

**AMENDMENT NO. 5 TO COST SHARING AGREEMENT AMONG  
WEST VALLEY SANITATION DISTRICT, CUPERTINO SANITARY  
DISTRICT, COUNTY SANITATION DISTRICT NO. 2-3 OF SANTA  
CLARA COUNTY, BURBANK SANITARY DISTRICT, AND THE  
CITY OF MILPITAS**

This Amendment No. 5 is entered into by and between the West Valley Sanitation District, Cupertino Sanitary District, County Sanitation District No. 2-3 of Santa Clara County, Burbank Sanitary District (collectively “**Sanitation Districts**”), and the City of Milpitas (each individually a “**Party**” and collectively the “**Parties**” or “**Common Interest Group**”) (“**Amendment No. 5**”).

**RECITALS**

A. On August 25, 2015, the Parties formed a Common Interest Group pursuant to a Common Interest, Privilege, and Confidentiality Agreement (“**Common Interest Agreement**”), in order to exchange privileged and confidential information among themselves to advance their common interests in negotiating amendments to their respective Master Agreements for Wastewater Treatment with the Cities of San José and Santa Clara;

B. The Common Interest Agreement allows for experts and consultants to be jointly hired by the Common Interest Group in furtherance of the purpose of developing a common negotiation strategy and negotiating amendments to the Master Agreements;

C. The Common Interest Group participated in a year-and-a-half administrative claims process, four all-day mediation sessions spanning a six-month period before a retired judge, the filing of two substantial administrative complaints, and two hearings before the Treatment Plant Advisory Committee (“**TPAC**”). Despite that effort, the most critical issues and concerns of the Common Interest Group remain unresolved and, thus, the Master Agreements have not been amended;

D. The lack of a satisfactory resolution results in ongoing substantially adverse and unquantifiable fiscal impacts on the Common Interest Group. Consequently, after having exhausted all other available means of negotiating acceptable amendments to the Master Agreements, the Common Interest Group authorized initiation of litigation against the Cities of San José and Santa Clara to pursue claims for breach of the Master Agreements;

E. Based upon the change in circumstances, the Parties amended the Common Interest Agreement on October 13, 2017 (“**Amendment No. 1 to the Common Interest Agreement**”) to more accurately reflect the current purpose and needs of the Common Interest Group to pursue litigation in order to enforce its rights in relation to the Master Agreements;

F. In March 2016, the Parties entered into a Cost Sharing Agreement (“**Agreement**”) to share costs of consultants and experts involved with advancing their common interests as articulated in the Common Interest Agreement;

G. The Agreement established a maximum dollar amount that no single Party would be required to pay toward the shared expenses and designated Milpitas' share to be forty percent (40%) of the total shared expenses in Exhibit A of the Agreement;

H. In or about January 2017, the Parties executed Amendment No. 1 to the Agreement ("**Amendment No. 1**") in order to increase the maximum dollar amount limit for the shared expenses based on the percentages set forth in Exhibit A of the Agreement and to identify the specific applicable limits for each Party;

I. In or about February 2017, the Parties executed Amendment No. 2 to the Agreement ("**Amendment No. 2**") in order to further increase the maximum dollar amount limit for the shared expenses based on the percentages set forth in Exhibit A of the Agreement and to identify the specific applicable limits for each Party;

J. In or about October 2017, the Parties executed Amendment No. 3 ("**Amendment No. 3**") to the Agreement based on the estimated cost of the litigation provided by Hunton Andrews Kurth, LLP ("**Law Firm**") in order to further increase the maximum dollar amount limit for the litigation expenses to a collective total amount of \$3,390,850 and again identify the specific applicable limits for each Party based on the percentages set forth in Exhibit A of the Agreement of which the City of Milpitas committed to provide \$1,399,000;

K. Pursuant to Section 4 of the Agreement, Cupertino Sanitary District is designated as the Administrative Agency under the Agreement and, as such, is responsible for entering into consulting or expert services contracts on behalf of each of the participants in the Cost Sharing Agreement as well as paying invoices of those consultants or expert advisors, and invoicing each Party to the Agreement for its respective share of costs;

L. On March 23, 2018, the Parties filed suit against the City of San José and the City of Santa Clara in *County Sanitation District, et al. v. The City of San José, et al.*, Santa Clara Superior Court Case No. 18 CV 325480 ("**the Litigation**");

