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**VIA CERTIFIED MAIL-
RETURN RECEIPT REQUESTED**

November 30, 2011

Head of Operations
San Jose/Santa Clara Water Pollution Control Plant
Administrative Offices
700 Los Esteros Road
San Jose, CA 95134

Richard Doyle
City Attorney
City of San Jose
200 East Santa Clara St.
San Jose, CA 95113

Re: Notice of Violations and Intent to File Suit Under the Clean Water Act

Dear Head of Operations and City Attorney:

The Clean Water Act (“CWA” or the “Act”) § 505(b) requires that 60 days prior to the initiation of a civil action under CWA § 505(a), [33 U.S.C. § 1365(a),] a citizen must give notice of the intent to sue to the alleged violator, the Environmental Protection Agency (“EPA”) and the State in which the violations occur.

Northern California River Watch (“River Watch”) hereby places the City of San Jose hereinafter referred to as “the Discharger” on notice that following the expiration of 60 days from the date of this NOTICE, River Watch intends to bring suit in the United States District Court against the Discharger for continuing violations of an effluent standard or limitation, permit condition or requirement, a Federal or State Order or Plan issued under the CWA, in particular, but not limited to CWA § 505(a)(1), [33 U.S.C. § 1365(a)(1),] the Code of Federal Regulations, and the Regional Water Quality Control Board - San Francisco Bay Region, Region Water Quality Control Plan (“Basin Plan,”) as exemplified by violations of permit conditions or limitations in the Discharger’s National Pollutant Discharge Elimination System (“NPDES”) Permit.

INTRODUCTION

The CWA regulates the discharge of pollutants into navigable waters. The statute is structured in such a way that all discharge of pollutants is prohibited with the exception of enumerated statutory exceptions. One such exception authorizes a polluter, who has been issued a permit pursuant to CWA § 402, to discharge designated pollutants at certain levels subject to certain conditions. The effluent discharge standards or limitations specified in a NPDES permit define the scope of the authorized exception to the 33 U.S.C. § 1311(a) prohibition, such that violation of a permit limit places a polluter in violation of 33 U.S.C. § 1311(a) and thus in violation of the CWA. Private parties may bring citizens' suits pursuant to 33 U.S.C. § 1365 to enforce effluent standards or limitations, which are defined as including violations of 33 U.S.C. § 1311(a) and 33 U.S.C. § 1365(f)(1).

The CWA provides that authority to administer the NPDES permitting system in any given state or region can be delegated by the EPA to a state or to a regional regulatory agency, provided that the applicable state or regional regulatory scheme under which the local agency operates satisfies certain criteria. See 33 U.S.C. § 1342(b). In California, the EPA has granted authorization to a state regulatory apparatus comprised of the State Water Resources Control Board and several subsidiary regional water quality control boards, to issue NPDES permits. The entity responsible for issuing NPDES permits and otherwise regulating discharges in the region at issue in this NOTICE is the Regional Water Quality Control Board, San Francisco Bay Region ("RWQCB").

The CWA requires that any Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto shall include sufficient information to permit the recipient to identify the following:

1. *The specific standard, limitation, or order alleged to have been violated.*

To comply with this requirement River Watch has identified in this NOTICE the NPDES Permit of the San Jose/Santa Clara Water Pollution Control Plant and specifically identified the applicable permit standard, limitation or condition being violated. A violation of the NPDES Permit is a violation of the CWA.

2. *The activity alleged to constitute a violation.*

Most often the NPDES Permit limitations being violated are self-explanatory and an examination of its language is sufficient to inform the Discharger, especially since the Discharger is responsible for complying with that Permit condition. In addition, River Watch has set forth narratives in this NOTICE describing with particularity the activities leading to violations and has incorporated by reference the Discharger's own records and other public documents in the Discharger's possession or otherwise available to the Discharger regarding its NPDES Permit, compliance with that Permit and any other information designed to inform the Discharger or the public.

