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**RECYCLED WATER FACILITIES AND PROGRAMS INTEGRATION AGREEMENT  
BETWEEN  
THE CITY OF SAN JOSÉ AND  
THE SANTA CLARA VALLEY WATER DISTRICT**

This RECYCLED WATER FACILITIES AND PROGRAMS INTEGRATION AGREEMENT BETWEEN THE CITY OF SAN JOSE AND THE SANTA CLARA VALLEY WATER DISTRICT ("Integration Agreement") is made as of this \_\_\_\_ day of \_\_\_\_\_, 2010 ("Effective Date"), between the Santa Clara Valley Water District (the "District") and the City of San José (the "City"). The District and the City are sometimes collectively referred to in this Agreement as the "Parties," and individually referred to as "Party".

**RECITALS**

- A. The City of San José, as the administering agency for the San José/Santa Clara Water Pollution Control Plant ("Plant"), a joint powers agency of the State of California, manages and operates the South Bay Water Recycling Program and System ("SBWR").
- B. The District is the primary water management agency for Santa Clara County, providing wholesale water supply, groundwater management, and flood management.
- C. In 1990, the City developed the South Bay Action Plan, which was designed to reduce flows from the Plant to South San Francisco Bay (Bay) to avoid converting the salt marsh habitat of two endangered species, the Salt Marsh Harvest Mouse and the California Clapper Rail. The Action Plan had three main components, water recycling, marsh mitigation, and water conservation. The Plan was approved by the San Francisco Bay Regional Water Quality Control Board and adopted by the City in 1991.

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- D. In 1997, the Action Plan was revised to call for expansion of the water recycling and conservation programs as well as several new flow reduction programs. The Revised Plan was approved by the Regional Board in 1997 and incorporated into the Plant (City's) NPDES permit in 1998.
- E. The City began development of SBWR in 1994. The City has expended approximately \$220 million to date on development of the SBWR, which currently has the capacity to deliver a daily average flow of 35 million gallons per day (mgd) and a peak flow of 50 mgd. The SBWR currently consists of 110 miles of pipe, four pump stations, and three reservoirs and serves nearly 600 customers with an average of approximately 10,000 acre-feet annually of recycled water.
- F. The District Board is committed to ensuring that the water supply for Santa Clara County meets or exceeds all applicable water quality regulatory standards. The District, as the groundwater management agency for the county, aggressively protects the groundwater basins from contamination and the threat of contamination.
- G. On April 7, 1998, City and District entered into an Agreement entitled "South Bay Water Recycling Reimbursement Agreement For Development And Utilization Of Non-potable Recycled Water Between The Santa Clara Valley Water District And City of San José", providing for payment by District to City for water produced and distributed by SBWR that offsets District supplies (the "1998 Reimbursement Agreement"). This 1998 Reimbursement Agreement, as extended by the Parties, expired on June 30, 2009.
- H. In 2000, the City began, and District participated in, a multi-stakeholder process to develop a long-term master plan for the SBWR program. The findings of that process confirmed the importance of the linkage between the SBWR program

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and the District's Integrated Water Resource Plan (IWRP) and the need for a long-term collaboration between the City and the District.

- I. The District completed its second Integrated Water Resources Plan (IWRP) in 2003. The District Board of Directors adopted new Ends Policies in 2005 following completion of IWRP 2003. Some of these new policies recognized the need for all weather water supplies and placed value on local water supplies.
- J. In 2003, the Parties began collaborating on design, construction and operation of an advanced treated recycled water facility and related facilities (AWTF), to be located on lands owned by the Plant, in order to demonstrate the treatment capability of a local AWTF to produce highly purified water that will be blended with existing recycled water to expand irrigation and industrial uses.
- K. In 2005, the District, with City support, submitted a proposal to the State of California for grant funding for the AWTF, as part of the state's Proposition 50, Chapter 8, grant process. Approximately Three Million Dollars (\$3,000,000) in State grant funding has been approved for the AWTF.
- L. In 2009, the AWTF was authorized for federal funding and is identified to receive federal appropriations from the Federal Recovery and Reinvestment Act of 2009 in the amount of \$8.25 million.
- M. District has completed 60% final plans and specifications for construction of the AWTF.
- N. The Parties are in the process of negotiating a Ground Lease and Property Use Agreement, providing for the use by District of Plant lands for the AWTF.

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- O. The proposed AWTF will accept up to twelve (12) million gallon per day (mgd) of Plant secondary effluent for treatment through microfiltration, at a cost saving to the Plant for tertiary treatment that would otherwise be required to be provided by the Plant; will increase the reliable production of non-potable recycled water through microfiltration; will enhance the quality of non-potable recycled water quality through the provision of up to 8 mgd reverse osmosis treated water for blending with the Plant's existing non-potable water; and will offset the demand for development of new sources of water supply for Santa Clara County.
- P. The Parties desire to financially support the production and use of recycled water in Santa Clara County consistent with each Party's separate and distinct interests: for wastewater treatment and disposal for the City, and water quality and supply for the District, as well as to coordinate and cooperate to achieve the most cost effective, environmentally beneficial utilization of recycled water to meet both water supply and wastewater treatment and disposal needs.
- Q. On February 23, 2010, District approved a mitigated negative declaration for the proposed AWTF.

### **NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:**

#### **ARTICLE.1 DEFINITIONS**

Each reference in this Agreement to specific terms or phrases as capitalized herein shall have the meaning set fort in **Exhibit A** attached hereto and incorporated by reference herein.

#### **ARTICLE 2. TERM**

The term of this Agreement shall commence on the first day of July, 2010, if the Parties have negotiated and executed a mutually acceptable Ground Lease and Property Use

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Agreement by that date, and, unless earlier terminated or extended as herein provided, shall terminate at 11:59 p.m. on June 30, 2050. The expiration of the Term or the earlier termination of this Agreement pursuant to the provisions contained herein shall be referred to as "Agreement Termination".

