

SETTLEMENT AGREEMENT BETWEEN THE CITY OF SPOKANE AND SIERRA CLUB REGARDING DRY WEATHER COMBINED SEWER OVERFLOWS

- 1. Parties:** The parties are the City of Spokane, WA, a municipal corporation of the State of Washington (“City”), and Sierra Club, a non-profit corporation.
- 2. Subject Matter:** By letter of July 13, 2006 (“Notice Letter”), Sierra Club notified the City through its Mayor, Dennis Hession, of its intention to file a lawsuit under the Clean Water Act or CWA pursuant to section 505 (b) (33 U.S.C. §1356(b)) concerning alleged violations of the City of Spokane’s National Pollution Discharge Permit Elimination System (NPDES) permit by allegedly allowing recurring and ongoing dry weather Combined Sewage Overflows (DWCSOs) of raw/untreated sewage to the Spokane River, and by failing to provide the appropriate level of maintenance and monitoring as required by the NPDES permit. The City disputed the basis of the Sierra Club’s assertions and claims, but following a period of extended negotiations, meetings, and exchange of documentation, the parties have agreed to terms of this Settlement Agreement and intend to mutually bind themselves thereto.
- 3. Sierra Club Consideration; release of claims and covenant not to sue:** For and in consideration of this Settlement Agreement, Sierra Club, by and through its authorized representative signatory herein below, unconditionally releases the City from any and all claims raised in the Notice Letter which is the subject matter of this Settlement Agreement and covenants not to sue the City in relation thereto. Sierra Club agrees to forego all claims for attorneys’ fees, civil penalties, damages, injunctive relief or other remedies except as otherwise provided herein. The extent of this release shall be for any and all DWCSO events that occur prior to the adoption of this Settlement Agreement by both parties. This agreement does not bind Sierra Club from taking action for DWCSO events that occur after the date of the signing of this agreement by both parties.
- 4. City Consideration; obligations.** For and in consideration of this Settlement Agreement, the City of Spokane unconditionally agrees and binds itself to the following terms:
 - a. Enhance Evaluation-based Sewer Cleaning Program:** By the times set below or in provision 10, the City shall have added items b, c, and e below to its current evaluation-based sewer cleaning and rehabilitation activities and protocols.

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b. Form for crews to use after responding to DWCSO events.

By the time set below, the City agrees to develop a revised maintenance crew form that requires city staff to provide a narrative description of the cause of any DWCSO event. It is understood that this may include listing a cause as “unknown” if that is the case. The form will include an express prompt for this purpose. Staff will be trained to seek to identify the cause of a DWCSO wherever possible and to avoid guesses or vague reporting language such as “probably” or “might have been” in reporting causes of DWCSO, where it is reasonably possible by additional effort, to identify the cause and prevention of continued DWCSO events. If this is not possible, staff shall identify what investigatory steps and efforts were made to seek to determine the cause and prevention of DWCSO events and such shall be part of the documentation maintained in DWCSO event reporting. Again, this does not preclude a determination that a cause was “unknown” if that is the case. The completed forms described here shall be considered public records and copies shall be provided to Sierra Club upon request. For any elements of this section not dependent on Ecology approval of the O&M Manual, the City agrees to accomplish said items by ~~August 1~~ July 1, 2008, to the extent of its functional capacity to do so, understanding that such tasks may later be subject to modification or adjustment, to the extent they may be affected by the O&M Manual, as approved by the State Department of Ecology.

- c. Visual inspection:** By the time set below, city sewer inspection crews shall be trained and instructed to make diagnostic visual inspections, including estimation of the quantity of the obstruction where reasonably possible, and record the same as can be reasonably determined in a DWCSO event report. The intent here is to use a reasonable and fair effort to generally describe the nature of the debris (i.e. that the amount was small, moderate, or large in a qualitative sense). In general, “small” means about 1 cubic foot or less, “moderate” means over 1 cubic foot but less than 2 cubic feet, and “large” means over 2 cubic feet. Reasonable effort shall also be taken to determine if the source of debris arises from cleaning activities, including note of what actions were taken to inquire on this question. Recommendations for changing frequency or cleaning techniques to avoid DWCSO events should also be included as an item in each DWCSO report where such determination can be reasonably made. Where a large amount of debris is discovered, the line should be evaluated for increased cleaning frequency where such action would assist to avoid DWCSO events. For any elements of this section not dependent on Ecology

