

## Confidential Federal Rule of Evidence 408 Communication

### Memorandum of Agreement Regarding Settlement Terms

The following Memorandum of Agreement Regarding Settlement Terms (“Settlement Agreement”) is entered into by and among Wishtoyo Foundation/Ventura Coastkeeper, the City of San Buenaventura, and Heal the Bay. All capitalized terms used herein and not defined when first used are defined in Attachment “A” to this document, which is hereby incorporated into this Settlement Agreement by this reference.

#### Recitals

- A. The Parties believe that to further their shared commitment to protecting the ecology of the Estuary and its watershed, and to proactively commence planning and implementation for environmentally protective, sustainable, and integrated water supply and wastewater discharge practices, the City needs to develop, over time, one or more yet-to-be identified infrastructure options for Ventura’s reclamation and diversion of an ecologically appropriate volume of its Effluent.
- B. Although the Construction Implementation Constraints and Operational Implementation Constraints are not yet fully identified, studied, documented, or resolved, the Parties agree that it is appropriate for the City to engage now in the process to identify, select, plan, design, engineer, environmentally review, permit, and, ultimately, construct one or more technically, financially, and regulatorily feasible reclamation and diversion infrastructure projects, including Treatment Wetlands, with the goal of achieving the cumulative capacity to divert and eliminate 100% of the Effluent from Direct Discharge to the Estuary (with a first priority for diversion to Water Reclamation Uses) so that the WRF can implement, by December 31, 2025, Effluent diversions that result in a discharge regime that is determined by the Resources Agencies to be most ecologically beneficial for the Estuary. The Parties acknowledge that even for the City in the future to best adaptively manage diversions from Direct Discharge, the City must strive to develop capacity to divert 100% of the Effluent from Direct Discharge and to reclaim the maximum feasible amount of this Effluent for beneficial reuse.
- C. The Parties agree that, taking into account and subject to Construction Implementation Constraints, the reclamation and diversion infrastructure projects constructed on the Time Schedule shall consist of a combination of projects that have the capacity required by the Design Considerations, and can:
  - 1. as a first priority, divert on an ongoing basis the Maximum Feasible Diversion Volume to broadly defined Water Reclamation Uses as a first and best use of the Effluent; and
  - 2. as a second priority, divert Effluent to Treatment Wetlands, in the event that 100% reclamation is infeasible due to Construction Implementation

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Constraints or Operational Implementation Constraints, and so long as such diversion remains consistent with the Approved Effluent Diversions as determined by the Resource Agencies.

- D. The Parties agree that, subject to Construction Implementation Constraints and Operational Implementation Constraints, upon the construction of the Diversion Infrastructure Project(s), the City shall implement the Approved Effluent Diversions by the expiration of the Time Schedule, so long as the Approved Effluent Diversions are not Financially Infeasible, Technically Infeasible, or Regulatorily Infeasible.

#### Settlement Terms

Accordingly, the Parties agree, without either the adjudication of any of the Parties' claims, or admission by the City of any alleged violation or other wrongdoing, on the following terms in settlement of all of HTB's currently pending administrative actions or claims, and all of VCK's currently pending litigation claims.

- 1.) **City Goals and Obligations Regarding Design and Capacity of Diversion Infrastructure Projects; Construction Implementation Constraints.**
- a. **The City's Infrastructure Design and Construction Goals.** The City's infrastructure design and construction goals shall be to identify, select, plan, design, engineer, environmentally review, permit, and construct on the Time Schedule Diversion Infrastructure Projects that have the capacity required by the Design Considerations, and that shall cumulatively have the capacity to:
- i. eliminate 100% of the average annual volume or flow of Direct Discharges; and
  - ii. divert a minimum of 50%, and up to 100%, of the average annual volume or flow of Effluent to Water Reclamation Uses.

The Parties acknowledge, however, that the City's infrastructure design and construction goals may not ultimately be achieved on the Time Schedule due to the Construction Implementation Constraints or an Event of Force Majeure.

- b. **The City's Infrastructure Construction Obligation.** The City shall, on the Time Schedule, identify, select, plan, design, engineer, environmentally review, permit, and construct reclamation and diversion infrastructure projects, including the Treatment Wetlands, that have the capacity required by the Design Considerations, and, unless and except to the extent

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precluded, prevented, or impeded by the Construction Implementation Constraints, that cumulatively have the capacity to:

- i. as a first priority, divert on an ongoing basis the Maximum Feasible Diversion Volume to Water Reclamation Uses; and
- ii. as a second priority, divert Effluent to the Treatment Wetlands, in the event that 100% diversion to Water Reclamation Uses is Technically Infeasible, Regulatorily Infeasible, or Financially Infeasible.

2.) **The City's Diversion Implementation Obligations.** Upon issuance of all Required Agency Permits, the City shall, by the expiration of the Time Schedule, operate the Diversion Infrastructure Projects that the City constructs to implement the Approved Effluent Diversions, subject to occurrence(s) of Operational Implementation Constraints. From and after the implementation of diversions, the Parties agree that the City may temporarily discharge Effluent to the Estuary, in the event of the occurrence of any Operational Implementation Constraints, subject to the limitations of this Settlement Agreement. Notwithstanding the foregoing, in the event that the terms and conditions of any Required Agency Permit are materially inconsistent with the terms and conditions of this Settlement Agreement (*e.g.*, a Required Agency Permit makes a determination that the volume or flow of Approved Effluent Diversions will be materially less than the Maximum Ecologically Protective Diversion Volume, requires the City to perform before the expiration of the Time Schedule, or otherwise fails to take a Construction Implementation Constraint or an Operational Implementation Constraint into account), the Parties each reserve, and shall have the right to challenge and/or seek to remedy the terms and conditions of the Required Agency Permit as set forth in Paragraph 11.b.i. of this Settlement Agreement, and no Party shall be in violation of this Settlement Agreement or have any liability hereunder as a result of implementing any Required Agency Permits as issued by the applicable Agencies with Jurisdiction, or for exercising the Party's rights to challenge Required Agency Permits to make such permits consistent with the terms and conditions of this Settlement Agreement.

- a. **Limitations Related To Scheduled Maintenance, Health and Safety Situations.** The City shall assure that all Scheduled Maintenance, Health and Safety Situations that the City plans and implements shall occur during the period between December 1 and April 1 of each year.
- b. **Limitations on Treatment Wetlands Bypass.** If second priority diversions of Effluent to the Treatment Wetlands are constructed and implemented, then, after construction of the Treatment Wetlands, in the event that 1) Breakdown Situations, or 2) Maintenance, Health and Safety

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Situations occur that preclude the City from diverting Effluent from Direct Discharge to Water Reclamation Uses, but do not impact diversions to the Treatment Wetlands, the City shall first divert the Effluent to the Treatment Wetlands, and the City shall only allow a Direct Discharge if: (a) the Treatment Wetlands do not have the capacity to accept the additional Effluent despite being built in accordance with the Design Considerations, or (b) the Breakdown Situation or Maintenance, Health and Safety Situation precludes, prevents, or impedes diversions of Effluent to, or the capacity, treatment, or other operations of, the Treatment Wetlands.

- 3.) **Meet and Confer Obligations.** Upon a Notice under Paragraph 8 by the City that any Event of Force Majeure, Construction Implementation Constraints, or Operational Implementation Constraints preclude or impede timely implementation of the City's construction or diversion obligations under this Settlement Agreement, the Parties shall be required to meet and confer as set forth in Paragraph 8 below to evaluate and determine an appropriate way to address and resolve the City's claim made in such Notice, and the action to be taken to address such claim, which action may include, without limitation, extending the City's Time Schedule for completion of the City's goals and obligations under this Settlement Agreement. If the Parties are unable to reach agreement with respect to that action to be taken to address a claim of an Event of Force Majeure or occurrence of any Construction Implementation Constraints or Operational Implementation Constraints pursuant to the "meet and confer" provisions in Paragraph 8 of this Settlement Agreement, then any Party may seek formal dispute resolution as set forth in Paragraph 9 below to determine an appropriate way to address such claim.
- 4.) **Effect of Settlement Agreement.**
  - a. **Contractual Effect of Infeasibility.** In the event that any Construction Implementation Constraint or Event of Force Majeure occurs that impedes, prevents, or precludes completion of Diversion Infrastructure Projects by the Time Schedule, the City shall not be liable for breach of the Settlement Agreement. In addition, in the event that any Operational Implementation Constraint occurs that impedes, prevents, or precludes the City from achieving 100% of the Approved Effluent Diversions, the City shall not be liable for breach of the Settlement Agreement. At the same time, the occurrence of these events shall not relieve the City completely of its obligations under this Settlement Agreement to construct Diversion Infrastructure Projects and/or to implement Effluent diversions that are agreed to or determined to be appropriate for the City to implement pursuant to Paragraphs 8 and 9.

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- b. **Intent and Regulatory Effect of Settlement Agreement.** The Parties agree that, so long as the City is implementing the terms and conditions of this Settlement Agreement and is not in violation hereof, it is the intent of this Settlement Agreement that the City will be in full compliance with, or exceed the requirements of the CWA, Porter-Cologne, and other applicable federal, state, and local laws, regulations, and permits issued thereunder. Notwithstanding the Parties' intent, nothing in this Settlement Agreement limits in any way the obligations of the City to comply with all federal, state, and local laws and regulations governing diversions or discharges of Effluent or any activities required by this Settlement Agreement, and all requirements and conditions of the Required Agency Permits. This Settlement Agreement is not a permit or modification of any existing permits under any federal, state, or local law, and in no way relieves the City of its responsibilities to obtain any Required Agency Permits and to comply with all applicable federal, state, and local laws and regulations. Nothing in this Settlement Agreement, and no City action pursuant to this Settlement Agreement, shall constitute evidence of, or be construed as a finding, adjudication, acknowledgement, or admission by the City of, or with respect to, any fact, finding, issue of law, legal defense, or violation of law, regulation, permit, or administrative order. This Settlement Agreement and/or any payment or other action pursuant to this Settlement may constitute evidence against the City only in actions seeking to enforce compliance with this Settlement Agreement.

