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**WHOLESALE-RETAILER AGREEMENT
FOR SUPPLY OF RECYCLED WATER
BETWEEN
SANTA CLARA VALLEY WATER DISTRICT
AND
CITY OF GILROY**

This Agreement (the "Wholesaler-Retailer Agreement" or "Agreement") is made and entered into on this 5th day of OCTOBER, 1999, (the "Effective Date") between the Santa Clara Valley Water District (hereinafter referred to as "Wholesaler") and the City of Gilroy, California (hereinafter referred to as "Retailer"). Wholesaler and Retailer may be referred to herein individually as a "Party" or collectively as the "Parties."

RECITALS

- A. Retailer and Wholesaler are actively involved in regional efforts to develop recycled water supplies; and
- B. The Cities of Gilroy and Morgan Hill are the members of a Joint Powers Agency called the South County Regional Wastewater Authority (hereinafter called either "SCRWA" or "Producer"), which operates a regional wastewater treatment plant (the "WWTP"); and
- C. Producer and Wholesaler are entering into a companion agreement (the "Producer-Wholesaler Agreement") to this Wholesaler-Retailer Agreement by which Producer agrees to produce recycled water and sell it to Wholesaler for distribution and sale to the Cities of Gilroy and Morgan Hill as retailers, and potentially directly to certain End Users (as defined below); and
- D. Producer and Wholesaler intend to develop a recycled water master plan pursuant to the Producer-Wholesaler Agreement for expanded distribution facilities for the distribution of recycled water in the service area of Producer and intend that said master plan shall promote the use of recycled water throughout the service area of Producer and shall be consistent with overall water supply planning for the south Santa Clara County region; and

- E. Wholesaler's Board of Directors has reaffirmed its commitment to recycled water by passing Resolution 97-60 in support of the expanded use of recycled water; and
- F. Producer, Wholesaler, and Retailer are supporting the development and construction of a recycled water distribution system yielding from 5,000 to 15,000 acre-feet annually by the year 2020; and
- G. Included within said system are facilities to treat such recycled water at the WWTP; and
- H. The WWTP is permitted by the State of California Central Coast Regional Water Quality Control Board to distribute and use treated effluent as recycled water; and
- I. Recycled water to be delivered by Wholesaler to Retailer will be disinfected tertiary recycled water, in accordance with the provisions of Title 22 of the California Code of Regulations and applicable requirements of the California Department of Health Services; and
- J. Retailer wishes to acquire from Wholesaler the quantity of recycled water which it can sell to End Users (as defined below) located within Retailer's Service Area (which, for the purposes of this Agreement shall be deemed to be coterminous with the incorporated territory of Retailer, as the same may be adjusted from time to time).

AGREEMENT PROVISIONS

For and in consideration of the foregoing recitals and of the mutual promises and covenants herein contained, the Parties hereto agree as follows:

A. ARTICLE A. INTRODUCTORY PROVISIONS

- 1) **Definitions** - When used in this Agreement, the following terms shall have the meanings hereinafter set forth:
 - a) "End User" shall mean the ultimate user of recycled water.
 - b) "Fiscal Year" shall mean each 12-month period during the term of this Agreement commencing July 1st of one year and terminating June 30th of the next succeeding year, both dates inclusive.
 - c) "End User Point of Connection" shall mean the recycled water connection between Wholesaler's distribution system and Retailer's recycled water meter at each End User location. See Exhibit "B" attached hereto and incorporated herein by this reference.

- d) "Other Retailer" shall mean any entity, public or private, contracting with Wholesaler for a supply of recycled water.
- 2) **Term and Renewal** - This Wholesaler-Retailer Agreement shall commence on the Effective Date and be in force for twenty (20) years. Following the original twenty (20) year term, the term shall be automatically renewed and extended one (1) year, year-by-year, unless terminated in accordance with the provisions of Article E herein.

B. **ARTICLE B. RECYCLED WATER SERVICE PROVISIONS**

1) **Recycled Water Delivery Limitations**

- a) Retailer understands and acknowledges that Producer is charged with the responsibility to operate its sewerage systems in a manner which it determines to be most beneficial to the users thereof. The rights of Retailer to recycled water under this Wholesaler-Retailer Agreement pertain only to the recycled water which actually is produced at the WWTP and distributed by Producer to Wholesaler.
- b) Any circumstances beyond Producer's control which cause a reduction in the flow available from the WWTP may, at the discretion of Producer, result in a temporary or permanent decrease in recycled water available to Wholesaler under the Producer-Wholesaler Agreement in such amounts as Producer determines are necessary in order to fairly allocate any such reduced flow among all End Users of recycled water from the WWTP. Wholesaler shall attempt to allocate reduced flow among all of the End Users of recycled water distributed by Wholesaler in proportion to the actual use in the previous fiscal year of recycled water distributed by Wholesaler; however, Wholesaler may depart from such proportional allocation to accommodate differing priorities among End Users of the recycled water. Retailer shall have the right to meet and confer with Wholesaler regarding any such proposed non-proportional allocations. The reduced availability will continue in effect until such time as the WWTP and recycled water distribution system have been restored to normal operations.

