

**GROUNDWATER WELL MONITORING AND MITIGATION AGREEMENT**

**between**

**CYPRESS LAWN CEMETERY ASSOCIATION**

**and the**

**SAN FRANCISCO PUBLIC UTILITIES COMMISSION**

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## RECITALS

This Groundwater Well Monitoring and Mitigation Agreement (“Agreement”), with an Effective Date as set forth below, is entered into with reference to the following facts, all of which the Parties agree are true and are incorporated as material terms into this Agreement:

A. Cypress Lawn Cemetery Association (“Cypress Lawn”) is a California non-profit public benefit corporation established in 1892 for purposes of providing funeral services and operating an approximately 185-acre cemetery on certain real property it owns in Colma, California.

B. The San Francisco Public Utilities Commission (“SFPUC”) is a department of the City and County of San Francisco, a California municipal corporation (“City”). The SFPUC operates the Hetch Hetchy Regional Water System, a surface water importation system that supplies water to over 2.6 million people in Alameda, Santa Clara, San Mateo and San Francisco Counties.

C. The Westside Groundwater Basin (“Basin”) extends from the vicinity of Golden Gate Park in San Francisco through the Sunset District and in a southeasterly direction to the City of Burlingame through the cities of Daly City, Colma, South San Francisco, San Bruno and Millbrae, as generally depicted on the map attached hereto as **Attachment 1**. The Cypress Lawn Property overlies the Basin.

D. Cypress Lawn has overlying groundwater rights (“Overlying Rights,” as defined in Section 1.24) in the Basin which rights it has exercised, is presently exercising, and in the future intends to exercise through the pumping of groundwater wells for the purpose of irrigation and other beneficial uses on its overlying property. Cypress Lawn intends to preserve its ability to increase its use of groundwater from the Basin under its Overlying Rights, through increased beneficial use on its overlying property, through new beneficial uses on future property expansion overlying the Basin, or both.

E. The SFPUC approved the Project on August 12, 2014 in resolution no. 14- following certification of the Project Final Environmental Impact Report (“FEIR”, State Clearinghouse No. 2005092026) pursuant to the California Environmental Quality Act (“CEQA”, Public Resources Code, § 21000, et seq.) by the San Francisco Planning Department on August 7, 2014 in motion no. . Under the Project, the SFPUC would provide additional surface water in wet and normal hydrologic years in lieu of groundwater pumped by three SFPUC wholesale customers: Daly City, California Water Service Company (serving South San Francisco and portions of Colma), and San Bruno (collectively, the “Participating Pumpers”), leading to an accumulation of groundwater in storage in the Basin in the form of rising groundwater levels.

F. The Participating Pumpers pump groundwater from the Basin to provide water supply to their customers for domestic and municipal purposes pursuant to the exercise of their existing appropriative groundwater rights. As the Project is conceived by the SFPUC, if the Participating Pumpers refrain from exercising their appropriative groundwater rights in a particular year due to the delivery of supplemental surface water by the SFPUC, this stored groundwater may be available for appropriation from the Basin during dry years, subject to paramount Overlying Rights, including the exercise of Overlying Rights by Cypress Lawn.

G. The Project involves the construction and operation of approximately 16 new groundwater wells in the southern portion of the Basin (the “Project Wells”). The currently proposed locations for Project Wells are depicted in **Attachment 1**. All Project Wells will draw down water levels in the Basin. In addition, the FEIR identifies several proposed Project Wells in the vicinity of the Cypress Lawn’s currently-owned overlying property, including wells at Site 5, Site 6, Site 7, Site 8, Site 9, Site 10, Site 11, Site 17 (Alternate), and Site 18 (Alternate). The FEIR concludes that pumping from these Project Wells could result in the creation of overlapping cones of depression with wells operated by Cypress Lawn (“Cypress Lawn Wells,” as defined in Section 1.10).

H. The FEIR identified potentially significant well interference impacts to the operation of Cypress Lawn Wells that would be caused by the operation of Project Wells during multi-year drought periods, such that Cypress Lawn might not be able to fully exercise its Overlying Rights to groundwater and to fully maintain its beneficial uses of Basin groundwater. The FEIR also identified technically feasible Mitigation Actions that the SFPUC could take in its Project Operations, along with potential Mitigation Actions that the SFPUC could take with the cooperation and agreement of Cypress Lawn and subject to future agreement between Cypress Lawn and the SFPUC. Cypress Lawn is concerned about Project impacts to Cypress Lawn.

I. By entering into this Agreement, the SFPUC intends to provide assurance to Cypress Lawn that it will implement Mitigation Actions consistent with this Agreement to avoid well interference impacts to Cypress Lawn and the Cypress Lawn Property. By entering into this Agreement, Cypress Lawn intends to provide assurance to the SFPUC that it will cooperate with the SFPUC in the implementation of Mitigation Actions that require Cypress Lawn’s future consent as provided for in this Agreement.

**Article 1. Defined Terms.** The capitalized terms and acronyms used in this Agreement shall mean as follows:

- 1.01 Agreement.** As defined in the first paragraph of this document.
- 1.02 Basin.** As defined in Recital C.
- 1.03 Basin Draw-Down Well Interference.** A lowering of the Basin's Static Groundwater Level as measured at Cypress Lawn Wells due to an increase in groundwater production from the Basin by Project Operations.
- 1.04 CEQA.** As defined in Recital E.
- 1.05 Cone of Depression Well Interference.** The condition occurring when the area of influence of a Project Well or Wells comes into contact with and overlaps the area of influence of one or more Cypress Lawn Wells.
- 1.06 Confidential Information.** Information provided by Cypress Lawn to the SFPUC that is designated by Cypress Lawn as confidential in accordance with Section 6.11.
- 1.07 Consumer Price Index.** The United States Department of Labor's Bureau of Labor Statistics Consumer Price Index for All Urban Consumers, San Francisco-Oakland-San Jose, California, excluding the shelter component of said index. If the aforesaid Consumer Price Index ceases to be published, any similar index published by any other branch or department of the U.S. government shall be used as the index in this Agreement, and if none is published, another index generally recognized as authoritative shall be substituted therefore by the Parties.
- 1.08 Cypress Lawn.** As defined in Recital A As referred to herein, Cypress Lawn includes all successors in interest to the Cypress Lawn Property.
- 1.09 Cypress Lawn Property.** The existing cemetery property owned by Cypress Lawn identified by Tax Assessor's Parcel Nos. on **Attachment 2** to this Agreement, and future property that may be acquired by Cypress Lawn overlying the Basin.
- 1.10 Cypress Lawn Wells.** The Existing Wells and any New Wells and Replacement Wells on Cypress Lawn Property used in the exercise of Cypress Lawn's Overlying Rights.
- 1.11 Effective Date.** The date on which the SFPUC General Manager executes this Agreement, as authorized by SFPUC Resolution No. \_\_\_\_\_, following execution by Cypress Lawn.

