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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF KERN

CLEAN WATER FUND and ASSOCIATION OF IRRITATED RESIDENTS,

Plaintiffs,

vs.

VALLEY WATER MANAGEMENT COMPANY,

Defendant.

CASE NO. BCV-19-101750
Consolidated with Case No. BCV-19-102368

Assigned to Hon. David R. Lampe for All Purposes

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION TO APPROVE PROPOSITION 65 SETTLEMENT BASED UPON STIPULATED CONSENT JUDGMENT

Dept. No: 11
Hearing Date: May 24, 2021
Time: 8:30 am
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August 22, 2019

CLEAN WATER FUND and ASSOCIATION OF IRRITATED RESIDENTS,

Plaintiffs,

vs.

SENTINEL PEAK RESOURCES, LLC; SENTINEL PEAK RESOURCES CALIFORNIA, LLC; and DOES 1-20, inclusive,

Defendants

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MEMORANDUM OF POINTS & AUTHORITIES

Plaintiffs CLEAN WATER FUND ("CWF") and ASSOCIATION OF IRRITATED RESIDENTS ("AIR") (hereinafter "Plaintiffs") respectfully request the entry of the [Proposed] Consent Judgment provided herewith, to fully resolve these consolidated matters. Plaintiffs and Defendants VALLEY WATER MANAGEMENT COMPANY ("VWMC"), SENTINEL PEAK RESOURCES, LLP, and SENTINEL PEAK RESOURCES CALIFORNIA (Sentinel Defendants are collectively "SPR") have reached a negotiated settlement agreement for the cessation of discharges of Proposition 65 listed contaminants, from VWMC's McKittrick 1 and 1-3 Facilities ("Facility"), by an agreed upon date, and for Defendants' payment of civil penalties, reimbursement of Plaintiffs' attorneys' fees and litigation costs, and additional items. For the reasons discussed further, below, Plaintiffs respectfully request that the [Proposed] Consent Judgment be entered.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Plaintiffs allege Defendants' disposal of oil and gas wastewater into unlined pits at the Facility violates Proposition 65 by discharging chemicals listed under Proposition 65 directly into, and where such chemicals probably will pass into, sources of drinking water. (E.g., VWMC Compl., ¶¶ 6, 23, 43, 44, 51; SPR Compl. ¶¶ 6, 29, 44, 45, 52.) Plaintiffs' allegations are based, in part, on VWMC's test results showing the presence of Proposition 65 contaminants in both wastewater and groundwater in and around the Facility,[1] and the fact VWMC reports admit the Facility operates above the "Regional Lower Aquifer." (Flanders Decl. Ex. A.) Plaintiffs allege that the Regional Lower Aquifer is a major source of ground drinking water in the subbasin. The Facility also sits atop groundwater that has, at all relevant times, been designated for municipal supply ("MUN") in the Central Valley Regional Water Quality Control Board's Basin Plan. (Valley Compl. at ¶ 25; SPR Compl. at ¶ 30. Defendants discharged as much as 4.4 million gallons of oil and gas production wastewater into unlined pits at the Facility in a single day, and, on average, have discharged approximately 2.5 million gallons per day. (VWMC

[1] These discharges and disposals of the listed chemicals are alleged to constitute violations of Proposition 65: 1,4-Dioxane; Arsenic; Benzene; Bromoform; Cumene; Diethanolamine; Ethylbenzene; Ethylene Glycol; Methanol; Naphthalene; Nickel; Radionuclides; Residual (heavy) fuel oils; Toluene; and Trisodium Nitrilotriacetic acid (hereinafter "Subject Chemicals").

Compl. ¶ 37.) Proposition 65 provides for, and Plaintiffs seek, injunctive relief, and penalties for past violations. (*Toxic Injuries Corp. v. Safety-Kleen Corp.* (C.D.Cal. 1999) 57 F.Supp.2d 947, 949.)

