JEFFREY H. WOOD
Acting Assistant Attorney General

NICOLA T. HANNA
United States Attorney

MATTHEW R. OAKES
CHERYL MACKAY
R. JUSTIN SMITH
United States Department of Justice
Environment and Natural Resources Division
Law and Policy Section
Ben Franklin Station, P.O. Box 7415
Washington, D.C. 20044
(202) 514-2686
(202) 514-4231 (fax)

Counsel for the United States of America

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

GARY LUNSFORD,

Plaintiff,

v.

ARROWHEAD BRASS PLUMBING And ARROWHEAD BRASS & PLUMBING, LLC.

Defendants.

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

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

Current due date: April 23, 2018
Proposed due date: May 18, 2018

The Honorable Percy Anderson

TABLE OF CONTENTS

GLOSSARY vii

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. LEGAL FRAMEWORK 3

A. CWA Citizen Enforcement and the Importance of Review 3

B. Clean Water Act Permitting 4

C. California's Role Implementing the CWA 6

III. FACTUAL BACKGROUND 10

IV. STANDARD OF REVIEW FOR ENTRY OF CONSENT DECREES 13

V. THE UNITED STATES' CONCERNS WITH BRODSKY & SMITH'S CITIZEN SUIT PRACTICES 15

A. General Concerns With Brodsky & Smith's Citizen Suit Practice 16

1. Concerns regarding repeat plaintiffs, multiple plaintiffs at the same address, and no indications of plaintiff qualifications for monitoring 16

2. Volume of lawsuits compared to litigation capacity, low ratio of federal lawsuits, and high ratio of voluntary case closure 18

3. Little indication that consent judgments seek to enforce the CWA 19

4. No justification for attorneys' fees 20

5. Direct payments to plaintiffs 22

6. The factual basis of alleged claims is generalized, and unclear 24

B. Concerns About Pending Consent Judgments 26

1. *Lunsford v. Arrowhead Brass Plumbing* 26

a. The injunctive relief required by the revised *Arrowhead* decree is compliance with existing permitting requirements.....27

b. The enforcement mechanism in the *Arrowhead* decree is weak. 29

c. The revised *Arrowhead* decree contains an "environmental" project that appears to have no nexus to the violations alleged.....30

d. The revised *Arrowhead* decree creates confusion about permit requirements.....32

e. The revised *Arrowhead* decree requires "Action Report Payments" that may discourage IGP compliance 34

f. Plaintiffs' counsel have not justified their attorneys' fees, costs and other payment provisionss.....35

2. Lares v. Reliable and Luke Delgadillo Garcia v. Miller Castings 36

C. Concerns About Prior Settlements of Filed Claims 37

VI. RECOMMENDATIONS AND LEGAL SUPPORT FOR REVIEW AUTHORITY 42

A. Federal Courts Have An Independent Obligation To Ensure Subject-Matter Jurisdiction Over A Purported Claim.....43

B. The Court May Exercise its Inherent Authority Here.....43

C. This Court Should Also Review Attorneys' Fees and Costs 45

VII. CONCLUSION 50

TABLE OF AUTHORITIES

CASES:

Allstate Ins. v. Hughes, 358 F.3d 1089 (9th Cir. 2004) 43

Arbaugh v. Y&H Corp., 546 U.S. 500 (2006) 43

Chambers v. NASCO, Inc., 501 U.S. 32 (1991) 44

Davis v. City and County of San Francisco, 890 F.2d 1438 (9th Cir. 1989) 15

Davis v. County of Los Angeles, No. 73-63-WPG, 1974 WL 180 (C.D. Cal. June 5, 1974) 47

