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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ANTHONY NGUYEN,
Plaintiff,
v.
M. D. BITER,
Defendant.

Case No. 1:11-cv-00809-AWI-SKO (PC)
**FINDINGS AND RECOMMENDATIONS
RECOMMENDING PLAINTIFF’S MOTION
FOR SUMMARY JUDGMENT BE DENIED
AND DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT BE GRANTED**

(Docs. 114 and 142)

Objection Deadline: 30 days
Response Deadline: 15 days

I. Background

Plaintiff Anthony Nguyen (“Plaintiff”), a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on May 18, 2011. This action is proceeding against Defendant M. D. Biter (“Defendant”) for violation of the Eighth Amendment of the United States Constitution. Plaintiff’s claim arises from his alleged exposure to arsenic-contaminated water while he was at Kern Valley State Prison (“KVSP”) in Delano, California. During the relevant twenty-seven month time period, Defendant was first the Chief Deputy Warden, then the Acting Warden, and finally the Warden, a position he still presently holds.

1 On September 15, 2014, Plaintiff filed a motion for summary judgment, and on September
2 29, 2014, Plaintiff filed a supplement to his motion.¹ Fed. R. Civ. P. 56(c). (Docs. 114, 117.)
3 Following resolution of numerous discovery motions and motions for terminating sanctions, to
4 amend the pleadings, and for modification of the scheduling order, Defendant timely filed his
5 opposition and cross-motion for summary judgment on July 20, 2015.² (Doc. 142.) On August 3,
6 2015, Plaintiff filed a response to Defendant's motion, entitled objections, and separate
7 supplemental objections. (Docs. 147, 148.) Defendant filed a reply on August 17, 2015, and the
8 cross-motions for summary judgment have been submitted on the record without oral argument
9 pursuant to Local Rule 230(l).

10 **II. Summary Judgment Standard**

11 Any party may move for summary judgment, and the Court shall grant summary judgment
12 if the movant shows that there is no genuine dispute as to any material fact and the movant is
13 entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted);
14 *Washington Mut. Inc. v. U.S.*, 636 F.3d 1207, 1216 (9th Cir. 2011). Each party's position, whether
15 it be that a fact is disputed or undisputed, must be supported by (1) citing to particular parts of
16 materials in the record, including but not limited to depositions, documents, declarations, or
17 discovery; or (2) showing that the materials cited do not establish the presence or absence of a
18 genuine dispute or that the opposing party cannot produce admissible evidence to support the fact.
19 Fed. R. Civ. P. 56(c)(1) (quotation marks omitted). The Court may consider other materials in the
20 record not cited to by the parties, but it is not required to do so. Fed. R. Civ. P. 56(c)(3); *Carmen*
21 *v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001); *accord Simmons v.*
22 *Navajo Cnty., Ariz.*, 609 F.3d 1011, 1017 (9th Cir. 2010).

25 ¹ Plaintiff's supplemental motion is confined to pages 1 through 8 of document 117. Pages 9 through 52 were
26 Plaintiff's opposition to Defendant's motion for terminating sanctions, which was addressed by the Court on January
27 27, 2015. (Doc. 131.)

27 ² Concurrently with his motion for summary judgment, Defendant served Plaintiff with the requisite notice of the
28 requirements for opposing the motion. *Woods v. Carey*, 684 F.3d 934, 939-41 (9th Cir. 2012); *Rand v. Rowland*, 154
F.3d 952, 960-61 (9th Cir. 1998).

1 In resolving cross-motions for summary judgment, the Court must consider each party's
2 evidence. *Tulalip Tribes of Washington v. Washington*, 783 F.3d 1151, 1156 (9th Cir. 2015);
3 *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 960 (9th Cir. 2011). Plaintiff bears the burden
4 of proof at trial, and to prevail on summary judgment, he must affirmatively demonstrate that no
5 reasonable trier of fact could find other than for him. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d
6 978, 984 (9th Cir. 2007). Defendant does not bear the burden of proof at trial and in moving for
7 summary judgment, he need only prove an absence of evidence to support Plaintiff's case. *In re*
8 *Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010).

9 In judging the evidence at the summary judgment stage, the Court does not make
10 credibility determinations or weigh conflicting evidence, *Soremekun*, 509 F.3d at 984 (quotation
11 marks and citation omitted), and it must draw all inferences in the light most favorable to the
12 nonmoving party and determine whether a genuine issue of material fact precludes entry of
13 judgment, *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 942
14 (9th Cir. 2011) (quotation marks and citation omitted). Additionally, Plaintiff is entitled to liberal
15 construction of his filings because he is a prisoner proceeding pro se. *Thomas v. Ponder*, 611 F.3d
16 1144, 1150 (9th Cir. 2010) (citations omitted).

17 **III. Discussion**

18 **A. Plaintiff's Eighth Amendment Conditions-of-Confinement Claim**

19 **1. Legal Standard**

20 Plaintiff's Eighth Amendment claim arises from his exposure to allegedly unsafe levels of
21 arsenic in the drinking water at KVSP, where he was incarcerated between November 2009 and
22 February 2012.³ The Eighth Amendment's prohibition against cruel and unusual punishment
23 protects prisoners not only from inhumane methods of punishment but also from inhumane
24 conditions of confinement. *Morgan v. Morgensen*, 465 F.3d 1041, 1045 (9th Cir. 2006) (citing
25 *Farmer v. Brennan*, 511 U.S. 825, 847, 114 S.Ct. 1970 (1994) and *Rhodes v. Chapman*, 452 U.S.
26 337, 347, 101 S.Ct. 2392 (1981)) (quotation marks omitted). While conditions of confinement

27 ³ Plaintiff is presently incarcerated at California State Prison-Centinel in Imperial.
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1 may be, and often are, restrictive and harsh, they must not involve the wanton and unnecessary
2 infliction of pain. *Morgan*, 465 F.3d at 1045 (citing *Rhodes*, 452 U.S. at 347) (quotation marks
3 omitted). Thus, conditions which are devoid of legitimate penological purpose or contrary to
4 evolving standards of decency that mark the progress of a maturing society violate the Eighth
5 Amendment. *Morgan*, 465 F.3d at 1045 (quotation marks and citations omitted); *Hope v. Pelzer*,
6 536 U.S. 730, 737, 122 S.Ct. 2508 (2002); *Rhodes*, 452 U.S. at 346.