**ARTICLE 3. RECYCLED WATER POLICY ADVISORY COMMITTEE**

A. Creation; Membership. It is mutually agreed that a recycled water policy advisory committee, consisting of six (6) members, shall be immediately created, said committee to be designated and to be known as the “Recycled Water Policy Advisory Committee” “Committee”). The Board of Directors of the Santa Clara Valley Water District shall appoint three of its members to serve at the pleasure of the Board on the Committee. Three of the members of said Committee shall be from cities and/or agencies with voting membership on the San José/Santa Clara Treatment Plant Advisory Committee, as appointed by the City Council of the City of San José, and shall serve at the pleasure of said Council, with one (1) of such members being a member of the City Council of the City of San José and one (1) of such members being a member of the City Council of the City of Santa Clara.

B. Alternate Members. The Board of Directors of the Santa Clara Valley Water District may appoint an alternate member to serve in the place of any District regular member of the Committee. The City of San José may appoint alternate members for each of the City’s regular members on the Committee. Said alternate members shall serve in the place and stead of either of the regular members appointed by the said Council or Board whenever said regular member should be absent from a meeting of the Committee, and when so serving shall have the same powers and duties as a regular Committee member.

C. Chair. At its first meeting in each fiscal year, the members of the Committee shall elect one member to serve as Chair of the Committee. The Chair shall serve until the election of a successor in the next fiscal year, or no longer a member of the Committee, whichever is earlier. Mid-fiscal year vacancies in the office of the Chair occurring in between regular elections will be filled by the Committee electing a chairperson to serve until the next regular election. The chairperson shall preside at all meetings of the Committee. In the event of the chairperson’s absence from any

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meeting, the members of the Committee may elect a chair pro-tem to serve as chair during the latter's absence.

D. Secretary. City shall provide a secretary/clerk for the Committee in even numbered years and District shall provide secretary/clerk in odd numbered years. Said staff member shall during the one year term keep minutes of the Committee's proceedings, and shall also maintain custody of all books, records, and papers of the Committee during his/her term.

E. Meetings. The meetings of the Committee shall be subject to the requirements of the Brown Act. The first meeting of the Committee shall be noticed and held on September 16, 2010 at San José City Hall, 200 East Santa Clara Street, San José, CA 92113. Regular meetings of the Committee shall thereafter be noticed and held on the third Thursday of April beginning at 10 AM at San José City Hall in even numbered years and at District Headquarters, 5700 Almaden Expressway, San José, CA, in odd numbered years. Special meetings may be called at any time by the chairperson or if requested by one member appointed by each Party, The notice calling the special meeting shall identify the time and place of the meeting. Notice of all meetings shall conform to applicable requirements of law, including but not limited to noticing requirements adopted by the parties for their respective advisory committees, boards and commissions.

F. Quorum, Voting and Procedure. A majority of the total number of member seats, filled or vacant, including at least two members appointed by each Party, shall be necessary for the Committee to take action, although a lesser number may adjourn. Except as may otherwise be provided by resolution of the Committee, Robert's Rules of Order will be followed. The Committee may act by resolution or motion; a motion duly passed by the Committee and entered at length on the committee's minutes shall be deemed to be a resolution.

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G. Powers and Duties. The Committee shall have the following powers and duties:

1. Tender its advice to the Board of Directors of the Santa Clara Valley Water District and the City Council of the City of San José with respect to policy matters under consideration by those legislative bodies relating to the production, distribution and use of recycled water.

- (a) Examples of matters on which the City Council and District Board agree to consider the recommendation of the Committee include:
  - (i) Recommendations related to cost sharing for special studies, technical investigation and master planning related to recycled water.
  - (ii) Recommendations related to pursuit of future grant funding for Parties' recycled water projects.
  - (iii) Recommendations related to expansion of the non-potable system and/or AWTF expansion or additional AWTF facilities;
  - (iv) Recommendation to City Council of the City of San José on changes in terms and conditions for wholesale distribution of recycled water, including amendment of agreements with water retailers, new water retailer agreements and proposed changes in wholesale recycled water rates;
  - (v) Recommendation related to expenditure of any Project Costs Savings.
- (b) While the following matters will not be subject to Committee review as expansion projects, they may be subject to review for other issues, such as water quality:
  - (i) Pipeline extension projects for which funding has been approved or secured prior to the Effective Date.
  - (ii) Pipeline extension projects that are completely developer funded.

- (iii) Customer or public agency facility or irrigation system improvements which are located on the customer, for use of recycled water, including customer laterals to connect to the installed SBWR pipeline distribution system.
2. Tender its advice to the legislative bodies of both Board of Directors of the Santa Clara Valley Water District and the City Council of the City of San José with respect to amendments to this Agreement.
3. Annually, on or before the first day of May each year beginning on May 1, 2011 the Recycled Water Policy Advisory Committee shall review and make recommendations to the Board of Directors of the Santa Clara Valley Water District and the City Council of the City of San José on their respective proposed budgets for the ensuing fiscal year for the maintenance, expansion, replacement, improvement and operation of the SBWR and the AWTF.

**ARTICLE 4. SUBMISSION OF PROPOSED BUDGETS TO RECYCLED WATER ADVISORY COMMITTEE**

A. Budget Submission and Contents. On or before April 1 of each calendar year beginning April 1, 2011, City and District shall provide draft budgets to the Recycled Water Advisory Policy Committee. City's budget shall include a complete financial plan, for the budget year, for the maintenance, repair, expansion, replacement, improvement, and operation of SBWR. District's budget shall include a complete financial plan, for the budget year, for the maintenance, repair, expansion, replacement, improvement, and operation of the AWTF. The draft budgets shall include the following information:

1. An itemized statement of estimated income and revenues from the sale of recycled water, any revenue from third parties related to operation of SBWR or the AWTF, together with a comparative statement of income and revenues for the last complete fiscal year and the year in progress, plus a statement of estimated unencumbered balances at the beginning of the budget year.

