

# **MEMORANDUM OF UNDERSTANDING**

## **BETWEEN**

### **SANTA CLARA VALLEY WATER DISTRICT AND**

### **THE SAN FRANCISCO PUBLIC UTILITIES COMMISSION AND BAY AREA WATER SUPPLY AND CONSERVATION AGENCY TO**

### **PARTICIPATE IN A FEASIBILITY STUDY TO EVALUATE ALTERNATIVES FOR SAN FRANCISCO PUBLIC UTILITIES COMMISSION AND BAY AREA WATER SUPPLY AND CONSERVATION AGENCY PARTICIPATION IN THE EXPEDITED PURIFIED WATER PROGRAM**

This MEMORANDUM OF UNDERSTANDING (“MOU”), made in the State of California on this \_\_\_\_\_ day of \_\_\_\_\_ 2017, is by and between the Santa Clara Valley Water District (“SCVWD”), an independent special district created by Legislature of the State of California, the Bay Area Water Supply and Conservation Agency (“BAWSCA”), and the San Francisco Public Utilities Commission (“SFPUC”), a department of the City & County of San Francisco, collectively referred herein as the “Parties” and singularly as a “Party.”

This MOU sets forth the respective roles and responsibilities of the Parties regarding the development of a Feasibility Study between the Parties to identify and evaluate options for the SFPUC/BAWSCA to participate in SCVWD’s Expedited Purified Water Program (“Program”).

## **RECITALS**

1. WHEREAS, current and future drought conditions in California threaten water supply reliability; and
2. WHEREAS, SCVWD is investigating the feasibility of developing up to 45,000 acre-feet per year (“AFY”) or 40 million gallons per day (“MGD”) of purified water capacity by 2025 to augment water supply in Santa Clara County (“County”) via indirect potable reuse and potential direct potable reuse; and
3. WHEREAS, the SFPUC and SCVWD share common customers in the County; and
4. WHEREAS, SCVWD, as part of its Program, may develop capacity to produce additional water supplies that could be available, including to the SFPUC/BAWSCA and customers common to the SCVWD; and
5. WHEREAS, the SFPUC and SCVWD independently deliver treated water to the cities of San Jose and Santa Clara; and

6. WHEREAS, the Parties will have access to and may use all of the deliverables produced through this Feasibility Study; and
7. WHEREAS, the Parties are partners on multiple projects and programs related to improving regional water supply reliability, including the Bay Area Regional Reliability Project; and
8. WHEREAS, the SFPUC and SCVWD developed and make beneficial use of a System Intertie, located in the city of Milpitas; and
9. WHEREAS, the Parties intend to continue working together on projects and programs of mutual interest.

NOW, THEREFORE, in consideration of the recitals and mutual obligations of the Parties herein expressed, the Parties agree as follows:

## **1. PREAMBLE**

The Parties seek to work cooperatively to determine whether a water supply project can be developed to mutually benefit the Parties and provide greater water supply reliability to their common customers. This Feasibility Study includes two distinct phases: 1) Prepare an initial screening with sufficient information for the Parties to determine whether to proceed with continued analysis of a water supply project(s) to supply between 5-15 MGD in excess of SCVWD's needs, which can be made available to SFPUC customers/BAWSCA members within Santa Clara County; and 2) If the initial screening demonstrates that a project(s) is viable, prepare a technical memorandum specifying in detail an arrangement in which the SFPUC/BAWSCA can commit financial and other resources to the SCVWD in exchange for the right to receive 5-15 MGD from SCVWD's Program, should the SCVWD decide to implement that program.

The scope of work for Phase 1 of the Feasibility Study is detailed herein. It will conclude with a Work Plan for Phase 2. Developing the scope of work and cost of Phase 2 is also envisioned as part of this Feasibility Study and will be finalized as an addendum to this MOU upon the completion of Phase 1.

