

## **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release, effective as of the date the last signature is affixed hereto (the “Effective Date”), is entered into by Environmental Law & Policy Center (“ELPC”), Natural Resources Defense Council, Inc. (“NRDC”), Sierra Club, Inc., Friends of the Chicago River, Gulf Restoration Network and Prairie Rivers Network (collectively the “Environmental Groups”) and Metropolitan Water Reclamation District of Greater Chicago (“MWRD”) (hereafter the Environmental Groups and MWRD are collectively referred to as the “Parties” and any individual may be referred to as a “Party”).

### **RECITALS**

**WHEREAS**, on or about December 23, 2013, the Illinois Environmental Protection Agency (“IEPA” or the “Agency”) issued National Pollutant Discharge Elimination System (NPDES) Permit for the MWRD’s Stickney water reclamation plant (Permit No. IL0028053) (the “Stickney Permit”), the MWRD’s NPDES Permit for the Calumet water reclamation plant (Permit No. IL0028061) (the “Calumet Permit”) and the MWRD’s NPDES Permit for the Terrence J. O’Brien water reclamation plant (Permit No. IL0028088) (the “O’Brien Permit”) (collectively the “Permits”).

**WHEREAS**, the Permits, among other requirements, contain a 1.0 mg/L Total Phosphorus effluent limit and other phosphorus monitoring and sampling requirements for each water reclamation plant’s discharge.

**WHEREAS**, the Environmental Groups appealed, among other things, the 1.0 mg/L Total Phosphorus limit in each of the Permits to the Illinois Pollution Control Board. In three consolidated cases styled *Prairie Rivers Network, et al. v. Illinois Environmental Protection Agency, et al.*, PCB Case No. 14-106, *Prairie Rivers Network, et al. v. Illinois Environmental Protection Agency, et al.*, PCB Case No. 14-107, and *Prairie Rivers Network, et al. v. Illinois Environmental Protection Agency, et al.*, PCB Case No. 14-108, the Environmental Groups’ principal argument is that the 1.0 mg/L phosphorus effluent limit is not stringent enough to protect against violations of the Illinois Environmental Protection Act and corresponding regulations (the “IPCB Proceedings”).

**WHEREAS**, on December 18, 2014, the Illinois Pollution Control Board granted summary judgment in favor of the Agency and the MWRD on the Environmental Groups’ appeal.

**WHEREAS**, the Environmental Groups appealed the Illinois Pollution Control Board’s grant of summary judgment to the Illinois Appellate Court for the First District in a case styled *Prairie Rivers Network, et al. v. Illinois Pollution Control Board, et al.*, No. 1-15-0971 (the “Appellate Proceedings”) (the IPCB Proceedings and the Appellate Proceedings are collectively referred to as the “Litigation”).

**WHEREAS**, the Appellate Court reversed the Illinois Pollution Control Board’s grant of summary judgment in favor of the Agency and the MWRD, and remanded the matter back to the Illinois Pollution Control Board for further proceedings.

**WHEREAS**, the Litigation is now pending before the Illinois Pollution Control Board.

**WHEREAS**, the MWRD and the Agency have denied and continue to deny that the Permits are not stringent enough to comply with the Illinois Environmental Protection Act and corresponding regulations.

**WHEREAS**, some members of the Environmental Groups have brought suit against the MWRD in a case styled *Natural Resources Defense Council, Inc. et al. v. Metropolitan Water Reclamation District of Greater Chicago*, Case No. 11 cv 2937 currently pending before the United States District Court for the Northern District of Illinois, and that case is also being resolved in a separate settlement agreement simultaneously.

**WHEREAS**, the Parties through this Settlement Agreement and Release (the "Agreement"), desire to settle and resolve their differences relating to the Permits and the Litigation, without any further proceedings, on the following terms and conditions.

**NOW, THEREFORE**, in consideration of the foregoing recitals, promises and consideration as set forth below, the sufficiency of which is hereby acknowledged, the Parties hereby agree and covenant as follows:

1. RECITALS.

The Recitals set forth above are hereby incorporated in and made a part hereof by this reference.