- 1.12 Existing Well(s).** As of the Effective Date, Cypress Lawn maintains two (2) wells that are used in the exercise of its Overlying Rights. Information regarding the location, age, casing size, screened depth(s), pump setting depth(s), and other pertinent data are set forth in **Attachment 3** to this Agreement.
- 1.13 FEIR.** The Final Environmental Impact Report for the Project certified by Planning Commission motion no. \_\_\_\_\_ on August 7, 2014.
- 1.14 Force Majeure Event.** An event not the fault of, and beyond the reasonable control of, the Party claiming excuse which makes it impossible or extremely impracticable for such Party to perform obligations imposed on it by this Agreement, for a period of time, by virtue of its effect on physical facilities and their operation or employees essential to such performance. Force Majeure Events do not include drought but include (a) an “act of God” such as an earthquake, flood, earth movement, or similar catastrophic event, (b) an act of the public enemy, terrorism, sabotage, civil disturbance or similar event, (c) a strike, work stoppage, picketing or similar concerted labor action, or (d) delays in construction caused by unanticipated negligence or breach of contract by a third party or inability to obtain essential materials after diligent and timely efforts, but only to the extent that such occurrences make it impossible or extremely impracticable for such Party to perform obligations imposed on it by this Agreement for such period of time.
- 1.15 Irrigation Well Monitoring and Reporting Program.** The Monitoring and Reporting Program described in the FEIR for Mitigation Measure HY-6 and in the MMRP adopted by the SFPUC, and the subsidence monitoring Program to be undertaken by the SFPUC provided for in Section 4.10 of this Agreement.
- 1.16 Mitigation Action(s).** One or more Project Operation actions under the SFPUC’s control, as well as actions that require future agreement(s) with Cypress Lawn, and the provision of Replacement Water to Cypress Lawn, that individually and collectively mitigate potential Well Interference Impacts caused by Project Operations.
- 1.17 Mitigation Asset(s).** New assets funded by the SFPUC as a Project mitigation expense subject to potential future agreement with, and for the sole ownership and use of, Cypress Lawn, including, but not limited to: irrigation efficiency improvements; lowering or replacement of pumps; construction of additional storage; and complete well replacement. Mitigation Assets also include Replacement Water Mitigation Assets.
- 1.18 Mitigation Asset Capital Costs.** All Mitigation Asset planning and design costs, including engineering services, costs incurred to obtain related regulatory permits, fees for environmental consultants, landscape restoration costs on Cypress Lawn Property, and real property acquisition costs, along with the cost of constructing the Mitigation Asset.



- 1.19 Mitigation, Monitoring and Reporting Program (MMRP).** The CEQA required program of mitigation and monitoring adopted by the SFPUC as part of Project approval in SFPUC res. no.
- 1.20 New Well.** A well constructed by Cypress Lawn that is not a Replacement Well, used for purposes of exercising Cypress Lawn’s Overlying Rights.
- 1.21 Operating Agreement.** The agreement between the SFPUC and the Participating Pumpers governing Project Operations.
- 1.22 Operating Committee.** The Project Operations governance committee formed by the SFPUC and the Participating Pumpers under the terms of the Operating Agreement.
- 1.23 Overlying Rights.** Groundwater rights exercised by pumping water from the Basin for use on Cypress Lawn Property overlying the Basin.
- 1.24 Participating Pumpers.** The Cities of Daly City and San Bruno, and the California Water Service Company South San Francisco District (serving South San Francisco and portions of Colma), wholesale water customers of the SFPUC who would participate in operation of the Project under the terms of the Operating Agreement. The phrase “Partner Agencies” is used in the FEIR and has the same meaning.
- 1.25 Party or Parties.** Cypress Lawn and the SFPUC, individually or collectively.
- 1.26 Peak Water Demand.** The maximum amount of water required to meet existing and reasonable future demand on the Cypress Lawn Property using the operating criteria set forth in Section 2.01.
- 1.27 Project.** As defined in Recital E.
- 1.28 Project Operation(s).** The operation of the Project as described in the FEIR, including the operation of wells owned by the Participating Pumpers, as informed by the Irrigation Well Monitoring and Reporting Program.
- 1.29 Project Well.** Each of the Project Wells, as defined in Recital G.
- 1.30 Pumping Groundwater Level.** The level of water in a well that is affected by the withdrawal of groundwater from the well.
- 1.31 Regional Water System.** The Hetch Hetchy Regional Water System operated by the SFPUC Water Enterprise to distribute potable surface water to wholesale and retail customers in Alameda, Santa Clara, San Mateo and San Francisco Counties.

- 1.32 Replacement Water.** Water supplies from the Regional Water System delivered on a standby basis to Cypress Lawn directly by the SFPUC, or wheeled through the California Water Service Company's South San Francisco District system for delivery to Cypress Lawn, as a Mitigation Action to address predicted or observed Well Interference Impacts caused by Project Operations.
- 1.33 Replacement Water Cost.** The contractually established unit (100 cubic feet, or "ccf") cost of Replacement Water paid by Cypress Lawn to the SFPUC, based on Cypress Lawn's cost of groundwater production, adjusted annually for inflation using the Consumer Price Index.
- 1.34 Replacement Water Mitigation Assets.** All Mitigation Assets, both within and outside of Cypress Lawn Property, that are reasonable and necessary for the delivery of Replacement Water to Cypress Lawn Property as shown on **Attachment 5** to this Agreement.
- 1.35 Replacement Water Mitigation Asset Capital Costs.** All costs of installing Mitigation Assets that are reasonable and necessary to supply Replacement Water to Cypress Lawn Property.
- 1.36 Replacement Well.** A well constructed by Cypress Lawn to replace an Existing Well for purposes of exercising Cypress Lawn's Overlying Rights.
- 1.37 SFPUC.** As defined in Recital B.
- 1.38 Static Groundwater Water Level.** The level of water in a well that is not affected by the withdrawal of groundwater from the well.
- 1.39 Well Interference Impacts.** A loss of production capacity at Cypress Lawn Wells caused by either Basin Draw Down Well Interference or Cone of Depression Well Interference, resulting in an inability to meet Peak Water Demand, including for example pump discharge rates decreasing to the point that existing or planned land uses would not be fully supported, or decreased pump discharge rates and potential damage to Cypress Lawn Well(s) and pump(s) that are so substantial that Cypress Lawn's existing or planned land uses would not be fully supported.
- 1.40 Well Pumping Expenses.** The incremental additional cost of power to pump water from Cypress Lawn Well(s) attributable to a decrease in pump discharge rates as a result of Basin Draw Down Well Interference Impacts or Cone of Depression Well Interference Impacts caused by Project Operations.

**Article 2. Cypress Lawn Wells and Water Demand**

**2.01 Volume of Water Required to Meet Peak Water Demand.** Cypress Lawn's current estimated daily Peak Water Demand derived from Basin groundwater is approximately 1.8 acre feet pumped over a 12 hour period. If Cypress Lawn decides to increase the estimate of Peak Water Demand set forth in this Section 2.01 by more than 10% (by more than .18 acre feet pumped over a 12 hour period) it shall provide information to the SFPUC that describes the well(s) to be used and the pumping schedule that is proposed to supply the increase in Peak Water Demand.

- A. The SFPUC intends to install transducers and other monitoring equipment in Cypress Lawn Wells with Cypress Lawn's consent in order to (1) implement the Irrigation Well Monitoring and Reporting Program and (2) measure volumes of water required to meet Cypress Lawn's Peak Water Demand. The Parties acknowledge that as a result of data derived from the Irrigation Well Monitoring and Reporting Program the estimate of Peak Water Demand in this section is subject to change based on the Parties' review of data from Cypress Lawn Wells. The Parties may agree to reduce the estimate of Peak Water Demand set forth in this Section following demonstrable reductions in water demand that may result from (1) the implementation of Mitigation Actions in Section 3.03; (2) irrigation system improvements undertaken by Cypress Lawn as may be required by Colma Municipal Code subchapter 5.11; or (3) the evaluation of metered discharge data from Cypress Lawn Wells as part of the Irrigation Well Monitoring and Reporting Program. Cypress Lawn agrees to engage in good faith efforts to reach mutual agreement with the SFPUC regarding the extent of any reductions in Peak Water Demand that may result from the implementation of the Mitigation Actions listed in **Section 3.03** or the review of data from the Irrigation Well Monitoring and Reporting Program.
- B. The estimate of Peak Water Demand set forth in this Section shall not be interpreted as a limit to the amount of groundwater Cypress Lawn may pump from the Basin in the future for any reasonable beneficial use(s) in the exercise of its Overlying Rights. Cypress Lawn reserves its paramount Overlying Rights to increase its Peak Water Demand.

**Article 3. Description of Project Mitigation Actions and Other SFPUC Commitments**

**3.01 General.** This Article describes the Mitigation Actions that the SFPUC agrees to implement under the Agreement, as well as the SFPUC's commitment to pay certain Well Pumping Expense incurred by Cypress Lawn and carry out a subsidence monitoring program.

