

SETTLEMENT AGREEMENT AND MUTUAL RELEASE OF CLAIMS

This Settlement Agreement and Mutual Release of Claims ("Agreement") is entered into between California River Watch, a nonprofit corporation, on behalf of itself and its members ("CRW") and Leucadia Wastewater District, a special district organized under the laws of the State of California ("LWD"), (collectively the "Parties") as of the last date executed below (the "Effective Date"), with respect to the following facts and objectives.

RECITALS

WHEREAS, CRW is a 501(c)(3) nonprofit, 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 California.

WHEREAS, LWD provides wastewater collection for some 60,000 residents and businesses in a 16-square mile boundary that includes Leucadia, northern Encinitas and the La Costa area of Carlsbad, via its ownership and operation of a wastewater collection system comprised of approximately 200 miles of gravity sewer pipeline, 5,000 manholes, 10 pump stations and 16 miles of pressurized pipelines.

WHEREAS, in July of 2014, LWD updated its Sewer System Management Plan ("SSMP") to incorporate new changes to the Monitoring and Reporting Program under the Sanitary Sewer Waste Discharge Requirements, Order No. 2006-0003-DWQ, and incorporated the gravity sewer ranking system described herein.

WHEREAS, on or about August 21, 2014 CRW served LWD with a Notice of Violations and Intent to File Suit under the Clean Water Act, CWA § 505, 33 U.S.C. § 1365, ("CWA Notice") alleging various violations of the CWA relating to activities and operations of the collection system, which is attached hereto as **Exhibit A**.

WHEREAS, CRW and LWD, through their authorized representatives, and without either adjudication of CRW's claims or admission by LWD of any alleged violation or other wrongdoing, wish to resolve in full CRW's allegations as set forth in the CWA Notice, through settlement to avoid the cost and uncertainties of litigation.

WHEREAS, CRW and LWD have agreed that it is in their mutual interest to enter into this Agreement setting forth the terms and conditions appropriate to resolving CRW's allegations in the CWA Notice, including without limitation, any disputes, obligations, claims and/or causes of action that were or could have been asserted in or pursuant to the CWA Notice.

NOW THEREFORE, for good and valuable consideration through the execution of this Agreement and the releases, satisfactions and promises made herein, it is hereby agreed upon by the Parties as follows:

AGREEMENT

I. DEFINITIONS

- A. **Collection System:** Any public system of pipes, pump stations, sewer lines, or other conveyances located within the boundary of LWD's sewage collection service area, for which LWD has ownership and/or maintenance responsibility, used to collect and convey wastewater to the Encina Water Pollution Control Facility. For the purposes of this Agreement, the Collection System consists of gravity mains, force mains, pump stations and manholes and does not include private laterals or other private conveyances.
- B. **Condition Assessment:** A report that comprises inspection, rating, and evaluation of the existing condition of individual segments of the Collection System. Inspection for gravity mains is based on closed circuit television ("CCTV") inspections. Inspections of manholes and pipe connections are based on visual inspection at the manhole for structural defects. After inspection occurs, gravity main pipe segments are assigned a grade based on the rating system described in the LWD Sewage System Management Plan ("SSMP"), as follows:
- 0 – The asset does not have any defect(s).
 - 1 – The asset has a minor defect(s). Examples: minor cracks or minor roots.
 - 2 – The asset has a defect(s). Examples: medium offset joint, several roots, broken/cracked cleanout cap, medium sag, broken pipe.
 - 3 – The asset has a major defect that needs attention accordingly. Examples: Large offset joint, void in pipe, infiltration, major sag, fractures.
 - 4 – The asset is in eminent failure.
- C. **Surface Water Condition Assessment:** A Condition Assessment of sewer gravity mains, manholes and pipe connections in the Collection System located within two hundred (200) feet of surface waters, defined as any perennial or intermittent creek or other surface water of the state.
- D. **Full Condition Assessment:** A Condition Assessment of all sewer gravity mains, manholes, pipe connections and pump stations in the Collection System, with the exception of sewer gravity mains, manholes, pipe connections and pump stations

located within two hundred (200) feet of surface waters.

- E. Significantly Defective: A gravity sewer pipe segment is considered to be Significantly Defective if the condition of the pipe receives a grade of 4 based on the rating system described in the SSMP and above.
- F. Rehabilitation: The replacement or slip lining of a defective pipeline segment.

