



Office of the City Manager

INFORMATION CALENDAR
September 19, 2023

To: Honorable Mayor and Members of the City Council
From: Dee Williams-Ridley, City Manager
Submitted by: Farimah Brown, City Attorney
Subject: Settlement with California River Watch of Notice of Intent to File Suit

INTRODUCTION

Under Berkeley Municipal Code section 2.06.120G, all settlements that are not announced at the conclusion of a closed session are provided to the Council and the public via an information report.

CURRENT SITUATION AND ITS EFFECTS

Pursuant to the Council's authorization on July 24, 2023, the City has entered into the attached Settlement Agreement and Release.

BACKGROUND

The Berkeley Transfer Station collects and discharges stormwater, and therefore it is an industrial facility subject to certain permit requirements overseen by the State Water Resources Control Board under the federal Clean Water Act. As required by these authorities, the City has developed a Stormwater Pollution Prevention Plan (SWPPP) that includes (1) Best Management Practices (BMPs) to (a) minimize exposure of stormwater to the Transfer Station's industrial activities, (b) control and contain stormwater to reduce discharges, and (c) provide basic treatment on site; and (2) procedures for discharge monitoring, sampling, and reporting.

On or about October 24, 2022, the City received a letter sent on behalf of California River Watch, alleging various violations of the City's requirements to address stormwater discharges from the Berkeley Transfer Station. The letter is styled as a "Notice of Violations and Intent to File Suit Under the Federal Water Pollution Control Act (Clean Water Act)" (Notice), indicating River Watch's intention to file suit in federal court based on its perception of violations of the Clean Water Act.

City staff and environmental consultants evaluated the Notice's allegations and engaged with River Watch to identify specific BMPs and other SWPPP updates to address the alleged violations. On July 24, 2023, the Council agreed that these SWPPP updates and payment to River Watch of its claimed attorneys' fees, in exchange for a release from River Watch, represented a positive and responsible resolution of the

issues raised by the Notice. The attached Settlement Agreement and Release reflects the terms reached by the parties consistent with the Council's approval.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

The operational changes being implemented at the Berkeley Transfer Station can reasonably be expected to reduce the amount and increase the quality of any stormwater discharged from the facility, thereby reducing the City's impact to local water resources.

POSSIBLE FUTURE ACTION

None considered.

FISCAL IMPACTS OF POSSIBLE FUTURE ACTION

Not applicable (no possible future actions considered).

CONTACT PERSON

Farimah Brown, City Attorney, 510-981-6950

Attachments:

1: Settlement Agreement and Release

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (“Agreement”), effective as of the last date of execution below (“Effective Date”), is made by and between California River Watch, a nonprofit corporation, on behalf of itself and its members (“CRW”), and the City of Berkeley (“City”), a California charter city. CRW and the City are sometimes hereinafter each referred to as “Party” or collectively as the “Parties.”

RECITALS

- A. CRW is an Internal Revenue Code § 501(c)(3) nonprofit, public benefit corporation organized under the laws of the State of California, dedicated to protecting, enhancing, and helping to restore the surface and ground waters of California including coastal areas, rivers, creeks, streams, wetlands, vernal pools, aquifers and associated environs, biota, flora, and fauna, and to educating the public concerning environmental issues associated with these environs.
- B. The City owns and operates the City of Berkeley Transfer Station located at 1201 Second Street, Berkeley, California (“Facility”). The Facility accepts municipal, commercial, and private solid waste, and green waste for composting.
- C. The Facility is subject to various federal and state regulatory requirements under the Clean Water Act (“CWA”) including compliance with State Water Resource Control Board General Industrial Activities Storm Water Permit, Water Quality Order No. 2014-0057-DWQ (“IGP”).
- D. On or about October 24, 2022 CRW, through its authorized representative, served the City with a Notice of Violations and Intent to File Suit Under the CWA, alleging violations of the CWA relating to activities taking place at the Facility (“CWA Notice”).
- E. The Parties have expended effort and resources in investigating and evaluating the allegations set forth in the CWA Notice, including the exchange of information regarding the Facility and a site inspection of the Facility on February 17, 2023.
- F. The Parties, through their authorized representatives, and without either adjudication of CRW’s allegations and claims or admission by the City of any alleged violation or wrongdoing, now wish to resolve and settle all disputes, obligations, and purported or actual claims or causes of action, which may exist by and between CRW and the City, 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.
- G. The Parties agree it is in their mutual interest to enter into this Agreement setting forth the terms and conditions appropriate to resolve CRW’s allegations and claims as set forth in the CWA Notice.