**3.02 Project Operation Mitigation Actions Under Control of the SFPUC.** The SFPUC has sole control to alter Project Operations by selecting one of the following Mitigation Actions. The SFPUC can feasibly:

- A. Modify Project Operations to redistribute Project pumping to other Project Wells; or
- B. Modify Project Operations to reduce or cease pumping at Project Wells.

**3.03 Project Mitigation Actions Requiring Cypress Lawn's Agreement.** The Mitigation Actions listed in this Section require consultation and agreement with Cypress Lawn before implementation and may result in the construction of Mitigation Assets. One or more of the following Mitigation Actions may be appropriate for implementation under future agreement(s) between the Parties:

- A. Improve Cypress Lawn's irrigation efficiency to reduce water use.
- B. Modify irrigation operations to accommodate reduced well capacity.
- C. Lower pump(s) in Cypress Lawn Well(s) to accommodate water level fluctuations induced by Project pumping.
- D. Replace and lower pump(s) in Cypress Lawn Well(s).
- E. Construct additional storage capacity to meet Cypress Lawn's Peak Water Demand.
- F. Completely replace Cypress Lawn Well(s).

All Mitigation Asset Capital Costs for the options listed in Subsections A through F above shall be funded entirely by the SFPUC. Cypress Lawn will engage in good faith efforts to reach mutual agreement with the SFPUC regarding implementation of Mitigation Actions listed in this Section 3.03, or any other actions proposed by the SFPUC that avoid Well Interference Impacts that have occurred or are projected to occur as a result of Project Operations. Any proposal by the SFPUC for implementation of one or more Mitigation Actions under this Section shall include sufficient design information, a proposed operations plan and an estimate of total Mitigation Asset Capital Costs to enable Cypress Lawn to respond to the proposal. Cypress Lawn shall respond within fourteen (14) days to

a complete SFPUC proposal for Mitigation Action under this Section. In its response, Cypress Lawn shall select one of the following options: (1) accept the proposal and promptly authorize SFPUC to take the Mitigation Action(s); (2) propose alterations to the SFPUC's proposed Mitigation Action(s) to address any identified concerns and the reasons for those concerns; or (3) propose any alternative feasible Mitigation Action. If Cypress Lawn does not respond to a complete SFPUC proposal within thirty (30) days, the SFPUC may initiate mediation or arbitration under Section 6.12, including a request for specific performance from the arbitrator.

The listing of specific Mitigation Actions in this Section 3.03 shall not be construed to foreclose the Parties' ability to approve similar measures that are equally effective in mitigating Well Interference Impacts. The effectiveness of any alternative Mitigation Actions proposed by the Parties shall be subject to the concurrence of the Environmental Review Officer of the San Francisco Planning Department.

**3.04 Provision of Replacement Water by the SFPUC as Mitigation Action.** The MMRP and CEQA findings adopted by the SFPUC as part of Project approval in res. no. \_\_\_\_\_ concluded that the Project would cause Well Interference Impacts unless Mitigation Actions are implemented. Prior to commencing Project Operations, the SFPUC shall make a supply of Replacement Water available to Cypress Lawn Property as a Mitigation Action. The installation and funding of Replacement Water Mitigation Assets, and the SFPUC's supply of Replacement Water to Cypress Lawn as a Mitigation Action in response to Project caused Well Interference Impacts, shall be in accordance with the following requirements:

- A. **Design Objective.** The SFPUC shall design Replacement Water Mitigation Assets and operate the Regional Water System to provide at least the volume of water needed to meet Cypress Lawn's current estimated Peak Water Demand set forth in Section 2.02. Additional Replacement Water Mitigation Assets shall be constructed, as necessary, in phases following commencement of Project Operations in order to provide expanded water delivery capability for future increases in Cypress Lawn's Peak Water Demand.
- B. **Volume of Replacement Water.** The volume of Replacement Water provided by the SFPUC shall be reduced to the extent that Cypress Lawn Well(s) can continue to safely produce groundwater to meet a portion of its Peak Water Demand while avoiding Well Interference Impacts. Cypress Lawn agrees to use reasonable good faith efforts to maintain the production capacity of its Existing Wells and future New and Replacement Wells to the extent feasible.

- C. **Ownership and Operation of Replacement Water Mitigation Assets.** The SFPUC's Replacement Water supply pipeline(s) will be extended to a meter or meters located on Cypress Lawn's property boundary. The Replacement Water meters shall be the point of demarcation between facilities owned and operated by Cypress Lawn and the SFPUC. The Replacement Water meters and Replacement Water Mitigation Assets located upstream of the meters shall be owned and operated by the SFPUC. Replacement Water Mitigation Assets located downstream of the meters shall be owned and operated by Cypress Lawn.
- D. **Replacement Water Mitigation Asset Capital Costs and Installation Responsibility.** The SFPUC shall fund all reasonable and necessary Replacement Water Mitigation Asset Capital Costs for the Replacement Water Mitigation Assets shown on **Attachment 5** to this Agreement. The SFPUC's contractors shall install the Replacement Water Mitigation Assets from the Replacement Water meter upstream to the Regional Water System connection. The SFPUC shall fund the installation of all Replacement Water Mitigation Assets on Cypress Lawn Property by Cypress Lawn's contractors on a reimbursement basis at a cost of \$\_\_\_\_\_, subject to an agreed upon cost overrun percentage of 10%, for a total not-to-exceed amount of \$\_\_\_\_\_. To the extent that Cypress Lawn contracts out for any of the work required to install Replacement Water Mitigation Assets on Cypress Lawn Property, Cypress Lawn will ask for bids from no less than three responsive and responsible contractors and shall select the lowest bid received. Work performed by Cypress Lawn's contractors shall be supported by invoices detailing the work performed on a quantitative, as opposed to lump sum, basis, and such other substantiation as the SFPUC may reasonably require.
- E. **Permitting for Replacement Water Mitigation Asset Construction and Operation.** The SFPUC shall hold and be responsible for any regulatory agency permits that are required for the construction and operation of Replacement Water Mitigation Assets located upstream of and including the Replacement Water meters. Cypress Lawn shall hold and be responsible for any regulatory agency permits that are required for the construction and operation of Replacement Water Mitigation Assets located downstream of the Replacement Water meters on Cypress Lawn Property. Expenses incurred by Cypress Lawn in obtaining any regulatory permits for Replacement Water Mitigation Assets on Cypress Lawn's property shall be included as an element of the total Replacement Water Mitigation Asset Capital Costs funded by the SFPUC.
- F. **Replacement Water Operation and Maintenance Expenses.** The SFPUC shall fund all operation and maintenance expenses for the Replacement Water meters and all Replacement Water Mitigation Assets

upstream of the meters. Cypress Lawn shall fund all operation and maintenance expenses for all Replacement Water Mitigation Assets located downstream of the Replacement Water meters on Cypress Lawn Property.

- G. **Cost of Replacement Water.** Cypress Lawn shall pay the Replacement Water Cost to the SFPUC based on meter readings by the SFPUC. The initial Replacement Water Cost as of the Effective Date of this Agreement is \$ \_\_\_\_\_ per unit.
- H. **Term for Providing Replacement Water.** The SFPUC's obligation to supply Replacement Water to Cypress Lawn shall extend for such term as is necessary to protect Cypress Lawn from Well Interference Impacts caused by Project Operations, but in no event shall extend beyond the time when (i) Pumping Groundwater Levels in Cypress Lawn's Wells meet or exceed the elevations shown in Table 1 of Section 4.03, when the supply of Replacement water is no longer necessary.
- I. **SFPUC Rules and Regulations.** Supply of Replacement Water by the SFPUC shall be subject to the SFPUC's rules and regulations for water service, as amended from time to time and as are (1) applicable to the sale and delivery of Replacement Water to Cypress Lawn, (2) reasonable, and (3) not inconsistent with either this Agreement or with the adopted MMRP for the Project.
- J. **Interruption of Supply for Scheduled Maintenance Activities.** In the event that scheduled maintenance of Regional Water System transmission pipelines requires an interruption in the supply of Replacement Water to Cypress Lawn, the SFPUC shall provide at least ninety (90) days advance notice to Cypress Lawn of the service interruption and shall make good faith efforts to (1) schedule such maintenance outside of the peak summer irrigation season; (2) minimize the amount of time of the service interruption; and (3) investigate and implement the provision of temporary alternative sources of water supply to meet Cypress Lawn's Peak Water Demand, if necessary as a result of the SFPUC's proposed maintenance activities.
- K. **No Dedication of Supply.** The supply of Replacement Water by the SFPUC is intended solely as a Mitigation Action as a result of Project Operations and shall not be considered a dedication of water to public use or to create any right to water service in excess of the SFPUC's obligation to mitigate Well Interference Impacts arising from Project Operations in accordance with Articles 3 and 4 of this Agreement.

