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16 SAN FRANCISCO BAYKEEPER

17 UNITED STATES DISTRICT COURT  
18 NORTHERN DISTRICT OF CALIFORNIA

19 SAN FRANCISCO BAYKEEPER, a California  
20 non-profit corporation,  
21 Plaintiff,

22 v.

23 CITY OF MILLBRAE, a California municipal  
24 corporation,  
25 Defendant.

Civil Case No.: CV 09-05675 SBA

**CONSENT DECREE**





1 a. To ensure that Millbrae uses, implements, and improves ways, means, and  
2 methods to prevent sanitary sewer overflows;

3 b. To ensure that Millbrae uses, implements, and improves ways, means, and  
4 methods to prevent violations of, or to comply with, applicable permits, laws, and regulations as related  
5 to sanitary sewer overflows.

6 **II. DEFINITIONS**

7 2. Unless otherwise expressly defined herein, terms used in this Consent Decree that are defined  
8 in the Clean Water Act or in regulations, or in rules promulgated under the Clean Water Act, have the  
9 meaning assigned to them in the applicable statutes, regulations, or rules. Whenever terms listed below  
10 are used in this Consent Decree, the following definitions apply:

11 a. "CCTV" means closed-circuit television.

12 b. "CIP" means Millbrae's sanitary sewer system capital improvement program.

13 c. "Day" means a calendar day. In computing any period of time under this Consent  
14 Decree, where the last day of such period is a Saturday, Sunday, or Federal or State Holiday, the period  
15 runs until the close of business on the next day that is not a Saturday, Sunday, or Federal or State  
16 Holiday.

17 d. "Design Storm" means a 10-year return period rainstorm with a duration of 24  
18 hours as measured by a properly calibrated and monitored rain gage, or such rain gages within the City  
19 of Millbrae or, if no such gage is available, at the San Francisco International Airport. Millbrae has  
20 determined that the 10-year Design Storm would yield 3.12 inches of rain in a 24 hour period. The  
21 engineering design criteria to be used by Millbrae for a 10-year 24-hour storm shall take into account  
22 short duration intense rainfall periods by reference to USDA Urban Hydrology for Small Watersheds  
23 guidance TR-55 (June 1986) and use of the synthetic rainfall distribution curve, Figure B-1 SCS 24-  
24 Hour Rainfall Distribution of TR-55. Millbrae shall use the distribution curve for a Type IA storm as  
25 referenced on Figure B-1 of TR-55 based on local rainfall quantities for the Millbrae area in San Mateo  
26 County, California.

27 e. "FOG" means fats, oil, and grease.

1 f. “FSE” means Food Service Establishment, any facility where food is served and  
2 intended for individual portion service, and includes the site at which individual portions are provided.

3 g. “Infiltration” means groundwater, rainwater, or other surface water that may enter  
4 the sewage collection system through the pipes, joints, or cracks.

5 h. “Inflow” means wastewater or water that may enter the sewage collection system  
6 through unpermitted connections, drains, or manholes.

7 i. “I/I” means infiltration and inflow.

8 j. “Lower Lateral” means the lateral line connecting a home or business to  
9 Millbrae’s sewer main extending from the sewer main to Millbrae’s clean out or to the back of the  
10 public right-of-way, whichever is applicable to the lateral connection. Lower Laterals are generally  
11 connected to “upper laterals.” Millbrae owns twenty-two (22) miles of Lower Laterals within the City  
12 of Millbrae limits. The remaining twenty-two (22) miles of Lower Laterals are considered “Private  
13 Laterals.”

14 k. “NPDES” means National Pollutant Discharge Elimination System.

15 l. “Private Lateral” means the private sanitary sewer lateral or line connecting a  
16 home or other structure to the Lower Lateral, generally extending from the outside of the foundation of  
17 the structure to the public right-of-way or Millbrae’s cleanout, whichever is applicable. It also means  
18 twenty-two (22) miles of “Lower Laterals” which are owned by the property owners in Millbrae and  
19 which are not maintained or controlled by Millbrae.

20 m. “Millbrae Collection System” means the sewer pipes and lines, manholes or  
21 maintenance holes, pump stations, and all appurtenances thereto under ownership and responsibility of  
22 Millbrae that are used to convey wastewater generated by residential, commercial, and industrial sources  
23 to Millbrae’s POTW. For purposes of this Consent Decree, the Collection System does not include  
24 Private Upper Laterals and 22 miles of Private Lower Laterals or other privately owned or operated  
25 infrastructure that may connect to the Collection System.

26 n. “Sanitary Sewer Overflow,” “overflow”, or “SSO” has the same meaning as those  
27 terms are defined in Section A.1. of the Statewide General Waste Discharge Requirements for Sanitary  
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1 Sewer Systems, State Water Resources Control Board Order No. 2006-0003 and Monitoring and  
 2 Reporting Programs No. 2006-0003 DWQ, as amended by Order No. 2008-0002- EXEC (“SSO  
 3 WDR”), or any amendment thereto, and which currently means: “any overflow, spill, release, discharge  
 4 or diversion of untreated or partially treated wastewater from a sanitary sewer system. SSOs include:  
 5 (i) Overflows or releases of untreated or partially treated wastewater that reach waters of the United  
 6 States; (ii) Overflows or releases of untreated or partially treated wastewater that do not reach waters of  
 7 the United States; and (iii) Wastewater backups into buildings and on private property that are caused by  
 8 blockages or flow conditions within the publicly owned portion of a sanitary sewer system.” For  
 9 purposes of this definition, “waters of the United States” has the meaning as set forth in 40 C.F.R. §  
 10 122.2.

11 o. “Sewer Line Segment” means any section of publicly owned sewer line or pipe  
 12 located between: (1) two manholes/maintenance holes; (2) a pump station and a manhole/maintenance  
 13 hole; (3) a pump station or a manhole/maintenance hole and a headworks structure; or (4) a sewer line or  
 14 pipe otherwise identifiable as a discrete section.

15 p. “SSMP” means the Sewer System Management Program implemented by  
 16 Millbrae to monitor the condition, maintenance, and repair of the Millbrae Collection System.

17 q. “Year” shall mean calendar year, unless otherwise specified.

### 18 **III. JURISDICTION AND VENUE**

19 3. Baykeeper alleges the following jurisdictional allegations:

20 a. This District Court has jurisdiction over the subject matter of the claims asserted  
 21 by Baykeeper pursuant to section 505(a)(1) of the Clean Water Act, 33 U.S.C. § 1365(a)(1), 28 U.S.C.  
 22 §§ 1331 and 2201 (an action for declaratory and injunctive relief arising under the Constitution and laws  
 23 of the United States).

24 b. Venue is proper in the Northern District of California pursuant to section  
 25 505(c)(1) of the Clean Water Act, 33 U.S.C. § 1365(c)(1), because the source of the violations is located  
 26 within this judicial district;

27 c. The Complaint filed herein states claims for which relief can be granted against  
 28

1 Millbrae pursuant to section 505 of the Clean Water Act, 33 U.S.C. § 1365;

2 d. Baykeeper has standing to bring this action; and

3 e. The District Court shall retain jurisdiction over this matter for purposes of  
4 interpreting, modifying or enforcing the terms of this Consent Decree, or as long thereafter as is  
5 necessary for the Court to resolve any motion to enforce this Consent Decree.

6 **IV. EFFECT OF CONSENT DECREE**

7 4. Baykeeper does not, by its consent to this Consent Decree, warrant or aver in any manner  
8 that Millbrae's compliance with this Consent Decree will constitute or result in compliance with any  
9 Federal or State law or regulation. Nothing in this Consent Decree shall be construed to affect or limit  
10 in any way the obligation of Millbrae to comply with all applicable federal, state and local laws and  
11 regulations governing any activity required by this Consent Decree.

12 5. Nothing in this Consent Decree shall be construed as an admission by Millbrae, and does not  
13 intend to imply any admission as to any fact, finding, issue of law, or violation of law, nor shall  
14 compliance with this Consent Decree be construed as an admission by Millbrae of any fact, finding,  
15 conclusion, issue of law, or violation of law.

16 **V. APPLICABILITY**

17 6. The provisions of this Consent Decree apply to and bind the Settling Parties, including any  
18 successors or assigns. The Settling Parties certify that their undersigned representatives are fully  
19 authorized to enter into this Consent Decree, to execute it on behalf of the Settling Parties, and to legally  
20 bind the Settling Parties to its terms.

