MEMORANDUM

Date: 12/9/2020
To: Starla Jerome-Robinson, City Manager
From: Nicole Nagaya, Public Works Director
Pam Lowe, Senior Civil Engineer
Re: Draft Operating Agreement with the City of East Palo Alto, Background and Proposed Next Steps

Background
On April 3, 2001 the City Council approved dissolving the East Palo Alto County Waterworks District (EPACWD) and transferring its assets to the Cities of Menlo Park (MP) and East Palo Alto (EPA) within their corporate boundaries. Assets included water mains, meters, valves, and fire hydrants in the two red-circled areas shown in the map below.

It was decided that EPA would supply water to customers on Euclid Avenue and some customers on O’Brien Drive. There are 31 customers that receive EPA water but pay water bills to Menlo Park Municipal Water (MPMW). See Attachment A for a list of these customers and Attachment B for maps showing the specific properties.

In April 2001, the City Council also approved signing an operating agreement with EPA which sets forth the procedures for meter reading and customer billing, how MP would reimburse EPA for water supplied by the San Francisco Public Utilities Commission (SFPUC) through EPA meters to MP customers, repair and maintenance of shared facilities, testing and notification, and transfer of EPACWD’s SFPUC’s supply guarantee to EPA and MP, 90% and 10% respectively. Attachment C is the April 2001 staff report. The draft agreement contains the following provisions:
1. EPA shall bill MP, and MP shall reimburse EPA on a monthly basis.
2. MP shall read and bill each EPA meter.
3. MP shall perform meter testing (5% annually), and EPA may request meter testing.
4. Each agency maintains the system within their service boundary.
5. MP reimbursement to EPA shall consist of the following.
   a. EPA consumption at the SFPUC wholesale rate
   b. EPA’s SFPUC monthly meter charge prorated
   c. 5% unaccounted-for-water based on MP meters the previous month

On December 11, 2012, the City adopted a resolution agreeing to participate in prepayment of capital debt, owed by the Bay Area Water Supply and Conservation Agency (BAWSCA) to the City and County of San Francisco outlined in SFPUC's Water Supply Agreement. The City began paying the BAWSCA bond surcharge in January 2014. Bond surcharges for each BAWSCA member agency are recalculated every fiscal year and are included in each agency’s monthly SFPUC bill.

Since 2001, Finance reimbursed EPA on a monthly basis as described above, and in 2014 the reimbursement calculation was expanded to include a percentage of EPA’s BAWSCA bond surcharge even though the draft operating agreement did not mention the bond surcharge. Staff and the City Attorney’s office reviewed the agreement and the history behind the bond surcharge and believes reimbursement of the bond surcharge meets the spirit of the agreement. If the customers had been serviced by Menlo Park Water Company, the bond surcharge would be payable.

**FINDINGS**

This past summer, Engineering staff realized that Finance last reimbursed EPA in June 2019, likely due to a retirement and staffing changes, so reimbursements to EPA were a year overdue. In the process of evaluating how to calculate and reimburse EPA for past amounts due, staff looked for and was not able to locate an executed operating agreement. Unfortunately, after a robust search through electronic files and paper files, neither MP nor EPA City Clerks, City Attorneys, or Public Works departments could locate the executed operating agreement. EPA was able to locate a copy of the operating agreement that they signed in April 2001 (Attachment B), but it did not include MP signatures.

Engineering staff contacted Ruben Nino, previous Director of Engineering Services who oversaw the dissolution of EPAWCD in 2001, to determine if he recalled finalizing the operating agreement. Ruben was almost certain that it had been completed.

In July 2020, Engineering staff calculated the reimbursement owed to EPA for fiscal year 2019-20, which totaled $10,910.90, and has since paid this amount to EPA.

**NEXT STEPS**

Since 2001, staff has reimbursed EPA as delineated in the draft operating agreement, and has added a portion of EPA’s BAWSCA bond surcharge since 2014 to fairly represent the true reimbursement. Because staff has followed the intent of the draft operating agreement and is fairly confident that MP executed the agreement even though the executed agreement cannot be found, staff is recommending that the City Manager sign the 2001 draft operating agreement (Attachment D). In addition, staff requests the City Manager’s concurrence that the BAWSCA bond surcharge should be included in the monthly reimbursement payment.