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2. An itemized statement of proposed expenditures and reserves for the budget year, together with a comparative statement of the expenditures and revenues for the last complete fiscal year and the year in progress, with the proposed expenditures and reserves for “operating costs” and the proposed expenditures and reserves for “future capital assets” separately stated.
3. Such other information as may be deemed essential or advisable.

B. Budget Adoption. The City Council of the City of San José and the Board of Directors of the Santa Clara Valley Water District shall consider any recommendation tendered by the Recycled Water Policy Advisory Committee on their respective proposed budgets for the ensuing fiscal year for the maintenance, expansion, replacement, improvement and operation of the SBWR or the AWTF. District acknowledges that the budget for the SBWR is also subject to review by the City Council of the City of Santa Clara and the Treatment Plant Advisory Committee, which advises the City Council of the City of San José and the City Council of the City of Santa Clara on certain matters related to the Plant. If the City Council of the City of San José or the Board of Directors of the Santa Clara Valley Water District adopts a budget for the ensuing fiscal year for the SBWR or the AWTF that is materially different than the budget that was recommended by the Recycled Water Policy Advisory Committee, or if said Council or Board fails to materially implement the budget recommendation of the Recycled Water Policy Advisory Committee, the City or District as applicable shall forward a statement of the reasons for such action to the Recycled Water Policy Advisory Committee.

### **ARTICLE 5. CONSTRUCTION OF ADVANCED WATER TREATMENT FACILITY**

A. Site Preparation. On or before July 1, 2010, City shall have completed the Work described in “Specification for South Bay Advanced Recycled Water Treatment Facility Project – Early Earthwork” which is further referenced as SCVWD Project No. 91184008, January 2010 (B&V Project No. 14607 on land owned by City as the

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Administering Agency for the Plant that is being leased to District pursuant to the Ground Lease and Property Use Agreement.

B. Design and Construction of AWTF. District shall design and construct an AWTF, in accordance with the Ground Lease and Property Use Agreement. District estimates the total cost of construction of the AWTF to be \$42,250,000 - \$47,250,000.

C. City Cash Contribution To AWTF Construction Cost. City will contribute toward the cost of constructing the AWTF the amount of Eleven Million Dollars (\$11,000,000.00) minus such reasonable costs as have been or are incurred by City for laboratory toxicity testing done to support design of the AWTF, or for design and completion of the Work described in **Exhibit B** ("City Construction Cost Share Payment").

D. Invoicing and Payment for City Share of AWTF Construction Cost. City shall make payment to District for AWTF construction costs as follows:

1. Within forty-five (45) calendar days after Award of the Construction Contract for the AWTF, District shall submit to City a projected construction progress payment schedule for such contract. Within fifteen (15) days after receipt of the projected construction progress payment schedule, City shall make an advance payment to District in an amount equal to thirty percent (30%) of City's Construction Cost Share Payment.
2. District shall update the construction progress payment schedule monthly to reflect any anticipated changes in the schedule.
3. Progress payments by City to District for work performed on the AWTF by District's Construction Contractor shall be based on Construction Progress Payment Estimate Sheets provided by District and approved by the Construction Contractor. District shall provide copies of Construction Progress Payment Estimate Sheets to City within twenty-four (24) hours of approval by the Construction Contractor. CITY shall make a first progress payment to District in

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an amount equal to thirty percent (30%) of City's Construction Cost Share Payment upon receipt of approved Construction Project Payment Estimate Sheets showing that the AWTF construction is at least twenty five percent (25%) complete. CITY shall make a second progress payment to District in an amount equal to thirty percent (30%) of City's Construction Cost Share Payment upon receipt of approved Construction Project Payment Estimate Sheets showing that the AWTF construction is at least fifty percent (50%). ..

4. CITY shall make a final payment to District in the amount of ten percent (10%) of City's Construction Cost Share Payment within sixty five (65) days from and after the filing of Notice of Completion on the Contract, provided, however, that if the Construction Contractor elects to substitute securities for withheld funds in accordance with the provisions of Section 22200 Public Contract Code, City shall make its final payment within thirty days after receipt of written notice from District of such substitution of securities.

5. If District does not award the construction contract for the AWTF on or before September 30, 2011, District shall reimburse City for all costs incurred by City for laboratory toxicity testing done to support the AWTF, or for design and completion of the Work described in Article 5, Section D, plus interest on the sum of such costs as calculated from the date such costs were incurred by City to the date of payment by District, based on the yearly average return of City's investment portfolio

6. Routing and account instructions for electronic payment may be provided in writing by District. District and City shall coordinate so that progress payments to can be made to Construction Contractors as required by law.

7. District agrees that if the final net cost to construct the AWTF, after consideration of all grant funding, is less than \$30,000,000 the difference between the final net cost and \$30,000,000 shall be treated as Project Cost Savings. The District shall hold such Project Cost Savings subject to disposition as set forth in Article 6, Section D.

**ARTICLE 6. INTEGRATED MANAGEMENT OF RECYCLED WATER PROGRAMS AND FACILITIES**

- A. Technical Working Group. Staff from each of the Parties shall meet at least quarterly to discuss work related to recycled water that is being done at a staff level, and to identify matters that should be reviewed by the Recycled Water Policy Advisory Committee pursuant to this Agreement.
1. The Chief Executive Officer of the District or their designee shall designate at least three (3) members of District staff to be members of the Technical Working Group. The City Manager of City shall designate three (3) staff members to be members of the Technical Working Group from the cities and/or agencies with voting membership on the San José/Santa Clara Treatment Plant Advisory Committee, with one (1) of such members being a City of San José staff member and one (1) of such members being a City of Santa Clara staff member. The designation of members may be by name or title. The designated Technical Working Group members for each Party may invite such other staff members to the meetings as they deem appropriate and the Technical Working Group may by mutual agreement invite third parties to the meetings.
  2. Agenda packets and meeting notices and staff support services to the Technical Working Group and Recycled Water Policy Advisory Committee will be provided at no charge or cost to the other Party by the Party scheduled to provide secretary/clerk services for the Recycled Water Policy Advisory Committee for the year.
  3. Each Party, through its members on the Technical Working Group, shall provide information at the Technical Working Group meetings on any costs that the Party expects to incur related to SBWR or the AWTF that are in excess of the amounts contained the budget recommended by the Recycled Water Policy Advisory Committee.
  4. Examples of matters that may be discussed in the Technical Working Group meetings include development of an operational manual for the AWTF consistent with the Engineers Report prepared by Black & Veatch and dated

