

## **SETTLEMENT AGREEMENT**

This Settlement Agreement is entered into by and among the City of San Bernardino (City) and City of San Bernardino Municipal Water Department (Department) (together, "San Bernardino"), and the Center for Biological Diversity (CBD) and San Bernardino Valley Audubon Society (SBVAS) (together, the "Petitioners"). The City, Department, CBD, and SBVAS are sometimes individually referred to herein as "Party," and collectively referred to herein as the "Parties."

### **RECITALS**

- A. The Department operates a wastewater treatment facility known as the Rapid Infiltration and Extraction Facility (RIX), which discharges treated wastewater to the Santa Ana River. In June 2010 the Department filed Wastewater Change Petition WW0059 (Petition) with the State Water Resources Control Board (State Water Board), pursuant to Water Code section 1211. The Petition seeks authorization to reduce discharge from RIX as part of a wastewater recycling and groundwater recharge project known as the Clean Water Factory Project.
- B. CBD filed a protest to the Petition with the State Water Board (Protest). The Protest expresses concern about the impacts of reducing discharge to the Santa Ana River on downstream beneficial uses, including the instream habitat of the Santa Ana sucker, a federally listed threatened species and California Species of Special Concern, and other species.
- C. On April 22, 2016, the Department circulated a draft environmental impact report (EIR) for the Clean Water Factory Project, pursuant to the California Environmental Quality Act (CEQA). Petitioners submitted comments on the Draft EIR expressing concern about the EIR's evaluation of impacts to instream and riparian habitats and species that rely on that habitat, including the Santa Ana sucker. On February 24, 2017, the Department published a Final EIR for the Clean Water Factory Project. On March 6, 2017, Petitioners submitted comments on the Final EIR expressing concerns about the analysis and mitigation of impacts to Santa Ana River species and habitats. On March 7, 2017, the Department certified the Final EIR and approved the Clean Water Factory Project. On April 6, 2017, Petitioners filed suit challenging the validity of the Department's certification of the Clean Water Factory Project EIR as violating CEQA (CEQA Action).
- D. The Parties have been engaged in discussion and negotiations regarding solutions to Petitioners' concerns with the Clean Water Factory Project, Petition and EIR. Those negotiations have resulted in this Agreement.

## AGREEMENT

Now therefore, the Parties, in consideration of their mutual promises and the foregoing recitals, which are incorporated herein, agree as follows.

1. **Minimum Discharge Commitment.** The Department shall maintain a minimum discharge of 28.6 cubic feet per second (cfs) (18.5 million gallons per day [mgd]) to the Santa Ana River from the RIX Facility from June 1 to October 15 of each year in perpetuity. These minimum discharge requirements shall not apply during temporary maintenance shutdowns and emergency shutdowns of the RIX Facility, which shutdowns will be mitigated to the extent feasible by the Department's RIX Well Rehabilitation/Santa Ana Sucker Habitat Maintenance/Restoration Project (State Clearinghouse No. 2016098137) (RIX Wells Retrofit Project). In addition, such minimum discharge requirement shall be further subject to any future Regional Water Quality Control Board/National Pollutant Discharge Elimination System permitting requirements that limit or preclude discharges from the RIX Facility to the Santa Ana River.
2. **Upper Santa Ana River Habitat Conservation Plan.** The Department acknowledges that it is participating in the development and implementation of the Upper Santa Ana River Habitat Conservation Plan (USAR HCP) and that the current goal is to have the USAR HCP finalized in 2020, with the Department becoming a permittee of the USAR HCP. The Department further acknowledges that technical analyses of flow needs to maintain the Santa Ana sucker prepared pursuant to the USAR HCP have preliminarily identified the need to maintain 36 cfs of flow resulting from treated wastewater discharge to the Santa Ana River, as measured in the Santa Ana River reach immediately below the RIX Facility. The Parties acknowledge that the USAR HCP's determination regarding minimum treated wastewater discharge assumed contribution from multiple sources, including, but not limited to, the Clean Water Factory Project. If any of the following circumstances occurs, the Department will obtain incidental take authorization independent of the USAR HCP, which will include the development and implementation of a Mitigation and Adaptive Management Plan (MAMP) to address potential impacts of the Clean Water Factory Project to federal and state listed species and California species of concern, and associated habitats, within and adjacent to the Santa Ana River: (1) the Department abandons the USAR HCP process; (2) the Department otherwise indicates it will not seek to become a permittee under the USAR HCP; or (3) the USAR HCP process is abandoned by the other potential permittees. The Department shall confer with CBD and SBVAS in developing the MAMP and consider any comments of CBD and SBVAS regarding the proposed MAMP prior to submitting the MAMP for approval by the United States Fish and Wildlife Service (USFWS) and California Department of Fish and Wildlife (CDFW).

