Law Office of Jack Silver

P.O. Box 5469 Santa Rosa, California 95402
Phone 707-528-8175 Fax 707-528-8675
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Via Electronic Mail
Judith.Harvey@usdoj.gov

February 3, 2014

Judy Harvey, Attorney
U.S. Department of Justice
Environment and Natural Resource Division
Law and Policy Section
P.O. Box 7415
Ben Franklin Station
Washington, DC 20044-7415

Re: *California River Watch v. Lunny Grading & Paving, Inc.*
USDC Case No.: 3:13-cv-03174 JST

Dear Attorney Harvey:

In compliance with 33 U.S.C. § 1365(c)(3), we enclose for agency review by the Department of Justice a copy of the [Proposed] Consent Decree entered into by the parties on January 30, 2014 in resolution of the above-captioned matter.

Thank you for your consideration.

Sincerely,

Jack Silver

JS:lhm
Enclosure
cc: Ryan R. Waterman
Juliet H. Cho
STOEL RIVES LLP

Ryan R. Waterman (SB #229485)
Juliet H. Cho (SB #271437)
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Attorneys for Defendant
LUNNY GRADING & PAVING, INC.

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Jerry Bernhaut (SB #206264)
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIA RIVER WATCH, a 501(c)(3), non-profit, Public Benefit Corporation, Plaintiff, v. LUNNY GRADING & PAVING, INC.; DOES 1-10, Inclusive, Defendant.	Case No. 13-CV-03174-KAW **[PROPOSED] Consent Decree**

WHEREAS, California River Watch ("CRW") is a 501(c)(3) nonprofit, public benefit corporation organized under the laws of the State of California, dedicated to protect, enhance, and help restore the surface waters and groundwater including all rivers, creeks, streams, wetlands, vernal pools and tributaries of California.

WHEREAS, Lunny Grading operates the Nicasio Rock Quarry located at 5400 Nicasio Valley Road in Nicasio, California ("Site"). The Site is subject to various federal and state regulatory requirements under the federal Clean Water Act ("CWA"), including compliance with

the State Water Resource Control Board's General Industrial Activities Storm Water Permit ("General Permit").

WHEREAS, on February 11, 2013, CRW served Lunny Grading with a 60-Day Notice of Violations and Intent to File Suit ("Notice Letter") alleging various violations of the CWA relating to activities at the Site. The Notice Letter alleges that Lunny Grading, the operator of the Site, and its employees, are responsible for the alleged violations.

WHEREAS, on July 9, 2013, CRW filed a Complaint against Lunny Grading in the United States District Court for the Northern District of California, Case No. 13-CV-3174-KAW, alleging violations of the CWA based on the Notice Letter.

WHEREAS, on October 3, 2013, CRW filed its First Amended Complaint, superseding its Complaint.

WHEREAS, Lunny Grading denies each and all of the claims and allegations in CRW's Notice Letter and First Amended Complaint.

WHEREAS, the Parties have expended effort and resources in investigating and evaluating allegations and claims set forth in the First Amended Complaint and Notice Letter, including the exchange of information regarding the Site, as well as engaging in a negotiation and technical dialogue regarding settlement.

WHEREAS, the Parties now wish to resolve and settle all disputes, obligations, and purported or actual claims or causes of action, which may exist by and between CRW and Lunny Grading, including without limitation any disputes, obligations, claims and/or causes of action that were or could have been asserted in or pursuant to the First Amended Complaint or Notice Letter relating to the Site.

NOW, THEREFORE, IT IS HEREBY STIPULATED BY THE PARTIES, AND ORDERED AND DECREED BY THE COURT AS FOLLOWS:

1. Parties Bound By This Consent Decree and Length of Consent Decree. This Consent Decree, and each of its provisions, including all representations, warranties, and promises contained herein, binds, and inures to the benefit of CRW and Lunny Grading, and each of their respective assigns, present and future affiliates, parents, subsidiaries, predecessors and successors

in interest whether by merger, consolidation, or otherwise, as well as their respective representatives, agents, and administrators, past, present, and future. The "Effective Date" of this Consent Decree shall be the date of the final signature on this Consent Decree by a Party. This Consent Decree shall terminate on the earlier of: (a) the date that all of the requirements under paragraphs 1 and 3 are completed by Lunny Grading, or (b) two years after the Effective Date ("Termination Date").