3. *The person or persons responsible for the alleged violation.*

The person or persons responsible for the alleged violations identified in this NOTICE are the City of San Jose as owner and operator of the San Jose/Santa Clara Water Pollution Control Plant, identified as the Discharger, and those of its employees responsible for compliance with the NPDES Permit.

4. *The location of the alleged violation.*

The location or locations of the various violations are identified in the Discharger's Permit and also in records created and/or maintained by or for the Discharger which relate to the San Jose/Santa Clara Water Pollution Control Plant and related activities as further described in this NOTICE.

5. *The date or dates of violation or a reasonable range of dates during which the alleged activity occurred.*

River Watch has examined both RWQCB files and the Discharger's records for the period from November 15, 2006 through November 15, 2011. The range of dates covered by this NOTICE is from November 15, 2006 through November 15, 2011. River Watch will from time to time update this NOTICE to include all violations of the CWA by the Discharger which occur after the range of dates currently covered by this NOTICE. Some of the violations are continuous and therefore each day constitutes a violation.

6. *The full name, address, and telephone number of the person giving notice.*

The full name, address, and telephone number of the person giving notice is Northern California River Watch, referred to in this NOTICE as 'River Watch.' River Watch is a non-profit corporation dedicated to the protection and enhancement of the waters of the State of California including all rivers, creeks, streams and groundwater in Northern California. River Watch is organized under the laws of the State of California, and located at P.O. Box 817, Sebastopol, CA 95472, telephone 707-824-4372.

THE DISCHARGER'S OPERATION

The Discharger owns the San Jose/Santa Clara Water Pollution Control Plant (the "Plant") through a Joint Powers Agreement with the City of Santa Clara, and operates the Plant as the administering agency of the Joint Powers Agreement. The City of San Jose and the City of Santa Clara individually own and operate their respective collection systems. The discharge of treated wastewater from the Plant is regulated under Order No. R2-2009-0038, NPDES Permit No. CA0037842. The Discharger provides sewerage service to a population of approximately 1,365,000. The Plant has design treatment capacities of 167 mgd average dry weather flow and 250 mgd peak wet weather flow design capacity with full tertiary treatment. The Plant is designed to route fully treated secondary effluent flow in

excess of the tertiary filtration design capacity of 250 mgd around the filters during extreme wet weather flow events, and to recombine it with filter effluent prior to disinfection. Treated wastewater from the Plant flows into Artesian Slough (37°26' 23.38"Latitude and 121°57' 29.18"Longitude,) tributary to Coyote Creek and South San Francisco Bay, all waters of the United States.

In addition to the respective collection systems of these two cities, wastewater is conveyed to the Plant from several satellite collection systems serving the City of Milpitas; Santa Clara County Sanitation Districts No. 2 and No. 3; West Valley Sanitation District, including Campbell, Los Gatos, Monte Sereno and Saratoga; and, the Cupertino, Burbank, and Sunol Sanitary Districts. The satellite collection systems are not part of the facilities subject to the requirements of Order No. R2-2009-0038. Each satellite collection system is owned, operated, and maintained independently from the Discharger, and collects wastewater from its respective service area.

The Discharger's sanitary sewer system consists of approximately 2,200 miles of sewer pipes (varying in size from 6 inches to 90 inches in diameter,) 45,000 manholes and 16 pump stations. The collected wastewater is conveyed to the Plant by major interceptor pipelines located in the northern part of San Jose.