3. **Establishment of New Populations of Santa Ana Sucker.** Subject to the availability of source fish, and so long as it is not inconsistent with the USAR HCP or other approvals of the USFWS, CDFW, or any other public agency with jurisdiction, the Department shall fully fund (up to a maximum of \$168,000.00) implementation of a plan to be carried out by a mutually agreeable public or private entity to establish three (3) new self-sustaining Santa Ana sucker populations in historic habitat (i.e., upper watershed tributaries to the Santa Ana River). The Department shall not reduce discharge of treated wastewater from the RIX Facility under the Clean Water Factory Project until at least two (2) of the translocation projects have been completed and suitable progress has been made towards meeting success criteria as defined and determined by the USFWS and CDFW, through either the USAR HCP or a MAMP approved for the Clean Water Factory Project by the USFWS and CDFW. The Department shall ensure that Petitioners are apprised in writing of all major milestones regarding these translocation efforts, including: (1) when translocation operations are planned and the details of such plans, and; (2) periodic monitoring of translocated populations to assess progress towards success criteria. The Department shall provide documentation on cost estimates demonstrating that \$168,000.00 is expected to cover the cost of implementing this measure. This commitment shall not preclude the Department from obtaining third party funding or reimbursement for any or all of the costs associated with this measure, should such funding become available.
4. **Mitigation for other species impacts.** The Department shall create, acquire, cause to be acquired or put under conservation easement suitable riparian habitat for mitigation of other species impacted by the Clean Water Factory Project, including least bell's vireo and southwestern willow flycatcher, in the amount of ten (10) acres. Such lands must have similar conservation values as riparian habitat impacted by the Clean Water Factory Project, and be located within the Santa Ana River watershed. Any mitigation project that includes arundo removal on existing habitat must also include habitat restoration or replacement, and a mechanism to ensure long-term maintenance and success of the restored lands, and shall not be limited to arundo removal alone. The Department could retain and manage mitigation lands for conservation purposes or donate them with a management endowment to a local non-profit conservation land trust. This commitment shall not preclude the Department from obtaining third party funding or reimbursement for any or all of the costs associated with this measure, should such funding become available.
5. **Additional Analysis.** The Department shall prepare a technical memorandum analyzing the effects of over-extraction pumping associated with the Clean Water Factory Project and pumping associated with the RIX Wells Retrofit Project and implement any pumping limits identified in the analysis as being necessary to avoid substantial lowering of streamflow levels and substantial long-term lowering of groundwater levels.

6. **Permits for Groundwater Pumping.** The Department shall obtain all applicable permits from the State Water Resources Control Board or other applicable agencies prior to conducting any groundwater pumping associated with the Clean Water Factory Project.
7. **Coordination of Operations During RIX Shutdown.** To the maximum extent feasible, the Department shall coordinate operation of its RIX Wells Retrofit Project with operation of the planned Rialto Tank project included in the February 2017 Memorandum of Understanding for Species and Water Management in the San Bernardino Basin Area between the Center for Biological Diversity, East Valley Water District and San Bernardino Valley Municipal Water District, for the purpose of maximizing flow and hydraulic continuity in the Santa Ana River below RIX during times of RIX shutdown. Towards this end, the Department shall undertake all reasonable efforts to develop and execute a memorandum of understanding (MOU) between the Department and the San Bernardino Valley Municipal Water District that sets forth the processes and procedures that will ensure coordination between the operation of the RIX Wells Retrofit Project and the Rialto Tank project to maximize flow and hydraulic continuity below RIX during times of RIX shutdown. Prior to finalizing the MOU, the Department shall consult with Petitioners regarding the contents of the MOU and consider any comments of Petitioners regarding revisions to proposed terms in the MOU.
8. **Dismissal of Protest and CEQA Litigation.** The Parties agree that this Agreement represents a comprehensive settlement of their dispute with respect to the Protest and CEQA Action. Not later than ten (10) days after the execution of this Agreement, CBD shall dismiss its Protest with prejudice, and Petitioners shall dismiss the CEQA Action with prejudice. Following dismissal of the Protest and CEQA Action, the Department shall pay Petitioners \$38,902.80 to cover their attorneys' fees and costs related to the Petition and Protest, and neither Petitioners nor their counsel shall seek or be awarded any additional fees or costs relating to these matters. The \$38,902.80 payment shall be made to the Center for Biological Diversity within 30 days after Petitioners file a notice of dismissal in the CEQA Action and CBD transmits to the State Water Board a letter dismissing the Protest.
9. **Release.** Petitioners hereby release the City and the Department from any and all claims, demands, actions, and causes of action, including for all injuries, damages, losses, costs and debts, related to the Clean Water Factory Project EIR and Wastewater Change Petition WW0059 (Released Claims). This release does not include any action to enforce the terms of this Agreement. This Agreement is intended as a full, final, and complete settlement and compromise of each and all of the Released Claims.