- c) Retailer and Wholesaler acknowledge that Wholesaler may sell increased flows of recycled water to Other Retailers or End Users, but only for ultimate use outside of Retailer's Service Area.

2) **Recycled Water Delivery Quantities**

- a) Subject to the provisions hereafter set forth, Wholesaler agrees to make available to Retailer each Fiscal Year during the term hereof recycled water produced at the WWTP and supplied by Producer to Wholesaler.
- b) Annually, Retailer and Wholesaler shall meet and confer in good faith to mutually determine the anticipated minimum annual delivery quantity (the "Annual Delivery Quantity") for the ensuing Fiscal Year and to determine projected minimum Annual Delivery Quantities for the next ensuing three Fiscal Years. Subject to the terms of this Agreement, for any Fiscal Year for which the Annual Delivery Quantity is binding, Wholesaler shall sell and Retailer shall purchase in such Fiscal Year, at least the Annual Delivery Quantity of recycled water established for such Fiscal Year.
- c) If Retailer and Wholesaler cannot mutually agree on the Annual Delivery Quantity for the ensuing Fiscal Year at the annual meeting, then the Annual Delivery Quantity for the ensuing Fiscal Year shall be set at fifty percent (50%) of the highest annual amount of recycled water delivered to Retailer in any of the five Fiscal Years immediately prior to the ensuing Fiscal Year.
- d) The proposed Annual Delivery Quantities for Fiscal Years 1999-2000 through 2003-2004 are set forth in Exhibit A, attached hereto and by this reference made a part hereof. The Annual Delivery Quantities established pursuant to this Paragraph 2 shall be non-binding for Fiscal Years 1999-2000, 2000-2001, and 2001-2002. For Fiscal Year 2002-2003 and subsequent Fiscal Years, the Annual Delivery Quantity so established shall be binding upon the Parties.

3) **Metering and Measurement of Flows**

- a) Retailer shall install or cause to be installed End User meters meeting local and state requirements at no expense to Wholesaler for the purpose of measuring the quantity of recycled water delivered to each End User.
- b) Retailer shall require that each End User meter the recycled water supplied to them (collectively, the "End User Metering") by Retailer. The sum total of the End User Metering shall govern billings by Wholesaler to Retailer and measure all recycled water delivered to Retailer.
- c) Retailer shall inform Wholesaler in writing of the total quantity of recycled water provided each quarter (or annually, at Wholesaler's option) to each End User to which Retailer provides recycled water.
- d) Retailer shall permit Wholesaler reasonable access to meters and records which measure and register recycled water flow to verify the quantity of recycled water delivered.

4) **Recycled Water Quality**

- a) All recycled water to be delivered by Wholesaler to Retailer pursuant to the terms of this Wholesaler-Retailer Agreement will be of such quality that the same may be used for all purposes allowed for disinfected tertiary recycled water. Such recycled water shall conform to the quality requirements set forth in the then current disinfected tertiary recycled water quality and monitoring regulations specified in Title 22, Division 4, Chapter 3: Wastewater Reclamation Criteria (California Code of Regulations), as further regulated by the California Regional Water Quality Control Board, the California Department of Health Services and all other federal, state and local agencies having jurisdiction over recycled water quality.
- b) The Parties recognize that factors beyond the control of Producer could cause operational difficulties at the WWTP resulting in the temporary production of recycled water which does not meet the current requirements referenced in the previous subparagraph for

the intended uses of the End Users. In such cases, Producer is obligated under the terms of the Producer-Wholesaler Agreement to (1) temporarily suspend deliveries of recycled water to Wholesaler from Producer's facilities, and to (2) use its best efforts to re-establish the production of recycled water of a suitable quality as soon as reasonably possible and to re-establish Wholesaler's supply of such water accordingly. Wholesaler shall use its best efforts to re-establish Retailer's supply of such water as soon as possible.

c) Wholesaler shall immediately notify Retailer if Wholesaler is notified by Producer that recycled water from the WWTP does not meet the currently applicable regulatory requirements or if deliveries of recycled water will be suspended. Such notice shall be given verbally to Retailer, telephone (408) 846-0450, between 8:00 a.m. and 4:30 p.m. on weekdays, and after hours, weekends, and holidays, with a follow-up written confirmation by personal delivery or FAX to (408) 846-0500 on the same-day verbal notice is given, or on the next business day if verbal notice is not given during business hours.

