

JOINT EXERCISE OF POWERS AGREEMENT

THIS FIFTH AMENDED JOINT EXERCISE OF POWERS AGREEMENT is entered into as of this 30<sup>th</sup> day of SEPTEMBER, 2010 between EAST BAY MUNICIPAL UTILITY DISTRICT (District) and the CITY OF ALAMEDA (City).

RECITALS

A. On May 2, 1997, District and City entered into a joint exercise of Powers Agreement for the purpose of providing District labor, services, materials and equipment necessary to operate and maintain the water distribution facilities at Alameda Point (formerly the Alameda Naval Air Station) at City's cost, all in furtherance of the City's caretaker responsibilities pursuant to a Cooperative Agreement between City and the United States Department of the Navy.

B. The Alameda Point water distribution facilities had not previously been operated or maintained prior to May 2, 1997 by the District nor had they been constructed to the standards used by the District for its water system. The facilities will continue to be the property of the United States Department of the Navy (Navy) and/or the City for the term of the Joint Powers Agreement, and any amendments thereto.

C. On and after October 20, 2003, the parties executed a Third Amended Joint Exercise of Powers Agreement.

D. On and about September 30, 2005, the parties executed a Fourth Amended Joint Exercise of Powers Agreement and it is the desire and intention of the parties to

further amend said Agreement with respect to the services to be provided by the District and to allow sufficient time to negotiate a new JPA.

NOW, THEREFORE, the parties agree that the terms and conditions of said Joint Exercise of Powers Agreement are hereby amended to read as follows:

1. Purpose. The purpose of this Agreement is to provide services to the City, compatible with the policies and practices of the District and in furtherance of the City's obligations under the Cooperative Agreement, for the operation and maintenance of the Alameda Point water distribution facilities. The Alameda Point water distribution facilities for which services will be provided by the District pursuant to this Agreement are described in Exhibit A, attached hereto and incorporated herein by this reference.

2. Operation and Maintenance Services. District shall provide personnel to perform operations and maintenance activity, and related services, with respect to the Alameda Point water distribution facilities as set forth in Exhibit B, attached hereto and incorporated herein by this reference. District shall have the right, at its sole discretion, to perform the work, or any portion thereof, under contract or by District forces. Unless restrained by the Navy, the City, or the Alameda Reuse and Redevelopment Authority (ARRA), District shall have unlimited and unimpeded access to the Alameda Point water distribution facilities to enable District to perform the services hereunder.

2.1 Materials and equipment. Except as otherwise provided in this Agreement, all materials and equipment necessary for the performance of said operations and maintenance services shall be provided by the District. Staging areas for District equipment and materials are to be provided by ARRA at Alameda Point as necessary. City will provide staging areas, should ARRA fail to do so.

2.2 Supervision and Control. The District shall have sole and exclusive supervision and control over its operations under this Agreement, including but not limited to the size and makeup of crews providing services hereunder, and unless restrained or restricted by the Navy or the City, the type and level of services provided and the timing and scheduling of said services. It is understood and agreed that the time of work hereunder shall be determined by District on the basis of its overall scheduling requirements and needs, taking into account such factors as the availability of work crews, materials, equipment, other commitments and contracts of District, and emergency jobs or installations. To the extent possible, District will notify affected tenants of any planned interruption of water service due to maintenance activities. District agrees to discuss changes in its practices or amendments to this Agreement if City requests such discussions to avoid breaching City's obligations under the Cooperative Agreement or to avoid suspension, disallowance, or termination of any payments from Navy to City under the Cooperative Agreement. Matters of overall District priorities shall be determined by District.

3. Costs. City shall compensate the District for all of its actual costs to perform operations and maintenance activity, and related services as provided herein, in addition to payment of the standard water consumption charges for water delivered to Alameda Point as provided in Section 4.3 hereof.

3.1 Routine Operations and Maintenance Cost Cap. Except as provided in Exhibit B, Section 6, the District will limit its routine operations and maintenance services under this Agreement to those that can be provided at a cost of \$7,000 per month.

3.2 Emergency Repairs. The District shall provide emergency services as needed up to \$30,000 per emergency repair event, unless the City provides verbal approval to perform services above said amount which shall be verified in writing within 24 hours. Refer to Exhibit B, Section 6.

4. Monthly Billing. District will determine the actual amount of its costs incurred in performance of the work hereunder. On a monthly basis, District shall prepare an itemized invoice, for the preceding month, detailing these actual operation and maintenance costs. Water consumption shall be billed separately per Section 4.3.

