

Well #38 PFAS AGREEMENT

This Well #38 PFAS AGREEMENT (the “**Agreement**”) is effective on _____ (“**Effective Date**”) and is between the ORANGE COUNTY WATER DISTRICT, a special governmental district organized and existing pursuant to the Orange County Water District Act, Chapter 924, Statutes of 1933, as amended (“**OCWD**”) on the one hand, and the City of Santa Ana (“**City**”) on the other. OCWD and City are each a “**Party**” and collectively “**Parties**” to this Agreement.

- A. OCWD manages the Orange County Groundwater Basin (“**Basin**”) in northern and central Orange County in order to support a variety of beneficial uses, including potable and non-potable water supply. Much of the potable water supply currently used within northern and central Orange County is pumped groundwater for use by persons and cities within OCWD’s service area. Inasmuch as Orange County is located in a semi-arid area, it is essential that all reasonable efforts be put forth by OCWD and City to protect the quality and quantity of groundwater supplies within OCWD’s boundaries.
- B. City operates a public water system for the purpose of delivering potable water. City obtains a portion of its water supply by pumping groundwater from Water Producing Facilities within the Basin.
- C. A group of man-made substances known as per- and polyfluoroalkyl substances (“**PFAS**”) has been used in numerous consumer and industrial products since the 1940s. Recent testing in the Basin has revealed that numerous groundwater wells that are sources of drinking water in the Basin are impacted by PFAS. PFAS compounds create a unique groundwater contamination issue that impacts many cities. Without any action, PFAS-impacted groundwater may migrate, affecting other Water Producing Facilities and larger portions of the Basin.
- D. OCWD and City have entered into a PFAS Treatment Facilities and Program Agreement (“**Original Agreement**”) in April 2019. The Original Agreement provides for OCWD to design and construct PFAS treatment systems for City wells that have detections of PFAS at or above 80% of an applicable State of California Division of Drinking Water (“**DDW**”) Response Level (“**RL**”) or State of California or Federal Maximum Contaminant Level (“**MCL**”) (“**OCWD Program**”). Under the OCWD Program, OCWD will also pay for 50% of the Operation and Maintenance cost of the PFAS systems up to \$75/acre-foot. City currently has four wells in the OCWD Program.
- E. The City has a Well #38 that currently has perfluorooctanoic acid (“**PFOA**”) groundwater concentrations of approximately 6 to 7 parts per trillion (ppt) which is below 80% of the current PFOA 10 ppt RL which makes Well #38 ineligible for the OCWD Program. However, the Well #38 PFOA and perfluorooctane sulfonic acid (“**PFOS**”) groundwater concentrations are above their respective State of California Notification Levels (“**NL**”) of 5.1 and 6.5 ppt, which has led the City to discontinue operating the well.
- F. In November 2019, the State of California Office of Environmental Health Hazard Assessment began the process of developing drinking water Public Health Goals (“**PHGs**”)

for PFOA and PFOS, the first step in the regulatory process leading to DDW setting enforceable MCLs. As of the Effective Date, DDW projected establishing PHGs for PFOA and PFOS in 2021, with MCLs projected to be established by the Fall of 2023.