#### 5.) **Planning and Regulatory Permits and Proceedings.**

- a. **Infrastructure Alternatives and Schedule.** By December 31, 2015, the City agrees to conduct all preliminary studies and complete such other tasks as are necessary to identify alternatives for the Diversion Infrastructure Projects that the City will study for implementation, and shall prepare a schedule for completing: (i) planning, engineering, and environmental review of the alternatives, (ii) selection of a preferred alternative, (iii) submission of applications for the Required Agency Permits necessary to implement the preferred alternative, (iv) project-level design and engineering work for the preferred alternative, and (v) construction of the preferred alternative.
- b. **Permit Applications.** The City agrees to notify VCK and HTB in writing by no later than August 1, 2018 what Required Agency Permits they intend to apply for. The City shall submit draft applications for Required Agency Permits to VCK and HTB by August 1, 2018. VCK and HTB shall have until September 1, 2018 to submit their written comments on the draft applications to the City. The City then shall have until October 1, 2018 to respond to VCK and HTB's comments and/or provide an explanation of

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why it is addressing the comments in an alternative manner. Subject to any delays created by the exercise with respect to applications for Required Agency Permits by any Party of its rights under Paragraphs 8 and 9, the City agrees to complete and submit applications for Required Agency Permits needed for construction and operation of the Diversion Infrastructure Projects selected as the preferred alternative under Paragraph 5.a. by no later than January 1, 2019. The City's applications for Required Agency Permits from the Resources Agencies shall request issuance of those permits by a date no later than January 1, 2020, containing terms and conditions that are consistent with the terms and conditions of the Settlement Agreement, and permitting the following activities:

- i. Subject to the Construction Implementation Constraints and the Operational Implementation Constraints, and by expiration of the Time Schedule, development, construction, and operation of the Diversion Infrastructure Projects;
  - ii. Subject to the Construction Implementation Constraints and the Operational Implementation Constraints, and by expiration of the Time Schedule, authority to implement diversions and eliminate Direct Discharge of the Maximum Ecologically Protective Diversion Volume; and
  - iii. Subject to the Construction Implementation Constraints and the Operational Implementation Constraints, and by expiration of the Time Schedule, authority to commence diversions from Direct Discharge of the Maximum Ecologically Protective Diversion Volume, as a first priority, to Water Reclamation Uses and, as a second priority, to Treatment Wetlands.
- c. **Determination of the Maximum Ecologically Protective Diversion Volume.** By no later than January 1, 2018, the Parties agree to mutually determine, using the best available scientific information and as a part of the planning, design, engineering, and environmental review process, the Maximum Ecologically Protective Diversion Volume. In the event that the Parties are unable to reach mutual agreement regarding the Maximum Ecologically Protective Diversion Volume on or before January 1, 2018, then the Parties shall proceed with dispute resolution as set forth in Paragraphs 8 and 9(a) to reach a determination that is binding on the Parties regarding the Maximum Ecologically Protective Diversion Volume, which the City shall then include in its applications for Required Agency Permits as set forth in Paragraph 5.b.

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- d. **City Representations to Agencies with Jurisdiction.** In all its applications for the Required Agency Permits, the City agrees to inform and request that the Agencies with Jurisdiction approve, adopt, issue, and/or grant Required Agency Permits on all terms and conditions necessary for:
- i. the City to have the ability to achieve its goals for construction of Diversion Infrastructure Project capacity as set forth in Paragraph 1.a.;
  - ii. the City to fulfill its obligations for design and construction of Diversion Infrastructure Projects as set forth in Paragraph 1.b.; and
  - iii. the City to obtain all Required Agency Permits to implement and operate the Diversion Infrastructure Projects in accordance with its obligations in Paragraph 2 above, to the extent that resulting Approved Effluent Diversions are consistent with eliminating from Direct Discharge the Maximum Ecologically Protective Diversion Volume.
- e. **Cooperation.** The City, VCK, and HTB shall each, individually and jointly, cooperate to advocate and support the issuance of the Required Agency Permits containing terms and conditions that are consistent with this Settlement Agreement, including, without limitation, achievement, subject to the Construction Implementation Constraints and the Operational Construction Constraints, and by the expiration of the Time Schedule, of the Effluent diversion and reclamation goals and obligations of this Settlement Agreement.
- f. **Schedule for Obtaining Permits.** The City shall timely submit applications pursuant to Paragraph 5.b., and use all diligent and reasonable efforts to obtain the Required Agency Permits by January 1, 2020; provided however, that if any Required Agency Permits that are no longer subject to administrative or judicial invalidation are not available for the Diversion Infrastructure Projects and/or Effluent diversions by January 1, 2021, then the Parties shall meet and confer to determine if the unavailability of any certain and valid Required Agency Permit is likely to preclude, prevent, or impede the City's implementation of Diversion Infrastructure Projects and/or Effluent diversions by the expiration of the Time Schedule, in which case the City shall not be liable for breach of the Settlement Agreement due to Regulatory Infeasibility. At the same time, the failure to receive by January 1, 2021, a Required Agency Permit that is no longer subject to legal or administrative invalidation shall not relieve the City completely of its obligations to construct Diversion Infrastructure Projects and implement Effluent diversions as set forth in this Settlement Agreement, and the Parties

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shall meet and confer, as set forth in Paragraphs 8 and 9, to determine any extension of the Time Schedule required, and/or otherwise how best to respond to the unavailability of a certain and valid Required Agency Permit.

- 6.) **Sewer and/or Water Revenue Measures.** The City shall use all reasonable efforts to adopt required sewer and/or water revenue measures, including, without limitation, rate increases, as necessary to comply with its obligations set forth in this Settlement Agreement. In the event that, despite the City's reasonable efforts to adopt required sewer or water revenue measures as necessary to fund compliance with this Settlement Agreement, the ratepayers or other parties with standing prevail in a Rate Rejection, then the Parties shall meet and confer as set forth in Paragraphs 8 and 9 to address the Rate Rejection. In addition to the Parties' obligations under this Paragraph to meet and confer regarding any Rate Rejection, in the event of any Rate Rejection, the Parties acknowledge that VCK and HTB may also assert a legal challenge to, or otherwise contest, the Rate Rejection, and may seek a ruling from the Court invalidating the Rate Rejection on grounds that it is in conflict with federal law on the grounds that the installation, construction, implementation, and operation of the Diversion Infrastructure Projects and Effluent diversions required by this Settlement Agreement are undertaken to advance, improve, and serve the purposes of the City's compliance with the Federal Clean Water Act. *Bylinski v. City of Allen Park*, 8 F.Supp.2d 965, 969-70 (E.D. Mich. 1998), *aff'd Bylinski v. City of Allen Park*, 169 F.3d 1001 (6th Cir. 1999), *cert. denied*. The City shall not oppose challenges to Rate Rejections asserted by VCK or HTB.
- 7.) **Participation and Cooperation:** The Parties shall use all reasonable efforts to cooperate with one another in implementing the Settlement Agreement, and shall actively and diligently participate in, advocate, and use reasonable efforts to support the following proceedings as necessary for compliance with the Settlement Agreement:
- a. **City Public Process.** VCK and HTB shall cooperate with the City with respect to planning and implementing the City Public Process, including aiding in the preparation, review, determination of content and message, and dissemination of mutually acceptable and consistent: press releases, public notices and postings, press articles, written external communications, public reports, public comments and responses, and public oral presentations; and consistently participating in, and advocating the Settlement Agreement in public meetings, workshops, and hearings.
  - b. **Additional Documents and Instruments.** The Parties shall cooperate to jointly prepare, draft, and, by the close of the City Public Process, execute more detailed legally binding instruments that incorporate

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and implement all terms and conditions of this Settlement Agreement, and that are fully consistent with this Settlement Agreement and one another, consisting of: (i) for HTB and the City, a Final Settlement Agreement; and (ii) for VCK and the City, a fully executed Consent Decree.

- c. **Settlement Related Communications.** VCK and HTB shall cooperate with the City to jointly prepare, review, determine the content of, and disseminate all external public communications regarding the terms and conditions of this Settlement Agreement and the claims dismissed hereby, including, without limitation, any sewer and water revenue measures necessary to implement the terms and conditions of this Settlement Agreement. Without limiting the Parties' obligations to cooperate under this Paragraph, HTB and VCK each agree to provide the City, at least twenty-four (24) hours prior to release or response, the content of the following types of external written communications regarding the terms and conditions of this Settlement Agreement and the claims dismissed hereby: press releases, press articles, public notices and postings, external written communications, public reports, public comments and responses, requests for interviews, responses, or comments received from the media, and communications with Agencies with Jurisdiction.
- d. **Permitting.** The Parties shall cooperate with respect to initiation, implementation, and conclusion of all consultation, permitting, certification, and approval proceedings with the Agencies with Jurisdiction to obtain valid Required Agency Permits that are consistent with this Settlement Agreement on or before January 1, 2020, subject to any delays associated with any Party exercising its rights under Paragraphs 8 and 9.
- e. **Studies.** The Parties shall cooperate with respect to, and shall actively participate as stakeholders in, the preparation of the Estuary Subwatershed Study Report (Final Report) and the Phase 2 Recycled Water Market Study for submission to the RWQCB that are consistent with the terms and conditions of the Settlement Agreement, the WRF NPDES Permit requirements, and any additional requirements imposed by the RWQCB.
- f. **Infrastructure and Diversions.** The Parties shall cooperate with respect to, and shall actively participate as stakeholders in, the planning, design, environmental review and approval, permitting, construction, and operation of the Diversion Infrastructure Projects and Effluent diversions to eliminate Direct Discharge and to direct Effluent to Water

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Reclamation Uses (as a first priority) and the Treatment Wetlands (as a second priority), which are to be implemented by the City in compliance with this Settlement Agreement.

#### **8.) Notice of Event of Force Majeure, or Event of Implementation Constraint, Disagreement, or Breach; Period to Cure and Meet and Confer.**

- a. **Notice of Event of Force Majeure or Event of Implementation Constraint, Disagreement or Breach.** The Parties agree that, despite the City's reasonable efforts to identify, select, plan, design, engineer, environmentally review, permit, construct, and implement Diversion Infrastructure Projects and Effluent diversions, the City may be prevented by an Event of Force Majeure, the Construction Implementation Constraints, or Operational Implementation Constraints from implementing Diversion Infrastructure Projects and/or Effluent diversions by the expiration of the Time Schedule. In addition, from time to time during the term of this Settlement Agreement, any Party may believe that another Party has breached the Settlement Agreement, or the Parties may disagree as to the appropriate interpretation or implementation of this Settlement Agreement, or the status or adequacy of any Party's performance of its obligations hereunder. In the event that any Party reasonably believes that an Event of Force Majeure or Event of Implementation Constraint, Disagreement, or Breach has occurred, then such Party shall provide the other Parties written notice of the occurrence of such event.
- b. **Right to Cure; Meet and Confer.** Upon receipt of written Notice from any Party of an Event of Force Majeure or an Event of Implementation Constraint, Disagreement or Breach, the affected Party or Parties shall have at least thirty (30) calendar days after receipt of the Notice to cure any alleged breach of the Settlement Agreement, or to address the claims of the Notice, and to provide a written response to such claims. If, after such thirty (30) calendar days (or such longer period as the Parties may mutually agree to in writing) and provision of the written response to the Notice, any Party reasonably believes that the Event of Force Majeure or Event of Implementation Constraint, Disagreement, or Breach has not been adequately addressed or cured, the Parties shall meet and confer to determine how best to respond to the Event of Force Majeure or Event of Implementation Constraint, Disagreement, or Breach, which response may involve, without limitation, the Parties' mutual agreement to: (a) modify, change, revise, or substitute different Diversion Infrastructure Projects, or Diversion Infrastructure Project components from those previously planned; (b) identify, select, and pursue implementation of different Effluent diversion flow alternatives and requirements than previously

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planned; (c) adjust capital investment, costs, expenses, and financing arrangements; (d) revise, modify, or prepare new applications for, or request amendments to, Required Agency Permits; (e) revise, modify, and extend the Time Schedule; and/or (f) delete, revise, change, modify, or develop new and additional Settlement Agreement terms and conditions.

