

**GROUND LEASE AND PROPERTY USE AGREEMENT BETWEEN THE CITY OF
SAN JOSE AND THE SANTA CLARA VALLEY WATER DISTRICT FOR ADVANCED
WATER TREATMENT FACILITY**

THIS GROUND LEASE AND PROPERTY USE AGREEMENT (this "Agreement") is made as of the ___ day of _____, 2010, by and between the City of San José, a charter city, as administering agency for the San José/Santa Clara Water Pollution Control Plant ("City" or "Landlord") and the SANTA CLARA VALLEY WATER DISTRICT, a California special district ("District").

RECITALS

A. Landlord is the owner of record, and joint owner as a tenant in common with the City of Santa Clara of that certain real property (the "Property") located on the east side of Zanker Road, north of State Route 237, in the City of San José, County of Santa Clara, State of California, as more particularly depicted on **Exhibit A** attached hereto and incorporated by reference herein.

B. Landlord operates recycled water facilities on the Property, as part of Landlord's operation of the San José/Santa Clara Water Pollution Control Plant (the "Plant"), a wastewater treatment plant jointly owned by Landlord and the City of Santa Clara.

C. District wishes to construct and operate an Advanced Water Treatment Facility ("AWTF") on a portion of the Property as shown on **Exhibit B** attached hereto and incorporated by reference herein (the "Premises").

D. Landlord and District desire that the AWTF be integrated into the operation of the Plant, for the purpose of demonstrating that the highly purified water produced by the AWTF can be blended with existing recycled water produced by the Plant to expand irrigation and industrial use of recycled water in Santa Clara County.

E. Construction and operation of an AWTF on the Premises will require usage by District of portions of the Property ("Ancillary Property"), as depicted in **Exhibit A** and **Exhibit C**, for the purpose of constructing and operating facilities to integrate the AWTF into the operation of the Plant and for obtaining utility services for the AWTF ("Related Facilities").

F. The proposed AWTF will treat up to twelve (12) million gallons per day (mgd) of WPCP secondary effluent, at a cost saving to the WPCP 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 eight (8) mgd reverse osmosis treated water for blending with the Plant's existing recycled water; and will offset the demand for development of new sources of water supply for Santa Clara County.

G. Landlord and District mutually desire to provide for District's use of the Premises and Ancillary Property as necessary for construction and operation of the AWTF and Ancillary Facilities.

H. On February 23, 2010, District approved a mitigated negative declaration for the proposed AWTF.

AGREEMENT

NOW THEREFORE, for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, Landlord and District hereby agree as follows:

SECTION 1. DEFINITIONS

Each reference in the body of this Agreement to specific terms or phrases set forth in this Section shall have the specific meanings and/or contain the respective express information set forth below.

"Agreement" means this Agreement between City and District.

"Ancillary Property" means the property described in **Section 2.2**.

"Advanced Recycled Water Treatment Facility" or **"AWTF"** means the facility to be constructed on the Premises as described in the Plans & Specifications.

"City" means the City of San José, a charter city, as administering agency for the San José/Santa Clara Water Pollution Control Plant.

"Days" unless otherwise specified, means calendar days.

"Director" means the person designated Director of Environmental Services by City, or such other person, division, department, bureau, or agency as may be designated by the City Council or the City Manager from time to time to exercise functions equivalent or similar to those now exercised by the Director of General Services. The term also includes any person expressly designated by the Director of General Services to exercise rights and/or obligations empowered in the "Director" under this Agreement.

"District" means the Santa Clara Valley Water District, a California special district

"Effective Date" shall mean July 1, 2010.

"Environmental Laws" shall mean and include the California Environmental Quality Act, to the extent applicable, the National Environmental Policy Act and all federal, state and local laws, statutes, ordinances, regulations, resolutions, decrees and/or rules now or hereinafter in effect, as may be amended from time to time, and all implementing

regulations, directives, orders, guidelines, and federal or state court decisions, interpreting, relating to, regulating or imposing liability (including, but not limited to, response, removal, remediation and damage costs) or standards of conduct or performance relating to industrial hygiene, occupational health, and/or safety conditions, environmental conditions, or exposure to, contamination by, or clean-up of, any and all Hazardous Materials, including without limitation, all federal or state superlien or environmental clean-up statutes.

“Hazardous Materials” means any and all (a) substances, products, by-products, waste, or other materials of any nature or kind whatsoever which is or becomes listed, regulated or addressed under any Environmental Laws, and (b) any materials, substances, products, by-products, waste, or other materials of any nature or kind whatsoever whose presence in and of itself or in combination with other materials, substances, products, by-products, or waste may give rise to liability under any Environmental Law or any statutory or common law theory based on negligence, trespass, intentional tort, nuisance, strict or absolute liability or under any reported decisions of any state or federal court; and (c) any substance, product, by-product, waste or any other material which may be hazardous or harmful to the air, water, soil, environment or affect industrial hygiene, occupational health, safety and/or general welfare conditions, including without limitation, petroleum and/or asbestos materials, products, by-products, or waste. Secondary treated water provided by the Plant to the AWTF for treatment shall not be considered a Hazardous Material.

“Improvements” means the AWTF and Related Facilities and all Subsequent Alterations and Improvements.

“Integration Agreement” means the “Recycled Water Facilities and Programs Integration Agreement Between the City of San José and the Santa Clara Valley Water” which is being approved by each Party simultaneously with its approval of this Agreement.

“Laws” means all present and future applicable judicial decisions, statutes, laws, ordinances, regulations, building codes, City rules and regulations adopted from time to time, regulations, orders and requirements and policies of all governmental authorities, including without limitation, city, state, municipal, county, federal agencies or the federal government, and their departments, boards, bureaus, commissions and officials and such other authority as may have jurisdiction including, without limitation, any regulation or order of a quasi-official entity or body.

“mgd” means million gallons per day.

“Municipal Code” means the San José Municipal Code, as amended from time to time.

“Person” means an individual, a corporation, a partnership, a joint venture or any other form of business association.

“**Plans & Specifications**” means the 60% Final Plans and Specification for Construction of AWTF, prepared by Black and Veatch, District Project No. 91184008, and approved by City and District prior to execution of the Lease.

“**Plant**” or “**WPCP**” means the San José/Santa Clara Water Pollution Control Plant.

“**Premises**” means the Property described in **Exhibit B**.

“**Recycled Water Policy Advisory Committee**” means the policy advisory committee formed by the Parties pursuant to the Integration Agreement.

“**Related Facilities**” means the facilities needed to integrate the AWTF into the operation of the Plant and to provide utility services for the AWTF, as depicted in **Exhibit A**.

“**South Bay Water Recycling**” or “**SBWR**” means the assets owned and operated by City, and the program conducted by the City, as administering agency for the Plant for the wholesale distribution of recycled water.

“**Subsequent Alterations and Improvements**” means any improvement, alteration, addition or construction of improvements on the Premises or Ancillary Property, other than with the AWTF and Related Facilities as shown in the Plans & Specifications, and furniture, trade fixtures and equipment which are and remain movable and unattached to the Premises or Property.

“**Technical Working Group**” means the staff level working group formed by the Parties pursuant to the Integration Agreement.

SECTION 2. LEASE OF PREMISES AND RIGHT TO USE ANCILLARY PROPERTY

2.1. Premises.

Landlord hereby leases, transfers and demises to District, and District hereby leases and takes from Landlord, the Premises for the terms and upon the agreements, covenants and conditions set forth in this Agreement, the Premises depicted on **Exhibit B** attached hereto and incorporated by reference herein.

2.2. Ancillary Property.

Landlord hereby grants to District, the right to use the Ancillary Property for the Related Facilities depicted on **Exhibit A and Exhibit B**, for the terms and upon the agreements, covenants, and conditions set forth in this Agreement.

2.3 Ingress and Egress.

District shall have a terminable nonexclusive license to use the access roadway to the Premises shown as North Access Road, as shown on Exhibit C, but title to such roadway and the underlying property shall at all times remain with City and shall not be deemed to be part of the Premises under this Agreement. City reserves the right to terminate the license to use the access road upon the offer to provide land for substitute access at no cost to District. Upon the offer of such substitute access, District shall be responsible for all costs and expenses of developing such substitute access, and shall promptly submit Plans & Specification therefore to City, pursuant to the provisions of **Section 8**.

SECTION 3. TERM

The term of this Agreement shall commence on July 1, 2010, and, unless sooner terminated or extended as herein provided, shall terminate at 11:59 on June 30, 2050. The expiration of the Term or the sooner termination of this Agreement shall be referred to as "Agreement Termination".

SECTION 4. RENT

4.1 Base Rent.

District shall pay to Landlord the sum of Ten Dollars (\$10.00) per year as rental for the use and occupancy of the Premises and Ancillary Property. Rent shall be due and payable in advance by the first day of July each year, commencing with the first day of July, 2010. It is not the intent of this Agreement to create any tenancy by District beyond the expiration or termination date hereinabove set forth. Any holding over after the expiration or earlier termination of the term of this Agreement shall be conditioned upon the approval of the City Council and on the terms and conditions approved by the City Council.

4.2 Additional Payments.

In addition, District shall pay when due, all insurance premiums, costs of utilities and services as provided in **Sections 6, 7 and 10**, and any other costs and charges, fees, taxes, assessments and all other liabilities and obligations which District assumes or agrees to pay or undertake pursuant to this Agreement.

SECTION 5. AUTHORIZED USE AND CONDITONS OF TITLE, PREMISES AND ANCILLARY PROPERTY

5.1 Authorized Use.

Use of the Premises and Ancillary Property shall be strictly limited to construction and operation of the AWTF and Related Facilities and public tours of the AWTF. Neither District, nor any of its employees or agents, shall conduct, transact or otherwise carry on any business or service on the Premises that is not specifically authorized by this Agreement. Use of the Ancillary Property is further subject to the "Special Terms and Conditions for Use of Ancillary Property" set

forth in **Exhibit D** attached hereto and incorporated by reference herein.

5.2 Condition of Title.

City leases the Premises and authorizes District to use the Ancillary Property subject to all easements, covenants, conditions, restrictions and other title matters whether recorded or unrecorded existing as of the Effective Date, and all matters that would be apparent from an inspection of the Premises and Ancillary Property on the Effective Date.

5.3 Condition of Premises and Ancillary Property.

District agrees that the Premises and Ancillary Property is leased and being authorized for use in its existing condition as of the Effective Date, As-Is and Where-Is, With All Faults and Without Warranty, and this Agreement does not obligate the City to perform work to prepare the Premises or Ancillary Property for occupancy or use by District. District acknowledges that it is accepting the Premises and Ancillary Property solely on the basis of its own investigations, and that neither City, nor any of its officers, Council Members, employees, or agents, is making or has agreed to make any representations or warranties of any kind, express or implied, written or oral, as to the physical condition of the Premises or Ancillary Property; the fitness for District's use, value or adequacy of the Premises or Ancillary Property for any purpose or any limitations thereon, including, but not limited to, any representation or warranty pertaining to environmental or other laws, regulations or governmental requirements; the existence, adequacy or availability of utilities on or utility services to the Premises or Ancillary Property; the condition of the soils and ground water of the Premises or Ancillary Property; the presence or absence of toxic materials or hazardous substances on or under the Premises or Ancillary Property; the condition of title to the Premises or Ancillary Property; or any other matter bearing on the use, value or condition of the Premises or Ancillary Property. District independently has satisfied itself regarding the following characteristics of the Premises and Ancillary Property: topography, availability of utilities, general plan designation, zoning, soil, subsoil, presence or absence of fill, presence or absence of hazardous materials, the purposes for which the Premises and Ancillary Property or any part thereof may be used, drainage, flood zone designation, access to public roads, and applicable environmental laws, rules, or regulations. The failure on the part of the District to procure, in writing, express warranties or representations regarding Premises and Ancillary Property characteristics shall constitute a conclusive admission that District has relied on its investigation and judgment as to all matters relating to the Premises and Ancillary Property. District represents that it has, prior to the execution of this Agreement, made investigations and tests of the Premises and Ancillary Property, including without limitation, inquiry from governmental agencies and quasigovernmental agencies having jurisdiction over the Premises and Ancillary Property, soils testing, tests and inspection for presence of hazardous materials and such other examination of the Premises and Ancillary Property as District has deemed necessary to

determine the condition of the Premises and Ancillary Property and that District, except as specifically set out in this Agreement, by execution hereof accepts the Premises and Ancillary Property in the condition and state in which they are, "as is" as of the Effective Date.

SECTION 6. STANDARDS OF OPERATION

6.1 Inspections.

District shall ensure that its employees and agents make regular inspections of the Premises and Ancillary Property for the purpose of maintaining the degree of cleanliness, condition of repair and operational ability of the AWTF and Related Facilities required under this Agreement.

6.2 Liability and Insurance.

District shall not do anything, or permit anything to be done, in or about the Premises or Ancillary Property that might: (i) invalidate or be in conflict with, or cause cancellation of, the provisions of any insurance policies covering the Premises or Ancillary Property; (ii) result in a refusal by casualty insurance companies to insure the Premises or Ancillary Property in amounts and on terms and conditions required by City; (iii) subject City to any liability or responsibility for injury or damages to any person or property by reason of any activity, use, business operation or other practice conducted on the Premises or Ancillary Property.

6.3 AWTF Operational Parameters.

District shall operate the AWTF and Related Facilities so as to provide microfiltration for up to 12 mgd of secondary treated wastewater produced by the Plant and up to 8 mgd reverse osmosis product water to SBWR, in accordance with the additional operational parameters set forth in **Exhibit E**.

