



# HAINES CITY

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## **CITY MANAGER MEMORANDUM**

**To:** The Honorable Mayor and City Commissioners

**Through:** James R. Elensky, City Manager

**From:** Fred Reilly, City Attorney

**Date:** October 4, 2023

**Subject:** Resolution No. 23-1766 Authorizing Execution of Settlement Agreement with BCR Environmental Corporation

### **Executive Summary**

Authorize execution of a Settlement Agreement with BCR Environmental Corporation (“BCR”).

### **Introduction**

The intent of this business item is to approve a Resolution authorizing execution of a Settlement Agreement with BCR Environmental Corporation (“BCR”).

In response to BCR serving the City with a Notice of Termination in relation to the Neutralizer Monitoring and Service Agreement, as amended, and General Release, the City requested a pre-suit mediation to address all outstanding issues related to the contractual relationships between the City and BCR.

At the pre-suit mediation, the City and BCR structured an agreement in principle which is represented by the proposed Settlement Agreement. BCR has approved the form and content of the proposed Settlement Agreement.

### **Background**

The City owns a wastewater treatment plant (the “Plant”) in Haines City, Florida, that provides wastewater treatment services to clients within its jurisdiction.

The City and BCR entered into the Neutralizer Monitoring and Service Agreement in 2011 which was subsequently amended by the First Amendment thereto.

The City and BCR entered into that certain Amended and Restated Master Lease, dated May 15, 2015, as amended (the regarding the Haines City Organics Recycling Facility (the "Facility")).



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The scope of these agreements was that the City would construct a facility and install equipment in its Plant to incorporate the BCR Neutralizer process (the "System") for the treatment of biosolids.

The Parties entered into that certain Operating Agreement, dated October 17, 2013, regarding the Facility ("Operating Agreement").

The City and the State of Florida Department of Environmental Protection entered into a Clean Water State Revolving Fund Design and Construction Loan Agreement WW530440, dated May 19, 2015, related to the Facility which remains as an outstanding obligation of the City.

Due to start-up challenges for the Facility and a firestorm of public opposition to operation of the Facility, the City and BCR negotiated the termination of the Lease, the Operating Agreement, and all other agreements, understandings, and contracts between the City and BCR related to the Facility.

The City and BCR negotiated the settlement of any and all outstanding matters and liabilities related to the Lease and all other agreements, contracts, Permits, and understandings pertaining to the Facility which were incorporated into the General Release.

At the time of the execution of the General Release, the City and BCR expressly acknowledged that they entered into that certain Neutralizer Monitoring and Service Agreement, dated October 6, 2011, and a First Amendment to the Neutralizer Monitoring and Service Agreement, dated October 17, 2013 (collectively referred to as the "Neutralizer Agreement"), which do not relate to the Facility.

Pursuant to the General Release, the City and BCR agreed that:

1. The City would have unrestricted use of the Facility for any public need consistent with the SRF Loan, and BCR would no longer have use of the Facility.
2. BCR had an obligation to assist the City in making Monthly Loan Deposit payments on the SRF Loan in the amount of Fourteen Thousand Five Hundred Twenty Dollars (\$14,520) per month ("Monthly SRF Payments"). BCR's obligation to make the Monthly SRF Payments would cease upon termination of the Neutralizer Agreement.

Subsequent to the General Release, BCR has not made all of the Monthly SRF Payments in a timely manner.

From the City's perspective, BCR owes the City the total of \$312,373 in relation to the unpaid Monthly SRF Payments (in the amount of \$139,603 through September 1, 2023) and accumulated interest (in the amount of \$172,770 through September 1, 2023).

Subsequent to the General Release, the City and BCR have attempted to perform the Neutralizer Agreement. BCR has made and the City has paid for substantial maintenance/upgrades to the Neutralizer System (in the amount of \$753,585 during the time period from June 2018 to February 2020). Despite the maintenance/upgrades, the Neutralizer System has not operated properly. BCR now claims that the City owes BCR the sum of \$166,317.20 in relation to the maintenance/upgrades.



