

## SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE ("Agreement") is entered into as of the last date of execution of the Agreement, by and between Plaintiffs and Petitioners San Diegans for Open Government ("SDOG") and Coastal Environmental Rights Foundation ("CERF") (collectively, "Plaintiffs") and Defendant and Respondent the City of San Diego, a charter city and California municipal corporation ("City") (each hereinafter a "Party" and collectively "the Parties").

A. On or about October 24, 2011, the City Council of the City of San Diego approved a Coastal Development Permit ("CDP") and a Site Development Permit ("SDP") for the City's Master Maintenance Program ("MMP") and certified a Programmatic Environmental Impact Report ("Programmatic EIR").

B. On or about November 23, 2011, Plaintiffs filed *San Diegans for Open Government, et al. v. City of San Diego*, in San Diego Superior Court, Department C-71 ("Court"), Case No. 37-2011-00101571, demanding declaratory and injunctive relief under the California Environmental Quality Act ("CEQA") ("Lawsuit").

C. On or about March 5, 2013, as a result of the Parties' participation in mediation, Plaintiffs agreed to dismiss the Lawsuit with prejudice in exchange for valuable consideration, as herein described.

D. On or about March 26, 2013, the City, by and through its City Council, agreed to settle Plaintiffs' Lawsuit on the terms and conditions specifically set forth in this Agreement.

**NOW THEREFORE**, in consideration of the forgoing and for good and valuable consideration, the parties hereby agree as follows:

1.0 Revisions to Master Storm Water Maintenance Program and Programmatic EIR. The City shall perform the following actions with relation to the MMP and its accompanying Programmatic EIR and SDP:

1.1 The Programmatic EIR shall automatically become null and void five years from the Effective Date of this Agreement.

1.2 City shall not tier off the Programmatic EIR for projects that are not within the scope of the Programmatic EIR. Tiering is acceptable for the following within the scope of the Programmatic EIR: Substantial Conformance Reviews, "after-the-fact" permits, CEQA 21166 analyses, and coastal development permits for flood control channel maintenance.

1.3 City shall not rely on the water quality white paper as substantial evidence for CEQA purposes during the term of the Programmatic EIR. City acknowledges that Petitioners reserve the right to challenge the validity of the white paper if City relies on it in any future proceeding. A copy of the white paper is attached to this Agreement as Exhibit "A."

1.4 City shall submit an application to modify the MMP as follows:

1.4.1 Modify the sections of Chapter 6.1 of MMP labeled "Process One Decision" and "Process Two Decision" so that all Substantial Conformance Review ("SCR") decisions are appealable directly to City Council. The SCR decisions will be modified Process Two decisions with an appeal right to City Council instead of Planning Commission. Otherwise, the standard Process Two procedures apply, as set forth in San Diego Municipal Code sections 112.0503 and 112.0504, as may be amended from time to time. Any interested person can raise CEQA issues during the appeal process.

1.4.2 Modify MMP Chapter 7.0 "Emergency Maintenance" to require that "after-the-fact" permits will be issued under the modified SCR procedure described in 1.4.1.

1.4.3 Modify the MMP to make staff SCR decisions appealable to City Council no later than 12 business days from SCR Notice of Decision.

1.5 Storm Water Division shall post its SCR application, including individual maintenance plans and studies, on its website on the same day that the Development Services Department posts a Notice of Future Decision.

1.6 City shall post any documentation that is part of the SCR application and any documentation in response to DSD follow-up questions on the Storm Water Division website prior to issuance of the SCR Notice of Decision.

1.7 City shall submit an application to amend the MMP SDP to add the following conditions, and shall include the following conditions in any future permit applications made under the MMP and Programmatic EIR:

1.7.1 Special conditions 9.a, 9.c, 9.d, 9.e, 9.f, 10 and 11 from the Coastal Commission's Coastal Development Permit No. A-6-NOC-11-086 shall apply to the entire MMP, except: (a) submission to and approval from the executive Director of the Coastal Commission shall not be required; (b) for impacts outside the coastal zone, mitigation under the MMP will be initiated within one year of the maintenance project instead of the nine months required by the Coastal Development Permit; and (c) impacts outside the coastal zone need not be mitigated inside the coastal zone.

1.7.2 Impacts to biological resources shall be mitigated through new enhancement, creation, or mitigation credit acquisition, except for the Tijuana River Valley (MMP Maps 138a, 138b, 138, 139), and Sorrento Valley (MMP Maps 7, 8, 9, 10, 11, 12). For all other channels, new mitigation shall be performed the first time channel maintenance is implemented under the MMP but need not be repeated for subsequent maintenance of the same project footprint so long as performance criteria continue to be met pursuant to Section 1.7.3, and no new impacts will result from subsequent maintenance activities

1.7.3 City shall confirm, as part of an SCR, that performance criteria continue to be met for any past mitigation upon which City has relied.