10. **No Third Parties.** This Agreement is for the benefit of the Parties only and is not intended to benefit any third party.
11. **No Admissions.** Nothing in this Agreement shall be deemed an admission of any issue of fact or law, except for the limited purpose of enforcing this Agreement.
12. **Entire Agreement.** This Agreement contains the entire agreement and understanding between the Parties as to the subject matter of this Agreement. There are no representations, warranties, agreements, arrangements, undertakings, oral or written, between or among the Parties hereto relating to the terms and conditions of this Agreement that are not fully expressed herein. This is an integrated agreement.
13. **Amendment.** This Agreement may not be amended or modified except by a written instrument executed by all Parties.
14. **Jurisdiction and Venue.** This Agreement and any dispute arising hereunder shall be governed by and interpreted in accordance with the laws of the State of California. Any action or proceeding at law or in equity brought by either Party hereto for the purpose of enforcing a right or rights provided by this Agreement shall be brought and maintained to the extent allowed by law in the County of San Bernardino, California.
15. **Waivers.** No failure or delay in exercising any right, power, or privilege hereunder by a Party shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise of any right, power, or privilege hereunder.
16. **Partial Invalidity.** If any part or provision of this Agreement is found or determined by a court of competent jurisdiction to be illegal or unenforceable, the remainder of this Agreement shall be given effect to the fullest extent permitted by law.
17. **Notices.** Any notices, requests demands, or other communications required or permitted under this Agreement shall be in writing and shall be deemed to have been duly given and received on (i) the date of service if served personally, served by facsimile transmission or served via electronic mail on the Party to whom notice is to be given at the addresses provided below, (ii) on the first day after mailing, if mailed by Federal Express, U.S. Express Mail or other similar overnight courier service, postage prepaid and addressed as provided below, or (iii) on the third day after mailing if mailed to the Party to whom notice is to be given by first class mail, registered or certified, postage prepaid, addressed as follows:

**Notice to City:**

City of San Bernardino  
Attn: City Manager  
290 North D Street  
San Bernardino, CA 92401  
Email: Miller\_An@sbcity.org

City of San Bernardino  
Attn: City Attorney  
290 North D Street  
San Bernardino, CA 92401  
Email: Saenz\_Ga@sbcity.org

**Notice to Department:**

Water Department  
City of San Bernardino  
Attn: General Manager  
397 Chandler Place  
San Bernardino, CA 92408  
Phone: (909) 384-7210  
Email: Miguel.guerrero@sbmwd.com

Kelley M. Taber  
Somach Simmons & Dunn  
500 Capitol Mall, Suite 1000  
Sacramento, CA 95814  
Phone: (916) 446-7979  
Email: ktaber@somachlaw.com

**Notice to CBD:**

John P. Rose  
Center for Biological Diversity  
660 S. Figueroa Street, Suite 1000  
Los Angeles, CA 90017  
Phone: (213) 785-5406  
Email: jrose@biologicaldiversity.org

**Notice to CBD:**

Aruna Prabhala  
Center for Biological Diversity  
1212 Broadway, Suite 800  
Oakland, CA 94612  
Phone: (510) 844-7100, ext. 322  
Email: aprabhala@biologicaldiversity.org

Notice to SBVAS:

Drew Feldmann  
San Bernardino Valley Audubon Society  
P.O. Box 10973  
San Bernardino, California, 92423  
Phone: (909) 881-6081  
Email: drewf3@verizon.net

18. **Authority.** The signatories hereto represent and warrant that they have been duly authorized to enter into this Agreement by the Party on whose behalf it is indicated that the person is signing and, by such signature, to bind such Party to the Agreement.
19. **Counterparts.** This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute the same instrument.
20. **Representation by Counsel.** Each Party acknowledges that it has been represented by independent legal counsel of its own choice throughout the negotiations which preceded the execution of this Agreement, and that it and its counsel have had adequate opportunity to investigate all facts relevant thereto, and based thereon it has fully participated in the drafting and negotiation of this Agreement and therefore that this Agreement shall be deemed for all purposes to have been drafted jointly by the Parties.
21. **Effective Date.** This Agreement shall become effective as of the date of the last signature to this Agreement.

**CITY OF SAN BERNARDINO**

By: Andrea Miller  
Andrea Miller  
City Manager

Date: 9/24/18

**Approved as to Form:**

By: Kelley M. Taber  
Kelley M. Taber  
Somach Simmons & Dunn  
Special Counsel for City of San Bernardino

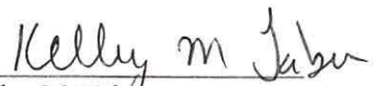
Date: 9/25/18

**CITY OF SAN BERNARDINO MUNICIPAL WATER DEPARTMENT**

By:   
For Toni Callicott  
President

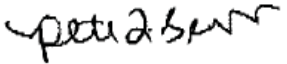
Date: 9/25/18

**Approved as to Form:**

By:   
Kelley M. Taber  
Somach Simmons & Dunn  
Special Counsel for San Bernardino  
Municipal Water Department

Date: 9/25/18

**CENTER FOR BIOLOGICAL DIVERSITY**

By:   
Print Name: Peter Galvin  
Title: Director of Programs

Date: 10/2/2018

**SAN BERNARDINO VALLEY AUDUBON SOCIETY**

By:   
Print Name: Drew Feldmann  
Title: Conservation Chair

Date: 9/26/2018