5) **Recycled Water Limitation of Use** - Recycled water delivered by Wholesaler pursuant to this Agreement has limited uses, and Retailer agrees to provide the recycled water it receives hereunder only for the use of those End Users who have obtained the appropriate permit from Producer.

6) **Permits** - This Agreement is conditioned on Producer and Wholesaler obtaining the necessary permits relating to the use of recycled water and the development and construction of a regional recycled water distribution system. Both Wholesaler and Retailer are responsible, where applicable, to comply with the regulations set forth in these permits.

C. ARTICLE C. RECYCLED WATER FACILITIES

Water Supply Master Plan for South County - The Parties shall work together to create and approve a master plan (the "Water Supply Master Plan") for the overall water supply for the south Santa Clara County region, which shall be consistent with the provisions of this Wholesaler-

Retailer Agreement and with the master plan for recycled water distribution to be developed pursuant to the Producer-Wholesaler Agreement. The Water Supply Master Plan may be a separate planning document, or may be included as part of a water supply master plan for a larger geographic area.

- 2) **Ownership, Operation and Maintenance of Facilities** - Wholesaler shall own, operate and maintain at no cost to Retailer, all of its distribution facilities to the End User Point of Connection. At Wholesaler's request or as necessary to comply with permit conditions or State or Federal law, Retailer may assist with the maintenance and emergency repair of Wholesaler's distribution facilities. Wholesaler shall reimburse Retailer for reasonable and necessary expenses incurred in carrying out such maintenance or repair. Retailer shall own, operate and maintain at no cost to Wholesaler, its water meters required to receive recycled water at the End User Point of Connection. Each End User shall own, operate and maintain all on-site facilities for its use of recycled water.
- 3) **Monitoring** - Operation, management, maintenance and monitoring of facilities under the control of the Retailer (i.e., End User meter and service valve) shall be the sole responsibility of the Retailer.
- 4) **Reporting** - Retailer shall provide Wholesaler the following reporting information:
 - a) Quarterly (or annual, at Wholesaler's option) billing and recycled water use records (with individual customer information) within 30 days of the close of each fiscal quarter (or Fiscal Year, as the case may be).
 - b) End User site self-monitoring reports and any other data required by the State of California Regional Water Quality Control Board.
 - c) Adequate notification of Retailer inspections, start-ups and disconnections.

D. ARTICLE D. PAYMENT PROVISIONS

- 1) **Recycled Water Pricing Policy** - The Parties agree that the rates charged by Wholesaler to Retailer and the rates charged by Retailer to End Users should provide an economic incentive to End Users to use recycled water.

The Parties intend that each Party shall recover through its rates no more than its direct and indirect costs of providing the recycled water service.

- 2) **Recycled Water Rate Review** - Wholesaler shall charge for the delivery of recycled water in accordance with the rate schedule for recycled water service as such rate schedule is established by the Wholesaler and approved by Wholesaler's governing board. Wholesaler shall review and establish said rate schedule every Fiscal Year. Retailer shall be given an opportunity to meet and confer upon the pricing policy and rates with Wholesaler prior to Wholesaler's setting of its water rates, to ensure compatibility with the intent of this Wholesaler-Retailer Agreement.
- 3) **Obligation to Pay for Available Water** - Retailer shall pay Wholesaler for the quantity of water it is required to take each Fiscal Year, assuming such quantity is made available to it by Wholesaler. Wholesaler shall bill Retailer at the close of each Fiscal Year for the difference, if any, between the Annual Delivery Quantity and the actual quantity of recycled water taken by Retailer during that Fiscal Year.
- 4) **Billings** - Retailer agrees to make quarterly (or annual, at Wholesaler's option) payments for the total amount of recycled water delivered in each fiscal quarter (or Fiscal Year, as the case may be) at the rates set according to the procedures herein.
- 5) **Time and Method of Payment** - Quarterly (or annual, at Wholesaler's option) payments shall be made by Retailer within 30 days of billing by Wholesaler.