De Long v. Hennessey, 912 F.2d 1144 (9th Cir. 1990) 44

Friends of the Earth, Inc. v. Laidlaw, 528 U.S. 167 (2000) 17, 22

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987) 45

Hensley v. Eckerhart, 461 U.S. 424 (1983) 46, 47, 48

Landis v. North Am. Co., 299 U.S. 248 (1936) 43

Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973) 48

Link v. Wabash R. Co., 370 U.S. 626 (1962) 43

Local No. 93, Int'l Ass'n of Firefighters, AFL–CIO v. City of Cleveland, 478 U.S. 501 (1986) 14

Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981) 22

Nachshin v. AOL, 663 F.3d 1034 (9th Cir. 2011) 31

Natural Resources Defense Council v. Southwest Marine, Inc., 236 F.3d 985 (9th Cir. 2000) 1, 14

Pac. W. Cable Co. v. City of Sacramento, 693 F.Supp. 865 (E.D.Cal.1988).....49

Pacific R. Co. v. Ketchum, 101 U.S. 289 (1880).....14

Public Interest Research Group of New Jersey, Inc. v. Windall, 51 F.3d 1179 (3d Cir. 1995).....21

Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983).....45

Sierra Club v. BNSF Ry. Co., 276 F. Supp. 3d 1067 (W.D. Wash. 2017).....49

Sierra Club, Inc. v. Electronic Controls Design,, 703 F.Supp. 875 (D. Or.1989) (*Electronic Controls*).....passim

St. John's Organic Farm v. Gem County Mosquito Abatement Dist., 574 F.3d 1054 (9th Cir. 2009).....47

Tutor-Saliba Corp v. City of Hailey, 452 F.3d 1055 (9th Cir. 2006).....44

United States v. Cannons Eng'g Corp., 899 F.2d 79 (1st Cir. 1990).....13

United States v. Cotton, 535 U.S. 625 (2002).....42

United States v. Montrose Chem. Corp. of Cal., 50 F.3d 741 (9th Cir.1995).....13, 14

United States v. State of Or., 913 F.2d 576 (9th Cir. 1990).....14, 15

Weissman v. Quail Lodge, Inc., 179 F.3d 1194 (9th Cir. 1999).....44

Welch v. Metro Life Ins. Co., 480 F.3d 942 (9th Cir. 2007).....49

Zuniga v. United Can Co., 812 F.2d 443 (9th Cir. 1987).....44

STATUTES

33 U.S.C. §1251(a).....5

33 U.S.C. §1311.....6

33 U.S.C. §1311(a).....5

33 U.S.C. §1319(a)(1).....3

33 U.S.C. §1342.....5

33 U.S.C. §1342(a)(2).....5

33 U.S.C. §1342(b) 6
33 U.S.C. §1342(p) 5, 6
33 U.S.C. §1342(p)(2) 5
33 U.S.C. §1365 1
33 U.S.C. §1365(a) 14, 22
33 U.S.C. §1365(a)(1) 3
33 U.S.C. §1365(b)(1) 3
33 U.S.C. §1365(c)(3) 1, 3, 10
33 U.S.C. §1365(d) 21, 44, 46
33 U.S.C. §1365(f) 3
42 U.S.C. §7604(d) 45

REGULATIONS

40 C.F.R. §122.2 7
40 C.F.R. §122.26(b)(14) 5
40 C.F.R. §122.44 6
40 C.F.R. §125.3 6
40 C.R.F. §135.5 3

LEGISLATIVE:

H.R. Rep No. 911, 92d Cong. 2d Sess. 133-34 (1972) 21, 45, 46
H.R. Conf. Rep. No. 1004, 99th Cong., 2d Sess. 139 (1986) 24
S. Rep No. 92-414 (1971) 45
S. Rep. No. 414, 92d Cong., 1st Sess 81 (1972) 21
S. Rep. No. 1011, 94th Cong. 2d Sess. 6, reprinted in,
1976 U.S.C.C.A.N. 5908 21
S. Rep No. 50, 99th Cong. 1st Sess. (1985) 4

131 Cong Rec. S3645 (daily ed. March 28, 1985) 4, 22

133 Cong Rec S. 737 (daily ed. Jan. 14. 1987) 4, 15

MISCELLANEOUS:

Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991) 19

Cal. Water Code Sec 13240-41 28

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

I. INTRODUCTION

The United States is concerned about the proposed consent decree—brought in the name of Gary Lunsford—seeking to resolve a Clean Water Act (CWA) citizen enforcement action filed against Defendant Arrowhead Brass Plumbing. A CWA citizen-suit plaintiff is limited to obtaining injunctive relief against "continuous or intermittent" violations, or penalties, and is not entitled to compensatory recovery. *See Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 998 (9th Cir. 2000). Yet, for little documented environmental benefit (to date), the proposed consent decree would pay Mr. Lunsford $15,000—for claimed services to be rendered as an environmental "monitor"—and his attorneys $76,500. The United States recommends that this Court require Plaintiff's counsel to file a full Motion to Enter, explaining how the proposed consent judgment is fair, adequate, reasonable, equitable, and consistent with the statutory purposes of the CWA, and justifying their fees and costs settlement. Pending that, the United States objects to the proposed consent decree.

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

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

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

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

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

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

II. LEGAL FRAMEWORK

A. CWA Citizen Enforcement and the Importance of Review

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

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

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

B. Clean Water Act Permitting

The CWA establishes a program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by reducing the discharge

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

A stormwater discharge is a point source discharge of pollutants that requires a NPDES permit when "associated with industrial activity." 33 U.S.C. §1342(p)(2). Industrial activities are defined by their standard industrial classification. 40 C.F.R. §122.26(b)(14). It is a CWA violation for an industrial facility to fail to comply with the conditions of a permit or to discharge stormwater from areas where industrial activities take place without a NPDES permit. Discharge permits can be individual permits or general permits. Individual permits are issued to a specific facility. General permits can be created for a class of facilities that have similar discharges and need to use similar techniques for controlling pollutants. General permits cover many facilities, which all comply with the same requirements. Any qualifying applicant can apply to obtain general

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

C. California's Role Implementing the CWA

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

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

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

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

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

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

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

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

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

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

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

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

III. FACTUAL BACKGROUND

Brodsky & Smith, L.L.C. is a Pennsylvania registered professional limited liability company that filed a certificate of organization on July 29, 1998.[2] According to the firm website, three firm attorneys are licensed to practice in California. *See* Ex. E (CA Bar Records). Starting in October of 2016, two of those attorneys have filed nineteen CWA citizen suit cases in the Central District of California. *See* Ex. F (listing cases). The firm failed to provide timely notice of the complaints filed in any of these cases. 33 U.S.C. §1365(c)(3).

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

[2] The registered address for this firm is 2 Bala Plaza, Bala Cynwyd, Pennsylvania 19004. The address listed for the California Office of Brodsky & Smith, L.L.C. is 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.

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

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

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

---

[3] A docket search for the Central District of California showed that Brodsky & Smith had filed 17 CWA citizen suits as of November 30, 2017 and one additional case that was docketed after November 30, 2017. One case, *Gloria Lares v. King's 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.

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

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

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

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

IV. STANDARD OF REVIEW FOR ENTRY OF CONSENT DECREES

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

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

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

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

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

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

Here the United States sets out: 1) general concerns with Brodsky & Smith's CWA practices; 2) specific concerns with the proposed CDs in this case; and, 3) an overview of concerns with some of Brodsky & Smith's settlement agreements. The firm's general practices and settlement agreements demonstrate patterns which demand scrutiny.

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

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

A. General Concerns With Brodsky & Smith's Citizen Suit Practice

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

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

[4] The 158 Brodsky & Smith CWA NOVs were sent on behalf of 38 named individuals. DOJ records indicate that the following Brodsky & Smith plaintiffs are the most frequent repeat CWA litigants: Luke Delgadillo Garcia (15 NOVs); Gary Lunsford (10 NOVs); Arthur Acevedo (10 NOVs); Jorge Ramirez (9 NOVs); 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.