## **2. DEFINITIONS**

- a) "CEQA" -The California Environmental Quality Act.
- b) "Consultant" - Consulting firms, engineering firms, scientific firms, public outreach firms, facilitation firms or other professional services firms retained by SCVWD to provide services for the Feasibility Study.
- c) "Consultant Contracts" – Consultant services contracts between SCVWD and Consultant for professional services for the development of the Feasibility Study.
- d) "ESA" – The Federal Endangered Species Act

- e) “NEPA” - The National Environmental Policy Act
- f) “Feasibility Study” - A proposed study of alternatives, analysis, and documentation of the feasibility of the concept broadly described in Article 1 of this MOU. The Feasibility Study will define objectives, evaluate project constraints, evaluate the delivery approach, conduct performance assessment, and estimate project costs.
- g) “Feasibility Study Staff Time” - Staff and management time from one or more of the Parties that is necessary for conducting the general project management and other duties as assigned under this MOU.
- h) “Participation Agreement” – An agreement in which SFPUC/BAWSCA shares in the costs of the Project in exchange for a right to receive a portion of the purified water produced by the Project, where the SCVWD may substitute such portion of purified water with other sources of SCVWD water.
- i) “Program” – more fully, “Expedited Purified Water Program – SCVWD’s planned development of up to 45,000 AFY or 40 MGD of purified water capacity by 2025 to augment water supply in the County via indirect potable reuse and potential direct potable reuse.
- j) “Project” – The constructed elements of the Expedited Purified Water Program.
- k) “Regional Facility” or “System Interties” - One or more facilities or interties between two neighboring agencies used to access (1) raw water or (2) treated water meeting drinking water standards administered by the California Division of Drinking Water.

### **3. TERM**

- a) This MOU shall become effective upon its execution by all Parties.
- b) This MOU will terminate on December 31, 2018 or when all obligations under this MOU have been performed, whichever occurs first.
- c) Payment obligations under Article 8, Cost Sharing and Payment, and Article 11, Cancellation, shall survive discharge or termination of this MOU until obligations are satisfied.

### **4. PURPOSE**

The purpose of this MOU is to:

- a) Define the roles and responsibilities of each Party in coordinating the development of the Feasibility Study by Consultant(s). All work associated with the Feasibility Study is to be conducted in accordance with the MOU.

- b) Establish the guidelines and principles for cost sharing between the Parties for the development of the Feasibility Study.
- c) Establish procedures for incurring costs such as contracting and payment of Consultant(s) for developing the Feasibility Study.
- d) Establish procedures for the SCVWD seeking reimbursement from SFPUC/BAWSCA for costs incurred by SCVWD for payment of Consultant(s) developing the Feasibility Study.

## 5. WORK TO BE PERFORMED

The Feasibility Study will be conducted cooperatively by the Parties and Consultant(s) in two phases. The focus of the first phase (“Phase 1”) will be to identify the key project objectives for the Parties and define viable alternative(s) that can meet those objectives. Based on the results of Phase 1, viable project alternative(s) can be further analyzed in detail in Phase 2, providing sufficient technical and institutional information to evaluate a Project(s) that can mutually benefit the Parties. Subsequent tasks and work products may be added through addendum(s) to this MOU as agreed by the Parties.

At the conclusion of Phase 1, each Party reserves the right to not move forward with Phase 2 or subsequent activities envisioned under this MOU. However, any Party may use the analysis developed herein for any future planning or development.

The SCVWD is seeking to develop a drought-proof water supply through purifying treated wastewater through advanced water treatment technologies. This Program is expected to meet or exceed drinking water standards and may be utilized to replenish the Santa Clara County groundwater basin; to supplement the raw water treated at the SCVWD’s water treatment plants; or to enable storage of the water through its participation in various banking programs and/or exchanges with other water agencies.

