

SETTLEMENT AGREEMENT AND MUTUAL RELEASE OF CLAIMS

This Settlement Agreement and Mutual Release of Claims (“AGREEMENT”) is entered into between Northern California River Watch (“NCRW”) and the City of Arcata (“City”) (collectively, the “PARTIES”) with respect to the following facts and objectives:

RECITALS

WHEREAS, NCRW is a 501(c)(3) non-profit, public benefit corporation organized under the laws of the State of California, dedicated to the protection, enhancement, and restoration of the rivers, creeks, and tributaries of Northern California;

WHEREAS, the City is a municipality organized under the laws of the State of California, which owns and operates a collection system for the purpose of collecting and conveying for wastewater from residential, commercial, and industrial sources to its publicly owned treatment works;

WHEREAS, on or about August 3, 2009, NCRW provided the City with a Notice of Violation and Intent to File Suit under the Clean Water Act (“Clean Water Act” or “CWA”), 33 U.S.C. §1365, (hereinafter “CWA Notice Letter”);

WHEREAS, the City denies any and all of NCRW’s allegations and claims in the CWA Notice Letter;

WHEREAS, NCRW and the City, through their authorized representatives and without either adjudication of NCRW’s claims or admission by the City of any alleged violation or other wrongdoing, have chosen to resolve in full NCRW’s allegations in the CWA Notice Letter through settlement and avoid the cost and uncertainties of litigation; and

WHEREAS, NCRW and the City have agreed that it is in their mutual interest to enter into this AGREEMENT setting forth the terms and conditions appropriate to resolving NCRW’s allegations set forth in the CWA Notice Letter.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, NCRW and the City hereby agree as follows:

EFFECTIVE DATE

1. The term “Effective Date,” as used in this AGREEMENT, shall mean the last date on which the signature of a party to this AGREEMENT is executed.

AGREEMENT

2. Closed Circuit Televising of Gravity Lines.

Within five (5) years of the Effective Date of this AGREEMENT, City agrees to closed circuit televise (“CCTV”) all gravity collection system lines that have not been CCTV’d within the five (5) years prior to the Effective Date of the AGREEMENT, except for those lines which have been replaced or repaired within ten (10) years prior to the Effective Date. The City shall provide written confirmation of the completion of this task herein to NCRW, with a copy to Jerry Bernhaut, no later than the TERMINATION DATE of the AGREEMENT.

3. GIS Mapping.

Within one (1) year from the Effective Date of this AGREEMENT, the City agrees to add to its Geographic Information System (GIS) maps the following information:

- (1) Proximity of collection system components to year round streams, drainage channels, and bay waters;
- (2) Class of streams in proximity to collection system components;
- (3) Soil types, as reported by the United States Geological Survey (“USGS”), in the collection system area and adjacent to potentially affected streams, drainage channels, and bay waters proximate to the City’s collection system; and
- (3) Land uses in the collection system area and adjacent to potentially affected streams, drainage channels, and bay waters proximate to the City’s collection system.

4. Re-Prioritization of the City’s Capital Improvement Projects

Within two (2) years from the Effective Date of this AGREEMENT, City agrees to use the information added to City’s GIS maps, discussed in paragraph 3. above, to re-prioritize City’s capital improvement projects as follows:

- (a) Wherever the added GIS information shows a gravity sewer pipeline within one hundred and fifty (150) feet of a stream, drainage channel or stream/channel crossing or two hundred and fifty (250) feet of bay waters, that segment of pipeline shall be assigned the highest priority for repair in the City’s Capital Improvement Program (“CIP”) if CCTV records show structural defects that are severe or require immediate attention;

- (b) If any segment of the City's gravity sewer pipes within two hundred and fifty (250) feet of a stream, drainage channel or bay waters has not been inspected by CCTV within five (5) years prior to the Effective Date of this AGREEMENT, to the extent feasible and consistent with orderly CCTV activities, that segment of pipeline will be assigned the highest priority in the City's five (5) year CCTV program discussed in paragraph 2 above; and
- (c) The City will develop a system for rating structural defects in gravity sewer pipelines to determine which segments of pipeline within one hundred and fifty (150) feet of a stream, drainage channel, or stream or channel crossing or two hundred and fifty (250) feet of bay waters will qualify to be assigned the highest priority in City's CIP. At this time, the City plans to employ a sewer inspection rating system, tailored to the City's site-specific system, which will be in conformance with an industry acceptable standard. The final City rating system will be subject to approval by NCRW, within thirty (30) days of submittal, and approval will not be unreasonably withheld by NCRW. The City's rating system will be deemed approved if NCRW does not affirmatively approve, or otherwise provide comment within thirty (30) days of submittal by City.