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

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

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

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

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

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

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

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

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

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

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

4. No justification for attorneys' fees

Reviewing courts are permitted to award attorneys' fees and costs in CWA citizen suit cases only when "the court determines such award is appropriate." 33

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

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

H.R. Rep. No. 911, 92d Cong., 2d Sess. 133-34 (1972); *see also* S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1972). Brodsky & Smith have provided no justification for their settlement of fees and costs. Preliminarily, Brodsky & Smith should establish that they are a prevailing party in the litigation, and that the fees awarded are reasonable. *Public Interest Research Group of New Jersey, Inc. v. Windall*, 51 F.3d 1179, 1184-85 (3d Cir. 1995). A reasonable fee is one which is "adequate to attract competent counsel, but which do[es] not produce windfalls to attorneys." *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

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

5. Direct payments to plaintiffs

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Concerns About Pending Consent Judgments

1. Lunsford v. Arrowhead Brass Plumbing

A prior CD submitted in this case had provided for a $1,000 direct payment to Plaintiff. The United States had previously informed Brodsky & Smith that such payments to Plaintiff are improper, (Ex. A), and we repeated that concern in response to the CD initially submitted in this case (and indicated other potential concerns) in a February 22, 2018 email (Ex. N). On March 9, 2018, the parties submitted a revised CD that shifted the $1,000 payment into an "environmental project." That revised CD was provided to the United States for review on

February 28, 2018.[8] The United States has the following concerns with the revised *Arrowhead* CD:

a. The injunctive relief required by the revised *Arrowhead* decree is compliance with existing permitting requirements

The *Arrowhead* Complaint alleges: 1) violations of unspecified provisions of the IGP and IGP Water Quality Standards through discharge of "polluted stormwater" (Complaint ¶¶ 77-85); 2) violations of unspecified IGP effluent limitations due to inadequate development and/or implementation of unspecified BMPs (Complaint ¶¶ 86-93); 3) failure to develop and implement an adequate SWPPP (Complaint ¶¶ 94-104); and, 4) failure to develop and implement an adequate monitoring and reporting program (Complaint ¶¶105-110). The United States does not see sufficient facts alleged to allow it to assess the appropriateness of these claims. For example, though Plaintiff alleges that Defendant's annual stormwater sampling is contaminated, Complaint ¶¶ 73, it is unclear if Plaintiff determined that the Water Quality Standards were violated by the level of this contamination. The Complaint also references "the applicable . . . Basin Plan." Complaint ¶ 78. The Water Quality Standards for a particular region are adopted

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

through a Basin Plan. *See* Cal. Water Code §§ 13240, 13241. However, no Basin Plan is specified in the Complaint, and the Complaint does not allege the violation of any particular Basin Plan provisions.

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

The stormwater pollution reduction measures described in the revised *Arrowhead* decree mirror the requirements in the facility's revised SWPPP. The revised SWPPP, which was amended on January 2017 after the complaint in the case was filed, contains BMPs beyond what was required in the previous SWPPP and the parties agree that these BMPs "bring the facility closer to compliance with the IGP." Revised *Arrowhead* CD at III.A.2. Thus, the CD itself requires nothing more than the IGP requires, but DOJ acknowledges that this litigation may have prompted some changes to aspects of permitting requirements. Information establishing that conclusion, however, is not apparent on the face of the CD and

the parties failed to explain how this litigation advanced any statutory purpose. Thus, the United States has only limited and circumstantial information regarding what led to the revision of the facility's SWPPP, and whether it was at all related to the filing of the complaint in this case.

