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6 NORTHERN CALIFORNIA RIVER WATCH,  
a non-profit Corporation  
7

8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA

10 NORTHERN CALIFORNIA RIVER WATCH, a non-profit Corporation, CASE NO. 3:12-cv-01624 MEJ

11 Plaintiff

12 v.

13 CITY OF SAN JOSÉ and DOES  
1-10, Inclusive,

14 Defendants  
15 \_\_\_\_\_/

**FIRST AMENDED COMPLAINT FOR  
INJUNCTIVE RELIEF, DECLARATORY  
RELIEF, CIVIL PENALTIES,  
RESTITUTION  
AND REMEDIATION  
(Environmental - Clean Water Act - 33  
U.S.C. § 1251, et seq)**

16 NOW COMES Plaintiff NORTHERN CALIFORNIA RIVER WATCH, a non-profit  
17 Corporation, (“RIVER WATCH”) by and through its attorneys, and for its First Amended  
18 Complaint against Defendants CITY OF SAN JOSÉ and DOES 1-10, Inclusive,  
19 (“DEFENDANT”) states as follows:

20 **I. NATURE OF THE CASE**

21 1. This is a citizen’s suit for relief brought by RIVER WATCH under the Federal Water  
22 Pollution Control Act, also known as the Clean Water Act (“CWA”), 33 U.S.C. § 1251 et seq.,  
23 specifically Section 505, 33 U.S.C. § 1365, 33 U.S.C. § 1311, and 33 U.S.C. § 1342, to stop  
24 DEFENDANT from repeated and ongoing violations of the CWA. These violations are detailed  
25 in the Notice of Violations and Intent to File Suit dated November 30, 2011 (“CWA Notice”)  
26 made part of this pleading and attached hereto as EXHIBIT A.

27 2. RIVER WATCH alleges DEFENDANT is routinely violating the CWA by violating the  
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1 effluent discharge standards or limitations in the National Pollutant Discharge Elimination  
2 System (“NPDES”) Permit under which DEFENDANT’s sewage treatment plant and associated  
3 collection facilities are regulated. DEFENDANT’s facilities were formerly regulated under  
4 Order No. R2 2003-0085, NPDES Permit No. CA OO37842 adopted by the Regional Water  
5 Quality Control Board (“RWQCB”) on September 17, 2003, and are currently regulated under  
6 Order No. R2-2009-0038, NPDES Permit No. CA 0037842, adopted by the RWQCB on April  
7 10, 2009.

8 3. The City of San José and City of Santa Clara own the San José/Santa Clara Water  
9 Pollution Control Plant located at 700 Los Esteros Road, in San José, California (“ the Treatment  
10 Plant”) through a Joint Powers Agreement (“JPA”). The City of San José operates the  
11 Treatment Plant as the administering agency of the JPA. The City of San José and the City of  
12 Santa Clara individually own and operate respective collection systems.

13 4. The Treatment Plant discharges treated domestic and commercial waste from a population  
14 of approximately 1,365,000. Treated wastewater from the Treatment Plant flows into Artesian  
15 Slough (37°26’ 23.38” Latitude and 121°57’ 29.18” Longitude,) tributary to Coyote Creek and  
16 South San Francisco Bay, all waters of the United States.

17 5. In addition to the respective collection systems identified in Paragraph 4, wastewater is  
18 conveyed to the Treatment Plant from several satellite collection systems serving the City of  
19 Milpitas, Santa Clara County Sanitation Districts No. 2 and No. 3, the West Valley Sanitation  
20 District (including Campbell, Los Gatos, Monte Sereno and Saratoga), and the Cupertino,  
21 Burbank, and Sunol Sanitary Districts. The satellite collection systems are not part of the  
22 facilities subject to the requirements of Order. No. R2-2009-0038. Each satellite collection  
23 system is owned, operated, and maintained independently from DEFENDANT, and collects  
24 wastewater from its respective service area.

25 6. DEFENDANT’s sanitary sewer collection system consists of pump stations, manholes  
26 and approximately 2,200 miles of sewer pipes. Collected wastewater is conveyed to the  
27 Treatment Plant by major interceptor pipelines located in the northern part of San José.  
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1 7. Numerous sewer system overflows (“SSOs”) from DEFENDANT’s collection system are  
2 documented in RWQCB records and in the California Integrated Water Quality System reporting  
3 system. Many of these SSOs reached storm drains that discharge into waters of the United  
4 States, in violation of the discharge prohibitions in DEFENDANT’s NPDES Permits. Each  
5 violation of a limit in a duly-authorized NPDES permit is a violation of the CWA.