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December 2009; efforts to identify and control salinity in Plant influent; identification of areas for appropriate expansion of the use of recycled water and recycled water quality goals; and assessment of whether demand for in county use of recycled water is less than available supply.

- B. City Use of Site Adjacent to AWTF Premises. Prior to July 1, 2020, City will not lease to third parties, plan for development, or construct permanent improvements on the lands owned by City as administering agency for the Plant, as designated on **Exhibit C** attached hereto and incorporated by reference herein. City shall be entitled to use the lands designated on **Exhibit B** for temporary or interim Plant related purposes, during this time period, subject to such rights as District may have to use of such lands during construction of the AWTF under the Ground Lease and Property Use Agreement. After July 1, 2020, City agrees to provide ninety (90) days advance notice to District before it begins planning for construction of permanent improvements on, or engaging in negotiations with any third party for use of, the lands designated on **Exhibit B**
- C. Export of Secondary Treated Wastewater or Recycled Water. Prior to July 1, 2020, export of secondary treated wastewater or recycled water out of County is not allowed by either Party unless there is a signed written agreement approved by the City Council of the City of San José and the District Board. After July 1, 2020, if demand for in county use of recycled water is less than available supply, each Party may engage in negotiations for out of county export of secondary treated wastewater or recycled water once that Party provides one hundred eighty (180) days advance written notice to the other Party of the intent to engage in negotiations for out of county export of secondary treated wastewater or recycled water.
- D. Allocation of Project Cost Savings. Mutual consent of the governing bodies of the Parties shall be required for disposition of any Project Cost Savings; provided

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however, if there has been no consent on the disposition of such Project Cost Savings within one hundred eighty (180) of recordation of Project Notice of Completion for the AWTF, the Project Cost Savings shall be used in lieu of funding that would otherwise be required to be provided by the Parties for the District Sinking Fund for membrane and UV lamp replacement costs

- E. AWTF Operational Changes. Mutual consent of the governing bodies of the Parties shall be required prior to any changes in the operation of the AWTF that would materially change the operational parameters of the AWTF, as identified in the Ground Lease and Property Use Agreement, including but not limited to any changes that would:
1. Allow District to use Plant secondary treated water in any facility other than the AWTF.
  2. Allow any expansion of the AWTF in size of capacity, including any increase in brine discharge.
  3. Provide advance treated water from the AWTF to any facility other than SBWR.
  4. Reduce the annual quantity of secondary treated water provided to the AWTF below the amount need to meet recycled water quality goals as set by the Technical Working Group.

### **ARTICLE 7. FINANCIAL SUPPORT FOR COSTS OF PRODUCING AND DISTRIBUTING RECYCLED WATER**

A. District Support Payments Prior to Operation of AWTF. District shall make payments to City in the amount of One Million Dollars (\$1,000,000) per year to support expanding the usage of water produced by SBWR. The first payment shall be made on or before August 1, 2010, covering the fiscal year July 1, 2010-June 30, 2011 and subsequent payments shall be made on August 1 of each succeeding year until the AWTF commences operation. If the AWTF becomes operational during any fiscal year for which a payment has been made, City shall, within sixty (60) days of such

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commencement of operation, refund District a share of the payment prorated to reflect the number of days from July 1 of the fiscal year for which the payment was received to the date of termination or commencement of operation, whichever is earlier, plus simple interest on such sum calculated from the date payment was received by City to the date payment is made to District, based on the yearly average return of City's investment portfolio. City shall use the funds provided by District solely to support expanding the usage of water produced by SBWR. If this Agreement is terminated by City prior to AWTF becoming operational, City shall refund to District all of the payments made by District pursuant to this section.

### B. Operational Support Payments Upon Commencement of Operation of AWTF.

1. Beginning in the first full fiscal year after the AWTF becomes operational, if District Net Operating Cost for AWTF is less than City's Net Operating Costs for SBWR, District shall make a payment to City in the amount necessary to equalize the amount paid by each Party for Total Net Operating Costs. The calculation of the equalizing District support payment shall be as illustrated in **Exhibit C** and incorporated by reference herein.

2. Beginning in the first full fiscal year after the AWTF becomes operational, if City Net Operating Cost for SBWR are less than Two Million Dollars (\$2,000,000) and less than District Net Operating Cost for AWTF, City shall make a payment to District to equalize the amount paid by each Party for Total Net Operating Costs; provided, however that the total of City Net Operating Cost and City payment to District shall not exceed Two Million (\$2,000,000), unless there is City Net Operating Revenue, in which case City's payment to District shall be ½ of such City Net Operating Revenue up to District's Net Operating Cost and thereafter City's payment to District shall be based on a percentage of the Net Operating Revenue that is equal to the ratio of the District Capital Investment in the SBWR system and the AWTF relative to the Parties' Total Capital Investment in the SBWR system and the AWTF. The calculation of the equalizing City

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support payment shall be as illustrated in **Exhibit C** and incorporated by reference herein.