The Discharger's ageing wastewater collection system has historically experienced high inflow and infiltration (I/I) during wet weather. The structural defects in the collection systems, which allow I/I into the sewer lines, result in a build-up of pressure which causes sewage system surface overflows (SSO). Overflows caused by blockages and I/I result in the discharge of raw sewage into gutters, canals and storm drains which are connected to adjacent surface waters such as Artesian Slough, Coyote Creek, Guadalupe River and South San Francisco Bay, all waters of the United States. As recorded in California Integrated Water Quality System's ("CIWQS") Public SSO Reports, the Discharger's collection system has experienced 915 SSO between May of 2007 and November of 2011, with a combined volume of 204,202 gallons – 42,949 gallons reaching surface waters. For example, on May 15, 2011 there was a spill of reported volume of 12,500 gallons of untreated waste water from a city-owned sewer main at 2411 Canoas Garden Drive; 8,700 gallons of which discharged to a nearby surface water.

The Discharger has a history of non-compliance with the SSO reporting requirements of the Statewide General Requirements for Sanitary Sewer Systems, Waste Discharge Requirements ("WDR") Order No. 2006-0003-DWQ, governing the operation of sanitary sewer systems. The Discharger is a permittee under the Statewide WDR which requires that sewer system operators report SSO to the CIWQS, including an estimate of the volume of any spill, the volume recovered and the volume which reached a surface water. The Discharger's field reports regularly indicate the SSO start time as the same time the Discharger was notified of the SSO, or the same time the cleanup crew arrived. Both of these equivalencies are highly unlikely and result in an under estimation of the duration of

the spill.¹ The Discharger's common practice of under estimating the duration of the spill leads to under estimating the volume of the spill. The Discharger's SSO records generally do not indicate what method was used to estimate the total volume of the spill, which also calls into question the estimates of volume recovered and volume which reached a surface water.

In addition to SSO which discharge over land into surface waters, underground leakages ("exfiltration") caused by pipeline cracks and other structural defects result in discharges to adjacent surface waters via underground hydrological connections. Studies tracing human markers specific to the human digestive system in surface waters adjacent to defective sewer lines have verified the contamination of the adjacent waters with untreated sewage.² River Watch alleges that such discharges are continuous wherever ageing, damaged, structurally defective sewer lines in the Discharger's collection system are located adjacent to surface waters, including Artesian Slough, Coyote Creek, Guadalupe River and South San Francisco Bay.

The Discharger is required to conduct monthly chronic toxicity testing of its effluent discharge using *Ceriodaphnia dubia*. This species has been used in the Plant's chronic toxicity testing program since the program was started in December 1993. Prior to 2009, the Plant observed chronic toxicity in 16 of 192 months of monitoring. In July of 2009 the Plant observed chronic toxicity in all effluent concentrations tested. This testing event resulted in a calculated TUC of 33.5 Chronic Toxicity Units. Since these testing events in July 2009, toxicity in the Plant effluent has been intermittent and unpredictable.³

The Discharger has revised its Toxicity Reduction Evaluation Workplan to investigate the cause(s) of chronic toxicity in the Plant's discharge. Recent monitoring and evaluation of data has not identified the causes of toxicity in the Plant's effluent, and therefore has not provided a basis for developing effective reduction strategies. The Discharger's NPDES Permit requires the Discharger to demonstrate compliance with the RWQCB's Basin Plan Chronic Toxicity Objective by following the tiered requirements, (NPDES Permit, Section IV.D.2 - Whole Effluent Chronic Toxicity) including accelerated monitoring, a Toxicity Reduction Evaluation, a Toxicity Identification Evaluation and development of a Toxicity

¹ See Notice of Violation of State Resources Control Board Order No. 2006-0003-DWQ, City of San Jose Collection System. Issued by the RWQCB on January 3, 2011.

² See Report of the Human Marker Study conducted by Dr. Michael L. Johnson, U.C. Davis water quality expert, performed for the City of Ukiah, finding the presence of human derived bacteria in two creeks adjacent to defective sewer lines. Report issued in July, 2008.

³ See Toxicity Reduction Evaluation Interim Report of Tier 1, 2 and 3 Evaluations, March 15, 2010.

Reduction Evaluation Workplan. The Discharger has performed the required tests and evaluations and has not been able to demonstrate compliance with the Basin Plan Chronic Toxicity Objective. The Discharger is therefore in violation of the Basin Plan's narrative chronic toxicity objective.