The proposed Consent Judgment requires Defendants to completely cease discharging the Subject Chemicals at the Facility by September 1, 2021. However, the September 1, 2021 deadline may be extended to September 1, 2022, if the Regional Water Board extends its Cease and Desist Order compliance deadline beyond September 1, 2021. In no event, however, shall the Consent Judgment deadline to cease discharges of the Subject Chemicals at the Facility be extended beyond September 1, 2022. (Consent Judgment at ¶ 2.1.) The proposed Consent Judgment requires Defendants to pay civil penalties in the amount of $139,000, attorney's fees of $430,000, expert and litigation costs of $51,000,[2] and an additional settlement payment of $25,000, for a total of $645,000. (*See* Consent Jmt., ¶ 3.1).

LEGAL BACKGROUND

Proposition 65 is a strict liability statute that provides:

> No person . . . shall knowingly discharge or release a chemical known to the state to cause cancer or reproductive toxicity into water or onto or into land where such chemical passes or probably will pass into any source of drinking water . . .

(California Health and Safety Code section 25249.5.) "Source of drinking water" is defined under Proposition 65 as "**either** a present source of drinking water **or** water which is identified or designated in a water quality control plan adopted by a regional board as being suitable for domestic or municipal uses." (Health & Safety Code § 25249.11(d)[emphasis added].) The California Supreme Court explains:

> that section 25249.11, subdivision (d) refers to water quality control plans only in the second part of its definition implies that the first part of the definition--present source of drinking water--was not intended to refer exclusively to bodies of water included in water quality control plans.

(*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 305.)

To settle Proposition 65 litigation, state regulations require a period of forty-five days for the Attorney General's Office to review and potentially comment upon any settlement, prior to entry by the Court. (11 Cal. Code Regs § 3003.) The statute also requires certain judicial findings: a warning that

[2] The proposed Consent Judgment combines fee and cost recovery at $481,000, but $51,000 will recompensate Plaintiffs for their expert and litigation expenses, while $430,000 will reimburse Plaintiffs' reasonable attorneys' fees incurred. (See Flanders Decl. ¶ 8.)

complies with Proposition 65,[3] that attorneys' fees are reasonable, and that the penalty amount is reasonable. (Health & Safety Code, § 25249.7, sub. (f)(4).)

ARGUMENT

The Court should enter the proposed Consent Judgment because it would cease discharges of Proposition 65 chemicals into, and where they probably will pass into, sources of drinking water; and because the civil penalties, and attorneys' fees and litigation cost, are reasonable. Pursuant to Health and Safety Code section 25249.7, subdivision (f)(4), a court may approve a Proposition 65 settlement upon finding that "[t]he warning that is required by the settlement complies with [Proposition 65]," that "[t]he award of attorney's fees is reasonable under California law," and that "[t]he penalty amount is reasonable based on the criteria set forth in [Health & Safety Code section 25249.7, subdivision (b)(2)]." The proposed Consent Judgment satisfies these requirements.

First, this case arises pursuant to Proposition 65's "discharge to drinking water" prong, not under Proposition 65's duty to warn prong; because no failure to warn is at issue, there is no warning requirement in the proposed Consent Judgment. *Second*, the attorneys' fees are a compromise far below the "lodestar" amount incurred by Plaintiffs' counsel, and the Consent Judgment otherwise comports with Code of Civil Procedure section 1021.5, California's private attorney general fee-shifting statute. The accompanying Declaration of Jason Flanders itemizes over 1598 hours incurred by Plaintiffs' counsel and legal support staff, for a total of $776,533 in attorneys' fees incurred. After an extensive exercise of billing judgment, however, Plaintiffs submit a lodestar attorneys fee of $685,934. Thus, the final attorney fee settlement of $430,000 represents a substantial compromise in furtherance of resolution of this matter, and is reasonable. *Third*, and finally, the civil penalty and additional settlement payment amounts will constitute a meaningful deterrent to future violations of Proposition 65, and will otherwise be used to further the purposes of Proposition 65.