Invoices shall be submitted to:

City of Alameda  
Attention: Jesse Barajas, Maintenance Superintendent  
Maintenance Service Center  
1616 Fortmann Way  
Alameda, CA 94501  
(510) 747-7900

Invoice inquiries should be directed to:

East Bay Municipal Utility District  
Attention: Leann Gustafson  
Manager of Distribution Maintenance and Construction  
375 11th Street, MS #608  
Oakland, CA 94607-4240  
(510) 287-0859

The City shall pay the amount of the invoice within thirty (30) days following receipt of District's written invoice. Actual costs include materials, labor, use of equipment, all District standard overhead charges, subcontractor services and all other costs incurred by the District to provide the maintenance and operation services hereunder. District's determination of all costs shall be final and binding, provided that such determination shall be made in accordance with generally accepted accounting principles.

4.1 Billing Review. District agrees to make available its accounting records upon request by City. Should City believe that an error in billing has been made, District will meet with City, upon request, for purposes of reviewing the relevant financial data; provided, however, that nothing herein shall affect City's obligation to make timely payment as provided in Section 4.0. In the event that an error is confirmed, District shall refund any overpayment made by City.

4.2 Auditor Review. Should the parties desire review of a cost issue by an auditor, auditors from both agencies shall jointly review the issue within 60 days. Should the auditors disagree, an independent auditor shall be chosen within 30 days of the agency auditors' joint review, to decide the issue. The auditor's fee shall be paid by the initiating agency and reimbursed by the agency in error.

4.3 Water Consumption Charges. City shall pay all of the District's standard water consumption charges for water delivered to Alameda Point. These consumption charges shall not be included as part of the Cost Cap as described in Section 3.1.

5. Indemnification. The City shall defend, indemnify, save, and hold harmless the District and its officers and employees from any and all claims, demands, suits, costs, expenses, and liability for any damages, injury, sickness, or death, including attorneys' fees, howsoever same may be caused, arising directly from or in any way connected with the operation and maintenance services performed by the District pursuant to this Agreement, including but not limited to liability for inverse condemnation, nuisance, trespass, lost profits, or interruption of water service, or liability under any state or federal law or regulation governing the handling and disposal of contaminated soil or hazardous waste, except to the extent caused by the gross negligence or willful

misconduct of the District. In the event action is brought against the City, or it is joined therein, the City shall provide its own defense at the sole cost and expense of the City.

6. Insurance Requirements. City shall furnish and maintain, during the life of this Agreement, all the coverage required by this Section and shall submit a memorandum of such coverage to the District. If the City is self-insured, the District will accept proof of self-insurance from the City. Acceptance of the Memorandum of Coverage shall not relieve the City of any of the requirements, nor decrease the liability of the City. The City shall provide workers' compensation and general liability insurance.

6.1 General Liability Insurance. The City shall furnish and maintain during the life of the Agreement general liability coverage that provides protection from claims which may arise from operation or performance under this agreement. The amounts of coverage shall be not less than the following:

\$1,000,000/Occurrence, Bodily Injury, Property Damage – General Liability.

The following coverage or endorsements are required:

- (1) The District, its Directors, officers, and employees are **Additional Insureds** in the Memorandum of Coverage as to the work being performed under the agreement.
- (3) The coverage includes **contractual liability** for the assumption of liability of others and through the indemnity in this Agreement.
- (4) The coverage is written on an **Occurrence** basis.
- (5) The coverage includes **personal injury** (libel, slander, and trespass) liability.

(8) The coverage shall not be canceled nor materially altered unless 30 days' written notice is given to the District.

(9) The coverage includes broad form property damage liability.

(10) The coverage includes use of non-owned automobiles and equipment.

(11) The coverage includes Pollution liability for claims related to sudden and accidental discharges of pollutants into the environment arising out of or resulting from performance under this Agreement.

