



**President**  
Russell Hildebrand  
City of Rocklin

**Treasurer**  
Tim Sailsbery  
City of Willows

**NCCSIF CLAIMS COMMITTEE  
SPECIAL MEETING  
AGENDA**

**Vice President**  
Bruce Cline  
City of Folsom

**Secretary**  
Michelle Pellegrino  
City of Dixon

**Date/Time:** Thursday, June 18, 2015  
1:30 p.m.

**Location:** Rocklin Event Center – Garden Room  
2650 Sunset Blvd.  
Rocklin, CA 95677

- A – Action**
- I – Information**
- 1 – Attached**
- 2 – Hand Out**
- 3 – Separate Cover**
- 4 – Verbal**
- 5 – Previously Mailed**

**MISSION STATEMENT**

*The Northern California Cities Self Insurance Fund, or NCCSIF, is an association of municipalities joined to protect member resources by stabilizing risk costs in a reliable, economical and beneficial manner while providing members with broad coverage and quality services in risk management and claims management.*

- A. Call to Order**
- B. Public Comments**
- C. Approval of Agenda as Posted** **A 1**
- Pg 2. **D. Coverage Denial Appeal: Nelson v. City of Red Bluff** **A 1**  
*The Committee will hear and make a decision regarding the appeal of a coverage denial.*
- Pg. **E. CLOSED SESSION TO DISCUSS PENDING CLAIMS** **A 2**  
(Per Governmental Code Section 54956.95)  
\*REQUESTING AUTHORITY  
**Liability**  
1. Arp v. City of Rocklin\*
- F. Report From Closed Session**  
*The Committee will announce any reportable action taken in closed session.*
- G. ADJOURNMENT**

*Per Government Code 54954.2, persons requesting disability related modifications or accommodations, including auxiliary aids or services in order to participate in the meeting, are requested to contact Raychelle Maranan at Alliant Insurance at (916) 643-2712.*

*The Agenda packet will be posted on the NCCSIF website at [www.nccsif.org](http://www.nccsif.org). Documents and material relating to an open session agenda item that are provided to the NCCSIF Claims Committee less than 72 hours prior to a regular meeting will be available for public inspection and copying at 1792 Tribute Road, Suite 450, Sacramento, CA 94111.*

*Access to some buildings and offices may require routine provisions of identification to building security. However, NCCSIF does not require any member of the public to register his or her name, or to provide other information, as a condition to attendance at any public meeting and will not inquire of building security concerning information so provided. See Government Code section 54953.3.*



**COVERAGE DENIAL APPEAL  
NELSON v. CITY OF RED BLUFF**

**ACTION ITEM**

**ISSUE:** The City of Red Bluff is appealing the denial of coverage for a claim and subsequent lawsuit regarding alleged odors from their sewer collection system. Legal counsel reviewed the original claim and subsequent lawsuit and issued two coverage opinion letters, relying on the pollution exclusion to deny coverage.

**RECOMMENDATION:** Review legal counsel's coverage position and Red Bluff's response to render a coverage determination for the subject claim.

**FISCAL IMPACT:** TBD. At this time it is uncertain whether or not the claim will exceed the \$50,000 Banking Layer. Red Bluff is allowed to use their Banking Layer funds for defense costs associated with this claim, per the MOC, since the denial is based on an exclusion.

**BACKGROUND:** None

**ATTACHMENT(S):**

1. Nelson v. Red Bluff Claim Denial, 12/31/14
2. Nelson v. Red Bluff Summons and Complaint, without attachments
3. Nelson v. Red Bluff Lawsuit Denial, 5/18/15
4. Coverage Appeal Letter from Richard Crabtree, 6/3/15

Austin R. Gibbons  
A. Byrne Conley  
Peter A. Urhausen  
Sean C. Conley

**GIBBONS & CONLEY**  
**ATTORNEYS AT LAW**

**Walnut Creek Office**  
2185 N. California Blvd., Suite 285  
Walnut Creek, California 94596  
Telephone: (925) 932-3600  
Fax: (925) 932-1623

**Indian Wells Office**  
74-900 Highway 111, Suite 216  
Indian Wells, California 92211  
Telephone: (760) 346-4633  
Fax: (760) 322-1292

**Please Respond to:**  
**Walnut Creek Office**

December 31, 2014

Richard Crabtree  
City Manager/City Attorney, City of Red Bluff  
555 Washington Street  
Red Bluff, CA 96080

*Re: Kathy Nelson v. City of Red Bluff, York File No. NCGA07814A2*

Dear Mr. Crabtree;

This firm provides general counsel services to NCCSIF, and was asked to review the government claim filed by Kathy Nelson.

This is a claim for "foul noxious sewage odorse emanating from [the] City's sewer system" i.e., from the City's collections system, particularly after a development was built near to, and uphill from, plaintiff's home. According to the file investigation, a smoke test revealed four locations on private laterals that had either cracks in the laterals or missing cleanout caps. Cameron Dewey indicates that reports also point to a lift station on private property (essentially a pump to move the contents to a higher level for further movement by gravity through the mains) that the City maintains. The government claim attaches numerous letters from citizens complaining to the City about odors, going back to 2012 and indicating odors have been noticed since 2011.

Based on the allegations of the government claim, there appears to be no coverage, for defense or indemnity, because this claim arises from pollution, and none of the exceptions that bring back coverage apply to the facts as alleged; but we will analyze the suit when received to make a further determination. (Note also that the absence of pooled coverage would not prevent the City from accessing the banking layer funds to pay for defense costs.)

NCCSIF provides coverage through an Underlying Memorandum of Coverage that incorporates by reference the excess form of the California Joint Powers Risk Management Authority (CJPRMA).

"Pollutants" are defined in the CJPRMA MOC as follows (emphasis added):

**Pollutants** means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, airborne particles or fibers, asbestos, lead and waste. Waste includes material to be recycled, reconditioned or reclaimed. The term *pollutants* as used herein does not mean potable water, agricultural water, water furnished to commercial users or water used for fire suppression.

The pollution exclusion provides:

This agreement does not apply to:

...

**27) Pollution**

Claims which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of *pollutants* at any time.

(a) This exclusion does not apply to fire fighting activities, including training burns, or intentional demolition or burns for the purpose of limiting a fire, or the discharge of *pollutants* for the purpose of controlling a fire; or to police use of mace, oleoresin capsicum (O.C.), pepper gas or tear gas; or to weed abatement or tree spraying.

(b) This exclusion does not apply to claims arising from sudden and accidental sewer backups. Notwithstanding what is stated in the applicable declarations, the *limit of coverage* for claims described in this exception will be subject to a sublimit of \$5,000,000.

(c) This exclusion does not apply to claims arising from the sudden and accidental discharge, dispersal, release, or escape of chlorine and other chemicals (gas, liquid or solid) which are being used or being prepared for use in fresh or wastewater treatment or in water used in swimming pools, wading pools or decorative fountains. Notwithstanding what is stated in the applicable declarations, the *limit of coverage* for claims described in this exception will be subject to a sublimit of \$5,000,000.

(d) This exclusion does not apply to claims arising from materials being collected as part of any drop-off or curbside recycling program implemented and operated by the *covered party*; if the materials have not been stored by the *covered party* or *parties* for a continuous period exceeding ninety (90) days. Notwithstanding what is stated in the applicable declarations, the *limit of coverage* for claims described in this exception will be subject to a sublimit of \$5,000,000.

(e) This exclusion does not apply to sudden and accidental discharges of *pollutants* occurring during the transportation or deposit of materials as part of garbage collection activities. However, the exclusion does apply after *pollutants* have been deposited at a landfill or garbage dump.

(f) This exclusion does not apply to *bodily injury* or *property damage* arising from activities of the *covered party* to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize *pollutants*, but this exception will not

apply to *bodily injury* or *property damage* caused by *pollutants* on or arising from premises, equipment or locations under the control of the *covered party*.