- G. The Parties recognize the necessity of and commit to a high level of coordination to expeditiously design, construct and operate a PFAS treatment system (“**Treatment System**”) to remove PFAS from groundwater extracted by Well #38.
- H. Until a Treatment System is constructed for Well #38, the City will be purchasing greater amounts of more expensive imported water.
- I. OCWD and the City mutually desire to enter into this Agreement pursuant to the OCWD Act to document the responsibilities of the Parties in the funding, design, construction and operation of the Well #38 PFAS Treatment System.
- J. OCWD has the authority to “construct, purchase, lease, or otherwise acquire, and to operate and maintain necessary waterworks and other works, machinery, [and] facilities ... useful or necessary to ... protect the quality of the common water supplies of [OCWD] and purposes incidental thereto.” OCWD may also perform groundwater cleanup, abatement, or remedial work in cooperation with any other governmental agency, and may initiate cost recovery actions against persons responsible for causing contamination of the Basin, and for its costs in cleaning up or containing contamination or pollution of the Basin. OCWD is also authorized under Section 2(6)(l.) of the OCWD Act to protect and improve water quality within the Basin by entering into contracts with Producers to produce more groundwater from the Basin, while taking less water from alternative non-tributary sources, where OCWD determines that such increased production of groundwater will result in removal of contaminants or pollutants from the Basin that otherwise would not be removed. Specifically, OCWD has authority, “for the common benefit of the district and for the purpose of managing the groundwater basin and managing, replenishing, regulating, and protecting the groundwater supplies within the district” to enter into an agreement with Producers to increase the production of groundwater in lieu of water from an alternative non-tributary source for the purpose of removing contaminants or pollutants from the Basin. OCWD may also “pay from district funds that portion of the cost of the groundwater production as will encourage the production for beneficial use of polluted or contaminated groundwater, as long as that pollution or contamination is impairing the quality of the water supplies within the district and the quality of the water supplies within the district will be improved by that production.”
- K. Well #38 is very important to the City’s operations to provide reliable water supplies to its service area. Given OCWD’s ongoing implementation of the design and construction of PFAS treatment facilities at other City wells under the OCWD Program, the City has requested that OCWD design and construct necessary PFAS treatment facilities as quickly as possible for this well under the terms of this Agreement.

The Parties therefore agree as follows:

- 1. The Recitals above are deemed true and correct and are hereby incorporated in this Agreement as though fully set forth herein. The Parties agree that the actions that will be taken

pursuant to this Agreement are reasonable and necessary to accomplish the goals and objectives of the OCWD Act.

2. PURPOSE.

2.1 Facilitation of Well #38 Treatment. OCWD and the City intend to facilitate treatment for PFAS. OCWD will coordinate, design and construct a PFAS Treatment System for Well #38 as directed and approved by City and subject to the provisions of this Agreement.

2.2 PFAS Compounds and Reopener. The Parties recognize the necessity of and commit to a high level of coordination to expeditiously design, construct and operate a Well #38 PFAS Treatment System to remove PFAS from the groundwater where PFAS has been detected. The Parties acknowledge that compounds within the PFAS family in addition to PFOA and PFOS may become regulated during the term of this Agreement. To the extent the Treatment System developed under this Agreement requires modification to treat for additional PFAS that becomes regulated after the Effective Date, the Parties will, where necessary and requested by City, amend this Agreement to provide for treatment of additional compounds in the PFAS family.

3. PLANNING.

3.1 Treatment Systems. With input from OCWD, City shall determine the type and final design of the Treatment System to treat PFAS contamination in the groundwater produced by Well #38 to levels below the NL or a future MCL. If City desires, a Treatment System that can remove PFAS contamination down to non-detect concentrations will be designed and constructed.

4. DESIGN AND CONSTRUCTION OF PFAS TREATMENT FACILITIES.

4.1 Funding. City shall reimburse OCWD for all reasonable costs and expenses incurred by OCWD to design and construct the Treatment System regardless of the Agreement Effective Date. City shall reimburse OCWD within 45 days of receiving an invoice for any such costs and expenses. Reimbursement from City to OCWD shall not exceed \$6 million without approval from the Santa Ana City Council.

4.2 Design Approval. City shall approve the Treatment System final design and the City Public Works Director, City Engineer and Water Resources Manager shall affix their signatures to the final set of contract drawings.

4.3 Consultant Selection. City shall be entitled to approve (1) the consultant selected by OCWD to provide the final design and (2) the estimated consultant design fee. The consultant selected must be currently under contract with OCWD.

4.4 Project Cost Estimate. OCWD and the selected design consultant shall prepare a Treatment System cost estimate once 90% design drawings are approved by City. If the 90% cost estimate or the construction contract bid amount causes the project cost estimate to exceed the reimbursement amount specified in Section 4.1, OCWD's General Manager may elect to not proceed with construction until the City and OCWD agree to revised funding reimbursement terms in writing.