I. The Required "Warning" Finding Does Not Apply to These Claims.

Proposition 65 contains separate and distinct regulatory frameworks for, on the one hand,

[3] As discussed, below, this finding is not applicable to this case, which was brought under the discharge prohibition of Proposition 65, as opposed to the toxic exposure prong of Proposition 65, for which a warning is an available remedy.

warnings to consumers for products containing Proposition 65 chemicals, and on the other hand, discharges of Proposition 65 chemicals to sources of drinking water. (Compare, §25249.5 ["Prohibition On Contaminating Drinking Water With Chemicals Known to Cause Cancer or Reproductive Toxicity"] with § 25249.6 ["Required Warning Before Exposure To Chemicals Known to Cause Cancer Or Reproductive Toxicity"].) As relevant to this case, "[n]o person in the course of doing business shall knowingly discharge or release a chemical known to the state to cause cancer or reproductive toxicity into water or onto or into land where such chemical passes or probably will pass into any source of drinking water." (§ 25249.5) There is no exception to this discharge prohibition on the basis of any warning. (Compare § 25249.9 ["Exemptions from Discharge Prohibition"] with § 25249.10 ["Exemptions from Warning Requirement"].) As a result, the statutory requirement that "[t]he warning that is required by the settlement complies with [Proposition 65]," simply does not apply to the claims in this case. The warning requirement allows businesses to market products containing Proposition 65 chemicals so long as there is adequate warning. Here, in contrast, Proposition 65 prohibits discharge of listed chemicals to sources of drinking water. Accordingly, the proposed Consent Judgment requires Defendants to cease discharges of the Subject Chemicals, from the Facilities, on or before September 1, 2021. (*See* Consent Judgment, Paragraph 2.) No warning is relevant or included.

II. The Settlement of Attorneys' Fees is Reasonable.

Next, to approve the proposed Consent Judgment, the Court must determine that "[t]he award of attorney's fees is reasonable under California law." (Health & Safety Code, § 25249.7, sub. (f)(4).) Here, Code of Civil Procedure section 1021.5, provides for an award of attorneys' fees

> to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

In turn, the reasonableness of the settlement amount is determined using the "lodestar/multiplier" method. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 48.) Under this method, the first step is to calculate the "lodestar" figure – the hours reasonably expended multiplied by the reasonable hourly rate. In addition,

the Attorney General's office has promulgated Proposition 65 guidelines that "apply to settlements under which the basis for a fee award is provided by Code of Civil Procedure section 1021.5." (Cal. Code Regs. §§3201 et seq. [hereafter "AG Guidelines"].) The AG Guidelines explain that, "[t]he fact that the fee award is part of a settlement, however, may justify applying a somewhat less exacting review of each element of the fee claim than would be applied in a contested fee application." (Id.) Nevertheless, as discussed, below, Plaintiffs' settlement satisfies each of these factors.

A. The Proposed Consent Judgment Comports with Section 1021.5.

First, by virtue of the settlement agreement and a Consent Judgment that changes the legal rights and responsibilities as among the parties, Plaintiffs are "a successful party" for purposes of 1021.5. (*See*, *Folsom v. Butte County Ass'n of Gov'ts* (1982) 32 Cal.3d 668, 687 [a party is successful under §1021.5 if it achieves some relief from the benchmark conditions challenged in the lawsuit]; *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.* (2001) 532 U.S. 598, 604 ["court-ordered consent decrees create the material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees"][cites, quotes omitted]; *see also* 11 Cal. Code Regs § 3201(a) ["The fact that a defendant changed its conduct prior to entry of a court order or judgment does not preclude a finding that the plaintiff was successful. If the plaintiff's action was the cause or 'catalyst' of the change in conduct, the plaintiff may be deemed successful."]) Here, the Consent Judgment provides for a complete cessation of discharges, and civil penalties, successfully obtaining the essential relief Plaintiffs' complaints sought.

Second, enforcement of Proposition 65 constitutes "the enforcement of an important right affecting the public interest." (*See*, Code Civ. Procedure, § 1021.5; *c.f. La Mirada Avenue Neighborhood Assn. of Hollywood v. City of Los Angeles* (2018) 22 Cal.App.5th 1149, 1158-1159 [municipal code confers important public right]; *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 892-893 [CEQA confers important right]; Health & Safety Code § 25249.7(d)-(f) [describing Proposition 65 cases and settlements as in "the public interest"].)