2. RECOMMENDATION OF ADDITIONAL PERMIT CONDITIONS.

Upon full execution of this Agreement, the Parties agree to recommend that the following special conditions be added to the Stickney Permit, the Calumet Permit, and the O'Brien Permit, and further agree to not contest or appeal, except as provided herein, the inclusion of special conditions in such permits that are substantially as follows:

**SPECIAL CONDITION XXX**

1. The Permittee shall submit an application for modification of this permit to include an implementation plan for the Chicago Area Waterways System (17 Ill. Adm. Code 3730.102 ("CAWS")) to the Illinois Environmental Protection Agency (the "Agency"), pursuant to either Section 2A or 2B below, as applicable. The Permittee shall assist in the formation of, and work cooperatively with, a Chicago Area Waterways Nutrient Oversight Committee ("NOC") to prepare the implementation plan, as defined below.

The NOC shall consist of three (3) members, one chosen by the Permittee, one chosen by the Illinois Environmental Protection Agency (the "Agency"), and one chosen collectively by Environmental Law and Policy Center (ELPC), Prairie Rivers Network, Natural Resources Defense Council, Inc., Gulf Restoration Network and

Friends of the Chicago River. The person chosen by the Agency shall not have previously been retained by the Permittee, Natural Resources Defense Council, Inc., Prairie Rivers Network, ELPC, Friends of Chicago River, Gulf Restoration Network or Sierra Club, Inc. The NOC shall be responsible for the selection of a consultant to study, develop, and prepare an implementation plan. Subject to the NOC's approval, the consultant shall engage biologists, engineers, or other contractors with expertise the consultant and the NOC deem necessary. In accordance with Permittee's applicable procurement rules and all applicable laws, the Permittee shall pay for the consultant's work to develop an implementation plan.

Permittee shall be responsible for installing a gauge to be located at Illinois Route 53 (Ruby St.) and the Des Plaines River in Joliet, Illinois that will provide continuous monitoring (subject to reasonable planned and unplanned disruptions) of flow, dissolved oxygen, temperature, pH, conductivity, chlorophyll-*a*, turbidity, nitrate plus nitrite as nitrogen, and dissolved phosphate as phosphorus. Permittee shall operate and maintain this gauge for a period of four (4) years after installation. Permittee may engage in a cost share to satisfy this condition.

2. A. If the Illinois Nutrient Science Advisory Committee releases numeric nutrient criteria or targets applicable to the CAWS on or before December 31, 2018, the consultant's implementation plan shall be developed as follows:

In Phase One, the consultant shall identify phosphorus input reductions or other measures reasonably calculated to meet the numeric nutrient criteria or targets applicable to the CAWS that are released by the Illinois Nutrient Science Advisory Committee. The consultant shall consider all point and non-point source discharges when identifying such phosphorus input reductions or other measures reasonably calculated for the CAWS to meet the applicable numeric nutrient criteria or targets.

In Phase Two, the consultant shall prepare and submit to the NOC by December 31, 2023, a plan and schedule for implementation of the phosphorus input reductions or other measures identified in Phase One.

- B. If the Illinois Nutrient Science Advisory Committee does not release numeric nutrient criteria or targets by December 31, 2018, the consultant's implementation plan shall be developed as follows:

In Phase One, the consultant shall identify in a written report any areas within the CAWS with recurring diurnal pre-dawn excursions from dissolved oxygen water quality standards, supersaturation in dissolved oxygen levels, and chlorophyll-*a* levels indicating the presence of unnatural plant or algal growth. If the consultant identifies any such recurring conditions, the

consultant shall propose phosphorus input reductions or other measures reasonably calculated to eliminate the conditions. The consultant shall consider all point and non-point source discharges when identifying such phosphorus input reductions or other measures.

In Phase Two, the consultant shall prepare and submit to the NOC by December 31, 2023 a plan and schedule for implementation of the phosphorus input reductions or other measures identified in Phase One.

In either Section 2A or 2B, if Permittee does not object to the consultant's implementation plan, Permittee shall thereafter begin implementation of the consultant's plan and apply for a permit modification seeking to have the consultant's implementation plan added as a condition to this permit. If Permittee objects to the consultant's implementation plan, Permittee shall promptly thereafter develop an alternative implementation plan, apply for a permit modification seeking to have the alternative implementation plan added as a condition to this permit, and shall be obligated to proceed only through the design phase of the consultant's implementation plan until such time as Permittee's modification application (including any appeals) is resolved. If any other person objects to the permit modification seeking to have the consultant's implementation plan added as a condition of the permit, the Permittee shall be obligated to proceed only through the design phase of the consultant's implementation plan until such time as Permittee's modification application (including any appeals) is resolved.

