SETTLEMENT AGREEMENT REGARDING PERMIT TERMS AND ADMINISTRATIVE CIVIL LIABILITY ORDER R1-2006-0054 FOR THE ARCATA WASTEWATER TREATMENT PLANT

This Settlement Agreement ("Agreement") is made by and between the California Regional Water Quality Control Board, North Coast Region Assistant Executive Officer and Watershed Protection Division (the "Regional Water Board staff") and the City of Arcata ("City" or "Arcata"). All parties to this Agreement are herein known as "Parties."

RECITALS

A. On June 22, 2004, the Regional Water Quality Control Board ("Regional Water Board") adopted Order No. R1-2004-0036, a National Pollutant Discharge Elimination System ("NPDES") permit for the City's Wastewater Treatment Plant ("2004 Permit"). The 2004 Permit took effect upon adoption, and rescinded the City's previous 1998 Permit (Order No. 98-13) ("1998 Permit"). At the time these permits were adopted, Arcata did not file petitions for review. The 2004 Permit expires in June of 2009, but the terms would be automatically continued until a new permit is adopted.

B. On May 17, 2006, the effluent limitations in the City's 1998 Permit became the subject of a Regional Water Board enforcement action against the City in Order No. R1-2006-0054, which assessed Mandatory Minimum Penalties ("MMPs") pursuant to Water Code sections 13385(h)-(k) in the amount of $297,000 for alleged violations of the 1998 Permit that occurred between January 1, 2000 and June 21, 2004 ("MMP Order").

C. On June 16, 2006, the City timely petitioned the Regional Water Board's MMP Order, which had assessed MMPs in the amount of $297,000, to the State Board (SWRCB File No. A-1754).

D. In order to avoid additional administrative civil liability and citizen suits due to disputed violations of the 2004 Permit requirements that the City believes are inapplicable to the City's discharge, the City also filed a formal request on July 13, 2006, pursuant to Water Code §13320, that the Regional Water Board take action to retroactively modify and reissue the 2004 Permit pursuant to the authority granted to the Regional Water Board under 40 C.F.R. §§124.5 and 122.62, and Water Code §13372 and 13374. Because the Regional Water Board legal counsel believes that the Regional Water Board does not have the legal authority to retroactively modify a permit in order to alleviate MMPs, the request for retroactive modification of the City's permit requirements was never brought to the Regional Water Board members, although the Regional Water Board had indicated that it would be willing to reissue Arcata's permit prior to the five year period anticipated under the Clean Water Act. The City petitioned this issue to the State Water Resources Control Board ("State Board")(SWRCB File No. A-1850) along with a challenge to the Regional Water Board's failure to timely modify its 2004 Permit both retroactively and prospectively per the City's request.

E. However, the State Board dismissed the City's administrative appeals without substantive review, except for four (4) technical mistakes that were corrected, and the final penalty amount was adjusted to $285,000 (SWRCB Order No. 2008-0001).

F. In response to the State Board's actions and dismissals, the City filed a petition for writ of mandate in Humboldt County Superior Court ("Superior Court") that was later amended and called the "First Amended Verified Petition for Peremptory Writ of Administrative Mandamus and Stay, and Complaint for Declaratory Relief," dated February 12, 2008 ("Lawsuit"). This Lawsuit challenged the permits as being inconsistent with the Clean Water Act (commencing with United States Code, title 33, section 1251) ("Clean Water Act"), and California's Porter-Cologne Water Quality Control Act (commencing with Water Code section 13000) ("Porter-Cologne Act"). In addition, the Lawsuit, among other things, challenged the Regional Water Board's authority to issue MMPs, the Regional Water Board's decision to not allow Arcata to complete a Compliance Project pursuant to Water Code section 13385(k), and the Regional Water Board staff's authority to deny the request for modification of the permit without first bringing it before the Regional Water Board. Venue was eventually changed to Contra Costa County Superior Court, and the parties entered into extensive settlement negotiations.

G. Based on these negotiations, the Parties agree that resolution of the Lawsuit as set forth herein is in the best interests of all the Parties.

H. As set forth below, the Parties have agreed upon new permit terms to address the City's concerns for Arcata's next permit to follow the 2004 Permit, which expires in June of 2009, but the terms of which may be administratively continued.

I. Without admitting anything, the Parties enter into this Agreement to resolve the Lawsuit and to avoid the expense and uncertainty of continued litigation.