Third, the Consent Judgment would provide a "significant public benefit" under 1021.5. The AG's guidelines provide that "[i]n a case alleging violations of Health and Safety Code section

25249.5, the reduction or elimination of the discharge of listed chemicals establishes a significant public benefit." (11 Cal. Code Regs. § 3003, subd. (b)(3).) Here, the settlement expressly provides for the elimination of discharges of listed chemicals, and thereby confers a significant public benefit. (*See* Consent Judgment ¶ 2.1.)

Fourth, enforcement of these public rights was "necessary" to achieve the result. Following Plaintiffs' 60-day notice of intent to sue, no public enforcement agency took action, and Defendants did not cease discharges. The Regional Waterboard's Cease and Desist Order only enforces the basin plan MUN standard—which may yet undergo years of administrative proceedings—and nowhere enforces Proposition 65's discharge prohibitions. (*See also*, *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 305, 306 [Proposition 65 "present source of drinking water--was not intended to refer exclusively to bodies of water included in water quality control plans;" Proposition 65 was adopted because "state government agencies have failed to provide [the People] with adequate protection".]) Thus, these actions were necessary to cease discharges of the Subject Chemicals into sources of drinking water, which the proposed Consent Judgment requires.

Fifth and finally, "such fees should not in the interest of justice be paid out of the recovery" (§ 1021.5). Here, the only other recoveries are for civil penalties, but the AG's Guidelines state that "civil penalties shall not be 'traded' for payments of attorney's fees" (11 Cal. Code Regs, § 3203(b)); and the additional settlement payment, which must be used for future activities to reduce Proposition 65 chemicals in drinking water (11 Cal. Code Regs, § 3204). Thus, the additional monetary payments in the Consent Judgment serve other purposes limited by law, and may not replace 1021.5 fees.

B. The Hours Spent and Market Rates are Reasonable.

The Consent Judgment requires Defendants to reimburse Plaintiffs' $430,000 for attorneys' fees incurred. Also, for each month the Compliance Deadline is extended beyond September 1, 2021 (which deadline shall not be extended beyond September 1, 2022), Defendants shall pay Plaintiffs $1,000 as a reimbursement of Plaintiffs' reasonable attorneys' fees and expert costs for ongoing monitoring of compliance with the Consent Judgment. (*See* Consent Jmt., ¶ 3.1.5; *see also*, *Pa. v. Del. Valley Citizens' Council for Clean Air* (1986) 478 U.S. 546 [providing fee recovery for compliance

monitoring]; *Zambrano v. Oakland Unified Sch. Dist.* (1991) 229 Cal.App.3d 802 [same]; *Daniels v. McKinney* (1983) 146 Cal.App.3d 42 [same].)

These fees are very reasonable under the facts and circumstances of these consolidated cases. "Absent circumstances rendering the award unjust, an attorney fee award should ordinarily include compensation for all hours spent, including those relating to the fee." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133 [emphasis added].) However, under the terms of the Consent Judgment, a significant amount of billed time will go uncollected, since achieving a significant public benefit was paramount to Plaintiffs' litigation goals.

Plaintiffs' counsel and legal support staff incurred over 1598 hours of work, for a lodestar of $776,533, over the life of these consolidated cases. (Flanders Decl., ¶¶ 4, 7, Ex. C.) However, counsel have exercised extensive billing judgment as reflected in the accompanying timesheets, with a resulting adjusted lodestar amount of $685,934, an approximate 12% reduction for billing judgment. The number of attorney and paralegal hours worked, fully documented in the accompanying timeslips, is reasonable in these cases, considering: 1) the long history of noncompliance with applicable law; 2) the number and severity of the alleged noncompliance; 3) the complexity of the science (hydrology, geology, chemistry, and industrial engineering) and Facilities (wastewater management from oil operations, including production, water storage, transit, and disposal); 4) necessary communications with experts; 5) the complex state regulatory frameworks established under Proposition 65; 6) the vigorous defenses (including persistent motion practice, numerous discovery disputes and delays, and lengthy settlement negotiations) presented by three defendants in these two consolidated cases, represented by seasoned trial counsel from three different law firms; and 7) confounding implications and delays created by the related case of *Valley Water Management Company v. Regional Water Quality Control Board* (Case No. BCV-19-101630). From initial investigation through the filing of this motion covered a period of over three years. Counsel's diligent prosecution of this matter was instrumental to its successful outcome. (*See*, *Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d 1106, 1111 ["By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker."])