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

TERMS AND CONDITIONS

1. Parties Bound by This Agreement and Term of Agreement. This Agreement, and each of its provisions, including all representations, warranties, and promises contained herein, binds and inures to the benefit of CRW and the City and each of their respective assigns, present and future affiliates, parents, subsidiaries, predecessors and successors in interest whether by merger, consolidation, or otherwise, as well as their respective representatives, agents, and administrators, past, present, and future. The “Termination Date” of this Agreement shall be the earlier of five (5) years from the Effective Date of this Agreement or the completion of the City’s planned Transfer Station redesign.

2. Remedial Measures by the City. In exchange for the delivery, execution, and performance of this Agreement and of the Release by CRW as provided herein, the City shall perform the below-specified remedial measures at the Facility. The City reserves the right, in its sole discretion, to determine (i) which persons shall perform any work described herein, including contractors, and (ii) the scope and technical details of, and manner to implement, any such work, subject to review and approval by the Regional Water Quality Control Board (or such other regulatory agency as may, from time to time, exercise jurisdiction with respect to environmental matters governing the Facility):

2.1. Sampling and Monitoring. In addition to any other sampling and monitoring requirements of the IGP, the City shall:

2.1.a. Collect the first storm water sample in Annual Reporting Year 2024-2025 and Annual Reporting Year 2025-2026 from the first “Qualifying Storm Event” (“QSE”) as defined in the IGP (“first flush”) and subject to the timing/safety protocols set forth in IGP §§ XI.B.5 and XI.C.6.a.ii.

2.1.b. Within three (3) months after the Effective Date of this Agreement, the City shall implement the following Best Management Practices (“BMPs”) to enable the required number of sampling events:

- i. Use of a precipitation log sheet and video to document discharges during QSEs ;
- ii. Installation of a Personal Digital Weather Station to track rain accumulation in real time.

2.1.c. Within three (3) months after the Effective Date of this Agreement, the City shall, in addition to its regular suite of parameters, initiate sampling for TPHg and TPHd. If two (2) successive sampling events show no presence of said parameters at levels exceeding water quality standards including Numeric Action Levels, EPA Benchmarks or California Toxics Rule limits, the City may discontinue sampling for these additional parameters.

2.2. Best Management Practices (“BMPs”): The City shall implement the following BMPs at the Facility within the time frames specified:

2.2.a. Within one (1) month after the Effective Date of this Agreement, the City shall create

and maintain detailed logs reflecting trench drain inspection and maintenance.

2.2.b. Within one (1) month after the Effective Date of this Agreement, the City shall implement increased housekeeping of the grate leading to the sump in Catchment Area E, including hand sweeping in the vicinity of the sump to ensure stormwater is directed into the sump and ultimately the nearby storage tanks.

2.2.c. Prior to the next rainy season, the City shall re-paint rusted yellow construction debris containers in Catchment Area A and repair or replace any containers with punctured floors. The City shall remove from service any containers with punctured floors not repaired prior to the first expected rains.

2.2.d. Within three (3) months after the Effective Date of this Agreement, the City shall implement additional housekeeping BMPs in the area of the DP-9 Sampling Point to include cleanup of trash and removal of any abandoned metal behind the Paper Recycling Warehouse.

2.2.e. Within one (1) month after the Effective Date of this Agreement, the City shall implement increased housekeeping of the grate leading to the sump in Catchment Area F, including hand sweeping to ensure stormwater is directed into the sump and ultimately the nearby storage tanks.