6.2 Excavated Soil Management. In the course of the work hereunder, the District may encounter soil and/or groundwater that may contain contaminants, such as volatile organic compounds, fuels, heavy metals, radium, and/or other hazardous materials. In order to effectively and safely manage excavated soils on the Alameda Point site, City/ARRA agrees to designate a transfer facility for centralized stockpiling of soil. District will do a preliminary evaluation of the excavation site. District will deposit spoils into the transfer station for disposal by City. City shall be responsible for the handling, maintenance and disposal of excavated soils in accordance with all applicable state, federal and local regulations. Navy is presumed to be the generator of all excavated soil. City is responsible for obtaining any necessary excavation permit. It is understood and agreed that, if contaminants are encountered, such that District personnel cannot safely operate or maintain the Alameda Point water system, as provided herein, operations and maintenance activities will be delayed during the removal, treatment or disposal of said contaminants and water service may be interrupted. The District shall notify the City and Navy in writing of the presence of such contaminants and be available

to discuss options for contaminated soil removal and transporting to the transfer station such that water system repairs can be completed in a timely manner. The District may choose not to remove contaminated soils at any excavation required for operation and maintenance of the system.

7. Term Agreement. District shall continue providing the operation and maintenance services described in Section 2 until this Agreement terminates on March 31, 2011. Either party shall have the right to terminate this Agreement prior to termination upon giving the other party at least one-month prior written notice. In the event of termination, District shall be entitled to compensation for services performed to the effective date of termination.

8. Communications. The District's project manager for the work covered by this Agreement will be:

Margo Schueler, Construction and Maintenance Superintendent  
East Bay Municipal Utility District, MS #60  
375 - 11<sup>th</sup> Street  
Oakland, CA 94607  
(510) 287-1690

The City's project manager for said work will be:

Jesse Barajas, Maintenance Superintendent  
Maintenance Service Center  
1616 Fortmann Way  
Alameda, CA 94501  
(510) 747-7900

The District will advise City's project manager, or designee, as soon as practicable whenever emergency or other non-routine work will be performed by District.

Emergency and non-routine work includes, but is not limited to, leaks, water main breaks, system investigations and customer complaints. Except for the notice required

under Section 6.2 and Exhibit B (6), no other notice of District work hereunder is required to be given to City.

8.1 Notices and Demands. Any demand to be made or notice to be given by either party hereunder shall be deemed to have been given within three (3) business days of such notice being deposited in the United States mail and sent postage prepaid and addressed as follows:

District:

Michael J. Wallis  
Director of Operations and Maintenance  
375 – 11<sup>th</sup> Street, MS #606  
Oakland, CA 94607

City:

Matthew Naclerio, Public Works Director  
City Hall West  
950 West Mall Square, Suite 110  
Alameda, CA 94501  
(510) 749-5840

8.2 Required Reports. City agrees to provide annual information by January 15<sup>th</sup> of each year to Maintenance Superintendent Margo Schueler of the District. The information to be provided consists of:

1. Total number of active connections
2. Total number of inactive connections
3. Number of metered connections
4. Number of unmetered connections
5. Number of year round residents the system serves
6. Approximately how many people were onsite during the busiest day in the past calendar year
7. Total number of backflow prevention devices in the system
8. Number of backflow devices installed during the year
9. Number of backflow devices tested during the year
10. Number of backflow devices failed during the year
11. Number of backflow devices repaired/replaced during the year
12. Provide a copy of the CCR Annual Water Quality Report to Customers.

Notwithstanding the reporting requirements above due on January 15<sup>th</sup> of each year, the City agrees to provide timely reporting of work which may affect water quality. Work such as installation of new services and changing meters are examples of work that may affect water quality.

9. Entire Agreement. This instrument contains the entire Agreement of the parties relating to the rights granted and obligations assumed and supersedes all prior written and oral discussions or representations and is not intended to create any third party rights.

10. Modification of Agreement. Notwithstanding any of the provisions of this Agreement, the parties may agree to modifications or additions hereto only by mutual written consent.

11. Severability. Should any part of this Agreement be declared by a final decision by a court or tribunal of competent jurisdiction to be unconstitutional, invalid, or beyond the authority of either party to enter into or carry out, such decision shall not affect the validity of the remainder of this Agreement, which shall continue in full force and effect, provided that the remainder of this Agreement, absent the unexcised portion, can be reasonably interpreted to give effect to the intentions of the parties.

12. Controlling Law. This Agreement and all matters relating to it shall be governed by the laws of the State of California.

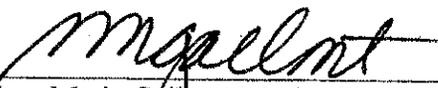
13. District Right to Terminate Water Service. It is understood and agreed that this Agreement shall in no way restrict or limit the District's right to terminate water service for nonpayment of billed charges or other permissible reason.

