

**AMENDED FISCAL AGREEMENT
FOR IMPROVEMENT OF
PINOLE HERCULES WATER POLLUTION CONTROL PLANT**

THIS FISCAL ADMINISTRATOR AGREEMENT (this “**Agreement**”) was entered into on the 19th day of February 2015 and amended on the 10th day of March 2020 by and between the CITY OF PINOLE, a municipal corporation (“**Pinole**,”) and the CITY OF HERCULES, a municipal corporation (“**Hercules**”), which is jointly referred to in this Agreement as the “**Parties**.”

RECITALS

WHEREAS, the Pinole-Hercules Water Pollution Control Plant (the “**WPCP**”) is located along the shoreline of San Pablo Bay at 11 Tennent Avenue within the city limits of Pinole; and

WHEREAS, the WPCP was constructed in 1956 to treat wastewater generated only by Pinole; and

WHEREAS, in 1971, the Cities of Pinole and Hercules entered into a joint use agreement, which included expansion and upgrades to the WPCP to treat wastewater effluent from Hercules; and

WHEREAS, the operating permit with the California Regional Water Quality Control Board (RWQCB) is in the name of Pinole; and

WHEREAS, the plant is operated, maintained and administered by Pinole, pursuant to a 2001 joint powers agreement with Hercules (the “**Wastewater Agreement**”); and

WHEREAS, treated wastewater from the WPCP is discharged from a deep water outfall known as “**Outfall 001**” (which also includes treated wastewater from the Rodeo Sanitary District (“**RSD**”)); and

WHEREAS, During periods of heavy rainfall from winter storm events, a portion of the WPCP effluent is discharged from a shallow water or near shore outfall known as “**Outfall 002**”; and

WHEREAS, the WPCP currently has an average dry weather flow capacity of 4.06 million gallons per day (mgd) and a wet weather capacity of 10.3 mgd; and

WHEREAS, effluent discharged from the WPCP is regulated by the California Regional Water Quality Control Board, San Francisco Bay Region (“**RWQCB**”), under the National Pollutant Discharge Elimination System (“**NPDES**”); and

WHEREAS, The NPDES permit issued in March of 2007 included a requirement that Pinole, as the permit owner, must examine alternatives and implement improvements to reduce the use of the shallow-water Outfall 002, and eliminate blending of primary and secondary-treated effluent, which occasionally occurs during periods of high rainfall during winter storm events; and

WHEREAS, in response to the need to upgrade wastewater treatment infrastructure, Pinole designed an upgrade project for the WPCP to comply with the requirements of the NPDES permit (the “**Project**”); and

WHEREAS, in August of 2012, the RWQCB issued a revised NPDES permit for the WPCP specifically intended to avoid construction of a parallel outfall pipeline that had been studied in the 2010 Environmental Impact Report, concluding that the additional cost of such a parallel outfall pipeline would be better spent on improvements to the collection system to reduce infiltration and the need to use the emergency outfall; and

WHEREAS, the August 2012 NPDES permit now requires the WPCP provide full secondary treatment for influent flows up to 20 mgd, discharge treated effluent up to 14.6 mgd to Outfall 001, and to limit use of Outfall 002 to flows in excess of 14.6 mgd; and

WHEREAS, the August 2012 NPDES permit further allows diversion of excess flow to the emergency outfall under the bypass conditions, provided that the peak wet weather influent flow exceeds 14.6 mgd after the effluent pump upgrades are completed and put into service, that the discharge complies with effluent and receiving water limitations, and the facility is properly operated as designed. The WPCP operator must report incidents of blending or use of the emergency outfall, or both, in routine monitoring reports. The compliance schedule in the 2012 NPDES permit requires upgrades to be operational by June 1, 2017; and

WHEREAS, Pinole and Hercules began preparation of a preliminary design for the WPCP to identify the treatment and conveyance upgrades needed to meet the current 2012 NPDES permit requirements for a redesigned Project; and

WHEREAS, the Wastewater Agreement between Pinole and Hercules requires each Party to share equally in the costs of the Project, for which Kiewit bid \$43,143,000 ; and

WHEREAS, in order to finance their share of the upgrade Project, Pinole and Hercules have each submitted separate loan applications to the Clean Water State Revolving Fund (“**CWSRF**”) program from the United States Environmental Protection Agency, which is administered by the State of California; and