6.4 Disposal, Use and Storage of Hazardous Materials.

District shall not dispose of Hazardous Materials on the Premises or Ancillary Property, nor cause, permit, or allow any officer, agent, employee, contractor, permittee, or invitee of District to dispose of Hazardous Materials on the Premises or Ancillary Property. District may only store and use such Hazardous Materials on the Premises, and use such Hazardous Materials on the Ancillary Property, as are incident to the normal and customary operation of the AWTF and Related Facilities. Storage and use of Hazardous Materials on the Premises or Ancillary Property are further governed by **Exhibit F**.

6.5 Storage of Vehicles.

Any vehicles containing explosive materials or explosive liquids are expressly prohibited inside any structure on the Premises or Ancillary Property.

SECTION 7. MAINTENANCE OF PREMISES, AWTF AND RELATED FACILITIES

7.1 Maintenance.

District shall be obligated, at all times, throughout the term of this Agreement, without cost to City, to maintain the Premises, AWTF and Related Facilities and all Subsequent Alterations or Improvements in good appearance, repair, and safe condition, except for ordinary wear and tear, and in a condition otherwise satisfactory to Director. District shall maintain all improvements on the Premises, whether installed by District or City. All maintenance shall be performed diligently and shall be of a quality equal to or better than the original work in materials and workmanship, and all work shall be subject to the prior written approval of Director, which approval shall not be unreasonably withheld. When used in this Agreement, the term "maintenance" shall include all repairs, alterations, maintenance and/or removals reasonably deemed necessary by Director in order to ensure that the AWTF and Related Facilities will consistently operate pursuant to the operational parameters set forth in **Exhibit E**. Landlord may enter the Premises at any time during regular business hours, to determine if District is in compliance with the requirements of this **Section 7**. If, following any such inspection by Landlord, Landlord delivers notice of any deficiency to District; District shall promptly prepare and deliver to Landlord, District's proposed plan for remedying the indicated deficiencies. Landlord's failure to deliver, following any Landlord's inspection, any notice of deficiency to District, shall not be deemed to be Landlord's approval of the then condition of the Project, nor Landlord's waiver of any default by District under this **Section 7**.

7.2 Trash and Refuse.

District, at its sole cost and expense, shall keep and maintain the areas occupied by District, clean and free of rubbish, dirt, garbage, and other waste matter at all times and shall provide and pay for regular janitorial and other service reasonably necessary for the proper maintenance of the Premises in a clean and sanitary manner. District, at its sole cost and expense, shall cause all dirt, rubbish, trash, garbage and other waste matter to be removed as needed from the Premises and deposited in suitable containers for regular removal from the Premises.

7.3 Waste or Nuisance.

District shall not commit, cause, maintain, permit, suffer, or allow to be committed, caused, maintained, or permitted, any legal waste upon the Premises, or any public or private nuisance, or injury, or any improper or unlawful use on the Premises or surrounding areas of the Premises. District shall maintain in safe, good and clean condition all areas of the Premises where District conducts its Authorized Activities.

SECTION 8. IMPROVEMENTS

8.1 Construction of AWTF and Ancillary Facilities.

District shall construct an AWTF on the Premises, and Related Facilities on the Ancillary Property, pursuant to and in compliance with all the terms and conditions set forth in this **Section 8**. District will construct the AWTF and Related Facilities in a manner that includes no Material Change from the Plans & Specifications (except with Landlord's written approval of any such Material Change as provided below). A "Material Change" means any material change from the AWTF and Related Facilities as shown in the Plans & Specifications that (i) use, (ii) density, (iii) building area, (iv) location and dimension of improvements, (v) number and size of filtrations units, (vi) exterior elevations and appearance, (vii) quality of construction materials, finishes and designs, (viii) any other change in the Plans & Specifications that would impact the ability of the AWTF to meet the operational parameters set forth in **Exhibit E** or otherwise have a material adverse impact on the Plant. In the event District proposes to make a Material Change from the Plans & Specifications, District first must obtain the written consent of Landlord, which Landlord may not unreasonably withhold or delay. Landlord shall have no obligation to approve any change: (i) which shall materially increase or decrease the floor area to be built upon the Premises, (ii) increase or decrease the number of filtration units to be built upon the Premises, (iii) materially increase or decrease the size of the filtration units to be built upon the Premises, (iv) to the uses which are permitted upon the Premises or Ancillary Property or (v) impact the ability of the AWTF to meet the operational parameters set forth in **Exhibit E** or otherwise have a material adverse impact on the Plant.

8.2 AWTF and Related Facilities Construction Schedule.

District agrees to use commercially reasonable efforts to cause the AWTF and Related Facilities to be commenced by October 1, 2010 and completed by September 30, 2012 (the "Construction Schedule").

8.3 Approval of Plans and Specifications for All Subsequent Alterations and Improvements.

Following completion of the AWTF and Related Facilities, District shall not make any Subsequent Alterations or Improvements to the Premises, Ancillary Property, AWTF, or Related Facilities, without the prior written approval of Director. District shall be responsible for the payment of all engineering, inspection and review fees required by City or any other governmental entity. First-class standards of design and construction will be required in connection with all such Subsequent Alterations or Improvements. All construction must conform to the plans and specifications as approved by Director. Prior to the commencement of any Subsequent Alterations and Improvements, District, at its sole cost and expense, shall obtain all necessary permits and approvals from all appropriate Departments of City and/or from any other governmental entity, as required by

law.

8.4 Discovery of Hazardous Materials During Construction.

District shall be solely and exclusively responsible for all costs of any investigation and remediation as is necessary as the result of the discovery during construction of Hazardous Materials contamination on the Premises or Ancillary Property.

8.5 Construction Standards.

- (a) General Construction Standards. Once commenced, construction of the AWTF and Related Facilities and any approved Subsequent Alterations and Improvements shall be diligently prosecuted to completion, subject to Unavoidable Delays, by a licensed contractor selected by District selected by District pursuant to public competitive bidding process.
- (b) Compliance with Construction Documents and Laws. District shall construct or cause to be constructed the AWTF and Related Facilities and any Subsequent Alterations and Improvements on the Premises and Ancillary Property in substantial compliance with any documents relating thereto which have been approved by Landlord and in compliance with all applicable local, state, and federal laws and regulations. Without limiting the generality of the foregoing, District shall comply with the Mitigation Monitoring and Reporting Programs that are contained in the Mitigated Negative Declaration for the AWTF and Related Facilities and with any subsequent environmental mitigation and/or monitoring program adopted by the District Board for any Subsequent Alterations and Improvements. As between Landlord and District, District shall have the sole responsibility for implementing all necessary safeguards for the protection of workers and the public.
- (c) Governmental Approvals. District shall obtain, at its sole cost and expense, all governmental reviews and approvals (including any approvals of the Director or any other City official), licenses, and permits which are, or may be, required and are necessary to install any improvements and to conduct the Authorized Activities, including, but not limited to, all plans and specifications approvals, site development reviews, development permits, and building permits. The Director's approval shall not be deemed to include the approval of any other City department or governmental or public entity, which District may be required to obtain.
- (d) Hazardous Materials. District shall incorporate into any Construction Contract for the AWTF and Related Facilities and any Subsequent Alterations and Improvements, and shall require its contractor to incorporate into any subcontracts or contracts for materials or equipment: the requirements related to prevention and mitigation of Hazardous Materials releases in conformity with **Exhibit F**.

- (e) Prevailing Wages. District shall incorporate into any Construction Contract for the AWTF and Related Facilities and any Subsequent Alterations and Improvements, and shall require its contractor to incorporate into any subcontracts, the Prevailing Wage requirements set forth in **Exhibit G**.
- (f) Bonding Improvements. At least ten (10) business days prior to the commencement of construction of the AWTF and Related Facilities or any Subsequent Alterations and Improvements having a value in excess of Twenty-Five Thousand Dollars (\$25,000), District shall provide to Landlord, copies of payment and performance bonds, be in a sum of not less than one hundred percent (100%) of the total cost of the contract or contracts for the construction, alteration, demolition or repair of the Premises or Ancillary Property and/or improvements, naming Landlord as an additional obligee, in such form as may be satisfactory to and approved by City's Risk Manager and Director, and be approved as to form by the City Attorney for City. At the discretion of City's Director and upon approval of City Attorney for City, the performance bond requirement may be waived.
- (g) Insurance. At least ten (10) business days prior to the commencement of construction of the AWTF and Related Facilities or any Subsequent Alterations and Improvements, District shall provide City with certificates of insurance acceptable to City, Insurance Coverage shall meet, at a minimum, the requirements set forth in Section II of **Exhibit H** attached hereto and incorporated herein.
- (h) Asbestos Containing Materials. No asbestos-containing materials will be installed for any purposes on or as part of the Premises or Ancillary Property, whether as part of District's or District's Parties' business operations or as District improvements, unless specifically identified on the Plans & Specifications or approved in advance in writing by Landlord.
- (i) Underground Storage Tanks. District shall not install or use any aboveground or underground storage tanks on the Premises or Ancillary Property unless specifically shown in the Plans & Specifications approved in advance, in writing, by Landlord, which approval may be withheld in Landlord's sole discretion. If Landlord approves District's installation or use of aboveground or underground storage tanks, District will be responsible for compliance with all applicable requirements and Environmental Laws, including, but not limited to, financial assurance requirements, and must furnish evidence satisfactory to Landlord of that compliance. District will also test the soil for settling and conduct appropriate tests of the tank and associated piping and equipment at the time of installation to assure that the tank has been properly installed.
- (j) No Landlord Duty. Landlord's approval, review or modification of any plans, specifications or other construction documents with regard to the Project (or any other work by District) is for Landlord's internal purposes

only. Any Landlord review or approval specifically shall exclude review for the purpose of determining whether the reviewed documents contain any defects in the design, construction, or installation of improvements and Landlord shall have no liability or responsibility for any loss, damage, or injury arising out of or in any way connected with the design, construction, or installation of the any improvements on the Premises. Likewise, Landlord's review shall specifically exclude any review for purposes of determining whether the reviewed documents comply with laws, ordinances, rules or regulations applicable to the proposed work. By approving, reviewing, modifying or otherwise commenting on any of District's plans, specification or other construction documents, Landlord shall not be deemed to make any express or implied warranty of the reviewed matters for any intended use or purpose. The scope and breadth of any review by Landlord is at Landlord's sole discretion and cannot be relied upon, or deemed for the benefit of, any other party.

- (k) Landlord Access. Representatives of Landlord shall have the right of reasonable access to the Project without charges or fees, and at normal construction hours during any construction period, for the purposes of ascertaining compliance with the terms of this Agreement. Landlord's access shall be reasonably exercised to minimize interference with District's construction and/or operations. In any site visits, Landlord shall comply with all safety rules and requirements of the contractor.
- (l) Preconstruction Meetings. Prior to beginning construction, District shall arrange one or more meetings among Landlord, District, the general contractor and District's other construction professionals and consultants as Landlord shall reasonably request be included to discuss construction matters, including construction hours, truck access, dust abatement, marshalling and storage areas and any other matters that may be of concern to Landlord with regard to the Health Clinic operation or which may be of concern to neighbors.
- (m) Protection of Landlord. Nothing in this Agreement shall be construed as constituting the request of the Landlord, express or implied, for the performance of any labor or the furnishing of any materials or any specific improvements, alterations of or repairs to the Project or any part thereof for Landlord's account or benefit by any contractor, subcontractor, laborer or materialman. Landlord shall have the right, at all reasonable times, to post, and keep posted on the Premises, any notices which Landlord may deem necessary for the protection of Landlord and of the Premises, and the Project Improvements thereon from mechanics' liens or other claims. District shall give Landlord ten (10) days prior written notice of the commencement of any work to be done on the Project to enable Landlord to post such notices. In addition, District shall make, or cause to be made, prompt payment of all monies due and legally owing to all persons doing

any work or furnishing any materials or supplies to District or any of its contractors or subcontractors in connection with the Premises and the improvements thereon.

- (n) Mechanics Liens. Although Landlord believes that California law prohibits any mechanics' lien from attaching to the Premises, nevertheless, District shall keep the Premises, the Project and the Project Improvements free and clear of all claims for mechanics' liens and other liens on account of work done for District or persons claiming under it. District agrees to and shall indemnify and save Landlord harmless against liability, loss, damages, costs, attorneys' fees and all other expenses on account of claims of lien of laborers or material suppliers or others for work performed or materials or supplies furnished to District or persons claiming under it. In the event any lien is recorded and is not removed or discharged within 30 days, without reference to its validity District shall, upon demand, furnish the bond described in California Civil Code Section 3143, or any other applicable or successor statute, which results in the removal of such lien from the Project.
- (o) Notice of Completion. Upon completion of construction of any improvements, District shall file, or cause to be filed, in the Official Records of the County of Santa Clara, a Notice of Completion (the "**Notice of Completion**") with respect to that Project Improvement.
- (p) As Built Drawings. Upon completion of each improvement, District shall provide to Director two (2) completed sets of as-built drawings, a CAD disk if District produces drawings on disks, and a break-down which shows all costs incurred for completing such improvement. District agrees that, upon the request of Director, District will inspect the Premises jointly with Director to verify the as-built drawings.

8.6 No Right to Demolish.

Notwithstanding any other provisions of this **Section 8**, District shall have no right to demolish improvements, once built, unless District shall have received the prior written consent of Landlord, it being agreed that Landlord has entered into this Agreement in material reliance on District's covenants to construct the AWTF and Related Facilities in accordance with the Plans & Specifications and to operate and maintain the AWTF and Related Facilities in accordance with the provisions of this Agreement.