- c. **Right to Seek Formal Dispute Resolution.** If the Parties are unable to reach agreement with respect to addressing an Event of Force Majeure or Event of Implementation Constraint, Disagreement, or Breach pursuant to this “meet and confer” provision in Paragraph 8.b. within ninety (90) calendar days after the Notice (or such longer period as may be mutually agreed to in writing by the Parties), then any Party may seek formal dispute resolution as provided in Paragraph 9.

- 9.) **Formal Dispute Resolution.** Upon completion of all meet and confer proceedings and time periods set forth in Paragraph 8, if the Parties cannot reach mutual agreement regarding any Event of Force Majeure or Event of Implementation Constraint, Disagreement, or Breach then each Party shall have the right, upon seven (7) business days written Notice, to initiate formal dispute resolution proceedings as follows:

- a. **Dispute Regarding Maximum Ecologically Protective Diversion Volume.** In the event that the informal dispute resolution process set forth in Paragraph 8 does not fully resolve within ninety (90) calendar days (or such longer period as may be mutually agreed to in writing by the Parties) any dispute regarding the appropriate Maximum Ecologically Protective Diversion Volume, then any Party may invoke formal dispute resolution by giving seven (7) business days written Notice to all other Parties of such dispute, which dispute shall be resolved by a Scientific Review Panel in accordance with the following procedures. Within thirty (30) calendar days of receipt of the written Notice of scientific dispute, VCK and HTB shall mutually select one qualified scientific expert, and the City shall select one qualified scientific expert, to serve on a Scientific Review Panel, which shall review and resolve the scientific dispute. Within thirty (30) calendar days (or such longer period as may be agreed to in writing by the Parties) these two selected scientific experts shall select a third qualified scientific expert to serve on the Scientific Review Panel, at which point the Scientific Review Panel shall be deemed convened. Within fifteen (15) calendar days after the Scientific Review Panel is convened (or such longer period as may be agreed to in writing by the Parties), each Party shall submit to the Scientific Review Panel, with a copy to each of the other Parties, a written statement of its position regarding the Maximum Ecologically Protective Diversion Volume, together with any appropriate

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data and information in support of the Party's position. Within forty-five (45) calendar days after the Scientific Review Panel is convened (or such longer period as may be agreed to in writing by the Parties), each Party may submit to the Scientific Review Panel, with a copy to each of the other Parties, any written rebuttal statement and/or additional pertinent data or information for consideration by the panel. The Scientific Review Panel shall then review and objectively consider the material, and, within forty-five (45) calendar days after the due date for rebuttal statements and information (or such longer period as may be agreed to in writing by the Parties), the Scientific Review Panel shall decide and determine, by majority vote, the Maximum Ecologically Protective Diversion Volume based on the best available scientific information and data. The Scientific Review Panel shall prepare and shall, concurrently with issuing its determination, submit to each of the Parties a written report explaining their determination concerning the Maximum Ecologically Protective Diversion Volume. This report shall, at a minimum, include the Panel's evaluation of the environmental impacts of the alternative levels of Effluent discharge to the Estuary that they considered in making their determination of the Maximum Ecologically Protective Diversion Volume, and the environmental impacts of the Effluent discharge regime that they determine constitutes the Maximum Ecologically Protective Diversion Volume. This report shall also provide references to all the studies, reports, and data that the Panel relied upon in making its determination. The City shall submit this report to the Resource Agencies concurrently with, or as a part of, its applications for any Required Agency Permits. The Scientific Review Panel's determination of Maximum Ecologically Protective Diversion Volume shall be binding upon the Parties, and shall not be subject to further challenge or review. The scientific experts selected and serving on the Scientific Review Panel shall keep reasonably detailed logs of hours expended in reviewing and resolving the scientific dispute, and shall be compensated by the City for the hours accounted for at prevailing commercial rates charged by other scientific professionals with substantially similar qualifications and expertise.

- b. **Other Disputes.** In the event that the informal dispute resolution process discussed in the Paragraph 8 does not reasonably resolve the Parties' disputes within ninety (90) calendar days (or such longer period as may be mutually agreed to in writing by the Parties), then, with respect to any dispute not subject to formal dispute resolution pursuant to Paragraph 9.a., either the City or VCK, with VCK acting on its own behalf and/or on behalf of HTB, may invoke formal dispute resolution by filing a motion to show cause, or other appropriately named motion ("Motion"), in the District Court for the Central District of California, before Judge George

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King, to whom the Case No. CV-10-02072-GHK (PJWx) is assigned, to resolve the dispute. If Judge King is not available to perform, or declines to perform, the role identified herein, the Parties agree that the Motion shall be re-assigned to another judge, court, magistrate, or arbitrator pursuant to applicable rules of the District Court for the Central District of California. The decision or ruling by the Court or the Court's designee shall be binding upon the Parties, and shall not be subject to further challenge or review.

The Parties acknowledge and agree that HTB is not a party to Case No. CV-10-02072-GHK (PJWx). Further, while the Parties intend that the substantive provisions of the Final Settlement Agreement shall be consistent with, and materially the same as, those of the Consent Decree, VCK and HTB may in the future have differing views or interpretations of the provisions of the two instruments, and the Final Settlement Agreement will not be before the Court with jurisdiction over VCK, the Consent Decree, and Case No. CV-10-02072-GHK (PJWx). Notwithstanding the foregoing, VCK and HTB agree that all disputes involving HTB, whether arising under the Settlement Agreement or the Final Settlement Agreement, that are not resolved pursuant to Paragraphs 8 or 9.a., shall be addressed by VCK on behalf of HTB, as follows:

- i. When reasonably requested by HTB to do so in writing, VCK shall file and diligently prosecute to completion, a Motion for formal dispute resolution of any issues arising under the Settlement Agreement or Final Settlement Agreement, so long as the Motion is authorized by and is otherwise appropriate for VCK to file pursuant to Paragraphs 8 and 9 and the terms and conditions of this Settlement Agreement.
- ii. HTB agrees that, although HTB is not a party to VCK's action entitled Case No. CV-10-02072-GHK (PJWx) currently pending in the District Court for the Central District of California, and although the Final Settlement Agreement will not be before the Court in that action and HTB will not be a party to the Consent Decree or to any Motions filed by VCK under this Paragraph, any and all HTB disputes arising under the Settlement or Final Settlement Agreement that are not resolved under either Paragraph 8 or Paragraph 9.a. shall be resolved, as provided in this Paragraph 9.b., by VCK filing the Motion on behalf of HTB and/or both HTB and VCK.
- iii. In addition, HTB agrees that the judgment or ruling on the Motion by the Court or the Court's designee with respect to

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resolution of any such dispute arising under the Settlement Agreement or Final Settlement Agreement shall be fully binding on HTB, VCK, and the City, and HTB expressly waives any right to initiate formal dispute resolution independently or without the assistance of VCK, and/or to otherwise challenge or bring any Claim against the validity of the formal dispute resolution process, the District Court's jurisdiction to rule on the Motion, and HTB shall not contest the validity of the Motion or any ruling on it in any proceeding of any type.

#### **10.) Annual Report and Deliverables.**

- a. City's Annual Report.** Beginning on July 15 after the Effective Date of the Consent Decree (regardless of the Effective Date of the Final Settlement Agreement) and annually every July 15 thereafter until the termination of the Settlement Agreement, the City shall provide to HTB and VCK for their review and comment an annual report (the "Annual Report") regarding the status and progress of compliance with this Settlement Agreement, including copies of all available, final, non-confidential and unprivileged, pertinent supporting documents, information, and data not already delivered to HTB and VCK during the course of the year, such as, without limitation, documents and information regarding: the planning, design, engineering, environmental review and impacts, permitting, construction, and operation of potential and preferred Diversion Infrastructure Project alternatives; applications and supporting documentation for Required Agency Permits; and the potential for occurrence of Construction Implementation Constraints or Operational Implementation Constraints affecting any potential or preferred Diversion Infrastructure Project alternatives. Nothing in this Paragraph shall limit or reduce the obligation of each Party under Paragraph 7 to use all reasonable efforts to cooperate with one another, and to actively and diligently participate in, advocate, and use reasonable efforts to support proceedings of the City and other agencies required for compliance with the Settlement Agreement. HTB and VCK agree, notwithstanding the City's obligation to provide the Annual Report and to make available copies of available, pertinent supporting documents and information, HTB and VCK shall access any documents and information included or referenced in the Annual Report that have already been provided by the City to the public via the same means used by the City to provide those documents to the public (e.g., websites, stakeholder meetings, and other means of public communication used by the City from time to time).

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- b. **VCK and HTB Comments on Annual Report.** Within thirty (30) calendar days after receipt of the Annual Report, VCK and HTB shall review the Annual Report and any supporting documentation, and VCK shall provide any comments that either or both of those Parties may have on those documents in writing to the City on behalf of HTB or HTB and VCK, as applicable. In the event that VCK requests in those comments, for itself and/or for HTB, that the City provide additional available final, non-confidential and unprivileged, pertinent supporting documents, information or data, the City shall have at least fourteen (14) calendar days, or such longer time as VCK and the City may mutually agree upon, to provide the requested information. In the event that VCK reasonably requests in those comments, for itself or for HTB, that the City provide additional final, non-confidential and unprivileged, pertinent supporting documents, information, or data that is not readily available or accessible, the City shall have a reasonable time to access the requested information, or, if and only if the City agrees to do so, to prepare the requested information, and in any event shall have not less than thirty (30) calendar days to respond to such request. VCK and HTB shall have thirty (30) calendar days after receipt of any supplemental information from Ventura referred to in this Paragraph to provide additional supplemental comments on the Annual Report to the City. If VCK submits additional supplemental comments on the Annual Report, then the City shall have an additional thirty (30) calendar days after receipt of such supplemental comments to respond and/or provide an explanation of why it is addressing the comments in an alternative manner.
- c. **Parties' Additional Responsibilities Regarding Annual Report.** Upon receipt of written comments on the Annual Report provided to the City pursuant to Paragraph 10.b., the City shall consider each of the comments and recommendations provided, and shall indicate to VCK in writing within thirty (30) calendar days after receipt of VCK's comments (or such longer period as VCK and the City may mutually agree upon) whether the City accepts such comments or recommendations, or, if the City rejects such comments or recommendations, the City shall provide a detailed explanation to VCK as to why the comments or recommendations are being rejected or responded to in an alternative manner. Taking into account the importance of using an adaptive management approach to, and preserving the City's policy role with respect to the objective identification, evaluation, and environmental review of potential Diversion Infrastructure Project alternatives, if the City in good faith does not accept the comments or recommendations provided under Paragraph 10.b., or responds to them in an alternative manner, and VCK in good faith, on behalf of itself or HTB, rejects the City's reasoning or alternative response, then the Parties shall meet and confer for purposes of resolving such dispute as set forth in

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### Memorandum of Agreement Regarding Settlement Terms

Paragraphs 8 and 9.