2.3. Updating of Storm Water Pollution Prevention Plan ("SWPPP"): Within three (3) months after the Effective Date of this Agreement, the City shall update the Facility's SWPPP to incorporate all changes set forth in, or resulting from this Agreement.

3. Attorneys' Fees and Costs. Within thirty (30) calendar days after the Effective Date of this Agreement, the City shall pay CRW the sum of Sixty Three Thousand Five Hundred Twenty Nine Dollars and Twenty Three Cents (\$63,529.23) as reimbursement for CRW's investigative and attorneys' fees and costs. Payment shall be made in the form of a single check payable to "California River Watch" and mailed to the Law Office of Jack Silver, 708 Gravenstein Highway North, #407, Sebastopol, CA 95472. Said payment shall constitute full and complete satisfaction of all costs and attorneys' fees incurred by CRW that have been or could have been claimed in connection with this matter up to and including the Effective Date of this Agreement, and for CRW's expert's and attorneys' fees and costs for monitoring and enforcing the City's compliance with the ongoing obligations under this Agreement up to and including the Termination Date of this Agreement.

4. Release. It is the intent of the Parties that the execution and delivery of this Agreement constitutes a full and complete satisfaction of all rights, claims, and demands by CRW against the City with respect to any and all allegations or claims made in the CWA Notice or any CWA violation, if any, that occurred on or before the Effective Date of this Agreement. CRW on behalf of itself and any and all of its agents, representatives, successors, members, and assigns, except as otherwise provided for herein, does hereby absolutely, fully and forever release, relieve, remise and discharge the City and its past and present employees, officers, directors, attorneys, and the predecessors, successors, and assigns of any of them, from all causes of action, claims, damages, penalties, demands, actions, attorneys' fees, costs of suit, and liabilities of every kind or nature

whatsoever, which could have arisen out of or directly relating to claims that were made, or could have been made in the Parties' correspondence, with regard to compliance with the CWA at the Facility up to the Effective Date of this Agreement. The release provided for herein shall be valid and effective whether the claims hereby released (i) were known or unknown, suspected, or unsuspected, (ii) were based in contract, tort, statute, or otherwise, or (iii) arise at law or in equity. The release set forth in this Section 4 shall survive the termination of this Agreement, whether such termination occurs by satisfaction of the terms and conditions hereof or operation of law.

The release contained herein is intended to be complete and final as to the City and to cover (1) known claims asserted in the CWA Notice, and also (2) unknown claims not asserted in the CWA Notice, which, if known by CRW at the time of executing this Agreement, might have affected its actions. Accordingly, CRW expressly waives the benefit of the provisions of section 1542 of the California Civil Code with respect to the released claims only, which section provides:

A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.

The Parties acknowledge that each of them has specifically reviewed with its attorney 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.

5. Covenant Not to Sue. For a period of five (5) years after the date Effective Date of this Agreement, CRW agrees that neither CRW, its officers, executive staff, members of its governing board, nor any organization under the control of CRW, its officers, executive staff, members of its governing board, will serve any Notice of Violations and Intent to File Suit or file any lawsuit against the City seeking relief for alleged violations of the CWA with regard to the Facility, nor will CRW initiate, support, or assist in any such lawsuit against the City brought by other groups or individuals by providing financial assistance, personnel time, or any other affirmative actions. This Agreement may be pleaded as a full and complete defense to, and may be used as the basis for, an injunction against any dispute, suit, or other proceeding that may be instituted, prosecuted, or attempted in breach of the releases contained herein. The covenants set forth in this Section 5 shall survive the termination of this Agreement, whether such termination occurs by satisfaction of the terms and conditions hereof or operation of law.

6. No Admission. This Agreement is the direct result of a compromise of disputed allegations and claims. As such, this Agreement shall not, for any purpose, be considered as an admission of liability or responsibility by the City, nor shall the payment of any sum of money in consideration for the execution of this Agreement constitute or be construed as an admission of liability or responsibility by the City which expressly denies any such liability, responsibility, or wrongdoing.