1.7.4 City shall conduct photo documentation of each segment before and after maintenance, to be modeled after the State Water Resources Control Board Standard Operating Procedure 4.2.1.4: Stream Photo Documentation Procedure. Photo documentation must include GPS coordinates for each of the photo points referenced. Pre-maintenance photos must be taken no more than 30 days before maintenance and post-maintenance photos must be taken no more than 30 days after maintenance is complete.

1.7.5 City shall select and implement one of the following four options for each area to be maintained:

- (a) For every segment for which at least 100 linear feet of vegetation is removed (except for removal of invasive species, e.g., Arundo), and for every 100 additional linear feet thereafter, the City ensures landscape retrofits are implemented at one residential property within the Watershed Management Area of the segment with one of the following options: 1) Install a rain barrel or other rainwater harvesting device at least 50 gallons in size; 2) Redirect at least 100 ft<sup>2</sup> of rooftop surface area currently directed to the street to onsite landscaping (i.e., redirect rain gutter downspouts); 3) Replace at least 400 ft<sup>2</sup> of natural grass turf, or 100% of front yard turf if it is less than 400 ft<sup>2</sup> in size, with plants that have low watering requirements; 4) Replace non-weather-based irrigation controller; or 5) Replace existing in-ground and operable overhead spray irrigation servicing at least 200 ft<sup>2</sup> of landscape area to drip, micro-spray, in-line tubing, or other low-volume micro-irrigation components; or
- (b) Except for the three areas approved in Coastal Development Permit No. A-6-NOC-11-086 for which the City may satisfy this condition by implementing the additional street sweeping approved by the Coastal Commission, City shall increase street sweeping frequency by prioritizing high traffic commercial routes adjacent to maintained channel with vacuum-assisted sweeper for every 400 linear feet of vegetation that is removed (except for removal of invasive species, e.g., Arundo) within a drainage area. Sweeping shall be conducted in median areas that are not subject to regular sweeping routes, and shall occur at a frequency of at least once per quarter for one calendar year after maintenance; or
- (c) For every 200 linear feet of vegetation (except for removal of invasive species, e.g., Arundo) removed per fiscal year per Watershed Management Area (WMA), the City shall construct and maintain in perpetuity one of the following within the WMA: 1) install 100 ft<sup>2</sup> biofiltration system; 2) Replace 100 ft<sup>2</sup> of impermeable pavement with permeable surfaces; 3) Install 100 ft<sup>2</sup> vegetated swale; or 4) Restore

100 ft<sup>2</sup> of wetlands (such as stabilizing eroded drainage and planting with native riparian vegetation); or

- (d) City shall increase frequency of catch basin inspection and as-needed cleaning for one year after maintenance. For every segment that is cleared, the City shall conduct an inspection and cleaning if necessary of every catch basin within 100 feet of the maintained segment, and conduct additional inspections and cleaning if necessary every three months.

1.8 City shall complete a special study or studies in Fiscal Year 2015 that address the following issues: 1) whether continued maintenance is needed at current levels, including the purpose of the conveyance system location and whether the original need still exists, whether maintenance at individual locations is necessary for the function of the conveyance system, whether historic maintenance practices may be modified to reduce maintenance area or type of maintenance performed, whether vegetation could be trimmed by hand rather than removed by the roots, whether annual maintenance is necessary or deferral to subsequent years would suffice, whether herbicides are necessary and whether it could be avoided in areas with year-round flows, whether vegetation is invasive or native, whether the habitat supports any endangered species or served the greater region, whether the location is critical in relation to nearby roads and infrastructure and whether storm flow could be allowed to extend beyond the channel without risking damage to adjacent properties; and 2) identifying retrofit opportunities to reduce maintenance needs, including daylighting concrete channels, preserving important habitat which serves as a wildlife corridor, is home to special status species, or eventually discharges into a 303(d) listed water body, and reducing downstream flooding through localized Low Impact Development (LID), including the option of creating retention facilities at the Qualcomm Stadium parking lot and land acquisition in the Tijuana River Valley for conversion to wetlands. This study or studies will only address channels in which maintenance was undertaken in first two years of MMP implementation (beginning in Fiscal Year 2014), and will be posted on the Storm Water Division website.

1.9 City shall complete a fee study within three years from the Effective Date of this Agreement. The fee study will be conducted by a third-party expert, and will be posted on the Storm Water Division website.

1.10 City shall hold a stakeholder meeting at least 30 days before finalizing each Fiscal Year budget request, to include Plaintiffs. At this stakeholder meeting, the City will present any LID, retrofit, channel widening, restoration, and/or special study options considered for inclusion in its budget or Capital Improvement Plan.