WHEREAS, this Agreement is necessary in order to ensure sufficient cash flow requirements are met for the Project given the CWSRF funding requirements and the construction schedule for the Project; and

WHEREAS, this Amendment is necessary in order to ensure that sufficient contingency is available to meet the Project needs given the current status and the prolonged construction schedule for the Project; and

WHEREAS, it is the desire and intent of the Parties, without in any way surrendering the sovereignty of their respective governmental authority, to enter into this Agreement to set forth the basis for sharing costs, and administering the payments for the Project to contractor(s); and

WHEREAS, In the event that CWSRF funding is not approved by the State, then the Parties shall seek alternative financing, recognizing that time is of the essence in order for the Project to proceed; and

WHEREAS, it is the desire of both parties to obtain a Third Party Fiscal Administrator to oversee and manage the Project Account during construction and until final completion of the project to assure financial responsibility and accountability.

NOW, THEREFORE, FOR AND IN CONSIDERATION OF THE MUTUAL PROMISES HEREIN CONTAINED, THE PARTIES AGREE AS FOLLOWS:

1. Recitals.

The recitals hereinabove set forth are included herein and made a part of this Agreement.

2. Term.

The term of this Agreement shall be coterminous with the upgrade Project and will continue in force and effect until the Project is deemed complete and all contractor claims and bonds have been released, or unless terminated sooner in accordance with Section 17 (d).

3. Project Lead.

For the purposes of this agreement and project, Pinole shall serve as the Project Lead. Therefore, the City of Pinole will on behalf of both parties:

- (a) enter into all mutually agreed upon Project related contracts.
- (b) provide project administration for the Parties through completion of the Project;
and
- (c) process, review, approve and pay all invoices subsequent to review and administrative approval by Hercules staff pursuant to Section 9(d).

4. Third Party Fiscal Administrator.

In consultation with the City of Hercules, the City of Pinole will enter into a contract to obtain a Third Party Fiscal Administrator to represent both cities. The purpose of the Third Party Fiscal Administrator shall be to oversee and manage the Project Accounts during construction and until final completion of the project to assure financial responsibility and accountability. The duties of the Fiscal Administrator include, but are not limited to:

- (a) project administration and financial management for the Parties through completion of the Project;
- (b) processing and ordering payment of (by the "Paying Agent") all invoices after review and approval by both cities pursuant to Section 16 (a)
- (c) completing and submitting all "request for reimbursement" forms to the CWSRF for the draw-down of loan proceeds for both cities from the CWSRF loans
- (d) monitoring the cash balances in the Project Accounts to assure that adequate cash is available for the timely payment of invoices;
- (e) notifying each city when there is not sufficient cash available on the project account;
- (f) providing both cities with a monthly statement of cash balances, invoices paid and outstanding, retention monies.

5. Paying Agent.

Pinole and Hercules agree to establish separate "project accounts" at (TBD) Bank for the payment of debts for the construction of Project, authorizing (TBD) Bank as the Paying Agent to issue commercial checks/bank drafts upon demand of the Fiscal Administrator.

6. Ownership of the Plant.

This Agreement is limited to matters set forth herein and shall not affect the ownership of the improvements rights of the respective Parties in the WPCP and all improvements thereto, nor does it supersede, affect, modify or amend, in any way any of the agreements already existing between Pinole and Hercules with respect to any other matters.

7. Federal and State Assistance - Project Financing.

Pinole and Hercules have filed the necessary applications for loans from the CWSRF, which are or may be available for construction of Project and each Party shall, in good faith, each undertake all proceedings necessary to secure such CWSRF funds, or such other financing as may be necessary, for the benefit of both Parties hereto.

8. Sharing of Project Costs.

(a) Project Costs. Pursuant to the 2001 Wastewater Agreement, and upon approval by the Parties pursuant to the Construction Management procedure delineated in Section 16(a), Project Costs shall be shared equally by the cities of Pinole and Hercules.

For the purposes of the Plant Upgrade Project only, the City Engineers shall make a recommendation for accepting the Final Plans and Specifications to both city councils.