4.5 CEQA. For the purpose of complying with the California Environmental Quality Act (“CEQA”), City will serve as lead agency for a CEQA project, OCWD shall serve as a Responsible Agency. City is responsible for costs associated with CEQA studies, document preparation, compliance, and related activities.

4.6 Project Schedule. OCWD shall make all reasonable efforts to design and construct the Treatment System for Well #38 within 18 months of Effective Date. This time frame is dependent upon the type of Treatment System city requires and assumes receiving timely comments and direction from City as necessary during the preparation of the design drawings and during the construction of the Treatment System. OCWD will not incur any cost or penalties for exceeding this time frame.

4.7 Property Acquisition, Entitlements.

A. Land and Rights of Way. City shall secure at its expense any land and/or right of way necessary to construct the Treatment System.

B. Entitlements. City shall obtain at its expense all land use entitlements necessary to construct the Treatment System.

C. Property Rights. City shall provide OCWD with temporary property rights over any site necessary for construction, staging, and laydown for the Treatment System project. These temporary property rights shall be in the form of a license or temporary construction easement, or other property right sufficient to provide for OCWD’s control of the site during construction.

D. Advertising and Award of Construction Contracts. OCWD shall advertise, where required by the OCWD Act, and award a construction contract for construction of the Treatment System. City shall approve of the selected contractor and support and assist OCWD in these efforts, and shall expeditiously provide any documents necessary for construction.

E. Administration and Inspection. OCWD will administer the necessary contracts to construct the Treatment System, including reviewing and responding to contractor requests for information or requests for clarification, reviewing and approving shop drawings, and filing a Notice of Completion. OCWD shall provide all construction and inspection for the Treatment System.

F. Transfer of Treatment System. Upon filing the Notice of Completion for the Treatment System, OCWD shall transfer the constructed and operating Treatment System to the City with an appropriate legal instrument and a quitclaim of any property rights previously obtained. OCWD shall provide the City with copies of all applicable O&M manuals and record drawings for the Treatment System in OCWD’s possession. Upon the City’s receipt of the legal instrument and quitclaim of property rights, City shall be solely responsible for ensuring the proper operation, maintenance and repair of the Treatment System. The City may arrange for extended warranties on any component of the Treatment System, which additional cost may be paid for by the City, and which extended warranty will be transferred to the City together with the transfer documents.

G. Warranty, Post-Construction Remedies. OCWD shall make construction warranty repairs and modifications not attributable to the negligence or willful misconduct of City for one year after the date of filing of the Treatment System Notice of Completion. The Parties will also, to the extent they deem prudent, jointly pursue any statutory construction defect remedies against third-party designers and contractors.

H. DDW Permit Assistance. OCWD will support and assist the City with technical information in modifying the City's DDW operating permit to account for and authorize the new Treatment System as part of the City's public water system.

5. FINANCIAL.

5.1 Records Retention, Audit. The Parties shall keep and maintain all records, accounts and reports relating to this Agreement for a period of at least 3 years after notice of completion of project is filed. The Parties will have access to these records at any time during normal business hours upon 10 calendar days' notice. At its cost, any Party may audit the books, records and accounts of the Party relating to its performance of this Agreement, and the audited Party shall provide reasonable cooperation to the auditing Party in this regard.

6. RISK ALLOCATION.

6.1 Insurance.

A. Construction Activities. In the hiring of consultants and contractors to design and build the Treatment System, OCWD shall have the City included as an additional indemnitee and additional insured on the same basis and with the same limits in all contracts. OCWD shall provide the City with proof of insurance, including additional insured endorsements.