Attachments:
   A. List of customers that receive EPA water and are billed by MPMW
B. Maps showing the location of customers that receive EPA water and are billed by MPMW
C. April 3, 2001 City Council staff report
D. Draft operating agreement (signed by EPA, not signed by MP)
### MPMW Accounts Served by EPA (receive EPA water, MP bill)

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Parcels that receive EPA water but are billed by MPMW
DEPARTMENT OF PUBLIC WORKS
ENGINEERING DIVISION
STAFF REPORT

Agenda Item # F-2

City Council Meeting of
April 3, 2001

TO: Mayor and City Council

FROM: Department of Public Works/Engineering Division

AGENDA ITEM: REGULAR BUSINESS: Consideration of approving the following agreements and other legal documents regarding the establishment of the Menlo Park Water District as the water purveyor for the properties in the city limits of Menlo Park currently served by the East Palo Alto County Waterworks District:

1) Approve a Dissolution, Assignment and Assumption Agreement between the City of Menlo Park and the City of East Palo Alto.
2) Approve an Operating Agreement between the City of Menlo Park and the City of East Palo Alto.
3) Approve the First Amendment to the Water Supply Contract between the City and County of San Francisco Public Utilities Commission and the City of Menlo Park.
4) Approve the Declaration of Improvements by Menlo Business Park LLC and the City of Menlo Park.
5) Approve the Acceptance of the Improvements by Menlo Business Park LLC.

ISSUE

Should the Menlo Park City Council approve the legal documents listed above making the Menlo Park Water District (MPWD) the water purveyor for properties within the City Limits of Menlo Park currently served by the East Palo Alto County Water District (EPACWD)?

BACKGROUND

The EPACWD generally serves the area of East Palo Alto north of San Francisquito Creek and Highway 101, and east of Willow Road. The exception is the customers in East Palo Alto, served by two private well water companies, named the Palo Alto Park Mutual Water Company and the O'Connor Tract Co-Operative Water Company. The EPACWD serves about 3,850 customers, approximately 90 percent of which are located in the City of East Palo Alto.
A portion of EPACWD's boundaries incorporates property within the city limits of Menlo Park. This portion is the area east of Willow Road, south of the railroad tracks, west of University Avenue and north of the southerly city limit line along O'Brien Drive. The streets in the area include O'Brien Drive, Adams Drive, Adams Court and Hamilton Court. A map of the areas is included in the attached October 17, 2000 staff report. In addition, there is a small area in the Willows neighborhood within the city limits of Menlo Park and within the area served by the O'Connor Tract Co-Operative Water Company that is served by the EPACWD. This area includes the German-American School and approximately 10 properties on the west side of Euclid Avenue.

On June 21, 2000, the Local Agency Formation Commission (LAFCo) staff sent the City of Menlo Park an application from property owners in the City of Menlo Park business parks along O'Brien Drive and Hamilton Court requesting to detach from the EPACWD and requesting that the MPWD be the water purveyor. LAFCo staff requested the City of Menlo Park to comment on the application.

On August 1, 2000, staff presented the Council with a report on options regarding the LAFCo application (See Attachment A). The Council directed staff to meet with representatives from the City of East Palo Alto, County of San Mateo, LAFCo, and the affected property owners to gather additional information and evaluate potential alternatives.

In November 2000, the City of East Palo Alto submitted an application to LAFCo proposing to dissolve the EPACWD and transferring service to the cities of East Palo Alto and Menlo Park.

Staff met with the City of East Palo Alto, County of San Mateo, LAFCo staff and the affected property owner representatives on several occasions. From these meetings an option has emerged which has garnered support among the agencies and property owners' representatives.

The preferred option is to have all properties within the city limits of Menlo Park be serviced by the MPWD. This would include the business park areas on O'Brien Drive and Hamilton Court and the residential area in the Willows. Under this option the existing water system would be left intact without changing the physical piping system within the City of Menlo Park. The MPWD would provide all billing, meter reading, operation and maintenance of the system. The City of Menlo Park would pay to the City of East Palo Alto reimbursement for the amount of water used by the proposed new MPWD customers based upon the rate that the San Francisco Public Utilities Commission (SFPUC) charges for the water. The cost of the maintenance of the water lines and appurtenances which service both the City of East Palo Alto and the proposed new customers of MPWD would be shared based upon the pro-rated amount of water used by the two agencies. An Operating Agreement would define the details of the transfer, operation, and maintenance of the system.

SFPUC ALLOCATION

The EPACWD is a signatory to the 1984 Settlement Agreement and Master Sales Contract with the SFPUC, as is the MPWD. The EPACWD has entitlement to a certain water allocation from the SFPUC as part of the 1984 agreement. This entitlement is based upon a history of water use. If the City of Menlo Park is to incorporate a portion of the EPACWD into the MPWD, a portion of the allocation that represents this use will need to be allocated to the MPWD. This requires SFPUC approval, as does the incorporation of the portion of the EPACWD in the MPWD.
On October 17, 2000, the City Council adopted a Resolution supporting the MPWD as the water purveyor for the properties in the City of Menlo Park currently served by the EPACWD, subject to certain conditions. The conditions are as follows:

Conditions:

1) That an agreement be reached with the City of East Palo Alto and the County of San Mateo on the transfer and operations of the Water System for the properties in the city limits of Menlo Park currently served by the EPACWD

2) That the appropriate allocation of water be transferred to the MPWD.

