

**COST SHARING AGREEMENT BETWEEN THE CITY OF SAN JOSE
AND SANTA CLARA VALLEY WATER DISTRICT
FOR FEASIBILITY STUDY FOR THE SOUTH BAY WATER RECYCLING FACILITIES**

This Cost Sharing Agreement (“Agreement”) is made and entered into this ____ day of _____, 2012 (“Date of Execution”), by and between the City of San José, a municipal corporation (“City”) and the Santa Clara Valley Water District, an independent special district created by Legislature of the State of California (“Water District”).

RECITALS

WHEREAS, Water District develops, stores, manages, distributes, sells and delivers water for domestic, industrial and agricultural uses, as the primary water supply and groundwater management agency in Santa Clara County; and

WHEREAS, City is the administering agency for the San Jose/Santa Clara Water Pollution Control Plant (“WPCP”), a joint powers agency of the State of California, which includes the South Bay Water Recycling Program (“SBWR”); and

WHEREAS, City operates the WPCP and SBWR in compliance with California Regional Water Quality Control Board recycled water requirements; and

WHEREAS, the Silicon Valley Advanced Water Purification Center is currently under construction, and will be operated and maintained by the Water District upon its completion; and

WHEREAS, City and Water District desire to financially support the production and use of recycled water in Santa Clara County consistent with each party’s separate and distinct interests: for wastewater treatment and disposal for the City, and water quality

and supply for the Water District, as well as to coordinate and cooperate to achieve the most cost effective, environmentally beneficial utilization of recycled water to meet both water supply and wastewater treatment and disposal needs; and

WHEREAS, City received a grant from the United States Department of the Interior Bureau of Reclamation (“Reclamation”) for reimbursement up to \$1,200,000, of eligible project costs up to \$2,400,000, including federal administration costs, towards a feasibility study for improvements and expansions for the South Bay Water Recycling (“SBWR”) System (R11AC20130); and

WHEREAS, City and Water District, are seeking one or more qualified consultants or firms to provide professional services for preparation of strategic and master planning documents to determine the future direction, policies, and priorities of the South Bay Water Recycling system, which may result in identifying system improvements and expansions; and

WHEREAS, Water District and City agree to share in the financial costs and leadership responsibilities to support qualified consultants or firms for professional services in the preparation of strategic and master planning documents to determine the future direction, policies, and priorities of the South Bay Water Recycling system.

NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING AND THE MUTUAL PROMISES HEREINAFTER PROVIDED, THE PARTIES AGREE AS FOLLOWS:

1. **SCOPE OF WORK.** City and Water District will each perform the applicable tasks described in Exhibit A, entitled “Scope of Work,” attached and incorporated herein.

2. **TERM.** The term of this Agreement is from the Date of Execution through the later of: (i) the completion of the scope of services as described in the feasibility study consultant agreement; or (ii) June 30, 2014 inclusive, subject to the provisions of Section 8 of this Agreement.

3. **SCHEDULE OF PERFORMANCE.** Services will be on-going throughout the term of this Agreement.

4. **FEASIBILITY STUDY FUNDING.** City and Water District shall segregate the funds for the feasibility study in accordance with Exhibit B, entitled “Feasibility Study Funding”, attached and incorporated herein. Funds for the feasibility study shall only be used to pay for amounts specified in the Service Orders issued to the feasibility study consultant(s).

5. **INDEPENDENT CONTRACTOR.** City and Water District, in the performance of the tasks to be performed by each, will each act as and be an independent contractor and not an agent or employee of the other. As independent contractors, both City and Water District are responsible for tasks performed by their agents, contractors or employees, including the payment of any and all compensation, or the provision of any benefits due said agents, contractors or employees. City and Water District each agree to indemnify and hold harmless the other party from any claim that may be made by its agents, employee or contractors for benefits or compensation.

6. **INDEMNIFICATION.** City and Water District will each defend, indemnify and hold harmless the other, their officers, employees and agents against any claim, loss or liability arising out of or resulting in any way from work performed under this Agreement due to the willful or negligent acts (active or passive) or omissions of their respective officers, employees or agents. Nothing contained herein will 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 (Govt. Code §810 *et seq.*) The acceptance of services and duties by City or Water District will not operate as a waiver of such right of indemnification. This provision will survive expiration or termination of this Agreement.