The following tasks have been identified for assessing the Phase 1 feasibility of SFPUC/BAWSCA’s participation in the Program:

1. *Define objectives for the SCVWD and SFPUC/BAWSCA and their principles of participation*
  - a. Purpose: Identify the specific objectives that each Party has with respect to its participation in the Feasibility Study. These objectives will include conveyance, timing, quantity, quality and reliability of water supply and any other impacts or constraints of concern.
  - b. Elements:
    - i. The Parties will develop specific objectives and may solicit feedback from the following stakeholders, as appropriate:
      1. City of San Jose
      2. City of Santa Clara
    - ii. Synthesize preliminary findings

- iii. Hold a meeting between the Parties summarizing key areas of overlap, differences, and identifying issues that will require further analysis.
    - iv. Draft specific objectives, principles of participation, issues to be resolved in the near term, and those that require further study.
  - c. Deliverables:
    - i. Meeting agendas and summaries.
    - ii. Specific objectives, principles of participation, and list of issues to be resolved in Phase 1 (short-term) and Phase 2 (requiring further analysis).
- 2. *Conduct constraints analysis*
  - a. Purpose: Identify potential constraints/boundaries that would impact the Parties from entering into a Participation Agreement, and identify the particular terms and conditions of a Participation Agreement.
  - b. Elements:
    - i. Review and analyze the following areas of importance from each Party's perspective:
      - 1. Legal requirements and constraints
      - 2. SCVWD imported water contracts
      - 3. SCVWD treated water contracts
      - 4. Institutional/governance requirements
      - 5. Regulatory
      - 6. Environmental
      - 7. Financial
      - 8. Infrastructure
      - 9. Operational
      - 10. Water supply project commitments/availability of water
      - 11. Others as identified in Task 1
    - ii. Prepare draft findings and circulate among Parties for review and comment.
    - iii. Hold a joint meeting between the Parties to discuss draft findings and assess the need for further analysis (if necessary)
    - iv. Finalize findings
  - c. Deliverables: Memorandum (draft and final) summarizing findings.
- 3. *Identify conceptual alternatives*
  - a. Purpose: Identify conceptual alternatives that may be analyzed in further detail.
  - b. Elements:
    - i. Identify alternatives that meet the objectives identified in Task 1 and are not immediately omitted from further consideration under the constraints identified in Task 2.
      - 1. Groundwater extraction (SCVWD Campbell Well Field)
      - 2. New or leased wells.

3. Treated surface water deliveries to the SFPUC at the Intertie in Milpitas.
  4. Treated surface water deliveries to the SFPUC at a new Westside Intertie, to be developed.
  5. Treated water deliveries directly to San Jose and/or Santa Clara.
  6. Transfers/exchanges, either direct or indirect to SFPUC/BAWSCA, using Los Vaqueros, Semitropic, State Water Project, or other.
  7. Direct transfer of purified water to the San Francisco Regional Water System.
- ii. Select up to four (4) viable project alternatives from Task 3.b.i
    1. Develop Project schematic
    2. Identify infrastructure requirements for each alternative
    3. Identify preliminary (concept-level) capital and operations and maintenance costs
  - c. Deliverable: Technical Memorandum describing selected viable Project alternatives.
4. *Develop Work Plan for Phase 2*
    - a. Purpose: Identify hydraulic modeling and other needs for further analysis of each alternative.
    - b. Develop cost estimate for proposed scope of work for Phase 2.
    - c. Deliverable: Work plan description and cost estimate for Phase 2.
- 6. REGULATORY APPROVALS, ENVIRONMENTAL APPROVALS, ENVIRONMENTAL COMPLIANCE AND ENVIRONMENTAL REVIEWS**

The Parties agree that the work contemplated in this MOU, as it involves a feasibility study, is exempt from the requirements of CEQA pursuant to CEQA Guidelines and is similarly exempt from the National Environmental Policy Act (NEPA) and the ESA.

## **7. RESPONSIBILITIES OF THE PARTIES**

General responsibilities of all Parties are as follows:

- a) Work cooperatively to develop a work plan and the Feasibility Study.
- b) Commit Feasibility Study Staff Time to work with staff from the other Parties and the selected Consultant(s) in conducting the Feasibility Study.
- c) Share relevant engineering, permitting, regulatory and operational information regarding its own facilities and permits with the other Parties for the benefit of the Feasibility Study.
- d) Provide access to facilities and operational data that may be needed for developing the Feasibility Study (such as groundwater management,

hydrogeology, intakes, aqueducts and pumping plants, transmission lines, reservoirs, treatment plants, interties, etc.). If needed, commit Feasibility Study Staff Time to conduct necessary analysis of its own facilities, permits, operational data, modeling information, procedures or requirements, or any other data needed for the Feasibility Study and share the information with the other Parties. Access to facilities will be consistent with, and will follow, the facility owner's standard safety and notification requirements.