5. **Spill Reporting and Response**

Within one (1) year from the Effective Date of this AGREEMENT, the City agrees to add to the City's notification process for Sanitary Sewer Overflows ("SSO") the following categories of information, which should be included in the record of every SSO whenever possible:

- (a) The City staff person receiving a call reporting an alleged SSO incident shall record the name, address, and phone number of the person reporting the incident (the "caller"), if provided by the caller. The City staff person must ask the caller about the estimated duration of the observed problem, and the caller response shall be written down and preserved in the record of the SSO incident.
- (b) City service crews responding to an SSO incident shall record the following additional information:
 - (1) the information relied upon to estimate the start-time of the spill, including information provided by the person reporting the incident, if available and relevant;

- (2) the method used to estimate the volume of the spill;
- (3) a narrative description of the terrain surrounding the point of discharge/overflow, including the general direction of flow and the location of any streams or drainage channels in the area; and
- (4) measures taken to halt or remediate the overflow, including any efforts to repair the system, if related to a structural defect or blockage.

6. **Private Sewer Lateral Inspection and Repair**

- (a) Within one (1) year from the Effective Date of this AGREEMENT, the City agrees to develop a program for the mandatory inspection, repair, and/or replacement of private sewer laterals, at the private property owner's expense. The program shall use one or more of the following events (or additional events as identified by City) as a basis or "trigger" for inspection, repair and/or replacement:
 - (1) At the time of property sale or transfer; or
 - (2) Prior to approval of a "significant remodel" or "addition" as will be defined by the City's Public Works Director.
- (b) This program may be included through authorization by City ordinance. The City shall, as part of the ordinance adoption process related to private sewer laterals, conduct at least one public workshop in the City regarding the proposed sewer lateral inspection and repair program in order to receive public input and comment.
- (c) The proposal or draft ordinance and any public workshop materials shall be provided to River Watch for review and comment. River Watch shall return any comments it may have in writing within twenty-one (21) days of submittal by the City.
- (d) After receiving public input and comment, the City staff shall present a final proposal to the City's Council for its consideration and adoption.

7. **Website Linkage**

Within one (1) year from the Effective Date of the AGREEMENT, the City shall create a link from the City's web site to the State Water Resources Control Board's (SWRCB) CIWQS SSO Public Reports. The City shall also provide notification to all customers and other members of the public of the existence of the web based program, including a commitment to respond to private parties submitting overflow reports.

8. **Task Confirmation, and Fees, Costs, and Expenses.**

a) The City shall provide written confirmation of the completion of each task described in Paragraphs 3 through 7 above to NCRW, with a copy to Jerry Bernhaut, within thirty (30) days of the completion of each task.

b) Within fifteen (15) calendar days after the EFFECTIVE DATE of this AGREEMENT, City shall pay NCRW the sum of thirty thousand dollars (\$30,000.00) as reimbursement for NCRW's investigative, and attorneys' fees and costs. Payment shall be made by the City to NCRW in the form of a single check payable to "Northern California River Watch," and shall constitute full payment for all costs of litigation and attorneys' fees incurred by NCRW that have or could have been claimed in connection with NCRW's allegations in its CWA Notice Letter up to and including the Effective Date of this AGREEMENT, and for NCRW's attorneys' fees and costs spent monitoring and enforcing City's compliance with ongoing obligations under this AGREEMENT, with the exception of any action taken to enforce the Agreement in accordance with the dispute resolution procedures set forth in paragraphs 14 and 15 below.

TERMINATION DATE

9. This AGREEMENT shall terminate when one of the following conditions occurs, whichever is earlier:

- (a) Five years from the Effective Date of the AGREEMENT; or
- (b) At such time that the City completes the collection system activities set forth in Paragraphs 2 - 7 above, and payment pursuant to Paragraph 8.b) has been made.

NO ADMISSION OR FINDING

10. Neither this AGREEMENT nor any payment pursuant to the AGREEMENT shall constitute evidence or be construed as a finding, adjudication, or acknowledgment of any fact, law or liability, nor shall it be construed as an admission of violation of any law, rule or regulation. However, this AGREEMENT and/or any payment pursuant to the AGREEMENT may constitute evidence in actions seeking compliance with this AGREEMENT.