### C. Invoicing and Payment Procedure for Operational Support Payments.

1. Commencing in the first full fiscal year after the AWTF becomes operational; the Parties shall exchange Statements of Net Operating Costs within thirty (30) days after the exchange of audited financial statements for that year as required under Article 9 below.
2. After the exchange of Statements of Net Operating Costs, an invoice shall be prepared by the Party to whom an equalizing payment is due pursuant to Section B of this Article 7 and submitted to the Party from whom payment is due pursuant to Section B of this Article 7. Payment shall be due within forty five (45) days of receipt of invoice.
3. Routing and account instructions for electronic payment may be provided by either Party to the other Party.

## **ARTICLE 8. INDEMNIFICATION**

City and District shall each defend, indemnify and hold harmless the other, their officers, employees and agents against any claim, loss or liability arising out of or resulting in any way from work performed under this Agreement due to the willful or negligent acts (active or passive) or omissions of their respective officers, employees or agents. Nothing contained herein shall be construed as a waiver of any immunities or defenses that either party may have under applicable provisions of law, including the provisions of the California Tort Claims Act (Gov't. Code §810, *et seq.*) The acceptance of services and duties by City or District shall not operate as a waiver of such right of indemnification. .

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**ARTICLE 9. BOOKS AND RECORDS**

A. Maintenance of Books and Records. City and District will each maintain all documents and records which demonstrate their respective performance under this Agreement for a minimum period of five (5) years, from the date of termination or completion of this Agreement.

B. Inspection and Copying of Books and Record. Any records or documents required to be maintained pursuant to this Agreement shall be made available for inspection, at any time during regular business hours, upon written request by City or Water District. Copies of such documents shall be provided to City or District when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records shall be available for inspection at City's or District's address indicated for receipt of notices in this Agreement.

C. Audited Financial Statements. No later than January 15<sup>h</sup> of each year, beginning with of the year after the AWTF becomes operational, the Parties shall exchange audited financial statements for the immediately preceding fiscal year for covering the operations which are subject to this Agreement; provided, however, that if audited financial statements are not available, unaudited statements shall be provided by January 15<sup>th</sup> and audited statements shall be provided as soon as available.

**ARTICLE 10. TERMINATION OF AGREEMENT**

A. Automatic Early Termination.

1. This Agreement will automatically terminate if District has not awarded the contract for construction of the AWTF by September 30, 2011.
2. This Agreement will automatically terminate if the Ground Lease is terminated.

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B. Option for Early Termination. Each Party will have an annual option to terminate the Agreement, on January 1 of each year beginning January 1, 2020, for a termination date effective June 30 of the year in which the notice is given. If notice is timely provided by either Party, the Parties agree to meet and discuss, through the Technical Advisory Group whether amendment of the agreement in lieu of termination can address Parties' concerns with continuation of the Agreement and the Recycled Water Advisory Committee shall be provided with an opportunity to make a recommendation to the Parties' governing bodies with respect to termination.

C. Breach of Agreement. In the event either Party to this Agreement should at any time claim that the other Party has in any way breached or is breaching this Agreement, the complaining Party shall file with the legislative body of the other Party, and with the above mentioned Recycled Water Policy Advisory Committee, a written claim of said breach, describing the alleged breach and otherwise giving full information respecting the same. The Recycled Water Policy Advisory Committee shall thereupon, at a reasonable time and place specified by it, give both Parties full opportunity to be heard on the matter, and shall, upon conclusion of said hearing, give the legislative bodies of both Parties a full report of its findings and recommendations. Said report, findings and recommendations shall be deemed advisory only, shall not in any way bind either of the Parties hereto, and shall not be deemed to establish any facts, either presumptively or finally. Upon receipt of said report and recommendations, if either Party should be dissatisfied with or disagree with the same, the legislative bodies of both cities shall jointly meet with each other at a reasonable time and place to be determined by them, for the purpose of resolving their differences. No action for breach of this Agreement, and no action for any legal relief because of any breach or alleged breach of this Agreement shall be filed or commenced, and nothing shall be done by either Party to rescind or terminate this Agreement, unless and until the above provisions of this paragraph have been complied with and unless the complaining Party has first given to the other Party a reasonable time after conclusion of said joint meeting of the two legislative bodies within which to cure any breach or alleged breach.

D. Remedies. In addition to all other rights and remedies that either Party may have upon termination of this Agreement, City shall be entitled to receive from District and District shall pay to City, within sixty (60) days of the date of the termination, an amount equal to the remaining balance in the District Sinking Fund for membrane and UV lamp replacement costs, which remaining balance shall include interest posted to the fiscal year balance in said account on an annual basis, based on the yearly average return of the District investment portfolio; provided, however that any amounts attributable to Project Cost Savings, including interest thereon that are remaining in the Sinking Fund as of effective date of the termination shall be paid to District (“Sinking Fund Balance Payout”).

**ARTICLE 11. MISCELLANEOUS**

A. Assignment. No Party shall assign, sublet, or transfer this agreement or any of the rights or interests in this agreement without the written consent of the other Party.

B. Consent. Unless expressly stated otherwise, whenever in this Agreement the approval or consent of a Party is required, such approval or consent must be in advance, shall be in writing and shall be executed by a person having the express authority to grant such approval or consent.

C. Controlling Law. Except as federal law may apply, the parties agree that this Agreement shall be governed and construed by and according to the laws of the State of California.

D. Entire Agreement. This instrument contains all of the terms and conditions entered into and made by and between the parties and may not be modified orally, or in any manner, other than by an agreement in writing signed by all the parties hereto or their respective successors-in-interest.

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## E. Exhibits and Addenda.

All exhibits and addenda referred to herein, and any exhibits or schedules which may from time to time be referred to in any duly executed amendment thereto, are by such reference incorporated herein and shall be deemed a part of this Agreement as if set forth fully herein.