3) That the City of MPWD receive its fair share of the EPACWD Water Fund Balance.

4) That Tarlton Properties dedicate their water mains to the MPWD.

ANALYSIS

On January 17, 2001, LAFCo held a public hearing on the City of East Palo Alto's application to dissolve the EPACWD and transfer the ownership to the Cities of Menlo Park and East Palo Alto. LAFCo approved the City's proposal contingent upon certain agreements being approved by the respective Cities. LAFCo forwarded its recommendation to the San Mateo County Board of Supervisors, which is the conducting authority.

Staff has been working with staff from East Palo Alto, County of San Mateo, San Francisco Public Utilities Commission (SFPUC) and representatives of the affected property owners to work out the agreements necessary to establish MPWD as the water purveyor for the properties located in the City of Menlo Park currently serviced by the EPACWD. The agreements are available for review in the Engineering Office. The City Attorney has reviewed the agreements along with the attorneys for the City of East Palo Alto, SFPUC and business representatives. The agreements are described below.

DISSOLUTION, ASSIGNMENT AND ASSUMPTION AGREEMENT

The Dissolution, Assignment and Assumption Agreement will transfer the assets located within the East Palo Alto County Waterworks District (EPACWD) to the Cities of East Palo Alto and Menlo Park within their corporate boundaries. As stated in the operating agreements described below some of these assets are shared. This will include the water mains, meters, valves and fire hydrants. The agreement also recognizes the transfer of the water supply guarantee between East Palo Alto and Menlo Park per the proposed water supply contracts between the SFPUC and the City of Menlo Park and SFPUC and the City of East Palo Alto. Under the new contracts, 90 percent of EPACWD's water supply will be allocated to East Palo Alto and 10 percent will be allocated to the MPWD. The EPACWD reserve funds will be transferred to East Palo Alto and MPWD using the same allocation ratio (90 percent and 10 percent respectively). By approving this agreement, the City will accept such assets and be responsible for their maintenance.
OPERATING AGREEMENT

The Operating Agreement sets forth the procedures for meter reading, payment for water supplied by SFPUC through East Palo Alto's meters to new Menlo Park water customers, repair and maintenance of shared facilities, testing and notification, suspension or reduction in water supply and dispute resolution. The City of Menlo Park will pay for water at the same rate that SFPUC charges East Palo Alto. Menlo Park will pay East Palo Alto for the actual water used by Menlo Park customers plus a pro-rated share of the fixed costs and 5 percent of the unaccounted for water (such as water used during fires or lost in leaks). The maintenance cost of the shared facilities will be determined by a pro-rated share of the use of each system. Each City will be responsible for setting its own water allocation in the event of a drought or other emergency.

WATER SUPPLY CONTRACT BETWEEN THE CITY AND COUNTY OF SAN FRANCISCO PUBLIC UTILITIES COMMISSION (SFPUC) AND THE CITY OF MENLO PARK

This amendment to the MPWD's Water Supply Contract with SFPUC will increase Menlo Park's individual water supply guarantee by approximately 218,300 gallons per day (which is 10 percent of EPACWD supply guarantee) for a total of 4,454 million gallons per day on an annual average.

DEDICATION AND ACCEPTANCE OF IMPROVEMENTS

The proposed dedication and acceptance of the water system currently owned by the Menlo Business Park will turn the water system over to the City of Menlo Park for its maintenance. The agreement for acceptance contains a condition that requires the Menlo Business Park to have the water system inspected by California Water Service and complete any work identified in the inspection report.

RECOMMENDATION

Consideration of approving the following agreements and other legal documents regarding the establishment of the Menlo Park Water District (MPWD) as the water purveyor for the properties in the City Limits of Menlo Park currently served by the East Palo Alto County Waterworks District (EPACWD).

1) Approve a Dissolution, Assignment and Assumption Agreement between the City of Menlo Park and the City of East Palo Alto.

2) Approve an Operating Agreement between the City of Menlo Park and the City of East Palo Alto.

3) Approve the First Amendment to the Water Supply Contract between the City and County of San Francisco Public Utilities Commission and the City of Menlo Park.

4) Approve the Declaration of Improvements by Menlo Business Park LLC and the City of Menlo Park.