II. REMEDIAL MEASURES

A. SEWER SYSTEM INVESTIGATION AND REPAIR

1. Surface Water Condition Assessment

a. Within one (1) year from the Effective Date of this Agreement, LWD shall complete a Surface Water Condition Assessment of all sewer gravity main segments in the Collection System located within two hundred (200) feet of surface waters, if any, that have not been investigated and rated, or repaired within five (5) years prior to the Effective Date of this Agreement, or newly installed or rehabilitated within ten (10) years prior to the Effective Date of this Agreement.

b. Within one (1) year of determination under the Surface Water Condition Assessment that a sewer gravity main segment has a rating of 4, LWD shall repair the defect, or rehabilitate or replace the sewer gravity main.

c. Within one (1) year of determination under the Surface Water Condition Assessment that a sewer gravity main segment has a rating of 3, LWD will place the segment on a watch list to be further investigated in six (6) months, and moved up to a 4 rating, as needed, and then to be repaired within one (1) year once rated as a 4.

d. Upon completion of the Surface Water Condition Assessment, LWD shall provide CRW with a Report identifying the segments rated 4 and 3. For the segments rated 4, the Report shall include an explanation of further planned remediation.

2. Full Condition Assessment

a. Within one (1) year from the Effective Date of this Agreement, LWD shall demonstrate that it has committed funds in its Budget for Operations or Capital Improvements to provide for continuing Condition Assessment of all manholes, gravity main lines and pipe connections in its Collection System on an ongoing four (4) year cycle, and pump stations on a five (5) year cycle.

b. Inspection of traditional metal force mains has historically been accomplished by (1) excavating the pipelines at strategic points, (2) extracting a section of pipe or "coupon," (3) assessing the coupon using a corrosion expert; and (4) televising the force main to the extent possible by accessing the pipe through the excavation area. Similar inspection methods are not appropriate for Polyvinyl Chloride (PVC) pipes, which LWD is transitioning to over time. Within one (1) year from the Effective Date of this Agreement, LWD shall demonstrate that it has a financial plan that identifies on-going funding for inspection, replacement and/or other improvement of its force mains.

B. SEWER SYSTEM OVERFLOW RESPONSE

1. Within one (1) year from the Effective Date of this Agreement, LWD shall modify its Sanitary Sewer Overflow ("SSO") report form to require (not merely have a space for) the following additional information:

- a. The method or calculations used for estimating total spill volume, spill volume reaching surface waters, and spill volume recovered.
- b. For Category I spills, a listing of nearby residents or business operators contacted to attempt to establish the SSO's start time, duration, and flow rate.
- c. Provision for attachment of photographs taken of the manhole flow at the SSO site and of the spill volume if applicable, if photos can be taken without substantially impeding response measures.
- d. When appropriate, a brief description of any clearly visible ecological impacts (e.g. fish kills) and any remedial measures undertaken in an appropriate category on the CIWQS reporting form.

2. Commencing on the Effective Date of this Agreement through the term of this Agreement, LWD shall require water quality sampling and testing whenever it is estimated that an SSO of fifty (50) gallons or more enters surface waters if feasible and the conditions are not unsafe.¹

¹ For purposes of this agreement, "unsafe" conditions may include, but are not limited to, non-daylight hours, electrical storms, tornados, hurricanes or wind events exceeding 60 miles per hour, severe flood events, or other conditions that would not comply with CAL-OSHA requirements.

- a. LWD shall collect and test samples from three (3) locations: the point of discharge, upstream of the point of discharge, and downstream of the point of discharge. Constituents tested for shall include Ammonia, E.Coli, and Dissolved Oxygen. These water quality sample results shall be reported through CIWQS.
- b. If any of said constituents are found at higher levels in the point of discharge sample and the downstream sample than in the upstream sample, LWD shall, within one (1) week of receiving the test results, spot repair or replace the pipe segment determined to be the source of the SSO, if structural defects in that pipe segment rather than an internal blockage caused the overflow. If internal blockage caused the overflow, within one (1) week of receiving the test results, LWD shall perform any necessary maintenance not undertaken at the time of the spill.
- c. During the first year following the Effective Date of this Agreement, LWD will contract with a registered Environmental Health Specialist or biologist to develop a protocol to be implemented as part of the SSMP's defined SSO remediation procedures for any SSO releases to surface waters that are one thousand (1,000) gallons or more. LWD will provide a copy of the protocol to River Watch within 30 days of completion of the protocol.
- d. In addition to the above sampling requirements, during the first year of this Agreement only, LWD shall conduct a metals analysis² for samples taken on up to four (4) Category I SSO events of fifty (50) gallons or more that reach surface waters. If there are no such Category I SSO events during the first year of this Agreement, then no metals analysis is required under this paragraph. If the results of two (2) successive samples for any particular metal are non-detect or below the applicable water quality objective, analysis for that metal may be discontinued for future samples.

