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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

LUKE DELGADILLO GARCIA,
Plaintiff,
v.
MILLER CASTINGS INC.
Defendant.

Case No. 2:17-cv-07408-AB-AGR

UNITED STATES' STATEMENT OF
CONCERN AND RECOMMENDATION
THAT PLAINTIFF FILE A MOTION TO
ENTER THE PROPOSED CONSENT
DECREE

Current due date: April 16, 2018
Proposed due date: May 18, 2018

The Honorable Andre Birotte Jr.

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Cal. Water Code Sec 13240-4128

GLOSSARY

BAT	Best Available Technology Economically Achievable
BCT	Best Conventional Pollutant Control Technology
BMPs	Best Management Practices
CD	Consent Decree
CWA	Clean Water Act
DOJ	Department of Justice
ERA	Exceedance Response Action
IGP	Industrial General Permit
NALs	Numeric Action Levels
NOI	Notice of Intent
NOV	Notice of Violation
NPDES	National Pollutant Discharge Elimination System
QISP	Qualified Industrial Stormwater Professional
SMARTS	California's Stormwater Multiple Application and Report Tracking System
SWPPP	Site-Specific Storm Water Pollution Prevention Plan

1 **I. INTRODUCTION**

2 The United States is concerned about the proposed consent decree—brought
3 in the name of Luke Garcia—seeking to resolve a Clean Water Act (CWA) citizen
4 enforcement action filed against Defendant Miller Castings Inc. A CWA citizen-
5 suit plaintiff is limited to obtaining injunctive relief against “continuous or
6 intermittent” violations, or penalties, and is not entitled to compensatory recovery.
7 *See Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985,
8 998 (9th Cir. 2000). Yet, for little documented environmental benefit (to date), the
9 proposed consent decree would pay Mr. Garcia \$5,000—for claimed services to be
10 rendered as an environmental “monitor”—and his attorneys \$40,000. The United
11 States recommends that this Court require Plaintiff’s counsel to file a full Motion
12 to Enter, explaining how the proposed consent judgment is fair, adequate,
13 reasonable, equitable, and consistent with the statutory purposes of the CWA, and
14 justifying their fees and costs settlement. Pending that, the United States objects to
15 the proposed consent decree.

16 Congress directs citizen suit plaintiffs to provide the Attorney General and
17 the Administrator of the United States Environmental Protection Agency (EPA)
18 with 45 day advance notice of any “consent judgment” that seeks to resolve a
19 CWA citizen suit claim. 33 U.S.C. §1365(c)(3). Pursuant to this notice provision,
20

1 the United States is reviewing consent judgments in three pending cases filed by
2 Brodsky & Smith:

- 3 (1) *Alfonso Lares v. Reliable Wholesale Lumber, Inc.*, Case No. 8:18-cv-00157-JLS-AGR (“*Reliable*”) (Ex. A);
- 4 (2) *Gary Lunsford v. Arrowhead Brass Plumbing and Arrowhead Brass & Plumbing, LLC*, Case No. 2:16-cv-08373-PA-KS (“*Arrowhead Brass*”) (Ex. B);
- 5 (3) *Luke Delgadillo Garcia v. Miller Castings, Inc.*, Case No. 2:17-cv-07408-AB-AGR (“*Miller Castings*”) (Ex. C).

7 This firm has filed 158 notice of violation letters (NOVs)¹ against various
8 alleged violators since June of 2016 alone. The United States reserves the right to
9 take similar or additional steps with regard to other Brodsky & Smith citizen suit
10 actions. Many of these claims have been resolved out of court, with little or no
11 oversight, and the firm has received almost \$700,000 in CWA-related attorneys’
12 fees over a two-year period. The United States has not identified any firm, solo
13 practitioner, or organization having filed a similar volume of citizen suit actions in
14 a similar timeframe over the 41-year history of CWA citizen suit litigation. The
15 practice of initiating and settling a large volume of CWA citizen suits appears a
16 novel innovation. The United States is thus concerned that these lawsuits may not
17 be well founded and may be contrary to the expressed intent of Congress regarding
18 the CWA’s citizen suit provision. The volume of CWA claims asserted, the

19
20 ¹ Notice of violation letters are referred to as notices of intent to sue, or NOI letters.

1 number or issues raised in the consent judgments reviewed, and the potential for
2 abuse, support the necessity of a complete and public justification of Brodsky &
3 Smith’s proposed consent decree.

4 **II. LEGAL FRAMEWORK**

5 **A. CWA Citizen Enforcement and the Importance of Review**

6 Congress has authorized CWA enforcement actions not only by EPA and the
7 States, but also by citizens. *See* 33 U.S.C. §§1319(a)(1), 1365(a)(1). Pursuant to
8 the citizen suit provision, citizen plaintiffs (with Article III standing) may bring an
9 enforcement action against any person alleged to be in violation of a CWA
10 “effluent standard or limitation” or “an order issued by the Administrator or a State
11 with respect to such a standard or limitation.” 33 U.S.C. §1365(a)(1). *See also* 33
12 U.S.C. §1365(f) (defining “effluent standard or limitation”). No citizen suit may
13 be brought if the EPA or State “has commenced and is diligently prosecuting a
14 civil or criminal action” against the alleged violator. 33 U.S.C. §1365(b)(1)(B). At
15 least 60 days before filing a complaint, a citizen plaintiff must send a NOV to both
16 the alleged violator and to EPA. 33 U.S.C. §1365(b)(1). DOJ and EPA must be
17 provided notice of any complaint, 33 U.S.C. §1365(c)(3), and must be given at
18 least 45 days to review any proposed consent judgment. 33 U.S.C. §1365(c)(3); 40
19 C.F.R. §135.5. Notice provides the United States an opportunity to review

1 potential claims and, if appropriate, to bring its own judicial action before a citizen
2 suit is filed, or to intervene where a ruling or decree would be inconsistent with the
3 government’s enforcement program. *See* S. Rep. No. 50 at 28, 99th Cong. 1st
4 Sess. (1985). Notice also allows the United States to monitor litigation and to
5 assist with judicial review. As the Ninth Circuit explained, “[i]f it finds that the
6 proposed judgment is not in accordance with the Act, the United States can object”
7 to entry of the consent judgment. *Sierra Club v. Elec. Controls Design, Inc.*, 909
8 F.2d 1350, 1352 n.2 (9th Cir.1990) (*Electronic Controls*).

9 The notification provision further allows the United States to object to any
10 “abusive, collusive, or inadequate settlements,” as Senator Chaffee explained. 133
11 Cong. Rec. S. 737 (daily ed. Jan. 14, 1987). The Congressional Record explains
12 that “certain abuses have occurred, including the attempt to settle penalty claims
13 through payments to private parties rather than to the United States Treasury,”
14 indicating that the notice provisions would better “allow the United States the
15 opportunity to identify, to challenge, and to deter, as much as possible” this sort of
16 activity. 131 Cong. Rec. S3645 (daily ed. March 28 1985).

17 **B. Clean Water Act Permitting**

18 The CWA establishes a program “to restore and maintain the chemical,
19 physical, and biological integrity of the Nation's waters” by reducing the discharge
20

1 of pollutants into those waters. 33 U.S.C. §1251(a). Consistent with these goals,
2 the statute prohibits any discharge of pollutants from a point source to waters of
3 the United States unless authorized by a permit or an applicable statutory
4 provision. *Id.* §1311(a). The National Pollutant Discharge Elimination System
5 (NPDES) is a system of permits that authorizes controlled discharge of pollutants
6 from point sources. 33 U.S.C. §1342. The permits contain conditions designed to
7 limit the discharge of pollutants. 33 U.S.C. §1342(a)(2). In this case, the claims
8 brought by Brodsky & Smith involve stormwater discharges.

9 A stormwater discharge is a point source discharge of pollutants that
10 requires a NPDES permit when “associated with industrial activity.” 33 U.S.C.
11 §1342(p)(2). Industrial activities are defined by their standard industrial
12 classification. 40 C.F.R. §122.26(b)(14). It is a CWA violation for an industrial
13 facility to fail to comply with the conditions of a permit or to discharge stormwater
14 from areas where industrial activities take place without a NPDES permit.

15 Discharge permits can be individual permits or general permits. Individual permits
16 are issued to a specific facility. General permits can be created for a class of
17 facilities that have similar discharges and need to use similar techniques for
18 controlling pollutants. General permits cover many facilities, which all comply
19 with the same requirements. Any qualifying applicant can apply to obtain general
20

1 permit coverage, and the facility operator is responsible for all permit related
2 activities at a covered facility.