2. Actions By Lunny Grading. Lunny Grading shall perform the below specified projects at the Site no later than one year from the Effective Date of this Consent Decree. Lunny Grading reserves the right, in its sole discretion, to determine (i) which persons shall perform any work described herein, including contractors; and (ii) the scope and technical details of, and manner to implement, any such work, subject to review and approval by the Regional Water Quality Control Board (or such other regulatory agency as may, from time to time, exercise jurisdiction with respect to environmental matters at the Site):

2.1 *Cover Commodity Bins*: Lunny Grading shall cover the topsoil and compost commodity bins on the Site at all times except when access to the contents is required.

2.2 *Updating Drainage Controls*: As elevations and gradients at the Site change over time with the movement of materials, Lunny Grading shall inspect drainage controls at the Site each year by no later than October 1 to confirm that drainage controls are adequate to channel all storm water flows to the diversion swale and thence to the sedimentation pond. Results of the inspection shall be included in Lunny Grading's Annual Report.

2.3 *Replacing Wattles*: Lunny Grading shall replace all existing wattles with wattles made from biodegradable materials as the existing wattles wear out or within one year from the Effective Date of this Consent Decree, whichever is sooner.

2.4 *Install Sump Pump At Scale*: Lunny Grading shall install a sump pump beneath the truck weighing scale at the Site, and the collected water shall be pumped to the sedimentation pond at the Site.

2.5 *Clear Pond Outfall Path*: Lunny Grading shall clear brush leading to the outfall from the sedimentation pond at the Site and maintain a path so that samples can be taken at the outfall to Halleck Creek.

2.6 *Submission of Additional Reports to CRW*: No later than one year from the Effective Date, Lunny Grading shall provide CRW with a narrative report describing BMPs that have been implemented pursuant to this Consent Decree.

3. Fees and Costs. Within fifteen (15) days after the Effective Date of this Consent Decree, Lunny Grading shall pay to CRW the total sum of Four Thousand Nine Hundred and Ninety-Nine Dollars ($4,999.00). Payment will be made in the form of a single check made payable to "California River Watch", mailed to the Law Office of Jack Silver, P.O. Box 5469, Santa Rosa, CA 95402-5469.

4. Mutual Release. It is the intent of the Parties that the execution and delivery of this Consent Decree constitutes a full and complete satisfaction of all rights, claims and demands by CRW against Lunny Grading, and Lunny Grading against CRW, with respect to any and all allegations and claims made in the First Amended Complaint and Notice Letter under the Clean Water Act.

4.1 Upon this Consent Decree's Effective Date, CRW, on behalf of itself and any and all of its officers, agents, representatives, successors, members, and assigns, and any other person acting under its direction or control with respect to this matter, does hereby absolutely, fully, and forever release, relieve, remise, and discharge Lunny Grading, and its past and present employees, officers, directors, attorneys, and the predecessors, successors, and assigns of any of them, from any and all causes of action, claims, damages (including punitive damages), demands, debts, actions, attorneys' fees, costs of suit, and liabilities of every kind or nature whatsoever, except for the obligations under this Consent Decree, known or unknown, arising out of claims asserted in the First Amended Complaint and Notice Letter under the Clean Water Act concerning the Site, or which could have been alleged in the Notice Letter, including without limitation any and all

claims for violations of the Clean Water Act that occurred at any time up to the Effective Date.

4.2 Upon this Consent Decree's Effective Date, Lunny Grading, on behalf of itself and any and all of its officers, agents, representatives, successors, and assigns, and any other person acting under its direction or control with respect to this matter, does hereby absolutely, fully, and forever release, relieve, remise, and discharge CRW, and its past and present employees, officers, directors, members, attorneys, and the predecessors, successors, and assigns of any of them, from any and all causes of action, claims, damages (including punitive damages), demands, debts, actions, attorneys' fees, costs of suit, and liabilities of every kind or nature whatsoever, arising out of the claims asserted in the First Amended Complaint and Notice Letter under the Clean Water Act concerning the Site.

