id.* “The BMPs listed in the Consent Decree address the dust
18 and particulate issues directly, and provide affordable and implementable BMPs that
19 will result in a positive improvement that should be seen in future laboratory results.”
20 *Id.*

21 Caamano has also agreed to be the qualified QISP who will conduct the future
22 monitoring and additional inspection for Plaintiff required in the RPCD. *Id.* This
23 will allow for confirmation and verification that the additional BMPs have been
24 implemented. As a result, the implementation and verification of the BMPs called
25 for in the RPCD result in a settlement that is fair, reasonable, equitable, serves the
26 public interest, and furthers the goals of the CWA. *Id.*

1 **H. The RPCD Furthers The Objectives Upon Which the**
2 **CWA is Based, and Does Not Violate The Statute.**

3 The RPCD provides substantial injunctive relief which furthers the objective
4 of reducing Defendants’ stormwater pollution, and is not violative of the CWA. The
5 Statement raises, for the first time, a number of minor questions or critiques. The
6 criticism is unwarranted; more importantly, however, none of them result in the
7 RPCD being violative of CWA, nor do any provide a valid basis to deny its entry.

8 **1. The RPCD Has Strong Judicial Enforcement Options.**

9 The RPCD allows Plaintiff to seek both judicial and administrative enforcement
10 of its terms. The Statement suggests that enforcement of future violations of the IGP
11 “may” not be subject to judicial enforcement. Statement at p. 29. This concern,
12 similar to a number of other so-called concerns, is inconsistent with the very
13 language of the document.

14 Here, the RPCD sets out that for matters governed by a provision of the IGP,
15 the Plaintiff *may* (not shall) avail himself of any remedies available through the
16 RWQB or the courts of California. *See* RPCD at p. 25. The provision in no way
17 limits the Plaintiff to only this enforcement mechanism, and certainly does not
18 preclude enforcement through motion practice in this Court, as evidenced by its
19 specific language on page 4 at ¶ 5, and page 28 at § VIIIA.

20 **2. The RPCD Provides for an Appropriate Environmental**
21 **Project with a Nexus to the Alleged Violations.**

22 The RPCD provides that Arrowhead will make a “payment of eight thousand
23 five hundred dollars (\$8,500) to University of California San Diego Extension
24 Services (“UCSDES”) to fund tuition grants for owners and employees of small
25 businesses (business having no more than 50 employees) affected by the IGP.”
26 RPCD at p. 24. Despite this clear nexus, the Statement feigns concern about the
27 nexus between the environmental project and the litigation. Statement at pps. 30-
28 31. The Statement’s position is misguided. Again, context is critical.

1 Here, as required, Plaintiff submitted the RPCD to the DOJ. Smith Decl. at ¶
2 24. In its January 30, 2018 response, the DOJ requested a letter from the
3 organization that was going to receive the funds. *Id.* The DOJ specifically set forth
4 what was required in the letter. *Id.* Plaintiff's counsel contacted Laura Fandino,
5 Director, Science and Sustainability Programs at UCSDES, and requested that she
6 send the required letter to the DOJ. *Id.* On March 1, 2018, Ms. Fandino did exactly
7 that. *Id.* See true and correct copy of the Fandino letter attached to the Smith Decl.
8 at Exhibit "9." The letter addressed with specificity how the funds would be utilized
9 and answered each of DOJ's questions. *Id.* Unless the DOJ is contending that Ms.
10 Fandino or the UCSDES is lying about how and where the University will use the
11 funds, there is simply no legitimate basis for concern.

12 **3. The RPCD Requirements are Intelligible and**
13 **Unlikely To Cause Confusion.**

14 The RPCD, in § III.C.2, sets forth a requirement that Defendants file on
15 SMARTS and supply to the Plaintiff a Response Action Level 2 Evaluation and
16 Report. This Report, as acknowledged in the Statement, must include the
17 identification of contaminants discharged in excess of the NALs, an assessment of
18 pollutant sources, and the identification of BMPs to ensure compliance. Statement,
19 p. 32. This Report is just another way for Plaintiff to verify that the required BMPs
20 have been implemented and maintained. Nothing in the report is either inconsistent
21 with Defendants' Permit responsibilities, nor relieves them of having to file all
22 required Permit documents. Regardless of the Statement's contention that the
23 terminology used is "confusing," that is simply not the case. The language
24 represents a clear understanding between the parties regarding Defendants'
25 requirement to publicly file and send to Plaintiff a report, providing, among other
26 information, the continued identification of the BMPs that were achieved by this
27 RPCD.