5) Approve the Acceptance of the Improvements by Menlo Business Park LLC.
DATE OF REPORT: March 29, 2001

LEGAL NOTICE: Public notification was achieved by posting the agenda, with this agenda item being listed, at least 72 hours prior to the meeting.

ATTACHMENT: (A) Staff report dated October 17, 2000
OPERATING AGREEMENT

THIS OPERATING AGREEMENT (the “Agreement”) is entered into as of April 1, 2001 (the “Effective Date”), by and between the CITY OF MENLO PARK, a California municipality (“MP”), and the CITY OF EAST PALO ALTO, a California municipality (“EPA”). MP and EPA are referred to herein individually as a “Party” and collectively as the “Parties.”

RECATALS

A. As more fully described in that certain Dissolution, Assignment and Assumption Agreement by and among MP, EPA, and the East Palo Alto County Water District (“EPACWD”) dated as of ____________, 2001, EPACWD has been dissolved and its water service responsibilities, physical assets and fund balance have been assigned to MP and EPA as described therein. EPACWD currently receives its water supply from the San Francisco Public Utilities Commission (“SFPUC”). Under the Dissolution Agreement, EPA has assumed ownership, control and maintenance responsibilities for that portion of the EPACWD facilities within its corporate limits and the three EPACWD turnouts from the SFPUC’s Bay Division Pipelines under EPACWD control located within the corporate limits of MP. MP has assumed ownership, control and maintenance responsibilities for that portion of the EPACWD facilities located within its corporate boundaries, with the exception of the three turnouts referred to above.

B. The Parties desire for the water customers within their corporate boundaries to receive a continuous and adequate supply of water delivered under normal and reasonably foreseeable operational conditions. The Parties, therefore, desire to enter into this agreement to set forth their various joint and separate regulatory, operational and maintenance responsibilities.

NOW, THEREFORE, in consideration of the mutual promises and agreements set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. Definitions. As used herein the following terms shall have the meanings set forth below:

“Governmental Authority” means any federal, state, county, municipal, or regional legislative, executive, judicial or other governmental board, agency, authority, commission, administration, court or other body, or any official thereof, having jurisdiction.

“MP Customers” means those water service customers formerly served by EPACWD located within the corporate boundaries of Menlo Park.

“Notice” and “Notices” shall have the meaning set forth in section 18 hereof.

“Prudent Industry Practice” means the methods, techniques, standards and practices which, at the time they are to be employed and in light of the circumstances known or reasonably believed to exist at such time, are generally recognized and accepted as reasonably
prudent operation, maintenance, repair, replacement and management practices in the municipal water supply industry as followed in the western region of the United States.

"Term" shall have the meaning set forth in section 13 hereof.

2. **Water Allocation.** Pursuant to amendments to their respective Individual Water Supply Contracts with SFPUC, the Parties acknowledge that EPA shall receive ninety percent (90%) and MP shall receive ten percent (10%) of the individual water supply guarantee from the SFPUC previously allocated by SFPUC to the now-dissolved EPACWD pursuant to the 1984 Settlement Agreement and Master Sales Contract and Individual Water Supply Contract between EPACWD and SFPUC. As set forth in section 3 below, SFPUC shall bill EPA for all water used by former customers of the EPACWD subject to reimbursement by MP, unless and until the Menlo Park portion of the water delivery system is physically detached from the East Palo Alto system. In accordance with this Agreement, EPA and MP shall cooperate to ensure that customers in both cities are supplied with the water necessary to service their water supply needs without interruption for the Term of this Agreement.

3. **Payments for Water Supplied by SFPUC.** EPA shall pay SFPUC for the actual water used in each calendar month by all water customers located within its corporate boundaries, as depicted in blue on Exhibit A, as well as for Menlo Park as depicted in yellow on Exhibit A, pursuant to the established SFPUC rates applicable to its municipal wholesale water customers, as amended from time to time. The amount of actual water used by EPA shall be determined in accordance with section 4 below. EPA shall bill MP, and MP shall reimburse EPA, on a monthly basis for water used by MP Customers in accordance with section 5 below as well as for system water loss and other fixed costs.

4. **Meter Reading.**

a. SFPUC will continue to read the wholesale water meters measuring water delivery through the three Bay Division Pipeline turnouts serving water to EPA on a monthly basis, and to test and calibrate these meters in accordance with the terms of the 1984 Settlement Agreement and Master Water Sales Contract.

b. MP shall provide for the monthly reading of each retail water meter designed to measure the amount of water supplied to MP Customers by EPA. Each meter shall be designed and maintained to achieve an accuracy level of ±1.5% over the entire range of the meter. MP shall test at least 5 percent of MP Customer meters annually and all MP Customer meters at least every 20 years at MP’s expense and at such other times as may be requested by EPA at EPA’s expense (unless the tests show that the meter(s) in question were out of calibration by more than two percent (2%) over the entire range of the meter, in which event such tests will be at MP’s expense). If such a test is requested by EPA, EPA shall have the right to have a representative present at such test.

c. If a Menlo Park Customer’s retail water meter fails to register, or if the measurement made by the meter is found upon testing to be inaccurate by more than two percent (2%) over any material part of the range of the meter, the meter shall be promptly repaired or
replaced. Appropriate adjustment will be made to all measurements of water since the last previous accurate test of such meter based on all available dates and information.