- d. **HTB Waiver.** HTB acknowledges that it has negotiated for the benefit of having VCK prepare, submit, and coordinate with the City on HTB's behalf regarding comments on the Annual Report as set forth in this Paragraph 10. Accordingly, HTB expressly waives its rights to independently comment on the Annual Report, and from and after VCK's submission to the City of any comments on the Annual Report pursuant to this Paragraph 10, HTB further expressly waives any rights HTB may have to challenge or bring any Claim against the City or VCK with respect to the adequacy of VCK's comments on the Annual Report, and/or any aspects of the Annual Report other than those addressed by VCK's comments.
- e. **Other City Deliverables.**
  - i. **Required Agency Permit Applications.** The City shall provide VCK and HTB with copies of all applications for Required Agency Permits that must be submitted to VCK and/or the Resource Agencies as set forth in Paragraph 5 at the time such applications are due (subject to any delays to accommodate the exercise by any Party of its rights under Paragraphs 8 and 9).
  - ii. **Correspondence with Resources Agencies Regarding Required Agency Permits.** In addition, the City shall provide VCK and HTB with copies of any substantive correspondence (including e-mail messages) between the City and the Resource Agencies concerning its applications for Required Agency Permits submitted by the City to the Resource Agencies under Paragraph 5.

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#### 11.) **Covenant Not to Administratively or Judicially Challenge or Sue, Phased Dismissals, Mutual Releases, and Waivers**

- a. **Covenant Not to Sue or Challenge.** Except as permitted by this Settlement Agreement in Paragraph 11.b, the Parties shall not advocate, pursue, or request a determination, permit, certification, or approval from, or petition, appeal, administratively, legally, or judicially challenge or sue, or otherwise support, encourage, or initiate any Claim before any one of the Agencies with Jurisdiction or any court with jurisdiction, to obtain any Legal or Regulatory Action that is contrary to the Settlement Agreement and that would be specific to, and binding upon, any Party. In the event that any Legal or Regulatory Action is issued or adopted that is contrary to the terms and conditions of this Settlement Agreement, each Party reserves all its rights to pursue any available Claim to address such Legal or Regulatory Action.
- b. **Exceptions to Covenant Not to Sue or Challenge.** Notwithstanding Paragraph 11.a. or the releases set forth in Paragraph 11.c. below, the Parties reserve and shall have the following rights to pursue Claims :
  - i. Any Party may administratively appeal or seek judicial review of the terms and conditions of any Required Agency Permits that are contrary to the Settlement Agreement.
  - ii. During the term of the Settlement Agreement, any Party may institute Claims to enforce the terms and conditions of, and remedy any breach of the Settlement Agreement, subject to and in strict accordance with Paragraphs 8 and 9 above.
  - iii. No Party shall be deemed to be precluded from bringing Claims or asserting arguments otherwise available to them in the absence of this Settlement Agreement in any administrative or judicial proceeding concerning general policy positions, the general validity of statutes, administrative rules, regulations, or general permits, or the general applicability and operation thereof, even if such statutes, administrative rules, regulations, general permits, or regulatory policies could be deemed to apply to the City, HTB, or VCK as part of a class of regulated entities, so long as no Party is individually named as a defendant or opponent in such Claim, and no Party contends that any other Party's actions or operations (including without limitation the Effluent discharges) are a reason for, or a case study for, supporting the general validity or invalidity of such statutes, administrative

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rules, regulations, general permits, or regulatory policies.

- iv. In the event that the City fails to implement the Approved Effluent Diversions on the Time Schedule because to do so would require construction and operation of Diversion Infrastructure Projects that are Financially Infeasible because, although the City will not need to raise its sewer rate to levels that would cause the Median Income Cap and the Annual Rate Cap components of Financial Infeasibility to be exceeded, the Total Net Investment for the Diversion Infrastructure Projects exceeds the Net Investment Cap, then the City shall not be in breach of this Settlement Agreement, and the Parties shall meet and confer as set forth in Paragraphs 8 and 9. Further, in addition to those remedies provided by this Settlement Agreement, the Parties agree that in such case, and solely in such case, HTB and VCK each reserve and retain any legal rights otherwise available to them in the absence of this Settlement Agreement to assert a Claim challenging the City's failure to implement Diversion Infrastructure Projects as necessary to make the Approved Effluent Diversions on the Time Schedule.
- v. In the event that the City causes or materially contributes to a significant and unlawful discharge of pollutants or waste to the Estuary that results in death of wildlife occupying the Estuary, or destruction and substantial, long-term degradation of habitat provided by the Estuary, then each of HTB and VCK reserves any legal rights otherwise available to them in the absence of this Settlement Agreement to administratively challenge such a discharge of pollutants or waste.
- vi. The reservations of rights set forth in Paragraphs 11.b.iii, 11.b.iv and 11.b.v. operate only to reserve and retain the rights of Parties to assert Claims that the Parties would otherwise be legally entitled to assert in the absence of this Settlement Agreement, but nothing in those provisions shall be interpreted to create any new rights or Claims, or any basis for a new Claim.

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#### c. Phased Dismissals, Mutual Releases.

- i. **Phased HTB Dismissal.** Upon execution of this Settlement Agreement by HTB and the City, those Parties shall take all reasonably required steps and actions, and shall jointly file the documents appropriate, to hold in abeyance or otherwise extend the City's date to respond to HTB's Petition A-1927(a), which is currently pending against the WRF NPDES Permit and/or the City (as a real party in interest) before the State Water Resources Control Board, until at least 120 days after the date of execution of this Settlement Agreement (or such other date mutually agreed to by HTB and the City) to accommodate cooperation of the Parties with respect to the City Public Process. So long as the City fulfills its obligations under this Settlement Agreement, HTB and the City each agree not to file any new Claim against the other during the City Public Process with respect to Petition A-1927(a) or the subject matter of this Settlement Agreement (including, without limitation, any Claim regarding the WRF NPDES Permit or any WRF discharges of Effluent), except as permitted by Paragraphs 11.b.ii, 11.b.iii, or 11.b.v., and 11.b.vi. Upon conclusion of the City Public Process and execution of the Final Settlement Agreement by HTB and the City, those Parties shall take all reasonably required steps and actions, and shall file the documents appropriate, to assure adequate dismissal with prejudice of all pending HTB Claims against the City regarding HTB's Petition A-1927(a) and discharges of Effluent and/or the WRF NPDES Permit, and to provide the mutual releases of pending Claims as set forth in this Paragraph and Paragraph 11.c.iii., and to release and limit all future Claims by the Parties as set forth in Paragraphs 11.a., 11.c.v., and 11.d.
- ii. **Phased VCK Dismissal.** Upon execution of this Settlement Agreement by VCK and the City, those Parties shall take all reasonably required steps and actions, and shall jointly file the documents appropriate, to extend the time to respond to the remaining Claims in Case No. CV-10-02072-GHK (PjWx) to a date that is at least 120 days after the date of execution of this Settlement Agreement (or such other date mutually agreed to by VCK and the City and approved by the District Court) to accommodate cooperation of the Parties with respect to the City Public Process. So long as the City fulfills its obligations under this Settlement Agreement, VCK and the City each

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agree not to file any new Claim against the other during the City Public Process with respect to in Case No. CV-10-02072-GHK (PJWx) or the subject matter of this Settlement Agreement, including, without limitation, any challenges regarding the WRF NPDES Permit or any WRF discharges of Effluent, except as permitted by Paragraphs 11.b.ii, 11.b.iii, or 11.b.v., and 11.b.vi. Upon conclusion of the City Public Process and execution of the Consent Decree by VCK and the City, those Parties shall take all reasonably required steps and actions, and shall jointly file any documents appropriate, to dismiss with prejudice all remaining Claims in Case No. CV-10-02072-GHK (PJWx), and any other pending VCK Claims against the City regarding discharges of Effluent and/or the WRF NPDES Permit, and to provide the mutual releases of pending Claims as set forth in this Paragraph and Paragraph 11.c.iv., and to limit all future Claims by the Parties as set forth in Paragraphs 11.a., 11.c.v., and 11.d.

#### **iii. Mutual Release of Pending Liability: HTB and the City.**

In consideration of the mutual obligations of this Settlement Agreement, HTB and the City agree that, effective upon execution of the Final Settlement Agreement by the HTB and the City, each of HTB and the City, for itself and for its owners, shareholders, members, directors, employees, agents, representatives, attorneys, affiliates, consultants, successors and assigns, shall fully release the other Party to the Final Settlement Agreement, and its respective owners, shareholders, members, directors, employees, agents, representatives, attorneys, affiliates, consultants, successors and assigns, and all persons, firms, and corporations having an interest in it, from any pending Claims, including Claims for attorneys' fees, experts' fees, and consultants' fees, and other technical and litigation costs and expenses, and any other sum incurred or claimed in connection with the remaining claims in State Water Resources Control Board Petition A-1927(a), including but not limited to the alleged failure, violation, or continuing violation of the City to comply with the CWA, Porter-Cologne, the WRF NPDES Permit, the City's municipal ordinances, or any other general or individual discharge permits, as set forth in or arising from the facts, circumstances, legal authorities or claims in State Water Resources Control Board Petition A-1927(a). This release includes a waiver, general release and covenant not to sue or file any Claim for fees of attorneys, experts, or consultants, and

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others, any costs or expenses, or any other sum incurred through the date of the execution by the Parties of the Final Settlement Agreement.

- iv. **Mutual Release of Pending Liability: VCK and the City.** In consideration of the mutual obligations of this Settlement Agreement, the City and VCK agree, effective upon execution of the Consent Decree by VCK and the City, each of VCK and the City, for itself and for its owners, shareholders, members, directors, employees, agents, representatives, attorneys, affiliates, consultants, successors, and assigns, shall fully release the other Party to the Consent Decree, and its respective owners, shareholders, members, directors, employees, agents, representatives, attorneys, affiliates, consultants, successors, and assigns, and all persons, firms, and corporations having an interest in it, from any pending Claims, including Claims for attorneys' fees, experts' fees, and consultants' fees, and other technical and litigation costs and expenses, and any other sum incurred or claimed in connection with the remaining Claims in Case No. CV-10-02072-GHK (PJWx), including but not limited to the alleged failure, violation, or continuing violation of the City to comply with the CWA, Porter-Cologne, the WRF NPDES Permit, the City's municipal ordinances, or any other general or individual discharge permits, as set forth in or arising from the facts, circumstances, legal authorities or claims in Case No. CV-10-02072-GHK (PJWx) This release includes a waiver, general release and covenant not to sue or file any Claim for fees of attorneys, experts, consultants, and others, costs or expenses, or any other sum incurred through the date of the execution by the Parties of the Consent Decree.
- v. **Mutual Release of Future Claims: All Parties.** In consideration of the mutual obligations of this Settlement Agreement and in furtherance of Paragraph 11.a., the Parties agree (effective, with respect to HTB and the City, upon execution of the Final Settlement Agreement, and effective, with respect to VCK and the City, upon execution of the Consent Decree) that each Party, for itself and for its owners, shareholders, members, directors, employees, agents, representatives, attorneys, affiliates, consultants, successors, and assigns, fully releases and covenants not to sue or assert any future Claims of any kind or nature, whether known or unknown, against the other Parties, or such Parties' respective

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owners, shareholders, members, directors, employees, agents, representatives, attorneys, affiliates, consultants, successors, and assigns, or persons, firms, and corporations having an interest in the Party, except as specifically and expressly permitted by the reservations of rights set forth in Paragraphs 11.a., 11.b, 14.c and 15. This release includes a waiver, general release, and covenant not to sue or file any Claim for future fees of staff, attorneys, experts, consultants, and others, or costs or expenses, or any other sum incurred in connection with this Settlement Agreement, the Final Settlement Agreement, or the Consent Decree, except as expressly permitted by Paragraphs 14.c and 15.