4.3 The Parties acknowledge that they are familiar with Section 1542 of the California Civil Code. For any other claims against each other, known or unknown, suspected or unsuspected, and each party expressly waives and relinquishes any rights and benefits which they have or may have under Section 1542 of the Civil Code of the State of California, which provides:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release which if known by him or her must have materially affected his or her settlement with the debtor.

The Parties acknowledge that each has specifically reviewed with its attorney the meaning and effect of the release set forth herein, the language of California Civil Code Section 1542, and the waiver contained herein. The Parties acknowledge that their attorneys have fully explained the impact of these provisions, and the Parties knowingly accept the risks associated with these provisions.

5. Covenant Not to Sue.

5.1 For a period of five (5) years from the Effective Date, CRW agrees that neither CRW, nor its officers, executive staff, or members of its governing board, nor any organization under CRW's control, its officers, executive staff, or members of its

governing board, will serve any Notice of Intent to Sue or file any lawsuit against Lunny Grading seeking relief for alleged violations of the Clean Water Act (33 U.S.C. § 1365) or any similar statute and/or regulation, including the Porter-Cologne Water Quality Control Act (Cal. Water Code § 13000 *et seq.*), nor will CRW initiate or support any such action against Lunny Grading brought by other groups or individuals by providing financial assistance, personnel time, or any other affirmative actions.

5.2 The covenant expressed in paragraph 5.1 does not apply to the filing of any complaint based on the Notice Of Intent To Sue for Violations of the Clean Water Act, dated June 24,2013, sent to Kevin J. Lunny, Drakes Bay Family Farms, Owners/Managing Agents, Drakes Bay Oyster Co., against any party subject to the court's jurisdiction based on the entities named as recipients of said Notice.

6. No Admission. This Consent Decree is the direct result of a compromise of disputed allegations and claims. As such, this Consent Decree shall not, for any purpose, be considered as an admission of liability by Lunny Grading nor shall the payment of any sum of money in consideration for the execution of this Consent Decree constitute or be construed as an admission of any liability by Lunny Grading, which expressly denies any such liability or wrongdoing.

7. Delays in Schedule Implementation. In the event implementation by Lunny Grading of the remedial measures set forth in paragraph 1 of this Consent Decree does not occur by the agreed to dates, Lunny Grading agrees to notify CRW in writing as soon as practicable after the anticipated delay becomes apparent, and in any case not less than twenty (20) days prior to any deadline set forth in paragraph 1, and shall describe the reasons for the anticipated delay.

8. Force Majeure. Lunny Grading shall not be deemed in default or breach of this Consent Decree by reason of any event or condition which constitutes a force majeure event. For purposes of this Consent Decree, a force majeure event is defined as any event arising from causes beyond the reasonable control of Lunny Grading or its contractors that delay or prevents performance. This includes, without limitation, acts of God, acts of war, acts of terrorism, fire, explosion, extraordinary weather events, restraint by court order or public authority, delays caused by the action or inaction of federal, state, regional, or local permitting authorities and regulatory

agencies, or other causes beyond Lunny Grading's reasonable control. Neither increased costs nor economic hardship shall constitute a force majeure. Lunny Grading agrees to notify CRW in writing as soon as practicable after an anticipated delay due to any event or condition which qualifies under this paragraph becomes apparent.

9. Breach of Consent Decree and Dispute Resolution. Any disputes between CRW and Lunny Grading concerning any alleged breach of this Consent Decree shall be subject to the following dispute resolution procedures.

9.1 Notice. The Party alleging a breach of this Consent Decree shall provide written notice of the alleged breach and that Party's intent to initiate the dispute resolution procedure of this paragraph 9. The notice shall include a recitation of all facts and circumstances giving rise to the dispute, including the particular provisions of the Consent Decree alleged to have been breached.