5. **Reimbursements by MP for Water Supplied by EPA.**

   a. Pursuant to section 3, MP shall reimburse EPA on a monthly basis for the items set forth below.

   (1) MP shall reimburse EPA at the SFPUC water consumption rate for the actual water consumption by MP Customers as measured by MP meters during the previous calendar month.

   (2) MP shall reimburse EPA at the SFPUC wholesale water rate for unaccounted-for water. The reimbursement for unaccounted-for water shall be calculated at 5 percent of the total actual water consumption by MP Customers as measured by MP meters during the previous calendar month. The parties agree that the percentage used to calculate the reimbursement for unaccounted for water may be adjusted periodically for completed capital projects or other significant events that may affect unaccounted-for water in the parties’ respective water systems.

   (3) MP shall reimburse EPA for an allocated pro-ration of the monthly SFPUC water service charge. The reimbursement for the monthly SFPUC water service charge shall be based on the total water consumption set forth in the SFPUC billing and allocated on a pro-rated basis of the sum total of actual water consumption by MP Customers as measured by MP meters during the previous calendar month, and MP’s unaccounted-for water.

   b. EPA shall furnish MP with a copy of the SFPUC water bill, during the previous water period. Within 15 days upon receipt of a copy of the SFPUC water bill, MP shall send a check to EPA with a written statement setting forth the total charges (“Statement of Charges”), for the previous billing period in accordance with the calculation methods set forth in Sections 5 a. (1), (2) and (3). Overdue payments shall accrue interest at the same rate as SFPUC charges EPA for overdue payments from and including the payment due date but excluding the date of payment.

   c. If EPA in good faith disputes a Statement of Charges, EPA shall furnish MP a written explanation specifying the disputed amount and the basis for the dispute on or before the payment due date for the disputed Statement of Charges and shall pay the remaining undisputed amount of Statement of Charges no later than the payment due date. If the parties are unable to resolve disputes regarding the Statement of Charges within 15 business days, then such disputes shall be resolved in accordance with the dispute resolution processes set forth in Section 15 hereto.

6. **Rate Setting and Consumer Billing.** The Parties agree to separately set retail water rates for their respective customers. MP will set retail water rates for MP Consumers and EPA will set retail water rates for the consumers within its corporate boundaries in consultation with its water service contractor. The Parties also agree to separately bill and collect payment from their respective customers for water services provided within their respective corporate limits.

a. Except as provided in section 8, the parties agree that they shall individually operate, repair and maintain their respective water systems located within each of their respective corporate boundaries in accordance with prudent industry methods, practices and standards and in compliance with all applicable federal, state and local laws, rules, ordinances and regulations.

b. The parties agree to cooperate with each other in carrying out their individual scheduled repairs and maintenance responsibilities. Neither party shall obstruct, delay or interrupt water service to either Party’s customers for scheduled repairs and maintenance without consent of the other party and proper notification of all affected customers.

c. The parties agree to notify each other in a timely manner of any activity, problems, event or circumstance, water quality related or otherwise, concerning their respective water systems that threatens or may threaten the public health or safety of the other party’s water system and prudent industry methods, practices, and standards, and to take all necessary and appropriate corrective and mitigative actions required by applicable laws.

8. Shared Facilities.

a. The three EPACWD turnouts from the SFPUC Bay Division Pipelines and certain other transmission facilities owned and controlled by EPA but located within the corporate boundaries of MP and more fully described in Exhibit B attached hereto, shall be used jointly by the parties to provide water to customers located within their respective corporate boundaries. The facilities described in Exhibit B shall be termed “Shared Facilities.”

b. EPA shall operate, repair and maintain the Shared Facilities in accordance with prudent industry methods, practices, and standards and in compliance with all applicable federal, state and local laws, rules, ordinances and regulations, and the 1984 Master Contract.

c. MP shall reimburse EPA for an allocated pro-rataion of the costs associated with the operations, scheduled repair and maintenance of the Shared Facilities; and unscheduled emergency repairs and maintenance of the Shared Facilities. The reimbursement for these costs shall be based on the total water consumption set forth in the SFPUC billing and allocated on a pro-rated basis of the total actual water consumption by MP Customers located with the corporate boundaries of MP, as measured by MP meters during the previous calendar month.