C. LATERAL GRANT PROGRAM

Within one (1) year of the Effective Date of this Agreement, LWD shall establish a lateral grant program wherein LWD appropriates and budgets up to one hundred thousand dollars (\$100,000) per year, depending on sufficient demand, and will fund up to one half (½) the cost of a lateral repair/replacement program for a maximum of \$3,000. When LWD

² The following 17 metals will be sampled using EPA Part 136 approved methods: Antimony, Arsenic, Barium, Beryllium, Cadmium, Chromium, Cobalt, Copper, Lead, Mercury, Molybdenum, Nickel, Selenium, Silver, Thallium, Vanadium, and Zinc.

notifies private lateral owners that cracks, roots or other defects have been identified during the CCTV'ing of the main sewer line, LWD shall notify the private lateral owner of the availability of the grant program.

D. TASK CONFIRMATION

1. LWD shall provide written confirmation to CRW that details LWD's progress toward completion of the tasks in Section II. A-C. If all tasks are not completed within one year of the Effective Date of the Agreement, then updates should be provided annually.
2. Completion of all tasks described in sections II. A-C above and herein shall constitute completion of all obligations set forth in this Agreement, and LWD shall cease providing the above mentioned Reports to CRW at that time.

III. ATTORNEY'S COSTS AND FEES AND SUPPLEMENTAL ENVIRONMENTAL PROJECT

LWD agrees to pay to CRW, within thirty (30) days of the Effective Date of this Agreement, the sum of thirty-five thousand dollars (\$35,000), representing full satisfaction of all claims by CRW for CRW's investigative, expert, and attorneys' fees and costs. Payment shall be made by LWD to CRW in the form of a single check payable to "California River Watch," and shall constitute full payment for all costs of anticipated litigation and attorneys' fees incurred by CRW that have or could have been claimed in connection with CRW's allegations in its CWA Notice up to and including the Termination Date of this Agreement, and for CRW's expert and attorneys' fees and costs spent monitoring and enforcing LWD'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 Section VI below. Within one (1) year of the Effective Date, and in addition to the payment for fees and costs, LWD agrees to fund a \$10,000 study as a Supplemental Environmental Project (SEP) that will monitor and analyze background water quality in Batiquitos Lagoon.

IV. TERMINATION DATE

This Agreement shall terminate four (4) years from the Effective Date, or when LWD completes the Remedial Measures set forth in Sections II. A-C above, whichever is earlier. However, the provisions of Section V. below, survive the Termination Date.

V. RELEASE OF LIABILITY AND COVENANT NOT TO SUE

A. Upon the Effective Date of this Agreement, CRW, on behalf of itself, its officers, members, agents, successors and assigns, and any other person acting under its direction and control with respect to this matter (collectively "Releasers"), agrees that it releases, acquits and forever discharges LWD, its elected and appointed officials, officers, employees, agents, attorneys, legal successors and assigns, and any other persons acting on LWD's behalf (collectively "Releasees"), from all Clean Water Act claims and demands, actions, causes of action, obligations, (except for obligations under this Agreement,) liabilities, indebtedness, breach of duty, claims for injunctive relief and other equitable relief, suits, liens, damages, losses, costs or expenses, including attorneys' fees, (except for costs and fees pursuant to Section III above,) known or unknown, fixed or contingent, liquidated or unliquidated, suspected or unsuspected, foreseen or unforeseen based upon the claims alleged, or which could have been alleged, in the CWA Notice including without limitation, any and all claims for violations of the Clean Water Act which occurred at any time up to the Effective Date of this Agreement.

B. The Parties acknowledge that they are familiar with section 1542 of the Civil Code of the State of California. Each party expressly waives and relinquishes any rights and benefits which they have or may have under Section 1542 of the Civil Code of the State of California, which provides:

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

The Parties acknowledge they have specifically reviewed with their respective attorneys the meaning and effect of the release set forth herein, the language of California Civil Code Section 1542, and the waiver contained herein. The Parties acknowledge that their attorneys have fully explained the impact of these provisions, and the Parties knowingly accept the risks associated with these provisions.