Based on the mutual covenants, terms and conditions recited herein and made a material part hereof, and in consideration of the foregoing and the following, the Parties agree as follows:

AGREEMENT

1. Penalty Payment

The entire amount of the $285,000 penalty, less $25,000 paid to the Cleanup and Abatement Account for staff costs, will be in the form of a Compliance Project (see attached description in Exhibit A) which meets the requirements of Water Code section 13385(k) and section X of the State Board's 2002 "Water Quality Enforcement Policy," which has been conceptually approved by the Assistant Executive Officer. The Regional Water Board staff will support the Compliance Project at the hearing in front of the Regional Water Board to adopt the Compliance Project once the Regional Water Board staff has reviewed and agreed upon the details of the Compliance Project. Arcata may also include up to an additional $33,000 in penalties set forth in Administrative Civil Liability Order No. R1-2008-0048 if the total cost of the proposed Compliance Project exceeds $293,000. The approved Compliance Project shall be performed and paid for over a period of five (5) years.

2. Agreed Upon Permit Revisions

The Regional Water Board staff agree to release and support a draft permit for public comment that incorporates the terms described in this Agreement as revisions to the City's Permit when that permit is next reissued:

a. 85% Removal Requirements

The Regional Water Board staff agree to calculate percent removal based upon the difference between the weekly influent concentrations and the weekly effluent concentrations averaged over a calendar month to resolve concerns associated with percent removal calculations associated with periods of rainfall in relation to an increased mass of constituents in the effluent.

b. Concentration and Mass Based Limits

The Regional Water Board staff agree to review all mass-based limits and, where mass limits are maintained, to include a rationale for maintaining both mass and concentration effluent limits in the fact sheet in the next Permit.

c. Reasonable Potential and Daily Limits

The Regional Water Board staff agree, based on the current operations of the wastewater treatment facility, to remove daily limits for BOD and TSS. The Regional Water Board staff further agree to provide appropriate justification for their determination that a pollutant is being or may be discharged from the City's wastewater treatment facility at a level that would cause, have the reasonable potential to cause, or contribute to an excursion above applicable water quality standards, including settleable solids, and to remove limits where no justification exists.

Further, because Arcata's wastewater treatment plant is considered a POTW, pursuant to federal regulation 40 C.F.R. §122.45(d), the Regional Water Board staff will recommend that all effluent limits imposed for non-priority pollutants in the next reissued permit for the City will be stated, unless impracticable, as monthly average and weekly average limits. Nothing in the foregoing limits the Regional Water Board's discretion to make findings of impracticability where evidence exists to support such findings. For pollutants identified under the California Toxics Rule, the Regional Water Board must follow the State Board's "Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California."

d. Monthly and Weekly Limits

The Regional Water Board staff agree to calculate monthly and weekly averages based on a calendar month and week, respectively.

e. Sanitary Sewer Overflow Requirements.

The Regional Water Board staff agree that the individual NPDES Permits' requirements should be consistent with the General Sanitary Sewer Overflow Waste Discharge Requirements (SSO-WDR). Duplicate sanitary sewer overflow requirements will be removed from the NPDES Permit.

To the extent that the Regional Water Board staff chooses to use the McKinleyville permit as a template, staff agrees to make the following changes:

- Provision III.I. (from McKinleyville permit) will be combined with the requirements in Provision III.D. to eliminate duplication so as to not subject the City to duplicate enforcement penalties.

- The following sentence will be inserted after Provision 5.a.i. first paragraph (from pg. 27 of McKinleyville permit): "Compliance with these requirements will also satisfy the federal NPDES requirements specified in this Order."

- Provision 5.a.ii. (from pgs. 27-28 of McKinleyville permit) will be removed because the SSO WDR now has new oral reporting requirements that makes this language unnecessary; but the requirement for oral reporting in the SSO WDR will be referenced so that all reporting requirements are identified together.

f. Flow Issues

The Regional Water Board staff agree to include a provision in the revised Permit that would allow an increase in the wet weather design flow to 5.9 million gallons per day provided that the Regional Water Board approves the City's engineering documentation demonstrating that its system can fully treat 5.9 million gallons per day and an associated antidegradation analysis. Approval decisions on the documentation and antidegradation analysis by the Regional Water Board will be timely made and approval will not be unreasonably withheld.