3 **C. California's Role Implementing the CWA**

4 The CWA allows EPA to authorize states to administer NPDES permitting
5 and enforcement authority within its borders, where EPA retains oversight
6 responsibilities. 33 U.S.C. §1342(b). Since 1973, California has maintained
7 primary responsibility to administer the NPDES program. The California General
8 Permit for Stormwater Discharges Associated with Industrial Activities (Industrial
9 General Permit, Order 2014-0057-DWQ), went into effect on July 1, 2015. This
10 Industrial General Permit (IGP) is a NPDES permit issued pursuant to CWA
11 section 402(p), 33 U.S.C. §1342(p), to regulate industrial stormwater discharges
12 and authorized non-stormwater discharges from industrial facilities in California.
13 California's IGP covers discharges from the Defendant.

14 Like all NPDES permits, the IGP includes water quality-based effluent
15 limitations, technology-based effluent limitations, and special conditions required
16 for stormwater discharges. 33 U.S.C. §1311; IGP Fact Sheet §II.D.1. The water
17 quality-based effluent limitations are narrative restrictions based on CWA §301(b).
18 *Id.*; IGP §I.D.31. *See also* 40 C.F.R. §§122.44, 125.3. The IGP narrative

1 restrictions include the requirement that industrial stormwater discharges not cause
2 or contribute to an exceedance of applicable water quality standards. IGP §VI.

3 The technology based effluent limitations in the IGP require that dischargers
4 implement Best Management Practices (BMPs) that comply with the Best
5 Available Technology Economically Achievable (BAT) and Best Conventional
6 Pollutant Control Technology (BCT) standards to reduce or prevent pollution in
7 storm water discharges. IGP §§I.A.1, D.32, V.A. BMPs are defined broadly to
8 encompass “scheduling of activities, prohibitions of practices, maintenance
9 procedures, and other management practices to reduce or prevent the discharge of
10 pollutants ... includ[ing] treatment requirements, operating procedures, and
11 practices to control site runoff, spillage or leaks.” 40 C.F.R. §122.2. *See also* IGP
12 Glossary p. 2 ¶ 1. To comply with the IGP’s technology based effluent limitations,
13 dischargers must implement the Permit’s “minimum BMPs, as well as any
14 advanced BMPs that are necessary to adequately reduce or prevent pollutants in
15 discharges.” IGP Fact Sheet §II.D; see also Permit §X.H.1–2.

16 The IGP also establishes a tiered scheme that allows dischargers to identify
17 the technology that needs to be implemented to meet effluent limitations. IGP
18 §XII. Permitted dischargers start in Baseline status and are allowed “in the first
19 instance, to determine what must be done to meet the applicable effluent limits.”

1 IGP Fact Sheet §II.D.5. “Dischargers are required to select, design, install and
2 implement BMPs ... in a manner that reflects best industry practice considering
3 their technological availability and economic practicability and achievability.” *Id.*
4 The discharger must then sample the effluent being discharged from the site and
5 analyze the sample for certain parameters. IGP §XII.A.

6 The IGP establishes Numeric Action Levels (NALs) for multiple
7 parameters—if the sampled effluent exceeds the action level for any parameter, the
8 discharger is required to take an Exceedance Response Action (ERA). IGP §XII.
9 NALs are not effluent limitations, and exceedances of an NAL “are not, in and of
10 themselves, violations of” the permit. IGP ¶63. A discharger can, however, be
11 held in violation of the IGP where they do not fully comply with Level 1 or Level
12 2 ERA requirements. *Id.* The first time an NAL is exceeded for a parameter the
13 facility is elevated from Baseline to Level 1 ERA status and must work with a
14 Qualified Industrial Stormwater Professional (QISP) to evaluate and, if necessary,
15 revise its BMPs and submit a report to the State. IGP §XII.C.

16 If the facility exceeds the NAL for the same parameter while it is in Level 1
17 status the facility is elevated to Level 2 status. IGP §XII.D. The facility must then
18 prepare a Level 2 ERA Action Plan detailing how it will address the NAL
19 exceedances. IGP §XII.D.1. The Level 2 ERA Action Plan must be submitted to
20

1 the State. *Id.* The following year, the facility must provide the State with a Level
2 2 ERA Technical Report describing the BMPs implemented as part of the ERA,
3 analyzing their efficacy, and identifying any additional BMPs needed to reduce or
4 prevent NAL exceedances in the future. IGP §XII.D.2. However, subsequent
5 failure to conduct the required ERA analysis and implement the BMPs identified
6 as BAT and BCT, or failure to submit a required action plan or report after
7 exceeding an NAL is—at that time—a permit violation.

8 California’s ERA structure requires dischargers to identify the BMPs
9 necessary to achieve BAT and BCT. Dischargers do this by developing a site-
10 specific storm water pollution prevention plan (SWPPP). The SWPPP must
11 contain the discharger’s proposed BMPs, and must be updated to account for
12 expansion of or operational changes at the discharging facility or as a part of an
13 ERA. Dischargers are required to submit their SWPPPs to California when they
14 apply for IGP coverage and to submit any revised SWPPPs.

15 California maintains records of NPDES permit applications, reports,
16 SWPPPs, and other documents regulated dischargers submit. IGP §I.A.17.
17 California’s Stormwater Multiple Application and Report Tracking System
18 (SMARTS) is an online database where dischargers electronically file the required
19 documents that can be accessed by the public. The system increases accountability

1 by allowing the Regional and State Board staff, as well as EPA and the public
2 (including citizen plaintiffs), to access data about discharged pollutants.

3 **III. FACTUAL BACKGROUND**

4 Brodsky & Smith, L.L.C. is a Pennsylvania registered professional limited
5 liability company that filed a certificate of organization on July 29, 1998.²

6 According to the firm website, three firm attorneys are licensed to practice in
7 California. *See* Ex. E (CA Bar Records). Starting in October of 2016, two of those
8 attorneys have filed nineteen CWA citizen suit cases in the Central District of
9 California. *See* Ex. F (listing cases). The firm failed to provide timely notice of
10 the complaints filed in any of these cases. 33 U.S.C. §1365(c)(3).

11 Most of 158 NOVs sent by Brodsky & Smith since June 2016 target
12 dischargers that appear to be small businesses. According to a letter dated
13 November 30, 2017, from Brodsky & Smith to the Department of Justice (DOJ),
14 the firm settled 22 of these matters without filing a complaint, and decided not to
15 pursue 37 of these matters. Also according to letter, the NOVs resulted in 13 cases
16
17

18 ² The registered address for this firm is 2 Bala Plaza, Bala Cynwyd, Pennsylvania
19 19004. The address listed for the California Office of Brodsky & Smith, L.L.C. is
20 9595 Wilshire Boulevard, Suite 900, Beverly Hills, CA 90212. The Wilshire
Boulevard address is available online for rental as a virtual office location. Ex D.

1 filed in C.D. Cal.³ The remaining NOV's are presumptively active. The United
2 States is aware of seven filed cases resolved by settlement or consent decree (CD),
3 and the United States estimates that these claims, in addition to settlements of
4 unfiled cases, have resulted in businesses in central California agreeing to pay
5 Brodsky & Smith at least \$691,000 in legal fees in less than two years' time.

6 The United States sent a letter to Brodsky & Smith on June 30, 2017,
7 requesting that counsel submit to the United States copies of any CWA consent
8 judgments that involved their clients. Ex. G. Counsel responded in a letter dated
9 July 17, 2017, Ex. H, providing copies of three "private" settlement agreements of
10 filed cases that, counsel argued, were not subject to CWA notice requirements.
11 Brodsky & Smith also represented that the firm had filed 13 CWA citizen suits in
12 the Central District of California, and submitted copies of the complaints.

13 The United States reviewed the information provided by counsel and
14 followed up in a letter sent October 26, 2017 (inadvertently dated September 26,
15 2017). Ex. I. In this letter, the United States expressed concerns with the

16 _____
17 ³ A docket search for the Central District of California showed that Brodsky &
18 Smith had filed 17 CWA citizen suits as of November 30, 2017 and one additional
19 case that was docketed after November 30, 2017. One case, *Gloria Lares v. King's*
20 *Auto Wrecking, Inc.*, has two separate case numbers (2:17-cv-03951 and 5:17-cv-
01076-AB-SS). The United States has no explanation for why Brodsky & Smith
claimed to have filed 13, rather than 17 federal cases as of November 30, 2017.
See Ex. F, listing federal cases.