1 **4. The RPCD Requirement of Payments in Relation to Level**
2 **2 Status Reports is a Proper Tool to Further Incentivize**
3 **Defendants' Compliance with the IGP and the CWA.**

4 The RPCD (§ IV.C), requires Defendants to pay a modest sum of one
5 thousand five hundred dollars (\$1,500.000) *to the UCSDES* each time Defendants
6 are required to submit reports under the Level 2 scheme as identified in the RPCD
7 and the IGP. Such a modest payment is a proper incentive for Defendants to
8 effectuate, maintain, and update as necessary an effective SWPPP and MIP,
9 containing and properly implementing BATs, BCTs, and BMPs, in order to prevent
10 future NAL exceedances and discharges of stormwater containing impermissible
11 levels of pollutants from the Facility. Simply put, this provision is another arrow in
12 the RPCD's overall quiver of compliance options, which is easily and quickly
13 effectuated by the enforcement mechanisms contained therein.

14 **5. The Statement is Not an Objection to this Consent Decree,**
15 **But an Attempt to Limit Overall Citizen Suit Enforcement.**

16 Following multiple letters and telephone conversations, the production of
17 thousands of pages of documents, an amended Consent Decree, multiple extensions
18 of time sought by the DOJ, and an in-person meeting, it is clear to Plaintiff that the
19 DOJ does not have concerns with this RPCD but, instead, with the overall number
20 of NOV's that Plaintiff's counsel had sent. Smith Decl. at ¶ 26. This was confirmed
21 with the filing of the Statement which indicated that the volume of "cases" required
22 extra scrutiny. Statement at pps. 2, 16, 18, 50.

23 As set forth in the Statement, over an approximately two-year period,
24 Plaintiff's counsel issued 158 NOV's on behalf of 38 different California residents.
25 *Id.* at p. 16 n. 4. In each case, the NOV's were sent to all requisite governmental
26 agencies, including the EPA, providing them with notice of Plaintiff's counsel
27
28

1 clients' concerns. Smith Decl. at ¶ 28.⁹ These agencies had, by statute, 60 days to
2 exercise their enforcement responsibilities. *San Francisco Baykeeper, Inc. v. Tosco*
3 *Corp.*, 309 F. 3d 1153 (9th Cir 2002) (*citing* 33 U.S.C. section 1365(b)(1)(A)). If
4 federal, state, or local agencies had notified counsel that they were exercising their
5 right to enforcement then a citizen suit would not have been proper, and Plaintiff's
6 involvement in the case would have been over. *Center For Biological Diversity v.*
7 *Marina Point Development Co.*, 566 F.3d 794, 801 (9th Cir 2009). This is in
8 accordance with the congressional goals of allowing "government agencies to take
9 responsibility for enforcing environmental regulations, thus obviating the need for
10 citizen suits." *San Francisco Bay Keepers* at 1157.

11 The Statement does not claim that it did not receive notice of this or any other
12 NOV. In addition, it does not claim that the NOV's did not provide the mandated
13 information. It, likewise, does not claim, because it cannot, that the various
14 governmental agencies exercised their enforcement responsibilities. Instead, it asks
15 for additional judicial scrutiny, thereby implying that there was something wrong,
16
17

18
19 ⁹ Plaintiff's counsel issued this number of NOV's because of the size of the problem. Smith Decl.
20 at ¶ 27. Stormwater runoff is surface water generated by precipitation events, such as rainstorms,
21 which flows over streets, parking lots, commercial sites, and other developed parcels of land.
22 *National Resources Defense Council*, at 1197. When stormwater courses over urban environs, it
23 frequently becomes polluted with contaminants, such as "suspended metals, sediments, algae-
24 promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage and
25 pesticides." *Id. citing Env'tl. Def. Ctr., Inc.*, EPA, 344 F.3d 832, 840 (9th Cir. 2003). This polluted
26 stormwater often makes its way into storm drains and sewers, which generally channel collected
27 runoff into federal protected bodies, such as rivers and oceans. *Id.* Consequently, stormwater
28 runoff has been recognized as "one of the most significant sources of water pollution in the nation,
at times comparable to, if not greater than, contamination from industrial and sewage sources. *Id.*
Los Angeles County is home to more than 10 million people. *Id.* However, due to meager prior
enforcement, a large number of facilities in the Los Angeles area either have numerous CWA
Permit violations, or have failed to even obtain permit coverage to discharge pollutants when
required. Smith Decl. at ¶ 27.