7 Prison officials have a duty to ensure that prisoners are provided adequate shelter, food,
8 clothing, sanitation, medical care, and personal safety, *Johnson v. Lewis*, 217 F.3d 726, 731 (9th
9 Cir. 2000) (quotation marks and citations omitted), but not every injury that a prisoner sustains
10 while in prison represents a constitutional violation, *Morgan*, 465 F.3d at 1045 (quotation marks
11 omitted). To maintain an Eighth Amendment claim, a prisoner must show that prison officials
12 were deliberately indifferent to a substantial risk of serious harm to his health or safety. *E.g.*,
13 *Farmer*, 511 U.S. at 847; *Thomas*, 611 F.3d at 1150-51; *Foster v. Runnels*, 554 F.3d 807, 812-14
14 (9th Cir. 2009); *Morgan*, 465 F.3d at 1045; *Johnson*, 217 F.3d at 731; *Frost v. Agnos*, 152 F.3d
15 1124, 1128 (9th Cir. 1998).

16 2. **Objective Element – Substantial Risk of Serious Harm**

17 To prevail on his unsafe conditions-of-confinement claim, Plaintiff must first show a
18 deprivation which is objectively sufficiently serious. *Farmer*, 511 U.S. at 834. Courts have long
19 recognized that exposure to environmental conditions which pose a health risk, either present or
20 future, can support a claim under the Eighth Amendment. *Helling v. McKinney*, 509 U.S. 25, 33-
21 35, 113 S.Ct. 2475 (1993) (environmental tobacco smoke); *Wallis v. Baldwin*, 70 F.3d 1074, 1076
22 (9th Cir. 1995) (asbestos); *Carter v. Smith*, No. C-13-4373 EMC (pr), 2015 WL 4322317, at *7-11
23 (N.D.Cal.2015) (lead paint and asbestos); *Yellen v. Olivarez*, No. CIV S-94-1298 GEB DAD P,
24 2012 WL 3757373, at *8 (E.D.Cal. 2012) (contaminated water), *adopted in full*, 2012 WL
25 4210030 (E.D.Cal. 2012); *Rouse v. Caruso*, No. 06-CV-10961-DT, 2011 WL 918327, at *24-25
26 (E.D.Mich. 2011) (contaminated water), *adopted in full*, 2011 WL 893216 (E.D.Mich. 2011).
27 Plaintiff is required to demonstrate that he was exposed to unreasonably high levels of arsenic in
28 the water at KVSP, which requires a scientific and statistical inquiry into the seriousness of the

1 potential harm and the likelihood that such injury to health will actually be caused by the exposure
2 to the arsenic in KVSP's water. *Helling*, 509 U.S. at 35-36 (quotation marks omitted). In
3 addition, Plaintiff "must show that the risk of which he complains is not one that today's society
4 chooses to tolerate." *Id.* at 36.

5 **3. Subjective Element – Deliberate Indifference**

6 The second element of an Eighth Amendment claim is subjective deliberate indifference,
7 which involves two parts. *Lemire v. California Dep't of Corr. and Rehab.*, 726 F.3d 1062, 1078
8 (9th Cir. 2013). Plaintiff must demonstrate first that the risk was obvious or provide other
9 circumstantial evidence that Defendant was aware of the substantial risk of serious harm to his
10 health or safety, and second, that there was no reasonable justification for exposing him to that
11 risk. *Lemire*, 726 F.3d at 1078 (citing *Thomas*, 611 F.3d at 1150) (quotation marks omitted).

12 "[A] prison official cannot be found liable under the Eighth Amendment for denying an
13 inmate humane conditions of confinement unless the official knows of and disregards an excessive
14 risk to inmate health or safety; the official must both be aware of the facts from which the
15 inference could be drawn that a substantial risk of serious harm exists, and he must also draw the
16 inference." *Farmer*, 511 U.S. at 837. "[A]n official's failure to alleviate a significant risk that he
17 should have perceived but did not, while no cause for commendation, cannot . . . be condemned as
18 the infliction of punishment." *Id.* at 838. However, prison officials are not free to ignore obvious
19 dangers to inmates. *Farmer*, 511 U.S. at 842; *Foster*, 554 F.3d at 814. Prisoners "need not show
20 that a prison official acted or failed to act believing that harm actually would befall an inmate; it is
21 enough that the official acted or failed to act despite his knowledge of a substantial risk of serious
22 harm." *Farmer*, 511 U.S. at 842. "Whether a prison official had the requisite knowledge of a
23 substantial risk is a question of fact subject to demonstration in the usual ways, including
24 inference from circumstantial evidence, and a factfinder may conclude that a prison official knew
25 of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842;
26 *Foster*, 554 F.3d at 814.