**3.05 Integration of MMRP.** This Agreement constitutes a stand-alone commitment by SFPUC to implement Mitigation Actions, as provided in this Article 3, to

minimize or avoid the Well Interference Impacts to Cypress Lawn that were identified in the FEIR.

- 3.06 Well Pumping Expenses.** Well Pumping Expenses incurred by Cypress Lawn as a result of Basin Draw-Down Well Interference shall be funded by the SFPUC as a Project operating expense if the Static Groundwater Level in the vicinity of Cypress Lawn Wells drops below 260 feet (depth to water or an elevation of -163 feet under NGVD 29) due to Project Operations.
- 3.07 Improvement Measure Regarding Subsidence Monitoring.** The FEIR did not conclude that Project Operations would cause significant land subsidence impacts that required mitigation by the SFPUC. Nonetheless, solely as an improvement measure for purposes of this Agreement and to address Cypress Lawn's concerns in this regard, the SFPUC agrees that if it approves the Project, it will implement a subsidence monitoring program. The program shall include surveying baseline elevations in the Colma Area prior to Project Operations followed by regular re-surveying at periodic intervals. The re-surveying frequency may be tailored to Project Operations but data shall be collected at least annually, with greater frequency when Project Operations result in Static Groundwater Levels being depressed below elevation -163 NGVD 29 at Cypress Lawn Well No. 4.



**Article 4. Mitigation Actions by the SFPUC in Response to Forecasted or Observed Well Interference Impacts**

**4.01 General.** Article 4 identifies specific criteria that will trigger review and implementation of Mitigation Actions by the SFPUC under this Agreement when necessary to achieve the performance standard set forth in Section 4.03. It is the intent of the SFPUC to forecast Well Interference Impacts as early as possible at monitoring and production wells in order to identify and prevent the occurrence of Well Interference Impacts at Cypress Lawn Wells as a result of Project Operations. Cypress Lawn may also (1) demand that the SFPUC undertake Mitigation Actions in response to observed Well Interference Impacts at Cypress Lawn Wells, and (2) make recommendations that the SFPUC undertake Mitigation Actions based on data generated by the Irrigation Well Monitoring and Reporting Program indicating that Project pumping may cause future Well Interference Impacts at Cypress Lawn Wells. All opinions and reports regarding Well Interference Impacts that are exchanged by the Parties under Sections 4.05, 4.07, and 4.09 shall be prepared in the form of an opinion by a certified hydrogeologist or a professional engineer with expertise in groundwater hydrology, water supply wells and water well technology, and include any verifiable data and analysis that is necessary to support the opinion.

**4.02 Description of Irrigation Well Monitoring and Reporting Program Used for Determination of Well Interference Impacts by the SFPUC.** The Monitoring and Reporting Program in relation to Cypress Lawn includes the data and procedures set forth in this Section and in Mitigation Measure M-HY-6 in the FEIR and the MMRP adopted by the SFPUC in res. no. . The Parties may agree at any time in the course of Project Operations to extend, revise or eliminate these monitoring and reporting requirements as necessary to achieve the objectives of this Agreement and if consistent with the adopted MMRP. The Irrigation Well Monitoring and Reporting Program will include the following elements:

- A. Groundwater level monitoring in the Cypress Lawn Wells and SFPUC monitoring and production wells shown on **Attachment 3**.
- B. The well and pump information included in **Attachment 4**.
- C. Metering (measurement of volumetric discharge and recordation of operating periods) of the Cypress Lawn Wells and Project Wells shown in **Attachment 3**.

The SFPUC shall install monitoring equipment in Cypress Lawn Wells and shall carry out monitoring, with all monitoring data and reports to be provided promptly to Cypress Lawn. The Parties will follow the monitoring and reporting protocols described in the Irrigation Well Monitoring and Reporting Program to be developed by SFPUC with participation by Cypress Lawn.

#### 4.03 Performance Standard for Triggering Mitigation Actions by SFPUC.

The SFPUC will ensure that, with implementation of Mitigation Actions, Project Operations do not cause a loss of production capacity at Cypress Lawn Wells such that this production capacity becomes insufficient to meet existing and future Peak Water Demand as may be required in the reasonable exercise of Cypress Lawn's Overlying Rights. Based on historical (June 2002) well and pump performance data and information for Well No. 4 provided by Cypress Lawn, the SFPUC derived an estimated Pumping Groundwater Level for Well No. 4, and concluded that if Project Operations caused the Pumping Water Level to fall below the estimated Pumping Groundwater Level, Cypress Lawn may not be able to pump enough groundwater to meet its Peak Water Demand if Well No. 4 is the sole source of water supply for irrigation. The Well No. 4 Pumping Groundwater Level estimated by the SFPUC is shown in Table 1 below, and the actual Pumping Groundwater Level at which Cypress Lawn may not be able to meet Peak Water Demand is dependent on refinement of the estimate of Peak Water Demand in Section 2.01 and the well and pump performance data collected as part of the Irrigation Well Monitoring and Reporting Program. Cypress Lawn agrees to engage in good faith efforts to reach mutual agreement with the SFPUC regarding the extent of any modifications to the estimate of Pumping Groundwater Levels in Cypress Lawn Wells that may result from the review of data from the Irrigation Well Monitoring and Reporting Program. If Pumping Groundwater Levels at Cypress Lawn Well No. 4 drop below the depths shown in Table 1, either due to Basin Draw-Down Well Interference or Cone of Depression Well Interference, Well Interference Impacts shall be deemed to have occurred.

Table 1

[Insert table showing Cypress Lawn well numbers/ current pumping water surface elevations/ pumping water surface depth to water that would trigger mitigation]

The depth to Pumping Groundwater Levels shown in Table 1 reflect the design and operating parameters of Cypress Lawn Well No. 4 and the existing pump installed in that well as of the Effective Date. The SFPUC has not been provided with sufficient data to develop similar Pumping Groundwater Levels for Cypress Lawn Well No. 2, used as a backup supply to Well No. 4. Should Cypress Lawn operate Well No. 2 concurrently with, or as an alternative to, Well No. 4, Cypress Lawn shall provide the required data to the SFPUC to enable the Parties to agree on an appropriate determination of Pumping Groundwater Levels that would trigger the SFPUC's obligation to perform Mitigation Actions under this Agreement. The Parties may mutually agree to modify the Pumping Groundwater Level elevation shown in Table 1, or the estimate of Peak Water Demand in **Section 2.01**, based on information collected as part of the Irrigation Well Monitoring and Reporting Program, provided that the estimated Pumping

Groundwater Level shown in Table 1 for Well No. 4, or any future agreed upon Pumping Groundwater Level for any other Cypress Lawn Wells, may not be revised upward as a result of changes in the efficiency of Cypress Lawn Wells due to normal wear and tear that is not attributable to Project Operations.