In addition to the full lodestar, attorney fee awards in a case like this would ordinarily be entitled to a "fee multiplier" to reflect factors such as contingent fee risk, the degree of complexity, the quality of representation, the preclusion of other work, and delay in payment. (*Ketchum v. Moses* (2001) 24 Cal.4th 122, 1133, 1338; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255 (multipliers "can range from 2 to 4 or even higher"; see also, Flanders Decl. at 13 [fee multiplier of 1.1 for environmental citizen suit in Kern County].) Plaintiffs would very likely qualify for a fee multiplier in this matter, but instead, in furtherance of the environmental benefits of the injunctive relief obtained in the proposed Consent Judgment, have compromised for fee recovery far *below* the full lodestar.

The award is also appropriate given that Plaintiffs achieved, in full, their litigation goals of ceasing discharges of Proposition 65 chemicals into, and/or where they probably will pass into, a source of drinking water; and their goal of compelling a civil penalty for past violations. (*See*, *Save Our Uniquely Rural Community Environment v. County of San Bernardino* (2015) 235 Cal.App.4th 1179, 1185 ["the extent of a party's success is a key factor in determining the reasonable amount of attorney fees to be awarded under Section 1021.5"].)

Further, the attorneys' fees are consistent with other Proposition 65 settlements. The Attorney General's Office publishes annual summaries of Proposition 65 settlements. The most recent report, 2018, reviewed 829 settlements, and found that of all monetary relief collected, approximately 77.5% was allocated to reimbursement of reasonable attorneys' fees and costs. (*See* Flanders Decl., ¶ 10.) The fee and cost recovery in the present proposed Consent Judgment constitutes 74.57% of the total monetary settlement ($481,000 / $645,000), which is therefore at or below the statewide average.

Finally, the market rates of Plaintiffs' counsel are all supported by case law and recent attorney fee awards for attorneys of similar experience in environmental law. The reasonable hourly rate is generally the rate to which attorneys of like skill in the court's jurisdiction would typically be entitled. (*Ketchum v. Moses* (2001) 24 Cal.4th, 1132.) However, where a litigant makes "a good faith effort to find local counsel" and can establish "that hiring local counsel was impracticable," an award of out-of-market rates of the counsel ultimately retained for the case is appropriate. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 399; *Center for Biological*

Diversity v. County of San Bernardino (2010) 188 Cal.App.4th 603, 616-19, as modified (Oct. 18, 2010); *Gates v. Deukmejian* (9th Cir. 1992) 987 F.2d 1392, 1405.) Here, Plaintiffs looked for local counsel with experience prosecuting Proposition 65 discharge matters in the Central Valley, willing to take this matter on full fee contingency, but were unsuccessful. (*See* Decl. of T. Franz; Decl. of A. Grinberg.) Indeed, for these reasons, the Kern County Superior Court in 2020 awarded attorneys' fees, in an environmental citizen suit, to Plaintiffs' counsel at their San Francisco Bay Area market rate. (Flanders Decl. ¶ 12.)

Jason Flanders, partner at ATA Law Group, who acted as primary counsel for this case, submits for recovery at a market rate of $700 per hour. Mr. Flanders has practiced law since 2005, and has specialized in environmental protection for his entire career. As a regular part of his practice, and as further described in the accompanying declaration, Mr. Flanders reviews market data and attorney fee awards throughout the state to ensure that the rates of attorneys at ATA Law Group are competitive. (Flanders Decl. ¶¶ 12-19.) These rates are wholly consistent with those recently awarded (adjusted from 2020 to 2021 market rates) to out-of-market counsel in Kern County Superior Court in an environmental citizen suit. (Id.; *see also*, *Perdue v. Kenny A.* (2010) 559 U.S. 542, 555 [upholding use of present, not historic market rates, for contingency fee award]; *Missouri v Jenkins* (1989) 491 U.S. 274, 284 [same]; *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 583 [same].) Where any attorney performed work typically considered paralegal, the paralegal rate was used. (Flanders Decl. Ex. C.) Due to the multi-year nature of these consolidated cases, along with staff turnover during this time, this case was staffed by more timekeepers than usual, which has been reflected in the exercise of billing judgment to zero out all entries for Austin Sutta, Amanda Prasuhn, Claire Wilkens, and Kayla Karimi.