6 8. RIVER WATCH alleges DEFENDANT is also routinely violating the RWQCB’s Water  
7 Control Plan also known as the Basin Plan, Environmental Protection Agency (“EPA”)  
8 regulations codified in the Code of Federal Regulations, and toxics standards promulgated by  
9 the State Water Resources Control Board in the course of DEFENDANT’s operation the  
10 Treatment Plant and associated collection system, as described in the CWA Notice.

11 9. Under 33 U.S.C. § 1251(e), Congress declared its goals and policies with regard to public  
12 participation in the enforcement of the CWA. 33 U.S.C. §1251(e) provides, in pertinent part:

13 *Public participation in the development, revision, and enforcement of any*  
14 *regulation, standard, effluent limitation, plan or program established by the*  
15 *Administrator or any State under this chapter shall be provided for,*  
*encouraged, and assisted by the Administrator and the States.*

16 10. RIVER WATCH alleges DEFENDANT illegally discharges pollutants from the  
17 Treatment Plant and associated wastewater collection system to waters which are habitat for  
18 threatened or endangered species as that term is defined by both the California and United States  
19 EPA.

20 11. RIVER WATCH seeks declaratory relief, injunctive relief to prohibit future violations,  
21 the imposition of civil penalties, and other relief for DEFENDANT’s violations of the terms of  
22 its NPDES Permits and the CWA.

## 23 II. PARTIES

24 12. Plaintiff, NORTHERN CALIFORNIA RIVER WATCH, is a 501(c)(3) non-profit, public  
25 benefit corporation duly organized under the laws of the State of California, with headquarters  
26 and main office located in the City of Sebastopol, California. RIVER WATCH is dedicated to  
27 protect, enhance and help restore the surface and subsurface waters of Northern California. Its  
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1 members live in Northern California including the City of José, where the Treatment Plant and  
2 associated sewer collection system under DEFENDANT's operation and/or control are located.

3 13. Members of RIVER WATCH live nearby to waters affected by DEFENDANT's illegal  
4 discharges as alleged in this First Amended Complaint. Said members have interests in the  
5 watersheds identified in the CWA Notice and this First Amended Complaint, which interests are  
6 or may be adversely affected by DEFENDANT's alleged violations. Said members use the  
7 effected waters and effected watershed areas for domestic water, recreation, sports, fishing,  
8 swimming, hiking, photography, nature walks, religious, spiritual and shamanic practices, and  
9 the like. Furthermore, the relief sought will redress the injury in fact, likelihood of future injury  
10 and interference with the interests of said members.

11 14. RIVER WATCH is informed and believes and on such information and belief alleges that  
12 Defendant CITY OF SAN JOSÉ is a City formed under California Government Code § 34000  
13 *et. seq.*, with administrative offices located at 200 East Santa Clara Street, San José, California.

14 15. RIVER WATCH is informed and believes and on such information and belief alleges that  
15 Defendant DOES 1 - 10, Inclusive, respectively, are persons, partnerships, corporations and  
16 entities, who are, or were, responsible for, or in some way contributed to, the violations which  
17 are the subject of this First Amended Complaint or are, or were, responsible for the maintenance,  
18 supervision, management, operations, or insurance coverage of the Treatment Plant and sewage  
19 collection facilities which are the subject of this First Amended Complaint. The names,  
20 identities, capacities, and functions of Defendants DOES 1 - 10, Inclusive are presently unknown  
21 to RIVER WATCH, which shall seek leave of court to further amend to insert the true names  
22 of said DOES Defendants when the same have been ascertained.

### 23 III. JURISDICTIONAL ALLEGATIONS

24 16. Subject matter jurisdiction is conferred upon this Court by Section 505(a)(1) of the CWA,  
25 33 U.S.C. § 1365(a)(1), which states in part,

26 "any citizen may commence a civil action on his own behalf against any  
27 person . . . who is alleged to be in violation of (A) an effluent standard or  
28 limitation . . . or (B) an order issued by the Administrator or a State with  
respect to such a standard or limitation." For purposes of Section 505, "the

1 term 'citizen' means a person or persons having an interest which is or may be  
2 adversely affected."

