# CITY OF LODI

# COUNCIL COMMUNICATION

**AGENDA TITLE:** Introduction of Ordinance No. 1684 Repealing and Re-enacting Chapter 8.24, Comprehensive Environmental Response and Liability, of the Lodi Municipal Code

**MEETING DATE:** November 3, 1999

**PREPARED BY:** City Attorney

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**RECOMMENDATION:** That the City Council introduce the attached Ordinance.

**BACKGROUND:** In August of 1997, the City adopted Ordinance 1650, which established Chapter 8.24 of the Lodi Municipal Code. This Chapter known as the Comprehensive Environmental Response and Liability Ordinance (MERLO), is part of the City's environmental program relative to the PCE/TCE contamination of the groundwater within the City of Lodi. We have faced and repulsed several challenges to that Ordinance by insurance companies who provide coverage to potentially responsible parties who we have been focusing on relative to our enforcement activities. Through that process we have developed an understanding of revisions to the Ordinance, which can be undertaken to make the Ordinance even more effective than it already is. Additionally, we have adjusted the Ordinance to recognize the potential for instituting a financing program, which can be utilized to fund remediation activities by the City. Placing this improved MERLO in the City Code will assist us further in the City's remediation activities.

**Funding:** Not applicable.

Respectfully submitted,

Randall A. Hays

Randall A. Hays

APPROVED: _____

H. Dixon Flynn -- City Manager

ORDINANCE NO. 1684

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LODI REPEALING AND REENACTING LODI MUNICIPAL CODE TITLE 8, HEALTH AND SAFETY, CHAPTER 8.24 RELATING TO COMPREHENSIVE MUNICIPAL ENVIRONMENTAL RESPONSE AND LIABILITY

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BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LODI AS FOLLOWS:

Section 1. Lodi Municipal Code Title 8 Health & Safety, Chapter 8.24 - Comprehensive Municipal Environmental Response & Liability Ordinance (MERLO) is hereby repealed and reenacted to read as follows:

Title 8
HEALTH AND SAFETY
Chapter 8.24
Comprehensive Municipal
Environmental Response & Liability Ordinance


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**SECTION 8.24.010 DEFINITIONS**

Unless otherwise expressly stated, whenever used in this Chapter, the following terms shall have the meanings set forth below:

(1) The term "**Abatement Action**" shall mean any of the following activities that the Enforcing Officer determines are or may be necessary to respond to an existing or threatened Environmental Nuisance:

(a) the investigation, study, analysis, or assessment of the nature and extent of any known or suspected Environmental Nuisance, including, but not limited to, any known or potential endangerments to the public health, welfare, or the Environment resulting from or contributed to by such Environmental Nuisance within or affecting the City of Lodi, as well as any and all resulting damages to any Natural Resources owned by, controlled by, or appertaining to the City of Lodi;

(b) the investigation, analysis, or assessment of the causes and effects of any Environmental Nuisance within the City of Lodi or that is or may be adversely affecting the public health, welfare or the environment within the City of Lodi;

(c) the analysis and selection of suitable methodology and technology for the conduct of a comprehensive Remedial Investigation in compliance with the requirements of this Chapter, the assessment of the qualifications of, and retention of, appropriate technical, legal, and scientific personnel determined by the Enforcing Officer to be necessary or appropriate to the conduct of a Remedial Investigation by the City of Lodi or under its oversight and monitoring, and the creation, finalization, and implementation of the comprehensive work plan for the appropriate Remedial Investigation approved by the Enforcing Officer;

(d) the analysis and selection of suitable methodology and technology for the conduct of a comprehensive Feasibility Study (including any necessary or appropriate Endangerment Analysis or Treatability Studies) in compliance with the requirements of this Chapter; the assessment of the qualifications of, and retention of, the technical, legal, and scientific personnel necessary or appropriate to the conduct of a Feasibility Study (including any necessary or appropriate Endangerment Analysis or Treatability Studies) by the City of Lodi or under its oversight and monitoring; and the creation, development through the review and comment process determined appropriate by the City of Lodi, finalization, and implementation of the comprehensive work plan for the appropriate Feasibility Study approved by the Enforcing Officer;

(e) the development and implementation of an Environmental Nuisance abatement plan that adequately protects, or restores to the maximum extent practicable, the public health, safety, welfare, Environment, Natural Resources, and current and potential beneficial uses of the Environment, including the appropriate abatement of all known or potential endangerments to public health, welfare or the Environment;

(f) the action necessary to provide adequate protection against any actual or suspected, existing or threatened endangerment of any consequence warranting a response to assure adequate protection of the public health, welfare, or the Environment,

which endangerment was caused or contributed to in whole or in part by an Environmental Nuisance within the City of Lodi or affecting the City of Lodi;

(g) such actions as are necessary and proper for the Enforcing Officer to implement, and to evaluate the effectiveness of, any of the activities listed in subparagraphs (1)(a) through (1)(f), whether those activities were implemented in whole or in part by the Enforcing Officer, or by any other Person;

(h) the development and implementation of a public information and public relations programs consistent with the requirements of this Ordinance and determined necessary or appropriate and approved by the Enforcing Officer to keep the public informed about, and to allow public input and participation in, significant activities designed to respond to any Environmental Nuisances having any significant bearing on the public health or the Environment within the City of Lodi;

(i) such actions as are necessary and proper for the Enforcing Officer to provide comprehensive and effective oversight and monitoring of the performance of any of the activities described in subparagraphs (1)(a) through (1)(h) of this section by a Responsible Party approved by the Enforcing Officer as capable of implementing an approved response to any Environmental Nuisance within the City of Lodi; and

(j) such actions as are necessary and proper for the Enforcing Officer or the City Attorney to effectively coordinate and cooperate with the lawful actions of appropriate agencies of federal, state and county government in responding to any Environmental Nuisance, and to pay, as determined appropriate by the City Council, some or all of the costs of oversight and involvement by any such governmental agencies with respect to any Environmental Nuisance in which the City of Lodi is a responding agency or in which it is acting as lead agency.

(2) The term "**Abatement Action Costs**" shall mean any and all legal, technical or administrative fees and costs and interest and other costs of financing incurred by the City of Lodi in performing or preparing to perform an Abatement Action in compliance with the requirements of this Chapter. The term "Abatement Action Costs" shall specifically include, but shall not be limited to, any and all costs incurred by the City of Lodi:

(a) for expert assistance in health, law, engineering and environmental science, expert witness services and legal fees (including, but not limited to, internal costs of the City Attorney's Office or outside legal counsel deemed necessary at the sole discretion of the City of Lodi) to study, investigate, abate, remove, remediate or respond to an actual or threatened Environmental Nuisance or any endangerment to the public health, welfare or the environment that may be presented by an actual or threatened Environmental Nuisance;

(b) to investigate or respond to the existence, or threat of an Environmental Nuisance;

(c) to monitor, assess or evaluate an Environmental Nuisance or any endangerment to the public health, welfare or the Environment that may be presented by an actual or threatened Environmental Nuisance;

(d) to prevent, minimize, or mitigate an Environmental Nuisance or any endangerment to the public health, welfare or the Environment that may be presented by an actual or threatened Environmental Nuisance:

(e) to oversee and monitor the performance by any Responsible Party of any investigation or abatement action in response to a condition which is or may be an Environmental Nuisance;

(f) to review, comment on, or revise a Responsible Party's plans and proposals submitted pursuant to section 8.24.050(E) or to oversee and monitor the performance by any Responsible Party of any of the monitoring and testing activities which may be required pursuant to section 8.24.050(E);

(g) to prepare for or undertake necessary enforcement activity, including the recovery of Abatement Action Costs incurred or to be incurred by the City of Lodi or any injunctive relief authorized by this Chapter to respond to an Environmental Nuisance; provided, however, that the term shall not include any costs incurred to compel compliance with an Information Demand issued pursuant to section 8.24.050(B) of this Chapter prior to the entry of a judicial order upholding that Information Demand, in whole or in part; or

(h) to pay the following:

(i) the costs of investigation and evaluation, as authorized by the City Council, of such financing, with recourse to the maximum extent available solely against the present and future assets and recoveries pledged to Comprehensive Municipal Environmental Response Fund or any subfund of the Comprehensive Municipal Environmental Response Fund created by the City Council as authorized by Section 8.24.070(A), as may be necessary and proper to accomplish the purposes set forth in this Chapter; and

(ii) the costs of issuing, servicing, and retiring of any Financing Instruments authorized by the City Council as provided in section 8.24.070, with recourse to the maximum extent available solely against the present and future assets and recoveries pledged to the Comprehensive Municipal Environmental Response Fund or any subfund of the Comprehensive Municipal Environmental Response Fund created by the City Council as authorized by Section 8.24.070(A).

(3) The term "**Contractual Relationship**":

(a) for the purpose of section 8.24.040(B)(3) of this Chapter, a "Contractual Relationship" includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the Hazardous Substance, Pollutant or Waste on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by clear and convincing evidence:

(i) At the time the defendant acquired the facility, the defendant did not know and had no reason to know that any Hazardous Substance, Pollutant or Waste which is the subject of the release or threatened release was disposed of on, in, or at the facility.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of section 8.24.040(B)(3)(a) and (b) of this Chapter.

(b) To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (a) of this paragraph (3), the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence, the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination on, at or around the property, and the ability to detect such contamination by appropriate inspection. To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (a) of this paragraph, a defendant who acquired commercial or industrial property must establish: (i) that he identified the existence or actual operation on the commercial or industrial property within the twenty (20) year period immediately preceding the defendant's acquisition of the commercial or industrial property of every owner or tenant engaged in a business or industry known to routinely use Hazardous Substances in the operation of such business or industry, or that the identification of any such tenant was legally impossible; and (ii) that he conducted a complete, commercially reasonable environmental investigation of the area that may have been impacted by operation of any such business or industry to ascertain the likely presence in the Environment and likely impact on the public health or the Environment of any Hazardous Substances or Pollutants which may have been released from the operation of such business or industry.

(c) Nothing in this paragraph (3) or in section 8.024.040(B)(3) of this Chapter shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this Chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a Hazardous Substance, Pollutant or Waste at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 8.024.040(A) of this chapter and no defense under section 8.024.040(B)(3) of this Chapter shall be available to such defendant.

(d) Nothing in this paragraph shall affect the liability under this Chapter of a defendant who, by any act or omission, caused or contributed to the release or threatened

Release of a Hazardous Substance, Pollutant or Waste which is the subject of the action relating to the facility.

(4) The term "**Effective Settlement**" shall mean a good faith settlement of all or any part of any liability or obligation imposed pursuant to this Chapter that has been resolved between the Enforcing Officer, with the advice and written consent of the City Attorney, or the City Attorney and any Responsible or potentially Responsible Party, and which, considering all appropriate factors and circumstances, effectuates the purposes and goals of this Chapter, and which settlement has been either reduced to, and is wholly contained in, a writing, or all the material terms of which have been recited and agreed to before a court of record of competent jurisdiction. Any settlement agreed to by the parties and approved by the City Attorney in writing shall be valid and binding between the parties to the settlement unless such settlement is rejected by the City Council at its next meeting at which the settlement may be properly considered and acted upon.