21 7. The Settling Parties agree to be bound by this Consent Decree and not to contest its validity  
22 in any subsequent proceeding to implement or enforce its terms. By entering into this Consent Decree,  
23 Millbrae does not admit liability for any purpose as to any allegation or matter arising out of the Notice  
24 Letter and/or Complaint.

25 8. No change in ownership or corporate or other legal status of Millbrae or any transfer of  
26 Millbrae's assets or liabilities shall in any way alter the responsibilities of Millbrae or any of its  
27 successors or assigns thereof, under this Consent Decree. In any action to enforce this Consent Decree,  
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1 Millbrae shall not raise as a defense the failure by any of its agents, servants, contractors, employees,  
2 and successors or assigns to take actions necessary to comply with this Consent Decree.

3 **VI. EFFECTIVE DATE AND TERMINATION DATE**

4 9. The term “Effective Date,” as used in this Consent Decree, shall mean the last date for the  
5 United States Department of Justice to comment on the [proposed] Consent Decree, i.e., the forty-fifth  
6 (45<sup>th</sup>) day following the United States Department of Justice’s receipt of the [proposed] Consent Decree,  
7 or the date on which the Federal Agencies provide notice that no further review is required and the  
8 District Court enters the final Consent Decree, whichever occurs earlier.

9 10. This Consent Decree will terminate six (6) years from the Effective Date (“Termination  
10 Date”) unless Baykeeper has invoked the Dispute Resolution Procedure set forth in Section XVIII.

11 **VII. SSO AND SPILL REDUCTION PERFORMANCE STANDARDS**

12 11. SSO Reduction Standards. It is the goal of this Consent Decree to reduce Millbrae’s  
13 Collection System SSOs to zero over time. To approach the goal of zero SSOs, Millbrae shall reduce its  
14 SSOs and Lower Lateral spills as follows:

15 a. Millbrae Collection System SSO Reduction Performance Standards.

Calendar Year	Maximum Number of SSOs Per 100 Miles of Sewer Line/Year
2010	65
2011	50
2012	30
2013	15
2014	7
2015	4
2016	3

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26 12. For purposes of determining compliance with the Millbrae Collection System SSO Reduction  
27 Performance Standards, SSOs caused by storm events exceeding the Design Storm shall not be counted.  
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1 13. For purposes of determining compliance with the SSO Reduction Performance Standards, the  
2 miles of sewer lines, including twenty-two (22) miles of publicly-owned Lower Laterals as of the  
3 Effective Date equals seventy-seven (77) miles.

4 14. Compliance with the SSO Reduction Performance Standards shall be determined using the  
5 miles of sewer lines including Lower Laterals as subsequently updated in the Annual Report required  
6 under Section XV of this Consent Decree.

7 15. Failure to meet the SSO Reduction Performance Standards shall be a violation of this  
8 Consent Decree to be resolved by the Dispute Resolution procedure in Section XVIII below.

9 16. In order to reach the above SSO standards, Millbrae shall implement the programs described  
10 below.

11 17. Compliance or non-compliance with the SSO Reduction Performance Standards shall be  
12 documented by Millbrae in each year's Annual Report required under Section XV of this Consent  
13 Decree.

14 **VIII. SSO REDUCTION ACTION PLAN**

15 18. If any Annual Report required under Section XV of this Consent Decree provided by  
16 Millbrae to Baykeeper documents compliance with the then-applicable SSO Reduction Performance  
17 Standards, Millbrae shall have no obligation to prepare a SSO Reduction Action Plan as set forth herein.  
18 However, if an Annual Report documents SSOs in excess of the SSO Reduction Performance Standards  
19 of this Consent Decree, Millbrae shall submit to Baykeeper by April 1<sup>st</sup> of that same year a SSO  
20 Reduction Action Plan that specifies the actions taken in the prior calendar year pursuant to the Consent  
21 Decree and additional measures to be taken during the current calendar year and in the future, which are  
22 designed to achieve compliance with the SSO Reduction Performance Standards set forth in this  
23 Consent Decree. The SSO Reduction Action Plan shall include a proposed schedule for implementation  
24 of all actions proposed. The Settling Parties shall endeavor to reach agreement on the final SSO  
25 Reduction Action Plan by the end of Millbrae's fiscal year (June 30).

26 19. Baykeeper shall provide Millbrae, in writing, with all recommended revisions to the SSO  
27 Reduction Action Plan within thirty (30) days of receipt of the document. Millbrae shall consider each  
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1 of Baykeeper's recommended revisions and indicate within thirty (30) days of receipt of Baykeeper's  
2 comments whether Millbrae accepts each such recommendation for revision and if not provide a detailed  
3 explanation as to why Baykeeper's comments are being rejected. Baykeeper and Millbrae may seek  
4 Dispute Resolution pursuant to Section XVIII of this Consent Decree regarding disputes over the SSO  
5 Reduction Action Plan. In such Dispute Resolution processes, to the extent the Settling Parties do not  
6 dispute original provisions or recommended revisions, Millbrae shall implement all undisputed  
7 provisions or revisions. After the Settling Parties have reached agreement on the SSO Reduction Action  
8 Plan or after Dispute Resolution resolves any dispute concerning the SSO Reduction Action Plan,  
9 Millbrae shall begin implementation of the SSO Reduction Action Plan as an enforceable requirement of  
10 this Consent Decree within forty-five (45) days of agreement or upon the schedule set forth therein.

11 20. Millbrae shall address in the SSO Reduction Action Plan the various elements of such a plan  
12 that it believes will be necessary to achieve future compliance with the SSO Reduction Performance  
13 Standards, which may include any or all elements in its SSMP.

14 21. If additional funding is necessary to implement the SSO Reduction Action Plan, Millbrae  
15 shall seek such funding as soon as is practical. If Millbrae seeks financing, but is unsuccessful, Millbrae  
16 shall disclose in the SSO Reduction Action Plan the extent of its efforts to obtain financing.

#### 17 **IX. CAPACITY ASSURANCE**

18 22. By June 30, 2011, Millbrae shall have completed sufficient flow monitoring of the Millbrae  
19 Collection System to support hydraulic modeling. The monitoring shall be sufficient to calibrate and  
20 validate hydraulic modeling of the Millbrae Collection System.

21 23. By August 1, 2011, Millbrae shall submit a work plan for hydraulic modeling of the Millbrae  
22 Collection System. The hydraulic modeling shall be sufficient to identify all necessary capacity  
23 improvements to convey peak wet weather flows to the Millbrae Water Pollution Control Plant without  
24 SSOs caused by insufficient capacity in the Millbrae Collection System. The work plan shall contain a  
25 schedule for hydraulic modeling and all supporting efforts such as smoke testing, dye testing and other  
26 measures necessary to identify sources of I/I.

27 24. Capacity Assurance Report. By June 30, 2012, Millbrae shall provide a copy of a Capacity  
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1 Assurance Report to Baykeeper identifying all necessary capacity improvements to convey peak wet  
2 weather flows to the Millbrae POTW without SSOs caused by insufficient capacity. The Capacity  
3 Assurance Report shall include a schedule for construction of all necessary capacity improvements  
4 identified in the Capacity Assurance Report based on Design Storm criteria. The schedule for  
5 construction of capacity improvements shall be as expeditious as is practicable and Millbrae shall  
6 complete construction of such improvements within four (4) years from the date of the final Capacity  
7 Assurance Report. In no event shall the completion of the construction of the improvements identified  
8 in the Capacity Assurance Report extend beyond the Termination Date.

9       25. Extension of Time to Complete Capacity Improvements. Millbrae may request an extension  
10 of time to implement the capacity improvements beyond the Termination Date based on ability to pay.  
11 Such an extension shall require a demonstration of significant hardship to Millbrae ratepayers, by  
12 showing that:

- 13           a. Millbrae's sewer rates are equal to three percent (3%) of annual household income for  
14           residents within Millbrae; and
- 15           b. Millbrae has made timely and complete applications for all available bond funding, and  
16           either no bond funding is available, or bond funding is inadequate.

17 The demonstration set forth in (a) and (b) above shall be made in writing, and Millbrae shall provide all  
18 documents reasonably related to the extension request within fifteen (15) days of request by Baykeeper.