- 4.04 Water Level Elevations.** The water level elevations shown in Section 4.03, Table 1 are the starting elevations for: (1) the determination of Well Interference Impacts that trigger the performance standard in Section 4.03; (2) determining the SFPUC's responsibility for paying Cypress Lawn's Well Pumping Expenses; and (3) increasing the frequency of subsidence monitoring.
- 4.05 Action Criteria Used by the SFPUC in Determining Whether Project Operations May Cause Future Well Interference Impacts.** In reviewing data generated by the Irrigation Well Monitoring and Reporting Program, the SFPUC may predict that Well Interference Impact(s) will occur as a result of Project Operations if: (1) Pumping Groundwater Levels are projected to drop below the levels identified in Section 4.03, Table 1; or (2) Static Groundwater Levels are projected to drop below 260 feet (depth to water or an elevation of -163 feet under NGVD 29). For potential Cone of Depression Well Interference, the SFPUC will develop a graph that shows past and projected pumping of Project Wells within 1.5 miles of Cypress Lawn Well(s) over time, compared to the production capacity of Cypress Lawn Well(s) over the same period. For potential instances of Basin Draw-Down Well Interference, the SFPUC will develop an illustration showing the relationship between static, Static and Pumping Groundwater Levels at Cypress Lawn Wells, Project Wells, and other monitoring wells over time, as well as the overall drawdown of water levels in the Basin attributable to Project Operations. The SFPUC shall provide as much advance notice as possible of predicted Well Interference Impact(s) based on the operation of Project Wells, and shall use best efforts to provide a minimum of 6 (six) months written notice to Cypress Lawn. The notice submitted to Cypress Lawn shall include the Mitigation Actions in Sections 3.02, 3.03 and 3.04 that the SFPUC proposes to take to avoid the Well Interference Impact(s). Alternatively, Cypress Lawn may, at any time during Project Operations, request that the SFPUC review data generated by the Irrigation Well Monitoring and Reporting Program to assess the probability of future Well Interference Impact(s). As a result of such review, Cypress Lawn may submit a recommendation to the SFPUC that it undertake one or more of the Mitigation Actions in Sections 3.02, 3.03 and/or 3.04.
- 4.06 Mitigation Actions Undertaken by the SFPUC Following Projection of Future Project Caused Well Interference Impacts.** If the SFPUC advises Cypress Lawn that Well Interference Impacts may occur based on future Project pumping, it shall begin planning to implement one or more of the Mitigation Actions set forth in Sections 3.02, 3.03 and 3.04 prior to the time that Well Interference Impacts are forecasted to occur. The SFPUC shall provide Replacement Water to Cypress Lawn if necessary to avoid future Well

Interference Impacts in the event that the SFPUC chooses not to implement the modifications to Project Operations described in Section 3.02. The SFPUC shall continue to provide Replacement Water for the longest period of the following: (1) as necessary during the period of time required to negotiate and implement Mitigation Actions that require Cypress Lawn's agreement under Section 3.03; (2) for so long as the SFPUC chooses not to implement the modifications to Project Operations described in Section 3.02; or (3) until Pumping Groundwater levels in Cypress Lawn Wells meet or exceed the elevations shown in Section 4.03, Table 1, as such elevations may be modified by the Parties in the future.

- 4.07 Well Interference Impacts Observed by Cypress Lawn.** Independently of whether the SFPUC has notified Cypress Lawn of possible future Well Interference Impacts caused by Project Operations under Section 4.06, Cypress Lawn may deliver a written demand to the SFPUC to undertake Mitigation Actions in response to observed Well Interference Impacts at Cypress Lawn Wells.
- A. If Cypress Lawn claims that Well Interference Impacts have occurred based on a decline in Pumping Groundwater Levels below the estimated levels identified in Section 4.03, Table 1 (provided that Pumping Groundwater Levels have not declined to a greater degree than associated declines in Static Groundwater Levels, potentially indicating a well or pump problem instead of a problem caused by Project Operations), the cause of such Well Interference Impact shall be presumed to be Project Operations, in the absence of an agreement between the Parties based on documented evidence that the Well Interference Impact is not caused by Project Operations.
- B. Any rebuttal of the presumption in Section 4.07.A shall be based on documented evidence from the Irrigation Well Monitoring and Reporting Program, the length of time since the last withdrawal of water from Project Wells, and other relevant evidence. Examples of evidence that may rebut the presumption in Section 4.07.A include, but are not limited to, mechanical or physical issues with Cypress Lawn Wells or pumps attributable to normal wear and tear, earthquake, or other natural phenomena. The process for the SFPUC to partially or wholly rebut the presumption in Section 4.07.A is set forth in Section 4.09.
- 4.08 Supply of Replacement Water as Mitigation Action Undertaken by the SFPUC Following Cypress Lawn's Claim of Observed Well Interference Impacts.** If Cypress Lawn serves a written demand upon the SFPUC to undertake Mitigation Actions under Section 4.07, the SFPUC shall begin supplying Replacement Water to Cypress Lawn within twenty four (24) hours following receipt of the notice.

**4.09 Process for the SFPUC to Rebut Presumption Regarding Observed Well Interference Impacts and Associated Dispute Resolution Process.** This Section sets forth the process and schedule for the SFPUC to rebut the presumption that Well Interference Impacts are partially or wholly caused by Project Operations in connection with any written demand by Cypress Lawn to mitigate observed Well Interference Impacts made under Section 4.07. The time limits set forth in this Section shall not be construed to limit the time period of the SFPUC's implementation of changes to Project Operations under Section 3.02, or to foreclose Cypress Lawn's ability to agree or disagree with the SFPUC's proposed Mitigation Actions under Section 3.03.

**A. The SFPUC's Review and Response to Cypress Lawn's Demand for Mitigation Actions Under Section 4.07.** The SFPUC shall have thirty (30) days from receipt to review and comment upon Cypress Lawn's written demand that the SFPUC take Mitigation Actions under Section 4.07.

1. If the SFPUC does not respond in writing to Cypress Lawn's demand within the initial thirty (30) day period, the observed Well Interference Impacts documented in Cypress Lawn's demand shall be presumed to be caused by Project Operations. The SFPUC shall continue the supply of Replacement Water required under Section 4.08 in accordance with the terms of Section 3.04 and for the period of time stated in Section 4.06, and evaluate whether to take the Mitigation Actions under its control in Section 3.02 and/or propose the implementation of Mitigation Actions that require Cypress Lawn's consent in Section 3.03.

2. Alternatively, within thirty (30) days of receipt of Cypress Lawn's demand under Section 4.07, the SFPUC may, with the written concurrence of the Environmental Review Officer of the San Francisco Planning Department, deliver a written report to Cypress Lawn that the observed Well Interference Effects were not caused by Project Operations, in whole or in part.

3. If Cypress Lawn does not provide written objections to the SFPUC's report within thirty (30) days of receipt, the presumption that Well Interference Impacts are caused by Project pumping shall be deemed to be partially or wholly rebutted, consistent with the SFPUC's written opinion. The SFPUC may reduce or cease its supply of Replacement Water to extent that the SFPUC's written opinion rebuts the presumption that Project pumping caused Well Interference Impacts.

4. If Cypress Lawn provides written objections to the SFPUC's report within thirty (30) days of receipt, the dispute shall be submitted to mediation or arbitration under Section 6.12 of this Agreement. In any

mediation or arbitration proceeding, the SFPUC shall have the burden of proof in rebutting the presumption in Section 4.07.A. The SFPUC shall continue to supply Replacement Water to Cypress Lawn until the mediator resolves the dispute to the satisfaction of the Parties, or until the arbitrator orders otherwise. If an arbitrator finds that Project Operations did not cause the Well Interference Impacts observed by Cypress Lawn, the arbitrator may order Cypress Lawn to pay to the SFPUC the difference in cost between the Replacement Water Cost and the applicable established SFPUC water rate for the volume of Replacement Water previously delivered by the SFPUC following the receipt of Cypress Lawn's written demand under Section 4.07. Mediation or arbitration proceedings shall be terminated as moot in the event that the Pumping Groundwater Levels in Cypress Lawn Wells rise above the elevation specified in Table 1 of Section 4.03.

- B. The Parties shall engage in good faith discussion to resolve any remaining differences of opinion regarding the cause of the Well Interference Impact prior to initiating the dispute resolution process in Section 6.12.