b. The enforcement mechanism in the *Arrowhead* decree is weak

Enforcement of future violations of the IGP may only be possible through the state (and not judicial enforcement), while failure to pay attorney's fees is judicially enforceable. At a minimum, the *Arrowhead* dispute resolution mechanism makes it difficult for Plaintiff Lunsford to enforce the IGP requirements in court. Judicial enforcement is typically the primary advantage of a settlement commitment comply with pre-existing permit requirements. Here, however, the Dispute Resolution provision of the CD the parties expressly recognize only one avenue for relief regarding "a matter governed by a provision of the IGP." CD § VI.B. That avenue is Plaintiff filing a request for State enforcement. *Id.* By contrast, if parties dispute other, non-IGP related CD matters (related to payment of attorneys' fees, for example) the CD allows any party to "move the Court for a remedy." CD § VI.C. A reasonable reading of this language could prohibit Plaintiff from seeking judicial enforcement of any aspect of the CD "governed by a provision of the IGP." Thus, the CD appears to

contemplate IGP related enforcement solely (or, at least primarily) through a request for State action. Strong CWA settlement instruments allow, rather than disclaim, judicial enforcement options.

c. The revised *Arrowhead* decree contains an "environmental" project that appears to have no nexus to the violations alleged

The revised *Arrowhead* decree does not provide for civil penalties. Instead, it contains a $8,500 payment to the University of California at San Diego Extension Service for an "environmental" project.[9] The payment is "to fund tuition grants for owners and employees of small businesses . . . affected by the IGP." Arrowhead CD § V.A. The revised *Arrowhead* decree does not identify the training to be funded by the tuition grant or otherwise specify that the funding should be used to promote CWA compliance or a water quality benefit. When considering supplemental environmental projects, EPA emphasizes that the project have a nexus to the underlying violation by, for example, being designed to reduce the likelihood of future similar violations or reducing the public health impact of the alleged violation. *See* EPA Nexus Memo (Ex. O). It is not clear on the face of

[9] The original *Arrowhead* decree contained a $7,500 "environmental project" and a $1,000 payment to Plaintiff. In the revised *Arrowhead* decree these payments were combined into a $8,500 "environmental project."

the CD that this provision has anything to do with water quality, the environment, the CWA, or the allegations in the complaint.

Pursuant to our request, the University provided a letter referencing the decree and explaining that that the University "may receive $7,500 in funds" from Arrowhead Brass to support tuition grants to individuals seeking industrial stormwater compliance training. This letter indicates that the funds provided will be used in a manner that promotes the purpose of the CWA (sponsoring compliance training), though we know little about the specific relationship of any anticipated projects to the violations at issue here. *See generally Nachshin v. AOL*, 663 F.3d 1034, 1038-39 (9th Cir. 2011) (establishing 9th Cir. test to determine sufficiency of the nexus for a class action *cy pres* distribution). Also, this statement may not be enforceable as a CD provision because it is not incorporated into the revised *Arrowhead* decree.

d. The revised *Arrowhead* decree creates confusion about permit requirements

Section III.C.1. of the revised *Arrowhead* decree describes a requirement for Defendant to submit so-called "Response Action Level 2 Evaluation and Reports." This term is confusing because it is not defined either in the IGP or the CD. The IGP defines two similar terms—a forward-looking "Level 2 ERA Action Plan," to address a Level 2 NAL exceedance by a discharger, and a follow-up

report on the ERA action, called a "Level 2 ERA Technical Report." IGP § XII.D.1-2. The revised *Arrowhead* decree does not clearly state whether it would require submission of one of these IGP mandated documents, or submission of a third report.

In Section III.C.2. the revised *Arrowhead* decree lists the requirements for an "Exceedance Response Action Level 2 Report," which include the identification of contaminants discharged in excess of the NALs, an assessment of pollutant sources, and the identification of BMPs to ensure compliance. CD § III.C.2. The terms of the report make it unclear whether this report is the same report required under Section III.C.1, whether this report is separate the Technical Report already required by the IGP, or whether this CD provision creates a new requirement independent of the IGP. These requirements in Section III.C.2.(a)-(c), however, appear to be taken from the IGP's requirements for a "Level 2 ERA Technical Report." If the "Evaluation and Report" required in Section III.C.1. is the same reporting instrument as the report required in Section III.C.2. then the CD conflates IGP requirements and could create confusion about what must be submitted to the state under the IGP, and when that submission is required. If it is a separate report already required by the IGP, this should be clarified. This confusion is could interfere with Defendant's compliance with the IGP.