Plaintiffs' Counsel's Market Rates

Timekeeper	Position	Rate	Year Graduated
Anthony Barnes	Partner	750	1998
Matthew Maclear	Partner	730	2000
Jason Flanders	Partner	700	2005
Erica Maharg	Sr. Assoc.	550	2011
Christopher Hudak	Of Counsel	525	2012
Austin Sutta	Associate	475	2014

Amanda Prasuhn	Associate	450	2015
Tom Brett	Associate	400	2017
Claire Wilkens	Associate	375	2018
Lydia Wood	Associate	375	2018
Kayla Karimi	Associate	350	2019
Esmeralda Bustos	Paralegal	225	
Madeline Flynn	Law Clerk	150	
Emma Lautanen	Law Clerk	150	

In conclusion, in consideration of the significant public benefit achieved, the number of hours necessarily expended by counsel on these consolidated cases (and related case), the complexity of the facts and law at issue, the experience and expertise of the attorneys involved including opposing counsel, and the significant compromise of attorney fee recovery far below counsel's full lodestar, with no multiplier applied, the attorneys' fees in the proposed Consent Judgment are reasonable.

III. The Settlement Penalty is Reasonable.

The third requirement of Health & Safety Code section 25249.7, subdivision (f)(4) is that any civil penalty amount be reasonable based on criteria set forth in Health & Safety Code section 25249.7, subdivision (b)(2). In this case, the civil penalty totals $139,000, with an additional $25,000 settlement payment to Plaintiff Clean Water Fund, which must be used in furtherance of Proposition 65 purposes. Of the civil penalty, pursuant to statute, 75% ($104,250), will be payable to the Office of Environmental Health Hazard Assessment, and 25% ($34,750) is payable to Plaintiffs. (Health & Safety Code § 25249.12, subd. (c)(1) and (d).) The statute provides penalty factors for the Court to consider:

(A) The nature and extent of the violation.
(B) The number of, and severity of, the violations.
(C) The economic effect of the penalty on the violator.
(D) Whether the violator took good faith measures to comply with this chapter and the time these measures were taken.
(E) The willfulness of the violator's misconduct.
(F) The deterrent effect that the imposition of the penalty would have on both the violator and the regulated community as a whole.
(G) Any other factor that justice may require.

(Health & Safety Code, § 25249.7, subd. (b)(2).) Each of these factors is discussed below.

/ / /

/ / /

A. The Nature and Extent of the Violations

Plaintiffs allege in their Complaints that Defendants violated Health & Safety Code section 25249.5 by discharging Proposition 65-listed contaminants into a present source of drinking water (i.e. the regional aquifer), discharging to groundwater designated municipal supply ("MUN"), and placing such contaminants where they probably will pass into present drinking water, and/or water designated MUN. Defendants have discharged as much as 4.4 million gallons of oil and gas production wastewater into unlined pits at the Facility in a single day, and, on average, have discharged approximately 2.5 million gallons per day. (VWMC Compl. ¶ 37.)