19       26. In the event Millbrae requests an extension of time to complete capacity improvements as  
20 described in paragraph 25 above, Millbrae shall pay Twenty Thousand Dollars (\$20,000) within  
21 fourteen (14) days of requesting the extension, to compensate Baykeeper for time spent reviewing  
22 Millbrae's request. In the event the Settling Parties agree to extend the Consent Decree beyond the  
23 Termination Date, the Settling Parties shall then meet and confer pursuant to Section XVIII of this  
24 Consent Decree to determine the additional funds Millbrae shall pay to Baykeeper to monitor  
25 compliance with the Consent Decree beyond the Termination Date. All payments under this section  
26 shall be made payable to "*Lawyers for Clean Water Attorney Client Trust Account*" addressed to 1004-  
27 A O'Reilly Avenue, San Francisco, CA 94129, sent overnight delivery. Any money remaining when  
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1 this Consent Decree terminates shall be awarded to the Environmental Mitigation Project recipient  
2 identified in paragraph 68 below.

3 27. In the event Millbrae makes the showing described in paragraph 25 and provides the funding  
4 set forth in paragraph 26, Baykeeper will not unreasonably refuse to agree to extend the term of the  
5 Consent Decree beyond the Termination Date. The term of the extension shall be no greater than  
6 sufficient to fund the identified capacity projects consistent with the funding identified in paragraph 25,  
7 subsections (a) and (b) above. Any extension pursuant to this section shall be incorporated into this  
8 Consent Decree pursuant to paragraph 98 (Modification of the Consent Decree) below.

9 28. Inflow and Infiltration (I/I). I/I identified within Millbrae's Collection System by the  
10 hydraulic modeling, smoke testing, dye testing, and condition assessment programs set forth herein,  
11 shall be identified in the Capacity Assurance Report and shall be addressed within the Capacity  
12 Assurance Report. Major sources of I/I shall be removed as expeditiously as practicable. The Capacity  
13 Assurance Report shall include capacity improvements for the Millbrae Collection System designed to  
14 eliminate capacity-related SSOs during rain events of less than the Design Storm.

15 29. Final Compliance Report. Millbrae shall provide to Baykeeper a final compliance report for  
16 Baykeeper's review and comment. The final compliance report shall be submitted to Baykeeper a  
17 minimum of one (1) year prior to the Termination Date and the report shall provide the status of all of  
18 the construction and other related activities required in the Capacity Assurance Report. The report shall  
19 provide sufficient information and detail to reasonably demonstrate that Millbrae has undertaken and  
20 will have completed sufficient activities to fully comply with the capacity related SSOs for rain events  
21 less than the Design Storm by the Termination Date. This final compliance report shall be subject to  
22 review, comment and referral to the Dispute Resolution Procedures as set forth in Section XVIII of this  
23 Consent Decree.

24 30. Review of Submittals. Baykeeper shall have the right to review the work plan for hydraulic  
25 modeling and provide comments thereon. Baykeeper shall provide Millbrae, in writing, with all  
26 recommended revisions to the hydraulic modeling work plan within thirty (30) days of receipt of the  
27 document. Millbrae shall consider each of Baykeeper's recommended revisions and indicate within  
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1 thirty (30) days of receipt of Baykeeper's comments whether Millbrae accepts each such  
2 recommendation for revision and if not provide a detailed explanation as to why Baykeeper's comments  
3 are being rejected. Baykeeper and Millbrae may seek Dispute Resolution pursuant to Section XVIII of  
4 this Consent Decree regarding disputes over the hydraulic modeling work plan.

5 31. Baykeeper shall also provide Millbrae, in writing, with all recommended revisions to the  
6 Capacity Assurance Report within thirty (30) days of receipt of the document. Millbrae shall consider  
7 each of Baykeeper's recommended revisions and indicate within thirty (30) days of receipt of  
8 Baykeeper's comments whether Millbrae accepts each such recommendation for revision and if not  
9 provide a detailed explanation as to why Baykeeper's comments are being rejected. Baykeeper and  
10 Millbrae may seek Dispute Resolution pursuant to Section XVIII of this Consent Decree regarding  
11 disputes over the Capacity Assurance Report.

12 32. Neither Settling Party shall invoke Dispute Resolution until both Parties have made good  
13 faith efforts to resolve any professional differences with regard to the hydraulic modeling work plan and  
14 the Capacity Assurance Report.

15 **X. SEWER CONDITION ASSESSMENT/REHABILITATION/REPLACEMENT**

16 33. Within four (4) years of the Effective Date of the Consent Decree, Millbrae shall complete  
17 closed circuit television ("CCTV") inspection and condition assessment of all gravity Sewer Line  
18 Segments in the Millbrae Collection System that are fifteen (15) inches and smaller in diameter and are  
19 greater than ten (10) years old. Millbrae shall inspect and assess no less than ten (10) miles of sewer  
20 main in the first year of this Consent Decree and no less than an additional fifteen (15) miles by the end  
21 of the second year of this Consent Decree.

22 34. Within one hundred and twenty (120) days of the Effective Date of the Consent Decree,  
23 Millbrae shall propose to Baykeeper a schedule for CCTV inspections. The schedule shall be prioritized  
24 to first inspect areas with known SSO problems and second to systematically CCTV all other lines per  
25 basin.

26 35. Defects shall be coded and scored using the sanitary sewer system assessment codes and  
27 scores set forth in the Pipeline Assessment Condition Protocol ("PACP") coding system. The score for  
28 each segment is then weighted based on the PACP score to determine a response as shown in the

1 Timeframe for Actions to Correct Observed Defects below.

2 36. Any sewer line or Lower Lateral where the passage of the CCTV camera was blocked by the  
3 condition of the pipe shall result in the segment being defined as failed. That sewer line or Millbrae-  
4 owned Lower Lateral shall be cleaned within forty-eight (48) hours and shall be re-inspected and  
5 flushed bi-monthly until permanent repairs required by the table set out in paragraph 38 can be made.

6 37. Inspections shall be accomplished using CCTV. The work products shall include an  
7 inspection database, prioritized repair projects, and prioritized rehabilitation/replacement projects. The  
8 annual inspection quantity will include the sum of the lengths of all of the gravity sewers where  
9 inspection was completed. Segments failing to pass the CCTV camera shall not be included in the  
10 annual inspection quantity. Where a CCTV camera fails to pass through a given segment, and after  
11 repair and and/or replacement of that segment the camera subsequently passes, the segment may be  
12 included in the annual inspection quantity.

13 38. Millbrae shall correct defects that may cause an SSO within an appropriate timeframe.  
14 Based on the PACP scores derived during CCTV inspections, Millbrae's timeframes for actions to  
15 correct observed defects in the Sewer Line Segments are shown in the table entitled Timeframe for  
16 Actions to Correct Observed Defects set out below.

17 **Timeframe for Actions to Correct Observed Defects**

18 <b>Observed Defect</b>	<b>Corrective Action</b>	<b>Time Frame (from date defect observed)</b>	<b>Other Action</b>
19 PACP Grade 4 or 5 Maintenance Defect	Clean sewer	30 days	Place on trouble spot cleaning or mechanical root control schedule
20 PACP Grade 3 Maintenance Defect	Clean sewer	4 months	Place on trouble spot cleaning or mechanical root control schedule
21 PACP Grade 5 Structural Defect – Immediate Failure Likely	Repair rehabilitate or replace sewer	ASAP  (no more than 90 days)	N/A
22 PACP Grade 5 Structural Defect – Immediate Failure Unlikely	Repair, rehabilitate, replace, or re- inspect sewer	2 years	Re-inspect within one year if corrective action not taken

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	PACP Grade 4 Structural Defect	Repair, rehabilitate, or re- inspect sewer	5 years	Re-inspect within three years if corrective action not taken
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39. In addition to actions required above, when a SSO occurs due to the condition of a Millbrae-owned Lower Lateral, Millbrae shall, within ten (10) working days of the SSO, inspect the Millbrae-owned Lower Lateral with CCTV, assess its condition, and within thirty (30) days repair defects that were the cause of the SSO.

40. If Millbrae determines that the cause of a SSO was roots or debris entering the Millbrae-owned Lower Lateral through defects in the Private Lateral, Millbrae shall require the property owner to inspect the Private Lateral and to make all necessary repairs required to prevent a reoccurrence of the SSO within ninety (90) days.