Exacerbating the confusion created by the CD terminology, the revised *Arrowhead* decrees' implementation schedule is potentially inconsistent with the IGP. Specifically, if the CD contemplates a single report then terms of the revised *Arrowhead* decree would require defendant to implement their action plan prior to submitting that plan to the State. The IGP, by contrast, contains a logical scheme for ERAs that requires the regulated party to develop and submit a plan, implement the plan, and then report on implementation. Specifically, the revised *Arrowhead* decree says that "all BMPs are implemented . . . in no case later than January 1 following the submittal of the Level 2 Response Action Report." CD § III. C.3. The IGP requires the Level 2 ERA Action Plan to be submitted by January 1 following the reporting year during which a Level 2 NAL exceedance occurred. IGP § XII.D.1. Thus, the IGP requires submission of its Action Plan on the same schedule that the revised *Arrowhead* decree requires implementation of what might be the same plan. In any event, either the result of the CD terms conflicts, or the intent of the parties is unclear.

The revised *Arrowhead* decree also allows for a six month extension for implementation of the BMPs in the "Exceedance Response Action Level 2 Report" if Defendant submits, among other things, "a revised Level 2 Response Action Report describing the necessary tasks that will need to be taken in order to

complete the technical report justifying the extension." CD § III.C.3. It is unclear what this provision in the revised *Arrowhead* decree actually means, and it increases confusion about the regulatory scheme and could undermine compliance with the requirements of the IGP.

e. The revised *Arrowhead* decree requires "Action Report Payments" that may discourage IGP compliance

Section IV.C of the revised *Arrowhead* decree requires Defendant to remit a $1,500 "Action Report Payment" to University of California at San Diego Extension Services each time it submits a so-called "Exceedance Response Action Level 2 Report." The IGP requires regulated parties to submit both an Action Plan and a Technical Report. If the CD requires payment every time Defendant submits an IGP required document the revised *Arrowhead* decree effectively penalizes Defendant for complying with the IGP. The IGP is designed to facilitate self-monitoring and self-correction by the permittee, and permittees are encouraged to voluntarily conduct additional monitoring to anticipate and address any compliance problems. A required payment will discourage voluntary actions, and will impair, rather than facilitate, the self-regulatory scheme the IGP seeks to establish. The United States is concerned that discouraging facilities from reporting NAL exceedances and submitting Action Plans required by the IGP could deter permit

compliance and, as such, is contrary to the government's enforcement program and interpretation of the CWA.

f. Plaintiffs' counsel have not justified their attorneys' fees, costs and other payment provisions

The revised *Arrowhead* decree requires Defendant Arrowhead Brass to pay $76,500 in attorneys' fees and costs, and $15,000 to Plaintiff Lunsford for costs and fees incurred for monitoring CD. CD § V.B, IV.B. These amounts have not been justified. Because Brodsky & Smith did not provide justification for the attorneys' fee amount, the United States and the court have no basis upon which to assess the validity of these fees. The United States similarly lacks a basis for assessing the appropriateness of the $15,000 payment for monitoring compliance. The monitoring payment is framed as a payment to Plaintiff, but is made payable to Brodsky & Smith. In the CD this $15,000 is described as payment for "fees" as well as "costs" being made to a law firm, it is unclear whether this payment is intended to be a supplemental attorneys' fee payment.