- e) Provide oversight and review of Feasibility Study work products.
- f) Conduct general work that is needed to advance the Feasibility Study development. These efforts may include State and Federal grant application and grant administration support, website update, and outreach.
- g) Accept that, if any Party chooses to move forward with individual projects and concepts also being evaluated as part of the Feasibility Study, those individual projects and concepts are not subject to the terms of this MOU.

The Parties hereby designate SCVWD as the contracting entity under this MOU. Subject to approval by SCVWD's authorized representative, SCVWD shall be responsible for entering into Consultant Contract(s) to undertake the Feasibility Study. SCVWD shall conduct a consultant procurement process that satisfies its own internal consultant procurement policies/criteria. Once a Consultant(s) is selected, and only after the Parties have funded the Feasibility Study preparation effort as provided in Article 8 of this MOU, shall SCVWD enter into Consultant Contract(s). If SCVWD fails to approve the necessary Consultant Contract(s) or SCVWD terminates Consultant Contract(s) for any reason, SCVWD may terminate its participation in this MOU under Article 11.

## **8. COST SHARING AND PAYMENT**

The estimated Consultant cost to complete this scope of work is \$75,000. SFPUC agrees to reimburse SCVWD for 50% of the total Consultant cost. BAWSCA's share of the cost will be paid to SFPUC through a separate agreement. The SFPUC funding commitment, therefore, shall not exceed \$37,500, unless additional funding is authorized in writing through a modification pursuant to Article 15 of this MOU. If the projected cost to complete the scope of work to be performed by Consultant(s) is likely to exceed \$75,000, then Parties shall meet and confer within two weeks (14 days) of the notification by SCVWD of the projected increase in cost. Within 7 days of the meet and confer, Parties may choose to amend Consultant Contract(s) and this MOU to include the newly negotiated costs or make alternate arrangements.

- a) SCVWD shall request disbursement of SFPUC's financial commitment on a reimbursement basis by submitting to SFPUC invoices(s) for incurred Consultant Contract costs. SCVWD shall submit an invoice to SFPUC for Consultant Contract costs no more than once a calendar quarter, which shall include the hourly rates, hours spent and task break down of the activities performed in support of this scope of services specified in Consultant Contract(s).

- b) Following the review and approval of an invoice by SFPUC, SFPUC shall disburse to SCVWD an approved amount thirty (30) days after receipt of that invoice.
  - c) An invoice may be rejected by the SFPUC only if:
    - a. it is submitted without signature;
    - b. is submitted under signature of a person other than SCVWD's duly authorized representative;
    - c. the invoice contains a material error; or
    - d. paying the invoice would result in SFPUC exceeding its financial commitment described in Article 8 of this MOU.
- SFPUC shall notify SCVWD of any invoice so rejected, and the reasons therefore.

Costs incurred on the Feasibility Study by a Party for "in-kind" services including Feasibility Study Staff Time and overhead costs, as well as costs for Consultant oversight, meetings, travel, and incidental expenses shall not be reimbursable by the other Party.

No work on the Feasibility Study shall commence until this MOU has been executed by all Parties. If a single Party chooses to terminate its participation under the terms of this MOU, said Party shall remain financially responsible for its contribution as detailed in Article 11, Cancellation.

## **9. HOLD HARMLESS, INDEMNIFICATION, REMEDIES AND INSURANCE**

To the extent permitted by California State law and in proportion to fault, each Party will indemnify, defend and hold all other Parties and their directors, officers, agents, and employees safe and harmless from any and all claims, suits, judgments, damages, penalties, costs, expenses, liabilities and losses (including without limitation, sums paid in settlement of claims, actual attorneys' fees, paralegal fees, consultant fees, engineering fees, expert fees and any other professional fees) that arise from or are related in any way to each Party's, its employees', officers', or other agents' in the operation and/or performance of this MOU; provided, however, that no Party shall indemnify or hold harmless another Party for that Party's own negligent acts, errors or omissions, or willful misconduct, in the operation and/or performance of this MOU or the performance of Consultant(s).