SECTION 9. TITLE TO IMPROVEMENTS, ALTERATIONS AND REPAIRS

All improvements, alterations or construction of improvements made to the Premises by District (other than furniture, trade fixtures and equipment which are and remain movable and unattached to the Premises) and additions and alterations thereto made upon the Premises shall be and remain the property of District until the termination of this Agreement, at which time the improvements may, at the option of Director in accordance with **Section 24**, become the property of City. District shall execute any documents which Director feels necessary to further evidence the transfer of title to improvements from District to City, including a quitclaim deed and/or bill of sale. Any failure by District to execute any such transfer documents, however, shall not limit or preclude the transfer of title from District to City provided in this Section.

SECTION 10. UTILITY SERVICES

10.1 General.

Except as provided in **Sections 10.2 and 10.3** below, District shall secure and directly pay for any electrical, gas, water, sewer, and telephone services to the Premises utilized by the District as it may require, upon prior approval of Director. Installation of such additional utility connections shall be at District's sole cost and expense and are subject to the provisions of **Section 8** regarding District improvements. The location, relocation and coordination of all utilities and telephone facilities to service the Premises shall be subject to the prior written approval of the Director. District shall, upon request by the Director, cap off all utility connections installed by District and restore the affected areas to their original condition upon expiration or earlier termination of this Agreement.

10.2 Electrical Service.

At City's option, City may provide electrical services to District through City's existing electrical connection meter for the SBWR transmission pump station. In the event City opts to provide such electrical service, District shall be responsible for all costs and expenses associated with installing such connection and for paying rated share of the electrical bill associated with such service.

10.3 Microfiltration Return Water and Reverse Osmosis Reject.

Microfiltration return water from the AWTF shall be treated by the Plant and reverse osmosis reject (brine concentrate) shall be blended with Plant effluent in the Plant's nitrification tanks prior to discharge to San Francisco Bay.

SECTION 11. EMINENT DOMAIN

11.1 Definition of Taking.

The term "taking" as used herein means the exercise by any governmental or other permitted authority of the power of eminent domain or the exercise of any

similar governmental power and any purchase or other acquisition in lieu of condemnation, including, but not limited to, a voluntary sale or conveyance in lieu of condemnation.

11.2 Total Taking.

In the case of a taking (other than for temporary use not exceeding one (1) year) of the fee of the entire Premises, the improvements thereon, or the entire leasehold interest of District, this Agreement shall terminate as of the date on which a final judgment apportioning just compensation among the parties shall have been entered by the court with jurisdiction of the eminent domain proceeding. In the case of a taking (other than for temporary use not exceeding one (1) year) of such substantial part of the Premises or the improvements thereon as shall result, as determined by an independent member of the American Institute of Real Estate Appraisers (or if such organization or any successor or organization no longer exists, any person having knowledge and experience in valuing properties similar to the Premises and the improvements thereon, selected by District and approved by City), in the Premises and the improvements thereon remaining after such taking (even if restoration were made) being economically unsuitable for the use being made of the Premises and the improvements thereon at the time of such taking, District, at its option, may terminate this Agreement by written notice given to Landlord within sixty (60) days after such taking. Any taking of the Premises or the improvements thereon of the character referred to in this **Section 11**, or the entire leasehold interest of District, which results in the termination of this Agreement is referred to as a "total taking."

11.3 Partial Taking.

In the event of a taking of a portion of the Premises or the improvements thereon which is not a total taking (a "partial taking"), then:

- (a) This Agreement shall remain in full force and effect as to the portion of the Premises and the Improvements thereon remaining immediately after such partial taking.
- (b) District will promptly commence and complete restoration of the Premises and the improvements thereon as nearly as possible to its condition and character immediately prior to such partial taking, except for any reduction in area caused thereby; provided that, in the case of a partial taking for temporary use, District shall not be required to effect such restoration until such partial taking is terminated. Such restoration shall be performed in a good and workmanlike manner and undertaken in accordance with plans and specifications submitted to and approved by City in accordance with **Section 8** hereof and otherwise in accordance with the applicable provisions of this Agreement.

- (c) Notwithstanding any provision of this **Section 11** to the contrary, District shall have no obligation to, and may elect not to, repair or restore the improvements on the Premises and may elect to terminate this Agreement by providing written notice to City, provided however, that in the event of such termination by District, District shall have no interest in the award or other payment made on account of the taking.

11.4 Application of Awards.

Awards and other payments on account of a taking of the Premises or the Improvements thereon (less costs, fees, and expenses incurred by City, District in connection with the collection thereof) shall be applied as follows:

- (a) Net awards and payments received on account of a taking, other than (a) a taking for temporary use not exceeding one (1) year, (b) a taking of only the leasehold estate hereunder, or (c) a total taking, shall be allocated and paid in the following order of priority:
 - (1) First, to pay the cost of restoration of the Premises and the improvements thereon; provided, however, that the extent of District's obligation to restore the Premises and the improvements thereon shall be limited to the amount of the net award and payment received on account of the taking. District shall furnish to City evidence reasonably satisfactory to City of the total cost of the restoration of the Premises and the improvements thereon.
 - (2) Second, to District, in an amount equal to any expenses for the maintenance and operation of the Improvements which have accrued between the date that District loses possession pursuant to the partial taking and the date of the award, during the then current fiscal year up to the date of such partial taking, and which expenses are allocable to and remain payable with respect to the Premises and the improvements thereon which were taken by such partial taking, less net awards and payments pursuant to such taking received on account of such expenses, and less amounts compensated by business interruption or other insurance.
 - (3) Third, the balance to City.
- (b) Net awards and payments received on account of a taking for temporary use not exceeding one (1) year and relating to a period during the term of this Agreement shall be paid to 50% to City and 50% to District; provided, however, that if such taking for temporary use has resulted in any damage to or destruction of the Premises or the improvements thereon, such net awards and payments shall be first held and applied to pay the cost of restoration thereof. Net awards and payments received on account of a

taking for temporary use not exceeding one (1) year and relating to a period beyond the term of this Agreement shall be paid to City.

- (c) Net awards and payments received on account of a taking of only the leasehold estate created by this Agreement shall be paid to 50% to District and 50% to City.
- (d) Net awards and payments received on account of a total taking shall be allocated and paid in the following order of priority:
 - (1) First, at the option of City, in any amount necessary to raze remaining improvements, clear the Premises and make it safe.
 - (2) Second, to reimburse District in an amount equal to any expenses for the maintenance and operation of the Improvements which have accrued between the date that District loses possession pursuant to the total taking and the date of the award and remain payable with respect to the Premises and the improvements thereon, less net awards and payments pursuant to such taking received on account of such expenses, and less amounts compensated by business interruption or other insurance.
 - (3) Third, to City and District, in the ratio as nearly as practicable which represents each Party's capital investment in the AWTF and Related Facilities, to the extent that the award does not exceed the fair market value of the Improvements, as of the date of the total taking.
 - (4) Fourth, the balance, if any, to City.

11.5 Notice of Taking; Single Proceeding.

In case of a taking of all or any part of the Premises or the improvements thereon or the commencement of any proceeding or negotiations which might result in such taking, the party having notice of such taking or of the commencement of any such proceeding or negotiations shall promptly give written notice thereof to the other party. City and District shall jointly prosecute their claims for an award in a single proceeding. City and District shall not prosecute separate claims for an award, except that District may prosecute separate claims for awards for moving expenses or on account of the taking of any removable trade fixtures. District may recover loss of goodwill for District's business and for a relocation allowance, but only to the extent that any such separate award shall not diminish the award made to City and District with respect to their joint claim.

SECTION 12. SIGNS/ADVERTISING

District shall not install, erect, affix, paint or place any sign, lettering or other advertising device or media in, or upon any portion of the Premises or without the prior written consent of Director. Any and all such advertising device or media shall be removed by District at its sole cost and expense upon termination or expiration of this Agreement, without injury or damage to or defacement of any part of the Premises or of the Land. District will promptly restore to their original condition those portions of the Premises or Premises from which such advertising device or media have been so removed.

SECTION 13. ASSIGNMENT OR TRANSFER

13.1 No Transfer Without Landlord Consent.

District shall not assign, sublease, convey, sell, pledge, hypothecate, encumber by deed of trust, mortgage, or other instrument, or otherwise transfer this Agreement, the Premises or any part thereof, or any rights or obligation of District hereunder, whether voluntarily or by operation of law, without the prior written consent of City, which consent may be withheld in City's sole and absolute discretion.

13.2 Definition of Transfer.

A transfer within the meaning of this Section shall include, but is not limited to, the contracting or subcontracting for operation and maintenance of the AWTF or Related Facilities to any entity other than Landlord.

13.3 Consideration for Approval of Transfer.

In determining whether to consent to such a transfer, City may consider, without limitation: (i) the financial condition and responsibility of the proposed transferee; (ii) the type of activity proposed to be conducted by such transferee at the Premises; (iii) the capabilities and expertise of the proposed transferee to manage and operate the proposed activity; (iv) the past service record of the proposed transferee, (v) references of the proposed transferee; and (vi) any cost to City associated with such proposed transfer. In addition, City's consent to any proposed transfer under this Agreement may be conditioned upon, among other things, the express written assumption by the proposed transferee of District's obligations under this Agreement and/or performance of required or necessary repairs or maintenance to the Premises. City agrees that it will in good faith consider such encumbrances in favor of state or federal agencies as may be necessary to secure the grants for construction of the AWTF and Related Facilities that are referenced in the Integration Agreement.

13.4 Consent Not Waiver.

The consent of City to any transfer described in this Section shall not relieve District of its obligation to obtain the further consent of City for any subsequent transfer. Any attempt to transfer without the consent of City shall be void, and

shall constitute an Event of Default.

SECTION 14. TERMINATION OF AGREEMENT

14.1 Breach and Events of Default.

An Event of Default shall occur under this Agreement upon the occurrence of any of the following events (severally "Event of Default" and collectively "Events of Default"):

- (a) District shall have failed to pay when due any rent, fee, charge or obligation of District requiring the payment of money under the terms of this Agreement; or
- (b) District shall have failed to commence construction of the AWTF and Related Facilities by September 30, 2012.
- (c) District shall have failed to maintain any insurance required under **Section 17**; or
- (d) District shall have failed to perform any term, covenant, or condition of this Agreement to be performed by District, except those referred to in the immediately preceding three subparagraphs, and District shall have failed to cure same within ten (10) days after written notice from City; provided, however, that if the nature of District's default is such that more than ten (10) days are reasonably required for its cure, then District shall not be deemed to be in default if District commences such cure within said ten (10) day period and thereafter diligently prosecutes such cure to completion and to the satisfaction of Director; or
- (e) Any representation or warranty made by District hereunder shall have been false or misleading in any material respect as of the date on which such representation or warranty was made; or
- (f) District shall have made a general assignment of its assets for the benefit of its creditors; or
- (g) District shall have assigned or otherwise transferred its interest in this Agreement in violation of the provisions contained in this Agreement whether voluntarily or by operation of law; or
- (h) District shall have failed to occupy the Premises or to maintain continuous operations at the Premises, in each case, for any thirty (30) consecutive days, without approval by City, have been dispossessed by process of law or otherwise, or have otherwise abandoned the Premises; or
- (i) A court shall have made or entered any decree or order: (i) adjudging

District to be bankrupt or insolvent; (ii) approving as properly filed a petition seeking reorganization of District or an arrangement under the bankruptcy laws or any other applicable debtor's relief law or statute of the United States or any state thereof; (iii) appointing a receiver, trustee or assignee of District in bankruptcy or insolvency or for its property; (iv) directing the winding up or liquidation of District and such decree or order shall have continued for a period of sixty (60) days; or (v) District shall have voluntarily submitted to or filed a petition seeking any such decree or order; or

- (j) The sequestration or attachment of or execution or other levy on District's interest in this Agreement or the Premises or any improvements located thereon shall have occurred and District shall have failed to obtain a return or release of such property within thirty (30) days thereafter, or prior to sale pursuant to such levy, whichever first occurs; or
- (k) The revocation or termination of any certificate, permit, franchise, approval, authorization or power necessary for District to lawfully conduct the operations which District is required or permitted to conduct on the Premises or on the Premises; or
- (l) Any lien shall be filed against the Premises because of any act or omission of District, and shall not be discharged or contested by District in good faith by proper legal proceedings within twenty (20) calendar days after receipt of notice thereof by City.