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approval of the O&M Manual, the City agrees to accomplish said items by ~~August 1~~^{July 1}, 2008, to the extent of its functional capacity to do so, understanding that such tasks may later be subject to modification or adjustment, to the extent they may be affected by the O&M Manual, as approved by the State Department of Ecology.

d. Modify Priority CSO Facilities. The City agrees to pursue modification of the 11 combined sewer overflow weirs (nos. 6, 7, 10, 12 14, 15, 16B, 25, 39, 40 and 42). CSO 16B has been resolved with construction in 2007 of the CSO 16/18 Control Facility. The remaining ten are currently scheduled to be accomplished over the next 3 years as follows:

- i.** By December 31, 2008: CSO 6, 7 and 25
- ii.** By December 31, 2009: CSO 12, 14, 15 and 42
- iii.** By December 31, 2010: CSO 10, 39, and 40

The new designs will provide for limited overflow storage of wastewater at the Combined Sewer Overflow (CSO) regulators. If the weir is not going to be replaced, the City plans to build a small storage vault in the outfall line with a level sensor to detect accumulating flow. If the weir is replaced, the City plans to install a new vault with an improved weir less prone to plugging. Coupled with this would be an alarm system in the overflow storage to alert City crews to respond promptly and clear the blockage before wastewater overflows into the River if possible. The City shall provide Sierra Club with drafts of the engineering designs for the modification and a reasonable opportunity to provide comment, but Sierra Club agrees that this does not apply here or elsewhere, to the extent that it has already been provided a fair opportunity for comment and response. The City has thus far provided a 90% design drawing for modification to CSO 6, 7 and 25. Should monitoring data indicate that additional weir modification is warranted in the City's exercise of reasonable judgment, the City agrees to make reasonable efforts to include such modifications in pursuit of a successful weir design in accord with reasonable engineering practice and approved budget resources, the City retaining ultimate right and responsibility for design decisions.

e. Diagnostic tools. By the time set below, the City agrees to use closed circuit TV (CCTV) records of historical clogging events and other available diagnostic tools consistent with sound management to better determine how and when to conduct routine cleaning activities most effectively and efficiently to avoid DWCSO events. Using CCTV or other techniques, where feasible, the City will evaluate large debris during routine cleaning activity if shown to be

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present and modify its cleaning activities in accordance with subsection a above. For any elements of this section not dependent on Ecology approval of the O&M Manual, the City agrees to accomplish said items by ~~July 1~~^{August 1}, 2008, to the extent of its functional capacity to do so, understanding that such tasks may later be subject to modification or adjustment, to the extent they may be affected by the O&M Manual, as approved by the State Department of Ecology. The parties understand that the “maintenance management system” or computerized data base of past TV work is scheduled to be operational by December of 2008.

- f. Better inform, train maintenance crews.** By the time set below, in order to help reduce DWCSO events caused by City maintenance near a CSO regulator [Note: the City does not believe this happens with any frequency; e.g. it did not happen in 2006 according to the City] , the City agrees to better inform and train its maintenance crews to minimize the amount of water used during cleaning near a CSO regulator, consistent with accomplishing the maintenance task in a thorough and effective manner, by conducting an annual in-service training on proper CSO O&M procedures. In the alternative, the City may use specially trained CSO maintenance crews to address CSO maintenance needs. By the time set in provision 10, the City agrees to mark the sewer system map used by City crews to locate work sites to warn City crews of CSO regulator proximity and alert said crews to avoid causing a DWCSO event by overflushing a line. In addition, by the time set below, the City will require maintenance crews to check the downstream CSO regulator weir, as to weirs affected by CSO drainage and identified in provision 4 (d) above at the end of the day for any debris and clear the same as necessary after conducting flushing of sewer lines or other maintenance activities within the areas marked on the maps. NOTE: This provision will no longer apply as the weirs become modified in accord with the schedule dates in provision 4 (d). For any elements of this section not dependent on Ecology approval of the O&M Manual, the City agrees to accomplish said items by ~~August 1~~^{July 1}, 2008, to the extent of its functional capacity to do so, understanding that such tasks may later be subject to modification or adjustment, to the extent they may be affected by the O&M Manual, as approved by the State Department of Ecology.
- g. Train crews to be alert for unusual flows.** Recognizing that identifying an unusual flow which might signal a DWCSO potential problem is difficult to describe in any categorical or standard manner, the City will use reasonable efforts to include crews (CSO