In addition, the Regional Water Board staff agree to define "mean daily dry weather influent flow" in the City's new permit as "the average daily flow measured during the calendar month which measurements show the lowest flow of the calendar year."

g. Temperature

The Regional Water Board staff agree to include a provision in the revised Permit that would revise the receiving water limitation(s) for temperature and to allow for increased temperature up to limits stated in the Basin Plan provided that the Regional Water Board approves the City's studies showing that the receiving water beneficial uses will not be adversely impacted. Approval decisions on the City's studies by the Regional Water Board will be timely made and approval will not be unreasonably withheld.

h. Receiving Water Limitations

The Regional Water Board staff agree to move the language in Receiving Water Limitation C.13, and similar language, into the reopener provisions.

i. Monitoring.

The Regional Water Board staff agree to make changes to the monitoring and reporting requirements by allowing effluent grab sample collection for all priority pollutants. Regional Water Board staff also agree that the permit will continue to allow changes to salinity levels of the laboratory samples and will maintain protocols for salinity adjustment as currently referenced in the existing Monitoring and Reporting Program (MRP).

In addition, the Regional Water Board staff agreed to modify and/or reduce the monitoring requirements for oil and grease if so justified based on the results of the reasonable potential analysis.

3. Dismissals

a. If the Regional Water Board staff release a draft permit for public comment that includes the permit revisions discussed in Paragraph 2 above, then within ten business days of adoption of the new permit by the Regional Water Board, the City shall provide written notice to the Regional Water Board and its counsel of record of the dismissal of the Lawsuit without prejudice, regardless of whether the final new permit adopted by the Regional Water Board contains the permit revisions herein agreed to by the City and the Regional Water Board staff.

b. Should the Regional Water Board staff fail to release or support a draft permit for public comment that incorporates the permit revisions discussed herein, then the City need not dismiss its Lawsuit. In such an event, this Agreement shall become null and void, including any obligation or requirement imposed on either party under any provision of this Agreement. The Regional Water Board staff is not, however, prohibited from making changes to the draft permit based upon legal issues or concerns raised during the public comment period or as directed by the Regional Water Board members.

c. Within thirty (30) days of dismissal of the Lawsuit, Arcata will pay $25,000 to the Cleanup and Abatement Account, and will begin implementation of the Compliance Project once approved by the Regional Water Board. If Arcata fails to undertake or complete the approved Compliance Project in accordance with the adopted time schedule, Arcata will pay the outstanding penalty amounts remaining under ACL Order Nos. R1-2006-0054 and R1-2008-0048, if the proposed Compliance Project is intended to also address R1-2008-0048, directly to the Cleanup and Abatement Account, unless an alternative Compliance Project is approved by the Regional Water Board. Approval decisions by the Regional Water Board will be timely made and approval will not be unreasonably withheld.

4. Miscellaneous

a. Preservation of City's Legal Remedies.

Except for any permit provision that is specifically provided for in Paragraph 2 above

and adopted by the Regional Water Board pursuant to this Agreement, the City reserves the right to petition the State Board and pursue another lawsuit based upon any permit provision, including, but not limited to, findings of reasonable potential, findings of a need for mass and concentration-based limits, and findings of impracticability made by the Regional Water Board to support the terms of the new permit. Settlement of this case does not prejudice the City's rights to challenge any of the terms of its next permit, except for those specifically agreed upon by the terms of this Agreement, and the City expressly preserves its rights and ability to raise the same legal issues and defenses that are implicated here in other litigation or administrative fora, and nothing in this Agreement shall be construed to alter, narrow, waive, or expand the viability of any such legal issue or defense. This Agreement and any dismissal pursuant to this Agreement shall not be construed as the City's acceptance of or agreement with each of the underlying facts or findings contained in the Permit, or in any future amended permits.

b. Preservation of Regional Board's Discretion.

Nothing in this Agreement shall limit the permitting discretion of the Regional Water Board under the Porter-Cologne Act, the Clean Water Act, and other applicable laws. The Parties understand that the members of the Regional Water Board must consider the evidence before them and exercise their authority consistent with applicable laws, the record before them including public comments, and the discretion vested in them by applicable laws. No recommendation of the Regional Water Board staff binds the Regional Water Board, and no action by the Regional Water Board binds the State Board. Settlement herein does not prejudice the Regional Water Board's rights, and the Regional Water Board expressly preserves its rights and ability to raise the same legal issues and defenses that are implicated here in other litigation or administrative fora, and nothing in this Agreement shall be construed to alter, narrow, or expand the viability of any such legal issue or defense.

c. Remedy for Breach of Agreement

The sole remedy for breach of this Agreement is that the Agreement becomes null and void, and the parties revert to their legal position prior to entering into this Agreement. Each Party may, however, waive a breach by the other Party.

d. Changes in Law.