41. In the Annual Report required under Section XV of this Consent Decree, Millbrae shall provide information regarding condition assessment, rehabilitation, and replacement. At a minimum the Annual Report must include: the miles of sewer that were assessed in the previous year; the number of Lower Laterals that were assessed in the preceding year; the miles of sewer assessed receiving each grade in Millbrae's grading system; identification of the sewer segments with grades of 3, 4 or 5 under the PACP scoring system; and a summary of the number and identification of the sewers and Lower Laterals repaired, rehabilitated and/or replaced during the previous year.

#### **XI. IMPLEMENTATION OF FATS, OILS AND GREASE PROGRAM**

42. Within ninety (90) days of the Effective Date of this Consent Decree, Millbrae shall institute a residential outreach program to educate the public on proper FOG disposal in order to reduce the discharge of FOG to the Millbrae Collection System from residential sources. Millbrae shall institute a commercial outreach program to educate commercial establishments with the potential to discharge FOG to the sanitary sewer system on the use of Best Management Practices ("BMPs"), and the proper maintenance of grease recovery devices to reduce FOG from commercial sources consistent with the device manufacturer's requirements.

43. Millbrae shall continue to require the installation of a grease interceptor at any existing FSE



1 which has caused an SSO due to FOG.

2 44. Millbrae shall continue to cause the inspection of each of its FOG accounts no less than once  
3 a year. FOG accounts found in violation of Millbrae ordinances shall be re-inspected within thirty (30)  
4 days. Repeat violations shall be met with increased enforcement actions as deemed necessary by  
5 Millbrae to enforce compliance.

6 45. Millbrae shall continue to send a Notice of Correction (“NOC”) to any FSE found to be the  
7 cause of a FOG related SSO. The NOC shall describe the cause of the SSO that has been attributed to  
8 the FSE, and outline pertinent parts of Millbrae’s FOG Ordinance and suggest remediation methods and  
9 corrective actions to comply. Such NOC will require the recipient to acknowledge receipt within thirty  
10 (30) days. However, Millbrae has the discretion to issue a Notice of Violation, conduct a Show Cause  
11 Hearing on the violation(s) and issue fines, citation(s) or refer a case to its City Attorney in lieu of a  
12 NOC when circumstances indicate more action is appropriate.

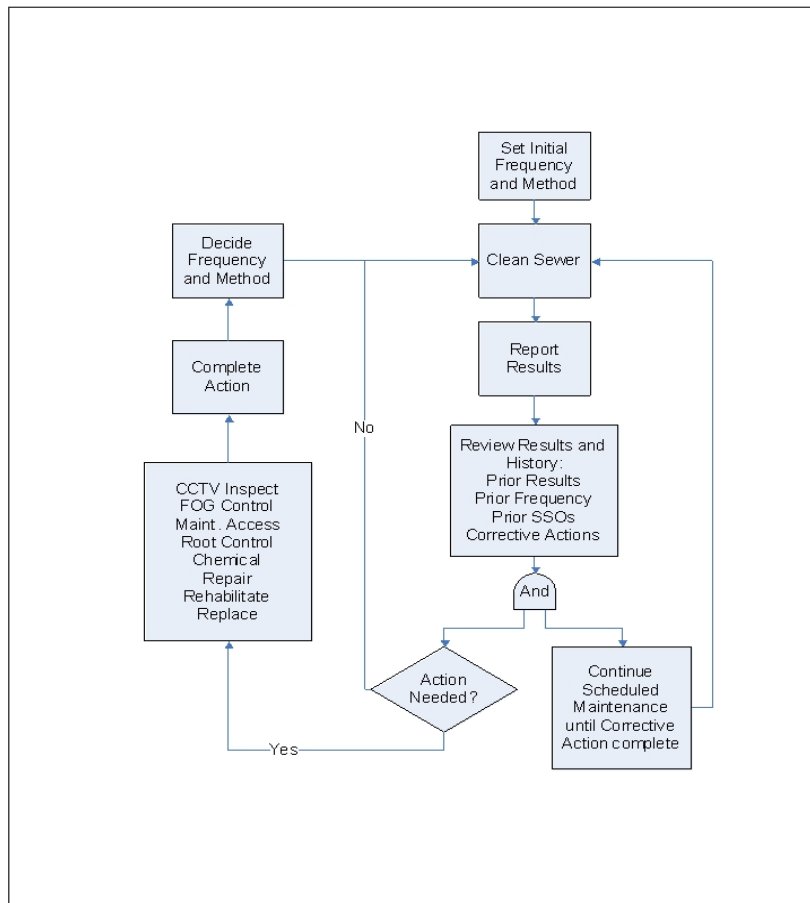
## 13 **XII. SEWER CLEANING, HOT SPOTS, AND LATERAL PROGRAMS**

14 46. Routine Cleaning. Millbrae shall continue to clean all of its gravity sanitary Sewer Line  
15 Segments fifteen (15) inches in diameter or smaller in the Millbrae Collection System in accordance  
16 with a schedule that is appropriate for the prevention of SSOs, but in any event Millbrae shall clean the  
17 entire Millbrae Collection System at least once every five (5) years. Lower Laterals maintained by  
18 Millbrae shall be cleaned and inspected after a reported blockage in the Lower Lateral whether or not it  
19 caused an SSO.

20 47. Hot Spot Cleaning Program. Millbrae shall include any Sewer Line Segment that has a  
21 blockage caused by roots, debris, grease or pipe condition into its Hot Spot Cleaning Program.  
22 Within one hundred and twenty (120) days from the Effective Date of the Consent Decree, Millbrae  
23 shall develop and submit to Baykeeper for comments a Hot Spot Cleaning Work Plan (“HSCWP”).  
24 The HSCWP shall include a listing of all lines requiring Hot Spot Cleaning and the cleaning frequency  
25 for each identified line. The HSCWP shall include the rationale relied upon to select the main sewer  
26 segments included in the HSCWP and to determine cleaning frequencies. Cleaning frequencies for the  
27 Hot Spot Cleaning Program shall include: 1 month, 2 month, 3 month, and 6 month cycles as needed.  
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1 The HSCWP shall incorporate the methodology set forth below in Figure 1 (“Preventive Maintenance  
 2 Scheduling Flow Chart”) below. If any Sewer Line Segment included in the HSCWP is subsequently  
 3 repaired or replaced and the need for the placement of the segment in the HSCWP is eliminated, the  
 4 Sewer Line Segment may be removed from the HSCWP and shall be indicated in the Annual Report  
 5 required by Section XV of this Consent Decree.





## Sewer Cleaning Results Matrix

	<b>Clear</b>	<b>Light</b>	<b>Moderate</b>	<b>Heavy</b>
<b>Debris</b>	No observable debris	Minor amount of debris 1 pass	moderate amounts of debris 2-3 passes	Significant amounts of debris More than 4 passes Operator concern for future stoppage
<b>Grease</b>	No observable grease	Minor amounts of grease 15 minutes or less to clean 1 pass	Small “chunks” No “logs” 15-30 minutes to clean 2-3 passes	Big “chunks” or “logs” More than 4 passes Operator concern for future stoppage
<b>Roots</b>	No observable roots	Minor amounts of roots 1 pass	Thin stringy roots No “clumps” 2-3 passes	Thick roots Large “clumps” More than 4 passes Operator concern for future stoppage
<b>Debris:</b> Structural pipe fragments soil, rock, etc.	No observable materials	Specify material (if possible) Minor amounts of material	Specify material Moderate amounts of material per line segment	Specify material Significant amounts of material per line segment Operator concern for future stoppage
<b>Action</b>	Decrease frequency to next lower frequency after 3 consecutive results (e.g. 6 months to 12 months)	Continue current maintenance frequency	Increase current maintenance frequency to next higher frequency (e.g. 6 months to 3 months)	Increase current maintenance frequency to next higher frequency (e.g. 6 months to 3 months)

52. Changes in cleaning frequency based upon cleaning results shall be as follows:

- a. No reduction in cleaning frequency shall be made in a sewer line segment with a previous history of SSOs without the approval of an appropriate Collection Public Works Supervisor or the Public Works Superintendent;
- b. A change from “Moderate” or “Heavy” after three (3) consecutive cleanings result in “Clear” will cause the cleaning frequency to be reduced to the next lower cleaning frequency;

1 c. Results of “Medium” or “Heavy” shall cause the cleaning frequency to be increased to  
2 the next highest frequency.