1 settlements provided; namely 1) terms providing for \$1,000 payments to be made
2 directly to the plaintiffs; 2) lack of meaningful injunctive relief or enforcement
3 mechanisms; and 3) substantial attorney’s fees (totaling \$94,500 for the settlement
4 agreements resolving the three filed cases), but no civil penalty, restoration,
5 mitigation or other environmentally beneficial project. The United States asked
6 counsel to explain how they planned to remedy the identified problems. The
7 United States also sought “copies of any written settlement agreements or other
8 agreements not to pursue claims with respect to any of the alleged violations”
9 outlined in their NOV letters.

10 Counsel’s November 30, 2017 response (Ex. J) did not fully respond these
11 requests. The letter claimed that Brodsky & Smith routinely undertook what
12 counsel characterized as an “extensive investigation” prior to issuing a NOV,
13 which involved online review of California’s online SMARTS database, PACER,
14 California registration records, EPA benchmarks and water quality standards and
15 NOAA rain data, as well as “internet investigation.” Counsel represented that a
16 Brodsky & Smith employee would then review records at the offices of the
17 Regional Water Quality Control Board, and that an outside expert would travel to
18 each facility to inspect and photograph discharge points. The United States also

1 received a subset of the settlement instruments DOJ requested, and an index of
2 included materials.

3 On May 7, 2018, the United States sent Brodsky & Smith another letter
4 more specifically setting out our concerns with the firm’s Clean Water Act practice
5 in advance of a May 14, 2018 meeting requested by counsel. *See* Ex. K. On May
6 14th the United States met with Brodsky & Smith to discuss its concerns, and the
7 firm provided the United States with additional information. At the conclusion of
8 that meeting, Brodsky & Smith indicated that they were willing to voluntarily file a
9 brief explaining why their CD’s met the standard for entry. The United States is
10 filing this statement to ensure that its concerns are understood, considered by this
11 Court, and addressed by such a filing.

12 **IV. STANDARD OF REVIEW FOR ENTRY OF CONSENT DECREES**

13 This court should enter a CD if it determines that “it is fair, reasonable and
14 equitable and does not violate the law or public policy.” *Electronic Controls*, 909
15 F.2d at 1355; *see also United States v. Montrose Chem. Corp. of Cal.*, 50 F.3d 741,
16 747 (9th Cir.1995). When examining a CD a court considers both substantive
17 fairness and reasonableness of the settlement instrument. *United States v. Cannons*
18 *Eng’g Corp.*, 899 F.2d 79, 86-91 (1st Cir. 1990). Substantive fairness introduces
19 the concepts of corrective justice and accountability: “a party should bear the cost
20

1 of the harm for which it is legally responsible.” *Id.* at 87. “Reasonableness”
2 involves the relationship between the relief obtained and the harm that occurred in
3 light of litigation risks. *Id.* at 89-90. If the CD “comes within the general scope of
4 the case made by the pleadings, furthers the objectives upon which the law is
5 based, and does not violate the statute upon which the complaint was based, the
6 parties’ agreement should be entered by the court.” *Electronic Controls*, 909 F.2d
7 at 1355) (quoting *Local No. 93, Int’l Ass’n of Firefighters, AFL–CIO v. City of*
8 *Cleveland*, 478 U.S. 501, 525-26 (1986) and *Pacific R. Co. v. Ketchum*, 101 U.S.
9 289, 297 (1880)). This approval is not a rubber stamp. A reviewing court must
10 independently scrutinize the terms of a CD. *Montrose Chem. Corp.*, 50 F.3d at
11 747. *See also Local No. 93*, 478 U.S. at 525.

12 Congress enacted the CWA citizen suit provision to permit litigants to enjoin
13 “continuous or intermittent” CWA violations. *See Natural Resources Defense*
14 *Council v. Southwest Marine, Inc.*, 236 F.3d 985, 998 (9th Cir. 2000). Congress
15 did not authorize CWA citizen suit plaintiffs, such as Plaintiff Garcia, to receive
16 damages or other monetary compensation. *See* 33 U.S.C. §1365(a).

17 Where a CD implicates the public interest in this way, the Ninth Circuit has
18 recognized it has a heightened responsibility to protect the interests of the public or
19 third parties who did not participate in negotiating the compromise. *United States*

1 *v. State of Or.*, 913 F.2d 576, 581 (9th Cir. 1990). In *Electronic Controls*, the
2 Ninth Circuit cited to authority on the standards applicable to approval of class-
3 action settlements, *Davis v. City and County of San Francisco*, 890 F.2d 1438,
4 1444-45 (9th Cir. 1989), indicating that, as with a class-action settlement, a court
5 must satisfy itself that the resolution of a citizen suit is in the public interest before
6 giving its approval to a particular settlement. 909 F.2d at 1355. A CWA citizen
7 suit is not, however, a class action.

8 **V. THE UNITED STATES' CONCERNS WITH BRODSKY &
9 SMITH'S CITIZEN SUIT PRACTICES**

9 Here the United States sets out: 1) general concerns with Brodsky & Smith's
10 CWA practices; 2) specific concerns with the proposed CDs in this case; and, 3) an
11 overview of concerns with some of Brodsky & Smith's settlement agreements.

12 The firm's general practices and settlement agreements demonstrate patterns which
13 demand scrutiny.

14 The legislative history of 33 U.S.C. 1365 indicates that Congress was
15 concerned with "abusive, collusive, or inadequate settlements." 133 Cong. Rec. S.
16 737 (daily ed. Jan. 14, 1987). Consistent with Congress' intent, citizen suit claims
17 should not be used as leverage to seek relief beyond that permitted by Congress.
18 And they must meaningfully redress environmental harms. But the complaints
19 filed by Brodsky & Smith make only general allegations, and the factual basis of
20

1 their claims is difficult to determine. The primary injunctive relief sought is
2 typically just a commitment to comply with preexisting permit conditions. The
3 combination of unclear underlying violations and general permit compliance as
4 relief indicate that additional inquiry is warranted.

5 **A. General Concerns With Brodsky & Smith’s Citizen Suit Practice**

6 **1. Concerns regarding repeat plaintiffs, multiple plaintiffs at** 7 **the same address, and no indications of plaintiff** 8 **qualifications for monitoring**

9 One fact calling for extra scrutiny of the CD is that Brodsky & Smith’s
10 plaintiffs tend to be repeat players in this high-volume practice. Some plaintiffs
11 are even clustered at the same addresses.⁴ Additionally, several of Brodsky &
12 Smith’s CWA citizen suit plaintiffs are also plaintiffs in one or more Americans
13 with Disabilities Act claims filed by Brodsky & Smith. *See* Ex. L (listing
14 examples of overlapping ADA and CWA plaintiffs). Yet CWA citizen suit
15 plaintiffs must establish Article III standing to bring such a claim—*i.e.*, actual

16 ⁴ The 158 Brodsky & Smith CWA NOVs were sent on behalf of 38 named
17 individuals. DOJ records indicate that the following Brodsky & Smith plaintiffs
18 are the most frequent repeat CWA litigants: Luke Delgadillo Garcia (15 NOVs);
19 Gary Lunsford (10 NOVs); Arthur Acevedo (10 NOVs); Jorge Ramirez (9 NOVs);
20 and Javier Florez (8 NOVs). Sometimes different plaintiffs appear to reside at the
same address. For example, five individuals who appear to reside at 4531 Birdie
Circle in Corona, California, have sent a total of 17 NOV letters: Dean Barwick
(4), Justin Barwick (4), Marie Barwick (3), Aaron Dominguez (4), and Jesse
Murillo (2). Alfonzo and Gloria Lares, who live at the same address, together have
sent a total of 7 NOV letters.

1 injury-in-fact, fairly traceable, to redressable conduct by the defendant. *Friends of*
2 *the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 180 (2000). The disparate geographic
3 location of the facilities these plaintiffs are challenging raise substantial questions
4 and support ensuring a sufficient connection to the waterbodies at issue.