7. NONDISCRIMINATION. Neither City nor Water District will discriminate, in any way, against any person on the basis of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity, or national origin, in connection with or related to the performance of this Agreement.

8. TERMINATION.

- (a) City and/or Water District will have the right to terminate this Agreement for convenience, without cause, by giving not less than thirty (30) days written notice of termination.
- (b) If either Water District or City fails to perform any of its material obligations under this Agreement, in addition to all other remedies provided by law, the other party may terminate this Agreement immediately upon written notice.
- (c) City and/or Water District will have the right to terminate this Agreement immediately upon written notice to the other that the City Council or Board of Directors, respectively, has failed to appropriate funds for the Agreement.
- (d) City's Director of Environmental Services is empowered to terminate this Agreement on behalf of City, and Water District's Chief Executive Officer

is empowered to modify or terminate this Agreement on behalf of Water District.

- (e) In the event of termination, each party will deliver to the other, copies of all reports, documents, and other work performed by it under this Agreement.
- (f) In the event of termination, the parties are only responsible for payment of amounts it agreed to under fully executed Service Orders(s), and any remaining balance of their original \$1,200,000.00 contribution shall be returned to them, and any accrued interest shall be shared equally.

9. **GOVERNING LAW.** This Agreement will be governed by the laws of the State of California.

10. **COMPLIANCE WITH LAWS.** City and Water District will each comply with all applicable laws, ordinances, codes and regulations of the federal, state and local governments.

11. **BOOKS AND RECORDS.**

- (a) All reports, documents or other materials developed or discovered by each party or any other person engaged directly or indirectly to a party under this Agreement, are and will remain the property of such Party without restriction or limitation upon their use.
- (b) City and Water District will each maintain all documents and records which demonstrate their respective performance under this Agreement for a minimum period of three (3) years, from the date of termination or completion of this Agreement.

- (c) Any records or documents required to be maintained pursuant to this Agreement must be made available for inspection during regular business hours upon reasonable written request by City or Water District. Unless an alternative is mutually agreed upon, City records must be available for inspection at City's address indicated for receipt of notices in this Agreement and Water District records must be available for inspection at Water District's address indicated for receipt of notices in this Agreement.

12. CONFLICT OF INTEREST. Water District and City will avoid all conflict of interest or appearance of conflict of interest in performance of this Agreement.

13. GIFTS.

- (a) Water 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.
- (b) Water District agrees not to offer any City officer or designated employee any gift prohibited by said Chapter.
- (c) The offer or giving of any gift prohibited by Chapter 12.08 will constitute a material breach of this Agreement by Water District. In addition to any other remedies City may have in law or equity, City may terminate this Agreement for such breach as provided in Section 8 of this Agreement.
- (d) City is familiar with Water District's prohibition against the acceptance of any gift by a Water District employee, which prohibition is found in Water District Policy & Procedure 0-102.

Notice will be deemed effective on the date personally delivered or, if mailed, three (3) days after deposit in the mail.

16. VENUE. In the event that suit will be brought by either party to this Agreement, the parties agree that venue will be exclusively vested in the state courts of the County of Santa Clara, or if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San José, California.

17. SEVERABILITY. In the event that any provision of this Agreement is prohibited by any law governing its construction, performance or enforcement, such provision shall be ineffective to the extent of such prohibition without invalidating thereby any of the remaining provisions of the Agreement.

18. ENTIRE AGREEMENT. This Agreement, including all exhibits attached hereto, represents the entire understanding of the parties as to those matters contained herein. No prior oral or written understanding will be of any force or effect with respect to those matters covered hereunder. This Agreement may only be modified by a written amendment duly executed by the parties to this Agreement.

WITNESS THE EXECUTION HEREOF on the day and year first hereinabove written.