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In the Notice of Termination, BCR claims that the City has been in arrears on payments due in the amount of \$166,317.20 pursuant to the Neutralizer Agreement for more than twenty-one (21) months and thus the City is in material breach of the Neutralizer Agreement.

Further, the Notice of Termination states that as a result of the termination of the Neutralizer Agreement, BCR's payment obligations pursuant to the General Release (dated September 6, 2017) are also terminated and BCR's payment made on May 12, 2023 shall be the Final Company Payment as defined in the General Release.

Subsequent to the General Release, the Neutralizer System has been upgraded, but recurring operational problems with the System have remained. BCR has asserted that their damages related to the City's performance of the Neutralizer Agreement resulted in lost profits in excess of \$1,200,000.

Based on the Neutralizer Agreement, and assuming that the Neutralizer System was operational, the City would need to purchase approximately \$22,000 in chemicals per month to produce Class AA sludge which the City would need to dispose of in the same manner as it currently disposes of Class B sludge. Thus, it does not make economic sense to pay the premium cost to dispose of Class AA sludge in the same manner as Class B sludge.

In addition, it does not make economic sense for the City to spend \$22,000 per month for chemicals in order to have BCR pay the City \$14,520 for its contribution towards the monthly SRF loan. Doing so, would result in a gross monthly loss of \$7,480.

At the mediation, the City and BCR structured an agreement in principle which is represented by the attached Settlement Agreement. BCR has approved the Settlement Agreement. To finalize the Settlement Agreement, the City Commission must approve the form of the Settlement Agreement.

Subsequent to the mediation, the following actions have taken place:

- Public Infrastructure Director James Keene has compiled a list of the (City-owned) Neutralizer equipment. Director Keene has been in contact with the principals of BCR concerning the list of (City-owned) Neutralizer equipment and BCR's initial interest in purchasing specific pieces of such equipment.
- City Attorney Fred Reilly has consulted with Attorney Fred Springer from Bryant Miller and Olive concerning the City's desire to request the Florida Department of Environmental Protection waive or forgive all or a portion of the outstanding SRF loan related to the compost facility.
- There have been internal discussions among City staff concerning the issuance of a Request for Proposals for prospective tenants utilizing the compost facility for a recycling facility or other renewable-type use.

### **Settlement Agreement**

The proposed Settlement Agreement provides that:



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- The Neutralizer Agreement, as amended, and BCR's obligations to pay a portion of the monthly SRF loan payments contained in the General Release, are terminated.
- The City and BCR agree to release all claims including all claims related to funds owed to the other respective party.
- There are protections for BCR's intellectual property and propriety property rights.
- The City provides BCR with a first right of refusal for the purchase of Neutralizer System equipment.

### **Organizational Goal(s)**

Infrastructure: Maintain, protect and design infrastructure that ensures a desired level of service and provides for future needs.

### **Budget Impact**

If the City Commission approves the Settlement Agreement, the financial impacts to the City will be as follows:

- A. The City will waive its claim for past-due monthly SRF loan payments and interest which total \$312,373 in relation to the unpaid Monthly SRF Payments (in the amount of \$139,603 through September 1, 2023) and accumulated interest (in the amount of \$172,770 through September 1, 2023).
- B. BCR will waive its claims for:
  - i. The sum of \$166,317.20 in relation to the maintenance/upgrades to the Neutralizer System.
  - ii. Damages related to the City's performance of the Neutralizer Agreement resulted in lost profits in excess of \$1,200,000.
- C. The City will have no further obligation to spend approximately \$22,000 on chemicals for the Neutralizer System to create Class AA sludge.
- D. BCR will cease paying the City the sum of \$14,520 for the Monthly SRF loan contribution.

### **Recommendation**

Staff recommends approval of a Resolution authorizing execution of a Settlement Agreement with BCR Environmental Corporation ("BCR").