**d. General Provisions Regarding Waivers and Releases Executed Pursuant to this Settlement Agreement**

- i. Waiver of California Civil Code Section 1542:** In connection with the waivers and general releases of existing, future, known, and unknown Claims provided and/or executed pursuant to Paragraphs 9b.iii., 10.d., 11.a., 11.c., 13, 14.a., and 14.b, and subject only to the exceptions set forth in Paragraphs 11.b., 14.c.i. through 14.c.iv., and 15, each of the City, HTB, and VCK, on behalf of itself, and its owners, shareholders, members, directors, employees, agents, representatives, attorneys, affiliates, consultants, successors, and assigns, expressly waives, for the benefit of each other Party and all with respect to all waivers and releases set forth in the Settlement Agreement, the benefit of California Civil Code § 1542, which provides as follows:

**“A GENERAL RELEASE DOES NOT EXTEND TO ALL 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.”**

RC  
City' Initials

\_\_\_\_\_  
VCK's Initials

\_\_\_\_\_  
HTB's Initials

- ii. HTB Representations and Warranties.** Dr. Mark Gold, represents and warrants that he is authorized to execute this

Memorandum of Agreement Regarding Settlement Terms

owners, shareholders, members, directors, employees, agents, representatives, attorneys, affiliates, consultants, successors, and assigns, or persons, firms, and corporations having an interest in the Party, except as specifically and expressly permitted by the reservations of rights set forth in Paragraphs 11.a., 11.b, 14.c and 15. This release includes a waiver, general release, and covenant not to sue or file any Claim for future fees of staff, attorneys, experts, consultants, and others, or costs or expenses, or any other sum incurred in connection with this Settlement Agreement, the Final Settlement Agreement, or the Consent Decree, except as expressly permitted by Paragraphs 14.c and 15.

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**“A GENERAL RELEASE DOES NOT EXTEND TO ALL 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.”**

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City' Initials

  
\_\_\_\_\_  
VCK's Initials

\_\_\_\_\_  
HTB's Initials

- ii. **HTB Representations and Warranties.** Dr. Mark Gold, represents and warrants that he is authorized to execute this

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owners, shareholders, members, directors, employees, agents, representatives, attorneys, affiliates, consultants, successors, and assigns, or persons, firms, and corporations having an interest in the Party, except as specifically and expressly permitted by the reservations of rights set forth in Paragraphs 11.a., 11.b, 14.c and 15. This release includes a waiver, general release, and covenant not to sue or file any Claim for future fees of staff, attorneys, experts, consultants, and others, or costs or expenses, or any other sum incurred in connection with this Settlement Agreement, the Final Settlement Agreement, or the Consent Decree, except as expressly permitted by Paragraphs 14.c and 15.

**d. General Provisions Regarding Waivers and Releases Executed Pursuant to this Settlement Agreement**

- i. Waiver of California Civil Code Section 1542:** In connection with the waivers and general releases of existing, future, known, and unknown Claims provided and/or executed pursuant to Paragraphs 9b.iii., 10.d., 11.a., 11.c., 13, 14.a., and 14.b, and subject only to the exceptions set forth in Paragraphs 11.b., 14.c.i. through 14.c.iv., and 15, each of the City, HTB, and VCK, on behalf of itself, and its owners, shareholders, members, directors, employees, agents, representatives, attorneys, affiliates, consultants, successors, and assigns, expressly waives, for the benefit of each other Party and all with respect to all waivers and releases set forth in the Settlement Agreement, the benefit of California Civil Code § 1542, which provides as follows:

**“A GENERAL RELEASE DOES NOT EXTEND TO ALL 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.”**

\_\_\_\_\_  
City' Initials

\_\_\_\_\_  
VCK's Initials

  
\_\_\_\_\_  
HTB's Initials

- ii. HTB Representations and Warranties.** Dr. Mark Gold, represents and warrants that he is authorized to execute this

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Settlement Agreement and the Final Settlement Agreement, and to otherwise act on legal matters on behalf of HTB without seeking advice or counsel of an attorney licensed to practice law in California. Dr. Gold further represents and warrants that he is a person experienced in these types of legal agreements and transactions, and has substantial experience in reviewing, implementing, and enforcing agreements like this Settlement Agreement, as well as the legal and regulatory matters addressed herein. Dr. Gold acknowledges that the City has recommended that HTB have this Settlement Agreement reviewed by legal counsel, but, in the exercise of Dr. Gold's sole discretion acting as President of HTB, he has declined to have legal counsel review the terms of this Settlement Agreement based on his expertise and experience in legal matters like this one, and with respect to the federal Clean Water Act, the California Porter-Cologne Act, and state and federal Endangered Species Acts.



**HTB's Initials**

- 12.) **Compliance Monitoring Payments.** In full and final satisfaction of all of VCK's collective accrued and future attorneys' fees, legal and technical consultants' fees, staff fees and costs, experts' fees, expenses, and costs, and any other costs and expenses incurred by VCK in connection with implementing its obligations under this Settlement Agreement and the Consent Decree (when executed), including, without limitation, VCK's: participation and cooperation under Paragraph 7; its review and comment on the Annual Report and any other data, reports, studies, information, or documents prepared and provided to VCK and/or HTB pursuant to Paragraphs 7 and 10; its challenge to any Rate Rejection under Paragraph 6; its participation in any informal dispute resolution process under Paragraph 8; and/or its participation in any formal dispute resolution process under Paragraph 9.b. to address an Event of Implementation Constraint or Disagreement, the City shall pay VCK a total sum of \$120,000 in six equal annual payments of \$20,000 each, without interest or service charges of any kind. The first annual payment shall be due from the City to VCK on the date that is thirty (30) days after the Effective Date of the Consent Decree (regardless of the Effective Date of the Final Settlement Agreement), without further invoice or notice being required from VCK. The remaining five annual payments shall be made to VCK on the date that is the later of: (a) thirty (30) days after the City receives a written invoice from VCK requesting payment of the annual \$20,000 installment, or (b) the date that constitutes the first, second, third, fourth, and fifth year anniversaries (respectively) of the first annual

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payment. All payments shall be made payable to "Ventura Coastkeeper," addressed to those persons and at the address specified for notices by VCK in the Consent Decree, and shall be made available for VCK to collect when due at the City Clerk's office. The funds provided by the City to VCK under this Paragraph 12 shall only be used by VCK, on its own behalf and on behalf of HTB, for purposes of implementing its obligations under, and monitoring the status and progress of the City's compliance with the Settlement Agreement and the Consent Decree (when executed), and under no circumstances shall the funds be used to institute any Claim against the City, except a Claim for enforcement of the Settlement Agreement as permitted by, and pursuant to, Paragraphs 8, 9, 11.a., 11.b.i. and 11.b.ii. VCK shall keep an accounting of all expenditures charged against this \$120,000 monitoring fund. VCK shall provide a copy of this accounting to the City on the earlier date of (a) exhaustion of the \$120,000 fund, or (b) termination of the Consent Decree pursuant to Paragraph 16.

- 13.) HTB hereby expressly waives its rights to, and agrees not to seek to recover or make a Claim against the City for any accrued or future attorneys' fees, legal and technical consultants' fees, staff fees and costs, experts' fees, expenses, costs, or any other fees, costs and expenses incurred by HTB or VCK in connection with implementing HTB's or VCK's obligations under this Settlement Agreement and the Final Settlement Agreement (when executed), including, without limitation, fees, costs or expenses associated with HTB's and/or VCK's: participation and cooperation under Paragraph 7; their review and comment on the Annual Report and any other data, reports, studies, information, or documents prepared and provided to VCK and/or HTB pursuant to Paragraphs 7 and 10; their challenge to any Rate Rejection under Paragraph 6; their participation in any informal dispute resolution process under Paragraph 8; and/or their participation in any formal dispute resolution process under Paragraph 9.b. to address an Event of Implementation Constraint or Disagreement.

14.) **Attorneys' and Consulting Fees.**

- a. **Settlement of VCK's Staff, Attorneys' and Consultants' Fees Incurred through the Effective Date of the Consent Decree .** In full and final settlement of any and all of VCK's Claims for staff, attorneys', consultants', and experts' fees, expenses, and costs that VCK may be entitled to claim or collect in connection with the Settlement Agreement, Consent Decree, any and all Claims dismissed and released under Paragraphs 11.c.ii. and 11.c.iv., the City shall pay VCK the sum of Fifty Nine Thousand dollars (\$59,000) within thirty (30) days after the Effective Date of the Consent Decree. All payments shall be made payable to "Ventura Coastkeeper," addressed to those persons specified

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for notices by VCK in the Consent Decree, and shall be made available for VCK to collect when due at the City Clerk's office. Upon payment of such sum, VCK shall be deemed to have waived any further Claim for attorneys', consultants', and experts' fees, expenses, and costs accruing in connection with the claims dismissed and released under Paragraphs 11.c.ii and 11.c.iv.