If there are relevant changes in applicable federal or state law or in an applicable water quality control plan or other policy that has undergone public review and comment, the Regional Water Board staff may modify the recommendations agreed to in this Agreement to be consistent with those changes in the applicable laws, plans or policies. However, the City preserves any rights it possesses to challenge these changes in the law or in the revised permit that were not expressly discussed under this Agreement.

e. No Admission of Liability.

Nothing in this Agreement shall be construed as an admission of liability by any of the Parties, or as a waiver of any future claims or causes of action, or as an agreement on the appropriate standard of review or causes of action or claims that may be asserted in future administrative appeals and litigation.

f. Notices.

Notices contemplated by this Agreement shall be sent to the following:

City of Arcata: Mark Andre and Karen Diemer City of Arcata Environmental Services 736 F Street Arcata, CA 95521 Facsimile: (707) 825-2116	With a Copy to: Melissa A. Thorme Downey Brand LLP 621 Capitol Mall, 18th Floor Sacramento, CA 95814 Facsimile (916) 444-2100
Regional Water Board: Luis G. Rivera, Asst. Executive Officer Regional Water Quality Control Board 5550 Skylane Blvd., Ste. A Santa Rosa, CA 95403 Facsimile (707) 523-0135	With a Copy to: Kim Niemeyer Office of Chief Counsel 1001 I St., 22nd Fl. Sacramento, CA 95814 Facsimile (916) 341-5199
Regional Water Board: Charles W.Getz, IV, DAG Office of the Attorney General 455 Golden Gate Ave., Ste. 11000 San Francisco, CA 94102-7004 Facsimile: (415) 703-5480	

g. Attorneys' Fees and Costs. The Parties acknowledge and agree that each of them will bear their own attorneys' fees, costs, and expenses arising out of and/or connected with the lawsuits appealing the Permits, appeals thereof, and this Agreement.

h. Representation by Counsel. The Parties understand and agree that this Agreement has been freely and voluntarily entered into by the Parties, each of which has been fully represented by counsel at every stage of these proceedings, and that no representations or promises of any kind other than as contained herein have been made by any part to induce any other party to enter into this Agreement.

i. Integrated Agreement. This Agreement contains the entire understanding of the Parties concerning the matters discussed herein and constitutes an integrated agreement.

j. No Third Party Rights. This Agreement is made for the sole benefit of the Parties, and no other person or entity shall have any rights or remedies under or by reason of this Agreement, unless otherwise expressly provided for herein.

k. Severability. In the event that any provision of this Agreement is determined by a court of competent jurisdiction to be invalid, the remainder of this Agreement shall not be affected thereby and shall remain in full force and effect.

l. Subsequent Amendment. This Agreement may not be altered, amended, modified, or otherwise changed except by a writing executed by each of the Parties.

m. Signatures. This Agreement may be signed in counterparts. Signatures transmitted by facsimile shall be deemed to have the same force and effect as original signatures. Photocopies and facsimiles of counterparts shall be binding and admissible as originals.

n. Effective Date: This Agreement is effective when signed by all Parties and the effective date shall be date of the last signature.

o. Authority: Each party to this Agreement warrants that the individual executing this Agreement is duly authorized to do so and that execution is the act and deed of the party.

p. Applicable Law. This Agreement shall be interpreted according to California law.

IN WITNESS WHEREOF, the undersigned hereby execute this Agreement.

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, NORTH COAST REGION

Date: By: _____

Luis G. Rivera, Asst. Executive Officer

CITY OF ARCATA

Date: 6/9/09 By: _____

Mark Wheetley, Mayor, City of Arcata

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CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD, NORTH COAST REGION

Date: June 11, 2009 By: _____

Luis G. Rivera, Asst. Executive Officer

CITY OF ARCATA

Date: By: _____

Mark Wheetley, Mayor, City of Arcata

Approved as to form:

DOWNEY BRAND LLP

Date: By: _____

Melissa A. Thorme,

Attorneys for City of Arcata

CALIFORNIA ATTORNEY GENERAL'S OFFICE

Date: By: _____

Charles Getz,

Attorney for State Water Resources Control Board and North Coast Regional Water Quality Control Board

Approved as to form:

DOWNEY BRAND LLP

Date: By: _____

Melissa A. Thorme,

Attorneys for City of Arcata

CALIFORNIA ATTORNEY GENERAL'S OFFICE

Date: June 9, 2009 By: _____

Charles Getz,

Attorney for State Water Resources Control Board and North Coast Regional Water Quality Control Board