(g) This exclusion does not apply to sudden and accidental discharges of *pollutants* from premises owned or controlled by a *Covered Party* as described in Definition 8(a) or (b) if the discharge is discovered within ten (10) days of the *occurrence* and reported to the *Authority* within thirty (30) days of discovery. Notwithstanding what is stated in the applicable declarations, the *limit of coverage* for claims described in this exception will be subject to a sublimit of \$5,000,000.

As used in paragraphs (b), (c), (e) and (g) above, "sudden" means abrupt or immediate, and occurring within a period not exceeding twenty-four (24) hours; "accidental" means causing harm neither expected nor intended by a *covered party*. Notwithstanding what is stated in the applicable declarations, any liability arising out of the actual, alleged or threatened exposure to asbestos or lead, which is covered by an exception within this exclusion, shall be subject to a sublimit of \$5,000,000.

The language of this exclusion starts with an absolute pollution exclusion, then makes exceptions for certain common municipal activities. None of the exceptions are presented in the facts alleged in the claim. This does not arise from firefighting activities or tree spraying; there is no sudden and accidental sewer backup; no chlorine used in waste water; no curbside recycling; no garbage collection; no cleanup of pollutants from other parties (this exception would not apply to cleanups emanating from City collection pipes). There is a "time element" exception, but that is only for sudden and accidental discharges, discovered within 10 days and reported within 30 days thereafter. Here, by contrast, neighbors were complaining for at least two years and there are indications of smells going back to 2011.

As a self-insurance pool, NCCSIF is not bound by insurance case law construing coverage memoranda against the drafter. (*City of S. El Monte v. S. Cal. Joint Powers Ins. Auth* (1995) 38 Cal. App. 4th 1629, 1640.) Nevertheless, where the MOC as incorporated by reference from CJPRMA uses a standard industry definition of "pollutants," we do look at the insurance case law that interprets the language. Here, the insurance case law indicates that offensive odors constitute "pollutants."

In *Cold Creek Compost, Inc. v. State Farm Fire & Casualty Co.* (2007) 156 Cal.App.4th 1469 the Court of Appeal held that offensive odors from a facility composting materials such as manure, grape pomace, and yard trimmings constituted "pollutants." The odors were "unquestionably an 'impurity, something objectionable and unwanted' in the air where the *Preserve II* plaintiffs lived; the odors 'polluted' the air, as the term 'pollute' is commonly understood." (At p. 1480.) There was a discharge, escape or release spreading a mile and a half to plaintiffs' homes. The court cites out-of-state cases re composting facilities and sewage treatment plants. The item need not be "toxic or particularly harmful" to be a "pollutant." (At 1482.)

The decision in *MacKinnon* supports State Farm here. The odors emanating from Cold Creek's facility were unquestionably an "impurity, something objectionable and unwanted" in the air where the *Preserve II* plaintiffs lived; the odors "polluted" the air, as the term "pollute" is commonly understood. In the ordinary and popular sense of the words of the pollution exclusion, the odors were "discharged" and "released" by the composting and "escaped" from the facility. The odors spread a mile and a half to the plaintiffs' homes—a "substantial dissemination" to the point of "dissipation and dilution" ordinarily understood as a "dispersal of pollutants" into the environment. The *Preserve II* plaintiffs did not suffer a "localized toxic accident" like the one in *MacKinnon*; they were harmed by a persistent byproduct of Cold Creek's business operations, what *MacKinnon* called "traditional environmental industrial pollution." (*MacKinnon*, *supra*, 31 Cal.4th at p. 641, fn. 1, 3 Cal.Rptr.3d 228, 73 P.3d 1205.) In *Garamendi v. Golden Eagle Ins. Co.* (2005) 127 Cal.App.4th 480, 486, 25 Cal.Rptr.3d 642 (*Garamendi*), the court held that, "unlike the residential use of a pesticide for the purpose of killing insects, the widespread dissemination of silica dust as an incidental by-product of industrial sandblasting operations most assuredly is what is 'commonly thought of as pollution' and 'environmental pollution' " under the reasoning of *MacKinnon*. Similarly here, we conclude that the widespread dissemination of offensive and injurious odors from a commercial compost facility is "environmental pollution" under *MacKinnon*, and thus excluded from coverage by the pollution exclusion in the policies.

This conclusion is consistent with the one reached in *City of Spokane v. United Nat. Ins. Co.* (E.D.Wash.2002) 190 F.Supp.2d 1209 (*Spokane*), which appears to be the only reported case involving the pollution exclusion's application to odors from a compost facility. The owner of the compost facility in that case was sued by nearby residents for damages caused by odors emitted from the facility. The owner incurred substantial defense costs, paid more than \$4 million to settle the case, and sought indemnification under liability insurance policies that contained pollution exclusions. The court took into account how an average purchaser of insurance would have understood the language of the exclusions (*id.* at p. 1217), and held in favor of the insurers (*id.* at p. 1221). The court reasoned: "Although [d]efendants' pollution exclusions did not explicitly list 'odors' in the definitions for 'pollutant' or 'contaminant,' the policies clearly exclude coverage for odors produced by the Colbert Compost Facility.... [¶] ... [R]eading the insurance policies to include coverage of odors from solid waste—although the policies clearly exclude coverage for gases, fumes, vapors, contaminants and irritants—would require a strained interpretation and produce an absurd result. Migration of odors from a solid waste facility clearly constitutes contamination, or pollution, of the environment." (*Id.* at p. 1219.)

The same conclusion was reached in an analogous context in *City of Bremerton v. Harbor Ins. Co.* (1998) 92 Wash.App. 17, 963 P.2d 194 (*Bremerton*). There, residents in the vicinity of a sewage treatment plant sued for damages for " "noxious

and toxic fumes,' " and " 'foul and obnoxious odors and toxic gases' " emitted by the facility. (*Id.* at p. 195.) The court held that the pollution exclusion applied: "The policy defines a 'pollutant' as any 'irritant or contaminant' and specifically lists 'fumes' and 'gasses' as examples. The language unambiguously excludes claims arising from 'fumes' and 'gases' from coverage. Furthermore, the specified examples of 'irritants or contaminants' in the exclusion language are listed as non-exclusive types of 'pollutants' subject to exclusion from coverage. The list is illustrative and not exhaustive and odors are effectively excluded as well. A reasonable person reviewing this language would expect that 'noxious and toxic fumes' and 'foul and toxic odors and gasses' are 'pollutants' within the meaning of the pollution exclusion." (*Id.* at p. 197; see also *Titan Holdings Syndicate v. City of Keene, N.H.* (1st Cir.1990) 898 F.2d 265, 267, 269 [pollution exclusion negated coverage for odors from sewage treatment plant]; *Tri-Municipal Sewer Commission v. Continental Insurance Company* (1996) 223 A.D.2d 639, 636 N.Y.S.2d 856, 857 [same].) The pollution exclusion has likewise been interpreted under California law to negate coverage for odors emanating from a manufacturing facility. (*Hydro Systems, Inc. v. Continental Ins. Co.* (C.D.Cal.1989) 717 F.Supp. 700, 701-702 (*Hydro Systems* ).)

Cold Creek contends, like the insured in *Bremerton*, that the pollution exclusion does not extend to odors because that word does not appear in the exclusion's definition of "pollution." However, odors are plainly a "gaseous ... irritant or contaminant" under the wording of the definition. Although *MacKinnon* precludes a literal reading of the exclusion to encompass all potential irritants and contaminants, the odors here, as we have explained, constitute "environmental pollution" and are therefore subject to the exclusion under *MacKinnon's* analysis.

(*Cold Creek Compost, Inc. v. State Farm Fire & Cas. Co.* (2007) 156 Cal. App. 4th 1469, 1480-82, emphasis added.)

It therefore appears that this claim is excluded entirely by the pollution exclusion.