- b. **Waiver of HTB's Staff, Attorneys' and Consultants' Fees Incurred through the Effective Date of the Final Settlement Agreement.** HTB hereby expressly waives its rights to, and agrees not to seek, demand, recover or make a Claim against the City for any staff, attorneys', consultants', and experts' fees, expenses, and costs incurred in connection with the Settlement Agreement, the Final Settlement Agreement, and any and all Claims dismissed and released under Paragraphs 11.c.i and 11.c.iii.
- c. **Future Attorneys' and Consulting Fees.** As set forth in Paragraphs 11.a. and 11.c.v. above, each and every Party releases any Claim for, and shall be responsible for all of its own future staff, attorneys', consultants', staff, and scientific, technical, or other experts' and consultants' fees, expenses, and costs incurred in connection with any Claim of whatever kind and nature, related to each Party's performance pursuant to, implementation of, or in any other way arising under or in connection with, this Settlement Agreement, including formal and informal dispute resolution under this Settlement Agreement, except that each of the Parties retains and reserves its rights to make a Claim for an award of staff, attorneys', consultants', and/or experts fees, expenses, and costs pursuant to the following exceptions:
  - i. as otherwise set forth in Paragraph 9.a. with respect to compensation of a Scientific Review Panel; provided, however, that in the event that any Party refers an issue to the Scientific Review Panel that is determined by dispute resolution under Paragraphs 8 and 9.b. to be frivolous or primarily for purposes of harassment or delay, then the dispute resolver under Paragraph 9.b. shall have the authority to award costs of such dispute resolution proceeding as well as reasonable attorneys', consultants, and experts' fees to the prevailing Party in the scientific dispute resolution proceeding;
  - ii. as otherwise set forth in Paragraph 12 regarding compliance monitoring fees that the City has agreed to pay;
  - iii. as otherwise set forth in Paragraph 15 regarding penalties the

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City has agreed to pay in the event that it fails to timely deliver the Annual Report, and

iv. The prevailing or substantially prevailing party in any formal dispute resolution proceeding brought pursuant Paragraphs 9.b. and 11.b.ii for a breach of the Settlement Agreement shall receive its reasonable costs and attorney's fees incurred in accord with the standard established by § 505 of the Clean Water Act, 33 U.S.C. §1365. Such fees and costs paid to the prevailing or substantially prevailing party in the formal dispute resolution proceeding under Paragraph 9.b. for a breach of the Settlement Agreement, provided, however, that:

- no Party shall be permitted to demand or make a Claim for any fees, costs, or expenses incurred in pursuing informal dispute resolution under Paragraph 8, which is necessary as a prerequisite to invoking formal dispute resolution under Paragraph 9.b.;
- no Party shall be permitted to demand or make a Claim for any fees, costs, or expenses incurred in pursuing formal dispute resolution for an Event of Implementation Constraint or Disagreement under Paragraph 9.b.;
- no Party shall make any demand for attorneys' fees during any informal dispute resolution proceeding under Paragraph 8; and
- no Party shall attempt to condition, or demand that any informal dispute resolution proceeding under Paragraph 8, or any formal dispute resolution proceeding under Paragraph 9.b. be conditioned upon, the payment of such Party's attorneys', experts', staff's, or consultants' fees, costs, or expenses incurred in pursuing informal dispute resolution.

Accordingly, except as expressly set forth in this Paragraph 14.c., no Party shall make any demand or Claim for attorneys', consultants', staff, and scientific, technical, or other experts' and consultants' fees, sums, expenses, and costs in connection with contesting a Rate Rejection, fulfilling participation and cooperation obligations, review or comment on the Annual Report, compliance monitoring, or informal or formal dispute resolution proceeding.

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- 15.) **Monetary Penalties.** Unless the City obtains an extension of an applicable due date for good cause, which extension shall not be unreasonably withheld by VCK, if the City fails to submit the Annual Report to VCK at the time due under Paragraph 10.a, then VCK shall provide written notice to the City of such failure, and the City shall have fifteen (15) calendar days as a grace period to cure its failure to provide the report to VCK. If the City fails within fifteen calendar days after receipt of VCK's written notice to provide the Annual Report to VCK, then the City shall pay stipulated payments accruing from the sixteenth calendar day following the VCK notice until the date that the City provides the Annual Report as follows:

<u>Period of Noncompliance</u>	<u>Payment Per Violation</u>
Days 1-30	\$100 per day
Days 31-60	\$200 per day
Days over 60	\$500 per day

VCK shall use its best efforts to obtain a written agreement by and among the City, VCK and California State University Channel Islands, that is acceptable to the Department of Justice, and binding upon the University to accept and use any stipulated payments that become due and payable by the City under this Paragraph to fund activities which benefit the watershed and ocean environments in and surrounding the watersheds in the area affected by City discharges of Effluent. Provided that such written agreement is obtained, the City shall tender any stipulated payments that become due and payable hereunder to California State University Channel Islands, to be used solely to fund activities other than litigation that benefit the watershed and ocean environments in and surrounding the watersheds in the area affected by the Effluent, and the City shall send such payments via overnight mail to: California State Channel Islands University, Grants and Contracts, Finance and Administration, attention: Leo Cervantes, One University Drive, East Tower #1762, Camarillo, CA 93012. The City shall send written notice to VCK once it has sent any such payments. If California State University Channel Islands has not provided the written agreement referenced in this Paragraph by the time that VCK and the City are prepared to execute the Consent Decree, then such written agreement shall be entered into with The Nature Conservancy, or another environmental organization that is mutually acceptable to, and agreed upon by VCK and the City.

- 16.) **Termination.**

This Settlement Agreement shall terminate as between VCK and the City on the date that the Consent Decree is fully executed by those Parties. This Settlement

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### Memorandum of Agreement Regarding Settlement Terms

Agreement shall terminate as between HTB and the City on the date that the Final Settlement Agreement is fully executed by those Parties. The Consent Decree between the City and VCK, and the Final Settlement Agreement between the City and HTB shall each and both terminate on the earlier of the following dates: (1) the last date of the period in which the City has commenced operation of the Diversion Infrastructure Projects and operated the projects for five (5) years; or (2) the last date of the period in which the City has commenced operation of the Diversion Infrastructure Projects and operated the projects for three (3) years in a manner that has achieved zero Direct Discharge (other than any Direct Discharges occurring due to Breakdown Situations or Maintenance, Health and Safety Situations).

#### 17.) **General Provisions.**

- a. **Successors and Assigns.** The provisions of this Settlement Agreement apply to and bind each of VCK, HTB, and the City, including each Party's directors, employees, owners, members, agents, representatives, shareholders, servants, contractors, consultants, successors, assigns, and legal affiliates. No change in structure, ownership, corporate, or other legal status of any Party, nor any transfer of the assets or liabilities of any Party, shall in any way alter the responsibilities of such Party under this Settlement Agreement, including its directors, employees, owners, members, agents, representatives, shareholders, servants, contractors, consultants, successors, assigns, and legal affiliates.
- b. **Authority.** Each of the undersigned representatives of the Parties certifies that he/she is fully and legally authorized by the Party to enter into this Settlement Agreement, execute it on behalf of the indicated Party, and to legally bind the represented Party to its terms. In any action to enforce this Settlement Agreement, no Party shall raise as a defense the failure by any of its directors, employees, owners, members, agents, representatives, shareholders, servants, contractors, consultants, successors, assigns, or legal affiliates to take actions necessary to comply with this Settlement Agreement.
- c. **Modification.** The terms and conditions of this Settlement Agreement may not be changed, discharged, or terminated unless by a written document or instrument, signed by all the Parties affected by the proposed action.
- d. **Continuing Jurisdiction.** The Parties stipulate that the District Court for the Central District of California shall retain jurisdiction to enforce the terms and conditions of this Settlement Agreement and the Consent Decree, and to resolve disputes pursuant to Paragraph 9.b., and otherwise

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### Memorandum of Agreement Regarding Settlement Terms

as may be necessary or appropriate for the interpretation, implementation, construction, or execution of this Settlement Agreement, the Consent Decree, and/or the Final Settlement Agreement. Each Party hereby waives all current and future objections it may have to the District Court's establishment or retention of jurisdiction over this Settlement Agreement, the Final Settlement Agreement, or the Consent Decree, and each Party agrees to take such further actions, including preparing and filing such documents with the Court as may be necessary to enable the Court to establish or retain jurisdiction for the purposes set forth in this Paragraph.

- e. **Counterparts.** This Settlement Agreement may be executed in any number of counterparts, all of which together shall constitute one original document. Telecopy, scanned copies (i.e., pdf) and/or facsimile copies of original signatures shall be deemed to be original signatures for purposes of executing counterparts of this Settlement Agreement, and any amendments, modifications, revisions, or notices to terminate this Settlement Agreement.
- f. **No Effect on the SSOs Consent Decree.** The terms and conditions of this Settlement Agreement shall not be interpreted, applied or implemented that would, in any way, alter, modify, revise, terminate, or supersede the provisions of that certain consent decree and stipulated dismissal entered into by and among VCK and the City, and approved by the District court for the Central District of California, releasing and dismissing those single and/or continuing sewer system overflow related violations alleged by VCK in connection with Claims III through V of the Complaint filed in Civil Case No. CV-10-02072-GHK(PJWx).
- g. **Notices.** Any notifications, submissions, or communications to VCK, the City, or HTB pursuant to this Settlement Agreement shall be, to the extent feasible, sent via electronic mail transmission to the e-mail addresses listed below (electronic return receipt requested) or, if electronic transmission is not feasible, via overnight or hand delivery to the addresses below. Any change in the individuals or addresses designated by any Party must be made in writing to all Parties.

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**Memorandum of Agreement Regarding Settlement Terms**

**If to VCK:**

Christopher Sproul  
ENVIRONMENTAL  
ADVOCATES  
5135 Anza Street  
San Francisco, CA 94121  
Telephone: (415) 533-3376  
Facsimile: (415) 358-5695  
Email:  
csproul@enviroadvocates.com

Jason Weiner, Staff Attorney  
Wishtoyo Foundation's Ventura  
Coastkeeper Program  
3875-A Telegraph Rd., #423  
Ventura, CA 93003  
Telephone: (805) 823-3301  
Email:  
jweiner.venturacoastkeeper@wishtoyo.org

**If to the City:**

Rick Cole  
City Manager, City of San  
Buenaventura  
501 Poli Street, Room 205  
Ventura, CA 93002-0099  
Telephone: (805) 654-7740  
Email:  
citymanager@ci.ventura.ca.us

Rick Raives  
Public Works Director, City  
of San Buenaventura  
501 Poli Street, Room 120  
Ventura, CA 93002-0099  
Telephone: (805) 652-4518  
Email:  
rraives@ci.ventura.ca.us

Shana Epstein  
Chief, City of San  
Buenaventura Water Dept.  
336 Sanjon Ventura, CA 93001  
Telephone: (805) 652-4503  
Email:  
sepstein@ci.ventura.ca.us

Ariel Calonne  
City Attorney, City of San  
Buenaventura  
501 Poli Street, Suite 26  
Ventura, CA 93002-0099  
Telephone: (805) 654-7818  
Email:  
acalonne@ci.ventura.ca.us

**If to HTB:**

Mark Gold  
President  
Heal the Bay  
1444 9<sup>th</sup> Street  
Santa Monica, CA 92401  
Telephone: (310) 451-1500  
Email: mgold@healthbay.org

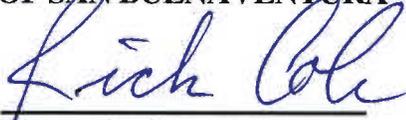
Kirsten James  
Director Water Quality  
Heal the Bay  
1444 9th Street  
Santa Monica, CA 92401  
Telephone: (310) 451-1500  
Email: kjames@healthbay.com

**Confidential Federal Rule of Evidence 408 Communication**

**Memorandum of Agreement Regarding Settlement Terms**

**In Witness Whereof, the Parties hereto enter into this Settlement Agreement, effective as of the last date entered below.**