3 53. At a minimum, main Sewer Line Segments shall be added to the Hot Spot Cleaning Program  
4 based on the findings from any CCTV Condition Assessment using Millbrae’s current system of Defect  
5 Codes and Ratings. Any Sewer Line Segments with a condition assessment rating of “Medium” or  
6 “Heavy” for roots, grease, or debris will be added to the Hot Spot Cleaning Program. A Sewer Line  
7 Segment with a condition assessment rating of “Medium” for roots, grease or debris will be added at a  
8 six (6) month cleaning frequency. A Sewer Line Segment with a condition assessment rating of  
9 “Heavy” for roots, grease or debris will be added at a three (3) month cleaning frequency.

10 54. Sewer Cleaning Quality Assurance/Quality Control Program: Millbrae shall institute and  
11 maintain a quality assurance/quality control (“QA/QC”) program adequate to ensure proper and  
12 complete cleaning of sewers. The quality assurance/quality control program shall consist of spot  
13 checking the cleaning quality in a minimum of two percent (2%) by Sewer Line Segment of the cleaned  
14 sewers on a monthly basis using CCTV to ensure adequate cleaning. If the cleaning is found to be  
15 inadequate, the Sewer Line Segment will be re-cleaned within thirty (30) days. If more than ten percent  
16 (10%) of the spot checked Sewer Line Segments require re-cleaning in any given month, spot checking  
17 of the system shall be increased to five percent (5%). Where spot checking of the system has increased  
18 to five percent (5%) pursuant to this Section, such spot checking will not be reduced to two percent (2%)  
19 until three consecutive months show two percent (2%) or less of the pipes inspected required re-  
20 cleaning. If a required inspection frequency increase is identified with a single crew, the increased  
21 inspection schedule will only apply to that crew.

22 55. If scheduled or hot spot cleaning of a segment or area cannot be properly accomplished due  
23 to pipe condition or access limitations, the condition of the segment shall be considered failing and shall  
24 be repaired within one hundred twenty (120) days.

25 56. Millbrae shall identify the sewer lines cleaned and the results of its QA/QC program each  
26 year in the Annual Report required by Section XV of this Consent Decree.

27 57. If Millbrae’s Hot Spot Cleaning Program and annual cleaning system fails to reduce the SSO  
28

1 rate to that required by the Millbrae Collection System SSO Reduction Performance Standards in  
 2 Section VII by 2011, Millbrae shall evaluate its current cleaning protocols and revise these cleaning  
 3 protocols within thirty (30) days. The new protocols shall be provided to Baykeeper for review and  
 4 comment.

5 58. Baykeeper shall review and provide Millbrae with comments on Millbrae's revised cleaning  
 6 protocols within thirty (30) days of submittal. Millbrae shall consider each of Baykeeper's  
 7 recommended revisions and indicate within thirty (30) days of receipt of Baykeeper's comments  
 8 whether Millbrae accepts each such recommendation for revision and if not provide a detailed  
 9 explanation as to why Baykeeper's comments are being rejected. Baykeeper or Millbrae may seek  
 10 Dispute Resolution pursuant to Section XVIII of this Consent Decree regarding disputes over the new  
 11 cleaning protocols.

12 59. The Settling Parties shall attempt to resolve any disputes regarding the new cleaning  
 13 protocols in good faith. Neither Settling Party shall invoke Dispute Resolution until good faith efforts to  
 14 resolve disputes have been completed. Millbrae shall immediately implement all portions of the new  
 15 cleaning protocols not in dispute and shall implement all portions of the final new cleaning protocols not  
 16 previously implemented immediately upon resolution of disputes.

### 17 **XIII. PRIVATE LATERALS**

18 60. Within one-hundred eighty (180) days of the Effective Date of this Consent Decree,  
 19 Millbrae shall propose and recommend to the Millbrae Council the adoption of amendments to the  
 20 Municipal Code to:

- 21 a. Require inspection of Private Laterals as a condition to obtaining a building permit if  
 22 the project adds plumbing fixtures or more than twenty-five percent (25%) of the  
 23 square footage of the structure is being remodeled. See MCC 8.20.470;
- 24 b. Set standards for evaluating the condition of Private Laterals subject to the provisions  
 25 in subsections (a)-(b) above. See MCC 8.20.430;
- 26 c. Require the Private Lateral owner to repair and/or replace the Private Lateral within one  
 27 hundred and eighty (180) days where an SSO has occurred from the Millbrae  
 28

1 Collection System as a result of a blockage, break or other issue in the Private Lateral,  
2 unless the property owned by the Private Lateral owner is undergoing an extensive  
3 remodeling, in which case the repair and/or replacement shall occur no later than the  
4 new occupancy date, or the Private Lateral owner claims financial hardship, in which  
5 case Millbrae may be required to conduct the repair or replacement. See MCC  
6 8.20.440;

- 7 d. Require any defects in the Private Lateral that causes the Private Lateral to fail the  
8 inspection be repaired or replaced within ninety (90) days for all remodeling efforts or  
9 sale of property. Defects causing a Private Lateral to fail the inspection shall include  
10 but not be limited to the following: pipe failure; open joints; and/or openings in the  
11 pipe, which allow root intrusion. See MCC 8.20.440;
- 12 e. Require the Private Lateral owner, within one hundred twenty (120) days of notification  
13 by Millbrae, to remove roots from their Private Laterals that are growing into Lower  
14 Laterals as determined by Millbrae and make all necessary repairs to the Private Lateral  
15 necessary to prevent a reoccurrence of roots intrusion that reaches the Lower Lateral.  
16 See MCC 8.20.430;
- 17 f. No later than six (6) months from the Effective Date of the Consent Decree, Millbrae  
18 shall adopt an ordinance requiring all property owners or their contractors to insert a  
19 temporary trap downstream of their Private Lateral when performing maintenance to  
20 remove a blockage, so to ensure any rootball, debris, or other item is not flushed into  
21 the Millbrae Collection System and potentially causing an additional blockage.

22 61. Millbrae shall continue to implement the following provisions of its Municipal Code  
23 concerning maintenance and inspection of Private Laterals:

- 24 a. Require the property owner to maintain the Private Lateral at the owner's expense, as  
25 required by Title 8, Section 20.430 of the Millbrae Municipal Code;
- 26 b. Require the property owner to abate all leaks, breaks and improper connections to the  
27 Private Lateral at the owner's expense, as required by Title 8, Section 20.440 of the  
28

1 Millbrae Municipal Code;

- 2 c. Require the property owner to test the sewer lateral for inflow and infiltration and make  
3 all necessary repairs and/or replacement prior to transfer of title upon the sale of the  
4 property, as required by Title 8, Section 20.450 of the Millbrae Municipal Code;
- 5 d. Require that the property owner install and maintain cleanouts, if not already existing,  
6 at the owner’s expense in the event of new construction on the property, remodels  
7 where plumbing fixtures are added to the property and/or more than twenty-five percent  
8 25% of the building area is being remodeled, upon repair or replacement of the Private  
9 Lateral, whenever backflow protection and/or relief devices are installed, where  
10 property has been damaged by blockage in the Millbrae Collection System, on all  
11 structures where a pump is used to lift sewage to the Private Lateral and to the Millbrae  
12 Collection System, and in buildings where the elevation of any floor is at or below the  
13 invert of the Millbrae Collection System, as required by Title 8, Section 20.460 of the  
14 Millbrae Municipal Code; and
- 15 e. Require that the property owner install and maintain backflow protection and relief  
16 devices in the event of new construction on the property, remodels, repair or  
17 replacement of the Private Lateral, where property has been damaged by a blockage in  
18 the Millbrae Collection System, on all structures where a pump is used to lift sewage to  
19 the Private Lateral and to the Millbrae Collection System, and in buildings where the  
20 elevation of any floor is at or below the invert of the Millbrae Collection System, as  
21 required by Title 8, Section 20.470 of the Millbrae Municipal Code.

22 **XIV. CAPITAL IMPROVEMENT PROGRAM**

23 62. Millbrae shall complete improvements included in its current Capital Improvement Program  
24 (“CIP”), which is attached hereto as Appendix A. Additionally, any Sewer Line Segments requiring  
25 replacement based on the results of the condition assessment program described in Section X of this  
26 Consent Decree shall also be included in the current CIP. The results of the condition assessment  
27 program and subsequent updates to Millbrae’s CIP will be provided to Baykeeper for review to ensure  
28

1 that mandatory replacements occur as scheduled.