5 In the United States' early interactions with Brodsky & Smith, it expressed
6 concern about direct payments to plaintiffs and the lack of continued
7 environmental monitoring, Brodsky & Smith plaintiffs have since been
8 incorporated into monitoring provisions as "monitors." See Revised *Miller CD*
9 §IV.B. When asked during our May 14th meeting about the citizen plaintiffs'
10 qualifications to provide compliance monitoring, counsel stated that they intended
11 to bring a qualified expert to these site visits. But it remains unclear whether the
12 named plaintiff will be still be paid to conduct such "monitoring." See CD §IV.B.
13 ("Miller Castings shall make a onetime payment of Five Thousand Dollars
14 (\$5,000) to compensate Plaintiff for costs and fees to be incurred for monitoring . .
15 ."). There is no evidence that Plaintiff has technical experience in developing or
16 assessing implementation of BMPs. The process of repeatedly, and expressly
17 directing monitoring money and other payments to an individual plaintiff is suspect
18 and—based on the information available for review—appears inappropriate.
19 While the United States does not take the position here that there is anything

1 inherently wrong with one law firm representing the same or related plaintiffs in
2 multiple cases where those plaintiffs have standing to bring each case and a *bona*
3 *fide* desire to stop the conduct of a polluter that is injuring them. But this pattern
4 and other unusual circumstances calls for additional oversight.

5 **2. Volume of lawsuits compared to litigation capacity, low**
6 **ratio of federal lawsuits, and high ratio of voluntary case**
7 **closure**

8 The significant volume of cases being pursued by Brodsky & Smith
9 compared to the amount of legal resources required to successfully prosecute CWA
10 violations to trial also raises questions. Based on correspondence from Brodsky &
11 Smith, the United States believes approximately 81 out-of-court matters 11 federal
12 cases are currently active. Properly litigating these cases would require an
13 immense amount of work. Because of this potential workload, DOJ asked Brodsky
14 & Smith to provide information about the number of attorneys and experts they
15 have engaged to successfully prosecute these matters. Oct. 26 letter at 3-4 (Ex. I).
16 Counsel, in reply, did not provide specific information, but stated that they “work
17 collectively as a Firm” so that each attorney can provide insight into a case. Nov.
18 30 letter at 5 (Ex. J). Only two attorneys appear in pleadings and on NOV letters
19 on these cases, and only three Brodsky & Smith attorneys are barred in California.
20 Counsel also listed four experts who the firm claims to have engaged at some
unspecified time on unspecified cases. Nov. 30 letter at 6 (Ex. J).

1 The relatively small number of individuals handling this large volume of
2 complex, technical cases raises questions about whether financial concerns may be
3 taking precedence over substantive CWA issues and environmental harm. *See*
4 *generally* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in*
5 *Securities Class Actions*, 43 Stan. L. Rev. 497 (1991) (arguing that the link
6 between the merits and settlement is broken in securities class action lawsuits).

7 **3. Little indication that consent judgments seek to enforce the**
8 **CWA**

9 The primary injunctive relief obtained in most Brodsky & Smith settlements
10 merely requires a defendant to comply with aspects of California’s IGP
11 (compliance already required by law). A judicially enforceable commitment to
12 comply with specific pre-existing permitting conditions that a defendant has not
13 been complying with can be meaningful (assuming proper factual support and
14 appropriate implementing provisions).⁵ Brodsky & Smith NOV’s and complaints,
15 however, are characterized by general allegations, and it is unclear what forms the
16 factual basis for Plaintiff’s claims, and so what such relief would entail. In this
17 case in particular, not only are the allegations generalized, the relief achieved may

18 ⁵ Similarly, there are circumstances (such as where a business is initially brought
19 into permit coverage) where a general acknowledgement of willingness to comply
20 with the IGP is significant. The underlying complaint in this case, however,
involves a business already covered by the IGP.

1 not be judicially enforceable. *See supra* §V.B.1.b. Without the additional
2 information regarding the nature of, and factual basis for Plaintiff’s allegations the
3 United States lacks sufficient information to fully assess the parties’ proposed CD.

4 Brodsky & Smith’s consent judgments generally do not seek civil penalties.
5 That, itself, is not problematic. That, combined with injunctive relief that tends to
6 seek only compliance with permitting requirements, indicates that consent
7 judgments negotiated by this firm may not primarily seek to advance the goals and
8 policy of the CWA. Brodsky & Smith also, on occasion, appears to use form
9 settlements that contain weak injunctive relief and has entered into CDs that
10 include provisions potentially penalizing IGP compliance (discussion *supra* section
11 V.B.1.e.). *See* Ex. M (form agreement). Given some of the confused terminology
12 we have observed in Brodsky & Smith’s settlement instruments, it does not appear
13 the attorneys crafting these agreements have a sophisticated understanding of
14 either the CWA, the IGP or the NPDES framework. Brodsky & Smith settlements
15 consistently include provisions sufficient to enforce compromises of fees and costs,
16 without similar provisions ensuring the enforceability of environmental relief is.

17 **4. No justification for attorneys’ fees**

18 Reviewing courts are permitted to award attorneys’ fees and costs in CWA
19 citizen suit cases only when “the court determines such award is appropriate.” 33
20

1 U.S.C. §1365(d). The legislative history of the CWA stresses the importance of
2 robust judicial review of fee awards:

3 Subsection (d) allows the court to award to any party the costs of
4 litigation, including reasonable attorney and expert witness fees,
5 whenever the court considers this to be appropriate. Concern was
6 expressed during the hearings that inclusion of a “citizen suit” provision
7 would lead to frivolous and harassing legal actions. By permitting the
8 court to award costs of litigation whenever it believes that it is
9 appropriate to do so, the Committee is satisfied that defendants who
10 were subjected to needless harassment or frivolous suits may be
11 reimbursed for their expenses. This should have the effect of
12 discouraging abuse of the “citizen suit” provision.

13 H.R. Rep. No. 911, 92d Cong., 2d Sess. 133-34 (1972); *see also* S. Rep. No. 414,
14 92d Cong., 1st Sess. 81 (1972). Brodsky & Smith have provided no justification
15 for their settlement of fees and costs. Preliminarily, Brodsky & Smith should
16 establish that they are a prevailing party in the litigation, and that the fees awarded
17 are reasonable. *Public Interest Research Group of New Jersey, Inc. v. Windall*, 51
18 F.3d 1179, 1184-85 (3d Cir. 1995). A reasonable fee is one which is “adequate to
19 attract competent counsel, but which do[es] not produce windfalls to attorneys.”
20 *See* S.Rep. No. 1011, 94th Cong.2d Sess. 6, reprinted in, 1976 U.S.C.C.A.N. 5908,
5913. Until this standard is met, no attorneys’ fees are warranted. Moreover, even
if one assumes some payment of fees and costs is appropriate, the court cannot
determine, *inter alia*, if counsel applied an appropriate lodestar rate, if

1 contemporaneous billing records support the fees award, and if the parties have
2 appropriately discounted attorney time spent on unsuccessful legal theories.

3 **5. Direct payments to plaintiffs**

4 The CWA does not support, direct payments to citizen plaintiffs. The CWA
5 limits remedies personally available to citizen plaintiffs to injunctive relief and
6 attorneys' fees. *See* 33 U.S.C. §1365(a), (d); *see also Friends of the Earth, Inc. v.*
7 *Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 175 (2000). To remedy harm to the
8 environment, such plaintiffs can also seek an assessment of civil penalties or
9 funding of supplemental environmental projects.⁶ *Id.* Compensatory damages are
10 not authorized. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*,
11 453 U.S. 1, 18 (1981). Any civil penalties must be payable to the U.S. Treasury.
12 *Laidlaw*, 528 U.S. at 175. Congress, in enacting CWA section 505, characterized
13 "attempt[s] to settle penalty claims through payments to private parties rather than
14 to the United States Treasury" as "abusive." *See* 131 Cong. Rec. S3645 (daily ed.
15 March 28 1985). Yet, contrary to what the CWA permits, every Brodsky & Smith
16 CWA settlement instrument the United States has reviewed initially contained a
17 direct payment to the plaintiffs. Indeed, the United States understands that

18 _____
19 ⁶ As part of a settlement third parties may agree to undertake an environmentally
20 beneficial project related to the violation. Such projects are referred to as
supplemental environmental projects.

1 Brodsky & Smith’s standard settlement template includes a \$1,000 direct payment
2 to the plaintiff. *See* Ex. M (form settlement).