The inverse condemnation exclusion might also apply. The CJPRMA MOC also excludes:

**22) Land Use**

Claims arising out of or in connection with land use regulation, land use planning, the principles of eminent domain, condemnation proceedings or inverse condemnation by whatever name called, and whether or not liability accrues directly against any *covered party* by virtue of any agreement entered into by or on behalf of any *covered party*.

Richard Crabtree

Re: *Kathy Nelson v. City of Red Bluff*, York File No. NCGA07814A2

December 31, 2014

Page 6

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NCCSIF narrows the exclusion, however.

Exclusion No. 22 of the CJPRMA Memorandum of Coverage does not apply under this Memorandum to inverse condemnation liability arising from accidentally caused physical injury to or destruction of tangible property, including all resulting loss of use of such property, for which the covered party may be legally responsible.

Here, the suit is likely to be based on inverse condemnation, nuisance and perhaps a dangerous condition of public property. It does not appear that the exception in the NCCSIF MOC, bringing back in partial coverage for inverse condemnation claims, applies here. There is no physical injury to or destruction of tangible property. There may be some diminution of market value, sufficient to support an inverse claim, but the exception is aimed at bringing in coverage for earth movement or flooding, neither of which is presented here. This inverse condemnation exclusion, of course, would not apply to causes of action for nuisance or dangerous condition of public property. However the pollution exclusion would apply to all of the causes of action.

Please advise if we can be of further assistance.

Very truly yours,

GIBBONS & CONLEY

  
A. BYRNE CONLEY

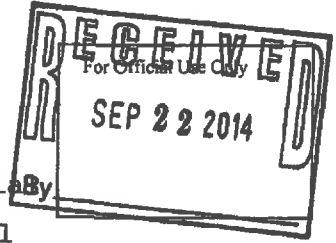
/kjb

cc: Jennifer Nogosek, York  
Marcus Beverly, Alliant  
Mike Simmons, Alliant



**CITY OF RED BLUFF - CLAIM FORM**

◆◆◆ PLEASE READ INSTRUCTIONS ON OTHER SIDE FIRST ◆◆◆



Name of Claimant Kathy Nelson  
(First Name) (Middle Initial) (Last Name)  
Home Address 2250 Walbridge St. Date of Birth Confidential  
City, State, Zip Red Bluff, CA 96080 Soc. Security # Confidential  
Daytime ( 530 ) 527-1266 Evening ( ) Cell/pager ( ) CA Driver's Lic# Confidential

Type of Loss: F Personal Injury Other Negligence, ----- Police Report # ----- Nuisance, Inverse  
F Property Damage F Indemnity-Date complaint served ----- Condemnation

When did injury or damage occur? Ongoing AM/PM  
(Month/Day/Year) (Day of Week) (Time)

Where did injury or damage occur? (Street address, intersecting streets, or other location)  
Walbridge Neighborhood

How did injury or damage occur? (Describe accident or occurrence)  
Foul noxious sewage odors emanating from City's sewer system.

What action or inaction of City employee(s) caused your injury or damage?  
Failure of City Council and City Manager to properly investigate and remediate.

What injury or damage did you suffer?  
Years of smelling foul noxious sewage odors, loss/diminution of property, loss of enjoyment including with late husband Ron Nelson.

Name of any witnesses  
Larry & Dorothy Bonds, 2320 Walbridge St., Red Bluff, CA 96080  
(Name) (Address) (Phone Number)  
See Attachment "A" - Complaints of residents (Bates RB-0226 through RB-0256)  
(Name) (Address) (Phone Number)

Name of City employee(s) involved? City Mayor, City Council, Bruce Henz, Richard Crabtree

Total Amount of Claim: Greater than \$10,000 X Less than \$10,000      (If less the \$10,000 indicate amount below)  
Personal Injury \$      Property Damage \$ Total value of property - tbd by experts

NOTE: Please attach copies of supporting documentation for the amounts claimed.

**If claim relates to an automobile accident, please answer the following and ATTACH PROOF OF INSURANCE:**

Please check here if there was no insurance coverage in effect at time of incident   
Insurance policy #      Insurance Company       
Insurance Broker/Agent       
Address      Phone ( )     

ALL NOTICES AND/OR COMMUNICATIONS SHOULD BE SENT TO: dkim@mcnlaw.com

Name (Mr./ Mrs./ Ms.) Dan Kim, McNeill Law Offices Daytime Phone ( 530 ) 222-8992  
Address (Street, City, State, Zip) 280 Hemsted Drive, Suite E, Redding, CA 96002

**Warning:** California State Law generally requires that most claims against a public entity, such as the City of Red Bluff, be presented within **SIX (6) MONTHS** from the date of the action or incident giving rise to the claim. Certain other claims must be filed within **ONE (1) YEAR** from the action or incident. You should check the Government Code to determine what presentation period applies in your case.

[Signature] Attorney for Kathy Nelson 9/18/14  
Signature Relationship (self, attorney, guardian, etc.) Date



It is the responsibility of the PLAINTIFF(S) to serve a copy of this notice on each defendant and provide the Court with proof that such service was accomplished.

NOTICE

This case is subject to THE TRIAL COURT DELAY REDUCTION ACT (Govt. Code §§68600 et seq.) and the TEHAMA COUNTY SUPERIOR COURT LOCAL RULES (Rule 11). Strict compliance with the Act and Rules is required by the Court. Local rules can be found at [www.tehamacourt.ca.gov](http://www.tehamacourt.ca.gov).

This matter is set for Case Management Conference on 9-8-15 at 4:00 p.m. in Dept. 1.

All parties are required to file with the Court a Case Management Statement (Judicial Council Form CM-110) at least **5 days prior** to **each** conference.

Pursuant to T.C. Rule 11, this case is assigned to the Hon. John J. Caravatta.

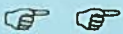
This case is not assigned to a judge at this time but hereafter shall be assigned by the Court Executive Officer by written notice.

Dated: APR 27 2015

CARYN A. DOWNING, CLERK OF THE COURT

Lane Moore

By \_\_\_\_\_ Deputy



INSTRUCTIONS FOR ATTORNEYS RE TELEPHONIC APPEARANCES:

- 1) Telephonic appearances are allowed at any Case Management Conference unless a personal appearance is specifically ordered by the Court. The Court uses AT&T Teleconference Services. (**Note:** Court Call is not available for Case Management Conferences.)
- 2) Notice of intent to appear telephonically should be noted on the Case Management Conference Statement (CM-110).
- 3) The telephone number is:  
DEPT. 1 – 888-808-6929 Participant Code: 354966

— SANCTIONS —

If you do not file the Case Management Statement or attend the Case Management Conference or participate effectively in the conference, the Court may impose sanctions (including dismissal of the case and payment of money).

**\*\*Fee of \$20.00 is required for any continuance of a Case Management Conference.\*\***

CM-010  
ENDORSED  
FILED  
TEHAMA SUPERIOR COURT  
2015 APR 21 AM 11:11

FOR COURT USE ONLY

CARYN A. DOWNING  
CLERK OF THE COURT  
By Lane Moore  
DEPUTY

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):  
Walter P. McNeill, #95865  
Dan D. Kim, #212577  
McNeill Law Offices  
280 Hemsted Drive, Suite E, Redding, CA 96002  
TELEPHONE NO.: 530-222-8992 FAX NO.: 530-222-8892  
ATTORNEY FOR (Name): Plaintiff, Kathy Nelson

SUPERIOR COURT OF CALIFORNIA, COUNTY OF Tehama  
STREET ADDRESS: 633 Washington Street  
MAILING ADDRESS: 633 Washington Street  
CITY AND ZIP CODE: Red Bluff, CA 96080  
BRANCH NAME:

CASE NAME:  
Kathy Nelson v. City of Red Bluff, et al.

