

Settlement Agreement and Mutual Covenants Not To Sue

A. Parties

This Settlement Agreement and Release (the “Agreement”) is entered into by and between the following parties:

1. The California Department of Toxic Substances Control (“DTSC”); and
2. The City of Lodi, California, a municipal corporation (the “City”).

These parties are sometimes collectively referred to herein as the “Settling Parties.” Any person or entity identified above may be referred to as a “Party.”

B. Recitals

WHEREAS, in 1997, DTSC and the City entered into that certain Comprehensive Joint Cooperative Agreement (“JCA”) which is incorporated herein by this reference as though fully set forth.

WHEREAS, certain disputes have arisen between the Settling Parties and relating to the JCA.

WHEREAS, the Regional Water Quality Control Board, Central Valley Region (“Central Valley Board”) has assumed Lead Agency status for the Site, and DTSC has become a Support Agency to the Central Valley Board.

WHEREAS, DTSC asserts that it may be entitled to reimbursement of certain costs relating to the Site.

WHEREAS, the City is prosecuting an environmental cleanup action entitled *City of Lodi v. M&P Investments, et al.*, Case No. CIV-S-00-2441 FCD JFM, United States District Court, Eastern District of California (“City Action”).

WHEREAS, the City is seeking to resolve its claims in the City Action against various defendants sometimes referred to as Potentially Responsible Parties (“PRP’s”) through settlement, and in the course of so doing may receive cash settlement payments (“Settlement Funds”).

WHEREAS, certain events and judicial decisions have occurred that have had a material effect on the JCA.

Now, therefore, in consideration for the mutual promises set forth in this Agreement, DTSC and the City agree to resolve their disputes and claims against each other in the manner set forth below.

C. Definitions

The term “Site” shall mean the area of the City of Lodi located within the County of San Joaquin, California bordered approximately by the Mokelumne River to the north, Beckman Road to the east, Harney Lane to the south, and Mills Avenue to the west and the surrounding commercial and residential area, composed of five areas of groundwater contamination that have been referred to as the Central Plume Area, the Northern Plume Area, the Western Plume Area, the Southern Plume Area and the Busy Bee Area, from which Hazardous Substances have been, or are threatened to be, released or where Hazardous Substances have or may come to be located.

The term “Central Valley Board” shall mean the Regional Water Quality Control Board, Central Valley Region and any successor agency.

“Covered Matters” shall mean claims for Past Response Costs and Future Support Agency Response Costs incurred by DTSC; any claims by DTSC regarding the adequacy of any work performed by or on behalf of the City pursuant to any Central Valley Board orders, actions or requirements relating to environmental response actions at the Site; any civil or administrative action by DTSC to compel the City to take any environmental response action during the time that the Central Valley Board or any other state agency is the Lead Agency for the Site and any claims by DTSC for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by DTSC.

The term “Response Cost(s)” shall include all removal or remedial costs, including but not limited to direct labor costs, contractor costs, travel expenses, oversight costs (including costs properly incurred to consult with, monitor, review and comment on the Work pursuant to the terms of the JCA), and interest charges allowed by law, incurred in response to the release or threatened release of Hazardous Substances at the Site.

DTSC’s “Past Response Costs” are those Response Costs incurred by DTSC as of the effective date of this Agreement that have not been reimbursed pursuant to the JCA.

DTSC’s “Future Support Agency Response Costs” are those response Costs that may be incurred by DTSC in the future as a Support Agency.

D. Mutual Promises and Conditions of Settlement

1. Payment

In addition to past payments made by the City to DTSC pursuant to the JCA, the City will make the following payments to DTSC:

If, as a result of a judicially approved settlement of the City’s claims against a defendant PRP in the City Action, the City receives Settlement Funds from a defendant PRP, then the City shall make monetary payment(s) to DTSC calculated as follows: (1) Initial Payment. Within 30 calendar days of the City’s receipt of such Settlement Funds, the City will make a payment to DTSC in the amount of 1.5% (one and one-half percent) of the Settlement Funds received in such defendant PRP settlement. (2) Completion Payment. The City will

make a further payment to DSTC in the amount of 1.5% (one and one-half percent) of the Settlement Funds received in such defendant PRP settlement, plus interest at a rate that is equivalent to the then prevailing internal investment rate available to the State of California. The Completion Payment may be made in equal annual installments over a period of 8 (eight) years commencing 1 (one) year following the Initial Payment. The aggregate sum of all such payments shall not exceed \$1.9 million, exclusive of the amount paid as interest. At the City's sole election, the City may pre-pay any amounts due to DTSC without pre-payment penalty.