2 63. City shall include in its CIP the repair, replacement, or rehabilitation of those sewer lines that  
3 cannot be kept free of stoppages by a reasonable program of maintenance, to add new sewer lines or  
4 install larger sewer lines as needed to address inadequate capacity of any existing sewer line to handle  
5 peak wet weather flows as determined by the Capacity Assurance Report detailed in Section IX of this  
6 Consent Decree, and to build other capital improvements (such as new or replacement manholes or  
7 improved or expanded pump stations) as needed to avoid line breakages or collapse, reduce I/I and dry  
8 weather infiltration, ensure adequate Millbrae Collection System flow conveyance capacity, and attain  
9 SSO Reduction Performance Goals. Funding for additions to the CIP will not be available until  
10 Millbrae's new POTW, currently under construction, is completed in FY 2011.

11 64. Millbrae shall provide the necessary funding to complete the projects outlined in the CIP.

12 65. When performing any CIP projects, Millbrae shall comply with the Statewide General Permit  
13 for Storm Water Discharges Associated with Construction Activities, NPDES No. CAS000002, and the  
14 Municipal Regional Stormwater NPDES Permit, Regional Board, NPDES Permit No. CAS612008. In  
15 addition, Millbrae shall implement appropriate storm water BMPs to control storm water runoff from  
16 any sites less than one acre in size where Millbrae is conducting construction required pursuant to this  
17 Consent Decree. Baykeeper or Millbrae may seek Dispute Resolution pursuant to Section XVIII of this  
18 Consent Decree regarding disputes over compliance with this paragraph.

19 66. Millbrae shall provide Baykeeper with the CIP timeline and funding schedule for review and  
20 comment. Millbrae shall consider each of Baykeeper's recommended revisions and indicate within  
21 thirty (30) days of receipt of Baykeeper's comments whether Millbrae accepts each such  
22 recommendation for revision and if not provide a detailed explanation as to why Baykeeper's comments  
23 are being rejected. Baykeeper or Millbrae may seek dispute resolution pursuant to Section XVIII of this  
24 Consent Decree regarding disputes over the CIP.

## 25 **XV. ANNUAL REPORT**

26  
27 67. Millbrae shall submit an Annual Report to Baykeeper for each year that this Consent Decree  
28



1 is in effect. Millbrae shall submit the first Annual Report to Baykeeper by May 1, 2011, and shall  
 2 submit all subsequent Annual Reports by March 1 of each year that this Consent Decree remains in  
 3 effect. The Annual Report shall:

- 4 a. Include the specific annual reporting requirements as set forth in Sections VII, X, and  
 5 XII of this Consent Decree.
- 6 b. Provide details relevant to Millbrae's implementation of, and compliance with, this  
 7 Consent Decree during the preceding year, including any program modifications during  
 8 the prior calendar year or delays.
- 9 c. Assess Millbrae's progress towards meeting the requirements of the Consent Decree.

10 **XVI. ENVIRONMENTAL MITIGATION PROJECT AND FEES AND COSTS**

11

12 68. Rose Foundation Payment. To remediate perceived environmental harms resulting from the  
 13 allegations in the Complaint, Millbrae shall pay to the Rose Foundation for Communities and the  
 14 Environment the total sum of Three Hundred Thousand Dollars (\$300,000) ("the Mitigation Payment")  
 15 to be used to fund environmental project activities that will benefit the San Francisco Bay or its  
 16 tributaries. In no event shall Baykeeper receive any of the Mitigation Payment to use for any purpose.  
 17 Payment of One Thousand Dollars (\$100,000) shall be made within thirty (30) days of the Effective  
 18 Date of this Consent Decree, to:

19 The Rose Foundation for Communities and the Environment  
 20 6008 College Avenue, Suite 10  
 Oakland, California 94618  
 Attention: Tim Little

21 Payment of the remaining balance shall be made to the Rose Foundation at the above address in two (2)  
 22 equal installments of One Thousand Dollars (\$100,000) each, and shall be made on August 1, 2011 and  
 23 August 1, 2012, respectively.

24 69. Low Impact Development Projects. As additional environmental mitigation projects,  
 25 Millbrae shall establish a dedicated fund in the total amount of Two Hundred and Twenty Five  
 26 Thousand Dollars (\$225,000) to be used over the life of the Consent Decree for replacement of "Y  
 27 Private Lateral Lines" and Low Impact Development Projects ("LID Projects"). Millbrae shall spend no  
 28

1 less than Seventy Five Thousand Dollars (\$75,000) of this fund on LID Projects. Furthermore:

- 2 a. For purposes of this paragraph, “Y Private Lateral Lines” means private sewer lateral  
3 lines that connect more than one dwelling to a City sewer main line.
- 4 b. For purposes of this paragraph “LID Projects” means any of the actions or activities  
5 listed in the attached Appendix B.
- 6 c. If Millbrae has not spent all of the Two Hundred and Twenty Five Thousand Dollar  
7 (\$225,000) fund required by this paragraph on Y Private Lateral Line replacement or  
8 LID Projects within thirty (30) days of Termination of the Consent Decree, Millbrae  
9 shall tender payment of the difference between the amount it has spent and the Two  
10 Hundred and Twenty Five Thousand Dollars (\$225,000) to the Rose Foundation for the  
11 Environment to fund environmental project activities that will benefit the San Francisco  
12 Bay or its tributaries. Millbrae shall simultaneously send notice to Baykeeper of any  
13 such payments to the Rose Foundation.
- 14 d. Millbrae shall include in its Annual Report submitted pursuant to Section XV of this  
15 Consent Decree an accounting of how Millbrae has expended the fund required  
16 pursuant to this paragraph, including an itemization of how many Y Lateral Lines  
17 Millbrae has replaced and the cost of this replacement and a description of the LID  
18 Projects implemented and the cost of these projects. In addition, Millbrae shall provide  
19 a final environmental project report thirty (30) days before the Termination Date of this  
20 Consent Decree that provides a final accounting of how Millbrae has expended the fund  
21 required pursuant to this paragraph.

22 70. Millbrae shall not refer to completion or implementation of the supplemental environmental  
23 projects required under this Consent Decree in any representation to the public without explicitly stating  
24 in any such representation that it undertook completion or implementation of the supplemental  
25 environmental projects in response to a Clean Water Act enforcement action brought by Baykeeper.

26 71. Litigation Fees and Costs. To help defray Baykeeper’s attorneys, consultant, and expert fees  
27 and costs, and any other costs incurred as a result of investigating, filing this action, and negotiating a  
28

1 settlement, Millbrae shall pay Baykeeper the sum of Two Hundred Thousand Dollars (\$200,000) which  
2 shall include all attorneys' fees and costs for all services performed by and on behalf of Baykeeper by its  
3 attorneys and consultants up to and through the Effective Date of this Consent Decree. The payment  
4 shall be made within twenty-one (21) days of the Effective Date of this Consent Decree. The payment  
5 shall be made in the form of a check payable to "*Lawyers for Clean Water Attorney Client Trust*  
6 *Account*" addressed to: 1004-A O'Reilly Avenue, San Francisco, CA 94129, sent overnight delivery,  
7 and shall constitute full payment for all costs of litigation incurred by Baykeeper that have or could have  
8 been claimed in connection with or arising out of Baykeeper's lawsuit, up to and including the Effective  
9 Date.

10 72. Compliance Monitoring. Millbrae agrees to compensate Baykeeper for time to be spent by  
11 legal staff or technical consultants reviewing compliance reports and any other documents, or  
12 participating in any meet and confer process under this Consent Decree. To this end, Millbrae shall pay  
13 Twenty-Five Thousand Dollars (\$25,000) within twenty-one (21) days of the Effective Date of this  
14 Consent Decree. In the event Millbrae fails to meet the SSO Reduction Performance Standards in a  
15 given year, and submits an SSO Reduction Action Plan pursuant to Section VIII of this Consent Decree,  
16 Millbrae shall pay Twenty Thousand Dollars (\$20,000) within seven (7) days of submitting the Plan to  
17 compensate Baykeeper for time spent reviewing and commenting on the Plan. All payments under this  
18 section shall be made payable to "*Lawyers for Clean Water Attorney Client Trust Account*" addressed to  
19 1004 O'Reilly Avenue, San Francisco, CA 94129, sent overnight delivery. Any compliance monitoring  
20 money remaining when this Consent Decree terminates shall be awarded to the Environmental  
21 Mitigation Project recipient identified above.