CASE NUMBER  
**70663**

**CIVIL CASE COVER SHEET**  
 **Unlimited** (Amount demanded exceeds \$25,000)  
 **Limited** (Amount demanded is \$25,000 or less)

**Complex Case Designation**  
 **Counter**  **Joinder**  
Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)

JUDGE:  
DEPT:

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

<p><b>Auto Tort</b></p> <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) <p><b>Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort</b></p> <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/PD/WD (23) <p><b>Non-PI/PD/WD (Other) Tort</b></p> <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-PI/PD/WD tort (35) <p><b>Employment</b></p> <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	<p><b>Contract</b></p> <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) <p><b>Real Property</b></p> <input checked="" type="checkbox"/> Eminent domain/Inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) <p><b>Unlawful Detainer</b></p> <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) <p><b>Judicial Review</b></p> <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	<p><b>Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403)</b></p> <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) <p><b>Enforcement of Judgment</b></p> <input type="checkbox"/> Enforcement of judgment (20) <p><b>Miscellaneous Civil Complaint</b></p> <input type="checkbox"/> RICO (27) <input checked="" type="checkbox"/> Other complaint (not specified above) (42) <p><b>Miscellaneous Civil Petition</b></p> <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
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2. This case  is  is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- |  |  |
|--|--|
| a. <input type="checkbox"/> Large number of separately represented parties   | d. <input type="checkbox"/> Large number of witnesses  |
| b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve | e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court |
| c. <input type="checkbox"/> Substantial amount of documentary evidence   | f. <input type="checkbox"/> Substantial postjudgment judicial supervision  |
3. Remedies sought (check all that apply): a.  monetary b.  nonmonetary; declaratory or injunctive relief c.  punitive
4. Number of causes of action (specify): 4
5. This case  is  is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: April 24, 2015

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

(TYPE OR PRINT NAME)

**NOTICE**

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.



# SUMMONS (CITACION JUDICIAL)

## NOTICE TO DEFENDANT: (AVISO AL DEMANDADO):

City of Red Bluff, Richard Crabtree, Bruce Henz, and Does 1 through 25

## YOU ARE BEING SUED BY PLAINTIFF: (LO ESTÁ DEMANDANDO EL DEMANDANTE):

Kathy Nelson

FOR COURT USE ONLY  
(SOLO PARA USO DE LA CORTE)

FILED  
TEHAMA SUPERIOR COURT

2015 APR 27 AM 10:13

CARYN A. DOWNING  
CLERK OF THE COURT  
BY Lane Moore  
DEPUTY

ENDORSED

**NOTICE!** You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **¡AVISO!** Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California ([www.sucorte.ca.gov](http://www.sucorte.ca.gov)), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), en el Centro de Ayuda de las Cortes de California ([www.sucorte.ca.gov](http://www.sucorte.ca.gov)) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:  
(El nombre y dirección de la corte es):

Superior Court of California, County of Tehama  
633 Washington Street, Red Bluff, CA 96080

CASE NUMBER  
(Número del Caso): **70663**

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

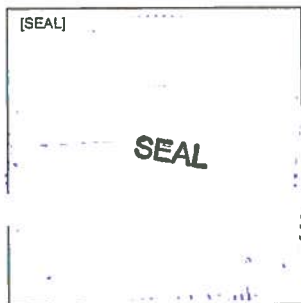
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):  
Walter P. McNeill, McNeill Law Offices, 280 Hemsted Drive, Suite E, Redding, CA 96003; 530-222-8992

DATE: April 24, 2015  
(Fecha)

APR 27 2015

Clerk, by Caryn A. Downing Lane Moore Deputy  
(Secretario) Clerk of the Court (Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)  
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).



### NOTICE TO THE PERSON SERVED: You are served

- as an individual defendant.
- as the person sued under the fictitious name of (specify):
- on behalf of (specify):  
under:  CCP 416.10 (corporation)  CCP 416.60 (minor)  
 CCP 416.20 (defunct corporation)  CCP 416.70 (conservatee)  
 CCP 416.40 (association or partnership)  CCP 416.90 (authorized person)  
 other (specify):
- by personal delivery on (date):

ENDORSED

FILED  
TEHAMA SUPERIOR COURT  
2015 APR 2 11 10 11

GARYNA DOWNING  
CLERK OF THE COURT  
BY Lane Moore  
DEPUTY

1 Walter P. McNeill, #95865  
2 Dan D. Kim, #212577  
3 MCNEILL LAW OFFICES  
4 280 Hemsted Drive, Suite E  
5 Redding, California 96002  
6 Telephone: (530) 222-8992  
7 Facsimile: (530) 222-8892  
8 Attorneys for Plaintiff

9  
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
11 **COUNTY OF TEHAMA**

12 KATHY NELSON,

13 Plaintiff,

14 vs.

15 CITY OF RED BLUFF, RICHARD CRABTREE,  
16 BRUCE HENZ, and DOES 1 through 25,

17 Defendants.

18 Case No. **70663**

19 VERIFIED COMPLAINT FOR  
20 NEGLIGENCE, PRIVATE NUISANCE,  
21 PUBLIC NUISANCE, AND INVERSE  
22 CONDEMNATION

23 **PRELIMINARY ALLEGATIONS**

24 **THE PARTIES**

25 1. Plaintiff KATHY NELSON is an individual who resides at 2250 Walbridge Street  
26 in Red Bluff, California.

27 2. Defendant CITY OF RED BLUFF (hereinafter "CITY") is, and was at all relevant  
28 times, a municipal corporation duly organized and existing under the laws of the State of  
California and situated within Tehama County, California.

1 3. Defendant RICHARD CRABTREE is, and was at all relevant times, the City  
2 Manager and also the City Attorney for CITY. Mr. Crabtree is named herein in his official  
3 capacity so that Plaintiff may assert the jurisdiction of the court and be afforded full and  
4 complete relief on her claims.

5 4. Defendant BRUCE HENZ is, and was at all relevant times, the Director of Public  
6 Works for CITY. Mr. Henz is named herein in his official capacity so that Plaintiff may  
7 assert the jurisdiction of the court and be afforded full and complete relief on her claims.  
8

9 5. Plaintiff is ignorant of the true names and capacities of Defendants named herein  
10 as Does 1 through 25, inclusive, and, therefore sues these Defendants by such fictitious  
11 names. Plaintiff will amend her complaint to allege their true names and capacities when  
12 ascertained. Plaintiff is informed and believes and thereon alleges that Does 1 through 25  
13 are public officials (elected and non-elected), officers, employees, and/or agents of  
14 Defendants and in doing the things hereinafter mentioned were acting within the course  
15 and scope of their authority as such with the permission and consent of their codefendants.  
16 Plaintiff is informed and believes and thereon alleges that each of the fictitiously named  
17 Defendants is responsible in some manner for the occurrences herein alleged and the  
18 damages suffered by Plaintiff.  
19

## 20 **FACTUAL BACKGROUND**

21 6. Ms. Nelson has lived at her current address in Red Bluff since 1985. She had lived  
22 there with her husband, Ron Nelson, who passed away on September 3, 2013.  
23

24 7. At all times relevant herein, Defendants planned, constructed, owned, operated,  
25 controlled, and maintained the CITY sewer system that is the subject of this lawsuit. The  
26 CITY's sewer system is a public facility designed for the collection and conveyance of  
27 sewage.  
28

1 8. In 2001, PACE Civil, Inc. prepared a report of the CITY's sewer system.