14.2 Remedies for Default.

Upon an "Event of Default", City shall have the following remedies, in addition to all other rights and remedies provided by law, equity or otherwise under this Agreement, to which City may resort cumulatively, or in the alternative:

- (a) City may, at any time without notice and without any obligation to do so (implied or otherwise), and upon condition that it be for the account and at the expense of the District, and without a waiver of such breach, perform any act which if performed by District would otherwise cure the breach. If in so doing City is required or elects to pay any monies or do any acts which will require the payment of any monies or the incurring of any costs or expenses, District covenants to pay to City upon demand by City the sum or sums of money paid or incurred by City, together with interest at the rate of one percent (1%) per month plus costs and damages, as part of its rental fee due on the first (1st) day of the month which immediately follows City's demand therefore. The demand for any payment by City shall be prima facie evidence that the expense incurred was necessary and reasonable and that such expense was incurred by City on behalf of District.
- (b) In addition to any other remedy that City may have, City may, at its

election, terminate this Agreement upon written notice of termination in which event this Agreement shall terminate on the date set forth in such notice. Any termination under this paragraph shall not relieve District from the payment of any sums then due to City or from any claim for damages or rent previously accrued or then accruing against District. In no event shall any one or more of the following actions by City, in the absence of a written election by City to terminate this Agreement, constitute a termination of this Agreement:

- (i) Appointment of a receiver or keeper in order to protect City's interest hereunder; or
 - (ii) Any other action by City or its agents intended to mitigate the adverse effects of any breach of this Agreement by District, including, without limitation, action to maintain and preserve the Premises or any action taken to relet the Premises or any portions thereof for the account of District and in the name of District.
- (c) This Agreement shall not terminate following an Event of Default and an abandonment of the Premises unless City gives District written notice of its election to terminate this Agreement. No act by or on behalf of City intended to mitigate the adverse effect of such breach, including those described by the immediately preceding subparagraphs (i) and (ii), shall constitute a termination of District's right to possession unless City gives District written notice of termination.
- (d) In the event City terminates this Agreement, City shall be entitled to damages in the following sums:
- (i) The worth at the time of award of all unpaid rental fees and other fees which have been earned at the time of termination;
 - (ii) The worth at the time of award of the amount by which the unpaid rental fees and other fees which would have been earned after termination until the time of award exceeds the amount of such rental fee or other fee loss that District proves could have been reasonably avoided;
 - (iii) Any other amount necessary to compensate City for all detriment or damage to the Premises proximately caused by District's failure to perform its obligations under this Agreement or which in the ordinary course of things would be likely to result therefrom, to fulfill its obligation to return the Premises to the City in the condition existing as of the date this Agreement was entered into, reasonable wear and tear excepted;
 - (iv) The "worth at the time of award" of the amounts referred to in subparagraphs (i) and (ii) above is computed by allowing interest at the rate of twelve percent (12%) per annum. The "worth at the time of award" of the amount referred to in subparagraph (iii) above is computed by discounting such amount at the discount rate of the

Federal Reserve Bank of San Francisco at the time of award plus one percent (1%).

- (e) No payment by District, or receipt by City, of a lesser amount than any rent, fee, charge or other amount due by District hereunder shall be deemed to be other than on account of the earliest rent, fee, charge or other amount due, nor shall any endorsement or statement on any check from District, or letter accompanying any check or payment, be deemed an accord and satisfaction. City may accept any such check or payment without prejudice to City's right to recover the balance of such rent, fee, charge or other amount or to pursue any other right or remedy available to City.
- (f) No option, right, power, remedy or privilege of City shall be construed as being exhausted or discharged by the exercise thereof in one or more instances.

14.3 Automatic Termination.

This Agreement shall automatically terminate as of the effective date of termination of the Cooperative Agreement.

SECTION 15. WAIVER OF BREACH

The waiver by City of any breach of any term, covenant, condition or provision herein contained shall not be deemed to be a waiver of any subsequent breach of such term, covenant or condition. The consent or approval by City to any act of District requiring City's approval shall not be deemed to waive or render unnecessary the need for City's consent or approval to or of any subsequent similar act of District. The subsequent acceptance of any fee, rent or charges hereunder by City shall not be deemed to be a waiver of any preceding breach by District of any term, covenant or condition of this Agreement other than the failure of District to pay the particular rent, fee or charge so accepted, regardless of City's knowledge of such preceding breach at the time of the accepting of such rent, fee or charge. No waiver, consent or approval by City shall be effective unless made by a duly authorized representative of City.

SECTION 16. INDEMNITY AND ASSUMPTION OF RISK

16.1 Indemnification.

- (a) Except as provided in Section 16.1 (b), 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 due to the willful or negligent acts (active or passive) or omissions of their respective officers, employees or agents in conducting activities pursuant to this Agreement or failing to in accordance with this Agreement. 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.

- (b) District, for and on behalf of its directors, officers, employees and agents, covenants and hereby agrees to indemnify, defend, protect and hold harmless City, its officers, employees, contractors and agents, from and against any and all claims, demands, damages, obligations, liabilities, losses, costs, expenses, penalties, suits or judgments, at any time received, incurred or accrued by City, its officers, agents, employees, and contractors arising out of or resulting in whole or in part from any act (or failure to act) of District, its officers, employees, contractors, agents, permittees or invitees, or which results from their noncompliance with any Laws respecting the construction of the AWTF and Related Facilities or the construction of any Subsequent Alterations and Improvements or the condition, use, occupation or safety of the Premises, or any part thereof, or District's failure to do anything required under this Agreement during construction of the AWTF and Related Facilities or the construction of any Subsequent Alterations and Improvements, except as may arise from the active negligence or the willful misconduct of City, its officers, employees or agents. City's right to full indemnity under this Section 16.1(b) shall arise notwithstanding that principles of joint, several or concurrent liability or comparative negligence, might otherwise impose liability on City pursuant to statutes, ordinances, regulations or other Laws. All of District's obligations under this Section are intended to apply to the fullest extent permitted by law and shall survive the expiration or sooner termination of this Agreement. In an action or claim against City in which District is defending City, City shall have the right to approve legal counsel providing City's defense. The provisions of **Section 32** regarding the Americans With Disabilities Act of 1990 ("ADA") shall not limit District's indemnification under this provision.

16.2 Assumption of Risk.

District agrees to and covenants that it shall voluntarily assume any and all risk of loss, damage or injury to the person or property of District, its directors, officers, employees, agents, and contractors which may occur in, on, or about the AWTF, Related Facilities, the Premises or Ancillary Property as a result of natural conditions that exist on the Premises and conditions associated with the operation of the Plant, except such loss, injury, or damage as may be caused by the sole active negligence or the willful misconduct of City, its officers, employees or agents. Nothing contained in this Section 16.2 is intended to impede District from pursuing any claims against third parties.

SECTION 17. INSURANCE

17.1 Insurance Requirements.

District agrees to have and maintain the policies set forth in **Exhibit G**, entitled "Insurance", which is attached hereto and incorporated herein. All policies, endorsements, certificates, and/or binders shall be subject to review and approval by the Director of Human Resources or the Director's authorized designee ("Risk Manager") of the City of San José as to form and content. These requirements are subject to amendment or waiver if so approved in writing by the Risk Manager. These insurance requirements shall be subject to periodic review by City's Risk Manager. Should the Risk Manager recommend any change in any coverage such recommendation shall be discussed by the Technical Working Group and reviewed by the Recycled Water Policy Advisory Committee.

17.2 Application of Insurance Proceeds.

All amounts that shall be received under any builder's risk or property insurance policy specified in **Exhibit G** above, shall be first applied to the payment of the cost of repair, reconstruction or replacement of any buildings or improvements, or furniture, fixtures, equipment and machinery, that is damaged or destroyed. Any amount remaining from the proceeds of any such insurance funds, after the repairing, reconstructing and replacing of any buildings or improvements, or furniture, fixtures, equipment and machinery, as herein required, shall be immediately paid to and be the sole property of District; provided that, if any governmental law or regulation governing land use prohibits the restoration or reconstruction of the buildings or improvements damaged or destroyed to their pre-casualty state, any excess insurance proceeds over restoration or reconstruction costs that are the consequence of such prohibition shall be allocated pursuant to the priorities set forth in **Section 11.4(d)** above. If said insurance proceeds shall be insufficient in amount to cover the cost of repairing, reconstructing or replacing any buildings or improvements, or furniture, fixtures, equipment and machinery, as herein required, District shall promptly pay any deficiency.

SECTION 18. BAILEE DISCLAIMER

It is hereby understood and agreed that City in no way purports to be a bailee, and is therefore not responsible in any way for any damage to the property of District, District's contractors, agents, employees and invitees.

SECTION 19. RIGHT TO ENTER

City reserves and shall have the right by its officers, employees, agents and contractors, and co-owner and Plant contract agency representatives to enter into and upon the Premises at all reasonable times (and in emergencies at all times):

- (a) To make any inspection, Director may deem expedient or desirable for the proper enforcement of the covenants, conditions, restrictions, limitations and provisions of this Agreement;
- (b) To install, construct and maintain, repair, replace and use any and all public utilities, sewer lines, drainage lines, water lines, water systems, irrigation lines, electrical lines, fuel lines and any municipal uses and appurtenances thereto, either above, on or below the surface of, in, along and/or across the Premises;
- (c) To otherwise maintain the Premises, the building in which the Premises is located and the Premises, or to do any other repair, maintenance, alteration or removal under the conditions set forth herein; or
- (d) To post notices of nonresponsibility for improvements, alterations or repairs if and when City shall desire to do so.

SECTION 20. TAXES; ABSENCE OF LIENS

20.1 Payment by District.

Although the Parties believe that no taxes should be payable as a result of District's occupancy and use of the Premises and Ancillary Property under California law, District agrees to pay before delinquency, and without notice or demand, any and all taxes, (including without limitation any gross receipts, income tax, real property possessory interest tax or excise tax) assessments, licenses, fees, possessory interest taxes and other public charges or penalties which shall be levied, imposed, or assessed by any governmental body (collectively "taxes") upon any of District's leasehold interest, upon District's business, or upon District for the privilege of conducting business within the Premises, or upon any other property of District within the Premises. Payment of any and all taxes shall not reduce the amount of rentals, charges or any other fee that is required to be paid by District to City under the provisions of this Agreement.

20.2 No Liens.

District shall not permit or suffer any liens or encumbrances to be imposed upon the Premises or any building or structure thereon, as a result of its activities without promptly discharging the same; provided, however, that District may, if it so desires, contest the legality of same following prior written notice to City. In the event of a contest, District shall provide a bond in an amount and in a form acceptable to City immediately following request therefore by City.

2034 Indemnity for District's Failure to Comply.

District shall protect, defend, indemnify and hold City, including the Premises, and any Agreement hold improvements now or hereafter on the Premises, free

and harmless from and against any liability, loss, or damage resulting from any taxes, assessments, or other charges required by this Agreement to be paid by District and from all interests, penalties, and other sums imposed thereon and from any proceedings to enforce collection of any such taxes, assessments, or other charges.

20.4 Payment by City.

If District fails to pay any tax or charge required by this Section to be paid by District, City may, but is not obligated to, on five (5) days prior written notice to District, pay, discharge, or adjust such tax or charge for District's benefit. In such event, District, on receipt of written demand of City, shall reimburse City promptly for the full amount paid by City in paying, discharging or adjusting such tax or charge together with interest thereon from its due date at the rate of one percent (1%) per month until paid, plus pay any penalties.

20.5 Contest of Tax or Charge.

20.5.1 Notice of Contest. In the event that District desires, in good faith, to contest or review by appropriate legal or administrative proceedings any tax or charge specified hereunder, District, at least ten (10) days prior to the delinquency of any such tax or charge or within the applicable period of time allowed by law, shall give City written notice of its intention to contest such tax or charge.

20.5.2 Procedure for Contest. District may withhold payment of the tax or charge being contested if, but only if, nonpayment is permitted during the pendency of such proceedings without the foreclosure of any tax lien or the imposition of any fine or penalty. The contest shall be prosecuted to completion (whether or not this Agreement has expired or terminated) without delay at District's sole cost and expense.

20.5.3 Payment Upon Final Determination. Within the applicable period of time allowed by law after the final determination of the amount of tax due, District shall pay the amount determined to be due, together with all costs, expenses and interest (whether or not this Agreement has then expired or terminated).

20.5.4 Failure to Pay Constitutes Event of Default. The failure to pay any tax or charge hereunder shall constitute an Event of Default, and the obligation to pay the same shall survive the termination of this Agreement.

SECTION 21. QUIET ENJOYMENT

Subject to the provisions of this Agreement, City covenants that District, on paying the rentals and otherwise performing its covenants and other obligations hereunder, shall have quiet and peaceable possession of the Premises.

SECTION 22. DAMAGE OR DESTRUCTION

22.1 Destruction Covered by Insurance.

In the event improvements on the Premises are damaged by any casualty which is covered under an insurance policy required to be maintained pursuant to this Agreement, District shall repair such damage as promptly as reasonably possible in accordance with **Section 17.2** and this Agreement shall continue in full force and effect, without any abatement of rent or payment of any damages or other amounts by City to District.

22.2 Destruction Not Covered by Insurance.

In the event the improvements on the Premises are damaged by any casualty not covered under an insurance policy required to be maintained pursuant to this Agreement, then City (through Director) may, at City's option, give written notice to District within thirty (30) days after the date of occurrence of such damage, of City's intention to cancel and terminate this Agreement as of the date of the occurrence of the damage. Regardless of whether or not City elects to terminate this Agreement, if such damage is caused by an act or omission of District, its agents, servants or employees, then District shall promptly repair such damage, at its sole cost and expense, in accordance with **Section 7.1**.

22.3 Survival of Obligation to Repair.

District's obligation pursuant to this Section to repair any damage or destruction that occurs during the term of this Agreement shall survive the Expiration Date or earlier termination of this Agreement.

SECTION 23. COMPLIANCE WITH LAWS

District shall, at its sole cost and expense, comply with and conform to all Laws applicable to or affecting, directly or indirectly, District, the Premises, or District's Authorized Activities under this Agreement. Further, District shall not do anything in, on or about the Premises, or bring anything that is prohibited by a standard form of fire insurance policy or that in any way would increase or affect the then existing rate of fire or other insurance required to be carried upon the Premises, or any part thereof, or any of their contents, or that will cause a cancellation of any insurance policy covering the Premises or any part thereof, or any of their contents. District agrees to observe and obey all rules and regulations adopted by City from time to time with respect to the use of the Premises. District shall be solely and fully responsible for compliance with the American with Disabilities Act as provided in **Section 32** below. The judgment of any court of competent jurisdiction, or the admission of District in any action or proceedings against District, whether City be a party thereto or not, that District has violated any such law, statute, ordinance, rule, regulation, order or requirement in the use of the Premises or the Premises shall be conclusive of that fact as between City and District.