3 17. Members and supporters of RIVER WATCH reside in the vicinity of, derive livelihoods  
4 from, own property near, and/or recreate on, in or near and/or otherwise use, enjoy and benefit  
5 from the waterways and associated natural resources into which DEFENDANT discharges  
6 pollutants as alleged in this First Amended Complaint, or by which DEFENDANT's operations  
7 adversely affect their interests, in violation of CWA § 301(a), [33 U.S.C. § 1311(a),] CWA §  
8 505(a)(1), [33 U.S.C. § 1365(a)(1)] and CWA § 402, [33 U.S.C. § 1342]. The health, economic,  
9 recreational, aesthetic and environmental interests of RIVER WATCH and its members may be,  
10 have been, are being, and will continue to be adversely affected by DEFENDANT's unlawful  
11 violations as alleged herein. RIVER WATCH and its members contend there exists an injury  
12 in fact to them, causation of that injury by DEFENDANT's complained of conduct, and a  
13 likelihood that the requested relief will redress that injury.

14 18. Pursuant to Section 505(b)(1)(A) of the CWA, 33 U.S.C. § 1365(b)(1)(A), notice of the  
15 CWA violations alleged in this First Amended Complaint was given more than sixty (60) days  
16 prior to commencement of this lawsuit, to: (a) DEFENDANT, (b) the United States EPA,  
17 Federal and Regional, and (c) the State of California Water Resources Control Board.

18 19. Pursuant to Section 505(c)(3) of the CWA, 33 U.S.C. § 1365(c)(3), a copy of this First  
19 Amended Complaint has been served on the United States Attorney General and the  
20 Administrator of the Federal EPA.

21 20. Pursuant to Section 505(c)(1) of the CWA, 33 U.S.C. § 1365(c)(1), venue lies in this  
22 District as the Treatment Plant and sewage collection facilities under DEFENDANT's operation  
23 and/or control, and the watersheds and lands where illegal discharges occurred which are the  
24 source of the violations complained of in this action, are located within this District.

#### 25 **IV. GENERAL ALLEGATIONS**

26 RIVER WATCH incorporates by reference all the foregoing as though the same were  
27 separately set forth herein.

1 21. DEFENDANT jointly owns the Treatment Plant with the City of Santa Clara and is  
2 responsible for its operation. The Treatment Plant serves a population of approximately  
3 1,365,000 including the satellite collection systems which convey wastewater to the Treatment  
4 Plant for treatment and disposal.

5 22. DEFENDANT's sewage system collects and transports wastewater flows to the Treatment  
6 Plant through a system of sanitary sewer pipelines consisting of approximately 2,200 miles of  
7 sewer pipes varying in size from 6 inches to 90 inches in diameter, 45,000 manholes and 16  
8 pump stations. The collected wastewater is conveyed to the Treatment Plant by major  
9 interceptor pipelines located in the northern part of San José.

10 23. RIVER WATCH alleges that SSOs from DEFENDANT's wastewater collection system  
11 caused by blockages and inflow and infiltration of rainwater and groundwater, result in the  
12 discharge of raw sewage into gutters, canals and storm drains which discharge to nearby surface  
13 waters such as Artesian Slough, Coyote Creek, Guadalupe River and South San Francisco Bay,  
14 all waters of the United States, in violation of DEFENDANT's former NPDES Permit, Order  
15 No. R2-2003-0085, (Discharge Prohibition A.6) and DEFENDANT's current NPDES Permit,  
16 Order No. R2-2009-0038, (Discharge Prohibition, III.D). As recorded in the California  
17 Integrated Water Quality System Interactive SSO Reports, DEFENDANT's sewage collection  
18 system has experienced 915 SSOs between May 2007 and November 2011, with a combined  
19 volume of 204,202 gallons. Of said amount, 42,949 gallons reached surface waters.

20 24. RIVER WATCH alleges that collection system overflows caused by underground  
21 leakage, also known as exfiltration, from DEFENDANT's structurally defective sewer pipelines  
22 in the sewage collection system result in the discharge of raw sewage to nearby surface waters  
23 via hydrologically-connected groundwater, in violation of DEFENDANT's former NPDES  
24 Permit, Order No. R2-2003-0085, (Discharge Prohibition A.6) and DEFENDANT's current  
25 NPDES Permit, Order No. R2-2009-0038, (Discharge Prohibition III.D).

26 25. RIVER WATCH alleges DEFENDANT has failed to monitor, report or adequately  
27 describe the SSOs referenced in the preceding paragraphs, in violation of the San Francisco Bay  
28

1 Region Standard Provisions And Reporting Requirements for NPDES Surface Water Discharge  
2 Permits, Section E.6.D - Non Compliance Reporting, incorporated into Order No. R2-2003-0085  
3 by Section V.A of the Monitoring and Reporting Program, and incorporated into Order No. R2-  
4 2009-0038 by NPDES Permit Section VI.B.