27 "In addition, prison officials who actually knew of a substantial risk to inmate health or
28 safety may be found free from liability if they responded reasonably to the risk, even if the harm

1 ultimately was not averted.” *Farmer*, 511 U.S. at 844. “A prison official’s duty under the Eighth
2 Amendment is to ensure reasonable safety, a standard that incorporates due regard for prison
3 officials’ unenviable task of keeping dangerous men in safe custody under humane conditions.”
4 *Id.* at 844-45 (internal quotation marks and citations omitted). “Whether one puts it in terms of
5 duty or deliberate indifference, prison officials who acted reasonably cannot be found liable under
6 the Cruel and Unusual Punishments Clause.” *Id.* at 845.

7 **B. Plaintiff’s Motion for Summary Judgment**^{4,5}

8 Plaintiff claims that Defendant violated his rights under the Eighth Amendment by
9 knowingly disregarding a substantial risk of serious harm to his health posed by the prison’s
10 water, which he alleges was contaminated by unsafe levels of arsenic. Plaintiff arrived at KVSP
11 on November 2, 2009, and he was incarcerated there until February 2012, subjecting him to the
12 water for twenty-seven months. Plaintiff moves for summary judgment on his claim on the
13 grounds that KVSP’s water was unsafe due to arsenic levels which exceeded the United States
14 Environmental Protection Agency’s Maximum Contaminant Level (“EPA” and “MCL”), and that
15 Defendant, as the warden, knew of the unsafe arsenic levels but failed to take reasonable measures
16 to protect Plaintiff and other inmates from being harmed by the contaminated water.

17 In support of his motion, Plaintiff submits six notices entitled “IMPORTANT
18 INFORMATION ABOUT YOUR DRINKING WATER,” which were signed by Defendant
19 between September 8, 2010, and January 6, 2012. (Doc. 114, Motion, Pl. Ex. 1.) The notices
20 stated that the running annual average of arsenic in KVSP wells 1 and 2 ranged between 0.014 to
21 0.020 mg/L (milligrams per liter), which exceeded the EPA MCL of 0.010 mg/L. (*Id.*) The
22 notices stated that it was not an emergency and that inmates did not need to use an alternative
23 water source such as bottled water, but that “some people who drink water containing arsenic in

24 ⁴ Plaintiff did not provide a Statement of Undisputed Facts in compliance with Local Rule 260(a). However, Plaintiff
25 is proceeding pro se and the Court is able to consider his arguments and evidence without the benefit of the statement.
26 *Thomas*, 611 F.3d at 1150. Also, Defendant was able to sufficiently address Plaintiff’s evidence. Therefore, the
27 Court will reach the parties’ motions on their merits rather than denying Plaintiff’s motion on procedural grounds.

28 ⁵ Plaintiff’s original and supplemental complaints are verified and they function as declarations to the extent the
allegations are based on personal knowledge of facts admissible in evidence. *Jones v. Blanas*, 393 F.3d 918, 922-23
(9th Cir. 2004).

1 excess of the MCL over many years may experience skin damage or circulatory system problems,
2 and may have an increased risk to getting cancer.” (*Id.*)

3 Plaintiff alleges that as a result of arsenic exposure, he developed warts on the palms of his
4 hands, and hyperkeratosis or keratosis on his hands, mouth, and head; and he submits several
5 medical records in support of his allegation that he developed these skin abnormalities as a result
6 of the arsenic in KVSP’s water.⁶ In a medical record dated December 6, 2011, Dr. DiLeo noted
7 three 2 mm warts on Plaintiff’s palm; and a pathology report related to the biopsy of tissue taken
8 from Plaintiff’s right soft palate on January 31, 2013, resulted in the finding of “hyperkeratosis
9 and hyperplasia of squamous mucosa, mild chronic inflammation and fibrosis, no evidence of
10 dysplasia or malignancy.” (*Id.*, Pl. Exs. 2, 4.) Finally, on August 20, 2014, Plaintiff was seen by
11 Dr. Ortiz regarding a skin growth or papule on his forehead. (Doc. 117, Supp. Motion, Ex. B.)
12 Plaintiff was referred to the Minor Procedure Clinic for evaluation and consideration for a
13 potential biopsy. (*Id.*)

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26 ⁶ Defendant’s authentication and hearsay objections to Plaintiff’s prison medical records are overruled. Fed. R. Evid.
27 803(6); Fed. R. Evid. 901(b)(4); *Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 533 (9th Cir. 2011); *U.S. v. Hall*, 419
28 F.3d 980, 987 (9th Cir. 2005). However, as discussed in section III(D)(1), Plaintiff lacks the requisite expertise to
interpret his medical records. Fed. R. Evid. 701, 702.

1 **C. Defendant’s Motion for Summary Judgment**

2 **1. Undisputed Facts**^{7,8,9}

3 **a. Arsenic Levels in Drinking Water**

4 Arsenic is the twentieth most abundant element on earth, and it is impossible to find
5 drinking water in the environment that is free of arsenic; all public drinking water in the United
6 States contains arsenic at some concentration. Arsenic is not necessarily poisonous. The
7 difference between a medicine and a poison is the dose, and arsenic trioxide, for example, is a
8 Food and Drug Administration-approved intravenous pharmaceutical. Long-term consumption of
9 very large amounts of arsenic in drinking water can cause disease, but these diseases are limited to
10 very specific skin lesions; cancers of the skin, bladder and lung; cardiovascular and
11 cerebrovascular diseases; and diabetes mellitus. These diseases also typically require both
12 exposure periods of twenty years or more and exposure to drinking water with arsenic
13 concentrations of generally more than 200 micrograms per liter (“mcg/L”) or 200 parts per billion
14 (“ppb”). There is no scientific evidence that predicts illness from ingestion of drinking water at 26
15 ppb (0.026 mg/L), such as KVSP’s water; and no epidemic of skin changes, internal organ
16 cancers, or neurological and cardiac damage resulting from drinking water at or below an arsenic
17 MCL of 50 mcg/L was ever identified in the United States.