2. Commitments of the Settling Parties

All of the obligations, commitments, and requirements of the City and DTSC set forth in JCA paragraphs V, VI, VII, VIII and IX are hereby deemed to be discharged, excused, or performed, as the case may be, in full and complete satisfaction of the JCA.

The City hereby agrees that nothing in the JCA or this Agreement prejudices, alters, or otherwise affects its legal obligation on and after the effective date of this Agreement to be responsible for oversight costs incurred by the Central Valley Board in connection with Cleanup and Abatement Order R5-2004-0043 and in connection with any other Central Valley Board orders or Central Valley Board oversight of voluntary cleanup actions relating to environmental response actions at the Site.

The City waives any defense it may have arising out of the JCA or this Agreement to the jurisdiction of the Central Valley Board or any successor Lead Agency for the site.

The City shall use Settlement Funds for environmental response actions at the Site consistent with the terms of any orders of the Central Valley Board or any successor Lead Agency for the Site.

DTSC agrees that it will not seek to recover any of the Past Response Costs or Future Support Agency Response Costs or take any judicial or administrative action to compel a response action, in whole or in part, from any person, party or entity who contributes Settlement Funds pursuant to a judicially approved settlement or judgment in the City Action provided that DTSC is given adequate and timely notice of any settlement prior to entry by the court.

3. Mutual Covenants Not to Sue

In consideration of the promises exchanged above, and except as otherwise provided in this Agreement, DTSC covenants not to sue or take any judicial or administrative action against the City and its legal successors and assigns, and each of its elected and appointed officials, departments and agencies for any claims related solely to Covered Matters, including but not limited to, any claims pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ . 9607 and 9613; section 7002 of RCRA, 42 U.S.C. § 6972; Chapters 6.5 (commencing with section 25100) and 6.8 (commencing with section 25301) of division 20 of the Health and Safety Code; or pursuant to other applicable laws, regulations or civil, judicial or administrative authorities whether known or unknown, and whether direct or in contribution.

The covenants not to sue extend only to the City and do not extend to any other person or entity.

DTSC's covenants not to sue shall be conditioned on the satisfactory performance by the City of its obligations under this Agreement. DTSC will not withdraw its covenants not to sue without giving the City reasonable notice and a reasonable opportunity to cure such unsatisfactory performance.

In consideration of the promises exchanged above, the City covenants not to sue and not to assert any claims or causes of action against DTSC based on any liability for acts or omissions of its authorized officers, employees, or representatives with respect to, created by, acknowledged in, or arising out of DTSC response activities at the Site including, but not limited to, nuisance, trespass, takings, equitable indemnity and indemnity under California law, or strict liability under California law, based on DTSC's oversight or consultative and field activities, if any.

4. Contribution Protection

Nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any Person not a Party to this Agreement.

The Settling Parties agree that the City is entitled, as of the effective date of this Agreement, to protection from contribution action or claims as provided by CERCLA section 113(f)(2), 42 USC Section 9613(f)(2) for the Covered Matters.

5. Reservation of Rights

DTSC's covenants not to sue do not pertain to any matters other than those expressly specified herein. DTSC reserves, and this Agreement is without prejudice to, all rights against the City with respect to all other matters, including but not limited to, the following:

- a. claims based on a failure by the City to meet a requirement of this Agreement including any claims for response costs which are caused by the City's failure to comply with this Agreement;
- b. claims based on liability arising from the past, present, or future disposal, release, or threat of release of hazardous substances outside of the Site;
- c. claims based on any discharge, disposal or release of hazardous substances by the City at, in or around the Site after the effective date of this Agreement;
- d. claims based on criminal liability;
- e. claims based on liability for violations of federal or state law which occur after the effective date of this Agreement;

In the event that DTSC becomes the Lead Agency by operation of law or by agreement with the Central Valley Board, the Settling Parties agree that nothing in this

Agreement addresses the City's legal obligations on and after the effective date of this Agreement to be responsible for future response costs incurred by DTSC or any environmental response actions required by DTSC. At this time, however, DTSC represents that it has no understanding with the Central Valley Board that DTSC will become the Lead Agency for the Site.

In the event that DTSC becomes the Lead Agency, DTSC agrees to meet with the City and negotiate in good faith to resolve any potential claims that DTSC may have at that time as a result of its status as Lead Agency.

6. No Admission of Liability

This settlement represents an agreement resulting from disputed issues of fact and of law. By entering into this Agreement, the Settling Parties do not admit that they, individually or jointly, have any liability or obligation for the actual or alleged claims. None of the terms reflected herein nor any statements or communications made by the Settling Parties or their agents, attorneys, or insurers during the negotiations leading to this Agreement shall be considered admissions of liability by or on behalf of any of the Settling Parties.