3. If monitoring in the Lower Des Plaines River and/or the Illinois River indicates unnatural plant or algal growth in those waters, and if a watershed group is formed to develop a nutrient control implementation plan for those waters; then, Permittee shall participate in such watershed group.
4. Permittee does not waive any right to contest or appeal any permit conditions other than special conditions XXX, YYY, and ZZZ. Permittee retains the right to challenge the findings of the Illinois Nutrient Science Advisory Committee and/or the consultant including, but not limited to, the extent those findings are used as the basis for any rulemaking, permit limits or conditions.
5. Should a trading program be developed in any of the watersheds within the State of Illinois to which Permittee could avail itself, Permittee shall be allowed to participate in that trading program to satisfy its obligations under this Permit.

### **SPECIAL CONDITION YYY**

An effluent limit of 0.5 mg/L Total Phosphorus annual geometric mean will be applicable to Permittee beginning January 1, 2030, unless: (1) the Permittee can demonstrate that this limit is not technologically feasible; or (2) this limit would result in substantial and widespread economic or social impact; or (3) this limit can only be met by addition of phosphorus reducing chemicals into Permittee's treatment process in addition to those currently contemplated; or (4) the implementation plan determines that a greater phosphorus input reduction is necessary and is attainable before 2030; or (5) the implementation plan determines that a greater phosphorus input reduction is necessary and attainable, and imposition of a 0.5 mg/L Total Phosphorus annual geometric mean limit in 2030 would impose costs on the Permittee that are disproportional to any benefit realized from meeting the 0.5 mg/L Total Phosphorus annual geometric mean limit in 2030. If meeting an effluent limit of 0.5 mg/L Total Phosphorus annual geometric mean is demonstrated not to be feasible in 2030, it should be met as soon as it is feasible.

### **SPECIAL CONDITION ZZZ**

The Permittee shall, within 24 months of the effective date of the issuance of a modified permit, prepare and submit to the Agency a feasibility study that identifies the method, timeframe, and costs of reducing phosphorus levels in its discharge to a level consistently meeting a potential future effluent limit of 0.5 mg/L, 0.3 mg/L, and 0.1 mg/L utilizing a range of treatment technologies including, but not necessarily limited to, biological phosphorus removal, chemical precipitation, or a combination of the two. The study shall evaluate the construction and Operation & Maintenance costs of the different treatment technologies for these limits on a monthly, seasonal, and annual average basis. For each technology and each phosphorus discharge level evaluated, the study shall also evaluate the amount by which the Permittee's typical ad valorem tax rate and user charge would need to increase if the Permittee constructed and operated the specific type of technology to achieve the specific phosphorus discharge level. The Permittee shall provide the CAWS NOC with a copy of the study at the same time it is submitted to the Agency.

#### **3. NOTICE OF OBJECTION TO IMPLEMENTATION PLAN.**

In either circumstance contemplated in Section 2A or 2B above, within (30) thirty days of the consultant's submission of its implementation plan and schedule to the NOC, the Permittee and the Environmental Groups shall give notice to the others of any objection to the consultant's implementation plan.

#### **4. ATTORNEYS' FEES AND COSTS.**

The Parties shall each bear their own attorneys' fees and costs related to the Litigation.

5. DISMISSAL.

After the Agency's issuance of permits for the Calumet, O'Brien and Stickney water reclamation plants containing Special Conditions XXX, YYY, and ZZZ as set forth in Section 2 of this Agreement, after any challenges to those permits have been resolved, and after the time for any challenge to those permits has expired, the, Environmental Groups shall move to dismiss the Litigation by filing a motion with Illinois Pollution Control Board for voluntary dismissal. The motion shall be filed in a manner that precludes the existence of multiple permits for the three water reclamation plants. The Parties agree to cooperate in the execution of Stipulations of Dismissal or any other documents necessary to obtain a dismissal.

6. RELEASE.

Petitioners release, waive, discharge and covenant not to sue MWRD, its commissioners, officers, directors, employees, agents, attorneys, representatives and assigns with respect to the claims raised in the Litigation or the corresponding expenses (including attorneys' fees and costs). The release set forth above shall extend to the issuance of a modified NPDES permit by IEPA that is consistent with the terms of this Agreement.

7. WARRANTIES.

- (a) Each signatory to this Agreement warrants that he/she has capacity to act on behalf of the entity for which they sign and to bind that entity to the terms and conditions of this Settlement Agreement.
- (b) Each Party represents and warrants that it has carefully read and fully understand all of the provisions and binding effects of this Agreement and has had the opportunity to thoroughly discuss all aspects of this Agreement with its attorney, and that it is voluntarily entering into this Agreement.
- (c) Each Party represents and warrants that it has not assigned or transferred any claim or part of any claim which is released by this Agreement and thereby bind the other Party on whose behalf it signs.