The Discharger's illegal discharge of untreated wastewater and of treated wastewater exceeding Basin Plan standards is a significant contribution to the degradation of South San Francisco Bay and tributary waters, such as Artesian Slough and Coyote Creek, with serious adverse effects on beneficial uses of those waters. River Watch members residing in the area have a vital interest in bringing the Discharger's operations at the Plant and associated collection system into compliance with the CWA.

REMEDIAL MEASURES REQUESTED

River Watch believes the following remedial measures are necessary to bring the Discharger into compliance with its NPDES permit and the Basin Plan, and to prioritize remedial measures to reflect the biological impacts of the Discharger's ongoing non-compliance:

1. A reduction of collection system I/I through an aggressive collection system management, operation and maintenance ("CMOM") program, with clear time lines for prioritized repairs. The CMOM program shall include:
 - a. The amendment of the Discharger's Sewer System Management Plan to specify that defective gravity sewer lines located within 150 feet of surface waters including storm drainage channels and creeks, will be given a higher priority for repair and/or replacement than other sewer lines with comparable defects located more than 150 feet from surface waters;
 - b. The provision of funding in the Discharger's Capitol Improvements Plan to CCTV all gravity sewer lines every 10 years, except for lines CCTV'd within the prior 10 years and lines constructed, replaced or repaired within the prior 20 years.
2. A Mandatory private sewer lateral inspection and repair program triggered by any of the following events:
 - a. Transfer of ownership of the property if no inspection/replacement of the sewer lateral occurred within 20 years prior to the transfer;
 - b. The occurrence of 2 or more SSO caused by the private sewer lateral within 2 years;

- c. A change of the use of the structure served (1) from residential to non-residential uses, (2) to a non-residential use that will result in a higher flow than the current non-residential use, and (3) to non-residential uses where the structure served has been vacant or unoccupied for more than 3 years;
 - d. Upon replacement or repair of any part of the sewer lateral;
 - e. Upon issuance of a building permit with a valuation of \$25,000.00 or more;
 - f. Upon significant repair or replacement of the main sewer line to which the lateral is attached.
- 3. Compliance with monitoring and reporting requirements, especially regarding all overflows which reach storm drains or discharge directly to state waters, including a more detailed account of SSO and remedial actions sufficient to verify and document SSO start times, durations, volumes, volumes recovered, volumes reaching surface waters and remedial actions.
 - 4. Creation of web site capacity to track information regarding SSO. In the alternative, a link from the Discharger's web site to the CIWQS Public SSO Reports. Provision of notification to all customers and other members of the public of the existence of the web based program, including a commitment to respond to private parties submitting overflow reports.
 - 5. Performance of human marker sampling on creeks, rivers, wetlands and areas of South San Francisco Bay adjacent to sewer lines to test for sewage contamination from underground exfiltration.

VIOLATIONS

From November 15, 2006 through November 15, 2011, the Discharger has violated the requirements of the Discharger's NPDES Permit, the Basin Plan and the Code of Federal Regulations as those requirements are referenced in the Discharger's NPDES Permit with respect to the San Jose/Santa Clara Water Pollution Control Plant. Said violations are evidenced and reported in the Discharger's Self Monitoring Reports, testing data compiled in compliance with the Permit or other orders of the RWQCB, and other documentation filed with the RWQCB or in the Discharger's possession, and as evidenced by unpermitted discharges due to failures in the Discharger's collection system. Furthermore, these violations are continuing. The violations, established in Self Monitoring Reports, raw data and records of the RWQCB, include but are not limited to the following categories in the NPDES Permit:

Discharge Prohibitions

<u>Violations</u>	<u>Description</u>
1800	Collection system overflows caused by underground exfiltration – an event in which untreated sewage is discharged from the collection system prior to reaching the Plant. Underground discharges are alleged to have been continuous throughout the 5 year period from November 15, 2006 through November 15, 2011.