18 In 2001, the EPA lowered the MCL to 0.010 mg/L (or 10 ppb or 10 mcg/L) of arsenic.
19 This standard did not become effective until 2006, and on November 28, 2008, the State of
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21 ⁷ Defendant’s request for judicial notice of (1) CDCR, Quarterly Status Report of Capital Outlay Projects for the
22 CDCR, Arsenic Removal Water Treatment System (March 31, 2013), and (2) State Water Resources Control Board,
23 Division of Water Quality GAMA Program, Groundwater Information Sheet, Arsenic (revised July 6, 2010) is
granted. Fed. R. Evid. 201; *Daniels-Hall v. National Educ. Ass’n*, 629 F.3d 992, 998-99 (9th Cir. 2010); *Siebert v.*
Gene Security Network, Inc., 75 F.Supp.3d 1108, 1111 n.2 (N.D.Cal. 2014). (Doc. 142.)

24 ⁸ Defendant’s cross-motion is supported by the declarations of Defendant; Dr. Rick Gellar, a physician and medical
25 toxicologist; Dr. S. Lopez, an osteopathic physician and surgeon who is the Chief Medical Executive at KVSP; G.
Wright, the Associate Director of the Project Management Branch for CDCR’s Facility Planning; and T. Wise, the
26 Correctional Plant Manager II. Defendant also submits Plaintiff’s deposition testimony.

27 ⁹ Plaintiff responded to Defendant’s motion with numerous objections but none sufficed to bring Defendant’s
28 evidence into dispute. Of specific note, Plaintiff’s disagreement with Dr. Gellar’s report neither creates disputed
issues of fact nor provides a basis for any legitimate evidentiary objections; and Plaintiff’s objections to counsel’s
arguments are misplaced. (Docs. 147, 148.) While Plaintiff is correct that defense counsel’s arguments are not
evidence, counsel is arguing the evidence, as is appropriate.

1 California adopted the EPA's new arsenic MCL standard. Prior to 2001, the EPA's original 0.050
2 mg/L, or 50 ppb, MCL standard for arsenic in water had stood for many years; and the standard
3 was lowered not in response to documented clinical illness caused by arsenic in drinking water
4 between 10 and 50 mcg/L, but in an attempt to protect Americans from one type of disease:
5 cancer.

6 KVSP's wells provide the water for the entire facility, and they provide the same drinking
7 water to inmates and staff, including Defendant, who drank the water provided by the wells.
8 KVSP has always tested the drinking water produced by its two wells and continues to do so to
9 this day. During the time Plaintiff was incarcerated at KVSP between November 2009 and
10 February 2012, KVSP's wells were well under the former MCL standard of .050 mg/L. Both
11 wells ranged between 0.012 and 0.021 mg/L (12 and 21 ppb), which was in compliance with the
12 prior standard. As of July 2010, 1,375 of all active wells tested in California had arsenic above the
13 new MCL, and the majority of those wells were located in Kern County, which is home to KVSP,
14 as well as in San Joaquin and San Bernardino Counties.

15 While Plaintiff was at KVSP, it provided the test results for the water drawn from its wells
16 to the California Department of Public Health ("CDPH"). During that time, KVSP also posted
17 quarterly notices reporting the arsenic levels. These notices conformed to the ones provided and
18 required by CDPH. The quarterly notices CDPH required KVSP to post stated that the arsenic
19 levels were not an emergency, and that inmates and staff did not need to use an alternative water
20 source. KVSP also provided annual consumer confidence reports to inmates and staff.

21 Even if a resident of Kern County drank water similar to KVSP's containing between 13 to
22 26 ppb of arsenic for an entire lifetime, it is unlikely that any adverse health effects related to
23 arsenic would occur because arsenic has not been scientifically established to be toxic in amounts
24 below 50 mcg/L, as shown by the absence of apparent adverse effects on the many millions of
25 Americans living for decades with this standard. There are several studies that investigate regions
26 in the United States where arsenic concentrations in local drinking water are higher than in other
27 areas of the country. The Central Valley in California, where KVSP is located, is frequently
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1 mentioned, along with Fallon, Nevada; Michigan; and New Hampshire, but even in those areas
2 there are no cohorts of people seeking treatment for the adverse effects of arsenic.

3 **b. Health Concerns Related to Arsenic Level in KVSP's Water**

4 Dr. Lopez, the Chief Medical Executive ("CME") at KVSP, has not observed any
5 increased incidents in the inmate population of medical conditions, including skin conditions and
6 cancers, attributable to high levels of arsenic in drinking water. As the CME, she closely
7 monitored the different medical conditions diagnosed in the inmate population, and would be
8 aware of any clusters of conditions that fell outside those normally expected in the inmate
9 population, including conditions caused by environmental factors. In 2008, after inmates began to
10 ask about the health effects of the arsenic in the water, Dr. Lopez contacted the California Poison
11 Control System, Fresno/Madera, to inquire as to the possible health concerns raised by the levels
12 of arsenic detected in the water at KVSP. Dr. Geller, M.D., M.P.H., from the California Poison
13 Control System, responded and informed Dr. Lopez that there were zero expected health
14 problems, acute or chronic, presented by arsenic at a concentration of 22 ppb, such as in KVSP's
15 water. He also stated that there was no need for other public-health actions as a result of the
16 findings, just a regulatory need to get the arsenic level below 10 ppb. Defendant was informed of
17 Dr. Lopez's inquiry and Dr. Geller's determination that there were no expected health concerns
18 from KVSP's water supply.