9.2 Mediation. If the dispute is not resolved by the Parties within thirty (30) days after such notice is given, such dispute shall be submitted to mediation before a mutually agreeable neutral mediator. The Parties shall each bear their own costs and attorney's fees incurred in connection with such mediation.

9.3 Arbitration. If, and only if, the dispute cannot be resolved by the Parties pursuant to the above mechanisms, such dispute shall be submitted for binding arbitration before a mutually agreeable neutral arbitrator. Either party may request that the presiding Judge of the Northern District of California select an arbitrator if the Parties cannot reach agreement. In the event that binding arbitration occurs, the Parties agree that no discovery shall be permitted. Briefing will be limited to one brief of no longer than ten (10) pages for each Party, submitted no later than fourteen (14) days before the scheduled arbitration hearing. The arbitration hearing is limited to a maximum of one (1) day. The determination of the arbitrator shall be binding upon the Parties. Within thirty (30) days after the conclusion of the arbitration hearing, the arbitrator shall issue a written award and a written statement of decision describing the reasons for the award, including the calculation of any damages awarded. The arbitrator shall be empowered to determine a prevailing party and award payment of reasonable attorneys' fees and costs to that party. To the extent there are multiple issues with a different prevailing party for one or more issues, the

arbitrator may take those facts into account in terms of an award for fees and costs. The non-prevailing party shall also bear the cost of the arbitrator's fees. Judgment upon any determination rendered by the arbitrator may be entered by any court having competent jurisdiction.

9.4 Waiver. By agreeing to these dispute resolution provisions, including the binding arbitration provision, the Parties understand that they are waiving certain important rights and protections that otherwise may have been available to each of them if a dispute between them were determined by a judicial action including, without limitation, the right to a jury trial, and certain rights of appeal. Other than the remedies contained within this Consent Decree including dispute resolution and specific performance of the terms of this Consent Decree, there are no other remedies. The Parties specifically agree that there is no basis within this Consent Decree or within the contemplation of the Parties to support a claim for consequential damages due to any form of breach.

10. Notices. All notices, consents, approvals, requests, demands and other communications (collectively, "Notice") which the Parties are required or desire to serve upon or deliver to the other Party shall be in writing and shall be given by nationally- recognized overnight courier, by certified United States mail, return receipt requested, postage prepaid, addressed as set forth below, or by facsimile or electronic mail addressed as set forth below:

If to CRW: Jack Silver, Esq.
Law Office of Jack Silver
P.O. Box 5469
Santa Rosa, CA 95402-5469
Tel: (707)528-8175
Fax: (707) 528-8675
Em ail: lhm28843@sbcglobal.net

If to Lunny Grading: Kevin Lunny
Lunny Grading and Paving Inc.
17300 Sir Francis Drake Boulevard
Inverness, CA 94937
Tel: (415) 662-9800
Fax: (415) 662-9804
Em ail: Kevin@lunnypaving.com

With a copy to: Ryan Waterman
Stoel Rives LLP
12255 El Camino Real, Ste. 100
San Diego, CA 92130
Tel: (858) 794-4114
Fax: (858) 794-4101
Em ail: rrwaterman@stoel.com

The foregoing addresses may be changed by Notice given in accordance with this paragraph 10. Any Notice sent by mail shall be deemed received two (2) days after the date of mailing. Any Notice sent by facsimile shall be deemed received upon electronic confirmation of the successful transmission thereof, and any Notice sent by electronic mail shall be deemed received upon electronic transmission thereof provided sender does not receive electronic notice of non-delivery. Any Notice sent by overnight courier service shall be deemed received on the day of actual delivery as shown by the confirmation of delivery by the messenger or courier service. If the date of receipt of any Notice to be given hereunder falls on a weekend or legal holiday, then such date of receipt shall automatically be deemed extended to the next business day immediately following such weekend or holiday for purposes of calculating time periods commencing upon the date of service.