MUTUAL RELEASE OF LIABILITY AND COVENANT NOT TO SUE

11. In consideration of the above, and except as otherwise provided by this AGREEMENT, the PARTIES hereby forever and fully release each other and their respective successors, assigns, directors, officers, agents, board members, representatives, and employees, and all persons, firms and corporations having an interest in them, from any and all claims and demands of any kind, nature, or description whatsoever, and from any and all liabilities, damages, injuries, actions or causes of action, either at law or in equity, whether known or unknown, which the PARTIES have or may have against each other arising from or related to NCRW's allegations as set forth in the CWA Notice Letter up to and including the Effective Date of this AGREEMENT.

12. The PARTIES acknowledge that they are familiar with section 1542 of the California Civil Code, which provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

The PARTIES hereby waive and relinquish any rights or benefits they may have under California Civil Code section 1542 with respect to any other claims against each other arising from, or related to, the allegations and claims as set forth in the CWA Notice Letter up to and including the Effective Date of this AGREEMENT.

13. For the period beginning on the Effective Date and ending five (5) years after the Effective Date of this AGREEMENT, NCRW agrees that neither NCRW, its officers, executive staff, members of its governing board nor any organization under the control of NCRW, its officers, executive staff, or members of its governing board, will serve any 60-day Notice Letter or file any lawsuit against the City seeking relief for alleged violations of the Clean Water Act or the Resources Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6901, or similar state statutes and/or regulations, including the California Porter-Cologne Water Quality Control Act, nor will NCRW initiate or support such lawsuits against the City brought by other groups or individuals by providing financial assistance, personnel time, or any other affirmative actions.

However, NCRW maintains the right to sue the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, or the Regional Water Quality Control Board for the North Coast Region related to any jurisdictional determination made regarding the status of the Arcata marsh as a “waters of the United States.” NCRW also maintains the right to file a declaratory relief action against the City regarding the jurisdictional status of the treatment marshes, but the City reserves all available defenses. Both Parties reserve the right to seek attorney’s fees as the prevailing party.

DISPUTE RESOLUTION PROCEDURE

14. Any disputes with respect to any of the provisions of this AGREEMENT shall be resolved through the following procedure. The PARTIES covenant and agree that, if either party determines the other is in violation of one or more terms of the AGREEMENT, the party shall provide notice to the other in writing of what actions or inactions they deem to be in violation of this AGREEMENT. Within thirty (30) days of receipt of such notice, the party receiving the notice shall respond to the notice in writing. If the PARTIES still dispute compliance with this AGREEMENT, within an additional thirty (30) days, the PARTIES will meet and confer in a good faith attempt to resolve their dispute. If the PARTIES cannot informally resolve the dispute, either party may seek relief through a claim filed and heard by the presiding judge of the Humboldt County Superior Court. To the extent there are multiple claims each with a different prevailing party, the judge may take those facts into account in terms of an award for fees and costs, and can order each party to bear their own costs.

15. If NCRW asserts that City is in violation of this AGREEMENT, and City corrects the action or inaction within sixty (60) days of written notice from NCRW describing the asserted violations, no further enforcement action under the terms of the AGREEMENT shall be taken by either party. To the extent an alleged violation cannot be reasonably cured within the sixty (60) day period, and the City undertakes all reasonable efforts to commence the cure of such asserted violation within that period, similarly, no further enforcement action under the terms of this AGREEMENT shall be taken by either party if City ultimately cures the alleged violation.

FORCE MAJEURE

16. Separate from, and in addition to any other limitations on the City’s obligations under this AGREEMENT, the City’s obligations to comply with any provisions of this AGREEMENT shall be excused or deferred if compliance, or a delay to compliance, is caused by an event or circumstance beyond the reasonable control of the City or any entity controlled by City, including its contractors, and which event or circumstance could not have been reasonably foreseen and prevented by the exercise of due diligence by the City. Where implementation of the actions set forth in this AGREEMENT, within the deadlines prescribed, becomes

unachievable, despite the timely good faith efforts of the City, the City shall notify NCRW in writing within thirty (30) days of the date that the City knew of the event or circumstance precluding compliance, and shall describe the reason for the non-performance. The PARTIES agree to meet and confer in good faith concerning the non-performance and, where the PARTIES concur that the non-performance was or is impossible, despite the timely good faith efforts of one of the PARTIES, compliance shall be excused or new performance deadlines shall be established by agreement of the parties. In the event that the PARTIES cannot timely agree, either party shall have the right to invoke the dispute resolution procedure described herein.