19 Plaintiff was provided with reasonable access to drinking water containing arsenic in
20 concentrations that were safe to drink. There is no scientific evidence that Plaintiff was exposed
21 to arsenic in the drinking water provided to him at KVSP in sufficient amounts to cause the skin
22 and other conditions he complains of. Typically, the skin conditions complained of by Plaintiff
23 are seen in individuals that consume concentrations of over 200 ppb for twenty years, but Plaintiff
24 only consumed water with a maximum level of 26 ppb (0.026 mg/L) for twenty-seven months.
25 The wart/corns, oral keratosis, and low lymphocyte and neutrophil counts that Plaintiff alleges he
26 suffered are not specific to arsenic exposure, and there is no evidence in Plaintiff's medical
27 records showing that he suffered any medical conditions caused by drinking KVSP's water.
28 Moreover, there is no evidence that he was exposed to arsenic in high enough doses for a long

1 enough time period to suffer any harm. Plaintiff's future health will not be seriously adversely
2 affected from consuming drinking water provided to him at KVSP between November 2, 2009,
3 and February 1, 2012; and he does not have any appreciable or determinable risk of future illness,
4 including cancer, from the arsenic in the drinking water at KVSP. Plaintiff had Dr. DiLeo
5 examine his warts/corns, but Dr. DiLeo did not note that they were caused by the arsenic in
6 KVSP's water, and none of Plaintiff's doctors with California Department of Corrections and
7 Rehabilitation ("CDCR") have informed him that any of his medical conditions were caused by
8 the arsenic in KVSP's water.

9 **c. Installation of Arsenic Removal Plant at KVSP**

10 The process of installing an arsenic removal plant at KVSP began around the time that
11 KVSP was constructed in 2005 and continued until it was completed between December 2012 and
12 January 2013. The installation of an arsenic removal plant is a long, complicated process that
13 required capital outlay budget change proposals to fund the preliminary plan, working drawings,
14 and construction of the facility. It required input from consultants, engineers, CDCR and facility
15 officials, and a number of state agencies. KVSP's plant required funding through a capital outlay,
16 which is an expenditure for fixed assets such as buildings and plants that requires a special request
17 for funding that must proceed through the Department of Finance. The original funding allocated
18 for the plant was insufficient based on the preliminary plans and was returned, but in May 2009,
19 the Public Works Board approved funds from General Fund AB 900 to modify the drawings and
20 complete construction.

21 As the Warden, Defendant did not have the personal authority to authorize a project the
22 size of the arsenic removal plant. Any alternative plan, such as alternative water sources and
23 point-of-use filtration systems, would have required the allocation and expenditure of funds.
24 Defendant had the power to authorize expenditures up to \$5,000, but any amount over that would
25 require additional authorization, possibly including legislative authorization.

26 When Defendant became the acting Warden, the decision had already been made that the
27 best approach to bringing the water into compliance with the revised MCL was to install an
28 arsenic removal plant at KVSP. At that point, consideration of other options was no longer

1 necessary because that option had been chosen; the arsenic removal plant was in the design and
2 planning stage; and Defendant had been informed that the water was not dangerous. Defendant
3 would generally defer to the expertise of KVSP and CDCR's staff on matters regarding arsenic;
4 and KVSP's plant operations staff and other staff involved in the process would report back to
5 Defendant regarding the progress of the planning, design, and installation of the plant. Further,
6 while KVSP was out of compliance with the MCL, it was never ordered to provide alternative
7 water, and it never had its permit revoked.

8 KVSP had previously considered drilling new wells or installing point-of-use filters at the
9 prison, but those alternatives were not viable because of cost, feasibility, and lack of a health risk.
10 CDCR had also considered the possibility of connecting to the City of Delano's water system.
11 During the design phase, a cost-benefit analysis was conducted to determine if connecting to the
12 City of Delano's system would be better than building a stand-alone plant at KVSP. The cost-
13 benefit analysis concluded that the KVSP stand-alone plant was the most beneficial option for a
14 number of reasons, including the speed at which the plant could be installed.

15 KVSP's staff provided input on the design of the arsenic removal plant, and during the
16 design phase, other arsenic removal facilities were toured in order to determine the type of facility
17 that would be best for KVSP. A pilot test of the technology chosen for the plan was conducted at
18 KVSP to make sure that the future plant would meet KVSP's filtration needs. Construction on the
19 arsenic removal plant at KVSP began in October 2011, and continued until finished in December
20 2012. The plant was completed and the project closed in January 2013.

21 KVSP's plant uses a coagulation/filtration process, which is considered a best-available
22 technology. Since completion of the KVSP arsenic removal plant, KVSP has been in compliance
23 with the current MCL standard; and KVSP continues to transmit the testing results to CDPH and
24 post the annual consumer confidence reports.

25 **2. Summary of Arguments**

26 Relying on these facts, Defendant argues that he is entitled to summary judgment because
27 Plaintiff failed to demonstrate either the existence of a substantial risk of serious harm from the
28 level of arsenic in KVSP's water or that he acted with deliberate indifference. Defendant contends

1 that the water at KVSP was suitable to drink and was in compliance with the prior MCL standard
2 of 0.50 mg/L. Defendant contends that there is no scientific evidence that arsenic levels below
3 0.50 mg/L cause disease, and arsenic becomes poisonous in much higher levels – 200 ppb – when
4 consumed for twenty years or more. Plaintiff’s exposure involved much lower levels of arsenic
5 for a much shorter period of time. Further, Defendant contends that Plaintiff failed to show he
6 suffered any actual harm from the water and while he complained of warts or corns and keratosis,
7 there is no evidence that they resulted from exposure to arsenic in the water. There is also no
8 evidence Plaintiff will suffer any future harm to his health.