**CITY OF SAN BUENAVENTURA**

**By:**   
Rick Cole, City Manager

**Date:** 8/11/11

**APPROVED AS TO FORM FOR  
CITY OF SAN BUENAVENTURA**

**By:**   
Ariel Calonne, City Attorney

**Date:** 8-11-11

**WISHTOYO FOUNDATION/  
VENTURA COASTKEEPER**

**By:** \_\_\_\_\_  
Mati Waiya, Executive Director

**Date:** \_\_\_\_\_

**APPROVED AS TO FORM FOR  
WISHTOYO FOUNDATION/  
VENTURA COASTKEEPER**

**By:** \_\_\_\_\_  
Jason A. Weiner, Staff Attorney

**Date:** \_\_\_\_\_

**Heal the Bay**

**By:** \_\_\_\_\_  
Mark Gold, President

**Date:** \_\_\_\_\_

**Confidential Federal Rule of Evidence 408 Communication**

**Memorandum of Agreement Regarding Settlement Terms**

**In Witness Whereof, the Parties hereto enter into this Settlement Agreement, effective as of the last date entered below.**

**CITY OF SAN BUENAVENTURA**

**By:** \_\_\_\_\_  
Rick Cole, City Manager

**Date:** \_\_\_\_\_

**APPROVED AS TO FORM FOR  
CITY OF SAN BUENAVENTURA**

**By:** \_\_\_\_\_  
Ariel Calonne, City Attorney

**Date:** \_\_\_\_\_

**WISHTOYO FOUNDATION/  
VENTURA COASTKEEPER**

**By:**   
Mati Waiya, Executive Director

**Date:** 8-10-2011

**APPROVED AS TO FORM FOR  
WISHTOYO FOUNDATION/  
VENTURA COASTKEEPER**

**By:**   
Jason A. Weiner, Staff Attorney

**Date:** 8/10/2011

**Heal the Bay**

**By:** \_\_\_\_\_  
Mark Gold, President

**Date:** \_\_\_\_\_

**Confidential Federal Rule of Evidence 408 Communication**

**Memorandum of Agreement Regarding Settlement Terms**

**In Witness Whereof, the Parties hereto enter into this Settlement Agreement, effective as of the last date entered below.**

**CITY OF SAN BUENAVENTURA**

**By:** \_\_\_\_\_  
Rick Cole, City Manager

**Date:** \_\_\_\_\_

**APPROVED AS TO FORM FOR  
CITY OF SAN BUENAVENTURA**

**By:** \_\_\_\_\_  
Ariel Calonne, City Attorney

**Date:** \_\_\_\_\_

**WISHTOYO FOUNDATION/  
VENTURA COASTKEEPER**

**By:** \_\_\_\_\_  
Mati Waiya, Executive Director

**Date:** \_\_\_\_\_

**APPROVED AS TO FORM FOR  
WISHTOYO FOUNDATION/  
VENTURA COASTKEEPER**

**By:** \_\_\_\_\_  
Jason A. Weiner, Staff Attorney

**Date:** \_\_\_\_\_

**Heal the Bay**

**By:**   
Mark Gold, President

**Date:** August 9, 2011

## Confidential Federal Rule of Evidence 408 Communication

### Attachment "A" To Memorandum of Agreement Regarding Settlement Terms Terms and Definitions

Unless otherwise expressly defined herein, terms used in this Settlement Agreement that are defined in the CWA or in regulations or rules promulgated under the CWA have the meaning assigned to them in those statutes, regulations or rules. Whenever terms listed below are used in this Settlement Agreement, the following definitions apply:

- A. "ACOE" means the United States Army Corps of Engineers.
- B. "Agencies with Jurisdiction" means, CDFG, RWQCB, ACOE, NMFS, USFWS, and other governmental agencies with jurisdiction to environmentally review, consult with respect to, certify, approve, condition, or otherwise permit Diversion Infrastructure Projects, components thereof, or over the elimination of Direct Discharge, and/or the implementation of alternative discharges of Effluent to new or different locations or uses.
- C. "Annual Rate Cap" means a 3% increase in any one year during the Time Schedule.
- D. "Approved Effluent Diversions" means that volume or flow of Effluent diversion permitted and approved for diversion from Direct Discharge to the Estuary by the Resources Agencies pursuant to Paragraph 5 of this Agreement.
- E. "Breakdown Situations" means any temporary event occurring after construction of the Diversion Infrastructure Projects and implementation of Effluent diversions that is beyond the City's reasonable control and that precludes the City from diverting Effluent, or materially reduces the volume of Effluent that may be diverted from Direct Discharge, such as:
  - i. an Event of Force Majeure;
  - ii. a rainfall event or series of events exceeding the Five-Year 24-Hour Storm Event or the Five-Year 30-Day Storm Event such that diversion of Effluent to the constructed Diversion Infrastructure Projects is precluded, and/or the potential for inundation of the WRF facilities creates a material risk that a WRF treatment unit process may be bypassed; and/or
  - iii. any mechanical failure of facilities, equipment or processes, whether operated by the City or by other water districts or users to whom the City may transfer Effluent, required to implement diversions of Effluent from Direct Discharge or to the Water Reclamation Uses and/or Treatment Wetlands.
- F. "CDFG" means the California Department of Fish and Game.
- G. "City" means the City of San Buenaventura, a California chartered City.

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- H. "City Public Process" means a ninety (90) to one hundred twenty (120) calendar day public communications and outreach process, to be conducted by the City after final execution of the Settlement Agreement, but prior to execution of the Final Settlement Agreement and Consent Decree, consisting of written, oral, and electronic communications, as well as public meetings, workshops, and City Council hearings to explain and allow stakeholders and the City's electorate to evaluate the policy importance of the Settlement Agreement, its goals, terms, conditions, its likely community and environmental benefits, and its likely impacts on the community, including, without limitation, potential water and sewer revenue measures that are anticipated to be necessary to comply with the Settlement Agreement.
- I. "Claim" means any legal, administrative, judicial or other claim, charge, demand, cause of action, challenge, lawsuit, petition, appeal, or other request for remedy of any kind or nature, at law or in equity, including, without limitation, those for violations of law or regulation, or for injunctive relief, declaratory relief, specific performance, damages, penalties, fines, sanctions, fees, costs, expenses, or monetary sums of any kind.
- J. "Consent Decree" means a proposed consent decree, which shall be consistent with, and implement all terms and conditions, of this Settlement Agreement, and, when executed, shall supersede this Settlement Agreement, together with any stipulated dismissal with prejudice, and any other required documents, which shall be entered into, executed, and filed jointly by VCK and the City with the District Court for the Central District of California in Case No. CV 10-02072-GHK (PJWx), as necessary to dismiss with prejudice all remaining VCK claims against the City, and to provide all releases and limit all future challenges against the City and VCK as set forth herein.
- K. "Construction Implementation Constraints" means, as applicable, the occurrence(s) of any of the following in a manner that precludes, prevents or impedes the City's construction of the Diversion Infrastructure Projects by the Time Schedule specified in this Settlement Agreement or the achievement of the Effluent diversions required by this Settlement Agreement: 1) Technical Infeasibility, 2) Financial Infeasibility, and/or 3) Regulatory Infeasibility.
- L. "CWA" means the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et. seq.*
- M. "Debt Service" means the interest and other costs of bond issuance which must be paid to finance the Total Net Investment in specified types of City sewer related capital projects, but, to eliminate "double counting," excludes the amount of the bond principle to be repaid to debt holders, which amount is already "counted" as the Total Net Investment in infrastructure and capital projects.

## Confidential Federal Rule of Evidence 408 Communication

### Attachment "A" To Memorandum of Agreement Regarding Settlement Terms Terms and Definitions

- N. "Design Considerations" means that the capacity for reclamation and diversion infrastructure projects is designed to accept the total combined flow or volume of Effluent and rainfall during a Five Year 24-Hour Storm Event, and a Five-Year 30-Day Storm Event, except during Maintenance, Health and Safety Situations or Breakdown Situations.
- O. "Direct Discharge" means any discharge of Effluent to the Estuary from the WRF or the WRF's existing wildlife treatment ponds, excluding those discharges of Effluent to the Estuary from Treatment Wetlands that are approved by the Resources Agencies, and that are otherwise conducted pursuant to the terms of this Settlement Agreement, which discharges of Effluent to the Estuary may be permitted as set forth herein.
- P. "Diversion Infrastructure Project" or "Diversion Infrastructure Projects" means those reclamation and diversion infrastructure projects, including the Treatment Wetlands that cumulatively will have the capacity, taking into account and subject to the Design Considerations, Construction Implementation Constraints, and Operational Implementation Constraints, to divert to Water Reclamation Uses and/or Treatment Wetlands the Maximum Feasible Diversion Volume.
- Q. "Effective Date" means the date that additional, more detailed legally binding documents, consistent with and implementing this Settlement Agreement, take effect and are binding upon the Parties. With respect to the document executed by HTB and the City, such date shall be the date that duly authorized representatives of both HTB and the City fully execute the Final Settlement Agreement. With respect to VCK and the City, such date shall be the last date for the United States Department of Justice to comment on the Consent Decree, *i.e.*, the 45<sup>th</sup> day following the United States Department of Justice's receipt of the Consent Decree.
- R. "Effluent" means current and future anticipated WRF tertiary treated sewage effluent, which also constitutes recycled water.
- S. "Estuary" means the Santa Clara River Estuary.
- T. "Event of Force Majeure" is an event which renders the City's compliance with the Settlement Agreement impossible, despite the timely and reasonable efforts of the City, due to circumstances beyond the control of the City or its agents, and which could not have been reasonably foreseen and prevented by the exercise of due diligence by the City. Any delays or failure to properly perform as required by this Settlement Agreement due to the City's failure to make timely and bona fide applications and to exercise reasonable and diligent efforts to comply with the terms in this Settlement Agreement, or due to normal inclement weather events taken into account by the Design Considerations, shall not, in any event, be considered to be an Event of Force Majeure.

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### Attachment "A" To Memorandum of Agreement Regarding Settlement Terms Terms and Definitions

- U. "Event of Implementation Constraint or Disagreement" means that one Party believes that one of the following has occurred: (a) a Construction Implementation Constraint; or (b) an Operational Implementation Constraint, or (d) a disagreement among the Parties regarding the terms and conditions of this Settlement Agreement, including, a disagreement regarding: (i) the existence, extent or effect of, or the appropriate response to a Construction Implementation Constraint, or an Operational Implementation Constraint; (ii) the appropriate Maximum Feasible Diversion Volume; (iii) the appropriate Time Schedule or extension to a Time Schedule; (iv) the existence, extent or effect of, or appropriate response to a Rate Rejection; (v) the appropriate Maximum Ecologically Protective Diversion Volume; or (vi) any other disagreement regarding the interpretation or implementation of the terms of this Settlement Agreement.
- V. "Event of Implementation Constraint, Disagreement, or Breach" means that one Party believes that one of the following has occurred: (a) an Event of Implementation Constraint or Disagreement, or (b) a violation or breach by a Party of the Settlement Agreement, or, when executed, of the Final Settlement Agreement or Consent Decree.
- W. "Financial Infeasibility" or "Financially Infeasible" means:
- i. that the increment of revenue needed to fund the Total Net Investment and Debt Service for the planning, design, engineering, environmental review, permitting, construction, and implementation of only the Diversion Infrastructure Projects and/or Effluent diversions will necessitate a total increase in the City's base cost of service sewer fees and/ or sewer rate of more than the Annual Rate Cap.
  - ii. the sum of the revenues needed for: (a) the City's sewer-related operations, management and maintenance duties, (b) the Total Net Investment and Debt Service for planning, design, engineering, environmental review, permitting, construction, and implementation of the City's adopted Capital Improvement Plan and Sewer Master Plan projects, and (c) the Total Net Investment and Debt Service for planning, design, engineering, environmental review, permitting, construction, and implementation of the Diversion Infrastructure Projects and/or Effluent diversions, together cumulatively require total net expenditures by the City that necessitate total average annual base cost of service sewer fees and/or a sewer rate at any time during the Time Schedule exceeding the Median Income Cap.
  - iii. the Total Net Investment needed for the planning, design, engineering, environmental review, permitting, construction, and implementation of the Diversion Infrastructure Projects and/or Effluent diversions exceeds the Net Investment Cap.

