

BEFORE THE UNITED STATES ARMY CORPS OF ENGINEERS

LOS ANGELES DISTRICT

IN THE MATTER OF:)
)
 CITY OF CARSON)
)
) CWA-SPL-2004-1
)
)
 DA PERMIT)
 CESPL-CO-R-200200729-JLB)
 _____)

SETTLEMENT AGREEMENT

WHEREAS, the United States Army Corps of Engineers ("Corps"), on June 3, 2002, pursuant to section 404 of the Clean Water Act ("CWA") conditionally verified after-the-fact Nationwide Permits 14 and 33, Permit No. 2002-00729-JLB ("Permit"), for the City of Carson's ("City") Macco Channel Double Box-Culvert Project ("Project") at the Del Amo Boulevard overcrossing of the I-405, in the City of Carson, Los Angeles County, California;

WHEREAS, on January 14, 2004, the Corps issued a proposed order (the "Order") to assess a Class 1 administrative penalty against the City for non-compliance with the Permit;

WHEREAS, the Order alleges the City failed to comply with Special Condition 1 of the Permit, which required the City to mitigate for permanent impacts to waters of the United States at a 7:1 ratio by removing exotic species and planting of pickleweed (*Salicornia virginica*) in a 0.07 acre portion of the Dominguez Channel in the City of Carson, and to submit a final detailed plan for this activity to the California Regional Water Quality Board, the California Department of Fish and Game ("CDFG"), and the Corps by July 18, 2003;

WHEREAS, instead of the City locating appropriate mitigation property, providing adequate funding for acquiring mitigation property, preparing habitat restoration plans and overseeing the installation of the mitigation, the City will provide funding to the California State Lands Commission ("Commission") for restoration of 0.2 acre of salt marsh habitat (hereinafter, "In-Lieu-Fee Mitigation") to offset ecological impacts to waters of the United States caused by the Project and for non-compliance with Permit conditions required to mitigate adverse impacts to aquatic resources;

WHEREAS, the City agrees to carryout the In-Lieu-Fee Mitigation in exchange for withdrawal of the Order by the Corps;

WHEREAS, this Settlement Agreement is intended to constitute a complete and final settlement of the Corps' claims under the CWA as set forth in the Order;

WHEREAS, the Corps and the City agree that settlement of this case is in the public interest and is the most appropriate means of resolving the Corps' claims under the CWA against the City in this case; and

THEREFORE, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby AGREED as follows:

I. APPLICABILITY

1. The undersigned signatories certify they are authorized to execute this Settlement Agreement and legally bind such parties.

2. The provisions of this Settlement Agreement shall apply to and be binding upon the parties to this action, their officers, directors, agents, servants, employees, successors, and assignees and any person, firm, or corporation who is, or will be, acting in concert or participation with them, whether or not such person has notice of this Settlement Agreement. The Settlement Agreement shall apply notwithstanding any claim or fact that any officer or employee of the City or the City's transferee, has acted outside the scope of employment.

II. SCOPE OF SETTLEMENT AGREEMENT

3. This Settlement Agreement shall constitute a complete and final settlement of all claims alleged in the Order against the City.

4. It is the express purpose of the parties in entering this Settlement Agreement to further the objectives set forth in CWA section 101, 33 U.S.C. § 1251. All plans, studies, construction, remedial maintenance, monitoring programs, and other obligations in this Settlement Agreement or resulting from the activities required by this Settlement Agreement shall have the objective of causing the City to achieve and maintain full compliance with, and to further the purposes of, the CWA.

5. This Settlement Agreement is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344. Nor does this Settlement Agreement relieve the City of any obligation to apply for, obtain and comply with the requirements of any new

or existing Section 404 permit, or with any other federal, state or local law or regulation.

6. Within fifteen (15) days after execution of this Settlement Agreement, the Corps agrees to issue an amended Permit to reflect the In-Lieu-Fee Mitigation required pursuant to this Settlement Agreement rather than the current Permit requirements set forth therein.

7. This Settlement Agreement in no way affects or relieves the City of their responsibility to comply with any applicable federal, state, or local law, regulation or permit.

8. Nothing in this Settlement Agreement shall constitute an admission of fact or law by any party.

9. The Corps does not waive any rights or remedies available to it for any violation or non-compliance by the City of Federal or State laws, regulations, or permit conditions except for its rights and remedies related to the allegations in the Order.

10. The parties agree that it is the responsibility of the City to achieve and maintain complete compliance with all applicable Federal and State laws, regulations and permits. Nothing herein shall be construed to limit the authority of the Corps to act under sections 308 and 504 of the CWA, 33 U.S.C. §§ 1318 and 1364.

III. IN-LIEU-FEE MITIGATION FUNDS

11. Within sixty (60) days of execution of this Settlement Agreement, the parties shall execute an In-Lieu-Fee Agreement with the Commission for the following compensatory mitigation project (hereinafter, "Compensatory Mitigation Project") by the Commission:

a. Tidal restoration of 0.2 acre of pickleweed at the Fieldstone Property located in Orange County, California to be undertaken within twelve (12) months from execution of this Settlement Agreement. Restoration includes property acquisition, site preparation, planting, one year maintenance and monitoring, two monitoring reports (6 months & 12 months or as appropriate), and as a contingency should the pickleweed establishment not work and likely additional efforts considered to be futile, two (2) acres of iceplant removal from an appropriate location within the Bolsa Chica lowlands as an alternative form of compensatory mitigation.

b. Should the acquisition of the Fieldstone Property not be accomplished by the Commission or the pickleweed restoration work not be able to be initiated by the Commission within twelve (12) months from execution of this Settlement

Agreement, then an equivalent amount of funds will be expended by the Commission for iceplant removal or other enhancement measures found to be acceptable by the Corps, NOAA Fisheries, U.S. Fish and Wildlife Service, and the CDFG.