5 26. RIVER WATCH alleges DEFENDANT has violated the chronic toxicity standard in the  
6 RWQCB's Basin Plan, as evidenced by chronic toxicity monitoring results and failure to  
7 demonstrate compliance with the Basin Plan standard (San Francisco Bay Region Water Quality  
8 Control Plan, 3.3.18 TOXICITY) in violation of Order No. R2-2009-0038, Section D.2.

9 27. All illegal discharges and activities complained of herein occur in the waterways  
10 identified in this First Amended Complaint and in the CWA Notice, all of which are waters of  
11 the United States, as well as at the locations identified in detail in the CWA Notice.

12 28. The RWQCB has determined that the watershed areas and affected waterways identified  
13 in the CWA Notice and this First Amended Complaint are beneficially used for drinking water,  
14 water contact recreation, non-contact water recreation, fresh water habitat, wildlife habitat,  
15 preservation of rare and endangered species, fish migration, fish spawning, industrial service  
16 supply, navigation, and sport fishing.

17 29. The EPA has identified SSOs which discharge to surface waters as harmful to beneficial  
18 uses. Domestic wastewater contains microbial pathogens, oxygen demanding organisms,  
19 suspended solids and nutrients. Wastewater from industrial and commercial facilities, part of the  
20 wastewater flow conveyed in DEFENDANT's collection system, contains toxic substances  
21 including metals and synthetic organic compounds, *EPA Report to Congress on the Impacts and*  
22 *Control of CSOs and SSOs* ( hereafter "EPA Report") p. 4-2. "In general, SSOs consisting of  
23 concentrated wastewater are predicted to violate water quality standards the majority of the  
24 time". ( EPA Report p. 5-9) Documented impacts to specific designated uses include beach  
25 closures in waters designated for recreation and shellfish harvesting restrictions in waters  
26 designated for shell fishing, ( EPA Report p. 5-9). The National Oceanic and Atmospheric  
27 Administration reported that the primary basis for harvest restrictions was the concentration of  
28

1 fecal coliform bacteria associated with untreated wastewater and livestock wastes ( EPA Report  
2 p. 5-13) “Microbial pathogens of human and non-human origin are present in domestic and  
3 industrial wastewater. ... In general microbial pathogens are easily transported in water. They can  
4 cause disease in aquatic biota and illness or even death in humans” ( EPA Report p. 6-2)

#### 5 **V. STATUTORY AND REGULATORY BACKGROUND**

6 30. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants  
7 from a “point source” into the navigable waters of the United States, unless such discharge is in  
8 compliance with applicable effluent limitations as set by the EPA and the applicable State  
9 agency. These limits are to be incorporated into a NPDES permit for that point source  
10 specifically. The effluent discharge standards or limitations specified in a NPDES permit define  
11 the scope of the authorized exception to 33 U.S.C. § 1311(a) , such that violation of a permit  
12 limit places a polluter in violation of 33 U.S.C. § 1311(a) and thus in violation of the CWA.  
13 Additional sets of regulations are set forth in the Basin Plan, California Toxics Plan, the Code  
14 of Federal Regulations and other regulations promulgated by the EPA and the State Water  
15 Resources Control Board. Section 301(a) of the CWA prohibits discharges of pollutants or  
16 activities not authorized by, or in violation of an effluent standard or limitation or an order issued  
17 by the EPA or a State with respect to such a standard or limitation including a NPDES permit  
18 issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. The Treatment Plant and  
19 wastewater collection system piping and lines owned and operated by DEFENDANT are point  
20 sources under the CWA.

21 31. The affected waterways detailed in this First Amended Complaint and in the CWA Notice  
22 are navigable waters of the United States within the meaning of Section 502(7) of the CWA, 33  
23 U.S.C. § 1362(7).

24 32. The Administrator of the EPA has authorized the RWQCB to issue NPDES permits,  
25 subject to specified conditions and requirements, pursuant to Section 402 of the CWA, 33 U.S.C.  
26 § 1342.

27 //



1 **VI. DEFENDANT’S VIOLATIONS**

2 RIVER WATCH incorporates by reference all the foregoing as though the same were  
3 separately set forth herein.

4 33. RIVER WATCH alleges that DEFENDANT’s violations of the terms of its NPDES  
5 Permits as detailed above and in the CWA Notice, are violations of CWA § 301(a), 33 U.S.C.  
6 § 1311(a). The violations are established in RWQCB files for the Treatment Plant and associated  
7 sewage collection facilities, as well as in studies conducted by DEFENDANT in compliance  
8 with orders from regulatory agencies .