E. ARTICLE E. TERMINATION

- 1) **General** - This Wholesaler-Retailer Agreement may be terminated in compliance with the following subparagraphs.
- 2) **Failure to approve Water Supply Master Plan** - If the Water Supply Master Plan has not been approved by the respective governing boards of both Parties by the second anniversary of the Effective Date of this Agreement (the "Plan Date"), then either Party may elect to terminate this Agreement by serving a written notice (the "Termination Notice") on the other Party within 180 days following the Plan Date. In the event of such termination, this Agreement shall be deemed terminated as of the last day of the Fiscal Year during which the Termination Notice was given. Upon

such termination, if Producer elects to purchase facilities from Wholesaler pursuant to the terms of the Producer-Wholesaler Agreement, then Wholesaler shall assign to Producer all of its rights and obligations under this Wholesaler-Retailer Agreement.

- 3) **Nonrenewal** - Following the expiration of the original 20-year term of this Wholesaler-Retailer Agreement, either Party may serve upon the other no later than 30 days prior to the next occurring anniversary of the Effective Date a notice of intent to terminate this Agreement. Such termination shall become effective upon said next occurring anniversary of the Effective Date.
- 4) **Cause** - This Agreement may be terminated by either Party at any time for good cause upon 60-days written notice to the other Party.
- 5) **Impasse over Rates or Delivery Quantities** - If the Parties are unable to agree upon Annual Delivery Quantities for two Fiscal Years in a row, then this Agreement shall be deemed terminated as of the end of the second Fiscal Year for which no agreement on an Annual Delivery Quantity was reached. If Retailer is unwilling to accept a new annual rate set for recycled water by Wholesaler (following mediation, if requested, as provided for herein), then this Wholesaler-Retailer Agreement shall be deemed terminated at the end of the Fiscal Year for which such impasse is reached.
- 6) **Assignment Upon Termination of the Producer-Wholesaler Agreement** - In the event of a termination of the Producer-Wholesaler Agreement, this Wholesaler-Retailer Agreement shall automatically be assigned by Wholesaler to Producer.

F. ARTICLE F. GENERAL PROVISIONS

- 1) **Amendments** - This Agreement may be amended at any time by mutual written agreement of the Parties. The Parties agree that in the event of action by an outside governmental body, producing a prospective change in the volume or use of recycled water by End Users supplied by Retailer, the Parties will make such amendments to Exhibit A of this Agreement as the circumstances may reasonably and equitably require.
- 2) **Notices** - All notices or other writings in this Agreement to be given by either Party to the other, shall be deemed to have been given or when

- 6) **Successors and Assigns** - Subject to the provisions of the succeeding Paragraph hereof, this Agreement and all the terms, covenants, agreements, and conditions herein contained shall inure to the benefit of and be binding upon the successors and assigns of the Parties hereto.
- 7) **Assignment** - No assignment or transfer by Retailer of this Agreement or any part hereof, or of any rights hereunder or interest herein, shall be valid unless approved by Wholesaler, which approval shall not be unreasonably withheld.
- 8) **Remedies** - By reason of the specialized nature of the recycled water service to be rendered, and for the further reason that the extent of any damage caused to either Party by reason of any breach of this Wholesaler-Retailer Agreement may be extremely difficult to determine, it is agreed by the Parties hereto that an action for damages is an inadequate remedy for any breach, and that specific performance, without precluding any other remedy available in equity or at law, will be necessary to furnish either Party hereto with an adequate remedy for the breach hereof.
- 9) **Indemnification** - Retailer shall defend, indemnify and hold harmless Wholesaler, its officers, agents and employees, from any and all costs, liabilities, damages or health-related claims arising out of any act or omission to act, including any negligent act, by Retailer, its officers, agents or employees arising out of the Retailer's performance of its obligations under this Agreement. Wholesaler shall defend, indemnify and hold harmless Retailer, its officers, agents and employees, from any and all costs, liabilities, damages or health-related claims arising out of any act or omission to act, including any negligent act, by Wholesaler, its officers, agents or employees arising out of Wholesaler's performance of its obligations under this Agreement.
- 10) **Dispute Resolution** - Any controversy between the Parties regarding the construction or application of this Agreement, and claims arising out of this contract or its breach, shall be submitted to mediation within 30 days of service of a written request by one Party on the other Party. If the Parties cannot agree on a mediator, the Party demanding mediation shall request that the Presiding Judge of the Superior Court of Santa Clara County appoint a mediator. The mediation session shall not exceed one day (eight hours), unless the Parties agree to extend said time. The costs

that the Presiding Judge of the Superior Court of Santa Clara County appoint a mediator. The mediation session shall not exceed one day (eight hours), unless the Parties agree to extend said time. The costs of mediation shall be borne by the Parties equally. Mediation under this section is a condition precedent to filing an action in any court.

- 11) **Governing Law** - This Agreement shall be governed, construed and enforced in accordance with the laws of the State of California.