The Exhibits attached to this Agreement are:

- Exhibit A    Definitions**
- Exhibit B    Adjacent Site**
- Exhibit C    Support Payment Illustrations**

F. Force Majeure. For purposes of this Agreement the term “Force Majeure” shall mean earthquake, fire or other casualty, flood, landslide, epidemic, unforeseeable adverse weather, “acts of God,” war, civil disturbance, court ordered injunction, intervention by civil or military authorities or government, strikes, lockouts, boycotts or other labor disputes, to the extent any of the foregoing are beyond the reasonable control of either City or Tenant and which cause such party to be delayed or hindered in or prevented from the performance of any covenant or obligation under this Agreement other than the payment of money.

G. Headings. The headings of the several paragraphs and sections of this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope or intent of any provisions of this Agreement and shall not be construed to affect in any manner the terms and provisions hereof or the interpretation or construction thereof.

H. Independent Contractor. City and District, in the performance of the tasks to be performed by each, shall each act as and be an independent contractor and not an agent or employee of the other. As independent contractors, both City and District shall be responsible for tasks performed by their agents, contractors or employees, including

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the payment of any and all compensation, or the provision of any benefits due said agents, contractors or employees. City and District each agree to indemnify and hold harmless the other Party from any claim that may be made by its agents, employee or contractors for benefits or compensation.

I. Interpretation. This Agreement shall be deemed to have been prepared equally by both Parties, and its individual provisions shall not be construed or interpreted more favorably for one Party on the basis that the other Party prepared it.

J. Material Considerations. Each and every term, condition, covenant and provision of this Agreement shall be deemed to be a material part of the consideration for the entry into this Agreement, and any breach hereof by either Party shall be deemed to be a material breach. Each term and provision of this Agreement to be performed by a Party shall be construed to be both a covenant and a condition.

K. Modification of Agreement. This Agreement shall not be modified, unless the parties first agree to and approve of such modification in writing. The CEO of District is authorized to approve amendment to this Agreement on behalf of District to effectuate the intent of the Parties.

L. Number and Gender. Whenever the singular number is used in this Agreement and when required by the context, the same shall include the plural and the masculine gender shall include the feminine and neuter genders.

M. Successors and Assigns. The provisions of this Agreement shall, subject to the provisions concerning transfer, apply to and bind the successors and assigns of the parties hereto.

N. Validity of Existing Agreements. Execution of this Agreement does not modify, invalidate or supersede any prior agreements made between the Parties.

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O. Venue. In the event that suit shall be brought by either party hereunder, the parties agree that venue shall be exclusively vested in the state courts of California in the County of Santa Clara or if federal jurisdiction is appropriate, exclusively in the United States District Court in the Northern District of California, San José, California.

P. Survival of Obligations. The obligations of Article 8 and Article 9 shall survive the expiration or termination of this Agreement.

Q. Relationship to Ground Lease. - This Agreement shall be of no force and effect unless and until the Parties have negotiated and executed a mutually acceptable Ground Lease and Property Use Agreement, providing for the use by District of Plant lands for the AWTF.

### **ARTICLE 12. NOTICES**

All notices, statements, demands, requests, consents, approvals, authorizations, offers, agreements, appointments or designations hereunder by either party to the other, shall be in writing and shall be addressed as follows, or to such other place as City or District, respectively, may notify the other in writing.:

If to City, the same shall be addressed to:

John Stufflebean  
Director of Environmental Services  
City of San Jose  
200 East Santa Clara Street, 10<sup>th</sup> Floor Tower  
San Jose, CA. 95113

If to District, the same shall be addressed to:

Jim Fiedler  
Chief Operating Officer  
Santa Clara Valley Water District  
5750 Almaden Expressway  
San José, CA 95118

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All notices shall be sufficiently given and served upon the other party if sent by first-class U.S. mail, postage prepaid. All termination notices shall be served in accordance with California Code of Civil Procedure Section 1162, as may be amended or modified.

**IN WITNESS WHEREOF**, the Parties have executed this Agreement as of the date first written above.

**“CITY”**

APPROVED AS TO FORM

CITY OF SAN JOSE, a municipal Corporation

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MOLLIE DENT  
Sr. Deputy City Attorney

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LEE PRICE, MMC  
City Clerk

**“DISTRICT”**

APPROVED AS TO FORM

SANTA CLARA VALLEY WATER DISTRICT, a public entity

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EMILY J. COTE  
Sr. Assistant District Counsel

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BEAU GOLDIE  
Chief Executive Officer

**EXHIBIT A**

**DEFINITIONS**

**“Advanced Water Treatment Facility” or “AWTF”** - shall mean an advanced treated recycled water facility and related facilities (AWTF), to be located on lands owned by the Plant, that will accept up to twelve (12) million gallon per day (mgd) of Plant secondary effluent for treatment through microfiltration and will provide up to 8 mgd reverse osmosis treated water for blending with the Plant’s recycled water to expand irrigation and industrial uses

**“City’s Capital Investment in the AWTF”** - shall mean the value of the AWTF and Related Facilities, as determined pursuant to the same methodology used by the City as administering agency for the Plant, for the purpose of allocating Plant costs among the cities and agencies discharging to the Plant times a percentage having the sum of all City capital contributions toward the AWTF as the numerator and all District and City capital contributions as the denominator. For example, if the value of the AWTF and Related Facilities as of the applicable date of valuation is \$50,000,000; the sum of the City capital contributions in is \$12,000,000; and the sum of District capital contributions in \$32,000,000; the City’s Capital Investment in the AWTF would be \$13,636,365.

**“City’s Capital Investment in the SBWR System”** - shall mean the sum of the value of all SBWR System Assets, as determined annually by the City as administering agency for the Plant, for the purpose of allocating Plant costs among the cities and agencies discharging to the Plant, less the value of District’s Capital Investment in the SBWR System. As of June 30, 2009, the City’s Capital Investment in the SBWR System was \$\_\_\_\_\_.

**“City’s Capital Investment in the SBWR System and the AWTF”** - shall mean the sum of the City’s Capital Investment in the SBWR system and the City’s Capital Investment in the AWTF.