**Article 5. Other Agreements Related to Water Supply.**

- 5.01 Installation of Equipment Necessary for Irrigation Well Monitoring and Reporting Program; Development and Exchange of Water Production Data.** Cypress Lawn shall provide the SFPUC and its consultants with access to Cypress Lawn Wells for purposes of installing, monitoring and maintaining equipment necessary to carry out the Irrigation Well Monitoring and Reporting Program pursuant to the terms of the license attached to this Agreement as Attachment 6. Cypress Lawn shall provide, upon request, data currently in its possession regarding well production and well condition. The SFPUC shall provide to Cypress Lawn, within thirty (30) days of receipt of Cypress Lawn's written request, data in its possession regarding Project Operations and the then-current and prior status of the Basin.
- 5.02 Cooperation in Design of Cypress Lawn's New and Replacement Wells.** Prior to submitting an application to San Mateo County for a well construction permit for a New or Replacement Well under Chapter 4.68 of the San Mateo County Ordinance Code, Cypress Lawn agrees that it will provide written notice to the SFPUC that includes the well location and diameter; depth of casing, screened intervals, pump size and setting depth. Cypress Lawn agrees to consider including in the well construction permit application to San Mateo County any reasonable changes to the design of the well that are proposed by the SFPUC to avoid Well Interference Impacts, provided that such comments are submitted to Cypress Lawn within thirty (30) days of Cypress Lawn's written notice to the SFPUC pursuant to this Section 5.02. Following well construction and test pumping, Cypress Lawn agrees to consider the SFPUC's comments on the type of pump proposed by Cypress Lawn in order to avoid Well Interference Impacts by selecting a pump that can accommodate a wide range of anticipated water levels due to Project Operations. If Cypress Lawn agrees to modify the design of its New or Replacement Well and associated pump selection as requested or agreed to by the SFPUC, the SFPUC agrees that it will:
- A. Pay the incremental share of the New or Replacement Well and/or pump capital cost incurred by Cypress Lawn to implement the SFPUC's requested modifications; and
  - B. Not contend that the New or Replacement Well and/or pump design, as modified by agreement of the Parties, triggers "special circumstances" warranting denial of the well construction permit under San Mateo County Ordinance Code Section 4.68.225.
- 5.03. Reservation of Groundwater Rights.** This Agreement shall not be construed to limit or characterize, in any manner, the Parties' claims to groundwater rights, except as and for the limited purposes described herein. This Agreement shall not be used or cited as evidence or proof in any proceeding, by either Party or by any

third party, of (1) either Party's water rights claims; or (2) waiver or release of any claims or defenses, in the event of future legal proceedings concerning the existence or extent of the Parties' respective water right claims. Further, the Parties agree that Cypress Lawn's acceptance of Replacement Water and/or Mitigation Actions shall not be used or cited as evidence or proof in any proceedings, by either Party or by any third party, that Cypress Lawn's Overlying Rights have been waived, prescribed, nullified, reduced, restricted or voided. The SFPUC's obligations under this Agreement are solely intended to protect Cypress Lawn from experiencing Well Interference Impacts or incurring Well Pumping Expenses caused by Project Operations as provided herein. Notwithstanding anything in this Section 5.03, the data regarding the Project and the Basin exchanged by the Parties pursuant to this Agreement may be used in evidence in any Basin adjudication.

- 5.04 Project Well Permits from San Mateo County.** Cypress Lawn agrees that it will not contend that the SFPUC's Project Wells, if designed and installed as described in the FEIR, trigger any "special circumstances" warranting denial of any well construction permits under San Mateo County Ordinance Code Section 4.68.225.
- 5.05 Cooperation in Design of Project Wells.** Cypress Lawn and its consultants shall be provided an opportunity to review and comment on the final well design for Project Wells within a 1.5 mile radius of Cypress Lawn Wells (Site 5, Site 6, Site 7, Site 8, Site 9, Site 10, Site 11, Site 17 (Alternate), and Site 18 (Alternate)). The SFPUC shall submit such final well design information to Cypress Lawn for its review and opportunity for comment at least thirty (30) days prior to the time that the SFPUC seeks a well construction permit from San Mateo County. The notice to Cypress Lawn shall include the Project Well location and diameter; depth of casing, screened intervals, pump size and setting depth. The SFPUC agrees to consider including in the well construction permit application to San Mateo County any reasonable changes to the design of the Project Well that are proposed by Cypress Lawn to avoid Well Interference Impacts, provided that such design changes (1) are submitted to the SFPUC within thirty (30) days of the SFPUC's written notice to Cypress Lawn pursuant to this Section 5.05 and (2) are consistent with the Project as approved by the SFPUC in res. no. \_\_\_\_\_, including, without limitation, any mitigation measures adopted by the SFPUC and included in the adopted MMRP for the Project.
- 5.06 Notice of Meetings of Operating Committee.** The meetings of the Operating Committee comprised of the SFPUC and the Participating Pumpers, as described in the Operating Agreement, are open public meetings. The SFPUC shall provide an opportunity for members of the public to attend and participate at such meetings. The SFPUC shall provide reasonable advance written notice of Operating Committee meetings to Cypress Lawn. Such notice shall include electronic links to any agendas, staff reports, or other written materials prepared



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for Operating Committee meetings. The failure of the SFPUC to provide notice of an Operating Committee meeting and related agenda links shall not invalidate any action taken by the Operating Committee at that meeting.

**Article 6. Other Agreements of the Parties.**

**6.01 Effectiveness and Term of Agreement.** This Agreement will become binding and effective on its Effective Date.

The term (“Term”) of this Agreement shall be from its Effective Date until the complete cessation of Project Operations as reflected in an adopted resolution of the SFPUC. At the end of the Term, any preexisting SFPUC obligations to pay Well Pumping Expenses and provide Replacement Water due to Project Operations shall continue beyond the Term until satisfaction of the conditions for ending such obligations in **Sections 3.06** (Well Pumping Expenses) and **Sections 3.04** and **4.06** (Replacement Water).

**6.02 Amendment.** The Parties may agree to amend this Agreement from time to time. All such amendments to this Agreement shall be in writing and signed by the Parties. Amendments related to the following provisions do not require the approval of the SFPUC’s governing body and may be approved by the General Manager of the SFPUC:

- A. Changes to any of the attachments to this Agreement.
- B. Changes to the estimated volume of water required to meet Cypress Lawn’s Peak Water Demand set forth in Section 2.02.
- C. The list of Mitigation Actions set forth in Section 3.03.
- D. Changes to the Irrigation Well Monitoring and Reporting Program described in Section 4.02, including but not limited to the cessation of monitoring and reporting.
- E. Changes to the estimated Pumping Groundwater Levels for Cypress Lawn Wells set forth in Section 4.03.
- F. Changes to the action criteria used by the SFPUC in determining whether Project Operations may cause future Well Interference Impacts described in Section 4.05.
- G. Changes to the schedule for resolution of disputes related to observed Well Interference Impacts set forth in Section 4.09, including entry into tolling agreements extending review and response times.
- H. Changes to the schedule for continuation of the subsidence monitoring improvement measure set forth in Section 4.10, including but not limited to the cessation of monitoring and reporting related to such improvement measures.

- I. Changes to the notice provisions in Section 6.08.
- J. Changes to the provisions for mediation and arbitration of disputes in Sections 6.12.A and 6.12.B.
- K. Changes to the estimated cost of Replacement Water Mitigation Assets on Cypress Lawn Property in Section 3.04.D.

**6.03 Interpretation.** In interpreting this Agreement, or any provision thereof, it shall be deemed to have been drafted by all signatories, and no presumption pursuant to Civil Code Section 1654 may be invoked to determine the Agreement's meaning. The marginal headings and titles to the sections and paragraphs of this Agreement are not a part of this Agreement and shall have no effect upon the construction or interpretation of any part hereof.