2 According to this report, the CITY has owned and operated its own sewer system since the  
3 early 1900's. Portions of the existing CITY sewers are up to 100 years old and consist of clay  
4 pipe with cement mortar joints. These pipes are susceptible to and suffer from infiltration  
5 and inflow. Sewers that leak in could also leak out, defeating the purpose of a sewer system  
6 which is to collect and convey the sewage in a manner that is not harmful to humans or the  
7 environment. There has not been a major attempt to repair and/or replace the most  
8 defective sewers and laterals. The report recommends infiltration and inflow reduction  
9 combined with either parallel relief sewers or replacement of old sewers.  
10

11 9. Starting in late-2010 or 2011, the Nelsons began smelling foul odors in the air.  
12 They could smell these odors from outside their home as well as from inside their home if  
13 their windows were open or if their swamp cooler was running. Others in the  
14 neighborhood or who visited the neighborhood also complained of smelling the odors.  
15

16 10. As the odors continued, Ms. Nelson called and notified the CITY that there is an  
17 odor problem that the CITY needs to investigate. Ms. Nelson initially did not know where  
18 these odors were coming from, but she started noticing the odors around the same time that  
19 a development of homes was completed nearby, called the Greenville Rancheria.  
20

21 11. The Greenville Rancheria is an eight-home residential development that utilizes a  
22 small lift station to pump sewage through a long underground pipe (called a sewer force  
23 main) that opens at a manhole on Walbridge Street in front of Ms. Nelson's residence.  
24

25 12. At all times relevant herein the CITY exercised control over the Greenville  
26 Rancheria development, including through its Planning and Building Departments, and the  
27 CITY continues to exercise control over the operation and maintenance of the subject sewer  
28 system, particularly through its Public Works Department and City Manager's Office.

1 13. Attached as Exhibits 1A through 1E are public records from the CITY relating to  
2 the Greenville Rancheria development.

3 14. As shown in Exhibit 1A, the CITY reviewed and approved improvement plans  
4 for the development that included the subject sewer force main.

5 15. As shown in Exhibit 1B, the CITY approved a use permit for the development  
6 with specific findings and conditions, including: (a) a finding that the proposed location of  
7 the planned development and the conditions under which it would be operated or  
8 maintained will not be detrimental to the public safety or welfare or materially injurious to  
9 properties or improvements in the vicinity; (b) a condition that all construction shall be  
10 done in accordance with the CITY's standards and specifications; and (c) a condition that  
11 the applicant submit plans and specifications for review and approval by the CITY, and  
12 obtain all necessary permits from the CITY.  
13

14 16. As shown in Exhibit 1C, the CITY's Planning Department and Public Works  
15 Department "requested a modification to the project that included a private lift station and  
16 approximately 2,000 foot of four inch force main paralleling Baker Road on City property  
17 that will connect to a sewer manhole at Walbridge St."  
18

19 17. As shown in Exhibit 1D, construction relating to the lift station, on Monrovia  
20 Street, had not yet been completed as of October, 2010.

21 18. As shown in Exhibit 1E, the CITY's Senior Building Inspector requested an  
22 electric meter from PG&E for the new homes, on or about November 24, 2010, referring to a  
23 "Sewer Station Permit #18065".  
24

25 19. The development was completed – and the homes were occupied – sometime  
26 towards the end of 2010 or the beginning of 2011.

27 20. As the odor problem developed and lingered with no response from the CITY,  
28 numerous concerned residents sent complaints to the CITY, in October and November of



1 2012, petitioning the CITY to do something about the sewage odors in Red Bluff,  
2 particularly in the Walbridge neighborhood. These letters are included as Exhibit "A" to  
3 Plaintiff's tort claim, which is attached as Exhibit 7 to this Complaint. The letters include  
4 signatures from approximately 42 residents of Red Bluff, including residents from  
5 approximately 13 homes on Walbridge Street.  
6

7 21. Ms. Nelson's husband was diagnosed with brain cancer in November of 2012.  
8 He passed away in September the following year. After his diagnosis but before his death,  
9 the Nelsons filled in their backyard pool intending to spend time enjoying their low-  
10 maintenance yard. However, due to the continuing foul odors, the Nelsons could not enjoy  
11 spending time outdoors in their backyard. Even while inside their home, the Nelsons had  
12 to block outside air from coming in so as to mitigate the foul odors that were coming into  
13 their home through their windows and swamp cooler. This meant they had to rely more on  
14 their air conditioner, which cost more to operate than their swamp cooler.  
15

16 22. The foul odors smell of feces or raw sewage. The odor problem is continuing and  
17 persists to this day. The problem is not noticeable all the time but plaintiff and other  
18 residents have smelled the odors throughout the months and years since 2011. Ms. Nelson,  
19 who frequently hosts friends and family members at her house, has had countless  
20 gatherings where guests have smelled the odors and have had to retreat inside. The odor  
21 problem seems to be worse in the winter or around the year-end holidays. Attached as  
22 Exhibit 2 is one of Ms. Nelson's earlier letters to the CITY, dated January 18, 2012,  
23 describing the odor problem.  
24

25 23. Ms. Nelson contacted the CITY on numerous occasions when the odors were  
26 present. But no one from the CITY responded during these times. Attached as Exhibit 3 is  
27 one of Ms. Nelson's letters to the CITY, dated July 19, 2012, describing her frustration with  
28 the CITY's inadequate response. For instance, the odors were bad all through the months of

1 September through December of 2012, and stayed for up to three or four days at a time. No  
2 one from the CITY called back or came out. On October 19, 2012 Ms. Nelson called about  
3 how bad the smell was. She left messages and visited City Hall. She and her neighbors also  
4 called through 2013 and 2014 to report the odors.

5  
6 24. Plaintiff is informed and believes that sewage odors are noxious, containing  
7 chemicals such as hydrogen sulfide, carbon monoxide, sulfur dioxide, and/or nitrogen  
8 dioxide. The odors are foul, offensive to the senses, and cause physical discomfort  
9 including gagging and nausea.

10 25. In June of 2014, Bruce Henz, Public Works Director, prepared a report at the  
11 request of Richard Crabtree, CITY Manager / CITY Attorney, to provide information  
12 "concerning the ongoing odor issue within the Walbridge Area Neighborhood." The City  
13 Council's Agenda Report considering Mr. Henz's report is attached to this Complaint as  
14 Exhibit 4, and Mr. Henz's report is included therein as Attachment A.

15  
16 26. Mr. Henz's report acknowledges that the odor concerns in the Walbridge Area  
17 neighborhood have been an ongoing issue for "a number of years." Although the CITY  
18 recognized the problem as "sewer gas odors" caused by "a complex mixture of gases that  
19 are produced and collected in sewage systems," Mr. Henz's investigation focused on Ms.  
20 Nelson's residence. As Mr. Henz explains in his report, "We eventually came to focus on  
21 the residence's waste vent that exits through the roof as a probable source of the odors at  
22 the residence."

23  
24 27. On or about January 16, 2012, Plaintiff hired a plumber at her own initiative to  
25 inspect the plumbing system at her house, through the sewer lateral, for any blockages or  
26 defects. This was a camera test that inspected the sewer pipes through where it hooks up to  
27 the CITY's sewer system. The inspection revealed no blockages or defects of any kind.  
28 Nevertheless, the very next day, Mr. Henz hired a different plumber to perform the same

1 camera inspection on Plaintiff's house. Both camera tests found no problem with Plaintiff's  
2 house.

3 28. Yet Mr. Henz persisted in seeking to blame Ms. Nelson, and ordered a smoke test  
4 to be performed by CITY staff. On or about February 16, 2012, CITY staff literally blew "a  
5 large amount of smoke" into its sewer system near Ms. Nelson's residence, after reportedly  
6 sealing the sewer main at the upstream and downstream manholes. Mr. Henz's report  
7 notes that "a significant indication of smoke was identified that had traveled up the sewer  
8 lateral, through the plumbing lines within the Nelson's house and out through the vent on  
9 the roof." But CITY staff were all outside, looking for smoke, and not one puff of smoke  
10 came out of the vents on Ms. Nelson's house.

11  
12 29. Notwithstanding, Mr. Henz recommended that residents raise their house vents  
13 and/or add odor filters.