These Final Plans and Specifications shall be accepted by both city council's within thirty days (30) of receipt from the City Engineers and unless there are objections presented in writing within that time period, the advertisement for construction bids will proceed.

It is agreed that for the purposes of this Fiscal Agreement, a Project Labor Agreement shall not be considered as a part of the Plans and Specifications.

Project Costs include all capital, engineering, and construction costs for this Project, which include, but are not limited to:

- (i) all costs for engineering design and work associated with design which directly relate to the preparation of Project construction plans and specifications;
- (ii) project management costs, including the cost of a project manager (the "**Project Manager**"), Third Party Fiscal Administrator, the Paying Agent, as well as legal and administrative expenses associated with the Project;
- (iii) the costs for advertising and bidding of the design and construction work for the Project;
- (iv) acquisition of equipment related to the Project;
- (v) the acquisition of required permits and authorizations to proceed with construction;
- (vi) preparation of operation and maintenance manuals, cash flow analysis and wastewater discharge studies;
- (vii) all contractor and consulting services costs associated with the Project;
- (viii) Project construction supervision and engineering costs; and
- (ix) costs to administer and settle claims, including litigation that arises out of the Project.
- (x) Temporary facilities to replace structures impacted by the construction.

(b) Defined Project Related Construction Impacts. To the extent the Project impacts the items defined below, the costs associated shall be limited as follows:

- (i) Tennent Avenue. Project costs related to the mitigation of any construction related impacts to the portion of Tennent Avenue from San Pablo Avenue to the WPCP site shall be limited to the incremental costs which result directly from the construction impacts. These impacts shall be determined by an assessment of the street condition prior to construction and an assessment after the completion of construction with a value assigned

based upon the difference as determined jointly by the Directors of Public Works for the Parties.

- (ii) Replacement of Pinole Corporation Yard Storage Building. The replacement of the storage building being displaced by the Project shall be limited to newly constructed "like for like" replacement adjusted to address any current Building Code, Plant limitations and requirements or other regulatory requirements. Any costs for a replacement structure outside of these parameters shall be the sole responsibility of the City of Pinole.
- (iii) Replacement of Bay Front Park Restroom. The replacement of the park restroom building being displaced by the Project shall be limited to newly constructed "like for like" replacement adjusted to address any current Building Code, Plant limitations and requirements or other regulatory requirements. Any costs for a replacement structure outside of these parameters shall be the sole responsibility of the City of Pinole.
- (iv) Bay Front Park Enhancements or Mitigation. Any park enhancement or mitigation for use of Bay Front Park for staging or construction purposes shall be limited to those enhancements or mitigations imposed by Bay Conservation Development Commission (BCDC) or another regulatory agency.

9. Project Account.

Thirty days after the construction plans are advertised for bids, Project Accounts shall be established with the mutually agreed upon in advance of the award of the contract and both cities shall deposit a total of \$2,750,000 into the account prior to the award of the construction contract

(a) Initial Amounts. Pinole and Hercules shall each be obligated to deposit into their respective Project Account a cash amount equal to \$2,750,000 each for an initial total amount of \$5,500,000, which represents the highest two (2) months of estimated Project costs over the term of this Agreement. Each Party shall deposit its initial cash share into their respective Project Account no later than ten (10) business days after the Project construction bid documents are released for bid. The monies in the Project Accounts will be confirmed by the Third Party Paying Agent and used to pay for Project expenses as set forth in Section 5 through the Fiscal Administrator.

(b) Minimum Project Account Balance. At no time prior to completion of the Project should the available balance in the Project Accounts be less than \$500,000 for each Party or less than \$1,000,000 in total. Each Party shall deposit within five (5) business days additional funds to increase the balance in their respective Project accounts to a total of \$2.75 Million each, but in no event should the balance be less than \$500,000 for each respective Project Account.

(c) Project Backstop Financing (Safety Net). Each City shall approve by Resolution the authorization for establishing a back up financing plan or a "safety net" to

assure that cash flow is maintained throughout the project. Each City shall identify the source of said funding. In addition to the initial \$2.75 Million in the Project Accounts, each City shall secure financing totaling \$3.5 Million to be used only if necessary due to delays in State reimbursements as confirmed by the Third Party Fiscal Administrator.

