

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is made by and between the Center for Biological Diversity (“the Center”) and the City of Minnetonka (“the City”). The Center and City are collectively referred to as “the Parties.”

Recitals

A. The Center is a non-profit corporation incorporated in California and headquartered in Tucson, Arizona, which is engaged in efforts to protect endangered species.

B. The City is a Minnesota municipal corporation and charter city located in Hennepin County, Minnesota.

C. In 2017, the U.S. Fish and Wildlife Service (“FWS”) listed the rusty patched bumble bee (*Bombus affinis*) as endangered, 82 Fed. Reg. 3186 (Jan. 11, 2017).

D. The presence of the rusty-patched bumble bee has been documented in Lone Lake Park, a 146-acre public park located within the City, which includes passive and active recreation facilities.

E. On August 26, 2019, the City’s city council voted to approve a concept plan for the construction of a multi-use trail system (including use by mountain bikes and pedestrians) in Lone Lake Park (the “Multi-Use Trail”).

F. On August 5, 2020, the Center sent the City a letter (the “Notice of Claim”) stating its intent to file a lawsuit claiming that the City has violated the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, by authorizing the mountain bike course that would cause unlawful “take” of the endangered rusty patched bumble bee (RPBB).

G. In order to avoid the costs and uncertainties of litigation, the City and Center have negotiated a settlement that they consider to be a just, fair, adequate, and equitable resolution of all disputes related to the construction, maintenance and operation of the Multi-Use Trail.

H. The Parties agree that settlement of this claim in this manner is appropriate and in the public interest.

Terms

In consideration of the mutual promises in this Agreement, and for other good and valuable consideration, the sufficiency of which the Parties each acknowledge, the Parties agree as follows:

1. Recitals. The above recitals are incorporated into and made a part of this Agreement.
2. No Admission. This Agreement is the result of compromise and settlement, and

does not constitute an admission, implied or otherwise, by either the Center or City, as to any fact, claim, or defense asserted in the Notice of Claim or that could have been asserted if a lawsuit had been initiated under the ESA or the Minnesota Environmental Rights Act, Minn. Stat. ch. 116B (“MERA”), or any other statute or common law legal theory that might have been asserted against the City with respect to the City’s construction, maintenance, repair, or operation of the Multi-Use Trail.

3. Trail Construction. The Parties agree as follows with respect to the construction of the Multi-Use Trail:

- a. The City agrees to comply with the “Recommendations for Mountain Bike Trail Construction within Rusty Patched Bumble Bee (RPBB) High Potential Zones,” which FWS prepared on November 15, 2019 and revised on May 15, 2020, for the City of Minnetonka concerning Lone Lake Park. The Center acknowledges that the FWS Recommendations contemplate that construction will occur during the months of September and October 2020, and that the Center entered into this Agreement with knowledge that the City would commence construction on September 14, 2020.
- b. The City shall use bee survey results derived from using U.S. Fish and Wildlife Service approved protocols, and Minnesota Land Cover Classification System (MLCCS) habitat mapping to make best efforts to avoid impacts to the RPBB and their key habitat areas in Lone Lake Park.
- c. The City shall avoid removing trees from Lone Lake Park wherever feasible. Only small trees (less than four inches in diameter at breast height) may be removed during construction of the mountain bike trail. The City shall ensure that no soil disturbance occurs with tree removal, unless the tree lies directly in the trail footprint. Larger diseased trees or trees that pose a safety risk may be removed at the direction of the City Forester.
- d. During trail construction, the City must operate equipment slowly and with at least one person walking in front of the equipment to search for bee activity, nests, or overwintering sites within the ten-foot-wide trail alignment corridor. In addition, the City will hire a qualified bee expert to generally scout the trail corridor for bee activity prior to soil disturbance. If any bumble bees are observed entering or emerging from a potential nesting or overwintering site within the corridor, construction in the immediate vicinity of the potential nest or overwintering site must stop, and the City must contact FWS prior to resuming work there.