"CITY"

APPROVED AS TO FORM:

City of San José, a municipal corporation

ROSA TSONGTAATARII
Deputy City Attorney

By: _____
NORBERTO DUENAS
Deputy City Manager

"WATER DISTRICT"

Santa Clara Valley Water District, a public
entity of the State of California

APPROVED AS TO FORM:

ANTHONY FULCHER
Assistant District Counsel

By: _____
BEAU GOLDIE
Chief Executive Officer

EXHIBIT A

SCOPE OF WORK

A. FEASIBILITY STUDY CONSULTANT(S) PROCUREMENT

1. City will be responsible for managing the procurement process for feasibility study consultant(s) in adherence with all City procurement procedures and policies.

2. The City Environmental Services Department Director shall select three individuals with Wastewater Interest (as defined below) expertise, and the Water District Chief Operating Officer shall select three individuals with Water Supply Interest (as defined below) expertise, to serve on a six-member review panel for the procurement of feasibility study consultant(s). In the event that four members of the review panel are unable to agree on the selection of feasibility study consultant(s), the panel shall solicit direction from the City Environmental Services Department Director and the Water District Chief Operating Officer on the final selection of the consultant(s). The City reserves the right to proceed with the feasibility study independent of the Water District provided ~~this Agreement is terminated pursuant to Section 8. the Water District shall be relieved of all financial obligations to the consultant.~~

As used in this Agreement, "Water Supply Interest" means any interest related to the comprehensive management of water to meet current and future beneficial uses, including construction, maintenance, and operation of facilities for groundwater recharge, surface distribution, and the purification and treatment of such water for water supply purposes. As used in this Agreement, "Wastewater Interest" means any interest that is both (1) related to the existing recycled water infrastructure, and potential capitol improvements to enhance recycled water system reliability, maintain water quality, or increase recycled water use; and (2) for the purpose of providing wastewater treatment services in compliance with state and federal environmental, health and safety regulations.

3. The City Environmental Services Department Director shall select two individuals with Wastewater Interest, and the Water District Operating Officer shall select two individuals with Water Supply Interest expertise, to develop and negotiate a master services agreement with the feasibility study consultant(s) with terms and conditions that are substantially consistent with the Request for Qualifications. The contract development process shall comply with City format and guidelines and shall contain a scope of work acceptable to the City and Water District.

B. FEASIBILITY STUDY SERVICE ORDER DEVELOPMENT

1. Each Task shall be authorized through Service Order(s) consistent with the Master Services Agreement. City staff and Water District staff shall coordinate the development of each Service Order. A Task Advisory Steering Committee ("TASC") with an equal number of members representing Wastewater Interests and Water Supply Interests shall be appointed by the City Environmental Services Department Director and Water District Chief Operating Officer. The TASC shall provide guidance to City staff and Water District staff regarding the scope of the Strategic Planning Task, and each Task thereafter consistent with the outcome of the Strategic Planning Task, and/or the scope of the Reclamation Grant Agreement.
2. Each Service Order shall detail the scope of services, the format of deliverables, the schedule of performance, and the compensation for each deliverable. The Service Order shall also specify how each deliverable is within the scope of the City's and the Water District's separate and distinct interests (i.e. a Wastewater Interest only, Water Supply Interest only, or both Wastewater Interest and Water Supply Interest), its relationship to a Task within the scope of the Reclamation Grant Agreement (if applicable), and the geographic limits of the project. The City and Water District acknowledge that each party is subject to special funds limitations if a Service Order advances an interest of only one party. Any disputes regarding whether a deliverable advances a Wastewater Interest, Water Supply Interest, or both shall be resolved by the City Environmental Services Department Director and the Water District Chief Operating Officer.
3. Each Service Order that advances a Water Supply Interest in whole or in part must be separately approved in writing by the Water District Chief Operations Operating Officer or his designee before the Service Order is issued to the feasibility study consultant(s).

C. FEASIBILITY STUDY MANAGEMENT

1. City will designate a Contract/Project Manager to manage the Master Services Agreement, and obtain authorization of each Service Order pursuant to the Master Services Agreement with the feasibility study consultant(s).
2. City shall ensure that the feasibility study consultant(s) only begins work under a Service Order after the Service Order is executed by the City Environmental Services Department Director, or designee and the signature of the City Attorney approving the Service Order as to form.
3. If the Service Order advances a Water Supply Interest in whole or in part, the Water District shall have five (5) working days after the Water District's receipt of the Service Order from the City to secure separate written

approval from the Water District Chief Operating Officer or his designee. The City reserves the right to proceed with the Service Order independent of the Water District provided this Agreement is either terminated pursuant to Section 8, or the Water District is relieved of its obligation to contribute towards the payment of any Service Order that is not approved in writing by the Water District Chief Operating Officer or his designee.