**6.04 Force Majeure Events.** No Party shall be liable in damages to the other Party for delay in performance of, or failure to perform, its obligations under this Agreement if such delay or failure is caused by a Force Majeure Event. The Party claiming excuse shall deliver to the other Party a written notice of intent to claim excuse from performance under this Agreement by reason of a Force Majeure Event. Notice required by this Section shall be given promptly in light of the circumstances, but in no case shall such notice be given later than ten (10) days after the occurrence of the Force Majeure Event. Such notice shall describe the Force Majeure Event, the services impacted by the claimed event, the length of time that the Party expects to be prevented from performing, and the steps which the party intends to take to restore its ability to perform. Any suspension of performance by a Party pursuant to this Section shall be only to the extent, and for a period of no longer duration than, required by the nature of the Force Majeure Event, and the Party claiming excuse shall use its best efforts to remedy its inability to perform as quickly as possible.

**6.05 No Third-Party Beneficiaries.** This Agreement is exclusively for the benefit of the Parties and not for the benefit of any other person. There are no third-party beneficiaries of this Agreement and no person not a party shall have any rights under or interests in this Agreement. No Party may assert a claim for damages on behalf of a person other than itself, including a person that is not a party.

**6.06 Repair of Damage.** If any portion of Cypress Lawn Property, including any improvements or personal property located thereon, is damaged by the SFPUC or its agents in accessing Cypress Lawn Property for purposes related to this Agreement, the SFPUC shall promptly repair such damage or replace the damaged item at its sole cost, or at SFPUC's election and, with Cypress Lawn's consent, shall compensate Cypress Lawn for the damage.

**6.07 Indemnity and Insurance.**

- A. **City Indemnity.** The SFPUC, on behalf of the City and County of San Francisco, shall indemnify, defend, and hold harmless Cypress Lawn from and against any and all demands, claims, legal, or administrative proceedings, losses, costs, penalties, fines, liens, judgments, damages, and liabilities of any kind (collectively, “Losses”) arising out of any conduct by SFPUC or its Agents under this Agreement on Cypress Lawn Property, except to the extent such Losses are caused or contributed to by the active negligence or intentional misconduct of Cypress Lawn or Cypress Lawn’s authorized representatives, or by third parties, and except for Losses resulting from the discovery of pre-existing conditions on or in the vicinity of the Cypress Lawn Property discovered (and not caused) by any investigations undertaken by SFPUC pursuant to this Agreement. The SFPUC assumes the risk of damage to any of the SFPUC’s personal property and of personal injury or death to any of its agents resulting from activities on Cypress Lawn Property, except to the extent damage, personal injury, or death is caused by the active negligence or intentional misconduct of Cypress Lawn or its authorized representatives.
- B. **City as Additional Insured and Indemnitee in all Contracts to Install Replacement Water Mitigation Assets on Cypress Lawn Property.** In all contracts for the installation of Replacement Water Mitigation Assets on Cypress Lawn Property that are funded in whole or part by the SFPUC, Cypress Lawn agrees to require its Contractors to maintain in force during the course of the contract insurance in the following amounts and coverages, with insurers satisfactory to the San Francisco: (i) Commercial General Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products and Completed Operations; and (ii) Automobile Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable. If any policy includes an aggregate limit or provides that claims investigation or legal defense costs are included in such aggregate limit, the aggregate limit shall be double the occurrence limits specified above. Each policy shall: (i) name as additional insured “the City and County of San Francisco, its officers, agents and employees”; (ii) provide that it is primary to any other insurance available to any additional insured, with respect to any claims arising out of this Agreement; (iii) provide that it applies separately to each insured against whom claim is made or suit is brought; and (iv) provide for at least thirty (30) days' advance written notice to the SFPUC of cancellation or modification.

In all contracts for the installation of Replacement Water Mitigation Assets on Cypress Lawn Property that are funded in whole or part by the

SFPUC, Cypress Lawn agrees to include language that requires its Contractors to indemnify, defend, and hold harmless the City and County of San Francisco for any and all claims for bodily injury or property damage arising out of the negligence or willful misconduct of the Contractor.

- 6.08 Notices.** All notices and other documents that either Party is required to send to the other Party shall be sent by United States mail, first class postage prepaid, addressed as follows:

**SFPUC:**

San Francisco Public Utilities Commission  
General Manager  
525 Golden Gate Ave., 13th Floor  
San Francisco, CA 94102

With copies to:

San Francisco Public Utilities Commission  
Manager, Water Supply and Treatment Division  
1000 El Camino Real  
Millbrae, CA 94030-2048

San Francisco City Attorney's Office  
Attn: Utilities General Counsel  
City Hall  
1 Carlton B. Goodlett Place, Rm. 234  
San Francisco, CA 94102

**Cypress Lawn:**

Kenneth E. Varner  
President and Chief Executive Officer  
Cypress Lawn  
1370 El Camino Real  
Colma, CA 94014

With a copy to:

Deborah E. Quick, counsel for Cypress Lawn  
Morgan, Lewis & Bockius LLP  
One Market, Spear Street Tower  
San Francisco, CA 94105-1126

Or such other designee as Cypress Lawn may specify in writing.

- 6.09. Assignment.** This Agreement shall be binding on, and shall inure to the benefit of, the Parties and their respective successors and assigns. The Agreement shall benefit successor owners/operators on Cypress Lawn Property. The SFPUC may only assign this Agreement in whole along with the entirety of the Project and all Project agreements and assets to a governmental entity that has the legal authority and financial and technical capability to perform the SFPUC's obligations hereunder. Each Party agrees that it will not transfer or assign any rights or privileges under this Agreement, either in whole or in part, whereby any provision of this Agreement will not continue to be binding on it, its assignee or transferee.
- 6.10. Good Faith and Fair Dealing.** The SFPUC and Cypress Lawn each acknowledge their obligation under California law to act in good faith toward, and deal fairly with, each other with respect to this Agreement.
- 6.11. Confidential Information.** Pursuant to this Agreement, the SFPUC acknowledges and agrees that it may receive or have access to Cypress Lawn's Confidential Information. Confidential Information does not include information received by the SFPUC from Cypress Lawn that is expressly labeled by Cypress Lawn with the wording "for inclusion in the Project record maintained by the San Francisco Planning Department in Case No. 2008.1396E" or any information that is obtained by the SFPUC as a result of conducting the Irrigation Well Monitoring and Reporting Program. The parties understand and agree that the Confidential Information is necessary to conduct analysis of the impacts of Project construction and operation on Cypress Lawn Wells, and that Cypress Lawn would not provide or allow the gathering of such Confidential Information if it were to be used or disclosed by the SFPUC other than as permitted by this Section 6.11. The SFPUC shall not use or disclose any Confidential Information except as provided in this Section 6.11. Documents provided to the SFPUC by Cypress Lawn that contain Confidential Information shall be marked by Cypress Lawn as "CONFIDENTIAL" on the front page of each such document. Confidential Information may be used by the SFPUC only for the following purposes (each, an "Authorized Purpose"):
- A. Determining baseline conditions at Cypress Lawn's existing wells.
  - B. Assessing the extent to which Project Operations may impact or may be impacting Cypress Lawn Wells.
  - C. Developing and implementing Mitigation Actions to avoid or reduce Well Interference Impacts to Cypress Lawn Wells.
  - D. Any other purpose reasonably necessary in connection with the planning, implementation, and operation of the Project or the resolution of disputes under Section 6.12 of this Agreement.

The SFPUC shall not disclose Confidential Information except: (i) to its Agents on a need-to-know basis and only in connection with any Authorized Purpose, (ii) with Cypress Lawn's express written permission, or (iii) to the extent disclosure is legally required by any applicable law (including, without limitation, the California Public Records Act (Government Code Section 6250 et seq.) and the San Francisco Sunshine Ordinance (San Francisco Administrative Code Chapter 67)) or any judicial or administrative order and after compliance with the procedures stated in the following paragraph.