(5) The term "**Enforcing Officer**" shall mean the City of Lodi Director of Public Works, the Water/Wastewater Superintendent of the Public Works Department of the City of Lodi, and such other Person(s) duly designated by the City Council of the City of Lodi.

(6) The term "**Environment**" shall mean any surface water, ground water, soil water, drinking water supply, soil, land surface, subsurface strata, or ambient air within, under the jurisdiction of, or affected by conditions emanating from the City of Lodi.

(7) The term "**Environmental Nuisance**" shall mean:

(a) any condition which may affect the Environment within the City of Lodi which is or may be injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, or which introduces, or may cause or allow the introduction of, Hazardous Substances or Pollutants into, any navigable lake, river, bay, stream, canal, or basin (specifically including any ground water within the territorial boundaries of the City of Lodi), or any public park, square, street, or highway;

(b) any condition that requires an investigation or response of any kind in order to secure adequate protection of public health, welfare, safety, or the Environment resulting in whole or in part from a Release, or threatened Release which causes the incurrence of Abatement Action Costs by the City of Lodi, of any Hazardous Substance, Pollutant or Waste;

(c) any environmental condition arising from the past or present handling, storage, treatment, transportation or disposal of a Hazardous Substance, Pollutant or Waste which may present an endangerment that may warrant an investigation or response to secure adequate protection of public health, welfare, safety, or the Environment; or

(d) any environmental condition or process declared to be a nuisance by the City Council of the City of Lodi, specifically including, but not limited to, the City of Lodi Ordinance No. 1647, Chapter 8.22 of this Code, as the same may be amended from time to time.

(8) The term "**Facility**" means:

(a) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock or aircraft; or

(b) any site or area where a Hazardous Substance or Pollutant has been deposited, stored, disposed of, or placed, or otherwise has come to be located, but does not include any consumer product in consumer use.

(9) The term "**Financing Costs**" shall mean the costs of servicing and retiring any Financing Instruments, including without limitation, the cost of principal, interest and any premium payable on or with respect to any such Financing Instruments, and any costs, fees, and expenses incurred to issue such instruments, to credit enhance such instruments, or to obtain any commitment to purchase such instruments, and, if provided by the documents securing any Financing Instruments, to indemnify the holders of such Financing Instruments or other parties.

(10) The term "**Financing Instruments**" shall mean any note, bond, or any certificate of participation evidencing an interest in a lease purchase obligation, installment purchase obligation or other purchase obligation of the City issued for the purpose of financing Abatement Action Costs incurred or to be incurred by the City of Lodi.

(11) The term "**Financing Proceeds**" shall mean any sums provided to the City of Lodi resulting from the issuance or incurrence of a Financing Instrument.

(12) The term "**Hazardous Substances**" shall include, but shall not be limited to, the following:

(a) Tetrachloroethene (PCE), Trichloroethene (TCE), 1,1,1-Trichloroethane (1,1,1-TCA), 1,1-Dichloroethene (1,1 DCE), cis 1,2-Dichloroethene (c-1,2 DCE), 1,2-Dichloroethane (1,2 DCA), 1,1-Dichloroethane (1,1, DCA), Benzene, Toluene, Ethylbenzene, Xylene, Chromic Acid, Hexavalent Chromium, Bromodichloromethane, Carbon Tetrachloride, Chloroethane (Ethyl Chloride), Chloromethane (Methyl Chloride), Dibromochloromethane, 1,4-Dichlorobenzene, Dichlorodifluoromethane, Dichloromethane, trans-1,2-Dichloroethene, 1,2,3,-Trichloropropane, and Chloroethene (Vinyl Chloride); and

(b) Such other materials as are included within the definitions set forth in:

(i) Section 104(14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub.L. 99-499, 100 Stat. 1613, and as further amended by the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub.L. 104-208, 110 Stat. 3009, 42 U.S.C. §§ 9601-9675 (hereinafter collectively "CERCLA"), 42 U.S.C. § 9601(14);

(ii) Section 1004(5) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as further amended by the Hazardous and Solid Waste Amendments of 1984, and as further amended by the Asset Conservation, Lender Liability, and Deposit

Insurance Protection Act of 1996, Pub.L. 104-208, 110 Stat. 3009, 42 U.S.C. §§ 6901- 6992k (hereinafter collectively "RCRA"), 42 U.S.C. § 6903(5);

(iii) Section 9001(8) of RCRA, 42 U.S.C. § 6991(8);

(iv) Section 307(a) of the Federal Water Pollution Control Act, as amended by the federal Clean Water Act, 33 U.S.C. § 1317(a), and its implementing regulations;

(v) Section 2701(23) of the federal Oil Pollution Act of 1990, 33 U.S.C. § 2701(23);

(vi) Section 112(6) of the federal Clean Air Act, 42 U.S.C. § 7412(6);

(vii) Section 25299.22 of the California Health and Safety Code;

(c) any radioactive material; and

(d) any other substance, as determined by the City Council of the City of Lodi, which poses or may pose a threat to the human health, welfare, Natural Resources or the Environment if improperly handled, treated, transported or disposed of within the City of Lodi.

(13) The term "**Knowingly**" imports only a knowledge that the facts exist which bring the act or omission within the provisions of this Chapter. It does not require any knowledge of the unlawfulness of such act or omission, nor does it require any knowledge of any requirement in law that a person affirmatively conduct any inquiry or assessment; however, for purposes of this Chapter, a Person acts knowingly if he proceeds without knowledge of any fact which the law, including this Chapter 8.24, imposes an affirmative obligation to know or ascertain.

(14) The term "**National Contingency Plan**" or "**NCP**" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated by the U.S. Environmental Protection Agency and codified at 40 C.F.R., Part 300, in accordance with section 105 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub.L. 99-499, as further amended by the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub.L. 104-208 ("CERCLA"), 42 U.S.C. § 9605, as the same may be amended or repromulgated from time to time ("NCP"), which plan, as referenced in and for purposes of interpreting this Chapter, shall be interpreted, read and understood, unless the context unambiguously requires otherwise, as the City of Lodi being and acting in every regard as the "Lead Agency".

(15) The term "**Natural Resources**" shall mean land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, or otherwise controlled or protected by the City of Lodi, or subject to its jurisdiction.

(16) The term "**Permitted Activity**" shall mean:

(a) any activity expressly authorized by valid permit issued by a federal, state, county, city or other governmental unit or agency with jurisdiction and authority to issue such permit which allows the very act, omission or process that is defined as, or which created or contributed to, an Environmental Nuisance as defined by this Chapter. A license or permit to introduce Waste, wastewater or other material into a City sewer does not constitute a Permitted Activity with regard to any such material which has come to be located in the Environment after its discharge to a sewer, sewer lateral, or connecting pipe, but prior to its actual arrival at a publicly owned treatment plant; or

(b) any activity expressly authorized by federal, state, county, city or other governmental statute, regulation, rule or other legislative enactment which allows the very act or process that is defined as, or which created or contributed to, an Environmental Nuisance as defined in this Chapter. Such authorization to introduce Waste, wastewater, or other material into a City sewer does not constitute a Permitted Activity with regard to any such material which has come to be located in the Environment after its discharge to a sewer, sewer lateral, or connecting pipe but prior to its actual arrival at a publicly owned treatment plant.

(17) The term "**Person**" shall mean an individual, trust, firm, joint stock company, corporation, including a governmental corporation, dissolved or bankrupt corporation to the extent of its available insurance assets or undistributed non-insurance assets, bankruptcy trustee, debtor in possession under the federal bankruptcy laws, partnership, association, consortium, joint venture or commercial entity. The term "Person" also includes any municipality, county, commission, district, any State, any department or agency thereof or any political subdivision thereof, any interstate body, or the United States, and any of its agencies or instrumentalities to the extent authorized by law, as well as the estate of a deceased individual to the extent of available insurance assets as referred to in Division 2, Part 13 of the California Probate Code, §§ 550-555.

(18) The term "**Pollutant**" shall include any element, substance, compound, or mixture, including disease-causing agents, which after Release into the Environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiologic malfunctions (including malfunctions in reproduction) or physical deformations in such organisms or their offspring.

(19) The term "**Privilege**" shall mean any legal right recognized by the Constitution or laws of the United States or of the State of California pursuant to which a Person possessing the right or having the authority or obligation to assert the right may refuse to disclose any matter or refuse to produce any writing, object, or other thing. For purposes of Section 8.24.050(B)(4)(b), the term "Privilege" does not refer to nor include the privilege against self-incrimination.

(20) The term "**Proceeding**" shall mean any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, the City Council, a Hearing Officer duly appointed pursuant to Chapter 2.34 of this Code, the Enforcing Officer, or any other person authorized by law) in which, pursuant to law, specifically including this Code, testimony can be compelled to be given or documents of any kind can be compelled to be produced.

(21) The term "**Release**" shall mean any accidental or intentional placing, spilling,

discharging, leaking, pumping, pouring, emitting, emptying, injecting, escaping, leaching, dumping, or disposing into the Environment.

(22) The term "**Responsible Party**" shall mean any Person described in Section 8.24.040(A)(1) through (9), inclusive, and, for purposes of the obligations imposed by Section 8.24.050(D) only, the Persons described in Section 8.24.050(E).

(23) The term "**Waste**" shall include garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations and from community activities, as well as sewage and any and all other waste substances, liquid, solid, gaseous or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.

**SECTION 8.24.020 DECLARATION OF PUBLIC NUISANCE**

The City Council of the City of Lodi declares that each and every Environmental Nuisance as defined in Section 8.24.010(7) is a nuisance and a public nuisance.

**SECTION 8.24.030 ABATEMENT ACTIONS**

**A. Environmental Response Authorities.**

(1) Whenever the Enforcing Officer determines that there is or may be an endangerment to the public health, welfare, the Environment or Natural Resources arising out of or resulting from, in whole or in part, an existing or threatened Environmental Nuisance, the Enforcing Officer may utilize funds available in the Comprehensive Municipal Environmental Response Fund (together with such other or additional funds as may be appropriated for that purpose by the City Council) to prepare to undertake, and to undertake, in compliance with the requirements of this Chapter, any Abatement Action which is or may be necessary or appropriate to secure adequate protection of the public health, welfare, the Environment or Natural Resources.

(2) In addition to any other action taken by federal, state, or other local government, whenever the Enforcing Officer determines that there is or may be an endangerment to the public health, welfare, the Environment or Natural Resources arising out of, in whole or in part, an existing or threatened Environmental Nuisance, the Enforcing Officer may either:

(a) issue an administrative order directing any Responsible Party(ies) to undertake partial or comprehensive Abatement Actions consistent with the National Contingency Plan, as modified, if at all, by the Enforcing Officer pursuant to paragraphs (5) or (6) of this Section 8.24.030(A), so as to provide adequate protection of the public health, welfare, the Environment or Natural Resources; or

(b) request that the City Attorney for the City of Lodi immediately seek such relief as may be necessary or appropriate from a court of competent jurisdiction, which court, upon finding that there is, or that the conditions complained of may present an endangerment to the public health, welfare, the Environment or Natural Resources arising

out of or resulting from, in whole or in part, an existing or threatened Environmental Nuisance, shall grant such relief to abate the Environmental Nuisance or endangerment as is consistent with the relevant requirements of this Chapter and the public interest and equities of the case to secure adequate protection of the public health, welfare, the Environment or Natural Resources.