**“City Net Operating Cost for SBWR”** - shall mean and include any and all costs and expenses incurred by San José for the administration, operation, maintenance and repair of SBWR or the AWTF (including but not limited to costs incurred by Plant to treat microfiltration return water and costs to investigate and remedy any effluent limit and toxicity violations of the Plant’s NPDES result from the addition of reverse osmosis concentrate (reject) from the AWTF to Plant effluent for blending prior to discharge to San Francisco Bay), less all revenue received by San José from wholesale recycled water sales. City Net Operating Cost for SBWR shall not exceed the amounts stated in the Draft SBWR Budget provided by City to the Recycled Water Policy Advisory Committee, except for costs attributable to unanticipated increases in supplies, material, equipment and labor rates. The methodology used to develop the following City Net

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Operating Cost for SBWR for fiscal year 2008-09 <sup>1</sup> shall be used to calculate future City Net Operating Cost for SBWR:

**South Bay Water Recycling Operating Cost Based on Adopted 2008-09 Budget**

<b>Description</b>	<b>Personal Service</b>	<b>Non-Personal Services</b>	<b>Total</b>
Program Administration, Permitting and Compliance	\$1,699,754	\$522,235	\$2,222,079
System Operations and Maintenance	\$968,165	\$408,535	\$1,376,700
Capital Planning and Engineering	\$171,891	\$580,252	\$752,143
Communication and Outreach		\$76,920	\$76,920
City of San Jose Overhead and Capitated Services		\$248,186	\$248,186
<b>Total SBWR Operating Expenses</b>	<b>\$2,839,810</b>	<b>\$1,836,218</b>	<b>\$4,676,028</b>
<b>SBWR Recycled Water Revenue</b>	<b>Irrigation and Agriculture \$1,194,498</b>	<b>Industrial \$476,268</b>	<b>\$2,670,766</b>
<b>SBWR Net Operating Costs</b>			<b>\$2,005,261</b>

“**City Net Operating Revenue**” –shall mean the amount by which City revenue from wholesale recycled water sales exceeds costs and expenses incurred by San José for the administration, operation, maintenance and repair of SBWR, but shall not include any revenue received by City from District for recycled water sold to District pursuant to the Silver Creek Pipeline Agreement.

“**District’s Capital Investment in the AWTF**” - shall mean the value of the AWTF and Related Facilities, as determined pursuant to the same methodology used by the City as administering agency for the Plant, for the purpose of allocating Plant costs among the cities and agencies discharging to the Plant times a percentage having the sum of all District capital contributions toward the AWTF as the numerator and all District and City capital contributions as the denominator. For example, if the value of the AWTF and Related Facilities as of the applicable date of valuation is \$50,000,000; the sum of the City capital contributions in is \$12,000,000; and the sum of District capital contributions in \$32,000,000; the District’s Capital Investment in the AWTF would be \$36,363,635.

<sup>1</sup> The budgeted costs for 2008-09 do not include the costs to treat microfiltration return water or to investigate or remedy any effluent limit and toxicity violations of the Plant’s NPDES result from the addition of reverse osmosis concentrate (reject) from the AWTF to Plant effluent for blending prior to discharge to San Francisco Bay. These costs will be added in the budget for the first year in which the AWTF is projected to commence operations.

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**“District’s Capital Investment in the SBWR System”**- shall mean the prorated value of any SBWR System Assets for which the District has provided capital funding, determined according to the percentage funding provided by the District for each such asset. As of the date of execution of the Agreement, the District has no Capital Investment in the SBWR System.

**“District’s Capital Investment in the SBWR System and the AWTF”** - ” shall mean the sum of the District’s Capital Investment in the SBWR system and the District’s Capital Investment in the AWTF.

**“District Net Operating Cost for AWTF”** - t shall mean and include all costs and expenses incurred by District for the administration, operation, maintenance and repair of the AWTF, less any revenue that may be received by District from wholesale recycled water sales of SBWR or AWTF water, from third parties for operation of the AWTF, but shall not include any revenue received by District from resale of recycled water sold by City to District pursuant to the Silver Creek Pipeline Agreement. District may also include as operating cost an amount not to exceed \$810,000 annually as adjusted for inflation as a sinking fund for membrane and UV lamp replacement. District Net Operating Cost for AWTF shall not exceed the amount stated in the Draft AWTF Budget provided by District to the Recycled Water Policy Advisory Committee, except for costs attributable to unanticipated increases supplies, material, equipment and labor rates. The methodology used to develop the following estimate of District Net Operating Cost for AWTF for projected, which is explained in more detail in the Black & Veatch Draft Project Report No. 146071, dated July 2007, shall be used to calculate future District Net Operating Cost for AWTF<sup>2</sup>:

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<sup>2</sup> The estimate assumes that District will not receive any third party revenue from operation of the AWTF. If revenue is received, it will be applied to costs before calculation of the District Net Operating Costs.

**Cost Estimate Using Average Annual Microfiltration Feed of  
8.7 mgd (summer)/3.6 mgd winter**

<b>Description</b>	<b>Summer Months</b>	<b>Winter Months</b>	<b>Annual Cost</b>
Energy	\$900,000	\$260,000	\$1,160,000
Chemicals	\$230,000	\$80,000	\$310,000
Labor	\$650,000	\$470,000	\$1,120,000
Sinking Fund for Membranes and UV Lamp Replacement			\$810,000
UV Lamps Replacement			\$70,000
Miscellaneous Cost			<sup>3</sup>
Tanks			\$59,000
Parts Replacement			\$25,000
<b>Total Annual O&amp;M Cost (Year 2010)</b>			<b>\$3,554,000</b>

**"Parties' Capital Investment in the SBWR System and the AWTF"** - shall mean the sum of the City's Capital Investment in the SBWR System and the AWTF and the District's Capital Investment in the SBWR System and the AWTF.