## 22 **XVII. COMMITMENTS OF BAYKEEPER**

23 73. Submission of Consent Decree to Federal Agencies. Baykeeper shall submit a copy of this  
24 Consent Decree to EPA and the United States Department of Justice ("DOJ") within three (3) days of its  
25 execution for agency review consistent with 40 C.F.R. § 135.5. The agency review period expires forty-  
26 five (45) days after receipt by both agencies, as evidenced by the certified return receipts, copies of  
27 which shall be provided by Baykeeper to Millbrae upon request. In the event that EPA or DOJ comment  
28

1 negatively on the provisions of this Consent Decree, the Settling Parties agree to meet and confer to  
2 attempt to resolve the issue(s) raised by EPA or DOJ.

3 74. Filing of Consent Decree With the Court. Baykeeper shall file this Consent Decree with the  
4 District Court within three (3) days of the Effective Date. Baykeeper is responsible for notifying  
5 Millbrae of the District Court's entry of the Order dismissing these claims with prejudice. Such  
6 notification can be satisfied by the Northern District of California's Case Management/Electronic Case  
7 Filing ("CM/ECF") notification to the Settling Parties that the Order was executed and entered by the  
8 District Court.

### 9 **XVIII. DISPUTE RESOLUTION**

10 75. This Court shall retain jurisdiction over this matter for the purposes of adjudicating all  
11 disputes among the Settling Parties that may arise under the provisions of this Consent Decree. The  
12 Court shall have the power to enforce this Consent Decree with all available legal and equitable  
13 remedies, including contempt.

14 76. Meet and Confer. Either Settling Party to this Consent Decree shall invoke the dispute  
15 resolution procedures of this Section by notifying all other Settling Parties in writing of the matter(s) in  
16 dispute and of the Settling Party's proposal to resolve the dispute under this Section. The Settling  
17 Parties shall then meet and confer in an attempt to resolve the dispute informally over a period of ten  
18 (10) calendar days from the date of the notice.

19 77. If the Settling Parties cannot resolve a dispute by the end of the meet and confer informal  
20 negotiations, the Settling Party invoking the dispute resolution provision may invoke formal dispute  
21 resolution by filing a motion before the United States District Court for the Northern District of  
22 California. The Settling Parties shall jointly apply to the Court for an expedited hearing schedule on the  
23 motion.

24 78. If any Settling Party invokes any of the provisions of this Section to enforce the terms and  
25 conditions of this Consent Decree, the prevailing Settling Party shall be entitled to recover reasonable  
26 fees incurred to enforce the terms of this Consent Decree consistent with the provisions of sections 505  
27 and 309 of the Clean Water Act, 33 U.S.C. §§ 1365, 1319.  
28

1 **XIX. MUTUAL RELEASE OF LIABILITY, COVENANT NOT TO SUE, AND FORCE**  
2 **MAJEURE**

3 79. In consideration of the above, upon the Effective Date of this Consent Decree, the Settling  
4 Parties hereby fully release, except for claims for the Millbrae's failure to comply with this Consent  
5 Decree and as expressly provided below, each other and their respective successors, assigns, officers,  
6 agents, employees, and all persons, firms, and corporations having an interest in them, from any and all  
7 alleged Clean Water Act violations claimed in the Complaint, up to and including the Effective Date of  
8 this Consent Decree.

9 80. Nothing in this Consent Decree limits or otherwise affects Baykeeper's right to address or  
10 take any position that it deems necessary or appropriate in any formal or informal proceeding before the  
11 Regional Board, EPA, or any other judicial or administrative body on any other matter relating to  
12 Millbrae.

13 81. Neither the Consent Decree nor any payment pursuant to the Consent Decree shall constitute  
14 or be construed as a finding, adjudication, or acknowledgement of any fact, law, or liability, nor shall it  
15 be construed as an admission of violation of any law, rule, or regulation. Millbrae maintains and  
16 reserves all defenses they may have to any alleged violations that may be raised in the future.

17 82. Force Majeure. Millbrae shall notify Baykeeper pursuant to the terms of this paragraph when  
18 implementation of the requirements set forth in this Consent Decree, within the deadlines set forth in  
19 those paragraphs, becomes impossible, despite the timely good-faith efforts of Millbrae, due to  
20 circumstances beyond the control of Millbrae or its agents, and which could not have been reasonably  
21 foreseen and prevented by the exercise of due diligence by Millbrae. Any delays due to Millbrae's  
22 failure to make timely and bona fide applications and to exercise diligent efforts to comply with the  
23 terms in this Consent Decree in normal inclement weather shall not, in any event, be considered to be  
24 circumstances beyond Millbrae's control. Financial inability shall not, in any event, be considered to be  
25 circumstances beyond Millbrae's control.

- 26 a. If Millbrae claims impossibility, it shall notify Baykeeper in writing within thirty (30)  
27 days of the date that Millbrae first knew of the event or circumstance that caused or  
28

1 would cause a violation of this Consent Decree, or the date Millbrae should have  
2 known of the event or circumstance by the exercise of due diligence. The notice shall  
3 describe the reason for the nonperformance and specifically refer to this Section of this  
4 Consent Decree. It shall describe the anticipated length of time the delay may persist,  
5 the cause or causes of the delay, the measures taken or to be taken by Millbrae to  
6 prevent or minimize the delay, the schedule by which the measures will be  
7 implemented, and the anticipated date of compliance. Millbrae shall adopt all  
8 reasonable measures to avoid and minimize such delays.

- 9 b. The Settling Parties shall meet and confer in good-faith concerning the non-  
10 performance and, where the Settling Parties concur that performance was or is  
11 impossible, despite the timely good faith efforts of Millbrae, due to circumstances  
12 beyond the control of Millbrae that could not have been reasonably foreseen and  
13 prevented by the exercise of due diligence by Millbrae, new performance deadlines  
14 shall be established.
- 15 c. If Baykeeper disagrees with Millbrae's notice, or in the event that the Settling Parties  
16 cannot timely agree on the terms of new performance deadlines or requirements, either  
17 Settling Party shall have the right to invoke the Dispute Resolution procedures pursuant  
18 to Section XVIII of this Consent Decree. In such proceeding, Millbrae shall bear the  
19 burden of proving that any delay in performance of any requirement of this Consent  
20 Decree was caused or will be caused by force majeure and the extent of any delay  
21 attributable to such circumstances.

22 83. The Dispute Resolution procedures set forth in Section XVIII shall be the exclusive  
23 mechanism for resolving disputes between the Settling Parties with regard to any aspect of this Consent  
24 Decree.

## 25 **XX. STIPULATED PAYMENTS**

26 84. Stipulated Payments for Failure to Comply with Consent Decree. Except as specifically  
27 provided in paragraph 85 below, Millbrae shall make a stipulated payment of One Thousand Dollars  
28

1 (\$1,000) for each missed deadline and/or failure to comply with a requirement included in or  
2 contemplated by this Consent Decree, unless the failure to comply is from a Force Majeure Event.  
3 Payments for missed deadlines shall be made for the restoration and/or improvement of the San  
4 Francisco Bay watershed, and shall be awarded to the Environmental Mitigation Project recipient  
5 identified in paragraph 68 above. Millbrae agrees to make the stipulated payment within thirty (30) days  
6 of a missed deadline and mail via certified mail or overnight delivery. Millbrae shall provide Baykeeper  
7 with a copy of each such payment.

8 85. Millbrae agrees to pay stipulated payments in the event complete reports covered by this  
9 Section are not timely submitted. Reports covered by this Section include the following Sections from  
10 this Consent Decree: the SSO Reduction Action Plan under Section VIII; the Capacity Assurance Report  
11 and the hydraulic modeling work plan under Section IX; and the Annual Reports under Section XV.  
12 Millbrae shall have a fourteen (14) day grace period after the due date for the reports covered by this  
13 Section prior to imposition of stipulated payments for the first instance of delayed reporting. Though  
14 Baykeeper is not obligated to notify Millbrae, it may do so in order to allow Millbrae to promptly  
15 address any alleged deficiency after any submission date has been missed.

16 86. Millbrae shall pay the following stipulated payments in the event that it files a late or  
17 incomplete report covered herein after the grace period:

- 18 a. For a report submitted after the grace period, Millbrae shall pay \$100 per day until the  
19 report is filed, up to thirty (30) days for a total amount of \$3,000.
- 20 b. For any report more than thirty (30) days late, Millbrae shall pay \$5,000.
- 21 c. For any report more than ninety (90) days late, Millbrae shall pay \$10,000.
- 22 d. The above payments are cumulative, as applicable, to a maximum payment of \$18,000  
23 per report.