At his discretion, the Enforcing Officer may, with the advice and consent of the City Attorney, both issue an administrative order pursuant to this Section 8.24.030(A)(2)(a) and request that the City Attorney for the City of Lodi seek such relief as may be necessary or appropriate from a court of competent jurisdiction pursuant to Section 8.24.030(A)(2)(b).

(3) Any such administrative order issued by the Enforcing Officer pursuant to this Section shall include a statement of the factual and legal grounds upon which the order is issued and may include a schedule for completion of specific actions. Such order shall also specifically advise the Person(s) to whom it is issued of the right to contest the order and request a hearing as provided for in Section 8.24.060 of this Ordinance. Such order shall also conspicuously advise the Person to whom it is directed that failure to request the hearing within the time and in the manner provided for in Section 8.24.060 of this Chapter will result in the order becoming final and binding.

(4) Except to the extent that the City of Lodi has authority pursuant to law to impose additional or more stringent requirements, all Abatement Actions imposed pursuant to this Chapter 8.24 involving environmental impacts on waters of the State shall be consistent with any applicable waste discharge requirements or other order issued pursuant to Division 7 (commencing with Section 13000) of the California Water Code, all applicable state policies for water quality control adopted pursuant to Article 3 (commencing with Section 13140) of Chapter 3 of Division 7 of the California Water Code, and all applicable water quality control plans adopted pursuant to Section 13170 of the California Water Code and Article 3 (commencing with Section 13240) of Chapter 4 of Division 7 of the California Water Code, unless the Enforcing Officer, with the advice and consent of the City Attorney, determines that the applicability of those provisions and any orders issued pursuant to them is, in the instance of any Environmental Nuisance which the City of Lodi is actively abating or causing to be abated pursuant to the provisions of this Chapter 8.24, voided, in whole or in part, by operation of California Water Code sections 13002 (a) or (b) or any applicable provision of federal law.

(5) Notwithstanding paragraphs (2) and (4) of this section 8.24.030, the Enforcing Officer may order additional or more stringent requirements for Abatement Action than those that would or might apply under the NCP whenever the Enforcing Officer determines that there is or may be an endangerment to the public health, welfare, the Environment or Natural Resources arising out of or resulting from, in whole or in part, an existing or threatened Environmental Nuisance, and the Enforcing Officer determines that such additional or more stringent requirements are necessary or appropriate to secure adequate protection against, or appropriate abatement of, such Environmental Nuisance, or are necessary or appropriate to protect or restore approved land uses consistent with the General Plan within the City of Lodi.

(6) The Enforcing Officer, on his own initiative or upon a timely and appropriately supported application for waiver by a Responsible Party, may order less stringent requirements for Abatement Action than those that would or might apply under the NCP, whenever the Enforcing Officer determines that it is in the best interests of the public health, welfare, the Environment or

Natural Resources, after considering the following factors:

(a) adequate protection of the public health, welfare, the Environment or Natural Resources in light of the existing or threatened endangerments presented and the public and private resources that are, or are likely to be, available to meaningfully and appropriately respond to such endangerments;

(b) restoration of, to the fullest extent practicable, the free use and enjoyment of land within the City of Lodi, consistent with its general plan, including but not limited to commercial, industrial and residential use and development;

(c) safety of the City of Lodi's drinking water;

(d) protection of the City of Lodi's tax base; and

(e) preservation and restoration of the safety and healthfulness of the Environment so as to preserve and expand the aesthetic interests and the appropriate development of social, recreational, residential and employment opportunities within the City of Lodi.

(7) Notwithstanding any other provision of this Code, at any site within the City of Lodi which is listed pursuant to section 25356 of the Hazardous Substance Account Act, any Abatement Action undertaken pursuant to this section 8.24.030, the Enforcing Officer must, at a minimum, comply with, or cause to be complied with, the requirements of section 25356(c) of the Hazardous Substance Account Act.

**B. Imminent & Substantial Endangerment Response Authorities**

Without conditioning or limiting the environmental response authorities set forth in paragraphs (A)(1) through (7) of this Section 8.24.030, whenever the Enforcing Officer determines that the past or present handling, storage, treatment, transportation, or disposal of any Hazardous Waste, Pollutant or Waste may present an imminent and substantial endangerment to the public health, welfare, the Environment or Natural Resources within the City of Lodi, the Enforcing Officer is authorized to undertake, or, by order, to require any Responsible Party to undertake, an immediate and long-term, as appropriate, Abatement Action with respect to any such imminent and substantial endangerment, if such action is necessary in the judgment of the Enforcing Officer, to secure adequate protection of the public health, welfare, the Environment or Natural Resources within the City of Lodi.

**C. - Review of Abatement and Monitoring Orders.**

(1) *Administrative Review.* Any person who has been named in an order issued by the Enforcing Officer pursuant to this Section 8.24.030, may file an objection to such an Order. An objection must be in writing and filed with the City Clerk and served on the Enforcing Officer and the City Attorney on or before the twentieth (20th) day following service of the Enforcing Officer's Order. Any objection must state both the legal and factual bases in support thereof, and must include at a minimum, the requested modification(s), if any, of the Order together with a summary of the issues, facts, and legal authorities to be raised at the hearing. The time requirement for filing any objection shall be deemed jurisdictional and may not be waived. Upon timely receipt of an

objection which complies with the requirements of this section, the City Clerk shall refer the matter to the next available Hearing Officer appointed pursuant to Chapter 2.34 of this Code of the filing of a compliant objection and shall, as directed by the Hearing Officer, maintain and transmit to the Hearing Officer a complete copy of the file.

(2) *Judicial Review.*

(a) Pursuant to Section 1085 of the Code of Civil Procedure, any person who has been named in an Order issued by the Enforcing Officer pursuant to this Section 8.24.030, may, following exhaustion of administrative remedies, seek judicial review of the Order by filing a petition for writ of mandate within 90 days after the Order becomes final and binding pursuant to this Chapter. Any other person who has the right to seek judicial review of the Order by filing a petition for writ of mandate pursuant to Section 1085 of the Code of Civil Procedure shall do so within 180 days after the Order has become final and binding pursuant to this Chapter. The filing of a petition for writ of mandate to review the Order shall not stay any action specified in the Order.

(b) For purposes of judicial review, the court shall uphold the Abatement Action Order if the Order is based upon substantial evidence available to the Enforcing Officer.

**SECTION 8.24.040 LIABILITY**

**A. - Liability for Abatement Action Costs and Damages.**

Notwithstanding any other provision of municipal law --

(1) Any Person who creates, has created, or threatens to create an Environmental Nuisance;

(2) Any Person who has contributed to, is contributing to, or threatens to contribute to an Environmental Nuisance;

(3) Any Person who maintains, has maintained or threatens to maintain an Environmental Nuisance;

(4) Any Person who, at any time during the creation or existence of an Environmental Nuisance, owned or had control over any Facility at or from which an Environmental Nuisance within the City of Lodi has been created, contributed to, or maintained and, who, regardless of actual knowledge of the existence or nature of the Environmental Nuisance condition, failed to abate the Environmental Nuisance;

(5) Any Person who owns or operates any Facility at or from which there has been a Release of a Hazardous Substance or Pollutant;

(6) Any Person who at the time of disposal of any Hazardous Substance or Pollutant owned or operated any Facility at which such Hazardous Substance or Pollutant was disposed of;

(7) Any Person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of Hazardous

Substances or Pollutants owned or possessed by such person, by any other party or entity, at any Facility owned or operated by another party or entity and containing such Hazardous Substances or Pollutant;

(8) Any Person who owns or operates, or who owned or operated at or after the time of such Release, any property at which Hazardous Substances or Pollutants came to be located during such Person's period of ownership or operation as a result, in whole or in part, of the previous release of, or the passive migration of previously released, Hazardous Substances or Pollutant, regardless of the source of such original Release, and who, having reasonable grounds to know or suspect the existence of the released Hazardous Substances or Pollutants on the Facility he owns or operates, failed to abate it; and

(9) Any Person (including any past or present generator or past or present transporter) who has contributed to or is contributing to the past or present handling, storage, treatment, transportation or disposal of any Hazardous Substance or Pollutant which presents an Environmental Nuisance or which may present an imminent and substantial endangerment to health or the Environment shall be liable for:--

(a) all Abatement Action Costs incurred by the City of Lodi to undertake, or to cause or compel any Responsible Party to undertake, any Abatement Action in compliance with the requirements of this Ordinance, whether those costs are incurred prior to, during or following enactment of this Chapter;

(b) any other necessary costs of response incurred by the City of Lodi not inconsistent with the requirements of this Chapter; and

(c) damages for injury to, destruction of, or loss of Natural Resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from the Environmental Nuisance.

(d) interest on expended amounts, other than Financing Proceeds, recoverable pursuant to this Chapter, which interest shall accrue at the rate of ten (10%) percent per annum compounded daily from the later of the date payment of a specified amount is demanded in writing, or the date of the expenditure concerned.

**B. - Defenses**

There shall be no liability under subsection (A) of this section 8.24.040 for a Person otherwise liable who can establish by clear and convincing evidence that all of that Person's acts or omissions with regard to the Environmental Nuisance which cause that Person to fall within any of the categories set forth in subsections (A)(1) through (9) of this section 8.24.040 were caused solely by --

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than by one whose act or omission occurs in connection with a Contractual Relationship, existing

directly or indirectly, with the defendant if the defendant establishes by clear and convincing evidence that: (a) he exercised due care with respect to the acts, events or conditions giving rise to the Environmental Nuisance, taking into consideration the characteristics of such Hazardous Substance or Pollutant, in light of all relevant facts and circumstance, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

**C. - Recovery of Abatement Costs.**

(1) *Civil Action.* At any time after any Abatement Action Costs have been incurred by the City of Lodi, the City Attorney may commence a civil action in the name of the City of Lodi to recover all such costs from any Responsible Party.

(a) Such an action may be joined with an action for any other relief, including mandatary or prohibitory injunctive relief, or damages to which the City of Lodi, acting on its own behalf or as *parens patriae,* or the People of the State of California may be entitled.

(b) In any civil action brought to recover such costs and civil penalties in which the City of Lodi prevails, the City of Lodi shall be entitled to recover three times its incurred (and to be incurred) Abatement Action Costs (including its litigation costs and Financing Costs and attorneys and expert witness fees and expenses) and damages, from any Responsible Party who intentionally, willfully or knowingly violated, or failed or refused to comply with any final Abatement Action Order issued pursuant to Section 8.24.030 of this Chapter without just and sufficient cause. For purposes of this subparagraph, damages shall include the fees and costs incurred to enforce the provisions of this Chapter or any information request or final order issued pursuant to it, as well as the damages resulting from the failure or refusal to comply with any requirement of this Chapter or any final order (including any order issued under this Chapter which was not stayed) issued pursuant to this Chapter.