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### Attachment "A" To Memorandum of Agreement Regarding Settlement Terms Terms and Definitions

- X. "Final Settlement Agreement" means a final settlement agreement, which shall be consistent with, and designed to implement all terms and conditions of, this Settlement Agreement, and, when executed, shall supersede this Settlement Agreement, together with any stipulated dismissal with prejudice, and any other required documents, all of which shall be to be entered into, executed and filed jointly by HTB and the City with the State Water Resources Control Board and any other all applicable governmental agencies with jurisdiction, as necessary to dismiss with prejudice all pending HTB administrative and/or legal challenges against the City regarding discharges of Effluent and/or the WRF NPDES Permit, including State Water Resources Control Board Petition A-1927(a), and to provide all HTB releases and limit all future challenges by or against the City, or HTB, and/or their operations as set forth herein.
- Y. "Five-Year 24-Hour Storm Event" means that amount of total rainfall generated from a rain event or series of rain events occurring over the course of a 24-hour period that, on average based on the historical rainfall records, occurs only once every five years.
- Z. "Five-Year 30-Day Storm Event" means that amount of total rainfall generated from a series of rain events occurring over the course of a 30-day period that, on average based on the historical rainfall records, occurs only once every five years.
- AA. "HTB" means Heal the Bay, a 501(c)(3) nonprofit organization.
- BB. "Legal or Regulatory Action" means any action, ruling, permit, certification, or approval, or any provision, term, effluent limitation, or other condition thereof, or any other similar regulatory requirement adopted or issued, and enforceable by an Agency with Jurisdiction or a court with jurisdiction.
- CC. "Maintenance, Health and Safety Situations" means any temporary event occurring after construction of the Diversion Infrastructure Projects and implementation of Effluent diversions that precludes the City from diverting Effluent, or materially reduces the volume of Effluent that may be diverted from Direct Discharge, due to either (i) the creation by normal operations of a threat to public health and safety that is beyond the City's reasonable control, and/or (ii) the need to implement maintenance, repairs, safety measures or capital improvements to assure the proper continued operation of the Diversion Infrastructure Projects, such as:
- i. An inability to divert Direct Discharge or deliver Effluent to Water Reclamation Uses and/or the Treatment Wetlands that may be foreseen, but is unavoidable because any of the facilities, equipment, or processes (whether operated by the City or by other water districts or users to whom the City may transfer Effluent) diverting Effluent to the Water Reclamation Uses and/or

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### Attachment "A" To Memorandum of Agreement Regarding Settlement Terms Terms and Definitions

Treatment Wetlands must be "offline" for emergency or scheduled maintenance, repair, replacement, capital upgrades, implementation of safety measures or similar types of work;

- ii. An inability to deliver Effluent to Water Reclamation Uses and/or the Treatment Wetlands arising due to an Event of Force Majeure that occurs despite the City's reasonable diligence, and creates a credible risk of causing a discharge, spill, or release resulting in a nuisance, or adverse impacts public health, safety, or the environment.
- DD. "Maximum Ecologically Protective Diversion Volume" means the maximum volume or flow of Effluent appropriate to divert from Direct Discharge that is ecologically protective of the Estuary, the Estuary's aquatic species, and the Estuary watershed, which volume or flow shall be conclusively established for purposes of this Settlement Agreement as set forth in Paragraph 5.c., or, if disagreement arises in the process set forth in Paragraph 5.c, the volume or flow shall be conclusively established by way of the meet-and-confer process set forth in Paragraph 8, or, if necessary, by way of formal dispute resolution as set forth in Paragraph 9.a. of this Settlement Agreement.
- EE. "Maximum Feasible Diversion Volume" is a term that will guide the determination and construction of infrastructure project capacity pursuant to this Settlement Agreement, and means a minimum average annual volume or flow of Effluent that can be diverted from Direct Discharge, which should be comprised of no less than 50% of the WRF total average annual Effluent volume and up to 100% of its total average annual Effluent volume, unless and except to the extent that such diversions are infeasible to achieve due to Construction Implementation Constraints, in which case "Maximum Feasible Diversion Volume" shall mean the greatest average annual volume or flow of Effluent that can be directed to Water Reclamation Uses and is not Technically Infeasible, Regulatorily Infeasible, or Financially Infeasible.
- FF. "Median Income Cap" means 1.2% of the City's annual median household income measured at any time during the Time Schedule.
- GG. "Net Investment Cap" means Fifty Five Million Dollars (\$55,000,000), increased on the date of calculation of the financial cap by the same percentage as the percentage increase in the Engineering Record News Construction Cost Index occurring between the Effective Date and the date of calculation.
- HH. "NMFS" means the National Marine Fisheries Service (also known as the National Oceanic and Atmospheric Administration's Division of Fisheries).
- II. "NPDES" means National Pollution Discharge Elimination System.

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### Attachment "A" To Memorandum of Agreement Regarding Settlement Terms Terms and Definitions

- JJ. "Operational Implementation Constraints" means, as applicable, the occurrence(s) of any of the following in a manner that precludes or impedes the City's operation of the Diversion Infrastructure Projects or the achievement of the Effluent diversions required by this Settlement Agreement by or after the Time Schedule specified in this Settlement Agreement: 1) Technical Infeasibility; 2) Financial Infeasibility; 3) Regulatory Infeasibility; 4) Breakdown Situations; or 5) Maintenance, Health and Safety Situations.
- KK. "Parties" means collectively the City, VCK, and HTB.
- LL. "Party" means, individually, the City, VCK, or HTB.
- MM. "Porter-Cologne" means the California Porter-Cologne Water Quality Control Act, California Water Code §§ 130000 *et seq.*
- NN. "Rate Rejection" means ratepayers succeed in any challenge to, or otherwise successfully legally prevent (pursuant to provisions of the California Constitution or otherwise), the City's rate increases or revenue measures necessary to finance the Diversion Infrastructure Projects and/or Effluent diversions as required by, and consistent with, the terms and conditions of this Settlement Agreement.
- OO. "Regulatory Infeasibility" or "Regulatorily Infeasible" means the failure to secure from Agencies with Jurisdiction the necessary approvals or permits needed to comply with the Settlement Agreement despite the City's timely and reasonable efforts to do so.
- PP. "Required Agency Permit" or "Required Agency Permits" means one or all of the legally required environmental reviews, consultations, permits, certifications and other approvals (including, but not limited to Waste Discharge Requirements pursuant to California Water Code section 13000 *et seq.*, an NPDES permit pursuant to Clean Water Act section 402, and incidental take authorization pursuant to section 7 or section 10 of the federal Endangered Species Act) that must be issued by any one of the Agencies with Jurisdiction to lawfully implement Diversion Infrastructure Projects, or components thereof, or diversions or alternative discharges of Effluent to new or different locations or uses and/or as necessary to eliminate Direct Discharges.
- QQ. "Resources Agencies" means USFWS, CDFG, NMFS, RWQCB and all other governmental agencies with jurisdiction to environmentally review, consult with respect to, certify, approve, condition or otherwise permit diversions from Direct Discharge, and/or alternative discharges of Effluent to new or different locations or uses.
- RR. "RWQCB" means the Los Angeles Regional Water Quality Control Board.

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- SS. “Scheduled Maintenance, Health and Safety Situations” means any Maintenance, Health and Safety Situations that are anticipated, are within the control of the City, and can be scheduled to occur during a certain time period by the City.
- TT. “Technical Infeasibility” or “Technically Infeasible” means that construction of the Diversion Infrastructure Projects by the Time Schedule specified by this Settlement Agreement is not possible despite the City’s reasonable efforts due to engineering, physical, environmental, or other technical problems beyond the City’s reasonable control.
- UU. “Time Schedule” means on or before January 1, 2025, or by such later date established as set forth in Paragraphs 8 and 9.
- VV. “Total Net Investment” means the total capital investment (*i.e.*, the bond principle amount) that is needed for planning, design, engineering, environmental review, permitting, construction, and implementation of the applicable activities or infrastructure, after offsetting or crediting the total capital investment or bond principle required by: all revenues generated from grants or state revolving fund loans; proceeds from the sales of Effluent diversions or the rights to reclaimed Effluent; and/or other revenues available for sewage and reclamation system expenses or capital investments generated from other non-ratepayer sources of funding realized by the City.
- WW. “Treatment Wetlands” means natural treatment systems other than the existing wildlife treatment ponds, constructed in uplands and/or as a retrofit of the wildlife treatment ponds, which shall be designed, engineered, and constructed such that, in combination with WRF upgrades to plant treatment unit processes, Effluent discharged from the natural treatment systems shall not, as mutually determined by the Parties and permitted by the RWQCB during the NPDES permitting process, cause or contribute to a violation of any applicable receiving waterbody water quality objectives, impair any receiving waterbody beneficial uses, or contain nitrate in concentrations greater than 4.0 mg/L as a monthly average.
- XX. “USFWS” means the United States Fish and Wildlife Service.
- YY. “VCK” means Wishtoyo Foundation’s Ventura Coastkeeper Program, Wishtoyo Foundation being a 501(c)(3) nonprofit organization.
- ZZ. “Ventura” means the City.
- AAA. “Water Reclamation Uses” means diversion or delivery of Effluent to uses to improve or enhance beneficial uses (as defined under Porter Cologne and designated in the RWQCB’s Water Quality Control Plan (Basin Plan)) or otherwise for purposes of improving conservation of, providing supply in lieu of, or offsetting use of. other designated sources of state, regional, or local water

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supply, including, without limitation, urban landscape irrigation, agricultural irrigation, groundwater injection, groundwater percolation or recharge, groundwater injection to combat sea water intrusion, delivery to, and provision of water to another agency for any of the foregoing uses, and/or diversion or delivery of Effluent to enhance water conservation or for other appropriate uses, such as once-through cooling for power plants.

BBB. "WRF" means the Ventura Water Reclamation Facility.

CCC. "WRF NPDES Permit" means RWQCB Order No. R4-2008-0001 and NPDES No. CA00053651, together with any time schedule orders that may be issued by the RWQCB in conjunction therewith, and any renewal, revision, or replacement thereof, or any superseding Order, NPDES permit, or associated time schedule orders.