4. General Provisions for Lone Lake Park. The following provisions apply to all areas of Lone Lake Park, whether within or outside the corridor of the Multi-Use Trail:

- a. The City agrees to conduct a post-project bumble bee survey, using U.S. Fish and Wildlife protocols for conducting bumble bee surveys, every year for at least three years to continue to monitor the population of RPBBs and other bumble bee species

in Lone Lake Park. The results of these surveys shall be made publicly available on the City's webpage.

- b. For a period of five years following the effective date of this Agreement, the City agrees to the following practices:
 - i. To not prune flowering trees while in bloom in Lone Lake Park except to prevent a safety hazard;
 - ii. Except as expressly provided in this paragraph 4.b., to not apply any pesticides in Lone Lake Park except for hand application of herbicides (spot treatment) for control of nonnative plants, such as buckthorn, during restoration efforts. Broadcast application of herbicides may be used on the athletic playfields, which are larger areas that have been regularly mown and maintained as established turf and which do not provide flowering plants for pollinators; provided, however, that the City's contractor must follow the application guidelines as required by the manufacturer's instructions, must have an applicator's license if required by law, and must not apply herbicides within 50 feet of any adjacent natural area;
 - iii. To not remove any nonnative plants that the RPBB is known to rely upon, during the plants' peak flowering period.

Following the five-year period, the City will reevaluate these practices in light of the bee surveys and other factors and, at the City's sole discretion, decide whether to continue, modify, or discontinue the practices.

- c. By July 1, 2021, the City shall have developed a plan and implemented the conversion of one acre of turf at Lone Lake Park into pollinator lawn and/or pollinator meadow habitat to create new floral resources for the RPBB, with a goal of achieving a fully established one-acre habitat area by December 1, 2023. The City shall collaborate with Friends of Lone Lake Park on volunteer efforts to help maintain this bee habitat and raise funds for educational signage. The Parties recognize that establishment of a stable pollinator lawn and/or pollinator meadow habitat will require multiple growing seasons.
 - d. The City agrees to coordinate with and provide technical expertise to a local volunteer group that has expressed interest in raising funds to enhance pollinator plants in a prairie area located on the west side of Lone Lake Park near Nine Mile Creek, which currently has a low diversity of plant species. Best efforts will be taken to avoid disturbing any nests or overwintering sites of the RPBB.
5. Additional City Commitments. The City agrees to take the following actions:
- a. If the Hennepin County Board of Commissioners approves the Glen Lake Wetland Banking Project by December 31, 2022, the City agrees to work with the county

and provide \$5,000 of dedicated funding to supply pollinator plantings in approximately 8 acres of upland habitat associated with the wetland banking and habitat conservation project that is located on land owned by Hennepin County, located south of Glen Lake in Minnetonka.