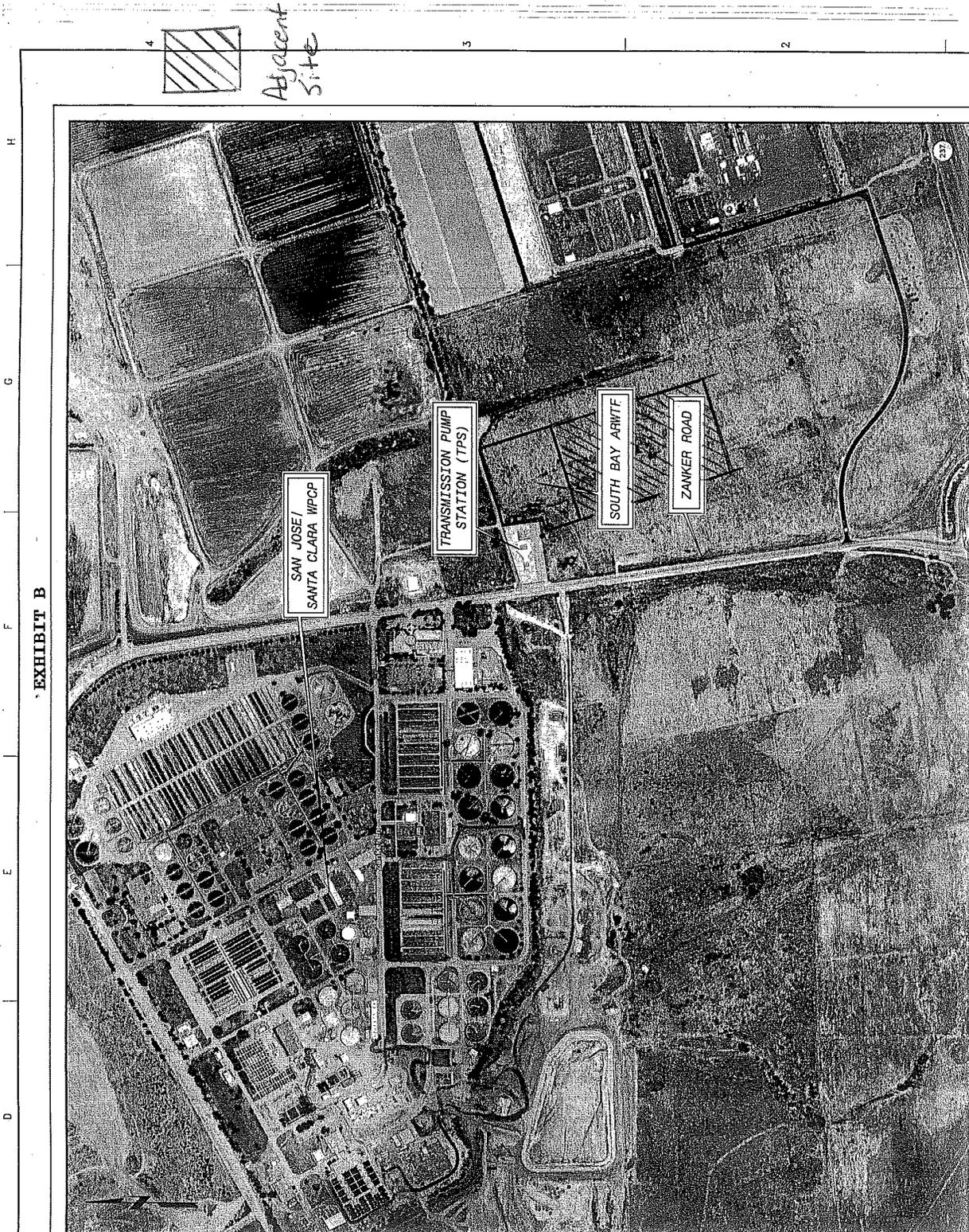
**"Silver Creek Pipeline Agreement"** - means the agreement between the Parties a "Management and Operation of the South Bay Water Recycling (SBWR), including the Silver Creek Pipeline", dated January 22, 2002.

**"SRBR System Assets"**- shall mean all assets owned and operated by City for the wholesale distribution of recycled water, but shall not include and recycled water assets owned and operated by water retailers or by the District pursuant to the Silver Creek Pipeline Agreement.

**"Total Net Operating Costs"** - shall mean City Net Operating Cost for SBWR plus District Net Operating Cost for AWTF.

<sup>3</sup> Other costs incurred for operation of the AWTF that are specifically described and included in the approved budget.

EXHIBIT B



## EXHIBIT C

**FINANCIAL SUPPORT PAYMENT ILLUSTRATIONS**

The following financial support payment calculations are provided for illustration purposes:

**Total Net Operating Loss Scenarios**

District Net Operating Costs for AWTF	\$3.5 Million
City Net Operating Cost for SBWR	\$2.5 Million
Total Net Operating Costs	\$6 Million
No payment by either Party	

District Net Operating Costs for AWTF	\$3,500,000
City Net Operating Cost for SBWR	\$1,500,000
Total Net Operating Costs	\$5,000,000
City Payment to District	\$500,000

**Total Net Operating Revenue Scenario**

District Net Operating Costs for AWTF	\$4,500,000
City Net Operating Revenue for SBWR (City Operating Revenue of \$10,000,000 – City Operating Costs for SBWR of \$4,500,000)	\$5,500,000
District Capital Investment in AWTF and SBWR	\$50,000,000
City's Capital Investment in AWTF and SBWR	\$250,000,000
Parties' Total Capital Investment in AWTF and SBWR	\$300,000,000
City Operating Cost Support Payment to District (1/2 of City Net Operating Revenue)	\$2,750,000
City Excess Revenue Payment to District (16.66% of balance of City Net Operating Revenue after City Operating Costs Support Payment)	\$458,333.15
City Retained Excess Revenue (83.34% of balance of City Net Operating Revenue after City Operating Costs Support Payment)	\$2,291,666.90