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crews) with necessary experience and training to be able to recognize unusual flows in a given situation to help avoid DWCSO events in accord with sound engineering practice when reasonably available. For any elements of this section not dependent on Ecology approval of the O&M Manual, the City agrees to accomplish said items by ~~July 1~~^{August 1}, 2008, to the extent of its functional capacity to do so, understanding that such tasks may later be subject to modification or adjustment, to the extent they may be affected by the O&M Manual, as approved by the State Department of Ecology.

- h. Maintain, evaluate effectiveness of CSO alarms.** The City will require appropriate CSO alarm notice, which will be subject to periodic reevaluation as an ongoing task. Currently CSO monitors measure for overflow every 5 minutes. Upon validation of an alarm during dry weather, a maintenance crew is dispatched for maintenance on the CSO regulator. The program will continue to evaluate alarm levels on a case-by-case basis seeking to improve efficiency and effectiveness, while avoiding false alarms, which defeats the process of the alarm system. With these improvements, data may be downloaded monthly or sooner if deemed needed. For any elements of this section not dependent on Ecology approval of the O&M Manual, the City agrees to accomplish said items by ~~August 1~~^{July 1}, 2008, to the extent of its functional capacity to do so, understanding that such tasks may later be subject to modification or adjustment, to the extent they may be affected by the O&M Manual, as approved by the State Department of Ecology.
- i. Frequency of Monitoring.** By the time set below, the City will require: (1) that visual/visual data check inspections of CSOs will occur twice a month for each CSO. This shall consist of one visual inspection and a second inspection consisting of downloading data and an incidental visual check. Alternatively, the City may institute or develop remote monitoring checks of equivalent or better reliability to the visual monitoring; (2) mandatory inspections following a heavy rain and rain following a relatively long dry weather period; and (3) year-round inspection. For any elements of this section not dependent on Ecology approval of the O&M Manual, the City agrees to accomplish said items by ~~August 1~~^{July 1}, 2008, to the extent of its functional capacity to do so, understanding that such tasks may later be subject to modification or adjustment, to the extent they may be affected by the O&M Manual, as approved by the State Department of Ecology.

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- j. Citizen education.** By the time set below, the City shall develop a citizen education program to enhance public education and outreach regarding DWCSO events. This program, excluding the lined-out items, which were completed in 2007, shall include:
- i.** Utility bill insert describing the settlement, including DWCSO events, new measures being taken to address such events, and where to receive more information and report CSO spills;
 - ii.** Update the City's website to provide an enhanced online map that provides greater detail of CSO location and provides online photos of CSO outfalls and location;
 - iii.** Provide information and notice to the public at major river access points, which are located at or near 1) TJ Meenach Drive, 2) Water Street, and 3) Plese Flats [~~note: this is State Parks land; the City will seek permission to post~~] as follows:
 - a.** Wet weather CSO events: To the extent it has not already done so, the City agrees to install and maintain permanent signage plainly posted at the three river access points identified above notifying the public of: (1) possible sewage overflows during and following heavy rain or snowmelt events ; (2) the web address and phone number to obtain information regarding ongoing overflow events; and (3) the phone number to report overflow events . These signs are intended to address wet weather CSO events.
 - b.** Dry weather CSO (DWCSO) events: For dry weather CSO events, the City will post temporary signs at the above locations when an alarm is received involving immediate City crew response. Such temporary signs will be posted within four (4) hours and remain in place during and following such DWCSO events for at least 24 hours or as long as necessary. ~~The City will invite as determined by~~ the Spokane Regional Health District to make this last determination if it wishes.
The intent of the signage is to alert the public of DWCSO events during periods of high use. High use periods are defined as May 15 through October 1, that period having been identified by the State Department of Ecology as a high use period (Ecology Order # 3821, Sept 11, 2006). The City further agrees to extend this period to April 15 through November 1. Temporary signage may be displayed by manual placement, remote activation of a signal, blinking light or other signaling device, reasonably calculated to give notice to the public of the dry weather event.