14. No Waiver. The District's waiver of the performance of any covenant, condition, obligation, representation, warranty or promise in this agreement shall not invalidate this Agreement or be deemed a waiver of any other covenant, condition, obligation, representation, warranty or promise. The District's waiver of the time for performing any act or condition hereunder does not constitute a waiver of the act or condition itself.

15. No Discrimination. There shall be no discrimination against any person, or group of persons, on account of race, color, religion, creed, national origin, ancestry, gender, age, marital status, disability, or sexual orientation in the performance of this contract. Neither City nor District shall establish or permit any such practice(s) of discrimination with reference to the contract or any part thereof. Either party determined to be in violation of this section shall be deemed to be in material breach of this Agreement.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized officers in Oakland, California, on this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

**CITY OF ALAMEDA**

By:   
Ann Marie Gallant, Interim City Manager

Date: 9/30/10

By:   
Recommended for approval  
Matthew T. Naclerio, Director of Public Works

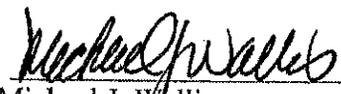
Date: 9-30-10

Approved as to Form:  
City Attorney

By:   
Teresa Highsmith Donna Mooney  
Asst City Attorney

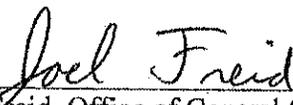
Date: 9/30/10

**EAST BAY MUNICIPAL UTILITY DISTRICT**

By:   
Michael J. Wallis  
Director of Operations & Maintenance

Date: 9/29/10

Approved as to Form:

By:   
Joel Freid, Office of General Counsel

Date: 9/29/10

## **EXHIBIT A**

### **Facilities Which Will Be Maintained and Operated by the District**

For purposes of this agreement, the Alameda Point potable water system includes water distribution piping and fire suppression water distribution piping. The system includes valves and hydrants. Except as otherwise provided, the District will operate and maintain said potable water distribution system; provided, however, that the District's responsibilities therefor shall terminate at the point that any pipeline included in said system passes beneath or connects to any building or structure as part of the water delivery system, or passes onto any pier or wharf. In the event that a water system pipeline leak or failure occurs under a building or structure, the District will attempt to isolate the leak and contact the City as soon as possible for the City to determine how repairs should be effected. Additionally, where a building shutoff valve exists or at such time as a meter is installed for purposes of measuring water delivery to any residence or business situated at Alameda Point, the District's maintenance and operational responsibilities with respect to the water delivery system providing water service to said residence or business shall thereafter terminate at said shutoff valve or meter. Under no circumstances, shall the District repair or otherwise maintain water pipelines and appurtenances within buildings and other structures or on piers or wharves. In the event that the District determines that maintenance or operation work is beyond its responsibilities hereunder, the District will promptly notify the City

## **EXHIBIT B**

### **Water System Operation and Responsibilities**

District will operate and maintain the portion of the Alameda Point Water System, as identified in Exhibit A, according to customary water utility standards of practice.

District will endeavor to provide a level of service as close as possible to the level of service provided for the District owned system and to operate in a manner consistent with the California Department of Health Services Permit #020498P0110016 issued to the Navy; however, the parties acknowledge that the level of service cannot be assured as the Alameda Point system has not been constructed to District standards and that there are portions of the Alameda Point water system that are not under the District's physical or financial control and thus limits the District's ability to ensure compliance with the DHS permit.

Operation and maintenance responsibilities include the following activities:

- 1) WATER QUALITY MONITORING (sample collection, analysis and reporting)
  - Preparation of a water quality sampling plan
  - Routine bacteriological testing and chlorine residual measurements
  - Water quality testing and analysis as needed in response to customer inquiries, main breaks, positive coliform bacterial results from the routine programs, etc.
  - Other water quality testing and analysis as directed by the California Department of Health Services (DHS).

## 2) RESPONDING TO CUSTOMER INQUIRIES

Customer inquiries regarding water quality, water pressure and water flow will be investigated and appropriate response will be provided depending upon the nature of the inquiry to the extent possible given the limitations of the existing plumbing system.

## 3) SYSTEM FLUSHING

- As required to address water quality issues, customer inquiries, pipe repairs
- City shall pay for all water used for hydrant flushing, hydrant testing, unidirectional flushing, disinfection, and dechlorination.