3 During the course of our prior correspondence, Brodsky & Smith cited
4 *Electronic Controls* to argue that, because Brodsky & Smith seeks to resolve its
5 citizen suit claims by executing a settlement agreement rather than a court-
6 approved CD, it is not constrained by the limits of the CWA. *See* Ex. H; Ex. J at 4,
7 fn.2. *Electronic Controls*, however, involved very different types of payments.
8 The CWA citizen suit settlement at issue in that case involved a \$45,000 payment
9 to an environmental organization for their efforts to protect water quality and
10 remedy environmental harm, a penalty payment if future violations occurred, and a
11 \$5,000 payment for attorney and expert witness fees. *Electronic Controls*, 909
12 F.2d at 1352. These penalty payments were structured to provide an incentive to
13 comply with agreed-upon injunctive relief that, itself, ensured compliance with
14 CWA permits. *Id.* at 1352. As the court explained, the settlement provisions at
15 issue in *Electronic Controls* all sought to further the purpose of the CWA. *Id.* at
16 1355-56. Such provisions are permissible because Congress sought to encourage
17 settlements that “preserve the punitive nature of enforcement actions while putting
18 the funds collected to use on behalf of environmental protection.” *Id.* At 1355
19 (quoting the lower court’s decision in *Sierra Club, Inc. v. Electronic Controls*

1 *Design*, 703 F.Supp. 875, 877–78 (D.Or.1989) and H.R.Conf.Rep. No. 1004, 99th
2 Cong., 2d Sess. 139 (1986)). In contrast, a settlement agreement that provides for
3 cash payments directly to plaintiffs, is not in furtherance of the goals of the CWA.⁷

4 Congress designed the CWA citizen suit provision to achieve a public
5 benefit—protection, preservation and improvement of waters of the United States.
6 Payments to named plaintiffs does not have any direct benefit to such waters, the
7 statutory structure does not permit such payments, and they should not be a
8 component of a CWA citizen suit consent judgment.

9 **6. The factual basis of alleged claims is generalized, and
10 unclear**

11 The allegations contained in NOVs and complaints sent by the firm tend to
12 be undeveloped, and general, and often target smaller businesses, who may have
13 fewer resources to expend on legal defenses. The NOVs provide very little
14 tangible information about the alleged violations.

15 Most Brodsky & Smith NOVs and complaints are based on: 1) alleged
16 violations of unspecified provisions of the IGP and unspecified Water Quality
17 Standards through discharge of “polluted stormwater”; 2) alleged violations of
18 unspecified IGP effluent limitations due to inadequate development and/or

19 ⁷ In *Electronic Controls* the Ninth Circuit recognized that there is no requirement
20 that private parties seek penalty payments payable to the U.S. Treasury, and the
United States is not seeking to require that.

1 implementation of BMPs; 3) failure to develop and implement an adequate
2 SWPPP; and 4) failure to develop and implement an adequate monitoring and
3 reporting program. These allegations are so general that Brodsky & Smith's
4 complaint could be used to allege unspecified violations against virtually any of
5 the wide range of business covered by the IGP. In addition, the factual basis of
6 these claims is unclear. For example, Brodsky & Smith does not cite to or allege
7 violations of specific IGP provisions, explain which Water Quality Standards are
8 violated or how such violations occurred, identify how the BMPs in use at the
9 facility are inadequate to comply with effluent limitations, or specify when the
10 facility failed to conduct required monitoring or reporting. To support a
11 monitoring violation claim, the firm could identify the monitoring frequency
12 required by the IGP, provide information from the SMARTS database showing
13 when monitoring occurred, and cross-reference information regarding qualifying
14 rainfall events to demonstrate that monitoring is inadequate. Put another way, the
15 face of the typical Brodsky & Smith complaint does not identify any specific facts
16 indicating a CWA violation occurred.

17 Instead, it appears that most allegations are rooted in self-reported
18 exceedances of NALs. Though an exceedance is an indicator that a facility may
19 need to improve its BMPs, an NAL exceedance itself is not a violation of the IGP

1 or the CWA. *See* IGP ¶ 63. If Brodsky & Smith's claims are premised solely on
2 NAL exceedances, they would be attempting to indirectly enforce an
3 unenforceable standard. The generalized and conclusory nature of the underlying
4 claims, however, prevents the United States from determining the precise nature of
5 the underlying violations. The complaint does not provide allegations linking
6 NAL exceedances to effluent limit violations. While it is possible that Brodsky &
7 Smith has conducted factual research as to these questions prior to filing suit which
8 do not appear in the complaints. Brodsky & Smith's pleading practices do not
9 allow the United States to determine if an actual violation has occurred or if the
10 relief proposed in the CD addresses that violation.

11 **B. Concerns About Pending Consent Judgments**

12 **1. *Garcia v. Miller Castings, Inc.***

13 A prior CD submitted in this case had provided for a \$1,000 direct payment
14 to Plaintiff. The United States had previously informed Brodsky & Smith that
15 such payments to Plaintiff are improper, (Ex. I), and we repeated that concern in
16 response to the CD initially submitted in this case (and indicated other potential
17 concerns) in a February 22, 2018 email (Ex. N). On February 28, 2018, the parties
18 submitted a revised CD that shifted the \$1,000 payment into to another provision
19
20

1 of the decree.⁸ The United States’ concerns with the revised *Miller Castings* CD
2 are as follows:

3 **a. The injunctive relief required by the revised *Miller***
4 ***Castings* decree is compliance with existing permitting**
5 **requirements**

6 The *Miller Castings* Complaint alleges: 1) violations of unspecified
7 provisions of the IGP and IGP Water Quality Standards through discharge of
8 “polluted stormwater” (Complaint ¶¶ 82-90); 2) violations of unspecified IGP
9 effluent limitations due to inadequate development and/or implementation of
10 unspecified BMPs (Complaint ¶¶ 91-98); 3) failure to develop and implement an
11 adequate SWPPP (Complaint ¶¶ 99-109); and, 4) failure to develop and implement
12 an adequate monitoring and reporting program (Complaint ¶¶ 110-115). The
13 United States does not see sufficient facts alleged to allow it to assess the
14 appropriateness of these claims. For example, though Plaintiff alleges that
15 Defendant’s annual stormwater sampling is contaminated, Complaint ¶¶ 75, 77, it
16 is unclear if Plaintiff determined that the Water Quality Standards were violated by
17 the level of this contamination. The Complaint also references “the applicable . . .

18 ⁸ The parties chose to revise all three CDs currently pending entry in C.D. Cal.
19 (*Reliable Wholesale, Arrowhead Brass, and Miller Castings*). In revising these
20 proposed decree, the parties did not update the caption or the signature page. We
note the unchanged dates in order to avoid confusion.

1 Basin Plan.” Complaint ¶ 83. The Water Quality Standards for a particular region
2 are adopted through a Basin Plan. *See* Cal. Water Code §§ 13240, 13241.

3 However, no Basin Plan is specified in the Complaint, and the Complaint does not
4 allege the violation of any particular Basin Plan provisions.

5 Similarly, there are no allegations indicating which BMPs are inadequate,
6 or what adequate BMPs should be implemented. There are no allegations
7 regarding what, exactly, is inadequate regarding the current SWPPP. And the
8 United States is not aware of any failure by Defendant to meet its current
9 monitoring and reporting obligations. If we do not understand the factual basis for
10 the underlying violations, the United States cannot assess the adequacy of the relief
11 set out in a CD.

12 The *Miller Castings* decree, in CD § III, does appear to, potentially, create
13 some forward-looking injunctive relief beyond what is specifically required by the
14 IGP. Revised *Miller Castings* CD § III.A.1-2 (referencing SWPPP measures to be
15 created with the assistance of a Qualified Industrial Stormwater Practitioner); §
16 III.A.6.(a)-(d) (requiring specified non-structural BMPs under certain conditions).

17 An additional explanation from plaintiff, set forth in a motion to enter, may
18 provide necessary context to understand the parties’ approach here. The bulk of
19
20

1 the injunctive relief required appears to be the implementation of required IGP
2 terms.

3 **b. The revised *Miller Castings* decree contains an**
4 **“environmental” project that appears to have no**
5 **nexus to the violations alleged**

6 The revised *Miller Castings* decree does not provide for civil
7 penalties. Instead, it contains a \$5,000 payment to the University of California at
8 San Diego Extension Service for an “environmental” project. The payment is “to
9 fund tuition grants for owners and employees of small businesses . . . affected by
10 the stormwater permit.” *Miller Castings* CD § V.A. The revised *Miller Castings*
11 decree does not identify the training to be funded by the tuition grant or otherwise
12 specify that the funding should be used to promote CWA compliance or a water
13 quality benefit. When considering supplemental environmental projects, EPA
14 emphasizes that the project have a nexus to the underlying violation by, for
15 example, being designed to reduce the likelihood of future similar violations or
16 reducing the public health impact of the alleged violation. *See* EPA Nexus Memo
17 (Ex. O). It is not clear on the face of the *Miller Castings* decree that this provision
18 has anything to do with water quality, the environment, the CWA, or the
19 allegations in the complaint.