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- c. The parties understand that in the event the City is required to follow different procedures at the direction of any jurisdictional health or environmental governmental authority, such direction may supersede these provisions to the extent they may be inconsistent. The City agrees to provide reasonable notice to Sierra Club in the event that different procedures are implemented.
- iv. Develop an easily remembered telephone number and email for the public to notify the City of observed CSO events and update the City's website and other material with such information; [NOTE: the City's telephone is (509) 344-FISH and is the best recommended contact method.]
- ~~v. Improve signage at CSO outfalls to ensure that signs and information contained thereon are visible to river users; and~~
- vi. Develop an information CSO brochure for outreach and education to conservation / river user / neighborhood groups.

For any elements of this section not dependent on Ecology approval of the O&M Manual, the City agrees to accomplish said items by ~~August 1~~^{July 1}, 2008, to the extent of its functional capacity to do so, understanding that such tasks may later be subject to modification or adjustment, to the extent they may be affected by the O&M Manual, as approved by the State Department of Ecology.

To the extent that it has not been previously provided a fair opportunity for comment or input, Sierra Club shall be provided an opportunity to review and comment on the elements described above. The City may respond to Sierra Club, including sharing available information in response to Sierra Club comments or suggestions. In addition, Sierra Club will be invited to participate in development of public outreach and notification plan as described in the September 11, 2006 order of the Washington State Department of Ecology.

- k. **Amendments to CSO O&M Plan; Sierra Club comments on revised O&M.** The City has a CSO Operations and Maintenance Plan which it is now required to update annually and obtain the approval of the State of Washington Department of Ecology. It is the City's intent to seek to update and amend its O&M Plan consistent with this agreement, but subject also to State approval and annual updates. By the time set in provision 10, the City will amend its Operations and Maintenance (O&M) Plan to include procedures and content of a-j above. Prior to finalization, the City

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will provide a draft of the revised Wastewater O&M Plan to Sierra Club for its review and written comment to the extent opportunity has not been otherwise provided. The City shall provide Sierra Club with a reasonable period of time to review the draft document for compliance with this Agreement and any other suggestions or comments. The City shall respond to any Sierra Club comments, in writing, and explain whether any suggested changes were or were not adopted in response to such comments. Sierra Club agrees to write a letter to the State Department of Ecology expressing its support of the O&M Plan and Manual to the extent it is consistent with this Settlement Agreement.

- 1. Costs and Expenses:** The City shall provide payment to Sierra Club's attorneys, Center for Justice, for costs associated with pursuing and settling this matter. This payment shall be subject to the separate agreement between the City and Sierra Club titled, "Agreement Between Sierra Club and the City of Spokane Regarding Review of Sierra Club's Expert Report in regards to the City of Spokane's Dry Weather Sewer Overflow Events."
- 5. CSO Upgrade Schedule.** The City shall not use this agreement or the requirements contained herein as justification for any alteration of the schedule for other upgrades of its CSO system as required by Ecology. Moreover, this settlement agreement shall not be construed as an endorsement by Sierra Club of the existing upgrade schedule or any modifications thereto.
- 6. Obligations subject to Legislative Appropriation; Failure to Implement; Remedies.**
 - a.** The parties recognize that municipal utility budgets are subject to future legislative body decisions and other contingent obligations beyond the control of current officials approving this agreement. If the City fails to substantially complete any material part of this agreement for reasons beyond its control, the parties stipulate and agree that this Agreement may be terminated by the Court upon a showing by the city of such circumstances. Upon such Court termination under this Paragraph 6 a, the parties' respective positions shall revert to and be as they were upon the effective date of this Agreement. The parties agree to meet, confer and negotiate in good faith to modify this Agreement prior to filing a motion with the Court seeking to terminate this agreement under this Paragraph 6 a.