9 Further, Defendant contends that Plaintiff cannot prove the risk is one society chooses not
10 to tolerate, given that arsenic is an abundant natural element which is generally present in most
11 drinking water in the United States and is generally safe for consumption. Both staff and inmates
12 consumed the water at KVSP; and CDPH, which required the prison to post the notices signed by
13 Defendant, did not suspend or revoke KVSP’s water permit or order it to provide water from
14 another source.

15 Finally, Defendant contends that Plaintiff cannot establish that he was deliberately
16 indifferent or acted with deliberate indifference. Defendant had been informed that the water
17 supply was safe and the notices he signed stated the arsenic levels in the water did not constitute
18 an emergency. During the relevant events, CDCR and KVSP officials were actively involved in
19 installing an arsenic removal plant to bring the water into compliance with the new MCL standard.
20 It had been determined that the plant was the best option to address the arsenic in the water and
21 Dr. Lopez had been informed by the California Poison Control System that the water posed no risk
22 to inmate health, a determination which was shared with Defendant. Given the facts, Defendant
23 contends that there was no risk to inmate health of which he was aware and that prison officials
24 acted reasonably in moving to bring KVSP’s water into compliance with the new MCL standard.

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1 **D. Findings**

2 **1. Plaintiff's Motion**

3 **a. Objective Element**

4 Turning first to Plaintiff's motion for summary judgment, Plaintiff bears the burden of
5 demonstrating that no reasonable trier of fact could find other than for him. *Soremekun*, 509 F.3d
6 at 984. With respect to the objective element, Plaintiff must show that he was exposed to
7 unreasonably high levels of arsenic in the water. *Helling*, 509 U.S. at 35. As previously set forth,
8 this requires both "scientific and statistical inquiry into the seriousness of the potential harm and
9 the likelihood that such injury to health will actually be caused by exposure to [arsenic in the
10 water]," and that the risk "is not one that today's society chooses to tolerate." *Id.* at 36.

11 Plaintiff has not submitted any evidence demonstrating that the exposure to the levels of
12 arsenic in KVSP's water, which ranged between 0.014 and 0.020 mg/L per the six notices posted,
13 for twenty-seven months constituted an objectively serious risk of harm to his health; it is not
14 enough to merely show that the levels exceeded the EPA's new MCL standard of 0.10 mg/L. *Cf.*
15 *Wallis*, 70 F.3d at 1076 (stating it is uncontroverted that asbestos poses a serious risk to human
16 health and citing statutes in which there was a Congressional finding that medical science has not
17 established any safe minimum level of asbestos exposure) (quotation marks and citations omitted);
18 *Carter*, 2015 WL 4322317, at *8-10 (finding triable issues of fact on objective element of asbestos
19 exposure claim where there was evidence of government findings that medical science has not
20 established any minimum level of exposure to asbestos, but finding no triable issues of fact on
21 objective element of lead paint exposure claim). Regarding Plaintiff's opinion that the water was
22 not safe, Plaintiff is not qualified, as a lay witness, to offer his own opinion that the arsenic levels
23 were sufficiently high to create a substantial risk of serious harm to his health. Although Plaintiff
24 submitted evidence demonstrating that he developed several warts and nodules, there is no
25 evidence linking those growths to arsenic in the water at KVSP. Speculation that Plaintiff's
26 medical conditions *could* be linked to the arsenic levels is not sufficient in the first instance, but
27 here, Plaintiff did not submit any admissible evidence that even speculatively links the two, and he
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1 is not qualified to offer his own opinion on the issue, as it requires medical and/or toxicological
2 expertise he does not possess.¹⁰

3 Plaintiff also submitted some written information on arsenic, apparently obtained from the
4 internet and perhaps a book, to which Defendant objected. (*Id.*, Ex. 3.) However, the information
5 addresses arsenic at a broader level; the information is hearsay; and both the interpretation of the
6 information and the relation of that information to the arsenic levels in KVSP's water would
7 require toxicological and/or medical expertise, which has not been offered.¹¹ Fed. R. Evid. 801(c),
8 802. (*Id.*)

9 Having considered Plaintiff's evidence and arguments, the Court finds that Plaintiff failed
10 to produce any evidence demonstrating that level of arsenic in KVSP's water presented a
11 substantial risk of serious harm to his health. It is not enough to show merely that the arsenic
12 levels exceeded the new MCL standard; and Plaintiff's inadmissible lay opinion on the matter
13 cannot be used to establish that the water presented an objective risk of serious harm to his health
14 as a matter of law. Plaintiff also failed to produce any evidence "that the risk of which he
15 complains is not one that today's society chooses to tolerate." *Helling*, 509 U.S. at 35-36.

16 **b. Subjective Element**

17 Next, Plaintiff fails to make the requisite showing as to the subjective element of deliberate
18 indifference. Plaintiff has shown that Defendant signed six notices regarding arsenic levels in
19 KVSP's water exceeding the EPA's MCL standard but he has not demonstrated that Defendant
20 knowingly disregarded a substantial risk of harm to his health. Bare knowledge of the fact that the
21 arsenic levels were above the EPA's MCL standard is not sufficient. Indeed, the notices signed by
22 Defendant disclaimed any emergency situation or a need to use alternative water sources, such as
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24 ¹⁰ Even if the Court were to consider the letter purportedly sent to Plaintiff by someone at the EPA in response to his
25 inquiry, the letter undercuts rather than supports his position, as the author stated that "[h]yperpigmentation and
26 keratosis can occur from exposure to elevated levels of arsenic, such as 0.1-1.0 milligrams per day," but the water at
27 KVSP was much lower in arsenic, and it was doubtful Plaintiff's warts were caused by the water. (Doc. 114, Motion,
28 Pl. Ex. 4, p. 22.) The Court notes the letter, which is missing a signature, was not authenticated, lacks foundation, and
is hearsay. Fed. R. Evid. 802; *Millenkamp v. Davisco Foods Intern, Inc.*, 562 F.3d 971, 980-81 (9th Cir. 2009).