- b. By October 30, 2021 the City agrees to host a “Lawns to Legumes” workshop for interested residential landowners or businesses to educate them on the importance of planting for RPBBs and other pollinators. Within one year of the workshop date, the City agrees to make available an aggregate total of \$5,000 in grants to incentivize participation in the program by landowners and businesses located within six miles of Lone Lake Park. The City agrees to partner with local organizations, such as local watershed districts, to host by the end of year 2022 at least one additional workshop on pollinator plantings and sustainable landscapes.
 - c. The City agrees to include pollinator conservation best practices as part of the currently pending “Alternative Urban Areawide Review” for the Opus area near Lone Lake Park. At a minimum, such best practices shall include planting milkweed and other native wildflowers, trees, and shrubs to support pollinators, convert turf to native plantings where feasible, and reduce the use of chemicals and pesticides.
 - d. The City agrees to work with a local conservation group and Hennepin County to apply for grants and secure funding to enhance and restore the 30-acre undeveloped property in Minnetonka known as the Cullen Smith property located at 2510 and 2620 Oakland Road. By December 31, 2022, the City will provide an additional \$10,000, over and above any funds secured through grants, specifically to support pollinator plantings at this property.
 - e. By April 30, 2021, the City agrees to review its practices related to pesticide use and mowing for trails and roadsides to facilitate pollinator conservation on City properties. At a minimum, unless necessary to prevent a safety hazard, the City will not use pesticides on any City property other than irrigated athletic fields and irrigated maintained turf.
 - f. By December 31, 2021, the City shall create a GIS map of suitable rusty patched bumble bee habitat throughout Minnetonka, and develop written guidance for city staff on using the map and the “Rusty Patched Bumble Bee Habitat Assessment Form & Guide,” prepared by the Xerces Society, to identify potential conservation activities in future city projects that intersect with suitable RPBB habitat.
 - g. The City agrees to post updates on the City’s website regarding its progress in implementing the terms of this Agreement, on at least a semi-annual basis for three years.
6. Center Cooperation. The Center agrees to utilize its social media sites and subscriber notifications to distribute to its followers in the Twin Cities information about the

opportunities to volunteer in the efforts described in paragraph 5 above.

7. Waiver of Claims; Covenant Not to Sue. In exchange for the actions the City agrees to undertake this Agreement, CBD agrees not to sue or bring or maintain against the City, its present and former officers, directors, employees, and divisions any claims under the ESA, MERA, or any other statute or common law legal theory arising from or relating to the City's construction, operation and maintenance of the Multi-Use Trail, including any claims arising from or relating to the facts and allegations set forth in the Notice of Claims, as long as the City performs according to and has complied with the terms and conditions contained in this Agreement.

8. Dispute Resolution. In the event that either Party seeks to modify the terms of this Agreement, or in the event of a dispute arising out of or relating to this Agreement, or in the event that either Party believes that the other Party has failed to comply with any term or condition of this Agreement, the Party seeking the modification, raising the dispute, or seeking enforcement shall provide the other Party with notice of the claim or modification. The Parties agree that they will meet and confer (either telephonically or in person) at the earliest possible time in a good-faith effort to resolve the issue before seeking further relief.

9. Coordinated Publicity. The Parties will support this settlement publicly and coordinate any joint or separate press releases announcing the settlement to ensure they are consistent and appropriate in characterizations of this settlement and each Party's intent.

10. Mutual Drafting. It is hereby expressly understood and agreed that this Agreement was jointly drafted by the Parties. Accordingly, the Parties hereby agree that any rules of construction, to the effect that ambiguity is construed against the drafting party, shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of the Agreement.

11. Severability of Unenforceable Provisions. If any term, provision, covenant, or condition of this Agreement is held by an arbitrator or court of competent jurisdiction to be invalid, void, or unenforceable, the rest of the Agreement shall remain in full force and effect and shall in no way be affected, impaired, or invalidated.

12. Counterparts; Electronic Signature. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. This Agreement may be signed by any party with an electronic signature using DocuSign or a similarly reliable program.

13. Implementation. The Parties agree to ensure, to the maximum extent practicable, that their officials, employees, contractors, and agents undertaking actions pursuant to this Agreement adhere to the terms and conditions herein.

14. Effective Date. The terms of this Agreement shall become effective upon final approval by the Parties and execution of this Agreement by the undersigned representatives.

9/17/2020
Dated: _____, 2020

CENTER FOR BIOLOGICAL DIVERSITY, INC.

DocuSigned by:
By Collette Adkins
040CB656D529495...
Name and Position: Collette Adkins Senior Attorney

9/21/2020
Dated: _____, 2020

CITY OF MINNETONKA

DocuSigned by:
By Geralyn Barone
969A3E2EBA9E431...
Name and Position: Geralyn Barone City Manager

And
DocuSigned by:
By Brad Wiersum
21AA42DB33F7415...
Name and Position: Brad Wiersum Mayor