d. On the Commencement Date of this Agreement and each year thereafter, EPA shall furnish MP a written statement detailing an annual cost estimate for the operation and scheduled repairs and maintenance of the Shared Facilities. By the 10th day of each calendar month, EPA shall furnish MP with a written statement setting forth the total Shared Facilities charges (“Statement of Shared Facility Charges”) for the month payable hereunder and in accordance with the calculation method set forth in Section 8 (c). On or before 30 business days after receipt of EPA’s written statement, MP shall pay the amount set forth on such Statement of Charges to the address furnished in Section 18 hereto. Overdue payments shall accrue interest at the same rate that SFPUC charges EPA for overdue payments from and including the payment due date but excluding the date of payment.
e. If MP in good faith disputes a Statement of Shared Facilities Charges, MP shall furnish EPA a written explanation specifying: (a) the disputed amount and (b) the basis for the dispute on or before the payment due date for the disputed Statement of Charges and shall pay the remaining undisputed amount of Statement of Charges no later than the payment due date. If the parties are unable to resolve disputes regarding the Statement of Charges within 15 business days, then such disputes shall be resolved in accordance with the Dispute Resolution provisions set forth in Section 15 hereto.

f. MP shall in the absence of timely direction from EPA have the right to perform necessary emergency repairs and maintenance to the Shared Facilities to maintain water service to both MP and EPA customers. EPA shall reimburse MP for an allocated pro-ration of the costs associated with the emergency repairs and maintenance. The calculation and payment of the reimbursement shall be done in a manner consistent and in accordance with the methods set forth respectively in Sections 8 (c) and (d). In the event that EPA in good faith disputes either the cost or the necessity for any emergency repairs and maintenance performed by MP on the Shared Facilities, such disputes shall be resolved in accordance with the processes set forth in Section 8 (e).

g. The parties agree to cooperate with each other in carrying out their individual scheduled and unscheduled repairs and maintenance responsibilities related to the Shared Facilities. Neither party shall obstruct, delay or interrupt water service to either Party’s customers for scheduled repairs and maintenance without consent of the other party and proper notification of all affected customers.

h. EPA shall notify MP in a timely manner of any activity, problems event or circumstance, water quality related or otherwise, concerning the Shared Facilities that threatens or may threaten the public health or safety of the MP customers and take all necessary and appropriate corrective and mitigative actions required by applicable laws.

9. **Testing and Notification.** The parties agree they will carry out water quality testing in compliance with all applicable laws and to notify each other in a timely manner of any activity, problems, event or circumstance, water quality related or otherwise, concerning their respective water systems that threatens or may threaten the public health or safety of the other party’s water system and prudent industry methods, practice and standards, and to take all necessary and appropriate corrective and mitigative actions required by applicable laws.

10. **Joint Storage.** The Parties will work together for joint storage of water received by SFPUC to service both Parties’ consumers.

11. **Default by Either Party.** If either Party shall fail to keep and perform any of their obligations under this Agreement, which failure or breach continues for thirty (30) days after written notice thereof by the non-defaulting Party to the defaulting party, the non-defaulting Party shall have the right to seek specific performance or any other remedy at law or equity, unless the nature of the failure or breach is such that more than thirty (30) days is required for its cure and the defaulting Party has commenced such cure within such thirty (30) day period and thereafter diligently prosecutes the same to completion.
12. **Suspension or Reduction in Water Supply.**

   a. In the event of a drought or other emergency declared by SFPUC or Governmental Authorities, SFPUC may direct a temporary reduction or suspension of water use by the Parties for the limited time as necessary to meet the emergency condition.

   b. The Parties shall administer any such temporary reductions or suspensions by each Party’s water users in a reasonable manner, consistent with protection of public health, safety and welfare. Each party shall be responsible for setting their own water use allocation during shortage periods based on the water supplies available to the Parties.

   c. The Parties shall coordinate to provide or contract for the periodic testing of the water systems to ensure EPA will not run out of sufficient water to serve the need of the Parties’ water consumers in the event there is a shutdown of the SFPUC pipelines.

13. **Rules of Construction.** Unless the context or the provision in question requires otherwise, the following rules of construction shall apply to this Agreement: (i) the singular includes the plural, and the plural includes the singular; (ii) a reference to a Person includes its permitted successors and permitted assigns; (iii) a reference to an agreement, document or instrument includes all exhibits, schedules and attachments thereto and all amendments or replacements thereof; (iv) “include” and “including” are not limiting; and (v) “herein”, “hereof”, “hereunder” and similar words used in a document refer to the document as a whole. This Agreement is the product of negotiation between the Parties, and no ambiguity will be construed in favor of or against any Party solely as the result of such Party having drafted or proposed the ambiguous provision.