C. For the period beginning on the Effective Date and ending five (5) years from the Effective Date of this Agreement, CRW agrees to a covenant that neither CRW, its officers, executive staff, members of its governing board nor any organization under the control of CRW, its officers, executive staff, or members of its governing board, will file a complaint pursuant to the CWA Notice, or serve any new 60-day CWA Notice or file any lawsuit against LWD seeking relief for violations as alleged or as could have been alleged in the CWA Notice, nor will CRW support such lawsuits against LWD brought by other groups or individuals by providing financial assistance, personnel time, or any other

affirmative actions. Through the Termination Date of this Agreement, and in accordance with its standard practice, CRW agrees that it will not file a complaint or serve any new 60-day Notice pertaining to any remedial measures completed by LWD or to any pending remedial measure agreed to as a provision of this Agreement that has not been completed.

VI. DISPUTE RESOLUTION PROCEDURES

A. 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 believes 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, they will enter into binding arbitration, conducted by an arbitrator agreed upon by the Parties. Either party may request that the presiding judge of the North San Diego County Superior Court select an arbitrator if the Parties cannot reach an agreement. The arbitration shall be binding and not subject to ordinary judicial appeal; however, it shall be subject to the procedural provisions provided for under California Code of Civil Procedure Sections 1280, et seq. The arbitration shall be conducted in accordance with the arbitration rules and procedures of JAMS (Judicial Arbitration and Mediation Service) to the extent other conventional rules are not promptly agreed to by the Parties. The relief the arbitrator is empowered to award is limited to injunctive relief to take action specified in this Agreement, and the arbitrator shall be empowered to determine a prevailing party and may award payment of reasonable attorneys' fees and costs to a prevailing party. To the extent there are multiple issues with a different prevailing party, the arbitrator 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.

B. If CRW asserts that LWD is in violation of this Agreement, and LWD corrects the action or inaction within sixty (60) days of written notice from CRW describing the asserted violations, no further enforcement action under the terms of this Agreement, including the dispute resolution process described above, shall be taken by either party.

VII. FORCE MAJEURE

Separate from, and in addition to, any other limitations on LWD's obligations under this Agreement, LWD's obligations to comply with any provisions of this Agreement shall be excused or deferred if compliance, or a delay in compliance, is caused by an event or

circumstance beyond the reasonable control of LWD or any entity controlled by LWD, including its contractors, and which event or circumstance could not have been reasonably foreseen and prevented by the exercise of due diligence by LWD or any entity controlled by LWD. Where implementation of the actions set forth in this Agreement within the deadlines prescribed becomes unachievable, despite timely good faith efforts, LWD shall notify CRW in writing within thirty (30) days of the date that LWD 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.

VIII. GENERAL PROVISIONS

A. 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.

B. 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.

C. 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.

D. Correspondence/Notices: 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 CRW:

California River Watch
290 S. Main Street, #817
Sebastopol, CA 95472

And:

Jerry Bernhaut, Esq.
Law Office of Jack Silver
P.O. Box 5469
Santa Rosa, CA 95402-5469
Telephone: (707) 528-8175
Email: j2bernhaut@yahoo.com

If to LWD:

Paul Bushee, General Manager
Leucadia Wastewater District
1960 La Costa Avenue
Carlsbad, CA 92009
Email: pbushce@lwwd.org

And:

Melissa A. Thorne
DOWNEY BRAND, LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814
Telephone: 916-520-5376
Email: mthorne@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.

E. 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.

F. 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.

G. Modification. This Agreement, and any provisions herein, may not be changed, waived, discharged or terminated unless by a written instrument, signed by the Parties.

H. 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.

I. Integration. 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.

J. Negotiated Agreement. The Parties acknowledge they 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.

K. Authority. The undersigned representatives for CRW and LWD each certify that he or she is fully authorized by the party whom he or she represents to enter into the terms and conditions of this Agreement.

THE PARTIES HEREBY ENTER INTO THIS AGREEMENT.

DATED:

CALIFORNIA RIVER WATCH

By: 

Larry J. Hanson
Board President

DATED: 11/05/2014

LEUCADIA WASTEWATER DISTRICT

By: 

Name/Title

11/13/2014

APPROVED AS TO FORM:

Jerry Bernhaut

Jerry Bernhaut, Esq.
Attorney for California River Watch

DATED: 11-5-14

Melissa A. Thorne

Melissa A. Thorne, Esq.
Attorney for Leucadia Wastewater District

DATED: 11/13/2014