While this Court did issue a tentative ruling in the related case ordering the Regional Water Board to reevaluate the MUN designation, the Court did not enjoin enforcement of the MUN designation, and there is no dispute that the MUN designation is, and has been, in place at all times relevant to Plaintiffs' claims. Moreover, Defendants discharge Proposition 65 chemicals to, or where they probably will pass into, the Regional Aquifer, which is indisputably a present drinking water source. (*See* E.g., VWMC Compl., ¶¶ 6, 23, 43, 44, 51; SPR Compl. ¶¶ 6, 29, 44, 45, 52; Flanders Decl. Ex. A.) The statute and case law are clear that this violates Proposition 65 regardless of a Waterboard's basin plan designation. (*See*, Health & Safety Code § 25249.11(d)["source of drinking water" is "**either** a present source of drinking water **or** water which is identified or designated in a water quality control plan adopted by a Waterboard as being suitable for domestic or municipal uses" [emphasis added]; *Lungren*, *supra*, 14 Cal.4th at 305 ["since ['present source'] is used in the alternative with 'water which is identified…in a water quality control plan…as being suitable for domestic or municipal uses,' it is presumably something other than the water sources referred to in this latter part of the definition"]; *accord*, *California v. Kinder Morgan Energy Partners* (S.D. Cal. 2010) 2010 U.S. Dist. LEXIS 150858, at *7-8 [Proposition 65 claim lies for discharge to water "currently being drunk," but *not* designated MUN].) Thus, while this Court's tentative ruling in the related case may weigh against a *full* penalty assessment in this case, Plaintiffs allege and can prove violations beyond just discharges to MUN designated waters, for which the penalty amount is a reasonable settlement compromise.

/ / /

B. The Number of, and Severity of, the Violations

Based on testing performed on behalf of VWMC and their consultants, as well as Plaintiffs' experts' and consultants' review and analysis, Plaintiffs allege that Defendants violated Proposition 65 every time wastewater was placed into the ponds, as well as when the ponds discharge to groundwater. While the Proposition 65 statute of limitations only reached back one year prior to Plaintiffs' 60-day notice of intent to sue (Code Civ. Procedure § 340), the Facility has operated in its current configuration with wastewater storage and treatment ponds, and conveyances, such as pipelines or impoundments, since approximately 1980. Defendants deny any discharge involving a Proposition 65-listed chemical into any source of drinking water, or water suitable for domestic or municipal uses.

C. The economic effect of the penalty on the violator

Plaintiffs are informed and believe the penalty on the violators, Defendants, will have a meaningful economic effect. Economic discovery in this case was resisted and was the subject of a motion to compel that was never resolved. Nonetheless, settlement negotiations, including penalties, lasted many months, evidencing the significance of the penalties included. (See Flanders Decl. at ¶ 5.) The economic deterrent of a $139,000 penalty, and $25,000 additional payment, is meaningful.

D. Whether the violator took good faith measures to comply with this chapter and the time these measures were taken.

Plaintiffs do not have specific information demonstrating any good faith measures to comply. Plaintiffs submit that Defendants did undertake preliminary compliance measures in response to the Regional Board Cease and Desist Order (R5-2019-0045), but those efforts have been delayed and have resulted in litigation against the Regional Board challenging its enforcement. Plaintiffs' lawsuit and the proposed Consent Judgment now set a hard deadline for cessation of discharges. In this light, the proposed Consent Judgment settlement agreement itself may be seen as a good faith effort to comply.

E. The willfulness of the violator's misconduct

Plaintiffs have no information addressing willfulness at this time, other than to note that unlined pit wastewater storage is largely an outdated practice that is banned in certain states; and that VWMC closed a similar facility in 2016 in compliance with a Proposition 65 Consent Judgment, but knowingly

continued to operate the subject Facility here.

F. The deterrent effect that the imposition of the penalty would have on both the Violator and the regulated community as a whole

The civil penalty proposed in this case may have a deterrent effect on other companies similarly situated that continue to violate Proposition 65. As other similarly situated operators within the regulated community become aware of this action, there is reason to believe this action will help motivate entities to achieve compliance as opposed to face similar civil enforcement efforts.

G. Any other factor that justice may require.

The Court may consider the economic effects to Defendants resulting from the complete cessation of discharges of the Subject Chemicals from the Facilities; the efforts taken by Defendants to comply with the CDO; and the Court's tentative ruling regarding the Basin Plan MUN designation as mitigating factors supporting the civil penalty of $139,000, which is substantially less than a potential penalty of $2500 per violation (per chemical) per day, considering the size of the Facility at issue.

CONCLUSION

For the reasons discussed above, to confer the substantial public benefits achieved, and avoid unnecessary trial of these complex consolidated cases, Plaintiffs respectfully request that the Court approve the Stipulated Consent Judgment, and make the appropriate findings as set forth in Health & Safety Code section 25249.7, subdivision (f)(4).

Respectfully submitted.

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