In connection with its operations in or about the Premises, District shall pay to City all

amounts, fees, charges and taxes due City under any ordinance, resolution or other applicable law governing activities in or about the Premises.

SECTION 24. SURRENDER OF PREMISES

- 24.1** On the last day, or sooner termination of this Agreement, District shall quit and surrender, in good condition and repair (ordinary wear and tear excepted), the Premises and Ancillary Property and alterations, additions, improvements and betterments which may have been made in or to the Premises or ancillary Property, except: (i) movable and unattached furniture and trade fixtures installed at the expense of District; and (ii) such other property, if any, which District is expressly authorized in writing by Director to remove from the Premises. The Premises shall be surrendered to City in vacant condition, with no individuals, persons, or entities in occupancy of the Premises.
- 24.2** District shall remove any construction, betterment, alterations or additions which may have been made by District upon the Premises and Ancillary Property and restore the Premises and Ancillary Property to the condition they were in when received (reasonable use and wear thereof excepted), unless Director, at the option of City, determines that such construction, betterment, alterations or additions which may have been made by District shall remain. If Director should so desire, then District shall remove any such construction, betterment, alterations or additions and restore the Premises at its sole cost and expense. District shall ascertain in writing from Director not less than thirty (30) days prior to the end of the term of this Agreement whether Director desires to retain any construction, betterment, alterations or additions which may have been made by District upon the Premises. Any failure by District to so notify Director shall not relieve District of its obligations under this Section.
- 24.3** District shall, on or before the end of the term of this Agreement, remove all personal property owned by it (except such as it may be required to surrender under the provisions of the two immediately preceding paragraphs) from the Premises. All such property not so removed prior to any vacation, abandonment, dispossession or surrender of the Premises shall be deemed, at the option of Director, to have been abandoned by District. City may, at the option of Director, retain any such property so abandoned by District or remove and/or dispose of such property; District shall reimburse City for any costs or expenses incurred by City in removing and/or disposing of such property promptly upon demand by City.
- 24.4** Upon expiration or termination of this Agreement and upon the request of Landlord, District will perform all of the following activities at District's sole expense:
- (i) an environmental assessment of the Premises to evaluate the environmental condition of the Premises and any potential environmental

liabilities and in accordance with **Exhibit F**;

- (ii) all remedial or other work identified in the environmental assessment in accordance with **Exhibit F** and all applicable Environmental Laws;
- (iii) all corrective, remedial, repair, or other work necessary to correct any alleged violations, deficiencies, or hazards noted by any environmental governmental agency; and
- (iv) all steps necessary to terminate, close, or transfer all environmental permits, licenses, and other approvals or authorizations for the Premises or for activities, equipment, or conditions on the Premises, in accordance with all Environmental Laws. District will also obtain and provide to Landlord the written approval or verification of the satisfactory completion of the termination, closure, or transfer from each Agency with jurisdiction over the environmental permit, license, or other approval.

SECTION 25. HAZARDOUS MATERIALS - PROHIBITIONS AND RESTRICTIONS

District shall at all times comply with the provisions of this Agreement, including those provisions of **Exhibit F**, regarding Hazardous Materials.

SECTION 26. STATEMENTS, RECORDS AND INFORMATION

District represents and warrants to City that all statements, records, reports, certifications and other information submitted by District to City have been true and accurate and covenants that all future statements, records, reports, certifications and other information submitted by District to City will be true and accurate in all respects.

SECTION 27. GIFT

District is familiar with City's prohibition against the acceptance of any gift by a City officer or designated employee, which prohibition is found in Chapter 12.08 of the San José Municipal Code. District agrees not to offer any City officer or designated employee any gift prohibited by said Chapter. The offer or giving of any gift prohibited by Chapter 12.08 shall constitute a material breach of this Agreement by District. In addition to any other remedies City may have at law or in equity, City may terminate this Agreement for such breach as provided in **Section 16** of this Agreement.

SECTION 28. HEIRS, SUCCESSORS AND ASSIGNS

All of the covenants, agreements, conditions and undertakings herein contained shall apply to and bind the representatives, heirs, executors, administrators, successors and/or assigns of all the parties hereto.

SECTION 29. REPRESENTATIONS AND WARRANTIES

If District is a partnership or joint venture, at least two (2) partners or each of the joint

ventures, as the case may be, shall execute this Agreement on behalf of District.

SECTION 30. MECHANICS' AND OTHER LIENS

District shall promptly discharge or remove by bond or otherwise prior to foreclosure thereof, any and all mechanics', materialmen's and other liens for work or labor done, services performed, materials, appliances, teams or power contributed, used or furnished to be used in or about the Premises for or in connection with any operations of District, any alterations, improvements, repairs or additions which District may make or permit or cause to be made, or any work or construction by, for or permitted by District on or about the Premises, and to save and hold Landlord and all of the Premises and all buildings and improvements thereon free and harmless of and from any and all such liens and claims of liens and suits or other proceedings pertaining thereto. District covenants and agrees to give Landlord written notice not less than twenty (20) days in advance of the commencement of any construction, alteration, addition, improvement or repair costing in excess of Twenty Five Thousand Dollars (\$25,000) in order that Landlord may post appropriate notices of Landlord's non-responsibility.

SECTION 31. LIMITATION OF LANDLORD'S LIABILITY

In the event of any transfer of Landlord's interest in this Agreement, the Landlord herein named (and in case of any subsequent transfer, the then transferor) shall be automatically freed and relieved from and after the date of such transfer of all personal liability for the performance of any covenants or obligations on the part of Landlord contained in this Agreement thereafter to be performed; provided, however, that any funds in the hands of Landlord or the then transferor at the time of such transfer, in which District has an interest shall be turned over to the transferee and any amount then due and payable to District by Landlord or the then transferor under any provision of this Agreement shall be paid to District; and provided, further, that upon any such transfer, the transferee shall expressly assume, subject to the limitations of this **Section 31**, all of the agreements, covenants and conditions in this Agreement to be performed on the part of Landlord, it being intended hereby that the covenants and obligations contained in this Agreement on the part of Landlord shall, subject as aforesaid, be binding on each Landlord, its successors and assigns, only during its period of ownership.

SECTION 32. AMERICANS WITH DISABILITIES ACT

District shall be solely and fully responsible for complying with the ADA in connection with: (i) the Premises or any portion thereof and its operations thereon; (ii) removing physical barriers on the Premises; (iii) providing auxiliary aids and services for use of the Premises, where necessary or required; and (iv) modifying its policies, practices and procedures to comply with the ADA, as it and any implementing regulations may be amended or modified from time to time. District shall develop a workplan to correct or avoid any violations or non-compliance with the ADA. District shall deliver to the City, upon City's request, a copy of each such report and workplan. City's approval of or acceptance of any aspect of District's activities under this Agreement shall not be

deemed or construed in any way as a representation that such item, activity or practice complies with the ADA. District agrees to indemnify, defend and hold the City harmless from any and all costs incurred by City with respect to District's failure to comply with the ADA.

Nothing herein shall relieve District from the obligation to seek and obtain City's consent prior to commencing any construction, alteration or renovation pursuant to **Section 8 hereof**.

SECTION 33. NO RELOCATION BENEFITS

District shall not acquire, as a result of this Agreement and District's use and occupancy of the Property, any right to any relocation benefits or payments, whatsoever. District understands that such relocation assistance may include, without limitation, certain moving expenses, business re-establishment expenses, and expenses incurred in searching for a replacement business. District does hereby, in consideration of City's execution of this Agreement, expressly and knowingly waive any claim to relocation assistance (including without limitation under California Government Code Section 7260, et seq.) in connection with the Agreement and/or District's occupancy of the Property. District further expressly acknowledges that City is relying on this waiver in approving the Agreement. To the extent that District sublets the Property or permits its occupancy by any other party, District agrees that it will indemnify and hold harmless City from any claim for relocation benefits by any sub-District or other occupant.

SECTION 34. MISCELLANEOUS

34.1 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.

34.2 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.

34.3 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.

34.4 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	WPCP Property
Exhibit B	AWTF Premises
Exhibit C	Ancillary Property
Exhibit D	Special Terms and Conditions for Use of Ancillary Property
Exhibit E	AWTF Operational Parameters
Exhibit F	Hazardous Materials
Exhibit G	Prevailing Wage Requirements
Exhibit H	Insurance Requirements
Exhibit I	Memorandum of Ground Lease

34.5 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 District 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.

34.6 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.

34.7 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 City's entry into this Agreement, and any breach hereof by District shall be deemed to be a material breach. Each term and provision of this Agreement to be performed by District shall be construed to be both a covenant and a condition.

34.8 Modification of Agreement.

This Agreement shall not be modified, unless the parties first agree to and approve of such modification in writing.

34.9 No Assumption.

The review, approval, inspection, examination or consent of City of or to any item to be reviewed, approved, inspected, examined or consented to by City shall not constitute the assumption of any responsibility by City for either accuracy or sufficiency of any item or the quality or suitability of such item for its intended use, but rather for the sole purpose of protecting City's interests. No third parties, including District or persons claiming under District, shall have any rights hereunder resulting therefrom or otherwise.

34.10 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.

34.11 Recordation.

Upon request of District and provision of a legal description of the Premises, City agrees to execute, acknowledge and deliver to City a short form of memorandum of this Agreement, in the form attached hereto as **Exhibit I**. In the event of any amendment to this Agreement, District shall, upon request of City, execute, acknowledge and deliver to City a short form of memorandum of this Agreement, as amended, in a form satisfactory to Director and suitable for recording. In no event shall this Agreement or any memorandum hereof be recorded without the prior written consent of City, and any attempt to do so shall constitute a default by District.

34.12 Resolutions.

District shall submit a copy of any corporate resolution, if requested by City, which authorizes any director or officer to act on behalf of District or which authorizes District to enter into this Agreement.

34.13 Severability.

If a court of competent jurisdiction finds or rules that any provision of this Agreement is void or unenforceable, the remaining provisions of this Agreement shall remain in effect.

34.14 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.

34.15 District Not an Agent of City.

District is not an agent, contractor or employee of City and nothing in this Agreement nor any action of District shall be construed in any way to constitute District as an agent, contractor, or employee of City for any purpose.

34.16 Time of Essence.

Time is of the essence of this Agreement and each of its provisions, and failure to comply with this provision shall be a material breach of this Agreement.

34.17 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.

34.18 Distinction from Regulatory Approval.

District acknowledges that, at any time when the City of San José is the Landlord hereunder, Landlord shall have certain governmental regulatory authority over the Property. District agrees and expressly acknowledges that any approval or consent required or permitted hereunder by the City of San José, acting in its capacity as Landlord under this Lease, (1) is distinct from any approval or consent of such entity acting in the capacity of governmental regulatory authority, whether or not related to the same matter, and (2) shall not compromise, diminish or in any way limit the authority of such entity to give, deny or condition its approval or consent when acting as a governmental regulatory authority.

34.19 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.

34.20 Survival of Obligations.

The obligations of **Sections 16, 25 and 26** shall survive the expiration or termination of this Agreement.

SECTION 35. 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, 10th 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

All notices shall be sufficiently given and served upon the other party if hand-delivered or 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.

APPROVED AS TO FORM

MOLLIE DENT
Senior Deputy City Attorney

APPROVED AS TO FORM

EMILY J. CÔTÉ
Senior Assistant District Counsel

“CITY”

CITY OF SAN JOSE, a municipal corporation

LEE PRICE, MMC
City Clerk

“DISTRICT”