20 Pursuant to our request, the University provided a letter referencing the
21 decree and explaining that that the University “may receive \$5,000 in funds” from

1 Miller Castings to support tuition grants to individuals seeking industrial
2 stormwater compliance training. This letter indicates that the funds provided will
3 be used in a manner that promotes the purpose of the CWA (sponsoring
4 compliance training), though we know little about the specific relationship of any
5 anticipated projects to the violations at issue here. *See generally Nachshin v. AOL*,
6 663 F.3d 1034, 1038-39 (9th Cir. 2011) (establishing 9th Cir. test to determine
7 sufficiency of the nexus for a class action *cy pres* distribution). Also, this
8 statement may not be enforceable as a CD provision because it is not incorporated
9 into the revised *Miller Castings* decree.

10 **c. The revised *Miller Castings* decree requires “Action**
11 **Report Payments” that may discourage IGP**
12 **compliance**

13 Section IV.C of the revised *Miller Castings* decree requires Defendant to
14 remit a \$5,000 “Action Plan Payment” to University of California at San Diego
15 Extension Services each time it submits an Action Plan. The IGP requires a
16 forward-looking “Action Plan,” to address a Level 2 NAL exceedance by a
17 discharger. IGP § XII.D.1. The IGP also requires a qualified technical expert to
18 prepare a Level 1 ERA report, similar to the “Level 1 ERA Action Plan” described
19 in Section III.A.2.iii. of the CD. *Id.* It is unclear what, exactly, triggers the action
20 plan payment contemplated by the CD. If the CD requires payment every time

1 Defendant submits an IGP required document, however, the revised *Miller*
2 *Castings* decree effectively penalizes Defendant for complying with the IGP.

3 The IGP is designed to facilitate self-monitoring and self-correction by the
4 permittee, and permittees are encouraged to voluntarily conduct additional
5 monitoring to anticipate and address any compliance problems. A required
6 payment will discourage voluntary actions, and will impair, rather than facilitate,
7 the self-regulatory scheme the IGP seeks to establish. The United States is
8 concerned that discouraging facilities from reporting NAL exceedances and
9 submitting Action Plans required by the IGP could deter permit compliance and, as
10 such, is contrary to the government’s enforcement program and interpretation of
11 the CWA.

12 Not only does the *Miller Castings* decree contain a problematic payment tied
13 to the submission of a “Level 1 ERA Action Plan,” *see Miller Castings* CD § IV.C,
14 but also the payment structure created in the CD is unclear. The “Action Plan
15 Payment” reads as follows:

16 . . . Miller Castings shall pay Five Thousand Dollars (\$5,000.00) each
17 time an Action Plan is submitted to the United States Treasury care of
18 Alica Kolian . . . Payments shall be submitted simultaneously with
the submittal of the Action Plan. Payments shall be made payable to
“Brodsky & Smith, LLC” via U.S. Mail.”

1 Revised *Miller Castings* CD § IV.C. Both the language and intent of this revised
2 provision is unclear. An Action Plan is not submitted to the US Treasury either
3 under the terms of this CD or the IGP. The standard notification the United States
4 provides to litigants upon receipt of a CWA citizen suit complaint sets forth the
5 process for delivering a civil penalty payment to the United States; such payments
6 should not be made to plaintiff's counsel.

7 **d. Plaintiffs' counsel have not justified their attorneys'
8 fees, costs and other payment provisions**

8 The revised *Miller Castings* decree requires Defendant to pay \$40,000 in
9 attorneys' fees and costs, and \$5,000 to Plaintiff Garcia for costs and fees incurred
10 for monitoring CD. CD § V.B, IV.B. These amounts have not been justified.
11 Because Brodsky & Smith did not provide justification for the attorneys' fee
12 amount, the United States and the court have no basis upon which to assess the
13 validity of these fees. The United States similarly lacks a basis for assessing the
14 appropriateness of the \$5,000 payment for monitoring compliance. The
15 monitoring payment is framed as a payment to Plaintiff, but is made payable to
16 Brodsky & Smith. In the CD this \$5,000 is described as payment for "fees" as
17 well as "costs" being made to a law firm, it is unclear whether this payment is
18 intended to be a supplemental attorneys' fee payment.

1 The United States generally supports CD provisions that allow future site
2 access to monitor CD compliance. Particularly when technical assistance is
3 necessary to ensure proper implementation of injunctive relief, it may be
4 appropriate for a CD to include costs associated with monitoring. The *Miller*
5 *Castings* decree provides for one site inspection per year (CD § IV.A). There is no
6 indication that Mr. Garcia has any technical ability or training that would qualify
7 him for an oversight role, and the terms of the CD do not specify that a qualifying
8 expert will participate in these monitoring events.

9 **2. *Lunsford v. Arrowhead Brass Plumbing and Lares v. Reliable***
10 ***Wholesale***

11 The United States' concerns with the revised *Arrowhead Brass* and *Reliable*
12 CDs, are set out in detail with each reviewing court. We note that in many of the
13 problematic provisions are identical. The underlying allegations in both cases are
14 similarly generic and unclear, and the relief generally requires IGP permit
15 compliance. It is not clear that the relief provided for in the CD has any
16 relationship with the allegations supporting the plaintiff's complaints in these
17 cases. In both of these cases Plaintiff's counsel do not attempt to justify attorneys'
18 fees, costs, or monitoring fees.

19 **C. Concerns About Prior Settlements of Filed Claims**

20 Brodsky & Smith has settled three CWA citizen suit cases in C.D. Cal.
without providing timely notice to the United States. As a result, the United States

1 has never exercised its statutory right of review of these three settlements.⁹ These
2 cases are:

- 3 (1) *Matt Salnick v. Tapo Rock Sand*, No. 2:16-cv-8165-RGK-AFM (Ex. P);
4 (2) *Carlos Guzman v. Potential Industries, Inc.*, No. 2:16-cv-278-SJO-E (Ex.
5 Q); and,
6 (3) *Ricardo Espinoza v. West Coast Rendering Co.*, No. 2:16-cv-7922-ODO-
7 SS (Ex. R).

8 DOJ provides a brief overview of these settlement agreements in order to illustrate
9 the existence of a broader pattern of unclear pleadings, limited relief and
10 significant attorneys' fees in cases brought by the Brodsky & Smith firm. All of
11 these settlement agreements involve some form of direct payments to the plaintiff.
12 None of these settlement agreements demands any civil penalty. Each agreement
13 generally demands compliance with pre-existing obligations, and injunctive relief
14 in excess of pre-existing obligations appears to be negligible. While Brodsky &
15 Smith CDs typically make some attempt at developing a nominal environmental
16 project, these settlement agreements lack any reference to an environmental

17 ⁹ The United States received no information on these matters until DOJ sent a letter
18 to plaintiff's counsel requesting an opportunity to review those documents. Even
19 at that point the firm maintained that notice was not required. Ex. H. The United
20 States will determine separately whether and how to exercise our statutory right of
review of these three cases; the United States does not seek to reopen these three
settlements at this time.

1 project. Additionally, the underlying complaints in each case do little to explain
2 the factual basis for the underlying alleged violations.

3 The *Tapo Rock* settlement agreement is dated May 31, 2017 and appears to
4 be based on a form with blanks for the amount of attorneys’ fees, and the date of
5 entry. Ex. P. The settlement calls for a cash payment of \$20,000. Of that
6 payment, \$19,000 is designated as attorneys’ fees and costs. *Tapo Rock* settlement
7 ¶ 2. The remaining \$1,000 payment is to Plaintiff Matt Salnick. *Id.* The direct
8 payment to the plaintiff is objectionable for reasons explained in section V.A.5,
9 *supra*. There is no attempt to justify the \$19,000 payment.

10 In the “recitals” section the parties represent that Tapo Rock “has
11 substantially and materially updated its Stormwater Prevention Plan . . . for the
12 Facility,” but the scope of those amendments are not stated. *Tapo Rock* Settlement
13 Recitals ¶ C. The terms of the Settlement require Tapo Rock to implement the
14 updated SWPPP (conduct already required by law). *Tapo Rock* settlement ¶ 1.
15 There is no other injunctive relief. There is no penalty. There is no language
16 indicating that there will be any future site monitoring, or that there is any potential
17 enforcement of the terms of this agreement. There is no attempt to explain how
18 that SWPPP resolves the concerns the form the basis of the *Tapo Rock* complaint.