14  
15 30. On or about June 17, 2014, the City Council reviewed Mr. Henz's report and  
16 noted that the public works staff will continue to "explore" odor control products and  
17 continue to investigate indications that the odors arise from "a source other than those  
18 currently designated." (See Exhibit 4, p. 2).

19  
20 31. The sewage odors even as recognized by Mr. Henz in his report come from gases  
21 generated in, traveling through, and/or escaping from the CITY's sewer system. The CITY  
22 declined to even attempt to tackle the source of the problem, quickly dismissing any such  
23 effort as too challenging or too expensive, and latching instead to recommendations by Mr.  
24 Henz that odor control products should be explored.

25  
26 32. Mr. Henz in his report recognizes that the source of the sewer odors is the sewer  
27 main. (See Exhibit 4, Attachment A, p. 4.) Odor control products are not proven to be  
28 "totally effective" or even fully tested. (*Id.*, p. 5.) Residents of the Greenville Rancheria pay  
for CITY sewer services and have a pump station that empties their sewage into the CITY's

1 sewer system at Walbridge Street. (*Id.*) According to Mr. Henz, the sewage from the  
2 Greenville Rancheria pump station enters a force main that is over 2250 feet in length. (*Id.*)  
3 “While a comprehensive and precise analysis of the flow characteristics within the force  
4 main is problematic, it is reasonable to assume that a significant amount of pumped  
5 sewerage could remain within the force main between pumping cycles.” (*Id.*) Speaking of  
6 pumping cycles, the report notes, “The pumps are currently programmed to operate on a  
7 slowly recurring cycle.” (*Id.*)

8  
9 33. Short of correcting the inadequate flow characteristics of the CITY sewer system,  
10 a temporary “one-time” treatment of the problem would be to “flush” the sewer system  
11 from the Greenville Rancheria – essentially using high water pressure to force the  
12 accumulated sewerage to move on down the sewer system. (*Id.*, p. 6.) However, the pump  
13 station and force main at the Greenville Rancheria were not constructed to handle flushing  
14 and lacks service cleanouts. (*Id.*) In other words, that part of the CITY’s sewer system  
15 connecting from the Greenville Rancheria development is “not configured” for routine  
16 maintenance. (*Id.*) “As noted, the public works staff believes that appropriate maintenance  
17 cleanouts should be installed at suitable locations within the force main in order to facilitate  
18 an active maintenance program. This new construction would require a significant  
19 expenditure.” (*Id.*)

20  
21 34. Mr. Henz claimed in reports to the City Council and to the public that he had  
22 flushed the force main 11 times. But to Plaintiff’s knowledge, Mr. Henz had the force main  
23 flushed only once, which resulted in a temporary abatement of the sewage odors in and  
24 around Walbridge Street. Mr. Henz’s claim that he had flushed the force main 11 times is  
25 inconsistent with his own report, wherein he states that the Greenville Rancheria force main  
26 was not constructed to handle flushing and lacks service cleanouts. As reported by Mr.  
27 Crabtree to the City Council on June 20, 2014, Mr. Crabtree himself “directed that flushing  
28

1 of the Greenville Rancheria force main be done every 30 days until further notice.” (See  
2 Exhibit 5, attached hereto).

3 35. According to emails exchanged between Mr. Henz and an engineer in mid-July  
4 of 2014, the subject force main is 4-inches in diameter. The emails are attached as Exhibit 6  
5 to this Complaint. “There is lots that we don’t know for sure.” (*Id.*) “The force main  
6 pumps uphill and over a nob along the force main route, then down through the top end of  
7 a draw, then back up and over another gradual knoll and down to the outfall manhole.”  
8 (*Id.*) “This is really a WAG but we estimate that the high point in the pipe to at  
9 approximately 391’...” (*Id.*) “It appears that the pump is going on only about 4 times a  
10 week; much less than the design flow for the 8 SF units within the Rancheria Development.”  
11 (*Id.*)

12 36. On or about September 18, 2014, Plaintiff presented to Defendant CITY its claim  
13 for damages caused by the CITY’s negligence, nuisance, and inverse condemnation. A true  
14 and correct copy of this claim is attached here to as Exhibit 7 and incorporated by reference  
15 herein. On November 12, 2014, the CITY rejected Plaintiff’s claim; a true and correct copy of  
16 the rejection is attached hereto as Exhibit 8 and incorporated by reference herein.  
17

18  
19 **FIRST CAUSE OF ACTION – NEGLIGENCE**

20 37. Plaintiff refers to and incorporates by reference paragraphs 1-36 as though stated  
21 at length herein.

22 38. Defendant CITY has a duty to maintain its sewer system in good working order  
23 and free from defects.  
24

25 39. The CITY breached this duty by failing to maintain its sewer system in good  
26 working order and free from defects, in allowing concentrated sewage odors to escape from  
27 its sewer system into the open air in and around Red Bluff, particularly in the Walbridge  
28 neighborhood where Plaintiff resides.

1           40. Defendant CITY has a duty to make sure that in planning and approving new  
2 developments, any tie-ins to the CITY's sewer system are planned, designed, and  
3 constructed in such a manner as to work properly, that they in fact work properly, and that  
4 they are serviceable.

5           41. In planning, approving, and/or inspecting the Greenville Rancheria  
6 development, the CITY failed to ensure that the lift station and force main constructed and  
7 utilized by the Greenville Rancheria development would work and actually work in such a  
8 manner that sewage in the system does not accumulate so as to create odor-causing  
9 conditions that become concentrated and then escape into the atmosphere.

10           42. The lift station in place at the Greenville Rancheria as designed, constructed, and  
11 as it operates today, fails to push sewage through the force main with enough pressure,  
12 volume, and/or frequency so as to prevent odor-causing conditions to arise persistently.  
13 When sewage that has been lodged in the force main for an extended period of time finally  
14 exits the force main near Ms. Nelson's house, the concentrated odorous gases escape  
15 through the City's sewer system into the atmosphere. Furthermore, the force main from the  
16 Greenville Rancheria lacks appropriate maintenance cleanouts, making it unserviceable.  
17 The failure of this lift station, in combination with the over 2,250 foot long four-inch force  
18 main and the CITY's defective, old and/or dilapidated sewer system, causes sewage odors  
19 to become concentrated, and to escape and permeate into the open air in and around Red  
20 Bluff, including particularly the Walbridge neighborhood where Plaintiff resides.

21           43. Since the construction of the CITY's sewer system, the CITY has approved  
22 and/or inspected construction of residential housing, including the Greenville Rancheria  
23 development and other developments, which tie-in to the CITY's sewer system through lift  
24 stations and/or force main which increase the amount of sewage going into the CITY's  
25 existing sewer system. Notwithstanding these improvements and developments, the CITY  
26  
27  
28

1 has not repair or improved its sewer system, or perform needed maintenance and service  
2 required for its sewer system to be able to handle the additional loads of sewage, and any  
3 problems that arise as a result of these new developments.

4 44. As a result of Defendant CITY's negligence, Plaintiff has been harmed and has  
5 suffered damages, as follows:

- 6 a. the loss and enjoyment of life or property;
- 7 b. having to stay indoors with the windows shut;
- 8 c. suffering embarrassment and inconvenience when guests are over and smell the  
9 odors;
- 10 d. physical discomfort from the sewage odors, including but not limited to gagging,  
11 nausea, and lacking fresh air to breathe;
- 12 e. having to use air conditioning at higher cost as opposed to a swamp cooler due to  
13 the swamp cooler letting in more of the sewage odors from the outside to the inside of  
14 Plaintiff's home;
- 15 f. diminution in value to Plaintiff's property.

16  
17  
18 **SECOND CAUSE OF ACTION – PRIVATE NUISANCE**

19 45. Plaintiff refers to and incorporates by reference paragraphs 1-44 as though stated  
20 at length herein.

21 46. Plaintiff owns the residential real property located at 2250 Walbridge Street in  
22 Red Bluff, California, and she has resided there since 1985.