GENERAL PROVISIONS

16. **Construction.** The language in all parts of this AGREEMENT shall be construed according to its plain and ordinary meaning, except as to those terms defined by law, in the Clean Water Act, or specifically herein.

17. **Choice of Law.** This AGREEMENT shall be governed by the laws of the United States, and where applicable, the laws of the State of California.

18. **Severability.** In the event that any provision, section, or sentence of this AGREEMENT is held by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely affected.

19. **Correspondence.** All notices required herein or any other correspondence pertaining to this AGREEMENT shall be sent by regular, certified, overnight, or electronic mail as follows:

If to NCRW:

Northern California River Watch
500 North Main Street, Suite 110
Sebastopol, CA 95472
Telephone: 707-824-4370
us@ncriverwatch.org AS

And to:

Jerry Bernhaut
c/o Northern California River Watch
Law Office of Jack Silver
PO Box 5469
Santa Rosa, CA 95402-5469
Telephone: (707) 528-8175
Facsimile: (707) 528-8675
~~jbernhaut@comcast.net~~
j2bernhaut@yahoo.com BS

If to City:

Mark Andre, Director
Environmental Services Department
736 F Street
Arcata, CA 95521
Telephone: (707) 822-5951
Facsimile: (707) 822-8018
mandre@cityofarcata.org

Nancy Diamond
Arcata City Attorney
822 G Street, Suite 3
Arcata, California 95521
Telephone: (707) 826-8540
Facsimile: (707) 826-8541
ndiamond@humboldt1.com

And to:

Melissa A. Thorme
Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814
Telephone: (916) 444-1000
Facsimile: (916) 444-2100
mthorme@downeybrand.com

Notifications of communications shall be deemed submitted on the date that they are sent by electronic mail, postmarked and sent by first-class mail, or deposited with an overnight mail/delivery service. Any change of address or addresses shall be communicated in the manner described above for giving notices.

20. **Counterparts.** This AGREEMENT may be executed in any number of counterparts, all of which together shall constitute one original document. Telecopy, electronic, and/or facsimile copies of original signature shall be deemed to be originally executed counterparts of this AGREEMENT.

21. **Assignment.** Subject only to the express restrictions contained in this AGREEMENT, all of the rights, duties and obligations contained in this AGREEMENT shall inure to the benefit of and be binding upon the PARTIES, and their successors and assigns.

22. **Modification of the AGREEMENT:** Except as set forth herein, this AGREEMENT, and any provisions herein, may not be changed, waived, discharged or terminated unless by a written instrument, signed by the PARTIES.

23. **Full Settlement.** This AGREEMENT constitutes a full and final settlement of this matter. It is expressly understood and agreed that the AGREEMENT has been freely and voluntarily entered into by the PARTIES with and upon advice of counsel.

24. **Integration Clause.** This is an integrated AGREEMENT. This AGREEMENT is intended to be a full and complete statement of the terms of the agreement between the PARTIES and expressly supersedes any and all prior oral or written agreements covenants, representations and warranties (express or implied) concerning the subject matter of this AGREEMENT.

25. **Negotiated Agreement.** The PARTIES have negotiated this AGREEMENT, and agree that it shall not be construed against the party preparing it, but shall be construed as if the Parties jointly prepared this AGREEMENT and any uncertainty and ambiguity shall not be interpreted against any one party.

26. **Authority.** The undersigned representatives for NCRW and the City each certify that he or she is fully authorized by the party whom he represents to enter into the terms and conditions of this AGREEMENT.

The PARTIES hereby enter into this AGREEMENT.

Date: 1-29, 2010

NORTHERN CALIFORNIA RIVER WATCH

By: Margaret Bacigalupi
Name: Margaret Bacigalupi
Title: NCRW Board Pres.

Date: 2/9, 2010


CITY OF ARCATA

By: Alexandra Stillman
Name: Alexandra Stillman
Title: Mayor

APPROVED AS TO FORM:

For NCRW:

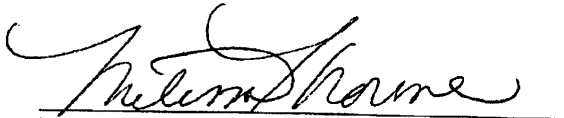
Date: 1/27, 2010 _____ LAW OFFICE OF JACK SILVER


By: Jerry Bernhaut, Esq.

For the City of Arcata:

Date: Jan. 22, 2010 _____

DOWNEY BRAND LLP


By: Melissa A. Thorme, Esq.