1.11 This Agreement is conditional on the City giving Plaintiffs written notice that it has approved the modifications to the MMP and SDP substantially as set forth in Sections 1.4 and 1.7 of this Agreement and on entry of the Court order described in Section 4.19 of this Agreement. This Agreement shall become

effective as soon as both of these conditions have been satisfied (the "Effective Date").

2.0 Plaintiffs' Obligations.

2.1 Plaintiffs agree to file a notice of dismissal of the Lawsuit, with prejudice, within 10 days of the Effective Date of this Agreement.

2.2 SDOG and CERF waive any and all rights to challenge any approval under the MMP and/or Programmatic EIR by judicial action or appeal to the Coastal Commission for five years from the date the Programmatic EIR was certified.

2.3 CERF agrees to withdraw its appeal of the Tijuana River Valley SCR to Planning Commission within 5 days of the Effective Date of this Agreement.

3.0 Release.

3.1 The Parties hereby release and forever discharge each other from any and all claims, debts, damages, liabilities, demands, obligations, costs, expenses, attorney fees, disputes, actions and causes of action of every nature, whether known or unknown, suspected or unsuspected, which each Party may now hold or have, or at any heretofore owned or held, or may now hold against each other as a result of the subject of the Lawsuit, including, but not limited to those claims set forth in the Lawsuit, all of which are incorporated herein fully by reference.

3.2 The Parties acknowledge that there is a risk that, subsequent to the execution of this Agreement, one or more of the Parties could incur injury, loss, damage, costs, attorneys' fees, or expenses, which are in some way caused by or connected with the persons, entities, matters, and/or issues referred to herein, or which are unknown and unanticipated at the time this Agreement is executed, or which are not presently capable of being ascertained. Nevertheless, the Parties acknowledge this Agreement has been negotiated and agreed upon in light of that realization. The Parties have had the benefit and advice of independent legal counsel on this issue and, therefore, enter into this Agreement with full knowledge and recognition of the above stated possibilities.

3.3 Wherefore, The Parties specifically waive their rights under California Civil Code section 1542. Section 1542 provides as follows:

"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."

4.0 Miscellaneous Provisions.

4.1 Compromise of Disputed Claims. This Agreement is a compromise of disputed claims and shall never at any time or for any purpose be considered an

admission of any liability or responsibility on the part of any Party; nor shall the furnishing of any consideration for the execution of this Agreement constitute or be construed as an admission of any liability whatsoever by either Party.

4.2 Integration. The undersigned, and each of them, acknowledge and represent that no promise or inducement not expressed in this Agreement has been made in connection with this Agreement. This Agreement contains the entire agreement and understanding between the Parties as to the subject matter of this Agreement and is intended to be and is a final integration thereof. 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.

4.3 Waiver and Amendment. No provision of this Agreement, or breach of any provision, can be waived except in writing. Any waiver by the City must be formally approved by the City Council. Waiver of any provision or breach shall not be deemed to be a waiver of any other provision, or of any subsequent breach of the same or other provision. This Agreement may be amended, modified or rescinded only in writing signed by all Parties to this Agreement.

4.4 Time of Essence. Time is expressly declared to be of the essence in this Agreement, and of every provision in which time is an element, if any.

4.5 Captions. Paragraph titles and captions contained in this Agreement are inserted as a matter of convenience and for reference, and are not a substantive part of this Agreement.

4.6 Interpretation and Intent. This Agreement is the result of arms-length negotiations by the Parties, each of whom had their own counsel. Accordingly, all Parties hereto acknowledge and agree that this Agreement shall not be deemed prepared or drafted by one party or another, or the attorneys for one party or another. No provision of this Agreement shall be interpreted against any Party because that Party, or their legal representative, may have drafted that provision.

4.7 Additional Documents. The Parties each agree to sign any additional documents which are reasonably necessary to carry out the purpose and intent of this Agreement.

4.8 Benefit and Burden. This Agreement shall be binding upon and inure to the benefit of the Parties and their heirs, executors, administrators, trustors, trustees, beneficiaries, predecessors, successors, assigns, partners, partnerships, parent companies, subsidiaries, affiliated and related entities, officers, directors, principals, agents, servants, employees, representatives, and all persons, firms, plaintiffs, and/or persons or entities connected with each of them, including, without limitation, their insurers, sureties, attorneys, consultants and experts.

4.9 Governing Law. This Agreement has been executed in the State of California, and shall be interpreted and enforced under California law. Venue for any action related to this Agreement shall be in San Diego County.

4.10 Attorney's Fees. The Parties agree that Plaintiffs are the prevailing parties in the Lawsuit and are entitled to attorney's fees in accordance with Code of Civil Procedure section 1021.5 and costs. The Parties agree the matter of attorneys' fees shall be submitted to the Court for determination after the Effective Date of this Agreement. The Parties further agree that regardless of the Court's ruling on the motion for attorneys' fees, Defendant shall not pay more than a total of \$200,000 and Plaintiffs shall not receive less than \$50,000, collectively. The Parties agree not to disclose the range of attorney's fees in Provision 4.10 of this Agreement to the Court.