23 47. Defendants, by acting or failing to act, created a condition that is harmful to  
24 health, indecent or offensive to the senses, and that is an obstruction to the free use of  
25 property, so as to interfere with the comfortable enjoyment of life and property. (Civil  
26 Code, § 3479 et seq.).

27  
28 48. At no time did Plaintiff consent to the presence of sewage odors.

1           49. The sewage odors are noxious, foul, and offensive, smelling of fecal matter or  
2 raw sewage, such that an ordinary person would be reasonably annoyed or disturbed  
3 thereby.

4           50. Plaintiff has been harmed by Defendants, and has suffered damages, as follows:

- 5           a. the loss and enjoyment of life or property;
- 6           b. having to stay indoors with the windows shut;
- 7           c. suffering embarrassment and inconvenience when guests are over and smell the  
8 odors;
- 9           d. physical discomfort from the sewage odors, including but not limited to gagging,  
10 nausea, and lacking fresh air to breathe;
- 11           e. having to use air conditioning at higher cost as opposed to a swamp cooler due to  
12 the swamp cooler letting in more of the sewage odors from the outside to the inside of  
13 Plaintiff's home;
- 14           f. diminution in value to Plaintiff's property.

15  
16  
17                           **THIRD CAUSE OF ACTION – PUBLIC NUISANCE**

18           51. Plaintiff refers to and incorporates by reference paragraphs 1-50 as though stated  
19 at length herein.

20           52. Defendants, by acting or failing to act, created a condition that is harmful to  
21 health, indecent or offensive to the senses, and that is an obstruction to the free use of  
22 property, so as to interfere with the comfortable enjoyment of life and property. (Civil  
23 Code, § 3480 et seq.) No lapse of time can legalize a public nuisance, amounting to an  
24 actual obstruction of public right. (Civil Code, § 3490 et seq.).

25  
26           53. The condition complained of herein constitutes a public nuisance – including as  
27 defined by Red Bluff's Code of Ordinances, Chapter 15, Article I, § 15.1, and Chapter 18A,  
28



1 Article I, § 18A.1 – which affected and which continues to affect a substantial number of  
2 people at the same time – particularly, in the Walbridge neighborhood of Red Bluff.

3 54. An ordinary person would be reasonably annoyed or disturbed by the condition,  
4 being that the condition involves the smell of feces or raw sewage.

5 55. The seriousness of the harm outweighs the social utility of Defendants’ conduct,  
6 of which there is none.

7 56. Plaintiff did not consent to Defendants’ conduct.

8 57. Plaintiff suffered harm and continues to suffer harm that was and is different  
9 from the type of harm suffered by the general public, due to her location relative to the  
10 Greenville Rancheria and that part of the sewer system going from the Greenville Rancheria  
11 through Walbridge Street, and due her loss of enjoyment of life and property with her  
12 husband in his final year.

13 58. Defendants’ conduct was a substantial factor in causing Plaintiff’s harm.

14 **FOURTH CAUSE OF ACTION – INVERSE CONDEMNATION**

15 59. Plaintiff refers to and incorporates by reference paragraphs 1-58 as though stated  
16 at length herein.

17 60. Both the United States Constitution and California Constitution provide that  
18 private property shall not be taken for public use without just compensation. (U.S. Const.,  
19 5<sup>th</sup> amend.; Cal. Const., art. 1, § 19.) Under the California Constitution, compensation is  
20 required when property has been “taken or damaged.” (Cal. Const., art. 1, § 19.) Following  
21 the passage of Proposition 99 on June 3, 2008, the California Constitution now defines a  
22 “public work or improvement” to include “wastewater-related facilities or  
23 infrastructure...and private uses incidental to, or necessary for, the public work or  
24 improvement.” (Cal. Const., art. I, § 19, subd. (e)(5); see also *Skoumbas v. City of Orinda*  
25  
26  
27  
28

1 (2008) 165 Cal.App.3d 783, 796, FN14 [noting the expansion of “public improvement” to  
2 include necessary/incidental private uses].)

3 61. Plaintiff owns the residential real property located at 2250 Walbridge Street in  
4 Red Bluff, California, and has resided there since 1985.

5 62. The CITY provides sewer services to the eight homes on the Greenville Rancheria  
6 property, which is within the CITY limits, through a lift station and force main that connect  
7 to the CITY’s existing sewer line running along Walbridge Street. The CITY designed,  
8 planned, approved, permitted, constructed, inspected, accepted, and/or maintained the lift  
9 station and force main serving the Greenville Rancheria. These components do not work in  
10 isolation but combine with the CITY’s existing sewer system, collectively constituting a  
11 “public work or improvement.”  
12

13 63. The subject sewer system leaks odorous effluent in and around Walbridge Street  
14 and causes substantial interference with the use and enjoyment of Plaintiff’s property, and  
15 the burden on plaintiff’s property is sufficiently direct, substantial and peculiar that it must  
16 be compensated. (See *Varjabedian v. City of Madera* (1977) 20 Cal.App.3d 285 [inverse  
17 condemnation claim allowed for sewage odors].) Plaintiff’s property has been physically  
18 invaded and continues to be invaded by gaseous effluent from the CITY’s sewer system.  
19 Because of the sewage odors, the value of Plaintiff’s property – both in and of itself and as  
20 part of the Walbridge neighborhood that has been impacted by the odors – has declined and  
21 continues to decline.  
22

23 64. Further, Plaintiff will be unable to sell her property for the value that it had prior  
24 to said invasion due to disclosure requirements and the undesirability of homes located in  
25 areas that are subject to foul and noxious sewage odors.  
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27 65. Plaintiff presented her claim for damages to the CITY, which claim was rejected.

28 66. Plaintiff has received no compensation from CITY for her damages.

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67. Plaintiff has incurred and will continue to incur attorney's, appraisal, and engineering fees because of this proceeding, in amounts that cannot yet be ascertained, which are recoverable in this action under the provisions of Code of Civil Procedure, Section 1036.

WHEREFORE, Plaintiff prays for Judgment against Defendants and each of them:

1. For damages for inverse condemnation according to proof;
2. For attorney's fees and expert witness fees;
3. For nuisance damages;
4. For general damages;
5. For cost of suit;
6. For injunctive relief; and
7. For such other and further relief as the Court may deem just and proper.

MCNEILL LAW OFFICES,

DATED: April 24, 2015

  
Walter P. McNeill  
Attorney for Plaintiff KATHY NELSON

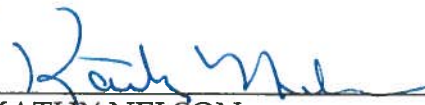
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**VERIFICATION**

I, Kathy Nelson, am the Plaintiff herein. I have read the foregoing Complaint and know its contents. The facts stated therein are true and are within my personal knowledge, except as to those matters alleged on information and belief, which I hereby affirm that I believe to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 4-24-15 at Redding California.

  
\_\_\_\_\_  
KATHY NELSON

Austin R. Gibbons  
A. Byrne Conley  
Peter A. Urhausen  
Sean C. Conley

**GIBBONS & CONLEY**  
**ATTORNEYS AT LAW**

**Walnut Creek Office**  
2185 N. California Blvd., Suite 285  
Walnut Creek, California 94596  
Telephone: (925) 932-3600  
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**Indian Wells Office**  
74-900 Highway 111, Suite 216  
Indian Wells, California 92211  
Telephone: (760) 346-4633  
Fax: (760) 322-1292

**Please Respond to:**  
**Walnut Creek Office**

May 18, 2015

Richard Crabtree  
City Manager/City Attorney, City of Red Bluff  
555 Washington Street  
Red Bluff, CA 96080

Re: *Kathy Nelson v. City of Red Bluff, York File No. NCGA07814A2*

Dear Mr. Crabtree;

This is a follow up to my letter of December 31, 2014. Claimant Kathy Nelson has now filed a complaint which we reviewed.