7. Force Majeure. The City shall not be deemed to be in default or breach of this Agreement by reason of any event which constitutes a force majeure. For purposes of this Agreement, a force

majeure is defined as any event arising from causes beyond the reasonable control of the City or its contractors that delays or prevents performance including, without limitation, acts of God, acts of war, acts of terrorism, fire, explosion, extraordinary weather events, restraint by court order or public authority, or other causes beyond the City's reasonable control. Neither increased costs nor economic hardship shall constitute a force majeure.

8. Dispute Resolution Procedure. Disputes between CRW and the City concerning any alleged breach of this Agreement shall be subject to the following dispute resolution procedures. If CRW asserts that the City is in violation of this Agreement, and the City corrects the action or inaction within sixty (60) days after written notice from CRW describing the asserted violations, no further enforcement action under the terms of this Agreement, including the dispute resolution process described in this Section 8, shall be taken by either party. Failure to satisfy the payment condition set forth in Section 3 is a substantial breach of this Agreement and relieves CRW of its obligations under this Agreement.

8.1. Good Faith Negotiations. CRW and the City shall make good faith efforts to resolve informally any alleged breach of this Agreement. If informal efforts to resolve the alleged breach are unsuccessful, the Party claiming a breach shall provide written notice of the alleged breach and that Party's intent to initiate the dispute resolution procedure of this Section 8. The notice shall include a recitation of all facts and circumstances giving rise to the dispute, including the particular provisions of this Agreement alleged to have been breached.

8.2. Mediation. If the dispute is not resolved by the Parties within thirty (30) days after such notice under Section 8.A. is given, such dispute shall be submitted to mediation before a mutually agreeable neutral mediator.

8.3. Arbitration. If the dispute is not resolved by the Parties through mediation, the Parties shall enter into binding arbitration, conducted by an arbitrator agreed upon by the Parties. 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 Services) to the extent other conventional rules are not promptly agreed upon by the Parties. The relief the arbitrator is empowered to award is limited to injunctive relief to take the actions specific in this Agreement. The Parties shall each bear their own costs and attorneys' fees in connection with the arbitration.

8.4. Waiver. By agreeing to the dispute resolution provisions set out in Section 8 of this Agreement, the Parties understand they are waiving certain important rights and protections that otherwise may have been available to each of them if a dispute between them were determined by judicial action including, without limitation, the right to a jury trial, and certain rights of appeal. Other than the remedies contained within this Agreement, including dispute resolution and specific performance of the terms of this Agreement, there are no other remedies. The Parties specifically agree there is no basis within this Agreement or within the contemplation of the Parties to support a claim for consequential damages due to any form of breach.

9. Notices. All notices, consents, approvals, requests, demands and other communications (collectively, "Notice") which the Parties are required to, or desire to serve upon or deliver to the other Party shall be in writing and shall be given by electronic mail when possible, or by certified United States mail, return receipt requested, addressed as set forth below:

If to CRW: California River Watch
290 South Main St. # 817
Sebastopol, CA 95472
Email: US@nriverwatch.org

Copy to: Jack Silver, Esq.
Law Office of Jack Silver
708 Gravenstein Highway North, #407
Sebastopol, CA 95472
Email: lh28843@sbcglobal.net

If to the City: City of Berkeley
City Manager's Office
2180 Milvia St.
Berkeley, CA 94704
Email: manager@berkeleyca.gov

Copies to: City of Berkeley
Office of the City Attorney
2180 Milvia St. 4th Floor
Berkeley, CA 94704
Email: attorney@berkeleyca.gov

City of Berkeley
Zero Waste Division
1947 Center Street
Berkeley, CA 94704
Email: PWRecycle@berkeleyca.gov

The foregoing addresses may be changed by Notice given in accordance with this Section 9. Any Notice sent by electronic mail shall be deemed received upon electronic transmission thereof provided the sender does not receive notice of non-delivery. If the date of receipt of any Notice to be given hereunder falls on a weekend or legal holiday, then such date of receipt shall automatically be deemed extended to the next business day immediately following such weekend or holiday for purposes of calculating time periods commencing upon the date of service.