14. **Term.** This Agreement shall be effective as of the Effective Date and shall be and remain in effect unless and until the Parties mutually agree to terminate it or it is terminated by operation of law.

15. **Dispute Resolution.**

   a. **Mediation.** The Parties agree to first submit any dispute arising out of or in connection with this Agreement to a mutually acceptable professional mediator and to negotiate in good faith toward an agreement with respect to the dispute.

   b. **Non-Binding Arbitration.** Should the Parties be unable or unwilling to resolve their dispute through the mediation process provided in Section 14.a above, either Party may give written notice to the other Party and elect to have the matter resolved by non-binding arbitration in accordance with the rules and procedures of the arbitrator selected in accordance with this Section 14.b (the “Arbitrator”). Alternatively, either Party may elect to resolve the dispute by the commencement of an action in a court of competent jurisdiction located in San Mateo County. The Party seeking arbitration shall set forth in its notice the particulars of its claims and shall state with specificity the issue(s) to be submitted to arbitration and the relief sought. Within thirty (30) days of the date of the election to arbitrate, the Parties shall select a single, mutually agreeable arbitrator. If the Parties are unable to agree, they shall request that the Judicial Arbitration and Mediation Service, Inc. (“JAMS”) if such entity is in existence, appoint an Arbitrator in accordance with then-current procedures. The Arbitrator shall be a
retired judge of the Superior Court of California, or the Court of Appeal of California, or a retired judge of the United States District Court sitting in California. If JAMS is not in existence, the Presiding Judge of the San Mateo Superior Court shall appoint an Arbitrator in accordance with its then-current procedures. The rules and procedures for arbitration shall be as follows:

(1) The Arbitrator shall be selected and arbitration shall be conducted within a reasonable time, but in no event later than ninety (90) days after the date upon which the demand for arbitration is filed.

(2) The arbitration proceedings shall be conducted in San Mateo County, California, at a time and location as agreed to in writing by the Parties, or in absence of an agreement, as designated by the Arbitrator.

(3) Subject to the same rules pertaining to privileged communications and attorney work product that would apply if the proceeding was filed in the courts of the State of California, the Arbitrator shall have the authority to make all decisions regarding the relevance, materiality, and admissibility of all evidence offered at the arbitration.

(4) The Arbitrator may issue any remedy or relief, whether provisional or permanent, including but not limited to a default judgment, which the Parties could have obtained under the law applicable in courts of the State of California under the same factual circumstances, and the Arbitrator shall follow and otherwise employ the standards for issuing such relief as defined by California law; provided, however, that the Arbitrator shall have no authority or jurisdiction to enter an award for consequential, special, exemplary, or punitive damages. The Arbitrator may also grant such ancillary relief as is necessary to make effective the award.

(5) Both Parties may conduct discovery as if the matter were pending before a Superior Court of the State of California and the Arbitrator shall have the full power of the State of California to issue and enforce subpoenas and to award sanctions. Either Party shall have the right to demand in writing that the other Party provide a list of witnesses it intends to call at the hearing, designating which witnesses will be called as expert witnesses, and a list of documents it intends to introduce at hearing. The responding Party's list(s) shall be served personally or by registered or certified mail on the requesting Party, with a copy to the Arbitrator, at least thirty (30) days before the hearing.

(6) Each Party shall have the right to be represented by counsel.

(7) No later than sixty (60) days following closing of the arbitration hearing, the Arbitrator shall make an award and issue a written opinion consisting of findings of fact and conclusions of law and setting forth the bases of the award. The Arbitrator may include in his or her award pre-award interest and post-award interest at the legal rate where authorized by law.

(8) The Party against whom the award is made or remedy or relief ordered shall have within thirty (30) days after receipt of the award or order to commence and thereafter diligently pursue to completion any action or proceeding in any court of the State of
California of appropriate jurisdiction located in the County of San Mateo to obtain de novo adjudication of the dispute. If the award or order is mailed, it shall be deemed to be received within five days after deposit in the mail.

(9) The Arbitrator shall be paid a per diem or hourly charge as established at the time of appointment. Each Party shall bear its own attorneys’ fees and costs in presenting its case. All other actual costs of conducting the arbitration, including without limitation the administrative fee and the Arbitrator’s compensation, shall be shared equally.

(10) This arbitration clause shall be interpreted under the arbitration laws of the State of California. Except as otherwise provided in this Agreement, any motion, application, complaint or proceeding arising out of or relating to this arbitration clause shall be determined in accordance with the laws of the State of California.