4.11 Attorney's Fees Arising Out of Enforcement of Agreement. In the event any action or proceeding is brought to enforce this Agreement, the prevailing party shall be entitled to the reasonable fees, out-of-pocket expenses, and costs of attorneys and experts against the non-prevailing Party, in addition to all other relief to which that Party may be entitled.

4.12 Warranty of Authority. Each of the signatories hereto represents and warrants that he or she is competent and authorized to enter into this Agreement on behalf of the Party for whom he or she purports to sign. Each Party hereto agrees to defend, indemnify, and hold harmless the other Parties hereto against all claims, suits, actions and demands, including necessary expenses of investigation and reasonable attorneys' fees and costs, arising out of claims that its signatory was not competent or so authorized to execute this Agreement.

4.13 No Assignment. Each party represents and warrants that it has not assigned or transferred any claims released herein, and that it is the sole owner of that claim.

4.14 Signatures. This Agreement may be signed in counterparts. Signatures transmitted by facsimile shall be deemed to be originals.

4.15 Representation by Counsel. The undersigned and each of them acknowledge and represent that they are affecting this compromise and settlement and are executing this Agreement after having received full legal advice as to their rights from an attorney of their choice.

4.16 Agreement Voluntarily. The undersigned and each of them acknowledge and represent that they have read this Agreement in its entirety, understand all of its terms and provisions, and sign this Agreement voluntarily and of their own free will, knowing that it is a legally binding document and with the intent to be bound hereby.

4.17 No Reliance On Other Party. The undersigned and each of them acknowledge and represent that they are affecting this compromise and settlement and are executing this Agreement (i) after they and their respective legal counsel had the opportunity to and did conduct an independent investigation of the relevant facts; and (ii) without relying on representation made by the other Party or the other Party's attorney.

4.18 Severability. Even if a court holds one or more parts of this Agreement ineffective, invalid, or void, all remaining provisions shall remain valid.

4.19 Jurisdiction. This Agreement shall not take effect until the Court in the Lawsuit has entered an order continuing its jurisdiction over the Lawsuit for the purposes of enforcing this Agreement pursuant to California Code of Civil Procedure section 664.6. The Parties shall enter into an appropriate stipulation for this purpose, to be filed by the City, and appear at any hearing that the Court may require for the purpose of issuing the order. The Parties shall otherwise cooperate in attempting to obtain the order.

4.20 Notices. All notices given pursuant to this Agreement or law shall be written. Notices shall be delivered with all delivery or postal charges prepaid. Notices may be given personally; by facsimile; by United States first-class mail; by United States certified or registered mail; or by other recognized overnight service. Notices shall be deemed received on the date of personal delivery or facsimile transmission; on the date shown on a signed return receipt or acknowledgment of delivery; or, if delivery is refused or notice is sent by regular mail, seventy-two (72) hours after deposit. Until a Party gives notice of a change, notices shall be sent to:

FOR PLAINTIFFS:

Marco Gonzales, Esq.  
Livia Borak, Esq.  
Coastal Environmental Rights Foundation  
1140 South Coast Highway 101  
Encinitas, CA 92024  
for Plaintiff Coastal Environmental Rights  
Foundation

Cory Briggs, Esq.  
Mekaela Gladden, Esq.  
99 East "C" Street Suite 111  
Upland, CA 91786  
for Plaintiff San Diegans for Open Government

FOR THE CITY:

Jan I. Goldsmith, City Attorney  
c/o Andrea M. Contreras, DCA  
Office of the San Diego City Attorney  
1200 Third Ave. Suite 1100  
San Diego, CA 92101

IN WITNESS THEREOF, the undersigned have executed this Agreement as follows:

COASTAL ENVIRONMENTAL RIGHTS FOUNDATION

Dated: 3-14-2013

By: Marco Gonzalez  
Its: Executive Director

SAN DIEGANS FOR OPEN GOVERNMENT

Dated: 3/26/13

By: Karen Ferguson  
Its: \_\_\_\_\_

APPROVED AS TO FORM:

Dated: 3-14-2013

By: Marco Gonzalez  
Marco Gonzalez  
Attorney for Plaintiffs Coastal  
Environmental Rights Foundation

Dated: 26 MARCH 2013

By: Cory Briggs  
Cory Briggs  
Attorney for Plaintiffs San Diegans for Open  
Government

CITY OF SAN DIEGO

Dated: 23 APR 13

By: [Signature]  
Its: Interim CDO

APPROVED AS TO FORM:

Dated: 4.23.13

JAN I. GOLDSMITH  
City Attorney  
By: Andrea M. Contreras  
Andrea M. Contreras  
Deputy City Attorney  
City of San Diego