B. City's Coverage. City shall take out and maintain in effect at all times during the operation of the Treatment System comprehensive general liability insurance in an amount not less than \$2 million per occurrence, for bodily injury, death and property damage associated with the operation and maintenance of the Treatment Facilities and Impacted Wells, naming OCWD as an additional insured under such policy. An endorsement evidencing this insurance coverage shall be furnished to OCWD prior to OCWD commencing construction on a Treatment System. If the City is, or becomes, partially or fully self-insured for its public liabilities, a letter executed by the City's Chief Executive stating the City's self-insured status and acknowledging its responsibility to indemnify OCWD as required in this Agreement, may be furnished in lieu of the insurance endorsement otherwise required herein. The City shall provide written notice to OCWD of any change in the City's insured or self-insured status within 30 days of the date of such change.

6.2 Indemnity.

A. By City:

(1) City shall defend, indemnify and hold OCWD, harmless from and against any and all actions, suits, claims, demands, judgments, attorney's fees, costs, damages to person or property, losses, penalties, obligations, expenses or liabilities (collectively,

“**Claims**”) that may be asserted or claimed by any third party arising out of the negligent or reckless performance or implementation of this Agreement by City

B. By OCWD:

- (1) OCWD shall defend, indemnify and hold City harmless from and against any and all actions, suits, claims, demands judgments, attorney’s fees, costs, damages to person or property, losses, penalties, obligations, expenses or liabilities that may be asserted or claimed by any third party arising out of the negligent or reckless performance or implementation of this Agreement by OCWD.

7. FUTURE WATER QUALITY TESTING AND REIMBURSEMENT BY OCWD

7.1 OCWD will reimburse to City the money paid by City to OCWD for design and construction of the Well #38 Treatment System within 120 days of confirmation of the following condition: If routine testing undertaken by OCWD shows that, for two consecutive quarters, a future Well #38 PFAS compound groundwater concentration is at or above 80% of a future state or federal MCL or at or above 80% of a current of future state Response Level.

7.2 Effective as of the date of cost reimbursement by OCWD to the City in the event that the condition described in Section 7.1 is confirmed by OCWD, the Well #38 Treatment System O&M and associated construction costs shall automatically be governed by the terms of the Original Agreement without the necessity of formally amending that Agreement Upon that occurrence, the terms and conditions of the Original Agreement shall be deemed to apply to Well#38 and shall be incorporated herein as if set forth in full hereat.

8. **LEGAL SERVICES AGREEMENT.** OCWD and City shall jointly and cooperatively work together in accounting for the Well #38 Treatment System cost and any impact it may have with the PFAS Legal Services Agreement both Parties have executed.

9. **EXPIRATION AND TERMINATION.** Notwithstanding Paragraph 7.2, this Agreement expires thirty years from the Effective Date.

10. **NOTICE.** Any notice, instrument, payment or document required to be given or delivered under this Agreement shall be given or delivered by personal delivery or by depositing the same in a United States Mail depository, first class postage prepaid, and addressed as set forth below. Notice under this Agreement may also be provided to such other address as any Party may direct in writing to the other. Service of any instrument or document given by mail will be deemed complete upon receipt if delivered personally, or forty eight (48) hours after deposit of such instrument or document in a United States mail depository, first class postage prepaid, and addressed as set forth above.

Orange County Water District
P.O. Box 8300
18700 Ward Street
Fountain Valley, CA 92708

Attn: General Manager
Mike Markus

City of Santa Ana
20 Civic Center Plaza (M-21)
Santa Ana, CA 92701
Attn: Executive Director
Public Works Agency

11. MISCELLANEOUS.

11.1 Further Assurances. The Parties shall execute and deliver any documents and cooperate in performing any acts necessary to further the intent of this Agreement.

11.2 Time is of the Essence. Time is of the essence in performing all obligations under this Agreement.

11.3 Force Majeure. Upon written notice by a Party, the respective duties and obligations of the Parties will be suspended for the time period that performance by the Party is prevented or substantially impeded by workforce strikes; riots; fire; flood; federal, state or county regulatory action; pandemics, war; or terrorism.