## 4) DISINFECTION AND DECHLORINATION

- Disinfection of pipes and appurtenances as required in response to main breaks, main repairs, appurtenance installation, etc, to ensure sanitary condition of distribution system
- Perform dechlorination of potable water released to storm system or receiving waters as needed to prevent any adverse environmental impacts and to comply with storm water regulations

## 5) HYDRANT FLOW TESTS

Perform or coordinate with the city Fire Department to perform hydrant flow tests if needed for verification of fire flow or hydraulic model calibration.

## 6) WATER MAIN REPAIR

- Investigation, leak identification, excavation, repair, testing, backfill and resurfacing associated with broken or leaking water mains.

- Installation of service line valves at locations that facilitate for future meter installation and/or to facilitate repairs.
- The District shall request and obtain advance approval from the City for any planned repairs estimated to be in excess of \$7,000.
- If an emergency repair is required, the District may proceed to secure the emergency without approval, and fully repair if repair is estimated to be less than \$30,000. District shall use due diligence in responding and shall contact and advise City within 24 hours of an emergency repair.

7) APPURTENANCE INSTALLATION, REPLACEMENT AND REPAIR

- Installation, replacement or repair of hydrants, valves, meters, as needed to maintain current Alameda Point level of service
- Installation of blow-offs as needed to maintain water quality

8) POTABLE WATER SYSTEM MAINTENANCE AND REPAIR

Maintenance, replacement and repair of equipment as needed to meet current Naval Air Station (NAS) level of service for the potable water system. District will operate the distribution pipelines to maintain acceptable water quality in the distribution system to the extent possible.

9) NEW SERVICE INSTALLATION

At the request of the City, the District will install new services for potable or fire supply or other purposes. Upon receipt of proper authorization from the City, the District will coordinate with the City's tenants or others as needed, on behalf of the City, to facilitate the installation of the authorized water services. New services will be metered as appropriate and as directed by the City. If meters are installed by

the parties other than the District, and the District inspects and approves the installation, the District will provide written acceptance and will be considered the same as a District-installed meter. All costs for new service installation shall be reimbursed by the City.

#### 10) BACKFLOW PREVENTION

The City will adopt a Cross-connection Control database with the assistance of the District to be established by March 31, 2011. The City will test backflow prevention devices as necessary to protect water quality and annually for DHS requirements. The City shall provide the District written documentation of the tests. The City shall provide the District a list of all backflow devices and the testing schedule. District will specify the location or locations and type or types of backflow prevention needed to meet DHS standards. The City shall be responsible for purchasing and installing backflow devices. The District will maintain the master meters and the City is responsible for maintenance of the master backflow preventors. City shall be responsible to issue authorization of and for contract payment for the required work. District will be responsible for overseeing the work of the subcontractor. District will provide written acceptance of these installations, both from inception of work at Alameda Point and in the future, where inspected and approved by the District, for purposes of eventual system conveyance. . The City shall provide to the District change of responsible party notification within two weeks of a change in occupancy within Alameda Point. The City shall provide to the District an annual summary report of the changes in responsible parties by March 1<sup>st</sup> of each year. The City's notification of change of responsible party and annual summary

report of such changes shall be sent to the District Construction and Maintenance

Superintendent named in Section 8 with a cc to:

Tim Collins, Senior Backflow Inspector  
East Bay Municipal Utility District, MS #47  
375 - 11<sup>th</sup> Street  
Oakland, CA 94607  
tcollins@ebmud.com  
(510) 287-0815

#### 11) WATER SUPPLY PERMIT

- City or the Navy shall be the holder of the permit to operate the Alameda Point water system until the District accepts conveyance of said system.
- If necessary, District will assist the City in the preparation and submission of a Water Supply Permit Application to DHS.
- District will provide information, verbal and written, to support the application.

#### 12) REPORT PREPARATION

If necessary, District will prepare water quality reports, on behalf of the City, as required to meet DHS requirements. These reports may include annual water quality reports, reports of maximum contaminant level violations, etc.

#### 13) NOTIFICATION

District will provide notification to City and DHS, as required regarding water quality problems and significant system outages.

#### 14) WATER SYSTEM MARKING

District will mark location of water system facilities in response to Underground Service Alert requests. Such markings will be based solely on available maps, supplied by Navy or City to District. District accepts no responsibility as to the accuracy of said maps.

#### 15) ENGINEERING

In order to effect system repairs and maintain a reasonable level of service, some engineering services are required. District will provide those services as needed to ensure repairs and level of services are adequate.

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