1 based upon nothing more than the number of NOV's issued by Plaintiff's counsel.¹⁰

2 **6. An NOV is Not a Citizens Suit.**

3 The Statement takes issue with the number of CWA "cases" that Plaintiff's
4 Counsel' firm is prosecuting, and speciously questions if "financial concerns may
5 be taking precedence over substantive CWA issues and environmental harm."
6 Statement at p. 19. As an initial matter, the Statement fails to set forth any evidence
7 whatsoever to support this offensive claim. This motion clearly evidences the
8 substantial injunctive relief obtained by the RPCD as a result of Plaintiff's Counsel's
9 advocacy in this matter. It is also surprising that a governmental agency would take
10 issue with the staffing of a private law firm as this is not a class action case that
11 requires the appointment of a lead/class counsel.¹¹ Its concerns here are a clear
12 overreach.

13 More importantly, the Statement appears to conflate the purpose of an NOV
14 and a CWA citizens suit. An NOV is intended to give "the alleged violator an
15 opportunity to bring itself into complete compliance with the Act and, thus, likewise
16 render unnecessary a citizen suit." *Hallstrom v. Tillamook County*, 493 U.S. 20, 29,
17

18 ¹⁰ The Statement also states that the RPCD requires extra scrutiny because some of counsel' clients
19 have issued more than one NOV, some are at the same address, and some have been represented
20 by this firm in ADA litigation. Statement at p. 16, n. 4. First, there is no prohibition as to how
21 many NOV's a citizen enforcer can send. The facilities at issue are close to where these citizen
22 enforcers' live, work, and recreate. Smith Decl. at ¶ 28. Next, some of counsel's clients live at
23 the same address because they are *members of the same immediate family*. *Id.* See Declarations of
24 Jesse Murillo, Dean Barwick, Marie Barwick, Aaron Dominguez, and Justin Barwick, true and
correct copies of which are attached to the Smith Decl. at Exhibits "10-14, respectively." Finally,
is the DOJ really claiming that a citizen enforcer requires extra scrutiny because he is disabled or
because has previously filed an ADA lawsuit? These comments are deeply troubling, and appear
to be nothing more than attempt to say which citizens can enforce the CWA.

25 ¹¹ Brodsky & Smith, LLC has been in existence for 20 years and has been appointed class counsel
26 in this District Court, and across the country, and has achieved enormous success in several areas
27 of the law. Smith Decl. at ¶ 29. See Brodsky & Smith, LLC firm profile, a true and correct copy
of which is attached to the Smith Decl. as Exhibit "15."

1 110 S.Ct. 304, 107 L.Ed.2d 237 (1989). While Plaintiff’s counsel has issued 158
 2 NOVs on behalf of 38 different clients over a two-year period, it has only filed 18
 3 CWA citizen lawsuits during this time. Smith Decl. at ¶ 30.¹² Clearly, the filing of
 4 18 lawsuits over a two-year period is not overtaxing on Brodsky & Smith, and
 5 provides absolutely no basis for “extra scrutiny,” and certainly no basis to deny the
 6 entry of the RPCD.¹³ Smith Decl. at ¶ 30.

7 **I. Plaintiff Has Standing.**

8 Despite the fact that Plaintiff’s Complaint sets forth how Defendants’
 9 pollution is affecting Plaintiff, and that Defendants have not challenged Plaintiff’s
 10 standing, the Statement requests Plaintiff to support his standing. Statement at pps.
 11 16, 42-43. Here, Plaintiff’s Complaint and his supporting Declaration easily
 12 establish standing. *See* Declaration of Gary Lunsford (“Lunsford Decl.”), a true and
 13 correct copy of which is attached to the Smith Decl. as Exhibit “2.”
 14
 15

16
 17 ¹² While only 18 different cases were filed, one case was administratively closed and reopened by
 18 the Court with a different case number making it appear that 19 were filed. Smith Decl. at ¶ 30.
 19 The Statement also raises the issue of why three prior private settlements were not produced for
 20 review. Statement at p. 36-37. Notice was not provided to the Law and Policy Section because
 21 these three cases were (i) not settled by consent decree and (ii) did not bind the United States or
 22 any non-party to the litigation. Smith Decl. at ¶ 31. A private settlement between the parties is
 23 not a court ordered consent decree, and therefore, does not require notice. This is consistent with
 24 the decision by the Supreme Court that a consent decree is demonstrably different from a private
 25 settlement because private settlements usually do not entail the judicial approval and oversight
 26 involved in a consent decree. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health*
 27 *& Human Res.*, 532 U.S. 598, 604, n. 7, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001).