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- b. Except as provided in Paragraph 6 a, failure to timely implement the terms described above constitutes a material breach of the agreement. This agreement will be entered as a Consent Decree in federal court and will be enforceable by the parties in accordance with the Federal Clean Water Act and the applicable federal rules of civil procedure

- 7. Severability; Violation of law, impossibility.** The provisions of this Settlement Agreement are severable as follows. A finding by a Court of competent jurisdiction or agreement of the parties that any specific term, condition, undertaking or obligation herein is illegal, impossible, or unenforceable, or if the parties otherwise agree it may be waived, shall not defeat the remainder of the Settlement Agreement if such Court finds or the parties agree that the substantive benefit of the bargain can still be realized. In such case, such term, condition, undertaking or obligation shall be severed or excluded from the Settlement Agreement, and the remainder of said Agreement shall remain in full force and effect. The question of whether such severance shall be prospective only may be resolved in like manner as the substantive question of illegality, impossibility or unenforceability.

- 8. City may seek Consent Decree; mutual cooperation.** The parties understand the City may also seek to include the terms of this agreement in a Consent Decree by a Court of competent jurisdiction to avoid multiple claims of a same or similar nature and assure that the subject matter of this settlement is not the subject of further proceedings or inconsistent results. Both parties agree to work together to facilitate this goal, without requirement of undue cost or expense on either party.

- 9. Dispute Resolution.** The parties stipulate that either party may request mediation in the event of a dispute. Such a request shall be delivered in writing by the requesting party to the other. Upon such a request, there shall be a thirty (30) day period where both parties agree not to institute litigation, but seek to retain the services of a qualified mediator under such further arrangements as are mutually agreed. Both sides accept the obligation to bargain in good faith towards the attainment of a mediated solution. After thirty (30) days, if either party is of the opinion that mediation is not feasible, this provision shall no longer apply.

- 10. Deadlines and Dates:**

 - a. Unless otherwise expressly provided in the body of the Agreement or this section for specified items, the deadlines for the City to do items within its functional capacity to accomplish are agreed to be:

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1. In general, provisions relating to completion of the CSO O&M Manual (must be submitted to the State Department of Ecology): No later than ninety (90) days after final approval by Ecology. Both sides agree to be bound in good faith so as not to unreasonably delay the approval process.
 2. In general, after required regulatory agency approvals are obtained, the City agrees to accomplish crew training within ninety (90) days of said approvals (e.g. approval of CSO O&M Manual). In this connection, the City agrees to do all things within its functional capacity to accomplish submission of the CSO O&M Manual by ~~August 1~~ ~~July 1~~, 2008. If the City discovers it may be delayed for reasons beyond its control or due to unforeseen circumstances, it will so advise Sierra Club. These deadlines do not prevent the City from embarking on achievement of the goals of this agreement in advance, and the City believes it has or is in the process of accomplishment of the mutually expressed provisions of this agreement.
 3. Work maps to avoid overflushing the line per Paragraph 4 f will not be available to a level of reliable assurance to City crews before December 31, 2008.
- b. For deadlines measured by a date certain in this section or elsewhere (rather than from date of approval of this agreement), both parties understand that a precise schedule for such final approval was not available when date certain deadlines were negotiated. Accordingly, the parties agree that any date deadlines may be extended by either side for such period as was necessary to obtain final client approvals from both sides. Both sides promise in good faith to seek prompt approvals so as not to unduly extend any specified deadlines.

11. Effective date. This Agreement takes effect upon execution by both parties and approval by the Court.

SIERRA CLUB

By: _____
Authorized Representative

Print Name and Title: _____

Date: _____

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Approved as to form:

Attorney for Sierra Club

CITY OF SPOKANE

By: _____
City Administrator

Attest: _____
City Clerk

Dated: _____

Assistant City Attorney
CITY OF SPOKANE