Upon completion and review of a cash flow analysis, additional funds may be required for deposit into the Project Accounts, based upon the recommendation of the Third Party Administrator. These funds shall be deposited into the Project Accounts within five (5) business days of such notification.

(d) Payment of Invoices. The Fiscal Administrator shall order the timely payment of invoices for eligible project costs following review and approval of invoiced charges. Neither City shall unreasonably delay the review nor administrative approval of Project invoices, with said review and approval to occur within fourteen (14) days. If no objections are received by the Fiscal Administrator, the invoices shall be deemed approved and sent to the Paying Agent. Copies of checks issued by the Paying Agent will be provided to each City in a timely manner by the Fiscal Administrator.

(e) Reimbursement by CWSRF. Project expenses are to be reimbursed by the CWSRF. As reimbursement checks are received by each city, equivalent funds are to be deposited into each respective Project Account with the Paying Agent within five (5) business days.

10. CWSRF Reimbursement Forms.

The Fiscal Administrator will complete and file with the CWSRF all request for reimbursement forms for each Party and will provide both cities through its designee, three (3) business days to review, comment and approve the form prior to submitting the form to CWSRF. If either City does not respond within three (3) business days, the request for reimbursement will be deemed approved for submittal to CWSRF.

11. Return of Funds Upon Project Completion.

Within ninety (90) days of the Project being deemed complete in accordance with Section 2 and the filing of a Notice of Completion with the County for completion of the Project, the Third Party Fiscal Administrator shall return to each Party its share of their respective Project Account funds.

12. Calculation of and True-Up for Project Costs.

Upon completion of the Project, the Third Party Fiscal Administrator shall provide an analysis comparing the payment of Project Costs with the actual Project Costs paid by each Party. Both cities shall be provided thirty (30) days to review and approve calculation of any true-up for Project Costs. Any overpayments or underpayments for either Party will be credited or debited to each Party.

13. Cooperation and Further Assurances.

The Parties agree to cooperate and act in good faith in connection with the payment of all capital costs related to the upgrade Project. Each Party agrees to provide such information, execute and deliver any instruments and documents and to take such other actions as may be necessary or reasonably requested by the other Party which are not inconsistent with the provisions of this Agreement and which do not involve the assumption of obligations other than those provided for in this Agreement, in order to give full effect to this Agreement and to carry out the intent of this Agreement.

14. Examination of Books and Records.

Any Party to this Agreement shall have the right to examine the books and records created and maintained by the Third Party Fiscal Administrator pursuant to this Agreement at any reasonable, mutually agreed upon time.

15. Revenue Covenant.

Any failure of a Party to meet its obligations hereunder or to cure such failure in a timely manner shall constitute a Default and the defaulting Party shall be subject to such remedies as provided herein. Each Party covenants and agrees:

- (a) to continue to pay or advance to their respective Project Account from its revenues, only its share of the Project costs in accordance with this Agreement. Each Party further agrees that it will establish the user rates and charges for services provided by its enterprise so that it will at all times have sufficient revenues to meet this obligation;
- (b) to make payments to their respective Project Account under this Agreement from the revenues;
- (c) to make payments under this Agreement whether or not there is an interruption in, interference with, or reduction or suspension of services provided under this Agreement; such payments not being subject to any reduction, whether by offset or otherwise, and regardless of whether any dispute exists provided such interruption, interference or reduction in services is caused by forces constituting a Force Majeure Event and not reasonably contemplated by the Parties;
- (d) to operate its enterprise in an efficient manner and to maintain its facilities in good repair, condition and working order so that:
 - (i) the Parties' obligations to make payments under this Agreement are not adversely affected or threatened; and
 - (ii) each Party's bond rating and ability to negotiate and enter into any other agreements for this Project are not adversely affected or threatened; and

- (e) annually, and in each and every fiscal year during the term of this Agreement, to include in its enterprise budget, as an enterprise capital project expense, whether or not any other items are included, an appropriation or commitment from its revenues sufficient to satisfy all payments required to be made by the Party in such fiscal year under this Agreement, which are not paid from other available funds of the Party, until all such payments required to be made by the Parties under this Agreement have been paid in full.