28 ¹³ While the governmental agencies may have chosen to not pursue the NOVs, in the majority of
 the instances, the NOVs met their intended purpose. Smith Decl. at ¶ 32. They gave the alleged
 violator the opportunity to take action and become compliant with the IGP. *Id.* In the majority of
 the NOVs issued, the alleged violators either became compliant with the IGP, made the required
 regulatory filing, or put in place BMPs to reduce the pollutants in their stormwater discharges. *Id.*
 This was accomplished without a consent decree, settlement agreement, or the alleged violator
 paying any monies either to the citizen enforcer or to Plaintiffs’ counsel. *Id.*

1 “Under § 505(a) of the Act, a suit to enforce any limitation in an NPDES
2 permit may be brought by any ‘citizen,’ defined as ‘a person or persons having an
3 interest which is or may be adversely affected.’” *Friends of the Earth, Inc. v.*
4 *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 174 (2000).
5 Significantly, “[t]he Ninth Circuit has held that the ‘CWA’s citizen suit provision
6 extends standing to the outer boundaries set by the ‘case or controversy’
7 requirement of Article III of the Constitution.” *San Francisco Baykeeper, Inc. v.*
8 *Moore*, 180 F.Supp.2d 1116, 1119-1120 (E.D. Cal. 2001) (quoting *Ecological*
9 *Rights Foundation v. Pacific Lumber Company*, 230 F.3d 1141, 1147 (9th Cir.
10 2000)).

11 For standing purposes, the causation element is satisfied upon a plaintiff’s
12 belief that a water body that he has a recreational or aesthetic interest in is being
13 contaminated by pollution, and that a defendant’s discharge of pollutants in its
14 stormwater contributes to that pollution downstream. *River City Waste Recyclers,*
15 *LLC*, 205 F.Supp.3d at 1147.¹⁴ Moreover, an injury-in-fact to his aesthetic or
16 recreational enjoyment of the affected area, and needs only to be “reasonably
17 inferred from factual allegations in the complaint ... ***need not be detailed at the***
18 ***pleading stage***”. *Ecological Rights Found.*, 230 F.3d at 1147; *see also, Coalition*
19 *for a Sustainable Delta v. Carlson*, No. 1:08-cv-00397-OWW-GSA, 2008 WL
20 2899735 at *13 (E.D. Cal. July 24, 2008)).

21 Plaintiff states in the Complaint that he uses and enjoys the Los Angeles
22 River, its tributaries, and the overall Los Angeles River Watershed for recreational
23

24
25 ¹⁴ In fact, this action is strikingly similar to *River City Waste Recyclers, LLC*, in which the Plaintiff
26 was deemed to have standing. Both cases involved plaintiffs suing defendants for violating the
27 IGP and CWA through the operation of the industrial facilities that discharged stormwater laden
28 with pollutants at unacceptable levels into waters of the United States. *River City Waste*
Recyclers, LLC, 205 F.Supp.3d at 1139.

1 and other purposes. *See* Complaint at ¶¶ 9-10. Defendants’ discharges of
2 stormwater containing pollutants impairs each of these uses. *Id.* at ¶ 10. Thus,
3 Plaintiff’s interests have been, are being, and will continue to be adversely affected
4 by Defendants’ failure to comply with the CWA and the IGP. While nothing more
5 was required, Plaintiff also explains how his enjoyment is being impaired. *See*
6 Lunsford Decl. Specifically, Plaintiff explains how his observation of the river and
7 the smell coming from the river hinders his enjoyment of Maywood Riverfront Park.
8 *Id.* Plaintiff further believes that reducing Defendants’ pollution will allow him to
9 better enjoy the park. *Id.* As a result, Plaintiff adequately establishes standing.

10 **J. The Economic Components of the RPCD are**
11 **Warranted and the RPCD Should Be Entered.**

12 This matter was mediated through the Court’s ADR program in which the
13 attorneys’ fees and costs were negotiated at arms-length and were agreed to be paid
14 by Defendants. In addition, the attorneys’ fees and costs in the RPCD are within
15 the range of the vast majority of CWA consent decrees that have been approved.

16 Despite the knowledge of the above, the Statement makes the highly unusual
17 request in a CWA case that Plaintiff’s counsel justify the payment of attorney fees.¹⁵
18 Finally, a lodestar cross check wholly supports the agreed upon fees and costs
19 provision. Simply put, the agreed upon attorneys’ fees and costs provisions in the
20 RPCD are appropriate.

21 **1. Plaintiff is the Prevailing Party and Entitled to Fees.**

22 A litigant qualifies as a prevailing party if it has obtained a court ordered
23 change in the legal relationship between parties. *Buckhannon Bd. & Care Home,*
24

25
26 _____
27 ¹⁵ While Plaintiffs’ counsel are often asked to justify their fees in other contexts, no previous
28 pleading from the DOJ could be found making a similar request of any other CWA citizen suit
enforcer. Smith Decl. at ¶ 33.