Based on the allegations of the complaint, there appears to be no coverage, for defense or indemnity, because this claim arises from pollution, Excluded by CJPRMA Exclusion 27, and none of the exceptions that bring back coverage apply to the facts as alleged; the complaint adds additional facts from what was provided in the government claim, but they do not change the coverage analysis.

A copy of the December 31 letter is attached.

The complaint alleges causes of action for negligence, (probably subject to demurrer), private nuisance, public nuisance, and inverse condemnation. The inverse condemnation action would be excluded by operation of CJPRMA Exclusion 22, even as narrowed by the NCCSIF Underlying Memorandum of Coverage. The remaining causes of action are excluded by the pollution exclusion.

The complaint adds additional details regarding the City's efforts to control the odors of which Ms. Nelson complains, and discusses issues of infiltration and inflow in more detail than in the government claim. However the complaint alleges that this has been an ongoing problem starting allegedly in late 2010 or 2011 (Complaint, para. 9) and continuing periodically thereafter. The importance of this is that there is no allegation of a sudden, accidental pollution event discovered within 10 days and reported within 30 days under the "time element" exception. The attachments to the complaint verify that the City made efforts over a period of time to address the issue.

Under the language of the Underlying Memorandum of Coverage of NCCSIF, specifically the last paragraph of Section 4 defining "LOSS" and the last paragraph of Section 7, "Defense," the City is entitled to use its banking layer funds to pay for defense and indemnity for this claim. However, in our view there is no coverage within the pooled layer. Essentially these provisions indicate that if a complaint seeks damages that would be covered but for the operation of an exclusion, damages and defense costs may be paid by the City from its banking layer funds.

Richard Crabtree

Re: *Kathy Nelson v. City of Red Bluff, York File No. NCGA07814A*

May 18, 2015

Page 2

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Please note that under Section 11 of the NCCSIF Underlying Memorandum of Coverage, the City is entitled to have this matter submitted to the Claims Committee, then the full Board of Directors, before submitting the coverage issues to binding arbitration.

Please advise if we can be of further assistance.

Very truly yours,

GIBBONS & CONLEY



A. BYRNE CONLEY

/kjb

cc: Jennifer Nogosek, York  
Marcus Beverly, Alliant  
Mike Simmons, Alliant



# CITY OF RED BLUFF

555 Washington Street Red Bluff, California 96080 (530) 527-2605 Fax (530) 529-6878 www.ci.red-bluff.ca.us

June 3, 2015

Northern California Cities Self Insurance Fund  
(NCCSIF)  
Claims Committee

RE: *Nelson v. City of Red Bluff, et. al.*  
Tehama County Superior Court Case No. 70663  
York File No. NCGA07814A2

Dear Members of the Claims Committee:

On or about April 30, 2015 the City of Red Bluff was served with a lawsuit filed by Plaintiff Kathy Nelson. The Complaint alleges damage to real property caused by leaks of “odorous effluent.” The City promptly tendered the Complaint to NCCSIF for defense and indemnity. The City later received correspondence from attorney Byrne Conley, dated May 18, 2015, stating that “there appears to be no coverage, for defense and indemnity.”

Under the operative NCCSIF “Liability Underlying Memorandum of Coverage” and the “Memorandum of Coverage of the California Joint Powers Risk Management Authority (CJPRMA),” the City believes that there is potential coverage for the allegations contained in the Complaint. Accordingly, the City requests that the Claims Committee determine that potential coverage exists and provide the City with a defense to the lawsuit.

## **Potential Coverage Exists For The Inverse Condemnation Claim**

The Complaint contains a cause of action alleging inverse condemnation.<sup>1</sup> (Complaint ¶¶ 59-67) Mr. Conley’s letter of May 18, 2015 states: “The inverse condemnation action would be excluded by operation of CJPRMA Exclusion 22, even as narrowed by the NCCSIF Underlying Memorandum of Coverage.” For the reasons explained below, the City believes that potential coverage exists under the plain language of the operative coverage provisions and the allegations in the Complaint.

CJPRMA Exclusion 22 excludes from coverage “Claims arising out of or in connection with land use regulation, land use planning, the principles of eminent domain, condemnation

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<sup>1</sup> This analysis focuses on the inverse condemnation cause of action because the potential for coverage clearly exists. The potential for coverage based on any individual cause of action triggers a duty to defend the entire Complaint.

proceedings or inverse condemnation by whatever name called, and whether or not liability accrues directly against any covered party by virtue of any agreement entered into by or on behalf of any covered party.” (CJPRMA Memorandum Section VI(22))

The NCCSIF Memorandum of Coverage, however, significantly narrows Exclusion 22: “Exclusion No. 22 of the CJPRMA Memorandum of Coverage *does not apply* under this Memorandum to inverse condemnation liability arising from accidentally caused physical injury to or destruction of tangible property, including all resulting loss of use of such property, for which the covered party may be legally responsible.” (NCCSIF Memorandum of Coverage ¶ 3(B), emphasis added.) Thus, coverage is provided for inverse condemnation claims alleging “accidentally caused physical injury to or destruction of tangible property, including all resulting loss of use of such property . . .”

Applying this coverage language to the allegations of the Complaint yields, at a minimum, a legitimate potential for coverage. The Complaint clearly alleges physical injury to Plaintiff’s property:

“The subject sewer system *leaks odorous effluent* in and around Walbridge Street and *causes substantial interference with the use and enjoyment of Plaintiff’s property* and the burden on plaintiff’s property is sufficiently direct, substantial and peculiar that it must be compensated. [Citations] *Plaintiff’s property has been physically invaded* and continues to be invaded by gaseous effluent from the City’s sewer system.” (Complaint ¶ 63, emphasis added)

The operative Memorandum of Coverage provides coverage for physical injury to property (including loss of use). This should be the beginning and end of the coverage analysis. The potential for coverage triggers a duty to defend the lawsuit. The duty to defend is broader than the duty to indemnify. The duty to defend is triggered by a mere potential for coverage under the terms of the relevant coverage memoranda and the allegations in the Complaint, consistent with the reasonable expectations of NCCSIF’s members.

“Injury to property” is not separately defined in the relevant coverage documents. However, the synonymous term “property damage” is defined as follows:

“Property damage means:

(a) physical injury to tangible property, including all resulting loss of use of that property; *or*

(b) loss of use of tangible property that is not physically injured or destroyed.” (CJPRMA Memorandum Section II(23), emphasis added)

Thus, property damage can occur through either physical injury or loss of use. Here we have both. As noted above, the Complaint clearly alleges physical injury to Plaintiff’s property. The Complaint also alleges loss of use of Plaintiff’s property:



- “the loss and enjoyment of life or property,”
- including “having to stay indoors with the windows shut,”
- Plaintiffs “could not enjoy spending time outdoors in their backyard”
- odors “stayed for up to three or four days at a time,”
- “the odors are foul, offensive to the senses, and cause physical discomfort including gagging and nausea.” (Complaint ¶ 21, 22, 23, 24, 44, 50, 63)

Accordingly, there is at least potential coverage based on either the allegations of physical injury to property or the alleged loss of use (or both). This potential for coverage automatically triggers a duty to defend the entire Complaint, including claims for which there may be no coverage.

\* \* \* \* \*

For the reasons expressed above, the City of Red Bluff requests that the Claims Committee find that there is potential coverage based on the allegations of the Complaint sufficient to trigger a duty to defend.

Sincerely,

Richard Crabtree  
City Manager/Attorney



**Northern California Cities Self Insurance Fund  
Claims Committee Special Meeting  
June 18, 2015**

**Agenda Item E.**

**CLOSED SESSION TO DISCUSS PENDING CLAIMS**  
(Per Governmental Code Section 54956.95)  
\*REQUESTING AUTHORITY

**Liability**

1. Arp v. City of Rocklin\*