10. Attorneys' Fees. Other than the payment to CRW under Section 3, each Party shall bear its own past and future attorneys' fees and costs relating to the subject matter of this Agreement.

11. Parties' Acknowledgment of Terms. This Agreement has been carefully and fully read and

reviewed by CRW, the City, and the Parties' respective counsel who hereby represent that the contents of this Agreement are understood, and agree that this Agreement is binding on each Party or its respective predecessors, successors, and assigns and as described above.

12. Interpretation and Applicable Law. This Agreement shall be construed and interpreted in accordance with the laws of the United States and the State of California without regard to principles of conflicts of law. This Agreement shall be interpreted and construed as a whole, according to its fair meaning and not strictly for or against any Party, and without regard to which Party drafted the Agreement or any section thereof.

13. No Assignments. Each Party to this Agreement represents and warrants that it has not assigned, transferred, hypothecated, or sold to any third person or entity, any of the rights or obligations released by or entered into under this Agreement. The Parties agree that the rights and obligations established by this Agreement shall not be assigned, and any such assignment by a Party is invalid.

14. Counterparts/Signatures. This Agreement may be executed in multiple counterparts, each of which shall evidence one and the same Agreement, and may be signed by electronic means.

15. Headings. The headings used in this Agreement are for convenience of reference and shall not be used to define any provision.

16. Entire Agreement in Writing. This Agreement constitutes the entire agreement between the Parties hereto with respect to the subject matter set forth herein and supersedes all previous or contemporaneous negotiations, commitments (oral or written), and writings with respect to the subject matter set forth herein.

17. Modification or Amendment. This Agreement or any of its provisions may be modified or amended only by written agreement executed by all Parties to this Agreement.

18. Severability. The invalidity or unenforceability of any provision of this Agreement shall in no way affect the validity or enforceability of any other provision. If, in any action before any court or other tribunal of competent jurisdiction, any term, restriction, covenant, or promise is held to be unenforceable for any reason, then such term, restriction, covenant, or promise shall be deemed modified to the extent necessary to make it enforceable by such court or other tribunal and, if it cannot be so modified, then this Agreement shall be deemed amended to delete such provision or portion adjudicated to be invalid or unenforceable, and the remainder of this Agreement shall be deemed to be in full force and effect as so modified.

19. Representations and Warranties. No Party, nor any officer, agent, employee, representative, or attorney of or for any Party, has made any statement or representation to any other Party regarding any fact relied upon in entering into this Agreement, and no Party is relying upon any statement, representation, or promise of any other Party, nor of any officer, agent, employee, representative, or attorney of or for any Party, in executing this Agreement or in making the settlement provided herein, except as expressly stated in this Agreement.


19. Representations and Warranties. No Party, nor any officer, agent, employee, representative, or attorney of or for any Party, has made any statement or representation to any other Party regarding any fact relied upon in entering into this Agreement, and no Party is relying upon any statement, representation, or promise of any other Party, nor of any officer, agent, employee, representative, or attorney of or for any Party, in executing this Agreement or in making the settlement provided herein, except as expressly stated in this Agreement.

20. No Third-Party Beneficiaries. This Agreement is not intended to confer any rights or obligations on any third party or parties, and no third party or parties shall have any right of action under this Agreement for any cause whatsoever. 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.

21. Authority. Each person signing this Agreement on behalf of an entity represents and warrants that he or she has actual authority and capacity to execute the Agreement on behalf of the entity and to bind it to all of the terms of this Agreement.

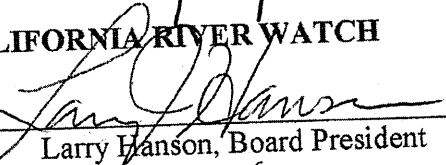
IN WITNESS WHEREOF, the undersigned have caused this Agreement to be executed by their duly authorized representatives.

CITY OF BERKELEY

By: 
LaTanya Bellow, Acting City Manager

Dated: 7/27/23

CALIFORNIA RIVER WATCH

By: 
Larry Hanson, Board President

Dated: 7/26/2023