1 *Inc., supra.* at 604. *St. John’s Organic Farm v. GEM County Mosquito Abatement*
 2 *District*, 574 F. 3d 1054, 1058 (9th Cir. 2009). Plaintiff must be able to point to a
 3 resolution of the dispute which changes the relationship. *GEM* at 1059. *Id.* 1058-
 4 1059. The Ninth Circuit has held that parties must obtain judicially enforceable
 5 actual relief on the merits of their claim that materially change the legal relationship
 6 between the parties. *Id.*¹⁶ In the instant case, it is undisputed that 1) the Court
 7 retains jurisdiction to enforce the terms of the RPCD (*see* RPCD at p. 4, 28), 2)
 8 Plaintiff has achieved relief on the merits of his claims by obtaining the injunctive
 9 relief in the RPCD, and 3) the entry of the RPCD will legally require Defendants to
 10 implement the injunctive relief, thereby materially changing the relationship of the
 11 parties. *See Gem. Supra.* at 1059. As such, Plaintiff is the prevailing party and is
 12 entitled to attorneys’ fees and costs.

13 **2. Attorneys’ Fees and Costs to Plaintiff as the**
 14 **Prevailing Party in the RPCD are Appropriate.**

15 Section 1365(d) provides that a district court may award attorneys’ fees and
 16 costs to a prevailing party whenever the court determines such award is appropriate.
 17 33 U.S.C. Section 1365(d). The Ninth Circuit has adopted the “special
 18 circumstances” standard for determining whether awarding fees and costs is
 19 appropriate under the CWA. *Gem* at 1062. When there is a prevailing party in a
 20 CWA case, fee awards “should be the rule rather than the exception” and that a
 21 district court “may deny attorneys’ fees to a prevailing party under 1365(d) only
 22 where there are special circumstances... which is extremely rare.” *Id.* 1063-64.¹⁷

23 _____
 24 ¹⁶ The threshold for sufficient relief to confer prevailing party status is not high. *Gem* at 109. If
 25 plaintiff has succeeded on any significant issue in litigation which achieved some of the benefit
 the parties sought in bringing suit, the plaintiff has crossed the threshold to a fee award. *Id.*

26 ¹⁷ It should be noted that this standard has only been applied when a prevailing party has applied
 27 to the Court for fees where, *unlike* here, the parties did not reach agreement on the fees and the
 court had to determine the amount, if any.

1 Here, the narrow exception of ‘special circumstances’ does not apply, and the
2 RPCD should be entered.

3 **3. The Agreed Upon Economic Components in the**
4 **RPCD Are Similar to Other Court Approved**
5 **Consent Decrees By This District Without Motion.**

6 Although this action is not a class action, in awarding fees in a class action
7 case, courts look to similar awards in similar cases. *Kerr v. Screen Extras Guild,*
8 *Inc.* 526 F.2d 67, 70 (9th Cir. 1995). Plaintiff has provided this court with four CWA
9 consent decrees that have been approved in this District within the past few years
10 without motion practice. Smith Decl. at Exhibits “5-8.” These approved consent
11 decrees had attorneys’ fees and costs, compliance and monitoring, and supplemental
12 environmental program provisions in the aggregate of up to \$448,000.00. Smith
13 Decl. at ¶ 34. Indeed, the attorneys’ fees and costs provisions in those consent
14 decrees are not dissimilar to and are in excess of the RPCD provisions. As such,
15 the economic components of this RPCD are within the range of other approved
16 CWA consent decrees in which the DOJ has not previously objected.

17 **4. The Work Performed and Lodestar Cross Check**
18 **Wholly Support the Agreed Upon Attorneys’**
19 **Fees and Costs Provision in the RPCD.**

20 In class action fee applications, courts look to lodestar (time spent by
21 attorneys multiplied by hourly rate) in order to determine whether an award of fees
22 is reasonable. *Kerr v. Screen Extras Guild, Inc.* 526 F.2d 67, 70 (9th Cir. 1995).
23 While Plaintiff submits this analysis is not required in this CWA action, Plaintiff
24 more than satisfies this lodestar cross check. *See* Smith Decl. at ¶¶ 35-39 and at
25 Exhibit “36” (evidencing a *negative* lodestar). As such, the fees and costs in the
26 RPCD are more than reasonable, and the RPCD should be entered.

27 Dated: June 11, 2018

BRODSKY & SMITH, LLC

By: s/Evan J. Smith

Evan J. Smith