M. Pursuant to the Agreement and Amendment No. 3, Milpitas initially remitted payment for its share of Litigation service costs provided by the Law Firm invoiced to it by Cupertino Sanitary District. However, on August 10, 2018, Milpitas, by letter, informed Cupertino Sanitary District that it would not pay the entire amount of the July 12, 2018 invoice;

N. The Parties have been engaged in negotiations to settle the dispute regarding Milpitas' obligation to share in the cost of Law Firm's services. In particular, Sanitation Districts maintain that Milpitas is obligated to provide approximately \$1,169,216.29 as its share of costs of Law Firm's services through May 31, 2021 pursuant to the Agreement and Milpitas disputes this claim ("**Dispute**"). Due to the length of time the Dispute remained unresolved, the cost of Law Firm's services exceeded the maximum collective share of the Sanitation Districts' cost obligations as designated in the Agreement and amended by Amendment No. 3;

O. Therefore, on December 17, 2020 the Sanitation Districts executed Amendment No. 4 to the Agreement ("**Amendment No. 4**") in order to maintain Milpitas' maximum dollar as designated in Amendment No. 3 and increase the Sanitation District's maximum dollar amounts

to collectively contribute and finance Milpitas' excluded forty percent (40%) share of costs while the Parties resolved the Dispute; and,

P. The Parties desire by this Amendment No. 5 to fully and finally resolve their Dispute.

### **TERMS AND CONDITIONS**

**NOW THEREFORE**, in consideration of the promises made and recited herein and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties do hereby agree to enter into this Amendment No. 5, which modifies and amends the Agreement as follows:

1. **Recitals.** The foregoing recitals are true and correct and hereby incorporated herein.
2. **Defined Terms.** All capitalized terms not defined herein shall have the meanings ascribed to them in the Agreement.
3. **Effective Date.** The Effective Date of this Amendment No. 5 shall be the date by which all Parties have executed it which shall be no later than September 30, 2021 ("**Effective Date**").
4. **Section 3.A is amended to read as follows:**

Each Party shall pay its allocated share of costs identified in Section 1.A within thirty (30) days of receipt of an invoice from the Administrative Agency pursuant to Section 3.D (hereinafter referred to as a "Payment Deadline"), based upon the percentages specified in Exhibit A.

5. **Subsection 4.A is amended to read as follows:**

The Administrative Agency shall not contract with a consultant, expert or legal counsel on behalf of the Common Interest Group until the Parties mutually agree to in writing regarding the hiring of the consultant, expert or legal counsel. Notwithstanding the proceeding, the Parties have mutually agreed to the hiring of Hunton Andrews Kurth, LLP including Tom Boer at Hogan Lovells LLP to represent the Common Interest Group and no further written agreement is required from the Parties with respect to such representation. After the Administrative Agency or another Party enters into a contract on behalf of the Common Interest Group that is subject to cost-sharing, no particular work shall be performed until each Party reviews and approves the scope of services to be performed and the estimated costs associated with such services, which for purposes of this Agreement shall be defined as a "Scope of Services." The following individuals, on behalf of each respective Party, are authorized to review and approve any Scope of Services:

**For West Valley Sanitation District:**

Jon Newby, District Manager and Engineer

West Valley Sanitation District

100 E. Sunnyoaks Avenue Campbell, CA 95008 [jnewby@westvalleysan.org](mailto:jnewby@westvalleysan.org)

**For Cupertino Sanitary District**

Richard Tanaka, District Consultant  
Cupertino Sanitary District  
20863 Stevens Creek Boulevard, Suite 100  
Cupertino, CA 95014 [rktmtco@gmail.com](mailto:rktmtco@gmail.com)

**For County Sanitation District No. 2-3**

Barry Ng, Deputy Director  
County of Santa Clara Roads and Airport Department  
County Sanitation District No. 2-3  
20863 Stevens Creek Boulevard, Suite 100  
Cupertino, CA 95014 [barry.ng@rda.sccgov.org](mailto:barry.ng@rda.sccgov.org)

**For Burbank Sanitary District**

Procopio Scalfani, President of Board of Directors  
Burbank Sanitary District  
20863 Stevens Creek Boulevard, Suite 100  
Cupertino, CA 95014 [pscalfani@burbanksanitary.org](mailto:pscalfani@burbanksanitary.org)

**For City of Milpitas**

City of Milpitas  
Steven G. McHarris, City Manager  
1265 N. Milpitas Boulevard  
Milpitas, CA 95035 [CityManagerOffice@ci.milpitas.ca.gov](mailto:CityManagerOffice@ci.milpitas.ca.gov)

**6. Subsection 4.C. is amended to read as follows:**

At no time during the term of this Agreement shall a Party's costs contemplated hereunder exceed its pro-rata share of costs as set forth in Exhibit A.