12. The City shall provide adequate funding for the Compensatory Mitigation Project for a total not to exceed \$85,000.00. The City shall make the checks payable to the Commission within thirty (30) days after the submittal of each Compensatory Mitigation Project invoice. Payments shall be deposited into the Commission's dedicated account specified in the In-Lieu-Fee Agreement.

13. The total amount of funds made available to the Compensatory Mitigation Project shall be invoiced by August 31, 2005 and paid in full, pursuant to invoice, by September 31, 2005. Paying all invoices received by August 31, 2005, the City will satisfy the conditions of its amended Permit.

14. The City shall provide proof of payment to the Corps at the address set forth in Section VI below.

15. The City and Corps acknowledge that, due to funding considerations, the City may not be able to make the required payments set forth in this Settlement Agreement and/or in the In-Lieu-Fee Agreement because, at present, it has only tentative approval from its funding source to use funds in this manner. If the City is unable to comply with this Settlement Agreement or the In-Lieu-Fee Agreement because of a lack of funding, it shall notify the Corps within sixty (60) days of the execution of this agreement. If the City gives notice of its inability to comply with this Settlement Agreement and In-Lieu-Fee Agreement due to lack of funding, the City shall not be required to make the payments set forth above or in the In-Lieu-Fee Agreement, but shall be required to mitigate for permanent impacts to waters of the United States by removing exotic species and planting of pickleweed (*Salicornia virginica*) in a 0.20 acre portion of the Dominguez Channel in the City of Carson or other location acceptable to the Corps and to submit a plan for this activity to the California Regional Water Quality Board, the CDFG, and the Corps within sixty (60) days of giving notice of its inability to comply with the Settlement Agreement and In-Lieu-Fee Agreement. If the notice set forth in this paragraph is given, the Permit will be amended and modified to reflect the intent of the parties as set forth in this paragraph.

IV. NOTICES AND OTHER SUBMISSIONS

16. If the required in-lieu-fee payments are not completed within the timeframe specified, the City shall provide the Corps written notice, at the address specified in Section VI of this Settlement Agreement, of the date when the payment was anticipated, and explain the reasons for any delay in completing

the payment beyond the scheduled timeframe required by this Settlement Agreement.

17. In all notices submitted to the Corps pursuant to this Settlement Agreement, the City shall, by signature of a senior management official, certify such notices as follows:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

V. ENFORCEMENT AND COMPLIANCE

18. In the event the City does not comply with the terms of this Settlement Agreement, and/or the Permit, or any modifications thereto, the Corps has the right to enforce the Settlement Agreement, the Permit, and any modifications thereto, pursuant to 33 U.S.C. § 1319(g) and 33 C.F.R. § 326.6.

19. In the event of non-compliance with this Settlement Agreement and/or the Permit, and any modifications thereto, the Corps has the right to issue a proposed order to assess Class 1 civil penalties pursuant to 33 U.S.C. § 1319(g) and 33 C.F.R. § 326.6. The City will have thirty (30) days from the date the proposed order is issued to respond to each allegation set forth therein. The response should deny or accept each proposed stipulation. If the City denies any stipulation, it shall provide the factual and substantive bases for such denial and supporting evidence, which may include declarations. The City waives its right to a hearing on any proposed order. Following the close of the thirty (30) day public interest review period, the District Engineer for the Corps will issue a Final Order. This decision will be based on the administrative record, including any comments and/or evidence submitted by the City, California Regional Water Quality Control Board, and members of the public. All evidence will be considered, and the decision will be based on a preponderance of the evidence.

20. Persons or entities commenting on the public notice shall be allowed an additional thirty days to request that the Final Order be set aside and a hearing be held in accordance with section 309(g)(8) of the CWA. Such a hearing shall only be granted if, in the opinion of the District Engineer, evidence to

be presented is material and was not considered in the preparation of the Final Order.

VI. ADDRESSES

21. All notices and communications required under this Settlement Agreement shall be made to the parties through each of the following persons and addresses:

A. TO THE CORPS:

Regulatory Branch
U.S. Corps of Engineers
ATTN: 2002-00729-JLB
P.O. Box 53211
Los Angeles, CA 90053

District Counsel
U.S. Corps of Engineers
P.O. Box 53211
Los Angeles, CA 90053

B. TO THE CITY:

Aaron C. Harp, Esq.
Aleshire & Wynder
18881 Von Karman Ave.
Suite 600
Irvine, CA 92612

City Manager
City of Carson
701 East Carson Street
Carson, CA 90749

VII. MODIFICATION

22. Any modification of this Settlement Agreement shall be in writing, and shall not take effect unless signed by both the Corps and the City.

VIII. SIGNATORIES

Each undersigned representative of a party to this Settlement Agreement certifies that he or she is fully authorized to enter into the terms and conditions of this Settlement Agreement and to execute and legally bind such party to this document.

[SIGNATURES ON FOLLOWING PAGE]

The parties enter into this Settlement Agreement:

Dated: 6 JULY 2004 By: David H. Turk
David H. Turk
Lieutenant Colonel (P), US Army
Acting District Engineer

Dated: 7/1/04 By: Lawrence N. Minch
Lawrence N. Minch
District Counsel
UNITED STATES ARMY CORPS
OF ENGINEERS, LOS ANGELES DISTRICT

Dated: 6/30/04 By: Aaron C. Harp
Aaron Harp
Aleshire & Wynder
Attorney for the CITY OF CARSON

Dated: 6/30/04 By: Jerome Groomes
Jerome Groomes
City Manager
CITY OF CARSON

[END SIGNATURES]