¹¹ Plaintiff also submitted an article on arsenic and Napoleon's death. (Doc. 114, Motion, Pl. Ex. 5.) The article is
hearsay and irrelevant, as Defendant contends. Fed. R. Evid. 401, 801(c), 802.

1 bottled water. Plaintiff's opinions that the water was dangerous and that Defendant knew it was
2 dangerous but failed to take additional protective measures do not constitute admissible evidence
3 supporting a finding of deliberate indifference. Further, there is no competent evidence that the
4 elevated levels were dangerously high and constituted an obvious health risk. *Farmer*, 511 U.S. at
5 842; *Foster*, 554 F.3d at 814.

6 In his motion, Plaintiff contends that Defendant admitted he was deliberately indifferent,
7 and that by stating in response to an interrogatory that he would not recommend his family
8 consume water deemed unfit for human consumption by the EPA, he demonstrated he was in a
9 position to provide Plaintiff with safe drinking water but elected not to do so. However, the
10 "admission" Plaintiff refers to is an excerpt from an argument Defendant made in a reply to
11 Plaintiff's opposition to his motion to dismiss for failure to state a claim. (Doc. 86, Reply, 3:20-
12 21.) Arguments made in briefs are not evidence, *Coverdell v. Dep't of Soc. & Health Servs.*, 834
13 F.2d 758, 762 (9th Cir. 1987), and review of the paragraph in which the sentence was made is
14 entirely consistent with Defendant's response that the word "not" was omitted due to a drafting
15 error. (Doc. 86, Reply, 3:15-22.) Regarding Defendant's interrogatory response, there is no
16 evidence that KVSP's water was unfit for human consumption, and Defendant's response that he
17 would not recommend his family drink water unfit for human consumption is of no assistance in
18 demonstrating that he knowingly disregarded a substantial risk of harm to Plaintiff with respect to
19 KVSP's water.

20 Accordingly, the Court finds that Plaintiff has failed to produce evidence demonstrating
21 that Defendant knew of a substantial risk of serious harm to his health but disregarded it. Because
22 Plaintiff's motion for summary judgment fails as to both elements, the Court recommends that it
23 be denied.

24 **2. Defendant's Motion**

25 **a. Objective Element**

26 Regarding Defendant's motion for summary judgment, he need only prove an absence of
27 evidence to support Plaintiff's case. *In re Oracle Corp. Sec. Litig.*, 627 F.3d at 387. Defendant
28 has presented evidence from medical and toxicology experts establishing that although the arsenic

1 in KVSP's water exceeded the new EPA MCL standard, it was within the range acceptable under
2 the prior EPA MCL; and that the change in the regulatory standard was not prompted by
3 documented clinical illness caused by arsenic levels between 10 and 50 mcg/L in drinking water.
4 Moreover, all public drinking water in the United States contains arsenic but even in those areas
5 where the concentration of arsenic is higher than in other areas, the former of which includes the
6 Central Valley, there are no cohorts of people seeking treatment for adverse effects from arsenic.
7 One study in particular compared the population of a town in Kern County, where the arsenic
8 concentration in the drinking water was 390 mcg/L, to a town in Wyoming where the
9 concentration was 1 mcg/L, and researchers found no differences in the health statuses of the two
10 populations.

11 Dr. Gellar, a physician who is board certified in internal medicine, emergency medicine,
12 and medical toxicology, and who is employed by the California Poison Control System as the
13 Medical Director and Managing Director, attested that in his expert opinion, even if one drank
14 water containing between 13 and 26 ppb of arsenic for an entire lifetime, it would be unlikely that
15 any adverse health effects related to the arsenic would occur. Dr. Gellar also attested that arsenic
16 has not been established to be toxic in amounts below 50 mcg/L.

17 With respect to Plaintiff's medical conditions, Defendant points to the lack of any evidence
18 that they were caused by KVSP's water. Plaintiff complained of low lymphocyte and neutrophil
19 counts, but Dr. Gellar attested that there is no indication they were caused by arsenic exposure.
20 Dr. Gellar also attested that a shift in lymphocyte levels is associated with viruses and a low
21 neutrophil count has many different causes, but Plaintiff's blood counts were normal during
22 incarceration with the exception of one time, and that abnormality was transient and of no medical
23 significance. Plaintiff's right soft palate biopsy showed hyperkeratosis, a non-specific medical
24 term that does not refer to a condition specific to arsenic exposure. Keratosis refers to any skin
25 condition where there is an overgrowth and thickening of the corneal epithelium. Arsenical
26 keratosis is one of numerous types of keratosis, and is the rarest type in the United States. Dr.
27 Gellar opined that oral lesions such as Plaintiff's are generally not associated with or caused by
28 arsenical keratosis, and there is no evidence that arsenical keratosis has ever been seen in the

1 California state prison population. Additionally, the warts or corns on Plaintiff's palms were
2 barely visible to the eye, and there is no indication they were caused by arsenic exposure.

3 The Court finds that Defendant has met his burden on summary judgment by producing
4 evidence that drinking water containing arsenic in concentrations less than 50 mcg/L is safe to
5 consume, that there is an absence of any evidence that Plaintiff's exposure to water containing
6 arsenic between 0.012 and 0.021 mg/L posed a risk to his health, and that there is an absence of
7 any evidence linking Plaintiff's medical conditions to the arsenic levels found in KVSP's drinking
8 water. Given Plaintiff's failure to submit any evidence raising a triable issue of fact regarding
9 whether the arsenic levels in KVSP's water posed a substantial risk of serious harm to his health;
10 caused him any health issues, present or future; or constituted a risk society is not willing to
11 tolerate, Defendant is entitled to judgment on the objective element of Plaintiff's claim.