9 34. The enumerated violations are detailed above and in the CWA Notice incorporated by  
10 reference herein designating the section of the CWA violated and describing the activity  
11 constituting a violation.

12 35. The location of the discharges are the discharges points as described in the CWA Notice  
13 and in this First Amended Complaint.

14 **VII. CLAIM FOR RELIEF**

15 **Violation of CWA - 33 U.S.C. § 1251 *et seq.*, 33 U.S.C. §§ 1342 (a) and (b)**  
16 **and 33 U.S.C. § 1311**

17 **Discharge of Pollutants from Point Sources to United States Waters**

18 RIVER WATCH realleges and incorporates by reference the allegations of Paragraphs  
19 1 through 35 above including the CWA Notice as though fully set forth herein. RIVER  
20 WATCH is informed and believes and based upon such information and belief alleges as  
21 follows:

22 36. DEFENDANT has violated and continues to violate the CWA as evidenced by the  
23 discharges of pollutants from a point source in violation of limits set forth and mandated in  
24 Order No. R2-2009-0038, NPDES Permit No. CA 0037842. and Order No. R2 2003-0085,  
25 NPDES Permit No. CA 0037842, in violation of Section 301 of the CWA, 33 U.S.C. § 1311.

26 37. The violations of DEFENDANT as alleged in this First Amended Complaint are ongoing  
27 and will continue after the filing of this First Amended Complaint. RIVER WATCH alleges  
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1 herein all violations which may have occurred or will occur prior to trial, but for which data may  
2 not have been available or submitted or apparent from the face of the reports or data submitted  
3 by DEFENDANT to the RWQCB or to RIVER WATCH prior to the filing of this First  
4 Amended Complaint. RIVER WATCH will further amend if necessary to address  
5 DEFENDANT's violations of the CWA which occur at the Treatment Plant and sewage  
6 collection system which may occur after the filing of this First Amended Complaint. Each  
7 violation of a NPDES Permit is a separate violation of the CWA.

8 38. RIVER WATCH alleges that without the imposition of appropriate civil penalties and the  
9 issuance of appropriate equitable relief, DEFENDANT will continue to violate the CWA with  
10 respect to the enumerated discharges and releases as alleged herein. Further, that the relief  
11 requested in this First Amended Complaint will redress the injury to RIVER WATCH and its  
12 members, prevent future injury, and protect those members' interests which are or may be  
13 adversely affected by DEFENDANT's violations of the CWA.

#### 14 **VIII. PRAYER FOR RELIEF**

15 RIVER WATCH prays this Court grant the following relief:

16 39. Declare DEFENDANT to have violated and to be in violation of the CWA;

17 40. Issue an injunction ordering DEFENDANT to immediately operate the Treatment Plant  
18 and associated sewage collection system in compliance with the CWA;

19 41. Order DEFENDANT to perform a biological assessment in any area where an SSO of  
20 untreated wastewater from DEFENDANT's sewage collection system creates the threat of  
21 deleterious exposure of humans or species listed as threatened or endangered under the ESA to  
22 harmful bacteria and toxic substances.

23 42. Where a biological assessment determines that an imminent and substantial threat to  
24 human health or ESA listed species exists in an area where DEFENDANT's sewage collection  
25 system has discharged untreated sewage to a surface water, order DEFENDANT to immediately  
26 take all necessary measures to protect humans and ESA listed species from any further  
27 discharges from DEFENDANT's sewage collection system, including performing immediate  
28

1 investigation and rehabilitation of nearby defective sewer lines likely to be a source of further  
2 discharges to the affected surface water.

3 43. Order DEFENDANT to pay civil penalties of per violation/per day for its violations of  
4 the CWA;

5 44. Order DEFENDANT to pay the reasonable attorneys' fees and costs of RIVER WATCH  
6 (including expert witness fees), as provided by 33 U.S.C. § 1365(d), and applicable California  
7 law; and,

8 45. For such other and further relief as the court deems just and proper.

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10 DATED: May 29, 2012

*/s/ Jerry Bernhaut*

\_\_\_\_\_  
JERRY BERNHAUT  
Attorney for Plaintiff  
NORTHERN CALIFORNIA RIVER WATCH

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# EXHIBIT A

# Law Office of Jack Silver

P.O. Box 5469 Santa Rosa, California 95402  
Phone 707-528-8175 Fax 707-528-8675  
lhm28843@sbcglobal.net



**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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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>
<b>1800</b>	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.

<b>185</b>	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>
<b>915</b>	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>
<b>20</b>	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

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