SANTA CLARA VALLEY WATER DISTRICT, a public entity

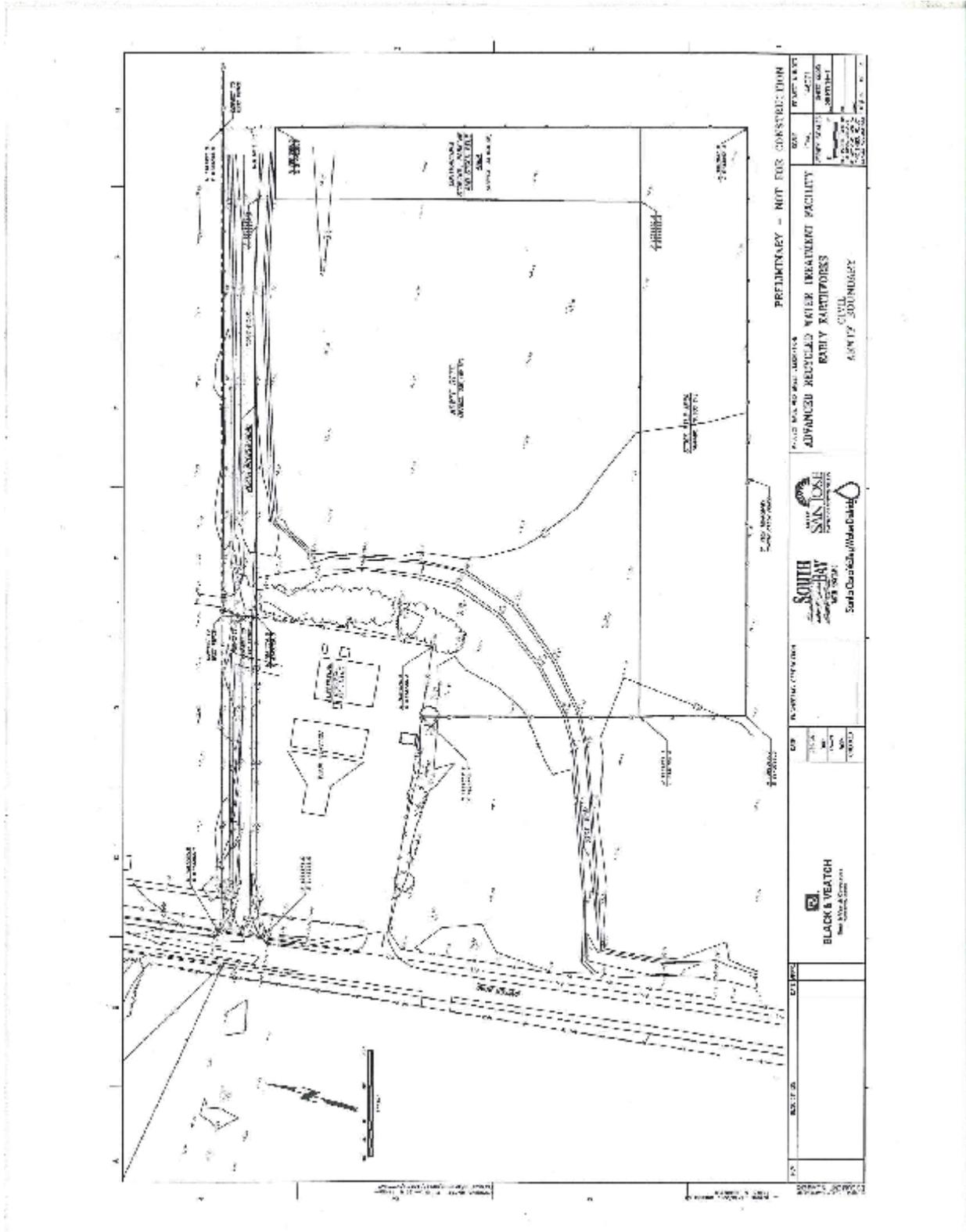
BEAU GOLDIE
Chief Executive Officer

EXHIBIT A



Figure 2-3
Proposed Pipe Alignments

EXHIBIT C



C-1

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Council Agenda: 03/02/2010

Item No.: 7.2d

DRAFT – Contact the Office of the City Clerk at (408) 535-1260 or CityClerk@sanjoseca.gov for final document.

Exhibit D
Special Terms and Conditions for Use of Ancillary Property

1. The Related Facilities shall be located on the Ancillary Property so as to avoid conflict and interference with existing and planned Plant facilities, improvements and uses. Final location of the Related Facilities and the boundaries of the Ancillary Property shall be subject to approval of City's Director.
2. Use of the Ancillary Property is subject to all prior unexpired permits, agreements, easements, privileges, or other rights, whether recorded or unrecorded, in the area specified in this permit. District shall make arrangements with holders of such prior rights.
3. The right to use the Ancillary Property is valid only as to the District and is not transferable.
4. No access shall be made until City has received a schedule for the proposed access, and a list of the names of all DISTRICT employees and contractors who will be entering the City Property under this Agreement
5. DISTRICT shall be responsible for location and protection of all underground utilities and for avoiding any conflicts with any Plant facilities and/or operations. All underground utilities will be located by the DISTRICT and communicated to the City, and the method of filling the borehole will be disclosed. The final location of the borehole and method of drilling shall be approved by City's Deputy Director Water Pollution Control or designee on behalf of the City before drilling is to commence. As required by law, Underground Service Alert will be notified a minimum of 48 hours before any field work begins.
6. The right to use the Ancillary Property may be revoked, modified or canceled at any time by the City when required for Plant purposes; provided that City shall make all reasonable efforts to identify an alternate location on City property for any affected the Related Facilities.
7. Upon written notice of cancellation or revocation of the right to use the Ancillary Property, District shall restore City's Property to the condition prior to the granting of the right to use the Ancillary Property and then shall vacate City property. Should District neglect to restore the premises or structures to a satisfactory condition, the District may perform such work or have work performed, and District agrees to reimburse the City for all costs of the work so performed upon receipt of a statement therefore.
8. Trench safety has not been checked and is not implied with this grant of right to use. Compliance with Section 6705 of the Labor Code concerning trench excavation and the obtaining of a "Permit to Excavate" issued by the

Division of Occupational Safety and Health as required by Labor Code Section 6500 shall be the responsibility of District.

9. District shall be responsible for compliance with California Labor Code Section 6300 (and following).

10. All backfill on the Ancillary Property shall be compacted to at least 90 percent relative compaction which shall be determined using maximum dry density based on ASTM D1557 laboratory test procedure. Field dry density and water content of soil should be determined following the ASTM D1556 or ASTM D2922 / ASTM D3017 standard procedure as applicable.

11. District will be responsible for verifying the location of the proposed work and facilities in the field.

12. District will be responsible to adjacent property owners for disturbances, including but not limited to noise and dust, caused by operations permitted hereunder.

13. District shall implement effective dust control measures to prevent dust and other airborne matter from leaving the site.

14. District will be responsible to return the City's Property to its original condition or better upon completion of the construction activity.

15. If weather or other adverse circumstances cause a public hazard or would interfere with Plant operations, use of the Ancillary Property shall be immediately discontinued.

16. No access will be allowed during or after storm events when the City Property is prone to damage. Before entering City Property, District shall assess the structural condition of any access roads/soil to ascertain whether or not the roadway/soil can support vehicles. Only if it is determined that the material is sound can vehicular traffic enter City property. If damage occurs, the District is required to report the damage to the City's Inspector within 48 hours of it occurring. District shall submit a work plan and schedule outlining the repair measures to be installed within one week of the damage occurring.

17. Construction materials and wastes, including drill cuttings shall be hauled offsite.

18. District shall submit to the City a fully completed "Import Material Certification Form" for any soils that will be placed or stored on City Property that do not originate from within the legal boundaries of such right of way.

19. Any damage caused to Plant structures, improvement, vegetation or landscaping including, but not limited to , fencing, maintenance road surfacing, and pipelines by reason of exercise of the right to use the

Ancillary Property shall promptly be repaired at the cost of District to the satisfaction of the District. If the repair is not so performed by District, City shall have the right (but not the obligation) to perform the necessary repair. Upon receipt of the notice of repair costs, District agrees to promptly reimburse City for the repair costs incurred, plus an additional amount equal to ten percent (10%) thereof for administrative overhead. The demand for payment by City shall be prima facie evidence that the expense incurred was necessary and reasonable and that such expense was incurred by City on behalf of District.

20. District shall implement all measures necessary to mitigate environmental impacts of its activities, including but not limited to: dust control measures to avoid air quality impacts from fugitive dust; specific measures to avoid burrowing owl habitat and biological impacts, including but not limited to, conducting no more boring activities within fifty-(50) feet of any existing owl burrow; specific measures to avoid impacts to cultural resources, including but not limited to, having a qualified archaeologist onsite during the testing to examine any materials exposed during testing and make specific recommendations regarding appropriate mitigation that the District shall perform. In the event that any archaeological artifacts or human remains are encountered, all work shall stop immediately within fifty-(50) feet of the find, the City shall be contacted, and the archaeologist consulted. In the event of the discovery of any human remains, the County Coroner shall also be contacted to determine the appropriate disposition of the remains (to ensure there will be no impact on Native American or early historic era burials); and all measures identified in District mitigated negative declaration.

21. District agrees to waive, release, defend, indemnify and hold harmless City and its officers, agents, and employees against all claims for loss, damage, or liability arising out of the exercise of rights granted hereunder by District, its employees, agents, or contractors, whether for loss of or damage to property, or injury to or death of persons, including but not limited to any claims related to Hazardous Materials generated, stored, used, or disposed of by the Plant, provided however, DISTRICT shall not be responsible for any cleanup of Hazardous Materials not generated, stored, used, or disposed of, by DISTRICT. **DISTRICT ACKNOWLEDGES THAT IT IS AWARE THAT EXERCISE OF THE RIGHTS GRANTED MAY EXPOSE ITS EMPLOYEES, AGENTS, AND CONTRACTORS TO INHERENTLY DANGEROUS ACTIVITIES CONDUCTED BY THE CITY ON THE CITY PROPERTY AND DISTRICT IS VOLUNTARILY EXERCISING THE RIGHTS HEREBY GRANTED WITH KNOWLEDGE OF THE DANGER INVOLVED.**

22. NOTHING CONTAINED IN THIS PERMIT SHALL BE CONSTRUED AS A RELINQUISHMENT OF ANY RIGHTS NOW HELD BY THE CITY.

D-4

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Council Agenda: 03/02/2010

Item No.: 7.2d

DRAFT – Contact the Office of the City Clerk at (408) 535-1260 or CityClerk@sanjoseca.gov for final document.

EXHIBIT E

OPERATIONAL PARAMETERS

TREATMENT STRATEGY

Two different strategies were developed to provide additional flexibility for the SBWR system and to increase the tertiary filter capacity at the SJ/SC WPCP during winter periods. The summer period is defined from May through November and the winter period from December through April.

Summer Operation

Under the summer operation mode, the AWTF would utilize the microfiltration/reverse osmosis/ultraviolet (MF/RO/UV) treatment train to produce high-purity recycled water, which would be blended with SJ/SC WPCP tertiary effluent to meet the summer recycled water demands and the target SBWR TDS goal of 500 mg/L. The recycled water supply sources for the SBWR system during summer operations are summarized in Table 1.

Table 1: SBWR Supply Sources – Summer Operation

Supply Source	Projected Year 2010 Flows, mgd		Projected Year 2015 Flows, mgd		Projected Year 2020 Flows, mgd	
	Avg.	Max Day	Avg.	Max Day ¹	Avg.	Max Day ¹
ARWTF MF/RO/UV	6.50	8.00	8.00	8.00	8.00	8.00
SJ/SC WPCP Tertiary Effluent	6.70	12.70	9.50	19.40	13.80	26.10
Total Combined Flow	13.20	20.70	17.50	27.40	21.80	34.10

¹ ARWTF MF/RO/UV capacity may be less than desired to meet target SBWR TDS.

For summer operations, nitrified secondary effluent from SJ/SC WPCP conveyed to the AWTF would be pretreated by MF/UF, then demineralized through the RO process, and disinfected through UV disinfection. The AWTF product water would be stored in a 2.25 MG (useable volume) Product Water Storage Tank and flow paced, using a flow control valve, to the SBWR Transmission Pump Station (TPS) to blend with SJ/SC WPCP tertiary effluent.

Winter Operation

The low recycled water demand during the winter period (December-April) would enable the AWTF to meet this demand on its own, without blending with the SJ/SC WPCP tertiary effluent and also capable of generally meeting a lower SBWR TDS goal of 400 mg/L. This would increase the tertiary filter capacity at the SJ/SC WPCP during winter periods. The recycled water supply sources for the SBWR system during winter

operations are summarized in Table 2.

Table 2: SBWR Supply Sources – Winter Operation

Supply Source	Projected Year 2010 Flows, mgd		Projected Year 2015 Flows, mgd		Projected Year 2020 Flows, mgd	
	Avg.	Max Day	Avg.	Max Day ¹	Avg.	Max Day ¹
ARWTF MF/UV	1.00	4.20	2.00	4.00	2.50	4.60
ARWTF MF/RO/UV	2.00	4.10	2.00	5.40	2.40	4.80
SJ/SC WPCP Tertiary Effluent	0.00	0.00	0.00	1.60	0.00	4.30
Total Combined Flow	3.00	8.30	4.00	11.00	4.90	13.70

¹ ARWTF capacity may be sufficient to meet entire maximum day recycled water demand.

As indicated above in Table 2, the initial AWTF treatment capacities alone may not be sufficient to meet projected maximum day winter demands for year 2015 and 2020. If so, tertiary effluent from the SJ/SC WPCP would supplement flows from the AWTF.

During winter operations, nitrified secondary effluent from SJ/SC WPCP would be treated by the MF/UF membranes at the AWTF, but only a portion of the MF/UF filtrate would be demineralized by the RO process. The remainder of the MF/UF filtrate would be bypassed around the RO membranes and conveyed directly to the UV disinfection process. Bypass piping and isolation valves would be provided in the UV Disinfection System to dedicate a section of the UV System for disinfection of the MF/UF filtrate, and the remaining section of the UV System for disinfection of the RO permeate. The recommended flow split would result in a blended TDS in the range of 400 mg/L to 500 mg/L. During the summer, the entire RO permeate flow would be treated by the UV System.

BRINE DISCHARGE STRATEGY

A brine stream up to 2 million gallons per day (mgd) with 10,000 mg/L dissolved solids or comparable mass discharge consisting of the reject water from the reverse osmosis component of the Advanced Water Treatment Facility may be returned to a selected location in the chlorine contact facility or other specified location at the San Jose/Santa Clara Water Pollution Control Plant (Plant) designated for direct discharge to the effluent outfall channel facilities, provided that the discharge of such material is compatible with the ability of the Plant to meet its National Pollutant Discharge Elimination System (NPDES) permit as administered by the San Francisco Bay Regional Water Quality Control Board or the State Water Resources Control Board. In the event that the quality of water discharged from the Plant fails to meet required limits or is anticipated to fail to meet required limits based on current trends, CITY will investigate the source of the water quality problem. CITY's investigation will include but will not be limited to tests to determine the source of constituent concentration or toxicity contributing to the Plant's failure to meet regulatory limits, including tests of various

influent sources of flow into the Plant including the AWTF brine stream. In the event that the AWTF brine stream is determined to be the source of constituent concentration or toxicity contributing to the Plant's failure to meet regulatory limits, CITY will discuss alternatives with DISTRICT **prior to taking** corrective actions which may include interrupting or suspending discharge of the brine stream to the Plant, or requiring District to make other arrangements for brine disposal in order to continue to operate the Advanced Water Treatment Facility.