IN WITNESS WHEREOF, Retailer and Wholesaler have caused this Agreement to be executed by their respective duly authorized officers effective as of the day and year first herein above written.

ATTEST:

CITY OF GILROY ("RETAILER")

By: *Shonda Puccini*

City Clerk

By: *[Signature]*
City Administrator

APPROVED AS TO FORM:

ARJ

Acting City Attorney

ATTEST:

SANTA CLARA VALLEY WATER DISTRICT
("WHOLESALER")

Queen D. Kelly

Clerk

By: *[Signature]*

SCVWD Chair/Board of Directors

APPROVED AS TO FORM:

[Signature]

General Counsel

Exhibit A = Recycled Water Delivery Schedule

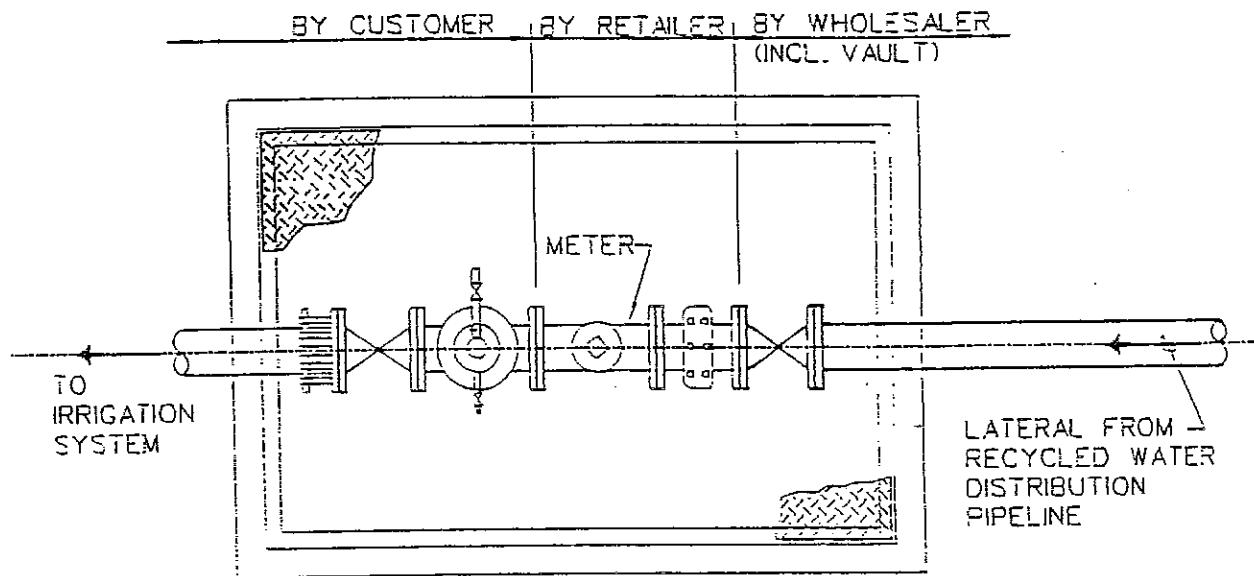
Exhibit B = End User Point of Connection Detail

EXHIBIT A

WHOLESALE - RETAILER
ANNUAL RECYCLED WATER DELIVERY SCHEDULE
(In Acre-Feet)

| | PROJECTED MINIMUM ANNUAL DELIVERIES | | | | |
|---------------------|-------------------------------------|-----------|-----------|-----------|-----------|
| | 1999-2000 | 2000-2001 | 2001-2002 | 2002-2003 | 2003-2004 |
| ANNUAL ACRE-FEET | 390 | 590 | 890 | 1090 | 1380 |

EXHIBIT B WHOLESALE-RETAILER POINT OF CONNECTION DETAIL



-NOT TO SCALE-

NOTE: WHOLESALE-RETAILER POINT OF CONNECTION SHOWN IS TYPICAL FOR ENTIRE DISTRIBUTION SYSTEM, SHOWING LIMITS OF RESPONSIBILITY. SPECIFIC PIPING AND VALVING DETAILS WILL VARY DEPENDING ON METER AND VAULT SIZE, EXISTING CONDITIONS, AND AGRICULTURAL, MUNICIPAL, OR INDUSTRIAL APPLICATION.

To: Central Files
Accounting
Bob Kenton

From: Liz Ellis

Subj: Agreements approved on 10/5/99

Date: 12/6/99

Attached are the fully executed copies of Agreements A2280-1 and A2280-3 for your files, which were approved by the Board on October 5, 1999 (Item 11). You previously received a copy of the approved agenda item with a copy of the agreements, not signed by all parties of the agreement.

Attachs.