1 The *Tapo Rock* settlement appears to be a form agreement that ordinarily
2 would have required a site visit, implementation of additional BMPs as necessary
3 and appropriate, and would have required Defendant Tapo Rock to provide
4 plaintiff with copies of any revised or updated SWPPP, but the parties agreed to
5 delete these provisions. *Tapo Rock* CD stricken §§1.a.vii, 2, 3. There are few
6 provisions of this settlement that have the potential to improve either CWA
7 enforcement or the condition of United States' waters. It is striking that plaintiff
8 agreed to delete many of the provisions that might advance CWA policies.

9 The *West Coast Rendering* settlement is with Defendant D&D Disposal, Inc.
10 According to the complaint in this case, D&D Disposal is the parent company of
11 West Coast Rendering Co., or is otherwise affiliated. *West Coast Rendering*
12 Complaint ¶ 1. The *West Coast Rendering* agreement fails to identify the parties
13 involved, and resolves claims that “in any manner arise from or relate to the
14 described above allegations,” without describing the allegations. *West Coast*
15 *Rendering* Settlement ¶ 6. The only injunctive relief is that D&D Disposal must
16 “fully comply” with the IGP for 3 years (conduct already required by law). *West*
17 *Coast Rendering* Settlement ¶ 2. The Brodsky & Smith index references an
18 anticipated updated SWPPP, but the settlement makes no such reference, and there
19 is not attempt to explain how the SWPPP resolves the underlying CWA violations.

1 Few provisions in the *West Coast Rendering* settlement focus on injunctive
2 relief—a more significant portion of the settlement is focused on ensuring
3 confidentiality of the settlement document. *West Coast Rendering* Settlement ¶ 10.
4 This confidentiality paragraph prevents parties from discussing the claims,
5 allegations, or payments made in the agreement beyond a statement that “the
6 parties amicably resolved all differences.” *Id.* This limitation is presumptively
7 inappropriate in a resolution of claims implicating a broader public interest, and
8 undermines transparency necessary to securing compliance with the CWA. The
9 United States notes that the *Tapo Rock* and *Potential* settlements contained
10 identical disclosure limitations. *Tapo Rock* settlement ¶ 9; *Potential* settlement ¶ 6.

11 Fees and costs in *West Coast Rendering* total \$39,000, with additional
12 penalties if payment is not timely. The agreement includes a provision to enforce
13 the attorneys’ fee and costs judicially, if necessary. *West Coast Rendering*
14 Settlement ¶ 4. The *West Coast Rendering* settlement also provides for a \$1,000
15 direct payment to Plaintiff Ricardo Espinosa. *Id.* There is no justification of either
16 the attorneys’ fees and costs or the direct Plaintiff payment.

17 The *Potential Industries* settlement contains limited injunctive relief in the
18 form of a requirement to prepare and implement an updated SWPPP that includes
19 specific BMPs. *Potential Industries* ¶ 2.1. Defendant in this action must submit
20

1 SWPPP reports to Plaintiff Guzman, and Mr. Guzman may conduct two site visits
2 to review BMPs. *Potential Industries* ¶¶ 2.2-2.3. There is no indication of the
3 expertise Mr. Guzman has in assessing such BMPs. The agreement, on its face,
4 does not provide for any attorneys fee settlement. The agreement does provide for
5 a \$37,500 payment directly to Mr. Guzman, made by check payable to Brodsky &
6 Smith. *Potential Industries* ¶ 3. Counsel clarified that \$36,500 of that payment
7 was “received by the Firm as attorneys’ fees and costs, and the remaining \$1,000
8 was received by Plaintiff Guzman.” Ex. J at 3, n.1. The docket reflects no attempt
9 to justify the amount of this payment.

10 In correspondence with Brodsky & Smith, Counsel attempted to explain how
11 these settlement agreements provided some environmental benefit for underlying
12 CWA violations. The United States does not find those explanations to be
13 sufficient. As noted in §§III and V.A.2, Brodsky & Smith have also settled a large
14 number of CWA claims without filing any pleadings. The United States has
15 received some, but not all, of their settlement agreements. The agreements
16 typically provide a significant payment of attorneys’ fees and relief that requires
17 permit compliance.

1 **VI. RECOMMENDATIONS AND LEGAL SUPPORT FOR REVIEW**
2 **AUTHORITY**

3 Some aspects of Brodsky & Smiths’ CDs are clearly flawed, as described
4 above. More information is necessary before the United States is in a position to
5 advise this Court whether the proposed CD in this case is objectionable. To assist
6 with judicial review of the proposed consent judgment in this case the United
7 States respectfully recommends that reviewing courts order Plaintiff’s counsel to
8 submit a Motion to Enter that demonstrates:

- 9 (1) Plaintiff Garcia meets the requirements of Article III and
10 CWA citizen-suit prudential standing;
11 (2) the specific and separate factual basis for each of
12 Plaintiff’s four causes of action and how those
13 allegations result in actual violations of the CWA;
14 (3) how the injunctive relief described in the CD furthers the
15 goals of the CWA;
16 (4) the relationship between the violations being enforced
17 and the proposed environmental project;
18 (5) how the requirements of the CD will be enforced; and,
19 (6) the reasonableness of the proposed settlement of
20 attorneys’ fees and costs.

15 **A. Federal Courts Have An Independent Obligation To Ensure**
16 **Subject-Matter Jurisdiction Over A Purported Claim.**

17 Subject-matter jurisdiction, because it involves a court's power to hear a
18 case, can never be forfeited or waived.” *United States v. Cotton*, 535 U.S. 625,
19 630 (2002). This Court has an independent obligation to determine whether
20 subject-matter jurisdiction exists, even in the absence of a challenge from any

1 party. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). *See also Allstate*
2 *Ins. v. Hughes*, 358 F.3d 1089, 1093 (9th Cir. 2004). The court, thus, should
3 satisfy itself that it has jurisdiction over Plaintiff’s claims.

4 **B. The Court May Exercise its Inherent Authority Here**

5 Plaintiff’s counsel have not demonstrated that the pending CD is “fair,
6 reasonable and equitable” or that it would advance either public policy or the broad
7 goals and purposes of the CWA, or otherwise meet the standard of review
8 discussed in section IV, *supra*. The pattern of litigation initiated by Brodsky &
9 Smith indicates the need for additional scrutiny. Under these circumstances, when
10 assessing the CD in this case, the United States believes this Court should act with
11 particular diligence. In particular, the United States does not understand the
12 factual basis for Plaintiff’s alleged violations and how these allegations resulted in
13 an actual CWA violation, and both the United States and the Court need to
14 understand the nature of the underlying violations in order to determine if the CD
15 is a “fair, reasonable and equitable” resolution of those concerns.

16 Courts have inherent authority to “manage their own affairs so as to achieve
17 the orderly and expeditious disposition of cases.” *Link v. Wabash R. Co.*, 370 U.S.
18 626, 630–631 (1962). This includes a court’s authority to manage its own docket.
19 *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936). Courts also have inherent
20

1 authority to issue a range of orders to secure needed information about a case and
2 to address the conduct of litigants. *See generally Chambers v. NASCO, Inc.*, 501
3 U.S. 32, 45 (1991). Thus, not only is this Court obligated to ensure that the
4 pending CD meets the standard for entry; this Court has independent inherent
5 authority to seek additional information. This Court should exercise its inherent
6 authority and ensure that courts, and the United States, have complete information
7 necessary to determine whether entry of CWA CDs, or resolution of a CWA case
8 pursuant to settlement agreement, is appropriate.¹⁰

9 **C. This Court Should Also Review Attorneys' Fees and Costs**

10 Determination of proper attorneys' fees lies with the sound discretion of the
11 trial court. *Tutor-Saliba Corp v. City of Hailey*, 452 F.3d 1055, 1065 (9th Cir.
12 2006) (quoting *Zuniga v. United Can Co.*, 812 F.2d 443, 454 (9th Cir. 1987)).
13 Congress recognized this discretion in the CWA. *See* 33 U.S.C. §1365(d)

14
15 ¹⁰ The Ninth Circuit highlights the importance of developing a record and allowing
16 parties an opportunity to explain their position in other circumstances involving
17 judicial oversight of litigation, such as cases addressing the inherent power of a
18 court to issue restrictive pre-filing orders against vexatious *pro se* litigants,
19 enjoining filings unless certain requirements are met. *See Weissman v. Quail
Lodge, Inc.*, 179 F.3d 1194, 1197 (9th Cir. 1999) (citing *De Long v. Hennessey*,
912 F.2d 1144 (9th Cir. 1990)). Such restrictions are typically available only
20 where a reviewing court creates adequate record for review and has provided
litigants a chance to be heard. *De Long*, 912 F.2d at 1145, 1148.