8. SUCCESSORS AND ASSIGNS.

This Agreement is made for the sole benefit of the Parties, and no other Person or entity shall have any rights or remedies under or by reason of this Agreement, unless otherwise expressly provided for therein. This Agreement shall be binding on the officers, directors, commissioners, agents, attorneys, representatives, employees, successors and assigns of the Parties hereto.

9. DUTY TO COOPERATE.

The Parties agree to cooperate fully and in good faith in carrying out the terms of the Agreement and affecting its purpose. The Parties further agree to execute such other documents as may be reasonably necessary to effect the purposes of this Agreement.

10. CONSTRUCTION OF THIS AGREEMENT.

- (a) It is the intention of the Parties that this Agreement be construed according to the fair import of its language as a whole, and not to be construed in favor or against any of the Parties hereto.
- (b) Neither this Agreement nor any uncertainty or ambiguity in this Agreement shall be construed or resolved against the Party that drafted this Agreement, whether under any rule of construction or otherwise. Neither Party to this Agreement shall be considered the draftsman; on the contrary, this Agreement has been reviewed, negotiated and accepted by both Parties and their attorneys and shall be construed and interpreted according to the intentions of both Parties hereto.
- (c) In construing this Agreement, the Parties agree that the singular shall include the plural, the plural the singular, the masculine shall include the feminine and neuter, and the neuter shall include the masculine and feminine, as necessary, to bring within the scope of the releases herein contained, any person, entity or matter which might otherwise be construed to be outside of the scope of this Agreement. Furthermore, the Environmental Groups and MWRD agree that in construing this Agreement, "and" as well as "or" shall be construed either disjunctively or conjunctively, as necessary, to bring within the scope of the releases herein contained any, person, entity or matter which might otherwise be construed to be outside of said scope. Furthermore, in construing this Agreement, the Parties agree that any reference to a party shall include not only such party but also for its parents, predecessors, successors, subsidiaries, assigns, partners, employees, officers, commissioners, directors, shareholders, agents, heirs, executors and administrators, individually and collectively and as necessary to bring within the scope of the releases herein contained any person, entity, or matter which might otherwise be construed to be outside of said scope.

11. NO ADMISSION OF LIABILITY.

The Parties understand and acknowledge that this Agreement constitutes a compromise and settlement of disputed claims. No action taken by the Parties either previously or in connection with this Agreement shall be deemed or construed to be (a) an admission of the truth or falsity of any claims heretofore made, or (b) an acknowledgment or admission by any Party of any fault or liability whatsoever to the other Party or to any third party.

12. NO THIRD PARTY RIGHTS.

This Agreement shall not be construed to create rights in, or grant any cause of action to, any third party that is not a Party to this Agreement.

13. GOVERNING LAW.

The law of the State of Illinois shall govern this Agreement. The Parties hereby submit to the jurisdiction of a court of competent jurisdiction located in Cook County, Illinois, with respect to any dispute regarding this Agreement.

14. INTEGRATION CLAUSE.

This Agreement comprises the entire agreement of the Parties with respect to the subject matter hereof. The Parties agree that none of the Parties nor their agents or attorneys, have made any representations concerning the terms or effects of this Agreement other than those contained herein and further agree that this Agreement contains the entire agreement of the Parties with regard to the matters set forth herein and shall be binding upon and inure to the benefit of the Parties hereto. This Agreement supersedes any and all prior and contemporaneous agreements, negotiations, correspondence, understandings, and communications of the Parties, whether oral or written, respecting the matters covered by this Agreement. No modification of this Agreement shall be binding upon any party unless set forth in a written document executed by the Parties.

15. WAIVER.

Any failure by any Party to insist upon the strict performance of the other Party of any of the provisions of this Agreement shall not be deemed a waiver of any of the provisions hereof, and such Party notwithstanding such failure shall have the right hereafter to insist upon the strict performance of any and all provisions of this Agreement to be performed by the other Party.

16. SEVERABILITY.

In the event that any provision of this Agreement becomes or is declared by a court of competent jurisdiction to be illegal, unenforceable or void, this Agreement shall continue in full force and effect without said provision.

17. CAPTIONS.

The captions contained in this Agreement are inserted only by way of convenience, and in no way define, limit, extend or describe the scope of this Agreement or the intent of any provision hereof.