If the SFPUC receives a request for disclosure of information that may be reasonably understood to include documents previously designated by Cypress Lawn as Confidential Information, the SFPUC shall notify Cypress Lawn in writing prior to disclosing such information, including in such notice either that the SFPUC will refuse to disclose the protected information or that the SFPUC has determined that there is no proper basis for such refusal and that the SFPUC intends to disclose the information unless ordered otherwise by a court. No member, official, agent, or employee of the City and County of San Francisco or any department thereof will be personally liable to Cypress Lawn, or to any of its successors in interest, in the event that the SFPUC fails to comply with the foregoing procedures stated in this Section 6.11. Upon receipt of notice from the SFPUC of a disclosure request, Cypress Lawn may at its election provide the SFPUC with any information that Cypress Lawn believes is relevant to the determination of whether such information is exempt from disclosure under the California Public Records Act and the San Francisco Sunshine Ordinance, or seek injunctive relief against such disclosure.

Cypress Lawn shall not seek to prevent or limit the disclosure of any information subject to a disclosure request or an order by a court or governmental agency unless Cypress Lawn has a reasonable, good faith belief that the information is privileged or otherwise exempt from disclosure.

Without limiting the provisions of this Section 6.11, Cypress Lawn acknowledges that this Agreement does not supersede the California Public Records Act, the San Francisco Sunshine Ordinance, or legal processes. Nothing herein shall require the SFPUC to take any action, or to refuse to release information, where to do so would violate applicable law.

## **6.12. Dispute Resolution.**

### **A. Mediation.**

1. Commencement of Mediation. Any controversy or dispute, whether sounding in contract or tort, arising out of or relating to the construction or application of any term or provision of this Agreement, including, but not limited to, any claim relating to the distribution or disposition of any proceeds to any Party, and any

conduct, act or omission related to, based upon or undertaken in connection with or pursuant to the Agreement, including but not limited to any claim for breach of fiduciary duty (a “Dispute”) may be submitted to the Judicial Arbitration and Mediation Service (JAMS), or its successor, for mediation. Either Party may commence mediation by providing to JAMS and the other Party a written request for mediation, setting forth the subject of the dispute and the relief requested.

2. Selection of Mediator. The Parties shall cooperate with JAMS and each other in selecting a mediator from the JAMS panel of neutrals and in scheduling the mediation proceedings.
3. Costs. The Parties agree that they will participate in the mediation in good faith and that they will share equally in its costs. Each Party shall pay its own counsel fees, witness fees, and other expenses incurred for its own benefit.
4. Confidentiality of Mediation. All offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts and attorneys, and by the mediator or any JAMS employees, are confidential, privileged and inadmissible for any purpose, including impeachment, in any arbitration or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation.

**B. Arbitration.** Any Dispute that is not settled through mediation or included in Section 6.13 shall be determined by neutral, binding arbitration, and not by court action, in San Francisco, California before one arbitrator. The arbitration shall be administered by JAMS pursuant to its Streamlined Arbitration Rules & Procedures (Comprehensive Arbitration Rules & Procedures). Judgment on the award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.

1. Confidentiality. The Parties shall maintain the confidential nature of the Arbitration and any award granted by the Arbitrator (the “Award”), including the Hearing, except as may be necessary (1) to prepare for or conduct the arbitration hearing on the merits; (2) in connection with a court application for a preliminary remedy, a judicial challenge to an Award, or its enforcement; or (3) unless



otherwise required by law, the San Francisco Sunshine Ordinance, or judicial decision.

2. **Limitation of Liability.** In rendering the Award, the Arbitrator may not award any punitive, exemplary, incidental, indirect or consequential damages, including damages for lost profits to any Party.
3. **Fees and Costs.** The Parties agree that they will participate in the arbitration in good faith and that they will share equally in its costs. Each Party shall pay its own counsel fees, witness fees, and other expenses incurred for its own benefit.

**6.13 Litigation of Claims; Reservation of Remedies.** The following issues are not subject to voluntary mediation or binding arbitration and may be litigated by either Party in any court or before any administrative agency with subject matter jurisdiction:

- A. Any determination of water rights in a Basin adjudication or other proceeding.
- B. The reasonableness of Cypress Lawn's use of water under the California Constitution.
- C. The failure of the SFPUC to implement Mitigation Actions under Sections 3.02 and 3.04, and agreed upon Mitigation Actions under Section 3.03, as may be necessary to enable Cypress Lawn to meet its Peak Water Demand due to Well Interference Impacts caused by Project pumping.
- D. Disputes about the scope of the arbitrability clause in Section 6.12.B.
- E. Disputes concerning release of Confidential Information under Section 6.11.

Cypress Lawn does not waive, and expressly reserves, its right to seek redress in any forum and for any claims for injuries to Cypress Lawn as a result of Project Operations. The mediation and arbitration requirements in Section 6.12, and the reservation of remedies in this section, shall not operate to toll, waive, or excuse Cypress Lawn's compliance with the Government Code Claim requirements under California Government Code Section 900, et seq., and San Francisco Administrative Code Chapter 10.

**6.14 Conflict of Interest.** By signing this Agreement, Cypress Lawn acknowledges that it is familiar with the provisions of Section 15.103 of the San Francisco Charter, the provisions of Article III, Chapter 2 of the San Francisco Campaign and Governmental Conduct Code, and the provisions of Sections 87100 et seq. and Sections 1090 et seq. of the Government Code of the State of California, and certifies that it does not know of any facts that would constitute a violation of those provisions, and agrees to immediately notify the SFPUC if Cypress Lawn becomes aware of any such fact during the term of this Agreement.

**6.15. General Terms.** (a) This Agreement (including the attachments hereto) contains the entire agreement between the Parties concerning the subject of this Agreement, and all prior written or oral negotiations, discussions, understandings, and agreements are merged herein. (b) This Agreement shall be governed by California law and City and County of San Francisco Charter. (c) This Agreement may be executed in counterparts, each of which is deemed an original, and all such counterparts constitute one and the same instrument. (d) This Agreement does not create a partnership or joint venture between the SFPUC and Cypress Lawn as to any activity conducted by the SFPUC or its agents on, in or related to Cypress Lawn Property. (e) The attachments referenced in and attached to this Agreement are incorporated herein and made a part hereof. (f) This Agreement shall be subject to the budgetary and fiscal provisions of the City and County of San Francisco Charter. There shall be no obligation for the payment of money by the City or the SFPUC under this Agreement unless City's Controller first certifies, pursuant to Section 3.105 of City's Charter, that there is a valid appropriation from which the expenditure may be made and that unencumbered funds are available from the appropriation to pay the expenditure. If sufficient funds for the payment of the compensation and any other payments required under this Agreement are not appropriated, then the SFPUC may terminate this Agreement, without penalty, liability, or expense of any kind to the City or SFPUC, as of the last date on which sufficient funds are appropriated. (g) The SFPUC represents and warrants that the undersigned representative of the SFPUC has full authority to enter into this Agreement and that no other consent or approval is required.

SAN FRANCISCO PUBLIC UTILITIES COMMISSION

By: \_\_\_\_\_  
Harlan L. Kelly, Jr.  
General Manager

Date: \_\_\_\_\_

Authorized by SFPUC Res. No. \_\_\_\_\_ Dated: \_\_\_\_\_

Attest: \_\_\_\_\_  
Secretary

Authorized by Board of Supervisors' Resolution No. \_\_\_\_\_ under Charter section 9.118

Approved as to form:

Public Review Draft  
June 18, 2014

By: \_\_\_\_\_  
Deputy City Attorney

Date: \_\_\_\_\_

CYPRESS LAWN CEMETERY ASSOCIATION

By: \_\_\_\_\_  
Ken Varner  
Chief Executive Officer

Date: \_\_\_\_\_

Approved as to form:

By: \_\_\_\_\_

Date: \_\_\_\_\_

**Attachments to Agreement**

1. Basin map showing currently proposed Project Well locations/ identifying numbers and Cypress Lawn existing well locations (used for all irrigator agreements).
2. Table of Cypress Lawn Property including identification by Tax Assessor's Parcel Nos.
3. Detail map showing Cypress Lawn Property, wells and irrigation infrastructure, along with project facilities and RWS facilities and predicted area of Cone of Depression Well Interference.
4. Well construction drawings with operating elevation details used to inform Well Interference calculations.
5. Drawing Showing Replacement Water Mitigation Assets, including retrofits and assets on Cypress Lawn Property.