(2) *Declaratory Judgment.* In any action brought by the City of Lodi pursuant to this Section to recover its incurred Abatement Action Costs or any injunctive relief authorized by this Chapter, the court shall enter a declaratory judgment with respect to liability for Abatement Action Costs that will be binding on any subsequent motion(s) or action(s) to recover further Abatement Action Costs. Upon finding any Person liable for reimbursement of Abatement Action Costs or performance of, or prospective obligation to pay for, an Abatement Action pursuant to this Chapter, the court shall retain jurisdiction over such matter until six (6) months after an Abatement Action is completed. Upon motion by the City of Lodi no more often than every six (6) months, any further Abatement Action Costs properly incurred by the City of Lodi in responding to the Environmental Nuisance which was the subject of the action shall, following such hearing as the Court may deem proper to establish the nature of those costs as recoverable Abatement Action Costs, be reduced to lump sum judgment against the Responsible Party or Parties found liable in such action.

**D. - Standard of Liability**.

Unless otherwise expressly indicated, the standard of liability imposed by this Chapter is strict liability, without regard to any element of *mens rea*, fault, negligence or other wrongdoing.

**E. - Scope of Liability.**

The scope of liability in this Chapter is joint and several for any Person who has caused, created, contributed to, or maintained a single indivisible harm to public health, welfare or the Environment resulting from, or which may result from, in whole or in any part, an Environmental Nuisance and for which there is no reasonable and reliable basis of apportioning the **harm** among the responsible parties. Any Responsible Party seeking to apportion the harm must demonstrate by clear and convincing evidence that the component of the harm which is sought to be apportioned is scientifically and technologically susceptible to apportionment, that there is a reasonable and practicable basis for apportioning the harm, and that the separate abatement activity proposed for that harm is as practicable, safe, efficient, reliable and cost-effective in providing the degree of protection of the public health, welfare and the Environment as the abatement activity or activities, if any, proposed by the Enforcing Officer.

**F. - Liability for Attorneys Fees.**

In a civil action or proceeding brought or continued in whole or in part pursuant to this Chapter by the City Attorney to recover Abatement Action Costs, to compel compliance with an Abatement Action Order issued pursuant to this Chapter, to enforce an Information Demand, Access, Inspection or Monitoring Order following a judicial order upholding the Demand or Order in whole or in part, or to abate an actual or threatened endangerment to the public health, welfare or the Environment arising out of, in whole or in part, an actual or threatened Environmental Nuisance, reasonable litigation expenses, including attorneys and expert witness fees and costs may be recovered by the prevailing party. However, the recovery of such fees and costs, including attorneys fees by the prevailing party is strictly limited to those individual actions or proceedings in which the City of Lodi elects, at the initiation of that individual action or proceeding, to seek recovery of its own attorneys fees.

**G. - Obligations or Liability Pursuant to Permitted Activity.**

Any obligation to perform an Abatement Action in response to, or any recovery for Abatement Action Costs or damages incurred (or to be incurred) as a result of, an Environmental Nuisance resulting from a Permitted Activity shall be pursuant to existing law in lieu of this Chapter. Nothing in this subsection (G) shall affect or modify in any way the obligations or liability of any Person under any other provision of law, including common law, for damages, injury or loss resulting from an Environmental Nuisance.

**SECTION 8.24.050 INFORMATION GATHERING, ACCESS, INSPECTIONS & MONITORING**

**A. - Action Authorized**

The Enforcing Officer, the City Attorney or any other Person duly designated by the City Council of the City of Lodi may exercise the authority set forth in this Section if there is a reasonable basis to believe that there is or may be a threat of an Environmental Nuisance within the City of Lodi. The authority of this Section may be exercised only for the purposes of investigating the nature or source of, or contributing sources to, an Environmental Nuisance, or for the purposes of determining the need for Abatement Actions, choosing or taking an Abatement Action under this Chapter, or for the purposes of determining the nature and extent of the assets and financial resources that are or may be available to (or available to provide indemnity or similar

benefits to) any potentially Responsible Parties to undertake Abatement Actions which are or may be required pursuant to this Chapter or to reimburse the Comprehensive Municipal Environmental Response Fund for any Abatement Action Costs incurred or to be incurred by the City of Lodi pursuant to this Chapter.

**B. - Information Gathering**

(1) *Authority to Compel Production of Documents and Information.*

(a) The Enforcing Officer or any other Persons authorized to act pursuant to this Section may require, upon twenty-eight (28) day notice or such shorter notice as may be necessary and appropriate under the circumstances, any Person who has or may have information relevant to any Environmental Nuisance within the City of Lodi or that is or may be adversely affecting the public health, welfare or the environment within the City of Lodi, regardless of where such information or documents are or may be found, to produce to the Enforcing Officer or his designee on the date, time and place set forth in his Information Demand:

(i) complete, written responses to Enforcing Officer's written demand for information; and

(ii) copies of any non-privileged books, records and other documents that contain, relate to, or may reasonably lead to the discovery of, any of the following information:

(a) The nature, characteristics, origin or extent of any Environmental Nuisance, or of any Hazardous Substance or Pollutant which is or may be contributing to such an Environmental Nuisance;

(b) The nature, characteristics, origin or extent of any existing or threatened Release of Hazardous Substances, Pollutants or Wastes;

(c) The identification, nature or quantity of materials which may be or may have been related by source, composition, origin, destination or use to the Environmental Nuisance or an existing or threatened Release of Hazardous Substances, Pollutants or Wastes;

(d) The identification, location, or nature and extent of any assets (including any guarantee, indemnity or insurance agreements, contracts or policies of any kind), or information pertaining to the financial condition of any Person who is, may have been, or may be a Responsible Party as defined by this Chapter;

(e) Information relating to the ability of any Person who is, may have been, or may be a Responsible Party to pay for or perform an Abatement Action or to reimburse the City of Lodi for Abatement Action Costs it has incurred or may incur, including information regarding the assets, ability, liability and responsibility of any guarantor, indemnitor, or insurer of (or providing any benefits to) any Person who is or may be a

Responsible Party, to perform or pay for the performance of any Abatement Actions, or to pay, indemnify, or reimburse for the costs of any potentially Responsible Party's performance of an Abatement Action or payment of Abatement Action Costs incurred or to be incurred by the City of Lodi.

(b) Any Person required by the Enforcing Officer to produce information or to produce and to permit the inspection and copying of any books, records and other non-privileged documents pursuant to Paragraph (1) shall, on or before the date and time set forth in the Information Demand for production, deliver a written certification, signed under oath administered before a notary public or other official authorized by law to administer such an oath:

(i) that the written information provided, if any, is truthful and complete;

(ii) that the books, records and other documents produced, if any, together with those withheld from production as Privileged or for any other reason and for which the information required by Paragraph (4) of this Section 8.24.050(B) has been timely produced, if any, constitutes the truthful and complete results of a diligent search, conducted in good faith, for the information demanded; and

(iii) that all books, records and documents responsive to the Information Demand that are in the possession, care, custody, or control of that Person, its agents, representatives, employees, directors, partners, consultants, parent corporations or other entities, subsidiary corporations or other entities, and to the extent they are available to that Person, all books, records and documents responsive to the Information Demand that are in the possession, care, custody, or control of that Person's predecessors or successors-in-interest, and any and all persons acting on its behalf or in concert with it, have been produced as required by the Information Demand.

(2) *Authority to Compel Testimony.* The Enforcing Officer, the City Attorney or any other Persons authorized to act pursuant to this Section, upon ten (10) days notice or upon shorter notice as may be necessary or appropriate under the circumstances, may require: (a) any Person who has or may have information relevant to any Environmental Nuisance within the City of Lodi or that is or may be adversely affecting the public health, welfare or the Environment within City of Lodi; or (b) any Person who has or may have information relevant to the assets, ability, liability and responsibility of any guarantor, indemnitor, or insurer of (or providing any benefits to) any Person who is or may be a Responsible Party, which information may be relevant to the ability of the Responsible Party to perform or pay for the performance of any Abatement Actions, or to pay, indemnify, or reimburse for the costs of any potentially Responsible Party's performance of an Abatement Action or payment of Abatement Action Costs incurred or to be incurred by the City of Lodi, to appear before the Enforcing Officer or a certified court reporter designated by the Enforcing Officer and to give non-privileged testimony under oath and on a record taken by a certified court reporter concerning such Environmental Nuisance, as well as concerning any documents or information that are properly the subject of a request pursuant to section 8.24.050.B(1) above. At any such Proceeding the Enforcing Officer shall be represented by, and the witness may be questioned by, the City Attorney or an assistant appointed by him. Testimony may be compelled either before or after documents and information are produced as provided hereinabove.

(3) *Availability to Public.* All documents or other information obtained by the Enforcing

Officer pursuant to this Section shall be available to the public, except that upon a showing satisfactory to the Enforcing Officer, such information and documentation shall be maintained in the manner described in Section 8.24.050.B(5).

(4) *Supporting Materials for Assertions of Privilege or Other Legal Basis for Failure to Produce.*

(a) In order to allow the Enforcing Officer to adequately assess the validity of any assertion of any Privilege for the purposes of determining whether public resources should be expended to pursue production of any withheld document, any Person from whom documents are requested pursuant to Section 8.24.50(B)(1) of this Chapter who fails or refuses to produce any such documents based in whole or in part upon a claim of Privilege or for any other reason must file with the City Clerk and with the Office of the City Attorney on or before the date set forth in the demand for the production of the documents a concise written statement setting forth all factual bases supporting the claim of Privilege or other asserted basis for withholding the requested document and the asserted legal authority upon which the failure or refusal to produce is based. The concise written statement required by this subparagraph (a) must, at a minimum, include the following as to each document to be withheld:

(i) the identity of the author thereof, the parties thereto and any other Person who helped in its preparation;

(ii) the title or other identifying data;

(iii) the date of the document or, if no date appears thereon, the approximate date;

(iv) a summary of the nature (e.g. letter) and content of the document sufficient to identify it;

(v) the name and location of each Person having or last having possession, care, custody or control of the original and of each copy thereof and the names of all Persons to whom the document has been disclosed;

(vi) if such document was, but is no longer in the possession or control of the Person from whom the document is requested, what disposition was made of it, including but not limited to the name and address of the Person who disposed of the document as well as the date, time, place and mode or method of disposal; and

(vii) the precise, current location of the document and the complete name and address of its current custodian.

(b) Any Person required by Section 8.24.50(B)(4)(a) of this Chapter to provide the concise written statement described therein who fails or refuses timely to file a concise written statement that fully complies with the requirements of that section, thereafter, in any civil, criminal, or administrative action by the City of Lodi or by the City Attorney acting on behalf of the People of the State of California, to enforce any provision of this Chapter, to

abate any nuisance condition, or to recover any Abatement Action Costs, or other fees or penalties pursuant to this Chapter, shall be barred from asserting or relying upon any Privilege for which a compliant statement of supporting factual basis and legal authority was not timely filed and shall further be barred from withholding based upon any assertion of Privilege any document for which all of the details required by sub-subparagraphs (i) though (vii) of subparagraph (a) of this Paragraph (4) were not timely provided. The bar established by this subparagraph (b) shall apply only to the assertion of any Privilege or other asserted basis for withholding requested information or documents for which no compliant, concise written statement is timely filed. It shall not apply to any failure or refusal to produce such documents based upon the claimed application of the privilege against self-incrimination.