16. Construction Management

- (a) *Coordination Meetings.* Representatives from the City of Hercules and the City of Pinole along with the onsite construction management firm shall meet weekly for the purpose of discussing and coordinating project related matters. The weekly meeting will include, but will not be limited to, project status, review of invoice(s) and invoices administratively approved by both parties, analysis of change orders to determine if change orders should be accepted for the project, and a monthly review of each City's Project Account with Paying Agent bank statements.
- (b) *Contingency Fund.* The Project shall have a Contingency Fund representing 10% of the Contractor's final bid award. Staff shall be authorized to administratively approve change orders within this amount and under the guidelines of 16 (c) below. If change orders are on track to exceed the total amount of the contract award plus the 10% Contingency Fund, this Agreement shall be amended by the Parties to increase the total contingency prior to additional change orders being approved.
- (c) *Change Orders.* If a dispute arises out of acceptance of change order(s), the change order(s) will be reviewed at a meeting by both City Managers and if not resolved, the Change Order will be reviewed and approved by the Pinole City Council up to the limit set forth in Section 16 (b).

For the purposes of this project, the authority for the approval of change orders shall be as follows:

| | |
|---|------------------|
| Directors of Public Works/City Engineers | 5% |
| Equal to an amount less than 5% of the Contingency amount | \$147,000 |

| | |
|---|--------------------|
| City Managers | 10% |
| Equal to an amount between 5% and 10% of the Contingency amount | — \$294,000 |

Pinole City Council
Equal to an amount over 10% of the Contingency amount.

17. Default and Remedies.

(a) Events of Default. An Event of Default under this Agreement shall exist with respect to a Party ("Defaulting Party") upon the occurrence of any one or more of the following:

- (i) If any Party fails to make any payment or to provide assurances as required by the Third Party Fiscal Administrator under this Agreement when due hereunder five (5) business days after receipt of notice given by the Fiscal Administrator pursuant to Section 19(a) of such non-payment or requirement to provide assurances; or
- (ii) the failure of the Party to perform any other covenant or obligation under this Agreement where such failure is not cured within ten (10) days following receipt of a notice from the Third Party Fiscal Administrator demanding cure; or

(b) Cure of an Event of Default. An Event of Default shall be deemed cured only if such default shall be remedied within the time periods set forth in Section 17(a) above.

(c) Remedies in the Event of Default.

(i) Remedies of Pinole. Upon the occurrence of an Event of Default, and following the applicable cure periods, where Hercules is the Defaulting Party, Pinole may, without limiting its other rights or remedies available under this Agreement, at law or in equity, and without constituting or resulting in a waiver, release or estoppels of any right, action or cause of action Pinole may have against Hercules, Pinole may demand that Hercules provide further assurances to compel the correction of the default, including, but not limited to, raising rates and charges to its customers or mandating the collection of a surcharge to produce revenues sufficient to secure the cure of the Event of Default.

(ii) Remedies of Hercules. Upon the occurrence of an Event of Default, and following the applicable cure periods, where Pinole is the Defaulting Party, Hercules may, without limiting its other rights or remedies available under this Agreement, at law or in equity, and without constituting or resulting in a waiver, release or estoppel of any right, action or cause of action Hercules may have against Pinole, Hercules may demand that Pinole provide further assurances to compel the correction of the default, including, but not limited to, raising rates and charges to its customers or mandating the collection of a surcharge to produce revenues sufficient to secure the cure of the Event of Default

(iii) Special Covenants Regarding Project Accounts. In the event that either Party's balance of their respective Project Account is insufficient to cover all project invoices for costs incurred under this Agreement sent to such Party, then, without limiting the other City's rights or remedies available under this Agreement, at law or in equity, such Party shall cooperate in good faith and shall cure the default within thirty (30) days, on an emergency basis, taking all such action as is necessary, including, but not limited to, raising rates and charges to its customers to increase its revenues to replenish its share of their respective Project Account as provided herein, obtaining further assurances by way of credit support and letters of credit, and taking all such other action as will cure the default.

(d) Effect of Termination or Suspension. This Agreement may not be terminated or suspended, except in writing signed by both Parties. In no event shall the termination of this Agreement waive, or otherwise discharge any ongoing or undischarged contingent liabilities or obligations arising from this Agreement until such obligations are satisfied in full, and all of the costs incurred by Parties in connection with such suspension or termination, including reasonable attorneys' fees, the fees and expenses of other experts, including auditors and accountants, other costs and expenses that a Party is entitled to recover under this Agreement, and other reasonable and necessary costs associated with any and all of the remedies, are paid in full.