18. COUNTERPARTS.

This Agreement may be executed in counterparts, which counterparts together shall have the same force and effect as a single original executed by all parties. Furthermore, the Parties agree that a faxed or emailed signature shall be as valid and as binding as an original signature.

19. DISPUTE RESOLUTION.

If a dispute under this Agreement arises, or either party believes that a breach of this Agreement has occurred, the Parties shall meet and confer within fourteen (14) calendar days of receiving written notification from the other Party of a request for a meeting to determine whether a violation has occurred and to develop a mutually agreed upon plan, including implementation dates, to resolve the dispute. If the Parties fail to meet and confer, or the meet-and-confer does not resolve the issue, after at least seven (7) days have passed after the meet-and-confer occurred or should have occurred, either Party shall be entitled to all rights and remedies under the law.

20. FORCE MAJEURE.

No Party shall be considered to be in default in the performance of any of its obligations when a failure to perform is due to a "Force Majeure." A Force Majeure event is any circumstances beyond the party's control, including, without limitation, any act of God, war, fire, earthquake, flood, or restraint by court order or public authority. A Force Majeure event does not include normal inclement weather or inability to pay. Any Party seeking to rely upon this paragraph shall have the burden of establishing that it could not reasonably have been expected to avoid, and has been unable to overcome by exercise of due diligence, the Force Majeure.

21. NOTICES.

Any notice or communication provided for in this Agreement or any notice that either Party may desire to give to the other shall be in writing and shall be sent by electronic mail, delivered by hand, sent by mail with all postage fully prepaid, or by courier with charges paid, to the following:

To MWRD:

Ronald M. Hill, Esq.  
General Counsel  
Metropolitan Water  
Reclamation District of  
Greater Chicago  
100 E. Erie St.  
Chicago, IL 60611  
hillr@mwrdd.org

To ENVIRONMENTAL GROUPS:

Albert Ettinger  
53 W. Jackson #1664  
Chicago, Illinois 60604  
  
Ann Alexander, Senior Attorney  
Henry Henderson, Director, Chicago,  
Midwest Program  
Natural Resources Defense Council  
20 North Wacker Drive, Suite 1600  
Chicago, Illinois 60606

Kim Knowles, Staff Attorney  
Prairie Rivers Network  
1902 Fox Drive, Suite G  
Champaign, IL 61820

Jessica Dexter, Staff Attorney  
Environmental Law & Policy Center  
35 E. Wacker Dr. Ste. 1600  
Chicago, IL 60601

Margaret Frisbie  
Executive Director  
Friends of the Chicago River  
411 S. Wells St. Suite 800  
Chicago, IL 60607

Cindy Skrukrud  
Clean Water Program Director  
Sierra Club, Illinois Chapter  
70 E Lake St Ste 1500  
Chicago, IL 60601

22. AGREEMENT CONTINGENT ON PERMIT MODIFICATION.

This Agreement shall be null and void by May 19, 2017 (the “Permit Deadline”) if: (1) the Agency does not issue permits for the Calumet, O’Brien and Stickney water reclamation plants containing special conditions XXX, YYY, and ZZZ in substantially the form set forth in Section 2 of this Agreement; and (2) all challenges to those permits have not been resolved; and (3) the time to challenge those permits has not expired. The Parties may extend the Permit Deadline in writing by mutual agreement.

23. AGREEMENT CONTINGENT ON BOARD APPROVAL.

This Agreement is contingent on approval of the Board of Commissioners of the Metropolitan Water Reclamation District of Greater Chicago.

**(SIGNATURE PAGE FOLLOWS)**

**IN WITNESS** of their agreement the Parties have caused this document to be signed by them on the dates specified below.

**NATURAL RESOURCES DEFENSE  
COUNCIL, INC.**

By: \_\_\_\_\_

Its: \_\_\_\_\_

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

**METROPOLITAN WATER RECLAMATION  
DISTRICT OF GREATER CHICAGO**

By: \_\_\_\_\_

Its: \_\_\_\_\_

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

**PRAIRIE RIVERS NETWORK**

By: \_\_\_\_\_

Its: \_\_\_\_\_

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

**SIERRA CLUB, INC.**

By: \_\_\_\_\_

Its: \_\_\_\_\_

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

**ENVIRONMENTAL LAW & POLICY  
CENTER**

By: \_\_\_\_\_

Its: \_\_\_\_\_

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

**FRIENDS OF THE CHICAGO RIVER**

By: \_\_\_\_\_

Its: \_\_\_\_\_

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

**GULF RESTORATION NETWORK**

By: \_\_\_\_\_

Its: \_\_\_\_\_

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