24 87. In the case of a late report, Millbrae shall send Baykeeper the report as per Section XXI of  
25 this Consent Decree. Baykeeper shall notify Millbrae of receipt of the late report and shall include an  
26 invoice for the amount of the stipulated payment, if any, due and payable. Millbrae shall contact  
27 Baykeeper within five (5) working days if Millbrae disagrees with Baykeeper's stipulated payment  
28

1 calculation and may meet and confer with Baykeeper or seek Dispute Resolution pursuant to Section  
2 XVIII of this Consent Decree. Millbrae shall pay any stipulated payments due pursuant to this Consent  
3 Decree within thirty (30) days after receipt of Baykeeper's invoice itemizing the stipulated payment  
4 liability, or thirty (30) days after resolution of a dispute if the dispute resolution process has been  
5 invoked pursuant to Section XVIII of this Consent Decree. All payments of stipulated payments  
6 described in this Consent Decree shall be paid by Millbrae to the "*Rose Foundation for Communities  
7 and the Environment*" and sent via overnight mail to: Rose Foundation for Communities and the  
8 Environment, 6008 College Avenue, Oakland, CA 94618, Attn: Tim Little. Nothing in this Consent  
9 Decree shall prevent Baykeeper from waiving any stipulated payments, which might be due under this  
10 Section, based on the outcome of the Dispute Resolution process, or based on Millbrae's good faith  
11 efforts.

#### 12 **XXI. NOTICES AND SUBMISSIONS**

13  
14 88. Millbrae agrees to provide Baykeeper with all documents or reports required or contemplated  
15 by this Consent Decree. All documents shall be directed to the following individuals at the addresses  
16 specified below unless specifically stated otherwise herein and shall be sent by certified or overnight  
17 delivery, and by electronic mail. Any change in the individuals or addresses designated by any Settling  
18 Party must be made in writing to all Settling Parties.

19 **If to BAYKEEPER:**

20 Daniel Cooper  
21 Samantha Williams  
22 LAWYERS FOR CLEAN WATER, INC.  
23 1004 O'Reilly Avenue  
24 San Francisco, California 94129  
25 Telephone: (415) 440-6520  
26 Email: daniel@lawyersforcleanwater.com  
27 samantha@lawyersforcleanwater.com  
28



1 Jason Flanders  
2 SAN FRANCISCO BAYKEEPER, INC.  
3 785 Market Street, Suite 850  
4 San Francisco, California 94103-2023  
5 Email: jason@baykeeper.org  
6 (email delivery only preferred)

7 If to MILLBRAE:

8 Michael J. Van Zandt  
9 HANSON BRIDGETT LLP  
10 425 Market Street, 26th Floor  
11 San Francisco, California 94105  
12 Telephone: 415-995-5001  
13 Fax: 415-995-3566  
14 Email: mvanzandt@hansonbridgett.com

15 Marcia Raines, City Manager  
16 CITY OF MILLBRAE  
17 621 Magnolia Avenue  
18 Millbrae, California 94030  
19 Telephone: 650-259-2334  
20 Fax: 650-259-2415  
21 Email: mraines@ci.millbrae.ca.us

22 89. Notifications of communications shall be deemed submitted three (3) days after the date that  
23 they are postmarked and sent by first-class mail or deposited with an overnight mail/delivery service.

24 90. Millbrae also agrees to make available to Baykeeper any new or existing documents within  
25 Millbrae’s custody or control that are reasonably necessary to evaluate system performance and/or  
26 compliance with this Consent Decree within seven (7) days of written request by Baykeeper.

27 91. During the life of this Consent Decree, Millbrae shall preserve at least one legible copy of all  
28 records and documents, including computer-stored information, which relate to performance of its  
obligations under this Consent Decree.

92. Any notice, report, certification, data presentation or other document submitted by Millbrae  
to Baykeeper pursuant to this Consent Decree, which discusses, describes, demonstrates, or supports any  
finding or makes any representation concerning compliance or non-compliance with any requirement(s)  
of this Consent Decree, shall contain the following certification, signed and dated by a responsible  
official:

1 I certify, under penalty of perjury, that this document and all attachments were  
2 prepared under my direction or supervision in accordance with a system designed  
3 to assure that qualified personnel properly gather and evaluate the information  
4 submitted and is, to the best of my knowledge and belief, true, accurate and  
5 complete.

6 **XXII. GENERAL PROVISIONS**

7 93. Continuing Jurisdiction. The Settling Parties stipulate that the District Court shall retain  
8 jurisdiction to enforce the terms and conditions of this Consent Decree and to resolve disputes arising  
9 hereunder as may be necessary or appropriate for the construction or execution of this Consent Decree  
10 up to and including the Termination Date in paragraph 10.

11 94. Construction. The language in all parts of this Consent Decree shall be construed according  
12 to its plain and ordinary meaning, except as to those terms defined in Section II above.

13 95. Choice of Law. The laws of the United States shall govern this Consent Decree.

14 96. Severability. In the event that any provision, paragraph, section, or sentence of this Consent  
15 Decree is held by a Court to be unenforceable, the validity of the enforceable provisions shall not be  
16 adversely affected.

17 97. Counterparts. This Consent Decree may be executed in any number of counterparts, all of  
18 which together shall constitute one original document. Telecopy, scanned copies (i.e., pdf) and/or  
19 facsimile copies of original signature shall be deemed to be originally executed counterparts of this  
20 Consent Decree.

21 98. Modification of the Consent Decree. This Consent Decree, and any provisions herein, may  
22 not be changed, waived, discharged, or terminated unless by a written instrument, signed by the Settling  
23 Parties.

24 99. Full Settlement. This Consent Decree constitutes a full and final settlement of this matter.

25 100. Integration Clause. This is an integrated Consent Decree. This Consent Decree is  
26 intended to be a full and complete statement of the terms of the agreement between the Settling Parties  
27 and expressly supersedes any and all prior oral or written agreements, covenants, representations, and  
28 warranties (express or implied) concerning the subject matter of this Consent Decree.

1 101. Authority. The undersigned representatives for Baykeeper and Millbrae each certify that  
2 he/she is fully authorized by the Settling Party whom he/she represents to enter into the terms and  
3 conditions of this Consent Decree.

4 The Settling Parties hereby enter into this Consent Decree.

5 CITY OF MILLBRAE

6  
7 Date: \_\_\_\_\_

\_\_\_\_\_

8 By: Marcia Raines, City Manager

9  
10 SAN FRANCISCO BAYKEEPER

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

\_\_\_\_\_

12 By: Deb Self, Executive Director

13 APPROVED AS TO FORM:

14 For DEFENDANT CITY OF MILLBRAE:  
15 HANSON BRIDGETT LLP

16  
17 Date: \_\_\_\_\_

\_\_\_\_\_

18 By: Michael J. Van Zandt

19  
20 For SAN FRANCISCO BAYKEEPER:  
21 LAWYERS FOR CLEAN WATER INC.

22  
23 Date: \_\_\_\_\_

\_\_\_\_\_

24 By: Daniel Cooper  
25  
26  
27  
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**ORDER**

IT IS HEREBY ORDERED that the above captioned action is dismissed with prejudice.

IT IS FURTHER ORDERED that the Court shall retain jurisdiction over Baykeeper's claims against the City of Millbrae for the sole purpose of enforcing compliance by the Parties with the terms of the Consent Decree.

IT IS SO ORDERED.

Date: \_11/15/10

  
\_\_\_\_\_  
Honorable Sandra Brown Armstrong  
United States District Court Judge  
Northern District of California

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101. Authority. The undersigned representatives for Baykeeper and Millbrae each certify that he/she is fully authorized by the Settling Party whom he/she represents to enter into the terms and conditions of this Consent Decree.

The Settling Parties hereby enter into this Consent Decree.

CITY OF MILLBRAE

Date: 8/31/10

Marcia Raines

By: Marcia Raines, City Manager

SAN FRANCISCO BAYKEEPER

Date: August 9, 2010

Deb Self

By: Deb Self, Executive Director

APPROVED AS TO FORM:

For DEFENDANT CITY OF MILLBRAE:  
HANSON BRIDGETT LLP

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

\_\_\_\_\_

By: Michael J. Van Zandt

For SAN FRANCISCO BAYKEEPER:  
LAWYERS FOR CLEAN WATER INC.

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

\_\_\_\_\_

By: Daniel Cooper