(11) Unless otherwise provided in this Agreement or otherwise agreed in writing, the Parties shall continue to perform their respective obligations under this Agreement during the pendency of arbitration proceedings.

(12) Except as modified or stated to the contrary in this Section 14, the rules and procedures of the Arbitrator in effect at the time of the arbitration shall apply to the arbitration procedure.

16. **Audit.** Each Party (and its representatives) has the right, at its sole expense and during normal working hours, to examine the records of the other Party to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made pursuant to this Agreement. If any such examination reveals any inaccuracy in any statement, the necessary adjustments in such statement will be promptly made, and any necessary amounts will be promptly paid by the appropriate Party, together with interest at the rate set forth in section 5 from the date the overpayment or underpayment was made until the date the correcting payment is made; provided, however, that no adjustment for any statement or payment will be made unless an objection to its accuracy was made within the applicable statute of limitations.

17. **Assignment.** Neither Party may assign or otherwise transfer its rights or obligations under this Agreement without the prior written consent of the other Party.

18. **Binding Effect and Benefit.** This Agreement shall be binding upon and inure to the benefit of the Parties.

19. **Notices.**

a. All notices, demands, requests, statements, payments, or other communications required by this Agreement (each a “Notice,” and collectively, “Notices”) shall be in writing and given as follows by: (i) personal delivery; (ii) established overnight commercial courier with delivery charges prepaid or duly charged; (iii) electronic transmittal via facsimile machine; or (iv) certified mail, return receipt requested, postage prepaid. All Notices shall be addressed to the applicable addresses and facsimile machine telephone numbers set forth below, or to any other address or addressee as a Party entitled to receive Notices shall designate, from time to time, by Notice given to the other Party in the manner provided in this section.
If to EPA: The City of East Palo Alto

[insert address]

[insert phone number]

[insert facsimile number]

If to MP: The City of Menlo Park

Attention: Ruben Nino

701 Laurel Street

Menlo Park, California 94025

(650) 858-3420 (phone)

(650) 327-5497 (facsimile)

b. All Notices shall be deemed “given” as follows: (i) by personal delivery or via facsimile machine, when received pursuant to section 18(c); (ii) when accepted by overnight commercial courier; or (iii) when deposited into the United States Postal Service.

c. Notices given by personal delivery shall be presumed to have been received upon tender to the applicable natural person designed above to receive Notices. Notices given by facsimile machine transmittal shall be presumed to have been received upon confirmation of successful transmittal by the sender’s facsimile machine. Notices given by overnight commercial courier shall be presumed to have been received the next business day after acceptance by such overnight commercial courier. Notices given by mail shall be presumed to have been received by the fifth business day after deposit into the United States Postal Service system. All copies to the applicable persons or entity(ies) designated above to receive copies shall be given in the same manner as the original Notice.

20. **Entire Agreement.** This Agreement and the Exhibits hereto constitute the entire agreement between the Parties with respect to the subject matter hereof.

21. **Amendment.** This Agreement may be amended only by a written instrument signed by the Parties.

22. **Further Assurances and Counterparts.** In addition to the acts specifically required in this Agreement, the Parties agree to perform or cause to be performed any and all such further acts and to provide such further assurances as may be reasonably necessary to effect the transactions contemplated hereby, including the execution, delivery and, if applicable, filing of such additional documents and instruments as may be reasonably requested by such other Party. This Agreement may be executed in any number of separate counterparts.

23. **Indemnification.**
a. Each Party hereto shall defend, indemnify, and hold harmless the other Party, its officers, directors, employees, and agents, from and against any loss, cost, or expense, including reasonable attorneys' fees, where such loss, cost, or expense is caused, by the sole negligence or willful misconduct of the indemnifying Party, or its officers, directors, employees, or agents, or by a breach of any obligation of this Agreement by the indemnifying Party.

b. Where such loss, cost, or expense is caused, or claimed or alleged to be caused, by the negligence or willful misconduct of both Parties, or their officers, directors, employees, or agents, or by a breach of any obligation of this Agreement by both Parties, each Party shall defend, indemnify, and hold harmless the other Party in proportion to their proportionate fault as determined by mutual agreement, mediation, arbitration or judicial decree.

24. Governing Law. This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the State of California, without giving effect to principles of conflicts of laws.
IN WITNESS WHEREOF, Buyer and Seller have caused this Agreement to be duly executed as of the date first above written.

CITY OF MENLO PARK, a California municipality

By: Starla Jerome-Robinson
Name: Starla Jerome-Robinson
Title: City Manager

CITY OF EAST PALO ALTO, a California municipality

By: Monika Hudson
Name: Monika Hudson
Title: City Manager