12 **b. Subjective Element**¹²

13 Defendant attested that the drinking water at KVSP is provided from wells, the same water
14 is provided to both inmates and staff, bottled water was not provided to staff in response to the
15 levels of arsenic in the water, and he has generally consumed the well water. Further, once
16 inmates began inquiring about possible health concerns in response to the notices being posted,
17 Dr. Lopez, the CME at KVSP, contacted the California Poison Control System for information
18 and Dr. Gellar informed her that the expected health problems caused by KVSP's water were zero
19 and there was no need for any public-health actions. Dr. Gellar's opinion, and Dr. Lopez's
20 concurrence with it, was circulated to staff in 2008; and this information directly formed the basis
21 for Defendant's belief that the level of arsenic in KVSP's water did not present any danger to staff
22 or inmates, including Plaintiff.

23 Further, Defendant and other prison officials took action in response to the arsenic levels in
24 KVSP's water and were moving forward with a plan to bring KVSP's water into compliance with
25 the new MCL standard through an arsenic removal plant. The process was lengthy and
26 complicated, beginning in 2005 and ending in 2013; and other options were considered and
27

28 ¹² Although the failure of proof as to the objective element is fatal to Plaintiff's claim, the Court elects to address the
subjective element as well. *Helling*, 509 U.S. at 35.

1 rejected, including drilling new wells to find a different water source, installing point-of-use
2 filters, and tying into the City of Delano's water system. However, it was determined that the
3 likelihood of finding a compliant source of water was minimal; filters were not a viable option due
4 to feasibility, cost, and absence of any health risk; and the cost-benefit analysis showed that a
5 stand-alone arsenic removal plant at KVSP was the most beneficial option.

6 The Court finds that based on the evidence presented, Defendant has demonstrated that he
7 was unaware of any substantial risk of serious harm to Plaintiff's health presented by KVSP's
8 water, having specifically been informed that the water was safe by medical and toxicology
9 experts. Further, Defendant did not disregard any substantial risk. At the time Defendant became
10 the Acting Warden, an arsenic removal plant was already in the works and it was completed in
11 2013. Due to the complexity of the project, it took years to plan and execute, and it had been
12 determined to be the most viable option for addressing the arsenic in KVSP's water. Given the
13 lack of any evidence that the arsenic levels in KVSP's water presented a risk of harm to staff and
14 inmates, Defendant has demonstrated that reliance on the in-progress arsenic removal plant to
15 bring KVSP's water into compliance with the EPA's new MCL standard was reasonable and no
16 other shorter-term solutions, such as bottled water, were necessary or required.

17 Although Plaintiff argues that Defendant's deliberate indifference is evidenced by the
18 notices he signed, this argument lacks merit in light of the showing that the quarterly
19 informational notices were posted in conformity with CDPH requirements and the notices
20 specifically stated that it was not an emergency and there was no need to use bottled water.
21 Plaintiff has not submitted any evidence showing that the water at KVSP was unsafe to consume
22 due to the arsenic levels or refuting Defendant's position that he was informed by Dr. Lopez that
23 there were no health concerns due to the water. Plaintiff also failed to submit any evidence
24 demonstrating that reliance on the arsenic removal plant was unreasonable. *Farmer*, 511 U.S. at
25 844-45. Plaintiff's argument that because Defendant had the authority to authorize expenditures
26 up to \$5,000, he should have done something more has no merit given the evidence regarding the
27 lack of risk and the on-going progression toward an arsenic removal plant. In light of Plaintiff's
28 failure to produce any evidence that Defendant was aware of any risk of harm from the water or

1 that Defendant failed to act reasonably in response to the risk presented, Defendant is also entitled
2 to judgment on the subjective element of Plaintiff's Eighth Amendment claim.

3 **IV. Conclusion and Recommendation**

4 As discussed herein, the Court finds that Plaintiff did not meet his burden on summary
5 judgment in that he failed to affirmatively demonstrate that no reasonable trier of fact could find
6 other than for him. In contrast, Defendant met his burden on summary judgment by producing
7 evidence that the water at KVSP did not present an objectively substantial risk of serious harm to
8 Plaintiff's health and that Defendant did not know of and disregard any risk of harm to Plaintiff's
9 health. Because Plaintiff did not produce any evidence that creates disputed issues of material fact
10 as to either element of his claim, Defendant is entitled to judgment.¹³

11 Accordingly, for the reasons set forth herein, the Court RECOMMENDS that:

- 12 1. Plaintiff's motion for summary judgment, filed on September 15, 2014, be
13 DENIED;
- 14 2. Defendant's motion for summary judgment, filed on July 20, 2015, be GRANTED;
15 and
- 16 3. Judgment be entered in favor of Defendant, thus concluding this action in its
17 entirety.

18 These Findings and Recommendations will be submitted to the United States District
19 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
20 **thirty (30) days** after being served with these Findings and Recommendations, the parties may
21 file written objections with the Court. Local Rule 304(b). The document should be captioned
22 "Objections to Magistrate Judge's Findings and Recommendations." Responses, if any, are due
23 within **fifteen (15) days** from the date the objections are filed. Local Rule 304(d). The parties are
24 advised that failure to file objections within the specified time may result in the waiver of rights on

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28 ¹³ Given the determination that Defendant is entitled to judgment on the merits, the Court does not reach Defendant's
alternative argument that he is entitled to qualified immunity.

1 appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923
2 F.2d 1391, 1394 (9th Cir. 1991)).

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IT IS SO ORDERED.

Dated: September 7, 2015

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE