

**COMMON INTEREST, PRIVILEGE, AND CONFIDENTIALITY
AGREEMENT**

This Common Interest, Privilege, and Confidentiality Agreement (“Agreement”) is entered into by and between the West Valley Sanitation District, Cupertino Sanitary District, County Sanitation District 2-3, Burbank Sanitary District, and the City of Milpitas, (each a “Party” and collectively the “Parties”) made by and through their respective legal counsel (individually and collectively, “Counsel”) effective the ___ day of August, 2015.

RECITALS

A. Each Party owns and operates a sewer system that collects and conveys sewage waste from its service area to the San José/Santa Clara Regional Wastewater Facility (“RWF”) for treatment and disposal, a portion of which is reused as non-potable recycled water.

B. The Cities of San José and Santa Clara jointly own the RWF and the Parties are considered tributary agencies to the RWF.

C. In or about 1983, each Party entered into a Master Agreement for Wastewater Treatment with the Cities of San José and Santa Clara (“Master Agreement”), which grants capacity rights to convey wastewater to the RWF for treatment and disposal and sets forth the Party’s obligations to pay for improvements to the RWF, including operation and maintenance costs.

D. The term of each Master Agreement ends on January 1, 2031, unless extended, renewed, or terminated early.

E. Although each Party has separately contracted with the Cities of San José and Santa Clara, the substantive provisions of each Party’s Master Agreement are identical with only a few minor exceptions.

F. In November 2013, the Cities of San José and Santa Clara adopted a Plant Master Plan to address various infrastructure upgrades to the RWF and they expect each Party, as a tributary agency, to fund its proportional share of the costs, which are estimated to be between \$1.8 billion dollars to \$2.2 billion dollars, total.

G. The Parties believe that the language of their current Master Agreements do not adequately address the Parties’ financial obligations related to the Plant Master Plan, and that other provisions in the Master Agreements are outdated and should be updated.

H. Notwithstanding the potential for adverse interests on certain issues, the Parties share a common interest in securing legal advice related to negotiating amendments to their Master Agreements that involve issues that are mutually important to the Parties, thus creating a commonality of interest between them.

I. The Parties and their Counsel believe that it is in their mutual best interest to coordinate their efforts and share certain privileged and confidential information, without risk of waiving or diminishing any protection against discovery, disclosure, or misuse of common interest information under any applicable privileges or protections by doing so, in order to negotiate with the Cities of San José and Santa Clara.

J. The Parties and their Counsel agree that such exchange of legal advice and information among themselves will advance the Parties' common interests in negotiating amendments to their Master Agreements.

K. By this Agreement, the Parties seek to establish a common interest group with respect to the discussion and formulation of a common negotiation strategy and the negotiation of potential amendments to their Master Agreements, preserving to the fullest extent possible all applicable legal and evidentiary privileges, including, but not limited to, the attorney-client privilege, work product doctrine, the deliberative process or official information privilege, privileges regarding mediation or settlement communications, common interest doctrine, joint defense privilege, or any other privilege, protection, doctrine or exemption recognized by California and federal law.

L. The Parties and their respective Counsel are referred to as "the Common Interest Group."

M. This Agreement is intended to allow for the inclusion of additional parties to the Common Interest Group.

N. The scope of this Agreement is intended to cover any later-filed related actions without the necessity of amending this Agreement.

TERMS AND CONDITIONS

NOW THEREFORE, in consideration of the mutual promises contained in this Agreement, the Parties agree as follows:

1. **PURPOSE**

A. The purpose of this Agreement is to memorialize the Parties' agreement concerning the exchange of legal advice, work product, and other privileged information in their negotiation of amendments to their Master Agreements, and to create a common interest privilege protecting the attorney-client privilege, work product doctrine, deliberative process and official information privileges, and any other privileges that may apply to any documents, data, or information that may be shared among members of the Common Interest Group. This Agreement addresses the flow, handling, security, and disclosure of documents, data, and oral and written information that may be exchanged by the Parties and/or their Counsel. It is the intention of the Parties that the exchange of Common Interest Communications (as defined in paragraph 3 below) among the members of the Common Interest Group will not constitute a waiver of any privilege from disclosure, including the attorney-client privilege, the attorney work

product doctrine, and the deliberative process and official information privileges. The Parties agree that any consultation between the Parties or among their Counsel, and any sharing of work product or other Common Interest Communications are in reliance on the common interest doctrine or joint defense privilege. However, no obligation to share Common Interest Communications is created by this Agreement.

B. The Parties and their Counsel consider that such disclosures of matters of common concern are essential to the effective representation of Counsels' respective Parties, and, therefore, that such disclosures are covered under the common interest doctrine and/or joint defense privilege as recognized in such cases as *OXY Res. California LLC v. Superior Court*, 115 Cal. App. 4th 874 (2004); *United States v. Henke*, 222 F.3d 633 (9th Cir. 2000); *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965); *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964); *In re Sealed Cases*, 29 F.3d 715 (D.C. Cir. 1994); and *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989).

2. ADDITIONAL LAWSUITS

The Parties expressly state their intention to include in the provisions of this Agreement any claims, actions, lawsuits or administrative proceedings related to the negotiation of amendments to their Master Agreements that may be filed by the Cities of San José and Santa Clara against any Party at any time during the pendency of this Agreement without the necessity of amending this Agreement.

3. COMMON INTEREST COMMUNICATIONS

A. Any documents, data, or information (including correspondence, reports, studies, memoranda of law and fact, factual material and summaries, mental impressions, transcripts, digests, and any other written material or oral information of any kind whatsoever) relating to matters addressed by Section 1.A of this Agreement that any Party receives from any other Party or any other Party's officers, partners, employees, agents, consultants, attorneys, representatives, or experts, or from any third person retained to further the Parties' common interest and joint defense under this Agreement, that would otherwise be protected from disclosure to third parties pursuant to applicable legal and evidentiary privileges, including the attorney-client privilege, work product doctrine, and/or the deliberative process and official information privileges (hereinafter "Common Interest Communication(s)"), shall be treated and maintained by the receiving Party as privileged and confidential.

B. Common Interest Communications may be disclosed or transferred among Counsel and between the Parties and their Counsel orally or in writing and by any other appropriate means of communication without waiving the attorney-client privilege, the work product doctrine or any other privilege/confidentiality protection.

C. Nothing in this Agreement requires a Party to share any information with another Party to this Agreement.

D. The Parties agree that all Common Interest Communications shared pursuant to this Agreement shall be held in strict confidence by the Parties and their Counsel. Other persons permitted access to any Common Interest Communications may include authorized representatives, and those of its councilmembers, directors, officers, employees, agents, independent contractors, consultants and retained experts who have a need to know. The Parties agree that all persons permitted access to any Common Interest Communications shall be specifically advised that the Common Interest Communications are privileged, confidential, and subject to the terms of this Agreement, and that such advised persons shall agree to be bound by the terms and conditions of this Agreement.

E. The Parties agree that if a consultant or expert is jointly hired by the Common Interest Group to assist or advise it with respect to the negotiation of amendments to their Master Agreements, that consultant or expert is covered by the common interest doctrine or joint defense privilege and that any privilege or protection applicable to the consultant or expert's work product or to any Party's communications with the consultant or expert shall not be waived by sharing such work product or communications with other Parties. The Parties further agree that such consultant or expert shall enter into a professional services agreement jointly with all the Parties or each Party individually, and the terms of agreement shall contain a non-disclosure clause. Furthermore, the consultant or expert may not be used as a testifying expert by a single Party without the written consent of all Parties.

F. A Common Interest Communication that is exchanged in written form and that is intended to be confidential shall be marked "Confidential: Common Interest Communication – Do Not Disclose" or with a similar heading indicating confidentiality. To the extent possible, the header or footer should further list all other privileges and protections that may be applicable to the particular Common Interest Communication, including the attorney-client privilege, work product doctrine, and/or the deliberative process and official information privileges. However, failure to mark or identify a Common Interest Communication as "Confidential: Common Interest Communication" or a similar heading shall not constitute a waiver of the common interest doctrine or joint defense privilege or any other applicable legal and evidentiary privileges that may apply.

4. PERMITTED USE OF COMMON INTEREST COMMUNICATIONS

A. Each Party agrees that all Common Interest Communications received from any other Party shall be used exclusively in connection with the discussion and formulation of a common negotiation strategy, which the Parties may jointly or individually choose to employ with respect to their Master Agreements.

B. Except as provided in Section 4(D), any Party may, without permission from the other Parties, use, for the Party's own purposes, any information that the Party disclosed to and shared pursuant to this Agreement.

C. Common Interest Communications shall not be used or be admissible in any phase of any litigation, settlement, or alternative dispute resolution involving the Parties, unless such information would be otherwise discoverable (e.g., publicly available information

may be used and disclosed under such circumstances, but attorney-client privileged and work product information may not be used or disclosed).

D. Any Party who is authorized to, and receives Common Interest Communications shall not disclose such Common Interest Communications or the information imparted thereby to any person or entity not a party to this Agreement without the express prior written consent of the other Parties. Waiver of the common interest doctrine and joint defense privileges or protections are effective only when all Parties unanimously agree to the waiver. However, no provision in this Agreement shall be construed to limit the right of any Party to disclose any documents or information that such Party obtained through means other than a Common Interest Communication.

5. INDEPENDENT EFFORTS

Nothing in this Agreement shall be construed to restrict the right of a Party to undertake independent investigative efforts or legal research in the negotiation of the Party's Master Agreement or in the defense of any later-filed related action. Any Party undertaking such independent efforts shall be free to disclose or use the results of the separate and independent efforts in any manner that Party desires, without the consent of the Parties or any other Party.

6. DISCLOSURE OF COMMON INTEREST COMMUNICATIONS

A. In the event that any third party requests or demands, by California Public Records Act ("CPRA") request, subpoena, or otherwise, Common Interest Communications received pursuant to this Agreement, the Party receiving such request or demand shall, prior to making such disclosure: (a) immediately notify the Parties pursuant to the notice provision herein; and (b) assert and exercise its utmost diligence to pursue the common interest doctrine or joint defense privilege and any and all other potentially applicable privileges or defenses to such disclosure of the Common Interest Communications, unless the privilege is waived by all the Parties who provided the Common Interest Communications. Each Party shall cooperate fully in defending the confidentiality of any Common Interest Information and, to the extent necessary, appear in any judicial proceeding relating to any such third-party requests for disclosure. The Party providing notice of a claim of privilege or confidentiality will bear the principal burden of demonstrating that claim. However, the Parties understand and acknowledge that they can still comply with their legal obligations under the CPRA and other document production statutes without breaching this Agreement.

B. The Parties agree that the unauthorized or improper disclosure of Common Interest Communications to third parties not covered by this Agreement will result in irreparable harm to the Parties. In the event a Party or former Party believes that another Party or former Party is preparing to disclose Common Interest Communications to third parties not covered by this Agreement, the Party or former Party objecting to such disclosure may seek an injunction to prevent the disclosure of such Common Interest Communications. Each Party represents and warrants that it will not, in the future, assert that such an injunction is not necessary on the grounds that there is an adequate remedy at law.

7. CONFLICT OF INTEREST

Each Party has consulted its own Counsel, and is aware that actual or potential conflicts of interest may exist or arise between the Parties as to certain aspects of their negotiations of their Master Agreements with the Cities of San José and Santa Clara. Being aware of those conflicting interests, each Party nonetheless irrevocably waives any conflicts of interest created by the retention of consultants or experts, jointly or otherwise, and agrees not to seek disqualification of consultants or experts for their work for the Parties, or for any individual Party, on conflict of interest grounds.

8. NO RELATIONSHIPS CREATED

Nothing in this Agreement shall be construed to (a) create an attorney-client relationship between any Party and/or Counsel to any other Party; (b) create any agency relationship among the Parties and/or their Counsel; or (c) affect the separate and independent representation of each Party by its respective Counsel according to what each such Counsel believes to be in the client's best interests. Each Party is responsible for directing its respective Counsel and, to the extent the research or work product of any Party's Counsel is disclosed to other Parties in furtherance of the Parties' common interest, such disclosure shall not waive any privileges or protections that apply to the work product, and shall not entitle any Party to move to disqualify the other Party's Counsel due to the performance of such work or because of information obtained in the course of such work. Each undersigned Counsel to this Agreement represents that he or she has specifically advised his or her respective client of this clause and that such client has agreed to its provisions.

9. WITHDRAWAL

Any Party to this Agreement may withdraw from participation in this Agreement after giving written notice to the other Parties and their Counsel. Such withdrawal shall be effective on the date that notice is deemed delivered to all Parties under the notice provision herein. In the event of such a withdrawal, however, the obligations of confidentiality and non-disclosure under this Agreement will survive and remain binding on the withdrawing party.

10. SURVIVAL OF OBLIGATIONS

Each Party agrees that all obligations herein with respect to Common Interest Communications under this Agreement shall survive the withdrawal from or termination of this Agreement and shall remain binding on all Parties notwithstanding their withdrawal or the Agreement's termination, even if the interests of the Parties later become adverse, and regardless of whether the common interest doctrine or joint defense privilege becomes inapplicable with respect to later communications between the Parties.

11. NOTICES

All notices hereunder must be in writing and must be served on the each of the Parties at the mail addresses or e-mail addresses of the individuals executing this Agreement, with copies

to their Counsel. Contact information may be changed by written notice to the other Parties to the Agreement. Any notice shall be deemed delivered five (5) business days after such mailing date if by U.S. mail, or the next business day if by e-mail. The mailing address, email address, and telephone number of each Party are as follows:

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
(408) 378-2407

With a copy to:

Sarah Quiter, District Counsel
Meyers Nave
555 12th Street, Suite 1500
Oakland, CA 94607
squiter@meyersnave.com
(510) 808-2000

For Cupertino Sanitary District

Richard Tanaka, District Manager
Cupertino Sanitary District
20863 Stevens Creek Boulevard, Suite 100
Cupertino, CA 95014
rtanaka@markthomas.com
(408) 453-5373

With a copy to:

Marc Hynes, District Counsel
Atkinson-Farasyn LLP
660 West Dana Street
Mountain View, CA 94041
(650) 933-5096

For County Sanitation District 2-3

Richard Tanaka, District Manager
County Sanitation District 2-3
20863 Stevens Creek Boulevard, Suite 100
Cupertino, CA 95014
rtanaka@markthomas.com
(408) 453-5373

With a copy to:

Michael Rossi, Deputy County Counsel
Office of the County Counsel, County of Santa Clara
70 W. Hedding Street, E. Wing. 9th Floor
San José, CA 95110
(408) 299-5907

For Burbank Sanitary District

Richard Tanaka, District Manager
Burbank Sanitary District
20863 Stevens Creek Boulevard, Suite 100
Cupertino, CA 95014
rtanaka@markthomas.com
(408) 453-5373

With a copy to:

Jennifer Faught, District Counsel
Meyers Nave
555 12th Street, Suite 1500
Oakland, CA 94607
jfaught@meyersnave.com
(510) 808-2000