Notwithstanding the preceding paragraph, where more than one Party is named in a suit challenging the Feasibility Study, or made subject to a claim or penalty regarding the same, the Parties shall coordinate and undertake a joint defense, utilizing a joint defense agreement to the extent possible, subject to the approval of the Parties. Each Party agrees that, to the greatest extent practicable, it shall cooperate in such defense and execute any waivers and/or tolling agreements that may be necessary in order to provide for a single joint defense of such a suit, claim, or imposition of penalty. Any communications between the Parties and any of their respective consultants and attorneys engaged in the joint defense shall be privileged as joint defense communications. Work performed during the joint defense by Consultants or attorneys, to the extent allowed by law, shall

be considered attorney work product. Nothing in this paragraph is intended to require a joint defense under circumstances where it would be legally impermissible or under circumstances where it is wholly impractical.

This indemnity provision shall survive the termination of this MOU and the termination of any Party's participation in this MOU. Further, each Party will be liable to the other Party(s) for attorneys' fees, costs and expenses, and all other costs and expenses whatsoever, which are incurred by the other Party(s) in enforcing this indemnity provision.

In all Consultant Contracts funded in whole or part by the Parties, SCVWD shall name the SFPUC, BAWSCA, and their respective officers, agents and employees as additional insureds and additional indemnitees in the insurance coverage and indemnity provisions customarily used in the SCVWD's professional service contracts.

## **10. DISPUTES**

Any claim that a Party may have against the other Party regarding the performance of this MOU including, but not limited to, claims for compensation will be submitted to such other Party. The Parties will attempt to negotiate a resolution of such claim and if necessary process an amendment to this MOU or a settlement agreement to implement the terms of any such resolution.

## **11. CANCELLATION**

If a Party elects to terminate its participation in this MOU or in the Feasibility Study, it may do so by delivering to the other Party a written notice of intention to terminate. Termination shall take effect thirty days following the receipt of notice by the other Party. No portion of the terminating Party's financial contribution provided under this MOU for use in preparing the Feasibility Study shall be refunded to the terminating Party.

## **12. MAINTENANCE AND INSPECTION OF BOOKS, RECORDS, AND REPORTS**

The Parties will, upon reasonable advance written notice, make available for inspection to the other Parties all records, books and other documents directly relating to the Feasibility Study as well as any other work related to water supply institutional arrangements and MOU that are required for conducting the Feasibility Study. Prior to release of such documents (other than in response to a request under the California Public Records Act or San Francisco Sunshine Ordinance, a subpoena, or court order), all draft information shall to be approved by all Parties for finalization and release.

## **13. MOU NOT A PRECEDENT**

The Parties intend that the provisions of this MOU will not bind the Parties as to the provisions of any future agreement between them. This MOU was developed specifically for the specified MOU term.

#### **14. NOTICES**

Any notice, demand, or request made in connection with this MOU must be in writing and will be deemed properly served if delivered in person or sent by United States mail, postage prepaid, to the addresses specified herein.

Santa Clara Valley Water District  
Attention: Garth Hall, Deputy Operating Officer, Water Supply  
5750 Almaden Expressway  
San Jose, CA 95118

San Francisco Public Utilities Commission  
Attention: Paula Kehoe, Manager, Water Resources  
525 Golden Gate Avenue, 10<sup>th</sup> Floor  
San Francisco, CA 94102

Bay Area Water Supply and Conservation Agency  
Attention: Nicole Sankdula, Chief Executive Officer  
155 Bovet Road, Suite 650  
San Mateo, CA 94402

#### **15. MODIFICATION**

This MOU may be modified only upon the mutual written consent of the Parties.

#### **16. NO THIRD-PARTY BENEFICIARIES**

No third-party beneficiaries are intended or created by this MOU.

#### **17. AUDITS**

SFPUC may audit the District's records related to disbursements of SFPUC funds, per Article 8 of this MOU, during normal business hours by providing the District with a least five business days notice.