(5) *Assertions of Confidentiality Arising From Trade Secret.*

(a) Upon a showing to the Enforcing Officer by any Person pursuant to Section 8.24.050.B(5)(c) that records, reports, documents, or other information to which the Enforcing Officer or any officer, employee or representative of the City of Lodi has access under this Section, if made public would divulge information entitled to protection under 18 U.S.C. § 1905, under Cal. Evidence Code § 1060, under Cal. Civil Code § 3426.1(d), or under Cal. Health & Safety Code § 25538, such information and documentation shall be considered confidential in accordance with the purposes of those sections and the properly substantiated trade secret information shall be segregated from information which shall be made available to the public upon request in accordance with the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). In the event the Enforcing Officer determines that certain records, reports, documents, or other information are not entitled to confidential treatment as trade secrets pursuant to this Section, the Enforcing Officer shall file with the City Clerk and serve on the Persons making the assertion of confidentiality a written order setting forth his determination.

(b) No Person required to provide information or documents under this Section may claim that the information is entitled to protection under this Section unless such Person clearly demonstrates each of the following:

(i) Such Person has not disclosed the information to any other Person, other than an officer or employee of the United States, the State of California or local government, or an employee of such Person who is bound by a confidentiality agreement, and such Person has taken reasonable measures to protect the confidentiality of such information and intends to continue such measures;

(ii) The information is not required to be disclosed, or otherwise made available, to the public under any other Federal, State or local law;

(iii) Disclosure of the information is likely to cause substantial harm to the competitive position of such Person; and

(iv) If specific chemical identity is sought to be protected, that such chemical identity is not readily discoverable through reverse engineering.

(c) The following procedure shall apply whenever the owner of a trade secret wishes to assert his or her trade secret privilege:

The owner of the trade secret shall file a petition for a Protective Order with the City Clerk. The petition shall include an affidavit based upon personal knowledge listing the affiant's qualifications to give an opinion concerning the trade secret at issue, identifying, without revealing, the alleged trade secret and articles which disclose the secret, and presenting evidence that the secret qualifies as a trade secret under 18 U.S.C. § 1905, under Cal. Evidence Code § 1060, under Cal. Civil Code § 3426.1(d), or under Cal. Health & Safety Code § 25538. If such petition is opposed by the Enforcing Officer in a written objection filed no later than twenty (20) days following filing of the petition, the City Clerk shall notify the next available Hearing Officer appointed pursuant to Chapter 2.34 of this Code who shall schedule and conduct appropriate pre-hearing, including necessary discovery proceedings, if any, and hearing proceedings on the petition.

(d) Except as otherwise specified in Section 8.24.050.B, neither the Enforcing Officer nor any officer, employee or representative of the City of Lodi shall disclose any properly substantiated trade secret which is so designated.

(e) The Enforcing Officer, as well as any officer, employee or representative of the City of Lodi, may disclose trade secrets received pursuant to this Section to authorized officers, employees or representatives of other governmental agencies only in connection with the official duties of that officer, employee or representative pursuant to any law for the protection of health and safety.

(f) If in the course of any administrative or judicial proceeding commenced pursuant to this Chapter, the Enforcing Officer with the advice and consent of the City Attorney determines that trade secrets received pursuant to this Section should be disclosed in order to facilitate appropriate protection of public health, welfare or the Environment or to secure timely performance of an Abatement Action, the Enforcing Officer shall notify each affected business that disclosure under this paragraph (5) (f) is being proposed and shall describe the nature of the proposed disclosure and the proposed recipients. Unless exigent circumstances render such a delay in disclosure impracticable, each such affected business shall be afforded a period of five (5) business days to object to the proposed disclosure. Trade secrets received pursuant to this Section may be disclosed under this paragraph (5)(f) only if, after consideration of any timely objections submitted by any such affected business, the Enforcing Officer with the advice and consent of the City Attorney determines in writing that, for reasons directly associated with the performance of the Abatement Action, that the proposed disclosure is necessary to protect the public interest in a safe and healthful Environment, and the Enforcing Officer with the advice and consent of the City Attorney further determines in writing that disclosure of the trade secret information is necessary and appropriate to the timely and competent performance of the selected Abatement Action. The Enforcing Officer with the advice and consent of the City Attorney may condition disclosure of trade secrets received pursuant to this Section upon the making of, or seeking from the court, such protective arrangements and commitments as the Enforcing Officer or the Court finds to be warranted.

(g) The Enforcing Officer, as well as any officer, employee or representative of the City of Lodi, shall disclose trade secrets received pursuant to this Section to the public,

or to one or more parties of record to any administrative or judicial proceeding commenced pursuant to this Chapter, if compelled to do so by lawful process of any administrative agency or court of competent jurisdiction.

(h) Any officer or employee or former officer or employee of the City of Lodi or any other governmental agency who, because of employment or position, has possession of, or has access to, information designated as a trade secret pursuant to this subsection, shall not knowingly and willfully disclose the information in any manner to any person not authorized to receive the information pursuant to this subsection. Any Person who violates the provisions of this paragraph, and who knows that disclosure of this information to the general public is prohibited by this subsection, shall, upon conviction, be punished by imprisonment in the county jail for not more than six (6) months or by a fine of not more than five hundred dollars ($500.00), or by both such fine and imprisonment.

**C. - Inspections.**

(1) *Right of Entry.* Whenever necessary for the purpose of investigating or enforcing the provisions of this Chapter, or whenever the Enforcing Officer has reasonable cause to believe that there exists in any structure or upon any land or any premises, any Environmental Nuisance or a violation of this Chapter, specifically including this section 8.24.050, the Enforcing Officer may enter such structure or land or premises at all reasonable times to inspect the same, or to perform any Abatement Action or other duty imposed upon or authorized to be undertaken by the Enforcing Officer by law, specifically including this Code; provided, that if such structure or land or premises be occupied, the Enforcing Officer shall first present proper credentials and request entry, and further provided, that if such structure, land, or premises be occupied by a firm, corporation or other entity, the Enforcing Officer shall first make a reasonable attempt to contact a responsible person from such firm or corporation or other entity and request entry, except in emergency circumstances. If such entry is refused, the Enforcing Officer may issue an Administrative Access Order compelling appropriate access to the site or sites at issue, or he may have recourse to, and may pursue, with the advise and consent of the City Attorney, each and every remedy provided by law to secure entry for the purposes described above.

(2) *Discretionary Nature of Inspections by Enforcing Officer.* All inspections specified herein shall be at the sole discretion of the Enforcing Officer and nothing in this Section shall be construed as requiring the Enforcing Officer to conduct any such inspection nor shall any actual inspection made imply a duty to conduct any other inspection. Furthermore, nothing in the Section shall be construed to hold the Enforcing Officer, or any officer, employee or representative of the Enforcing Officer, responsible for any damage to Persons or property by reason of making an inadequate or negligent inspection or by reason of any failure to make an inspection or reinspection.

(3) *Inspection Warrants.* Whenever necessary for the purpose of investigating or enforcing the provisions of this Chapter, or whenever the Enforcing Officer has reasonable cause to believe that there exists in any structure or upon any land or any premises, any Environmental Nuisance or a violation of this Chapter, specifically including this section 8.24.050, the Enforcing Officer may obtain an inspection warrant from the appropriate court commanding him to conduct any inspection required or authorized by this Chapter.

**D. - Enforcing Officer's Authority to Direct Others.**

The Enforcing Officer is expressly authorized, at his sole discretion, to hire, retain or otherwise direct appropriately qualified Persons reasonably necessary to assist the Enforcing Officer in the exercise of the authority granted in this Section.

**E. - Monitoring or Testing.**

(1) Upon receipt of any information that gives rise to probable cause for the Enforcing Officer to suspect that an Environmental Nuisance may be present at a site or Facility within the City of Lodi, the Enforcing Officer may order the owner or operator of that site or Facility or any Responsible Party having liability for the Environmental Nuisance that may be present at such site or Facility, to conduct such preliminary monitoring, testing, analysis, and reporting with respect to suspected Environmental Nuisance as the Enforcing Officer deems reasonable to ascertain only the existence and nature of any actual or potential Environmental Nuisance that may exist at the site.

(2) An order under paragraph (1) of this subsection shall require the Person to whom the order is issued to submit to the Enforcing Officer within thirty (30) days from the issuance of such order, or such earlier time as may be necessary considering all appropriate circumstances, a proposal for carrying out the required monitoring, testing, analysis, and reporting. The Enforcing Officer may, after providing such Person with an opportunity to confer with the Enforcing Officer respecting such proposal, require such Person to carry out such monitoring, testing, analysis, and reporting in accordance with such proposal, and may impose such modifications to the proposal as the Enforcing Officer deems reasonable to fully ascertain the nature and extent of the hazard; and

(3) If the Enforcing Officer determines that the owner or operator of the site or Facility or other Responsible Party is not able to, or refuses to conduct monitoring, testing, analysis or reporting satisfactory to the Enforcing Officer, or if the Enforcing Officer deems that any such action carried out by the owner or operator of the site or Facility or other Responsible Party to be unsatisfactory, the Enforcing Officer may conduct such monitoring, testing or analysis (or any combination thereof) that the Enforcing Officer deems reasonable to ascertain the existence and nature of an Environmental Nuisance or the nature and extent of the hazard associated with an Environmental Nuisance that may be present at or emanating from that site or Facility. The Enforcing Officer may further require, by order, that the owner or operator of the site or Facility or other Responsible Party referred to in paragraphs (1) and (2) above reimburse the City of Lodi for the costs of such activity undertaken pursuant to this paragraph (3).

**F. - Mandatory Compliance.**

Without Privilege to do so, no Person shall fail or refuse to comply with any Information Demand issued pursuant to this section. Nor shall any Person fail or refuse to comply with any order issued pursuant to this section or obstruct, impede, or otherwise interfere with compliance with any order issued, or any exercise of any information gathering, inspection, monitoring, testing or access authority provided in this Section. Nor shall any Person conspire to obstruct, impede or otherwise interfere with the exercise of any information gathering, inspection, monitoring, testing or access authority provided in this Section.

**G. - Notices.**

All notices required by this Section shall be delivered personally or sent by certified mail, postage prepaid, at the address given for purposes of the notice.

**H. - Other Authority**

(1) Nothing in this Section shall preclude the Enforcing Officer or the City of Lodi from securing access, monitoring or testing or obtaining information and documents in any other lawful manner.

(2) In any order issued pursuant to Sections 8.24.030(A)(2), 8.24.030(B) or 8.24.050(E)(1), the Enforcing Officer, if he reasonably determines that it would be necessary to secure adequate assurance that the requirements of the order will be fulfilled in a timely, competent, and uninterrupted manner, may require a Responsible Party to provide at the submission of its required workplan(s) and any amendments or revisions thereto, a performance bond from an "admitted surety insurer" as defined in California Code of Civil Procedure section 995.120 or other form of surety reasonably acceptable to the Enforcing Officer and to the City Attorney securing the timely, competent and uninterrupted performance of the obligations of the Responsible Party(ies) under the order.