18. Administration of Agreement by the Project Lead

Pinole, shall serve as the Project Lead for purposes of this agreement. The Project Lead shall provide project updates to the City of Hercules at each regular meeting of the Pinole - Hercules Wastewater Subcommittee and shall otherwise provide timely information to Hercules on all pending acts, decisions or approvals.

19. Miscellaneous.

(a) Notices. Except as otherwise specified in this Agreement, all notices to be sent pursuant to this Agreement shall be made in writing, and sent to the parties at their respective addresses specified below or to such other address as a party may designate by written notice delivered to the other party in accordance with this Section.

All such notices shall be sent by:

- (i) personal delivery, in which case notice shall be deemed delivered upon receipt;
- (ii) certified or registered mail, return receipt requested, in which case notice shall be deemed delivered two (2) business days after deposit, postage prepaid in the United States mail; or

(iii) nationally recognized overnight courier in which case notice shall be deemed delivered one (1) day after deposit with such courier.

Pinole: City of Pinole
2131 Pear Street
Pinole, CA 94564
Attention: City Manager, Copy to City Attorney

Hercules: City of Hercules
111 Civic Center Drive
Hercules, CA 94547
Attn: City Manager, Copy to City Attorney

(b) Counterparts. This Agreement may be executed in multiple counterparts each of which shall be an original and all of which taken together shall constitute one and the same instrument.

(c) Severability. If any term, provision, covenant or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions shall continue in full force and effect unless the rights and obligations of the parties are materially altered or abridged by such invalidation, voiding or unenforceability.

(d) Legal Actions and/or Attorneys' Fees. In the event any legal action is commenced to interpret or to enforce the terms of this Agreement or to collect damages as a result of any breach thereof, the Party prevailing in any such action shall be entitled to recover against the other Party all reasonable attorneys' fees and costs incurred in such action.

(e) Captions; Interpretation. The captions of the Sections of this Agreement are for convenience only and are not intended to affect the interpretation or construction of the provisions herein contained. The language of this Agreement shall be construed as a whole according to its fair meaning and not strictly for or against any Party.

(f) Parties Not Co-Venturers. Nothing in this Agreement is intended to or shall establish the Parties as partners, co-venturers, or principal and agent with one another.

(g) Governing Law; Venue. This Agreement shall in all respects be construed and enforced in accordance with laws of the State of California without regard to principles of conflicts of laws. Any action to interpret or enforce this Agreement shall be filed in Superior Court in Contra Costa County or in Federal Court for the Northern District of California.

(h) Waiver; Modification and Amendment. No failure or delay on the part of either Party in exercising any right, power, or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, power, or remedy preclude any other or further exercise thereof or the exercise of any other right, power, or remedy hereunder. No modification or waiver of any provision of this Agreement, nor any consent

to any departure there from, shall in any event be effective unless the same shall be in writing, signed by Pinole and Hercules, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given. No amendment to or modification of this Agreement shall be effective unless and until such amendment or modification is in writing, properly approved in accordance with applicable procedures, and executed by Pinole and Hercules.

(i) Assignment. This Agreement shall be binding upon each Party and their successors and assigns; provided however, this Agreement shall not be assignable by either Party, either by operation of law or otherwise, and any such assignment by operation of law or otherwise shall be void.

(j) Entire Agreement. This Agreement, together with the documents referenced herein constitutes the entire Agreement of the Parties with respect to the Project and supersedes all prior or contemporaneous written or oral agreements with respect thereto.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives the day and year first above written.

City of Pinole

City of Hercules

By: _____
Andrew Murray, City Manager

By: _____
David Biggs, City Manager

Date: _____

Date: _____

ATTEST:

By: _____
Heather Iopu, City Clerk

By: _____
Lori Martin, MMC, City Clerk

APPROVED AS TO FORM:

By: _____
Eric S. Casher, City Attorney

By: _____
Patrick Tang, City Attorney

EXHIBIT A

Construction Milestone Schedule

EXHIBIT B

**Project Account Funding Schedule
(Cash Flow Analysis)**