#### **18. CERTIFICATION OF FUNDS**

Any and all on-going costs under this MOU are subject to the budget and fiscal provisions of the City and County of San Francisco's Charter. Charges will accrue only after prior written authorization certified by the Controller, and the amount of the SFPUC's obligation hereunder shall not at any time exceed the amount certified for the purpose and period stated in such advance authorization. This MOU will terminate without penalty, liability or expense of any kind to the SFPUC at the end of any fiscal year if funds are not appropriated for the next succeeding fiscal year. If funds are appropriated for a portion of the fiscal year, this MOU will terminate, without penalty, liability or expense of any kind at the end of the term for which funds are appropriated. The SFPUC has no obligation to make appropriations for the Feasibility Study pursuant

to this MOU in lieu of appropriations for new or other agreements. The SFPUC budget decisions are subject to the discretion of the Mayor and the Board of Supervisors. THIS SECTION CONTROLS AGAINST ANY AND ALL OTHER PROVISIONS OF THIS MOU AND APPLIES TO ALL PARTIES' ABILITY TO PARTICIPATE IN THE ONGOING COSTS OF THE MOU AND ALL PARTIES MAY TERMINATE WITHOUT PENALTY IF FUNDS ARE NOT APPROPRIATED BY THEIR RESPECTIVE GOVERNING BODIES.

#### **19. SEVERABILITY**

If any term or provision of this MOU is deemed invalid or unenforceable by a court of competent jurisdiction or by operation of any applicable law, it will not affect the validity of any other provision, which will remain in full force and effect.

#### **20. COMPLETE AGREEMENT**

Other than as specified herein, no document or communication passing between the Parties to this MOU will be deemed to be part of this MOU.

#### **21. ASSIGNMENT**

This MOU is not assignable either in whole or in part, except upon mutual written consent of the Parties.

#### **22. AMENDMENT AND WAIVER**

Except as provided herein, no alteration, amendment, variation, or waiver of the terms of this MOU shall be valid unless made in writing and signed by all Parties. Waiver by any Party of the default, breach or condition precedent, shall not be constructed as a waiver of any other default, breach or condition precedent, or any right hereunder.

#### **23. SUCCESSORS**

This MOU shall bind the successors of the Parties in the same manner as if they were expressly named.

#### **24. INTERPRETATION**

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

#### **25. INTEGRATION**

This MOU represents the entire understanding of the Parties as those matters contained herein. No prior oral or written understanding shall be of any force or effect with respect to those matters covered hereunder.

**26. WAIVER**

The waiver at any time by any Party of its right with respect to default or other matter arising in connection with this MOU will not be deemed a waiver by that Party with respect to any subsequent default or matter.

**27. GOVERNING LAW**

This MOU is governed by and will be interpreted in accordance with the laws of the State of California.

**28. COUNTERPART**

This MOU may be executed in counterpart. Facsimile and electronic signatures shall be binding.

IN WITNESS WHEREOF, the Parties have executed this MOU by their duly authorized representatives, in counterpart.

**SANTA CLARA VALLEY WATER DISTRICT**

**APPROVED AS TO FORM**


By: \_\_\_\_\_  
Anthony Fulcher  
Senior Assistant District Counsel

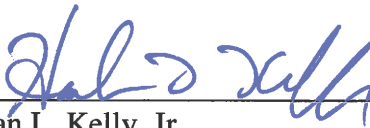
By: \_\_\_\_\_  
Norma Camacho  
Interim Chief Executive Officer

Dated: \_\_\_\_\_

**SAN FRANCISCO PUBLIC UTILITIES COMMISSION**

**APPROVED AS TO FORM**

By:   
Josh Milstein  
Deputy City Attorney  
Dated: 1-12-17

By:   
Harlan L. Kelly, Jr.  
General Manager

Dated: 1/13/17

Authorized by San Francisco Public Utilities Commission,  
**Resolution No. 17-0007**  
**Adopted January 10, 2017**

**BAY AREA WATER SUPPLY AND CONSERVATION AGENCY**

By: Nicole Sandkulla  
Nicole M. Sandkulla  
General Manager

Dated: 1/19/2017