(Order No. R2-2003-0085, (Discharge Prohibitions A.6)
(Order No. R2-2009-0038, (Discharge Prohibitions III.D)

Evidence to support the allegation of underground discharge of raw sewage exists in the Discharger’s own mass balance data regarding the number of connections in the service area, estimates of average daily volume of wastewater per connection, influent flow volumes to the Plant reported in Self Monitoring Reports, video inspection of the collection system, and testing of waterways adjacent to sewer lines, including creeks, wetlands, rivers and South San Francisco Bay, for nutrients pathogens and other constituents indicating sewage contamination, such as caffeine.

185	SSO, as evidenced in the CIWQS Interactive Public SSO Reports, including the reports discussed above. Also, unrecorded surface overflows witnessed by local residents.
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(Order No. R2-2003-0085, (Discharge Prohibitions A.6)
(Order No. R2-2009-0038, (Discharge Prohibitions III.D)

Order No. R2-2003-0085, Discharge Prohibition A.6: “Discharges of water, materials, or wastes other than storm water, which are not otherwise authorized by this NPDES permit, to a storm drain system or waters of the State are prohibited.”

Order No. R2-2009-0038, Discharge Prohibitions III.D: “Any sanitary sewer overflow that results in a discharge of untreated or partially treated wastewater to waters of the United States is prohibited”

Monitoring Requirements

<u>Violations</u>	<u>Description</u>
915	Failure to monitor, report or adequately describe violations. The majority of these violations occur due to failure to report violations of Discharge Prohibitions A.6 of Order No. R2-2003-0085, failure to report violations of Discharge Prohibitions III.D of Order No. R2-2009-0038, as well as failure to adequately describe reported violations of said provisions.

Chronic Toxicity

<u>Violations</u>	<u>Description</u>
20	Violation of the chronic toxicity standard in the Basin Plan as evidenced by chronic toxicity monitoring results and failure to demonstrate compliance with the Basin Plan standard, as discussed above.

(San Francisco Bay Region Water Quality Control Plan (Basin Plan))

Basin Plan 3.3.18 TOXICITY:

“All waters shall be maintained free of toxic substances in concentrations that are lethal to or that produce other detrimental responses in aquatic organisms. Detrimental responses include, but are not limited to, decreased growth rate and decreased reproductive success of resident or indicator species. . . There shall be no chronic toxicity in ambient waters. Chronic toxicity is a detrimental biological effect on growth rate, reproduction, fertilization success, larval development, population abundance, community composition, or any other relevant measure of the health of an organism, population, or community.”

CONTACT INFORMATION

River Watch has retained legal counsel with respect to the violations set forth in this NOTICE. All communications should be addressed to:

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CONCLUSION

The violations as set forth in this NOTICE effect the health and enjoyment of members of River Watch who reside and recreate in the affected communities. The members of River Watch use the affected watershed for domestic water supply, agricultural water supply, recreation, sports, fishing, swimming, shell fish harvesting, hiking, photography, nature walks and the like. The members' health, use and enjoyment of this natural resource is specifically impaired by the Discharger's violations of the CWA as set forth in this NOTICE.

River Watch believes this NOTICE sufficiently states grounds for filing suit. At the close of the 60-day notice period or shortly thereafter River Watch intends to file a citizen's suit under CWA § 505(a) against the Discharger for violations at the Plant identified in this NOTICE.

During the 60-day notice period, River Watch is willing to discuss effective remedies for the violations noted in this NOTICE. If the Discharger wishes to pursue such discussions in the absence of litigation, it is suggested that those discussions be initiated soon so that they may be completed before the end of the 60-day notice period. River Watch does not intend to delay the filing of a lawsuit if discussions are continuing when that notice period ends.

Very truly yours,



Jerry Bernhaut

JB:lhbm

cc: Administrator
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