LIMITATIONS ON PROVISION OF SECONDARY TREATED WASTEWATER AND AWTF PRODUCT WATER

District understands and acknowledges that City is charged with the responsibility to operate the Plant and its City's sewage systems in a manner which it determines to be most beneficial to the users thereof and that factors beyond the control of City could cause operational difficulties at the Plant or in the sewage system resulting in the need to temporarily reduce or suspend the provision of secondary effluent to District. The rights of District to secondary effluent under this Agreement pertain only to the secondary treated effluent which actually is provided by the Plant to the AWTF. Nothing contained herein shall be construed to qualify in any manner City's right to operate the Plant at such level as it determines, in its absolute discretion to be appropriate, or to discontinue the operation of the Plant. Any right of District to secondary treated effluent pursuant to this Agreement shall be subordinate to the rights and responsibilities of City as herein set forth. In the event that City temporarily reduces or suspends provision of secondary effluent to District, City shall use its best efforts to re-establish the production of secondary effluent of a suitable quality and quantity as soon as reasonably possible and shall re-establish District's supply of such water accordingly.

City recognizes that factors beyond the control of District could cause operational difficulties at the AWTF resulting in the need to temporarily reduce or halt the production of AWTF product water. In such cases, District may temporarily reduce or suspend provision of AWTF product water to City. District shall use its best efforts to re-establish the production of AWTF product water of a suitable quality and quantity as soon as reasonably possible and shall re-establish City's supply of such water accordingly.

EXHIBIT F

HAZARDOUS MATERIALS

In addition to complying with the provisions set forth earlier in this Ground Lease, District agrees to the following provisions:

1. Notification Requirements. District shall be solely and fully responsible for:
 - (a) notifying the appropriate public agencies of any Hazardous Material release which occurs on the Premises, or is caused by or results from the activities of District, District's officers, agents, employees, contractors, permittees or invitees on the Land other than the Premises;
 - (b) immediately after learning thereof, notifying City of any Hazardous Material release which occurs on the Premises, regardless of whether the release was caused by or results from District's activities or is in a quantity that would otherwise be reportable to a public agency, or which occurs on the Land other than the Premises and is caused by or results from the activities of District. District's officers, agents, employees, contractors, permittees or invitees, regardless of whether the release is in a quantity that would otherwise be reportable to a public agency.;
 - (c) giving immediate written notice to Landlord of:
 - (i) any enforcement, remediation, or other regulatory action or order, taken or threatened, by any Agency regarding, or in connection with, the presence, release or threat of release any Hazardous Material on, under, about, or from the Premises, or any tanks on the Premises, or otherwise resulting from District's use of the Premises;
 - (ii) all demands or claims made or threatened by any third party against District or District's Parties or the Premises relating to any liability, loss, damage, or injury resulting from the presence, release, or threat of release any Hazardous Materials on, under, about, or from the Premises or otherwise resulting from District's use of the Premises;
 - (iii) all incidents or matters where District and District's Parties are required to give notice to any Agency pursuant to applicable Environmental Laws.
 - (d) promptly providing Landlord with copies of all materials, reports, technical

data, Agency inspection reports, notices and correspondence, and other information or documents relating to incidents or matters subject to notification hereunder; and

- (e) promptly furnishing to Landlord copies of all permits, approvals, and registrations District receives or submits with respect to District's operations on the Premises, including, without limitation, any underground storage tank registrations, installation permits, and closure permits.

2. Liability. District shall be solely and fully responsible and liable for:

- (a) any Hazardous Material Release which is caused by or results from the activities of District, District's officers, agents, employees, contractors, or subcontractors on the Land.
- (b) any Hazardous Material Release which is caused by or results from the activities of permittees or invitees on the Land if the same was caused by the negligent or intentional misconduct of District.
- (c) any Hazardous Material release that commences during the term of the Ground Lease on the Premises, unless District establishes through investigation, sampling, testing and analysis acceptable to the City, that the release was caused by the sole negligence or willful misconduct of City, City's officers, agents, employees, contractors or permittees or solely by migration of Hazardous Materials onto the Premises from a source off the Premises.

3. Prevention of Release. District shall take all necessary precautions to prevent its activities from causing any Hazardous Material release to occur on the Land, including, but not limited to any release into soil, groundwater, or the City's sewage or storm drainage system.

4. Obligation to Investigate and Remediate. District, at District's sole cost and expense, shall promptly investigate and remediate, in accordance with requirements of all applicable Environmental Laws:

- (a) any release or danger of release of Hazardous Material on the Land other than the Premises, including, but not limited to, into soil or groundwater, or the City's sewage or storm drainage system, which was caused, or results, in whole or in part from the activities of District, District's officers, agents, employees, contractors, and subcontractors;
- (b) any Hazardous Material release which is caused by or results from the activities of permittees or invitees on the Land if the same was caused by the negligent or intentional misconduct of District;

- (c) any release or danger of release of Hazardous Materials which commenced during the term of this Ground Lease and which is discovered on the Premises, unless District establishes through investigation, sampling, testing and analysis acceptable to City, that the release was caused by the sole negligence or willful misconduct of City, City's officers, agents, employees, contractors or permittees or solely by migration of Hazardous Materials onto the Premises from a source off the Premises.

Unless an emergency situation exists that requires immediate action, Landlord's written approval of these actions will first be obtained, and the approval will not be unreasonably withheld. Landlord's right of prior approval of these actions includes, but is not limited to, the selection of any environmental consultant to perform work on or related to the Premises, the scope of work, and sampling activities to be performed by the consultant before the report is final. District will provide Landlord with at least three (3) business days' advance notice of any sampling, and upon request of Landlord, will split samples with Landlord. District will also promptly provide Landlord with the results of any test, investigation, or inquiry conducted by or on behalf of District or District's Parties in connection with the presence or suspected presence of Hazardous Materials on, under, about, or from the Premises. District must notify Landlord in advance and give Landlord the right to participate in any oral or written communications with regulatory agencies concerning environmental conditions on or arising from the Premises. Within thirty (30) days after District's completion of any remediation of the Premises, District must deliver to Landlord a letter from the applicable Agency stating that the remediation was undertaken in accordance with all applicable Environmental Laws and that any residual contamination remaining after the remediation does not pose a threat to human Health or the environment.

The failure to promptly commence remediation and provide City with a schedule for diligent completion of the remediation which thirty (30) days after discover of such release, or danger of release, of Hazardous Material (or such additional time period of time that is reasonably necessary under the circumstances) shall constitute prima facie evidence of failure to promptly commence remediation. In addition to all other rights and remedies of City hereunder, if District does not promptly commence, and diligently pursue to remediate, any such release, or danger of release, of Hazardous Materials, City, in its discretion, may pay to have same remediated and District shall reimburse City within fifteen (15) business days of City's demand for payment. The reasonable payment by City shall be prima facie evidence that the expense incurred was necessary and reasonable and that such expense was incurred by City on behalf of District.

- 5. Landlord's Right of Entry and Testing. Landlord and Landlord's representatives have the right, but not the obligation, at any reasonable time to enter onto and to inspect the Premises and to conduct reasonable testing, monitoring, sampling, digging, drilling, and analysis to determine if Hazardous Materials are present on,

under, or about the Premises and to review and copy any documents, materials, data, inventories, financial data, or notices or correspondence to or from private parties or governmental authorities (collectively, "Inspection"). If the Investigation indicates the presence of any environmental condition that occurred during the Term as a result of District's or District's Parties' activities, or failure to act where District had a duty to act, in connection with the Premises, District will reimburse Landlord for the cost of conducting the tests.

6. Environmental Assessment. Landlord may require District to retain a duly licensed environmental consultant acceptable to Landlord that will perform an environmental compliance audit of the Premises and District's business activities and compliance with the provisions of this Exhibit F. Landlord may require District to cause the environmental compliance audit to be conducted on an annual basis, the cost of which will be the sole responsibility of District. If the results of the environmental compliance audit indicate that District is or may be in violation of this Exhibit F, District will be responsible for the cost of any additional testing required by Landlord. District must promptly provide a copy of the report from the consultant to Landlord upon receipt, and upon request must promptly provide to Landlord a copy of all data, documents, and other information prepared or gathered in connection with the report. District acknowledges that District has been provided an adequate opportunity to conduct District's own environmental investigation of the Premises with independent environmental experts and consultants.

7. Indemnification. District shall defend, indemnify and hold City harmless from and against all loss, damage, liability (including all foreseeable and unforeseeable consequential damages) and expense (including, without limitation, the cost of any required cleanup and remediation of the Hazardous Materials) which City may sustain as a result of:
 - (a) any Hazardous Material release on the Property other than the Premises, including, but not limited to any release into soil or groundwater, or the City's sewage or storm drainage system, which is caused by or results directly from the activities of District, District's officers, agents, employees, contractors, and subcontractors; or
 - (b) District's breach of any prohibition or provision of this Exhibit F.
 - (c) The presence of any Hazardous Materials on or under the Premises during the Term or any Hazardous Materials on or from the Premises which commenced during the Term, including, but not limited to any release into soil or groundwater, except a release which District establishes, through investigation, sampling, testing and analysis acceptable to the City, was caused by the sole negligence or willful misconduct of City, City's officers,

agents, employees, contractors or permittees or by migration of Hazardous Materials onto the Premises from an identified source off the Premises.

This obligation by District to indemnify, protect, defend, and hold harmless Landlord Indemnities includes, without limitation, costs and expenses incurred for or in connection with any investigation, cleanup, remediation, monitoring, removal, restoration, or closure work required by the Agencies because of any Hazardous Materials present on, under, or about the Premises; the costs and expenses of restoring, replacing, or acquiring the equivalent of damaged natural resources if required under any Environmental Law; all foreseeable consequential damages; all reasonable damages for the loss or restriction on use of rentable or usable space or of any amenity of the Premises; all reasonable sums paid in settlement of claims; reasonable attorney's fees; litigation, arbitration, and administrative proceeding costs; and reasonable expert, consultant, and laboratory fees. Neither the written consent of Landlord to the presence of Hazardous Materials on or under the Premises, nor the strict compliance by District with all Environmental Laws, will excuse District from the indemnification obligation.

This indemnity will survive the expiration or termination of this Agreement. Further, if Landlord detects a deficiency in District's performance under this indemnity and District fails to correct the deficiency within ten (10) days after receipt of written notice from Landlord, or such other period of time that is deemed reasonable by the parties under the circumstances, Landlord has the right to join and participate in any legal proceedings or actions affecting the Premises that are initiated in connection with any Environmental Laws. However, if the correction of the deficiency takes longer than ten (10) days, Landlord may join and participate if District fails to commence corrective action within the ten (10) day period and after that diligently proceeds to correct the deficiency.

8. Release of Claims Against City. District releases, acquits and forever discharges City from any and all claims, actions, causes of action, demands, rights, damages, costs, including but not limited to loss of use, lost profits, or expenses, which District may now have, or which may hereafter accrue on account of or in any way growing out of all known or unknown, foreseen and unforeseen bodily and personal injuries and property damage, and the consequences thereof resulting or arising out of the presence or cleanup of any Hazardous Material for which District is responsible and liable under this Ground Lease. District understands and agrees that District is hereby waiving all such rights under Section 1542 of the Civil Code of California and any similar law of any state or territory of the United States. Said section reads as follows:

“1542. Certain claims not affected by general release. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.”

9. (a) Cessation of Activities. District shall cease its activities on the Premises to the extent reasonably requested by City, if City determines, in its reasonable opinion, that such cessation is necessary to investigate, cure or remediate any release of Hazardous Materials. District shall not recommence its activities on the Premises until notified by City that such release or danger of release of Hazardous Material has been investigated, cured, and remediated in a manner satisfactory to the City.
 - (b) Abatement of Fees and Charges on Premises. District shall not be entitled to an abatement of any fees or charges due under this Ground Lease after District has been requested to cease activities for investigation, cure, or remediation of Hazardous Materials on the Premises, except if District establishes, through investigation, sampling, testing and analysis that the presence of Hazardous Materials on the Premises was due to any event for which District is not responsible and liable under this Ground Lease.
10. Records and Inspections.
 - (a) District shall maintain, during the term of this Ground Lease and for a period of not less than four (4) years after the expiration or termination of this Ground Lease, or for any longer period of time required by any applicable law, regulation, policy, order or decree, separate and accurate daily records pertaining to the use, handling and disposal of any Hazardous Material(s) by District, District's officers, agents, employees, contractors, permittees or invitees on or from the Land.
 - (b) Upon request by City, District shall furnish City with such daily records, and such other documentation or reports as Director, from time to time, and at any time during the term of this Ground Lease, may reasonably require pertaining to the use, handling and disposal of any Hazardous Material(s) by District, District's officers, agents, employees, contractors, permittees or invitees on or from the Land.
 - (c) On the date that is one year from the commencement of the Term and annually after that, District must provide Landlord with a letter certifying that District has complied with all applicable Environmental Laws and the requirements of all applicable Agencies and that to the best of District's knowledge no soil or groundwater contamination has occurred on or

originated from the Premises.