**SECTION 8.24.060 ADMINISTRATIVE PROCEDURES**

**A. - Finality of Demands and Orders under this Chapter**

(1) *Finality.* Any Information Demand or Order issued by the Enforcing Officer pursuant to this Chapter 8.24, as such Order may be modified in whole or in part following review by a Hearing Officer or by the City Council as authorized by this Code, shall become a final, binding Demand or Order and not subject to any further direct or collateral attack upon issuance and service, except that compliance with such Demand or Order shall be stayed and all obligations imposed by the Demand or Order shall be tolled during the following time periods:

(a) upon issuance until expiration of the time established by this Section 8.24.060 for the filing of an objection;

(b) upon the timely filing of an objection, which objection is filed and served in strict compliance with the requirements of this Chapter, until such objection has been resolved by the Hearing Officer's issuance of a Recommended Final Order that upholds the Enforcing Officer's Order in whole or in part, and thereafter until the expiration of the time allowed under this Chapter for the filing of a Request of Review with the City Council;

(c) upon timely filing of a Request for Review with the City Council of the Hearing Officer's Findings, Conclusions, and Recommended Final Order, to the extent that it upheld all or any part of the Enforcing Officer's Order, which request is timely filed and served in strict compliance with the requirements of Chapter 2.34 of the Municipal Code until twenty (20) days after such request has been finally resolved by the City Council's issuance of a Final Order that upholds the Hearing Officer's Recommended Order, in whole or in part;

(2) *Stays.* The filing of an objection or request for review, when made within the time

specified, shall constitute a stay of any requirement to comply with the order for the periods of time specified in subsection (A)(1) of this Section 8.24.060, unless such order was issued pursuant to paragraph B of Section 8.24.030 to secure adequate protection of the public health, welfare, the Environment or Natural Resources within the City of Lodi against the past or present handling, storage, treatment, transportation, or disposal of any Hazardous Substance, Pollutant or Waste which may present an imminent and substantial endangerment to the public health, welfare, the Environment or Natural Resources within the City of Lodi. In such a case, the Enforcing Officer may require the performance of some or all of the requirements of the order during the pendency of the objection or request for review. Nothing in this Section shall preclude or affect the authority of the Enforcing Officer to implement measures deemed necessary to protect the public health, welfare or the Environment from an Environmental Nuisance or to recover the costs of any such measures, or undertake appropriate action under applicable federal, state or local law.

**B. - Objections.**

(1) *Filing of Objections, Including Claim(s) of Privilege, to Demand or Order.* Any person who has been issued an Information Gathering Demand or Administrative Order by the Enforcing Officer pursuant to this Chapter, may file an objection to the Demand or Order, either in whole or in part, and must include as or with the Objection any claim(s) of Privilege or other basis for refusing to comply with the Demand or Order. An objection must be in writing and filed with the City Clerk and served on the Enforcing Officer and the City Attorney on or before the twentieth (20th) day following service of the Enforcing Officer's Demand or Order. Any objection, including specifically every claim of Privilege and every other basis for refusing to comply with the Demand or Order, must state with particularity all of the legal and factual bases in support thereof, and must include at a minimum, the requested modification(s), if any, of the Demand or Order together with a summary of the issues, facts, and legal authorities to be raised at the hearing. The time requirement for filing any objection shall be deemed jurisdictional and may not be waived. Upon timely receipt of an objection which complies with the requirements of this section, the City Clerk shall promptly refer the matter to the next available Hearing Officer selected pursuant to Chapter 2.34 of this Code and shall, as directed by the Hearing Officer, maintain and transmit to the Hearing Officer a complete copy of the file.

(2) *Notice of Failure to Comply With Information Gathering Demand or Administrative Order.* If the Enforcing Officer determines that any Person who has been issued an Information Gathering Demand or an Administrative Order pursuant to this Chapter has failed to respond to or comply with such a Demand or Order, the Enforcing Officer may file a Notice of Failure to Comply with the City Clerk, naming as respondent the Person that has failed to comply with the Information Demand or Order. Such Notice must be filed with the City Clerk and served on all Respondents to the Demand or Order only after the twenty-eighth (28th) day following issuance and service of the Enforcing Officer's Demand or Order. Any Notice must state both the legal and factual bases in support thereof, and must include at a minimum, the requested relief, if any, together with a summary of the issues, facts, and legal authorities to be raised at the hearing. Upon timely receipt of a Notice which complies with the requirements of this section, the City Clerk shall refer the matter to the next available Hearing Officer selected pursuant to Chapter 2.34 of this Code.

## SECTION 8.24.070 ESTABLISHMENT AND PURPOSE OF FUND

### A. - Creation and Purpose of the Fund.

The City Council hereby creates the "Comprehensive Municipal Environmental Response Fund" into which all amounts, including any thing of any actual or potential value, any causes of actions or things in action, received by the City of Lodi from, or on behalf of, any Responsible Party or potentially Responsible Party shall be deposited. The City Council of the City of Lodi may create such discrete accounts within the Comprehensive Municipal Environmental Response Fund as may be necessary or appropriate to maintain financial records relating to specific Environmental Nuisances or to provide specific accounting control and detail. The City Council of the City of Lodi hereby directs the formation, within the Comprehensive Municipal Environmental Response Fund, of a restricted account to be known as the "Lodi Area of Contamination Comprehensive Environmental Nuisance Abatement Fund", which shall separately account for all amounts, including any thing of any actual or potential value, any causes of actions or things in action, recovered relating to the soil and groundwater contamination generally referred to as the Lodi Area of Contamination and directs that all such amounts recovered which relate to the Lodi Area of Contamination be deposited therein. Amounts in the Lodi Area of Contamination Comprehensive Environmental Nuisance Abatement Fund shall be used in the following order: (1) to pay Financing Costs; (2) to pay expenses, fees and costs incurred pursuant to its enforcement efforts paid for from funds of the City of Lodi other than Financing Proceeds; and (3) as authorized by subsection (B) of this section 8.24.070.

### B. - Authorized Expenditures.

The funds available, by account, in the Comprehensive Municipal Environmental Response Fund may be used for the purposes specified in this subsection:

(1) To pay all necessary and appropriate cost of Abatement of an Environmental Nuisance incurred by the City of Lodi or any designated representative of the City of Lodi;

(2) To pay for Site characterization of any place that is or may be affected by an Environmental Nuisance;

(3) To pay for all investigative work which is or may be necessary and appropriate relating to an Environmental Nuisance;

(4) To pay for all costs, including but not limited to attorneys' fees and consultant fees, of the immediate commencement and diligent prosecution of appropriate enforcement actions against potentially Responsible Parties, utilizing, as appropriate, the full range of the City of Lodi's remedial and regulatory injunctive and cost recovery authority under federal, state and municipal law, to compel the complete, timely, competent and cost-effective performance of all response actions necessary to develop and implement a NCP-compliant Remedial Action Plan ("RAP") that fully characterizes the lateral and vertical extent of the Hazardous Substances at and emanating from the Site and which results in a NCP-compliant RAP which fully and appropriately abates any endangerment to public health, welfare or the Environment resulting from the Hazardous Substances or Pollutants at and emanating from the Site;

(5) To reimburse to the California Environmental Protection Agency, Department of

Toxic Substances Control ("DTSC") or any other applicable regulatory agency, the properly billed past response costs incurred by DTSC or any other applicable regulatory agency arising from or related to any Environmental Nuisance, which costs the City of Lodi has agreed to pay or reimburse.

**C. - Issuance of Financing Instruments to Finance Abatement Action Costs.**

(1) *Authorization to Finance Abatement Action Costs.* If it determines that it may facilitate the effective and expeditious abatement of an existing or threatened Environmental Nuisance within or affecting the City of Lodi, the City Council, acting alone or upon request of the Enforcing Officer, may authorize the issuance or incurrence of Financing Instruments.

(2) *Terms and Conditions.* Unless the City Council should otherwise determine after considering the nature and extent of the Environmental Nuisance at issue and the assets that are or may be available to respond to it, the financing authorized by this section C of 8.24.070 shall be with recourse solely against the Lodi Area of Contamination Comprehensive Environmental Nuisance Abatement Fund to the maximum extent amounts which are required to be deposited therein by this Ordinance or any documents securing the Financing Instruments are available. Any documents securing the Financing Instruments may provide that the holders of Financing Instruments shall have a first and superior lien only on all amounts required by this Ordinance or by any documents securing the Financing Instruments to be deposited in the Lodi area of contamination Comprehensive Environmental Nuisance Abatement Fund, which lien will be effective and perfected as against all third parties upon execution of such Financing Instruments without any further action by the City and whether or not the City has deposited such amounts in any Fund or Account as required pursuant to subsection A of 8.24.070.

**SECTION 8.24.080 ENFORCEMENT**

**A. - Mandatory Compliance.**

No Person shall violate any provision of this Chapter or fail or refuse to comply with, or otherwise impair, interfere with, or impede any Person's compliance with, any order issued pursuant to this Chapter. Nor shall any Person conspire to violate any provision of this Chapter or refuse to comply with any order issued pursuant to this Chapter.

**B. - Injunctions in Civil Actions.**

(1) *Availability of Injunctive Relief.* Upon sufficient proof of an existing or threatened Environmental Nuisance within the City of Lodi being presented to the court, such Environmental Nuisance shall be abated, and any existing or threatened violation of this Chapter, specifically including any failure or refusal to comply with any order issued pursuant to Section 8.24.030 herein, or of any final order issued pursuant to this Chapter, upon sufficient proof of such violation or threatened violation being presented to the court, shall be enjoined, and compliance with the appropriate requirements of this Chapter shall be directed by a temporary restraining order, preliminary injunction or partial or complete mandatory or prohibitory permanent injunction, or other appropriate order of the court in an action which may be brought in the name of the City of Lodi by the City Attorney.

(2) *Required Relief in Certain Cases.* In any action brought by the City Attorney, either

on his own instance or upon request of the Enforcing Officer, to enforce compliance with any Information Demand or Order issued pursuant to Section 8.24.050 of this Chapter, the court, upon sufficient proof of a violation or threatened violation of such Section 8.24.050 or of any order issued pursuant to it being presented to the court, shall take the following actions:

(a) In the case of interference with entry or inspection, the court shall enjoin such interference or direct compliance with orders to prohibit interference with entry or inspection unless under the circumstances of the case the demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

(b) In the case of information (including testimony) or document demands or orders, the court shall enjoin interference with such information or document demands or orders, or direct immediate compliance with the demands or orders to provide such information (including testimony) or documents, unless under the circumstances of the case the court finds that the party to whom the request or order was directed has demonstrated that the request or demand for information (including testimony) or documents is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

(3) *Equitable Criteria for Injunctions Authorized by this Chapter.* In any civil action brought by the City Attorney pursuant to this Chapter, in which a temporary restraining order, preliminary injunction, or partial or complete mandatory or prohibitory permanent injunction is sought, it shall not be necessary for the City of Lodi to allege or prove at any stage of the proceeding that irreparable damage will occur should the temporary restraining order, preliminary injunction, or permanent injunction (including any appropriate nuisance abatement order) not be issued; or that the remedy at law is inadequate, and the temporary restraining order, preliminary injunction, or permanent injunction (including any appropriate nuisance abatement order) shall issue without such allegations and without such proof.