- 7. Effect of Amendment No. 5.** Except as expressly modified by Amendment No. 5, all terms and conditions in the Agreement, Amendment No. 1, Amendment No. 2, Amendment No. 3 and Amendment No. 4 shall remain in full force and effect and the Parties hereby ratify and affirm all their respective rights and obligations under the Agreement and Amendment Nos. 1 through 4. In the event of any conflict between the Amendment No. 5 and the Agreement or Amendment Nos. 1 through 4, the provisions of this Amendment No. 5 shall govern.
- 8. Milpitas Payment of Portion of its Past Due Pro-Rata Share of Law Firm Services (\$1,169,216.29) to Settle Dispute.** Within thirty (30) calendar days of the Effective Date of this Amendment No. 5, Milpitas shall provide the Administrative Agency with a payment of \$350,000.00 which shall be used by the Administrative Agency to pay for Law Firm services.
- 9. Milpitas Payment of Pro-Rata Share of Law Firm Services Incurred After June 1, 2021.** Milpitas shall pay its pro-rata share of Law Firm service costs as designated in the

Agreement and pursuant to this Amendment No. 5 beginning on June 1, 2021 and incurred in the Litigation thereafter except that, if the Effective Date is later than June 1, 2021, the Administrative Agency shall not invoice Milpitas for such costs until the Effective Date.

10. **General Release.** In consideration of the payments, promises, and obligations called for herein, the Sanitation Districts release and forever discharge Milpitas from any and all past, present, and/or future claims, demands, sanctions, actions and/or causes of action, now known or unknown, including, but not limited to, all injuries and damages arising out of, or in any way connected with the Dispute, including without limitation any claims and/or causes of action which were, or could have been asserted. The Parties acknowledge and agree that this Amendment No. 5 includes a general release and the Parties, except as provided herein, expressly assume the risk that any and all claims for damages arising out of the Dispute, that they may have as of the Effective Date but which the Parties do not know or expect to exist, whether through ignorance, oversight, error, negligence, or otherwise, and which, if known, would materially affect the Parties' decision to enter into this Amendment No. 5 are forever waived.
11. **Waiver of Civil Code Section 1542.** The Parties understand that it is possible that an unknown injury, damage, diminution or loss, action suit, lien theory of recovery, lawsuit, claim or cause of action may exist which if known by the Parties would have materially affected their decision to release and discharge each other as set forth herein. The Parties expressly acknowledge that they took that possibility into account in determining the consideration accepted for entering into this Amendment No. 5 and they expressly waive California Civil Code section 1542 as to the Dispute. The Parties expressly agree that this waiver shall not apply to any future amendment to the Agreement, unless specifically provided for therein.

California Civil Code section 1542 provides:

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

12. **Counterparts.** Execution of this Amendment No. 5 may be accomplished by execution of separate counterparts by each signatory. The separate executed counterparts, taken together, shall constitute a single agreement.

**SIGNATURES ON FOLLOWING PAGE**

**WITNESS THE EXECUTION HEREOF**, the Parties hereto have executed this Amendment No. 5 on the day and year first hereinabove written.

**WEST VALLEY SANITATION DISTRICT**

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Jon Newby, District Manager and Engineer

\_\_\_\_\_  
Laura McKinney, District Counsel

Dated: \_\_\_\_\_, 2021

**CUPERTINO SANITARY DISTRICT**

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Taghi S. Saadati  
President of the Board of Directors

\_\_\_\_\_  
Marc Hynes, District Counsel

Dated: \_\_\_\_\_, 2021

**COUNTY SANITATION DISTRICT 2-3**

**APPROVED AS TO FORM:**

\_\_\_\_\_  
James R. Williams, County Counsel

\_\_\_\_\_  
Gregory Charles, District Counsel

Dated: \_\_\_\_\_, 2021

**BURBANK SANITARY DISTRICT**

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Procopio Sclafani  
President of the Board of Directors

\_\_\_\_\_  
Valerie J. Armento, District Counsel

Dated: \_\_\_\_\_, 2021

**CITY OF MILPITAS**

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Steven G. McHarris, City Manager

\_\_\_\_\_  
Christopher Diaz, City Attorney

Dated: \_\_\_\_\_, 2021