1 (permitting an award of attorneys’ fees and costs “*whenever the court determines*
2 *such award is appropriate.*” (emphasis added)). Thus, a reasonable award of fees
3 and costs is subject to judicial review, and reviewing courts should award fees
4 following a judicial determination of the appropriateness of such fees.

5 Congressional history ties the Clean Water Act’s allowance of an
6 “appropriate” fee to the CAA’s allowance of an award of “reasonable” fees to a
7 citizen suit litigant. 42 U.S.C. §7604(d). Both the Senate and House Reports
8 explicitly connect the CWA citizen suit provision to the comparable CAA
9 provision.¹¹ Legislative history and Supreme Court precedent demonstrate that the
10 central purpose of the “reasonable” attorneys’ fee language in the CAA’s citizen
11 suit provision was to act as a check on the “multiplicity of [potentially meritless]
12 suits” that Congress feared would follow the authorization of citizen suit claims.
13 *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 692-93 and n.13 (1983) (citing 1
14 Legislative History of the Clean Air Act Amendments of 1970 (Senate Debate on
15 S. 4358, September 21, 1970), at 277). CAA legislative history makes it clear that
16

17 ¹¹ See S.Rep. No. 92–414 (1971), 2 Leg.Hist. 1497 (Citizen participation under the
18 Clean Water Act is “modeled on the provision enacted in the Clean Air
19 Amendments of 1970”); H.R. Rep. No. 92–911 at 133 (1972), 1 Leg.Hist. 820
20 (“Section 505 closely follows the concepts utilized in section 304 of the Clean Air
Act”). See also *Gwaltney of Smithfield, Ltd. V. Chesapeake Bay Foundation, Inc.*,
484 U.S. 49, 62 (1987) (acknowledging this connection).

1 courts award fees to “assure implementation and administration of the act or
2 otherwise serve the public interest.” 1977 House Report on CAA §307(f); 95
3 Cong. House Rept. 294; CAA 77 Leg. Hist. 26. Thus, both in a CWA setting and
4 an analogous CAA setting Congress has consistently indicated that judicial review
5 will provide a primary check on abusive citizen suit practices. *See* H.R. Rep. No.
6 911, 92d Cong., 2d Sess. 133-34 (1972) (acknowledging the role of judicial review
7 in CWA setting); *see also* S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1972) (same).

8 In *Hensley v. Eckerhart*, 461 U.S. 424, 433–37 (1983), a civil rights case,
9 the court articulated a step-by-step process by which courts should determine the
10 reasonableness of an attorneys' fees award. That process involves a court
11 determination that plaintiffs are properly considered a “prevailing party” as
12 required by the underlying statute, and a determination that the number of hours
13 expended and the lodestar rate were reasonable. *Id.* The CWA grants courts
14 discretion to award fees “to any prevailing or substantially prevailing party.” 33
15 U.S.C. §1365(d). *Hensley* teaches that such statutory language tying fees to the
16 results obtained indicates that a district court may adjust fees upward or downward,
17 discounting for failed claims and determining whether the level of success
18 achieved indicate that the hours expended is a satisfactory basis for a fee award.
19 *Hensley*, 461 U.S. at 434. Work on an unsuccessful claim is not ““expended in

1 pursuit of the ultimate result achieved,” and should not be the basis for a fee
2 award. *Id.* at 435 (quoting *Davis v. County of Los Angeles*, No. 73-63-WPG, 1974
3 WL 180 at *3 (C.D. Cal. June 5, 1974). For example, where a plaintiff alleges
4 inadequate BMPs but a consent judgment does nothing to establish improved
5 BMPs, a reviewing court may determine that a plaintiff’s alleged BMP claim is
6 unsuccessful, and should be disallowed. As the Supreme Court has recognized,
7 where “a plaintiff has achieved only partial or limited success, the product of hours
8 reasonably expended on the litigation as a whole times a reasonable hourly rate
9 may be an excessive amount.” *Hensley*, 461 U.S. at 436. The relief achieved by
10 plaintiffs in any settlement agreement should clearly promote the goals of the
11 Clean Water Act. *St. John’s Organic Farm v. Gem County Mosquito Abatement*
12 *Dist.*, 574 F.3d 1054, 1059, 1061 (9th Cir. 2009) (assessing whether prevention of
13 discharge of insecticides achieved CWA statutory goals).

14 As discussed, statute and precedent demand that before a court awards
15 attorneys’ fees and costs, a plaintiff must prevail or substantially prevail.
16 Additionally, reviewing courts should base a fee award on a reasonable
17 expenditure of attorney time, and that the relief achieved must promote the
18 statutory goals and the public interest. Consideration of these elements indicates
19 that parties cannot properly calculate a lodestar award unless the attorney

1 establishes the appropriateness of a fee award and proves number of hours spent on
2 the case. *See Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary*
3 *Corp.*, 487 F.2d 161, 167 (3rd Cir. 1973) (attorneys’ fees calculation should
4 include “some fairly definite information as to the hours devoted to various general
5 activities ... and the hours spent by various classes of attorneys[.]”) The
6 reasonableness of fees depends on the amount of work associated with the *specific*
7 case, not the amount it could potentially cost to litigate the case if it were to
8 proceed to trial. Put another way, especially with respect to cases settled early, an
9 award of attorneys’ fees and costs depends on the number of attorney hours
10 reasonably expended and costs incurred, not costs and fees associated with the
11 hypothetical litigation of a case that was settled. Where work appears to be
12 formulaic, rote, or does not require legal judgment it does not warrant full attorney
13 hourly rates. *Hensley*, 461 U.S. at 429–430 n. 3 (establishing factors, including the
14 novelty and difficulty of the questions and the skill requisite to perform the legal
15 service, courts must consider when increasing or decreasing attorneys’ fees).

16 Review of a CWA settlement may not always require an attorneys’ fee
17 motion – sometimes settlement without an accompanying fees motion is entirely
18 reasonable. *See Hensley*, 461 U.S. at 437 (“*Where settlement is not possible, the*
19 *fee applicant bears the burden of establishing entitlement to an award. . .*”)

1 (emphasis added). Mandating additional documentation seems appropriate with
2 respect to the Brodsky & Smith cases, however. The pure volume of NOV's
3 suggests that the two attorneys primarily associated with these cases are not
4 investing a great amount of time in any particular matter. However, absent judicial
5 review, there is no way to determine whether fees settlement correspond to
6 reasonable attorney hours. *See generally Sierra Club v. BNSF Ry. Co.*, 276 F.
7 Supp. 3d 1067, 1073 (W.D. Wash. 2017) (“Plaintiffs bear the burden of
8 documenting the appropriate hours expended and must submit evidence in support
9 of those hours worked.”) (citing *Welch v. Metro Life Ins. Co.*, 480 F.3d 942, 948
10 (9th Cir. 2007)); *Pac. W. Cable Co. v. City of Sacramento*, 693 F.Supp. 865, 870
11 (E.D.Cal.1988) (“The cases do not indicate that every minute of an attorneys' time
12 must be documented; they do, however, require that there be adequate description
13 of how the time was spent, whether it be on research or some other aspect of the
14 litigation ...”).

15 In order to assess whether Brodsky & Smith’s fee settlements are justified,
16 the United States recommends that this Court require the firm to justify attorneys’
17 fees and costs agreed to in the *Miller Castings* CD, including an explanation of the
18 hourly rate for each attorney or other person charging time and all time billed in
19 detail, supported by relevant contemporaneous billing records.

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PROOF OF SERVICE and STATEMENT RE. CONFERENCE OF COUNSEL

On this 18th day of May 2018, UNITED STATES’ STATEMENT OF CONCERN AND RECOMMENDATION THAT PLAINTIFF FILE A MOTION TO ENTER THE PROPOSED CONSENT DECREE was served on counsel of record by electronic filing.

This statement is made following a conference of counsel pursuant to L.R. 7-3 which took place on May 14, 2018.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 18th day of May, 2018.

/s/ Matthew R. Oakes
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