The United States generally supports CD provisions that allow future site access to monitor CD compliance. Particularly when technical assistance is necessary to ensure proper implementation of injunctive relief, it may be appropriate for a CD to include costs associated with monitoring. The *Arrowhead* decree provides for one site inspection (CD § IV.A), but other "compliance

monitoring" activities involve reviewing reports to which the public would have access via SMARTS, irrespective of the decree. There is no indication that Mr. Lunsford has any technical ability or training that would qualify him for an oversight role, and the terms of the CD do not specify that a qualifying expert will participate in these monitoring events.

2. *Lares v. Reliable Wholesale* and *Luke Delgadillo Garcia v. Miller Castings*

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

C. Concerns About Prior Settlements of Filed Claims

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

has never exercised its statutory right of review of these three settlements.[10] These cases are:

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

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

[10] The United States received no information on these matters until DOJ sent a letter to plaintiff's counsel requesting an opportunity to review those documents. Even at that point the firm maintained that notice was not required. Ex. H. The United 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.

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

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

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

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

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

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

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

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

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

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

VI. RECOMMENDATIONS AND LEGAL SUPPORT FOR REVIEW AUTHORITY

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

(1) Plaintiff Lunsford meets the requirements of Article III and CWA citizen-suit prudential standing;
(2) the specific and separate factual basis for each of Plaintiff's four causes of action and how those allegations result in actual violations of the CWA;
(3) how the injunctive relief described in the CD furthers the goals of the CWA;
(4) the relationship between the violations being enforced and the proposed environmental project;
(5) how the requirements of the CD will be enforced; and,
(6) the reasonableness of the proposed settlement of attorneys' fees and costs.

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

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

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

B. The Court May Exercise its Inherent Authority Here

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

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

authority to issue a range of orders to secure needed information about a case and to address the conduct of litigants. *See generally Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991). Thus, not only is this Court obligated to ensure that the pending CD meets the standard for entry; this Court has independent inherent authority to seek additional information. This Court should exercise its inherent authority and ensure that courts, and the United States, have complete information necessary to determine whether entry of CWA CDs, or resolution of a CWA case pursuant to settlement agreement, is appropriate.[11]

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

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

[11] The Ninth Circuit highlights the importance of developing a record and allowing parties an opportunity to explain their position in other circumstances involving judicial oversight of litigation, such as cases addressing the inherent power of a court to issue restrictive pre-filing orders against vexatious *pro se* litigants, 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 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.

(permitting an award of attorneys' fees and costs "*whenever the court determines such award is appropriate*." (emphasis added)). Thus, a reasonable award of fees and costs is subject to judicial review, and reviewing courts should award fees following a judicial determination of the appropriateness of such fees.

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

[12] *See* S.Rep. No. 92–414 (1971), 2 Leg.Hist. 1497 (Citizen participation under the Clean Water Act is "modeled on the provision enacted in the Clean Air Amendments of 1970"); H.R. Rep. No. 92–911 at 133 (1972), 1 Leg.Hist. 820 ("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).

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

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

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

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

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

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

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

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

VII. CONCLUSION

The practices and consent decree of Plaintiff Lunsford and Brodsky & Smith are concerning. The number of issues presented—and the overall circumstances in which they appear—158 NOVs, by one small firm, in just under two years—is unprecedented. Given the issues outlined in this Statement of Concern, the United States recommends that this Court order a Motion to Enter to be filed by Plaintiff, demonstrating each of the six elements outlined in section VI. This Motion to Enter will allow the United States to further advise the court with respect to the appropriateness of the proposed CD.

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General

NICOLA T. HANNA
United States Attorney

May 18, 2018

/s/ Matthew R. Oakes

Matthew R. Oakes, Attorney
Cheryl Mackay, Attorney
R. Justin Smith, Attorney
United States Department of Justice
Environment and Natural Resources Div.
P.O. Box 7415
Washington, D.C. 20044
(202) 514-2686

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

Matthew R. Oakes, Attorney
United States Department of Justice
Environment and Natural Resources Division
Law and Policy Section
P.O. Box 7415
Washington, D.C. 20044
(202) 514-2686