4. The City and Water District shall each designate a staff person to track each party's contributions under the Service Orders, and progress of the strategic and master planning Tasks.
5. The City shall ensure that the feasibility study consultant(s) provides both the City and the Water District with information including but not limited to all documentation, and deliverables produced as part of the strategic and master planning Service Order(s). The City shall ensure its agreement with the feasibility study consultant(s) specifies that the Water District and City mutually own all work product developed under each Service Order, unless otherwise provided for in the Service Order.
6. The Water District shall have ten (10) working days after its receipt from the City to review a Service Order deliverable or a request for payment of a completed Service Order or parts thereof from the feasibility study consultant(s). After ten (10) working days from the Water District's receipt of the deliverable or request for payment, absent any written request by the Water District to withhold payment associated with that deliverable, the City may exercise its discretion as the contract manager regarding whether payment should be made to the feasibility study consultant(s) for that deliverable. If the Water District provides a written request to withhold payment, it shall specify the reasons why such payment should be withheld. If the Water District and City contract managers are unable to resolve the deliverable and/or request for payment issue(s), the City Environmental Services Department Director and the Water District Chief Operating Officer shall discuss and endeavor to resolve those issue(s).
7. The Water District shall provide the City with any necessary documentation required by the Reclamation Grant Agreement.
8. The City as consultant procurement manager and grant administrator will maintain all auditable documentation in accordance with Federal Guidelines as required in the Reclamation Grant Agreement, and will ensure compliance with all other requirements specified in the Reclamation Grant Agreement.
9. Each party reserves the right to audit the other party's performance under this Agreement at any time to ensure that reimbursements are consistent with the terms of this Agreement.

EXHIBIT B

FEASIBILITY STUDY FUNDING

The City and Water District agree to segregate the funds for the feasibility study, and share the cost of the feasibility study in accordance with the following specifications:

1. Water District agrees to contribute One Million Two Hundred Thousand Dollars (\$1,200,000.00) to pay for those portions of the feasibility study reasonably related to Water Supply Interests, and the City agrees to contribute One Million Two Hundred Thousand Dollars (\$1,200,000.00) to pay for those portions of the feasibility study reasonably related to Wastewater Interests. Each party's One Million Two Hundred Thousand Dollar contribution shall be made within thirty (30) days after this Agreement is fully executed, and such funds shall be segregated from all other funds in an account that earns interest. These funds shall only be expended pursuant to Service Order(s) associated with strategic and master planning Tasks. Any reimbursements from the Reclamation Grant Agreement for tasks or subtasks related to Water Supply Interests shall be distributed to the Water District, while reimbursements from the Reclamation Grant Agreement for tasks or subtasks related to Wastewater Interests shall be distributed to the City. Reimbursements from the Reclamation Grant Agreement for tasks or subtasks related to both Water Supply Interest and Wastewater Interests shall be distributed equally to the City and Water District.
2. The City shall submit reimbursement requests to the United States Department of Interior Bureau of Reclamation within thirty (30) working days of receiving all necessary documentation from the Water District, and the feasibility study consultant(s).
3. For any reimbursements received in the preceding six (6) monthscalendar quarter, the City shall remit the Water District's portion of the reimbursement no later than thirty (30) days after the end of each calendar quartersix (6) month period, subject to appropriation.
4. Either party may terminate this Agreement under Section 8 of this Agreement. However, both parties remain financially liable for all previously issued Service Order(s) that were approved by both parties. Any fund balance remaining from each party's initial contribution shall be refunded pursuant to Section 8(f) of this Agreement after the parties' payment obligations for all previously issued Service Orders are resolved.
5. In the event that the United State Department of the Interior Bureau of Reclamation conducts an audit of the Reclamation Grant, and finds that the reimbursement request(s) in whole or in part are not qualified expenses, the Parties agree to return their respective portion of the reimbursement to the Bureau of Reclamation. This obligation shall survive the termination of this Agreement.