11.4 Dispute Resolution. If a dispute arises between the Parties in connection with this Agreement, the Parties shall engage in a mediation before a third-party neutral.

11.5 Successors and Assigns. All of the terms, conditions and provisions of this Agreement inure to the benefit of and will be binding upon OCWD, the Producer, and their respective successors and assigns.

11.6 No Implied Waivers. If any term, condition or provision of this Agreement is breached by either Party and thereafter waived by the other Party, that waiver will be limited to the specific breach so waived, and will not be deemed either to be a continual waiver or to waive any other breach under this Agreement.

11.7 No Obligation to Third Parties. The approval, execution and performance of this Agreement does not confer any rights upon any person or entity other than OCWD and the City. There are no third-party beneficiaries to this Agreement.

11.8 Nature of Relationship. This Agreement does not create, and will not be construed or deemed to create, any agency, partnership, joint venture, landlord-tenant or other relationship between OCWD and any Producer except as specified in this Agreement.

11.9 Integration, Construction and Amendment. This Agreement represents the entire understanding of OCWD and each Producer as to the design and construction of PFAS treatment facilities for the Impacted Wells. No prior oral or written understanding will be of any force or effect with respect to those matters covered by this Agreement. This Agreement will be construed as if drafted by both OCWD and each Producer.

11.10 Modification, Variance and Most Favored Nation Provisions. Unless specifically authorized herein, this Agreement may not be modified, altered or amended unless in writing signed by authorized representatives of both OCWD and City.

11.11 Severability. Each provision of this Agreement is severable from the whole. If any provision of this Agreement is found contrary to law, the remainder of this Agreement will continue in full force.

11.12 Authority. By entering into this Agreement, each Party represents that it, and to the best of its understanding the other Parties to this Agreement, have proper legal authority to enter into this Agreement and to fund the work described herein. Each person executing this Agreement on behalf of a Party warrants that they are: (1) duly authorized to execute and deliver this Agreement on behalf of that Party, (2) by executing this Agreement, that Party is formally bound to the provisions of this Agreement, and (3) entering into this Agreement does not violate any provision of any other Agreement to which that Party is bound. No individual signing this Agreement shall have individual liability under this Agreement. As a condition of entering this Agreement, all Parties expressly waive any future challenge to the legal authority of the other Parties to enter into this Agreement, or to the authority of any other Party to fund the programs described in this Agreement.

11.13 Construction and Amendment. The terms of this Agreement will be construed in accordance with the plain meaning of the language used and will not be construed for or against any Party by reason of the authorship of this Agreement or any other rule of construction which might otherwise apply. The headings of sections and paragraphs of this Agreement are for convenience or reference only and will not be construed to limit or extend the meaning of the terms, covenants and conditions of this Agreement. This Agreement may only be amended by the mutual consent of the Parties by an instrument in writing.

11.14 Effective Date and Binding Effect. The date OCWD executes this Agreement shall be the Effective Date of this Agreement.

11.15 Electronic Signatures. Any Party may execute this Agreement using an “electronic signature,” as that term is defined in California Civil Code Section 1633.2, or a “digital signature,” as defined by California Government Code Section 16.5. An electronic or digital signature will have full legal effect and enforceability. Nothing in this Agreement requires any Party to use or accept the submission of any subsequent or related document containing an electronic or digital signature where written notice is otherwise required by this Agreement.

[SIGNATURES FOLLOW]

APPROVED AS TO FORM:

ORANGE COUNTY WATER DISTRICT

By: _____
Counsel, OCWD

By: _____
Stephen R. Sheldon, President

By: _____
Michael R. Markus, General Manager

ATTEST:

CITY OF SANTA ANA

Daisy Gomez
Clerk of the Council

By: _____
Kristine Ridge
City Manager

APPROVED AS TO FORM
SONIA R. CARVALHO, City Attorney

RECOMMENDED FOR APPROVAL

By: John M. Funk
John M. Funk
Assistant City Attorney

Nabil Saba
Executive Director
Public Works Agency