(4) *Appropriate Joinder with Other Remedies.* Any action brought pursuant to this Chapter may be brought by the City Attorney independent of or combined with any action for civil penalties or any other relief provided by this Chapter, other municipal law, or by applicable federal or state law.

**C. - Civil Penalties.**

(1) *Imposition of Civil Penalties.* Any Person who violates any requirement of this Chapter or any final order issued pursuant to this Chapter, or who fails or refuses to comply with an Information Demand issued pursuant to this Chapter, is liable to the City of Lodi for the following civil penalty to be credited to and deposited in the Comprehensive Municipal Environmental Response Fund:

(a) Except as provided in subparagraph (1)(b) below, not more than five thousand dollars ($5,000.00), but not less than one thousand dollars ($1,000.00) per violation per each calendar day of violation.

(b) Not more than ten thousand dollars ($10,000.00), but not less than one thousand dollars ($1,000.00) per each intentional, knowing or willful violation per each calendar day of such violation.

(c) Liability under this subsection may be imposed in a civil action or liability may be imposed administratively pursuant to this Section. Any such civil action brought by the City Attorney may be joined with an action for any other remedy, including injunctive relief, available pursuant to federal or state law or pursuant to this Code.

(2) *Determination of Amount of Civil Penalties.* In determining the amount of any civil penalty under this Section, the court or other adjudicatory body shall, at a minimum, impose a penalty amount which eliminates all economic benefit which has accrued to and which is accruing to the violator by reason of noncompliance and which compensates the public for the harm and damage done to the Environment as a result of the violator's noncompliance. Impossibility of substantial compliance, or the impossibility of quantifying the harm to the Environment, does not bar the assessment of such a penalty. In addition, in determining the penalty, the court or other adjudicatory body shall consider the violator's degree of recalcitrance, the absence of good faith cooperation with the City of Lodi and any other governmental entities responding to the Environmental Nuisance, the violator's defiance of or indifference to requirements of the law, and any unusual or extraordinary burdens imposed on the public health or welfare or the public fisc as a result of the violation as factors requiring enhancement of the minimum penalty amount; and may mitigate the total amount calculated under the first sentence of this paragraph (2) to reflect any part of the noncompliance caused by the existence of extenuating circumstances that were wholly beyond the violator's control or to recognize *bona fide* efforts by the violator to timely comply with the requirements of the law and to extend significant and meaningful cooperation to the City and to other governmental enforcing agencies with jurisdiction.

(3) *Information Demand Exception.*

(a) Notwithstanding any civil penalties imposed in this section 8.24.080, no penalty shall apply to a failure to comply with an Information Demand issued pursuant to Section 8.24.050 of this Chapter, which failure occurred between the issuance and receipt of the Information Demand and an independent judicial review of such Information Demand, specifically including the reasonableness or validity of such Information Demand.

(b) Upon upholding the reasonableness or validity of any Information Demand issued pursuant to section 8.24.050 of this Chapter, the reviewing court, in its discretion, may compel prospective injunctive relief or impose civil or criminal penalties.

**D. - Criminal Penalties & Fines**.

(1) Except as provided in paragraph (2) of this subsection 8.24.080(D), the violation of any provision of this Chapter or any final order issued pursuant to this Chapter shall be a misdemeanor punishable by a fine of not more than five hundred dollars ($500.00), or imprisonment for not more than six (6) months, or both for each violation. Each calendar day during which a violation occurs or continues shall constitute a separate violation.

(2) The intentional, knowing or willful violation of any provision of this Chapter or any final order issued pursuant to this Chapter, shall be a misdemeanor punishable by a fine of not more than one thousand dollars ($1,000.00), or imprisonment for not more than one year, or both for each violation. Each calendar day during which such a violation occurs or continues shall constitute a separate violation.

(3) The violation of any provision of this Chapter or any final order issued pursuant to this Chapter by any Person who has previously been convicted of one or more violations of this Chapter or any final order issued pursuant to this Chapter shall be a misdemeanor punishable by a fine of not more than one thousand dollars ($1,000.00), or imprisonment for not more than one year, or both for each violation. Each calendar day during which such a violation occurs or continues shall constitute a separate violation.

(4) In any criminal action for violation of any provision of this Chapter in which the defendant is convicted of an intentional, willful, or knowing violation of any provision of this Chapter, the court shall tax the defendant for and award the City its reasonable costs of investigation and prosecution incurred in connection with the defendant's violation(s), including its reasonable attorneys fees and costs and expert witness fees and costs.

**E. - Maximum Penalty**.

If the maximum amount of any civil or criminal penalty imposed by this Section is determined to be in excess of the maximum amount authorized by law, the amount shall be reduced to the maximum amount permitted by law.

**F. - Relationship to Other Liability and Other Remedies.**

(1) Nothing in this subsection in any way limits, conditions or affects the liability of any Responsible Party to the City of Lodi for Abatement Action Costs or for any other legal or equitable remedy.

(2) In any criminal action brought pursuant to this Section in which the defendant is convicted of a violation of this Chapter, the court shall, upon motion of the City Attorney and following such hearing before the court sitting without a jury as the court may deem necessary, issue appropriate mandatory or prohibitory injunctive relief as may be necessary to restrain further violations of this Chapter, to remedy any conditions which may present an endangerments to public health, welfare or the environment arising out of or related to violations of this Chapter for which the defendant was convicted, or to secure compliance with the requirements of this Chapter.

**G. - Remedies not Exclusive.**

Remedies under this Section are in addition to and do not supersede or limit any and all other remedies, whether civil, criminal or administrative. Nothing in this Section shall affect or modify in any way the obligations or liabilities of any Person under any other provision of state, federal or local law, including common law, for damages, injury, loss, or for liability for nuisance abatement and nuisance abatement costs incurred by the City of Lodi which results from an Environmental Nuisance in the City of Lodi.

**H. - Penalties for Certain Knowing Violations**

In addition to the penalties provided for in Section 8.24.080(A) through (G), any Person who Knowingly fails to provide the notice required by 42 U.S.C. § 9603(a) or (c), or by California Health & Safety Code § 25359.4, or any generator subject to California Health & Safety Code § 25200.3 who Knowingly fails to comply with the requirements thereof, as the foregoing requirements relate to Hazardous Substances, Pollutant(s) or Waste(s) which present, may present, contribute to, or

may contribute to an Environmental Nuisance as defined in paragraph 8.24.010(7) within the City of Lodi, shall not be entitled to any limitation of liability or to any defenses to liability set out in section 8.24.040(B); provided, however, that notification under this subsection is not required for any Facility which would be reportable solely as a result of any stoppage in transit which is temporary, incidental to the transportation movement, or at the ordinary operating convenience of a common or contract carrier, and such stoppage shall be considered as a continuity of movement and not as the storage of a Hazardous Substance, Pollutant or Waste.

**I. - Judicial Review**

(1) In any judicial action concerning the adequacy of any Abatement Action Order, or any other Order arising pursuant to this Chapter, judicial review of any issues concerning the adequacy of any action taken or ordered by the Enforcing Officer shall be limited to the administrative record. Otherwise, applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) If the court finds that the selection of the response action was not in accordance with law, the court shall award only the response costs or damages that are not inconsistent with the requirements of law, including this Chapter, and shall grant any other relief that is consistent with the law and this Chapter.

(3) In reviewing an action brought pursuant to this Chapter, in which alleged procedural errors are raised as a defense, the court may impose costs or damages only if the errors were serious and related to matters of central relevance to the action, so that the action would have been significantly changed had the errors not been made.

**SECTION 8.24.090 MISCELLANEOUS PROVISIONS**

**A. - Severability.**

If any provision of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application. To this end, the provisions of this ordinance are severable. The City Council hereby declares that it would have adopted this ordinance irrespective of the invalidity of any particular portion thereof.

**B. -Direct Action Against Indemnitors of Certain Potentially Responsible Parties.**

(1) *Direct Action for Liability under this Chapter in Certain Cases.* In any case where a potentially Responsible Party is in bankruptcy, reorganization, or arrangement pursuant to the Federal Bankruptcy Code, or if with reasonable diligence, jurisdiction cannot be obtained over a potentially Responsible Party who is likely, as judged at the time of the commencement of the action, to be solvent to meet all of the relief demanded in the City of Lodi's complaint or administrative order at the time of judgment or at the time an administrative order becomes final and binding, the City of Lodi may commence a civil or administrative action to seek relief based upon, or to otherwise recover upon, liability imposed pursuant to this Chapter directly against any Person that is or may be a surety for, or a guarantor, indemnitor or insurer of ("Indemnitor") such a potentially Responsible Party on any claim arising under this Chapter. In any such action, the Indemnitor shall be named as the defendant or respondent on its relationship to (*i.e., "ex rel." or*

*Relator*) the potentially Responsible Party whose liability under this Chapter is at issue.

(2) *Rights and Defenses Available to Indemnitor.* In the case of any action, either administrative or civil, brought pursuant to this subsection against an Indemnitor, such Indemnitor shall be entitled to invoke all rights and defenses which:

(a) would have been available to the Relator/potentially Responsible Party in an action brought against that potentially Responsible Party by the City of Lodi pursuant to this Chapter; and

(b) which would have been available to the Indemnitor if an action had been brought on its contract (including, surety or performance bonds, guarantees, contracts for indemnity, insurance policies, or letters of credit) with the Relator/potentially Responsible Party by a judgment creditor of that Relator/potentially Responsible Party.

(3) *Assertion of Indemnitor's Contract Defenses.* The Indemnitor shall deny or otherwise contest its liability under the terms and conditions of its contract (including, surety or performance bonds, guarantees, contracts for indemnity, insurance policies, or letters of credit) with the Relator/potentially Responsible Party in the administrative action commenced by the Enforcing Officer or in the civil action commenced by the City Attorney pursuant to this subsection (B) or by an independent action. If the Indemnitor denies or otherwise contests its liability under the terms and conditions of its contract with the Relator/potentially Responsible Party by an independent action, such action, if not already pending at the time of the commencement of an action pursuant to this subsection (B) by the Enforcing Officer or the City Attorney, must be commenced within thirty (30) days of the commencement of the action brought pursuant to subsection (B), against the Indemnitor, must be diligently prosecuted to final judgment and must be through the appellate process, if any, reasonably pursued by the Indemnitor. Any claims or defenses to the liability imposed pursuant to this Chapter not brought or maintained in compliance with this subparagraph (3) shall be barred.

(4) *Avoiding Prejudice to Indemnitors.* In any civil action brought against an Indemnitor pursuant to this subsection, all issues that are properly triable to the court sitting without a jury shall be heard and resolved by the court prior to a hearing on the issues, if any, that are triable to a jury as a matter of right and in which a jury has been timely and properly demanded. All other claims shall be heard by a jury. If there are claims, demands or defenses in any such action that are triable to a jury as a matter of right and in which a jury has been timely and properly demanded, notwithstanding that recovery on such claims shall continue to be limited to only those amounts recoverable from the Indemnitor pursuant to paragraph (5) of this subsection and notwithstanding the fact that any judgment rendered on such claims shall be directly enforceable only against the Indemnitor, those claims shall precede next in order following resolution of all issues that are triable to the court sitting without a jury and shall, in all regards and proceedings before the jury, be presented as though the case had been brought solely against the potentially Responsible Party.