11. Attorneys' Fees. Other than the payment to CRW under paragraph 3 and subject to the prevailing party provisions under paragraph 9.3 of this Consent Decree, each Party shall bear its own past and future attorneys' fees and costs relating to the subject matter of this Consent Decree.

12. Parties' Acknowledgment of Terms. This Consent Decree has been carefully and fully read and reviewed by CRW and Lunny Grading and their respective counsel, who hereby represent that the contents of this Consent Decree are understood, and agree that this Consent Decree is binding on each Party or its respective predecessors, successors, and assigns and as described above.

13. Interpretation and Applicable Law. This Consent Decree shall be construed and interpreted in accordance with the laws of the United States and the State of California without regard to principles of conflicts of law. This Consent Decree shall be interpreted and construed as a whole, according to its fair meaning and not strictly for or against any Party, and without regard

to which Party drafted the Consent Decree. All of the promises, representations, and warranties contained in this Consent Decree survive the execution of this Consent Decree.

14. No Assignments. Each Party to this Consent Decree represents and warrants that it has not assigned, transferred, hypothecated, or sold to any third person or entity, any of the rights or obligations released by or entered into under this Consent Decree.

15. Counterparts. This Consent Decree may be executed in multiple counterparts, each of which shall evidence one and the same agreement.

16. Headings. The headings used in this Consent Decree are for convenience of reference and shall not be used to define any provision.

17. Entire Agreement In Writing. This Consent Decree constitutes the entire agreement between the Parties hereto with respect to the subject matter set forth herein and supersedes all previous or contemporaneous negotiations, commitments (oral or written), and writings with respect to the subject matter set forth herein.

18. Modification or Amendment. This Consent Decree or any of its provisions may be modified or amended only by written agreement executed by all Parties to this Consent Decree.

19. Severability. The invalidity or unenforceability of any provision of this Consent Decree shall in no way affect the validity or enforceability of any other provision. If, in any action before any court or other tribunal of competent jurisdiction, any term, restriction, covenant, or promise is held to be unenforceable for any reason, then such term, restriction, covenant, or promise shall be deemed modified to the extent necessary to make it enforceable by such court or other tribunal and, if it cannot be so modified, that this Consent Decree shall be deemed amended to delete herefrom such provision or portion adjudicated to be invalid or unenforceable, and the remainder of this Consent Decree shall be deemed to be in full force and effect as so modified. Any such modification or amendment in any event shall apply only with respect to the operation of this Consent Decree in the particular jurisdiction in which such adjudication is made.

20. Representations and Warranties. This Consent Decree is given voluntarily, free of undue influence, coercion, duress, menace, or fraud of any kind. No Party, nor any officer, agent, employee, representative, or attorney of or for any Party, has made any statement or

representation to any other Party regarding any fact relied upon in entering this Consent Decree, and no Party is relying upon any statement, representation, or promise of any other Party, nor of any officer, agent, employee, representative, or attorney of or for any Party, in executing this Consent Decree or in making the settlement provided herein, except as expressly stated in this Consent Decree.

21. No Third Party Beneficiaries. This Consent Decree is not intended to confer any rights or obligations on any third party or parties, and no third party or parties shall have any right of action under this Consent Decree for any cause whatsoever. Subject only to the express restrictions contained in this Consent Decree, all of the rights, duties and obligations contained in this Consent Decree shall inure to the benefit of and be binding upon the Parties, and their successors and assigns.

22. Authority. Each of the persons signing this Consent Decree on behalf of an entity represents and warrants that he or she has actual authority and capacity to execute this Consent Decree on behalf of the entity and to bind it to all of the terms of this Consent Decree.

The Parties hereto enter into this Consent Decree and submit it to the Court for its approval and entry as a final judgment.

Dated: January 30, 2014

LUNNY GRADING & PAVING INC.

By: _____
Kevin Lunny
President

Dated: January 30, 2014

CALIFORNIA RIVER WATCH

By: Margaret Bacigalupi
Margaret Bacigalupi
Board President

IT IS SO ORDERED.

Dated: _____

HON. _____ [*signature*]
JUDGE JON S. TIGAR