For City of Milpitas

Nina Hawk, Public Works Director
Public Works Department
City of Milpitas
1265 N. Milpitas Boulevard
Milpitas, CA 95035
nhawk@ci.milpitas.ca.gov
(408) 586-2603

With a copy to:

Gary Baum, Interim City Attorney
Office of the City Attorney
455 East Calaveras Boulevard
Milpitas, CA 95035
garybaumlaw@gmail.com
(408) 586-3041

12. ADDITIONAL PARTIES

Additional parties and their counsel may be added to the Common Interest Group by such counsel's completion of the party signature page, and delivery of the completed signature page to each other Party. Consent to such addition of an additional party to the Common Interest Group will be deemed to have been given by each Party hereto upon receipt of the executed additional party signature page, unless a majority of the current Parties object to the additional party and transmit a joint written objection to the additional party within ten (10) business days after receipt of the additional party signature page. In the event of a unanimous written objection, the additional party and its counsel shall not be added to this Agreement.

13. GOOD FAITH

Each Party agrees to exercise good faith and diligence to implement this Agreement, and to maintain the confidentiality of discussions and exchanged work product consistent with the purposes of this Agreement and the intent of the Party providing the information.

14. EQUITABLE REMEDIES

The Parties agree that the rights, privileges, and interests intended to be protected by this Agreement are unique and that any violation of this Agreement would result in irreparable harm and injury to the other Parties. The Parties specifically agree that the terms of this Agreement may be enforced through appropriate injunctive relief, specific performance, or other equitable relief, in addition to any monetary damages. The Parties further agree that this paragraph is not intended to limit the rights or remedies of the Parties to this Agreement.

15. ATTORNEY'S FEES

Each Party is covering its own attorney's fees in connection with this Agreement.

16. SEVERABILITY

If any provision of this Agreement is found invalid or unenforceable, the balance of this Agreement will remain in full force and effect.

17. AMENDMENTS

This Agreement may not be amended except in a writing signed by all of the then-current Parties and their Counsel. This Agreement will be binding on all successors and assigns of the Parties and their Counsel.

18. TERMINATION

This Agreement shall terminate upon the earlier of the following occurrences: (a) formal execution of amendments to each Party's Master Agreement; (b) upon unanimous written consent to terminate among all then-current Parties; (c) withdrawal from this Agreement by all of the Parties or where only one Party remains; or (d) five (5) years after the effective date of this Agreement.

19. JOINTLY DRAFTED

The Parties agree that this Agreement was jointly drafted by each Party, and no inference or rule of construction shall be applied based on the assumption that any individual Party drafted any provision in this Agreement.

20. CHOICE OF LAW

This Agreement will be interpreted in accordance with the laws of the State of California.

21. COUNTERPARTS AND SIGNATURES

This Agreement may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts together shall constitute one and the same document. Signatures may be transmitted electronically.

22. AUTHORITY

The undersigned individuals represent that they are authorized to execute this Agreement on behalf of their respective Party.

WHEREFORE, the Parties, acting by their respective District Managers and City Manager, have hereto executed and entered into this Agreement as of the date indicated.

[signatures appear on following page]

WEST VALLEY SANITATION DISTRICT

Jon Newby, District Manager and Engineer
Dated: _____, 2015

Approved as to Form:

Sarah Quiter, District Counsel

CUPERTINO SANITARY DISTRICT

Richard Tanaka, District Manager
Dated: _____, 2015

Approved as to Form:

Marc Hynes, District Counsel

COUNTY SANITATION DISTRICT 2-3

Richard Tanaka, District Manager
Dated: _____, 2015

Approved as to Form:

Michael Rossi, Deputy County Counsel

BURBANK SANITARY DISTRICT

Richard Tanaka, District Manager
Dated: _____, 2105

Approved as to Form:

Jennifer Faught, District Counsel

CITY OF MILPITAS

Thomas Williams, City Manager
Dated: _____, 2015

Approved as to Form:

Gary Baum, Interim City Attorney