7. Effective Date of Agreement

This Agreement shall be effective upon the date it is executed by DTSC, which shall be the last signatory to this Agreement.

8. No Liens or Encumbrances

Each Settling Party represents and warrants that no other person or entity has, or has had, any interest in the claims, demands, obligations, or causes of action referred to in this Agreement. Each Settling Party further represents and warrants that it has the sole right and exclusive authority to execute this Agreement and to agree to the terms herein, and that it has not sold, assigned, transferred, conveyed, or otherwise disposed of any claims, demands, obligations, or causes of action referred to in this Agreement.

9. Costs and Attorneys' Fees

The Settling Parties acknowledge and agree that they are to bear their own costs, expenses, expert and consultant fees, and attorneys' fees arising out of the negotiation, drafting, and execution of this Agreement. In any action or proceeding by either party to enforce this Agreement or any provision thereof, the prevailing party shall be entitled to reasonable attorney's fees and costs incurred. Unless otherwise addressed in this Agreement, DTSC reserves the right to recover any attorneys' fees and legal costs and expenses, including expert and consultant fees, to the extent that they are incurred in the future as response costs that arise pursuant to section 5 of this Agreement.

10. Integrated Agreement

Except for Paragraphs I through IV and X through XIX of the JCA, this Agreement supersedes any prior communications, agreements, and understandings regarding the

matters contained herein between the signatories hereto or their representatives, and any representation, promise, or condition in connection with such matters that is not incorporated in this Agreement shall not be binding upon any of the Settling Parties.

11. Binding Effect

Subject to the conditions found in this Agreement, this Agreement shall be binding upon and shall inure to the benefit of the Settling Parties as well as their respective officers and directors, the respective heirs, executors, administrators, trustors, trustees, beneficiaries, predecessors, successors, affiliated and related entities, officers, directors, principals, agents, employees, assigns, representatives, and all persons, firms, associations, and/or corporations connected with them, including, without limitation, their sureties and/or attorneys, except as otherwise provided by this Agreement. The Central Valley Board shall not be considered a beneficiary, successor, affiliated or related entity, officer, director, principal, agent, assign, or representative of DTSC for this purpose. Except as otherwise provided in Section 2 regarding the City's obligations to the Central Valley Board, nothing in this Agreement shall be construed to affect the rights of the Central Valley Board or any other department, office, board, agency, entity or organization of the State of California except for DTSC.

12. Benefit of Counsel

In entering into this Agreement, each Party represents and warrants that he, she, or it is not relying on any representations, opinions, conclusions, recommendations, or opinions expressed by, provided by, or inferred from any other Party to this Agreement, any attorney for any other Party, or any other Party's experts, consultants, or agents.

Each Party represents and warrants that it has been fully advised by its attorney concerning the effect and finality of this Agreement, and that the Party understands, without reservation or doubt, the effect and finality of this Agreement.

13. Interpretation

The Settling Parties agree that this Agreement shall be deemed to have been drafted equally by all parties hereto. Accordingly, the Settling Parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Agreement.

14. Counterparts

This Agreement may be executed in counterparts, and all so executed shall be binding upon all Parties hereto, notwithstanding that the signatures of the Parties' designated representatives do not appear on the same page.

15. Representations and Warranties

The Settling Parties make the following representations and warranties to the extent that the representation is related to its own respective knowledge, interests, or action:

Each Party warrants that it is fully authorized to enter into this Agreement on behalf of itself and that each Party's signatory is authorized to sign on behalf of the Party identified.

16. Governing Law

This Agreement is entered into and shall be interpreted in accordance with the laws of the State of California.

DATED: May ____, 2005

**CALIFORNIA DEPARTMENT OF TOXIC
SUBSTANCES CONTROL**

By: _____
B.B. BLEVINS, Director

APPROVED AS TO FORM

DATED: May ____, 2005

By: _____
TIMOTHY J. SWICKARD, Chief Counsel,
DTSC

DATED: May ____, 2005

CITY OF LODI

BLAIR KING, City Manager, CITY OF LODI

APPROVED AS TO FORM

DATED: May ____, 2005

By: _____
D. STEPHEN SCHWABAUER, ESQ., City
Attorney, CITY OF LODI

APPROVED AS TO FORM

DATED: May ____, 2005

FOLGER LEVIN & KAHN LLP

By: _____
MARGARET R. DOLLBAUM, Attorneys for
CITY OF LODI

20068\8002\441564.1