- (d) After the expiration of four (4) years following the termination of this Ground Lease, District may destroy the records pertaining to the use, handling and disposal of any Hazardous Material(s) by District, District's officers, agents, employees, contractors, permittees or invitees on or from the Land, provided, however, that District shall notify City no later than sixty (60) days prior to any proposed destruction of any of said records and shall upon request by City within thirty (30) days after such notice is received.
11. No Third Party Beneficiaries. Nothing contained in this Exhibit shall be construed as conferring any benefit on any person not a party to this Ground Lease, nor as creating any right in any person not a party to this Ground Lease to enforcement of any obligations created under this Ground Lease.
 12. Survival of Obligations. Each party's obligations under this Ground Lease shall survive the expiration or earlier revocation or suspension of this Ground Lease.

EXHIBIT G

INSURANCE REQUIREMENTS

I. **DISTRICT LIABILITY INSURANCE**

District covenants that, at District's sole cost and expense, it will maintain for the duration of the Agreement self-insurance against claims for injuries to persons or damages to property that may arise from, or in connection with, the performance of the services and/or operations herein by District, its agents, representatives, employees or contractors and the indemnity provisions of this Agreement.

A. Types of Coverage

Coverage provided by said self-insurance programs shall apply to and be in lieu of maintaining General, Pollution and Auto Liability and Workers' Compensation insurance, as well as Professional Liability Errors and Omissions insurance, when applicable.

B. Minimum Limits of Coverage

Coverage for Commercial General including Fire Legal Liability, Pollution Liability and Auto Liability shall be for not less than \$5,000,000 per occurrence and aggregate. Coverage for Professional Liability Errors and Omissions shall not be for less than \$2,000,000 per claim and aggregate. Coverage for Workers' Compensation coverage shall be as required by the California Labor Code and include Employers Liability limits of not less than \$1,000,000 per accident.

C. Other Self-Insurance Provisions

The District's self-insurance coverage applies to the City of, its officers, employees, agents, and contractors as respects: Liability arising out of activities performed by or on behalf of, District; products and completed operations of District; premises owned, leased or used by the District; and automobiles owned, hired, or borrowed by District. Said self-insurance applies fully to any indemnity for City, its officers, employees, agents and contractors.

District's self-insurance coverage shall be primary as respects to City, its officers, employees, agents, and contractors. Any insurance or self-insurance maintained by City, its officers, employees, agents, or contractors shall be excess of District's self-insurance and shall not contribute with it.

D. Verification of Coverage

Execution of this Agreement shall constitute District's representation and warranty as to the coverage required by this Agreement, and authority of the person signing the Agreement to bind coverage on its behalf.

II. CONTRACTOR/CONSULTANT/CONTRACTOR LIABILITY AND BUILDERS RISK INSURANCE

Each Contractor or Consultant ("Contractor") performing work on or about the Premises or Ancillary Property or for District pursuant to this Agreement, shall, at such Contractor's sole cost and expense, procure and maintain for the duration of such Contractor's work (or as otherwise specified below) insurance against claims which may arise from, or in connection with, the performance of the work on or about the Premises or Ancillary Property or for District pursuant to this Agreement, by such Contractor, its agents, representatives, employees or subcontractors.

A. Minimum Scope of Insurance

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage "occurrence" form CG 0001; and
2. The coverage provided by Insurance Services Office form number CA 0001 covering Automobile Liability. Coverage shall be included for all owned, non-owned and hired automobiles; and
3. Workers' Compensation insurance as required by the Labor Code of the State of California and Employers Liability insurance; and
4. Contractor's Pollution Liability Insurance, including coverage for all operations, completed operations and professional services; and
5. Builders' Risk including "all risk coverage", excluding only earthquake, on a replacement cost basis. ; and
6. Professional Liability Errors and Omissions including coverage for all professional services.

B. Minimum Limits of Insurance

Contractor shall maintain limits no less than:

1. Commercial General Liability: \$5,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
2. Automobile Liability: \$2,000,000 combined single limit per accident for bodily injury and property damage.
3. Workers' Compensation and Employers Liability: Workers' Compensation limits as required by the Labor Code of the State of California and Employers Liability limits of \$1,000,000 per accident.
4. Contractor's Pollution Liability: \$1,000,000 each occurrence/aggregate limit.
5. Builder's Risk: Completed value of the project. .
6. Professional Liability Errors and Omissions \$2,000,000 each occurrence/aggregate limit

C. Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to, and approved by the City. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officials, employees, agents and contractors; or the Contractor shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the City.

D. Other Insurance Provisions

The policies are to contain, or be endorsed to contain, the following provisions:

1. General Liability, Automobile Liability and Pollution Liability Coverages
 - a. The City, its officials, employees, agents and contractors are to be covered as additional insureds as respects: liability arising out of activities performed by, or on behalf of, the Contractor; products and completed operations of the Contractor; premises owned, leased or used

by the Contractor; or automobiles owned, leased, hired or borrowed by the Contractor..

- b. The Contractor's insurance coverage shall be primary insurance as respects the City, its officials, employees, agents, and contractors. Any insurance or self-insurance maintained by the City, its officials, employees, agents, or contractors shall be excess of the contractor's insurance and shall not contribute with it.
- c. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officials, employees, agents, or contractors.
- d. Coverage shall state that the Contractor's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- e. Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, agents, and contractors.

2. Workers' Compensation and Employers Liability

Coverage shall contain a waiver of subrogation in favor of City, its officials, employees, agents, and contractors.

3. Builders' Risk coverage:

- a. City of San José shall be named as an additional loss payee.
- b. Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, agents, and contractors.

4. All Coverages

To the extent possible, each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled, reduced in coverage or in limits except after thirty (30) days' prior written notice has been given to the City; except that ten (10) days' prior written notice shall apply in the event of cancellation for non-payment of premium.

E. Duration

1. Commercial General Liability, Professional Liability and Pollution Liability coverages shall be maintained continuously for a minimum of five (5) years after completion of work.

2. If any of such coverages are written on a claims-made basis, the following requirements apply:

- a. The policy retroactive date must precede the date work commenced.
- b. If the policy is cancelled or non-renewed and coverage cannot be procured with the original retroactive date, CONTRACTOR must purchase an extended reporting period equal to or greater than five (5) years after completion of work under this AGREEMENT.

F. Acceptability of Insurance

Insurance is to be placed with insurers acceptable to the City's Risk Manager.

G. Verification of Coverage

At least ten (10) days prior to the commencement of Work. Contractor shall furnish the City with certificates of insurance and with endorsements affecting coverage required by this clause. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Copies of all the required ENDORSEMENTS shall be attached to the CERTIFICATE OF INSURANCE which shall be provided by the Contractor's insurance company as evidence of the stipulated coverages.

Proof of insurance shall be either emailed in pdf format to: Riskmgmt@sanjoseca.gov, or mailed to the following postal address (or any subsequent email or postal address as may be directed in writing by the Risk Manager):

City of San José – Human Resources
Risk Management
200 East Santa Clara St., 2nd Floor Wing
San José, CA 95113-1905

And

Santa Clara Valley Water district
5750 Almaden Expressway
San José, CA 95118

H. Subcontractors

Contractors shall include all subcontractors as insureds under its policies or shall

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obtain separate certificates and endorsements for each subcontractor.

FIRE AND EXTENDED LIABILITY COVERAGE

District shall, at its sole cost and expense, obtain and keep in force during the Term, after substantial completion of the AWTF and Related Facilities upon the Premises property insurance (excluding flood and earthquake) naming City, as an additional loss payee hereunder, in the customary form in the City of San José for buildings and improvements of similar character, on the AWTF, Related Facilities and any betterments or improvement, and on all machinery, furniture, fixtures and equipment located therein. The amount of such insurance shall not be less than ninety percent (90%) of the actual replacement cost of such buildings and improvements, machinery, furniture, fixtures and equipment. The actual replacement cost of such buildings and improvements shall be determined by mutual agreement of District and City at the insurance is initially taken out and periodically over time as to increases in value, and in the event the parties cannot agree as to such actual replacement cost, such cost shall be determined by City up on advice of the Recycled Water Policy Advisory Committee.

EXHIBIT H
PREVAILING WAGE REQUIREMENTS

I. Remedies For District's Breach Of Prevailing Wage/Living Wage Provisions.

A. General. District acknowledges that it has read and understands that, pursuant to the terms and conditions of this Ground Lease, it is required to pay workers either a prevailing or living wage ("Wage Provision") and to submit certain documentation to the City establishing its compliance with such requirement. ("Documentation Provision.") District further acknowledges the City has determined that the Wage Provision promotes each of the following (collectively "Goals"):

1. It protects City job opportunities and stimulates the City's economy by reducing the incentive to recruit and pay a substandard wage to labor from distant, cheap-labor areas.
2. It benefits the public through the superior efficiency of well-paid employees, whereas the payment of inadequate compensation tends to negatively affect the quality of services to the City by fostering high turnover and instability in the workplace.
3. Pay workers a wage that enables them not to live in poverty is beneficial to the health and welfare of all citizens of San José because it increases the ability of such workers to attain sustenance, decreases the amount of poverty and reduces the amount of taxpayer funded social services in San José.
4. It increases competition by promoting a more level playing field among contractors with regard to the wages paid to workers.

B. Withholding of Payment. District agrees that the Documentation Provision is critical to the City's ability to monitor District's compliance with the Wage Provision and to ultimately achieve the Goals. District further agrees its breach of the Documentation Provision results in the need for additional enforcement action to verify compliance with the Wage Provision.

In light of the critical importance of the Documentation Provision, the City and District agree that District's compliance with this Provision, as well as the Wage Provision, is an express condition of this Ground Lease, and that failure to comply with this provision is a breach of this Ground Lease.

- C. **Liquidated Damages for Breach of Wage Provision.** District agrees its breach of the Wage Provision would cause the City damage by undermining the Goals, and City's damage would not be remedied by District's payment of restitution to the workers who were paid a substandard wage. District further agrees that such damage would increase the greater the number of employees not paid the applicable prevailing wage and the longer the amount of time over which such wages were not paid.

The City and District mutually agree that making a precise determination of the amount of City's damages as a result of District's breach of the Wage Provision would be impracticable and/or extremely difficult. Therefore, the parties agree that, in the event of such a breach, District shall pay to the City as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the amount of wages that should have been paid.

- D. **Audit Rights.** All records or documents required to be kept pursuant to this Ground Lease to verify compliance with the Wage Provision shall be made available for audit at no cost to the City, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such records or documents shall be provided to City for audit at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records or documents shall be available at District's address indicated for receipt of notices in this Ground Lease.

II. **Instructions to Obtain Prevailing Wage Determination**

A copy of the current General Prevailing Wage Determination made by the Director of Industrial Relations may be obtained from the Office of Equality Assurance at:

Office of Equality Assurance
200 E. Santa Clara Street
San José, CA 95113
Phone: 408.535.8430
Fax: 408.292.6270

For internet access to current wage rates and benefit information, you may contact the California Department of Industrial Relations web site at <http://www.dir.ca.gov/>. To access and print current prevailing wage rates directly, go to <http://www.dir.ca.gov/DLSR/PWD>. On the General Prevailing Wage Determination screen, scroll down and follow the directions until you locate the trade applicable to your contract. Prevailing wages for City of San José contracts will be found under:

- Step One Statewide,
- Step Two (A) Northern California, or
- Step Four for Santa Clara County

Effective Dates of Determination and of Rates within Determination

Contractors are advised that rates determined by the Department of Industrial Relations are subject to change during the term of this contract as described below.

Effective date of determination. All determinations issued by the Director of the Department of Industrial Relations will be effective ten (10) days after issuance. Determinations issued by the Director will show an issue date and will ordinarily show an expiration date. All determinations will remain in effect until their expiration date or until modified, corrected, rescinded or superseded by the Director. Contractors are advised to note the expiration date on the prevailing wage classification identified for this solicitation and the asterisk (*) as explained in the paragraph below.

Meaning of single and double asterisks. Prevailing wage determinations with a single asterisk (*) after the expiration date (which are in effect on the date of advertisement for bids) remain in effect for the life of the project. Prevailing Wage determinations with double asterisks (**) after the expiration date indicate that the basic hourly wage rate, overtime and holiday pay rates, and employer payment to be paid for work performed *after* this date have been predetermined. If work is to be extended past the rate expiration date, the new rate must be paid and should be incorporated in contracts entered into now. Contact the Division of Labor Statistics and Research for specific rates (415) 703-4774.

All determinations that do not have the double asterisks (**) after the expiration date remain in effect for the life of the contract.

EXHIBIT I

Recording Requested by:
City of San José, a
municipal corporation of
the State of California

When recorded, return to:
City Clerk's Office
200 East Santa Clara Street
San José, CA 95113-1905

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MEMORANDUM OF GROUND LEASE AGREEMENT

THIS MEMORANDUM OF GROUND LEASE AGREEMENT made and entered into this ____ day of _____, 201__ , by and between the City of San José, a charter city, as administering agency for the San José/Santa Clara Water Pollution Control Plant ("Landlord") and the SANTA CLARA VALLEY WATER DISTRICT, a _____ ("District") City leases to District and District leases from City the use of certain Premises located at _____, San José, California, as more particularly described in Exhibit A attached hereto .

The leased premises are leased upon and subject to the terms, provisions, covenants and conditions contained in, and the location and amount of space leased are more particularly described in, an unrecorded Ground Lease and Property Use Agreement dated _____, 201_ ("Ground Lease"). The term is, initially, for forty years (40) years commencing on _____, 201_, but the term is subject to early termination. The Ground Lease and Property Use Agreement and Exhibits are on file with the City Clerk's Office of the City of San José. The purpose of this Memorandum of Ground Lease Agreement is to give notice of the existence of the Ground Lease and Property Use Agreement, which itself constitutes the agreement between the parties.