(5) *Total Liability of Indemnitor.* The total liability of any Indemnitor in an action brought pursuant to this subsection shall be limited to the aggregate remaining amount of the monetary limits of the indemnity agreement, policy of insurance, guarantee, surety bond, letter of credit or similar instrument obtained from the Indemnitor by or for the benefit of the potentially Responsible Party, together with:

(a) any other amounts for which the Indemnitor is liable to the potentially Responsible Party by operation of law resulting, in whole or part, from a breach of the duty to defend against, or the unreasonable failure or refusal to settle, any claim brought against the Responsible Party by the City of Lodi; and

(b) any and all other amounts due and owing under the indemnity agreement, policy of insurance, guarantee, surety bond, letter of credit or similar instrument by operation of law and the language of the policy of insurance, guarantee, surety bond, letter of credit or similar instrument.

(6) *Effect of Judgment.* If the Indemnitor elects to deny or otherwise contest its liability under the terms and conditions of its contract (including, surety or performance bonds, guarantees, contracts for indemnity, insurance policies, or letters of credit) with the Relator/potentially Responsible Party in the administrative action commenced by the Enforcing Officer or in the civil action commenced by the City Attorney pursuant to this subsection, the final order or judgment entered in such action brought pursuant to this subsection shall be enforceable directly against the Indemnitor(s). If the Indemnitor elects to deny or otherwise contest its liability under the terms and conditions of its contract (including, surety or performance bonds, guarantees, contracts for indemnity, insurance policies, or letters of credit) with the Relator/potentially Responsible Party by an independent action, the judgment or final order entered in the action brought pursuant to this subsection and maintained and prosecuted in compliance with the requirements of this subsection shall be enforceable directly against the Indemnitor only after final judgment has been rendered in that independent action and then only to the extent that judgment finds the Indemnitor liable under its contract for the liability imposed by this subsection upon the Indemnitor by reason of its relationship to the Relator/potentially Responsible Party, and neither the final judgment rendered in the independent action nor execution upon it have been stayed.

(7) *No Limitation of Other Liability.* Nothing in this Section shall be construed to limit any other state or federal statutory, contractual, or common law liability of an Indemnitor, including but not limited to the liability of such Indemnitor for bad faith either in negotiating or in failing to negotiate the settlement of any claim.

**C. - Relationship to Other Authority**

Nothing in this Chapter shall be construed or interpreted to limit, restrict or preempt the authority of the City of Lodi or of the City Attorney for the City of Lodi pursuant to any other local, state or federal laws, specifically including the authority to assert claims to abate a public nuisance pursuant to California Code of Civil Procedure Section 731.

**D. - Settlement Procedures and Consequences**

(1) *Settlement of Joint & Several Liability.* Any Person alleged by the City of Lodi to be jointly and severally liable pursuant to this Chapter who has entered into an Effective Settlement, Administrative Settlement or Judicially Approved Settlement shall not be liable for claims for contribution, equitable indemnity, or partial or comparative equitable indemnity regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially Responsible Parties unless its terms so provide, but it reduces the potential liability of the other jointly and severally liable parties that have not settled by the amount of the settlement. Unless the settlement qualifies as an Administrative Settlement (the final action validating and approving

which, has neither been stayed nor reversed by a court of competent jurisdiction) or as a Judicially Approved Settlement (the final order validating and approving which has neither been stayed nor reversed on appeal by a court of competent jurisdiction) pursuant to this subsection D, the status of any settlement of all or any part of any joint and several liability imposed by this Chapter as an Effective Settlement may be challenged in a civil action by any Person not party to the settlement agreement whose rights or interests are or may be adversely affected by the settlement and whose claims against the Settling Party are not otherwise barred.

(2) *Administrative Settlement* The validity of any settlement of all or any part of any joint and several liability or obligation imposed by or pursuant to this Chapter (or any other liability that the City Attorney is authorized to assert on behalf of the City of Lodi or the People of the State of California related to protection of public health welfare and the Environment and which is not required by the general laws of the State of California to be judicially validated or reviewed for good faith purposes by another prescribed process that is exclusive of the processes available pursuant to this Chapter) as an Effective Settlement may be determined by a final action of the City Council validating and approving the settlement pursuant to one of the following methods:

(a) if there is no administrative proceeding brought pursuant to this Chapter to which the settling party is a respondent pending at the time of the Effective Settlement, at or following a properly noticed public meeting of the City Council, provided that advance public notice has been published in the *Lodi Sentinel* for at least two (2) consecutive two (2) day periods commencing at least two (2) weeks in advance of the scheduled meeting of the City Council at which the settlement will be considered, of the availability of the settlement for public review, the general nature of the pending settlement and its general effects if approval is granted, the date and time scheduled for City Council meeting, of the opportunity to submit comments on the settlement to the City Attorney for timely presentation to the City Council, and of the opportunity of interested parties to attend the City Council meeting and request time to present their views to the City Council; or

(b) if there is an administrative proceeding brought pursuant to this Chapter to which the settling party is a respondent pending at the time of the Effective Settlement, by joint motion for approval of the settlement brought before the Hearing Officer by the City Attorney and by the settling party, provided that advance public notice of the motion has been published in the *Lodi Sentinel* for at least at least two (2) consecutive two (2) day periods commencing at least two (2) weeks in advance of the scheduled hearing before the Hearing Officer at which the motion for validation and approval of the settlement will be considered, of the availability of the settlement for public review, the general nature of the pending settlement and its general effects if approval is granted, the date, time and place scheduled for hearing, of the opportunity for interested members of the public to submit comments on the settlement to the City Attorney for timely presentation to the Hearing Officer; and of their right to petition the Hearing Officer for permissive leave, conditioned as the Hearing deems appropriate, to address the merits of the motion at the scheduled hearing. The Hearing Officer's Report and Recommendation regarding the motion for approval and validation of the settlement, which shall be rendered and filed by the Hearing Officer on an expedited basis, shall, together with any timely objections to that Report and Recommendation, be brought before the City Council for final action at its next public meeting held pursuant to the regularly applicable notice requirements.

(3) *Judicially Approved Settlement.* The validity of any settlement of all or any part of

any joint and several liability or obligation imposed by or pursuant to this Chapter (or any other liability that the City Attorney is authorized to assert on behalf of the City of Lodi or the People of the State of California related to protection of public health welfare and the Environment and which is not required by the general laws of the State of California to be judicially validated or reviewed for good faith purposes by another prescribed process that is exclusive of the processes available pursuant to this Chapter) as an Effective Settlement under this Chapter may be judicially determined and finally resolved, as follows:

(a) in an action brought by the City Attorney in the name of the City of Lodi pursuant to Part II, Title 10, Chapter 9 of California Code of Civil Procedure, §§ 860-870; or

(b) if, at or within sixty (60) days following the date of settlement, there is a judicial action pending between the settling party and the City of Lodi in which the City of Lodi has asserted one or more claims arising under this Chapter, by joint motion brought in such pending action for judicial approval of the settlement, with such advance public notice, if any, deemed appropriate by the court of the availability of the settlement for public review, the general nature of the pending motion and its general effects if granted, the date and time scheduled for hearing of the motion, the available intervention procedures, and the opportunity for interested or affected members to submit comments on the settlement to the City Attorney for timely presentation to the court, together with the City of Lodi's response thereto.

(4) *Persons Not A Party To Settlement.*

(a) If the City of Lodi has obtained less than complete relief from a Person who has resolved its liability to the City of Lodi imposed pursuant to this Chapter in an administrative or judicially approved settlement, the City of Lodi may bring an action against any Person who has not resolved its liability imposed pursuant to this Chapter.

(b) A Person who has resolved its liability imposed pursuant to this Chapter to the City of Lodi for some or all of an Abatement Action or other obligation imposed pursuant to this Chapter or for some or all of Abatement Action Costs in an administrative or judicially approved settlement may seek contribution pursuant to the general laws of the State of California from any Person who has not obtained valid contribution protection for some or all of the under this Code or pursuant to federal law or the General Laws of the State of California .

(c) In any contribution action to apportion any liability arising under this Chapter, the rights of any Person who has resolved its liability to the City of Lodi shall be subordinate to the rights of the City of Lodi. Any contribution action brought under this subsection or concerning any liability arising pursuant to this Chapter shall be governed by the general laws of the State of California.

**E. - Computation of Time**

In computing any period of time prescribed or allowed by this Chapter, the day of the act, event, or default from which the designated period of time begins to run shall be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal

holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holiday shall be excluded in the computation.

Section 2.

(A) Notwithstanding the repeal of Chapter 8.24 (commencing with Section 8.24.010) of Title 8, Health and Safety, by operation of Section 1 of this Act, any action taken pursuant to that Chapter shall remain in effect, and be subject to Chapter 8.24 (commencing with Section 8.24.010) of Title 8 of the Health and Safety Code, as added by section 2 of this Act.

(B) The repeal and reenactment of Chapter 8.24 (commencing with Section 8.24.010) of Title 8, Health and Safety, by section 1 of this Act shall not terminate, affect, or modify any proceeding, order, or agreement issued or entered into by the City, or any officer, employee or agent of the City or any attorney acting with the approval of the City Attorney pursuant to Chapter 8.24, or any rights or obligations arising out of or pursuant to those provisions, and notwithstanding the effective date of this act, the provisions of Chapter 8.24 (commencing with Section 8.24.010) of Title 8, Health and Safety, as added by Section 2 of this Act, shall apply retroactively to those proceedings, orders, or agreements.

Section 3 - No Mandatory Duty of Care. This ordinance is not intended to and shall not be construed or given effect in a manner which imposes upon the City, or any officer or employee thereof, a mandatory duty of care towards persons or property within the City or outside of the City so as to provide a basis of civil liability for damages, except as otherwise imposed by law.

Section 4. All ordinances and parts of ordinances in conflict herewith are repealed insofar as such conflict may exist.

Section 5. This ordinance shall be published one time in the "Lodi News Sentinel", a daily newspaper of general circulation printed and published in the City of Lodi and shall be in force and take effect thirty days from and after its passage and approval.

Approved this_____day of_____, 1999.

_____
KEITH LAND
Mayor

Attest:

ALICE M. REIMCHE
City Clerk

State of California
County of San Joaquin, ss.

I, Alice M. Reimche, City Clerk of the City of Lodi, do hereby certify that Ordinance No.1684 was introduced at a regular meeting of the City Council of the City of Lodi held November 3, 1999 and was thereafter passed, adopted and ordered to print at a regular meeting of said Council held_____, 1999 by the following vote:

| | |
|---|---|
| Ayes: | Council Members - |
| Noes: | Council Members - |
| Absent: | Council Members - |
| Abstain: | Council Members - |

I further certify that Ordinance No. 1684 was approved and signed by the Mayor of the date of its passage and the same has been published pursuant to law.

ALICE M. REIMCHE
City Clerk

Approved as to Form:

Randall A. Hays

RANDALL A. HAYS
City Attorney