

MS4 NPDES STORMWATER PERMIT PARTICIPATION AND JOINT DEFENSE AGREEMENT

This MS4 NPDES Stormwater Permit Participation and Joint Defense Agreement (“Agreement”) is made and entered into as of October 6, 2020 (“Effective Date”), by and among the San Bernardino County Flood Control District (“Principal Permittee” or “SBCFCD”), the County of San Bernardino, and the City of Big Bear Lake, the City of Chino, the City of Chino Hills, the City of Colton, the City of Fontana, the City of Grand Terrace, the City of Highland, the City of Loma Linda, the City of Montclair, the City of Ontario, the City of Rancho Cucamonga, the City of Redlands, the City of Rialto, the City of San Bernardino, the City of Upland, and the City of Yucaipa, (collectively, the “Parties” or “MS4 Permittee Group”), and Pillsbury Winthrop Shaw Pittman LLP (“Pillsbury”).

RECITALS

- A. The Parties are permittees under that certain MS4 NPDES Permit and Waste Discharge Requirements for Area-wide Urban Stormwater Runoff, adopted January 29, 2010, NPDES No. 618036/Order No. R8-2010-0036, applicable to the SBCFCD, the County of San Bernardino, and the incorporated cities of San Bernardino County within the Santa Ana Region (“MS4 NPDES Permit”);
- B. The MS4 NPDES Permit expired by its terms on or about January 29, 2015, but has been subsequently administratively extended and remains in effect by operation of law.
- C. Parties have been identified as entities to be regulated under a new municipal stormwater permit expected to be adopted in 2020 or soon thereafter (the “2020 MS4 Permit”) by the California Regional Water Quality Control Board, Santa Ana Region (“RWQCB”) and have a common interest in addressing and negotiating the terms of the 2020 MS4 Permit;
- D. To reduce costs and to more effectively represent their interests, the Parties desire to cooperate with one another in addressing the 2020 MS4 Permit issues, recognizing that there are certain efficiencies in having common counsel representing the Parties during the 2020 MS4 Permit negotiation process and any subsequent appeals or litigation (collectively, the “Work”). Each Party has agreed to coordinate certain efforts, share information, and fund a portion of the attorneys’ fees and other costs associated with the Work as set forth in this Agreement;
- E. To assist SBCFCD, as the principal-permittee, on legal and other issues related to the 2020 MS4 Permit, as well as other matters that may be assigned, the San Bernardino County Counsel’s Office issued a Request For Proposals. SBCFCD received and evaluated proposals from five law firms and interviewed three. On or about March 25, 2014, SBCFCD retained Mr. Chris Amantea at the firm of Squire Sanders, which firm then changed its name to Squire Patton Boggs, LLP.

F. In February of 2016, the SBCFCD County Counsel's office received notice that Mr. Amantea switched firms and joined Steptoe & Johnson LLP. Thereafter, County Counsel retained Steptoe on behalf of SBCFCD through a purchase order. Since then Mr. Amantea joined the Pillsbury law firm which has similarly been retained by the SBCFCD County Counsel's office pursuant to a purchase order.

In consideration of the mutual covenants and obligations contained in this Agreement, the Parties agree as follows:

AGREEMENT

1.0 SCOPE AND PURPOSE.

The purpose of this Agreement is to set forth the terms and conditions under which the Parties will work together collectively as the MS4 Permittee Group to, among other things:

- (a) retain Pillsbury, as common counsel to advise the MS4 Permittee Group on legal and other issues related to the 2020 MS4 Permit;
- (b) if appropriate, engage technical consultants and direct their efforts, as necessary, to address technical issues related to 2020 MS4 Permit;
- (c) consider reasonable legal, technical, investigative, and administrative costs incurred relating to the 2020 MS4 Permit, and any subsequent administrative appeals and/or litigation;
- (d) allocate among themselves all approved fees and costs;
- (e) cooperatively provide all necessary technical and legal input, as requested by the SBCFCD, as the Principal Permittee;
- (f) communicate and negotiate with the RWQCB and the US Environmental Protection Agency ("USEPA") regarding the 2020 MS4 Permit, as necessary to accomplish the purposes of this Agreement; and
- (g) provide comments on the draft Report of Waste Discharge Requirements and review and comment on other issues that may be presented from time to time during the process that may impact one or more of the co-permittees.

2.0 MS4 PERMITEE GROUP.

- 2.1 Meetings & Notice. Upon at least 24 hours' advance notice, unless an emergency requires less notice, the Parties may schedule meetings from time-to-time, under this Agreement, as requested by the SBCFCD, to address issues pertinent to the 2020 MS4 Permit. Meetings may be held by telephone conference.
- 2.2 Cooperation. The Parties shall reasonably cooperate with each other to accomplish the purposes of this Agreement and shall attempt to resolve any disputes among them through good faith negotiation.

2.3 Communication with Pillsbury. All communications with Pillsbury under this Agreement will be coordinated through the SBCFCD or the city attorney in the case of a city.

3.0 SHARED COSTS.

3.1 Defined. Shared Costs are costs of common counsel (“Common Counsel”) and, if applicable, any consultants approved and retained by the MS4 Permittee Group for the work related to the 2020 MS4 Permit under this Agreement.

3.2 Payment. The Parties agree to pay the Shared Costs of Common Counsel pursuant to the Section VII (Program Costs) of the Implementation Agreement (County Contract No. 11-545) (“Implementation Agreement”) entered into by and between the MS4 Permittee Group under the NPDES Areawide Program budget. Matters that are assigned by SBCFCD to Pillsbury that relate only to the SBCFCD are not Shared Costs and shall be paid by SBCFCD separate and apart from the Agreement or the Implementation Agreement. SBCFCD shall review all invoices, approve payment of Shared Costs on behalf of the Parties, invoice the Parties, and prepare an annual fiscal year accounting consistent with Section VII of the Implementation Agreement.

4.0 SUCCESSORS AND ASSIGNS. This Agreement applies to, is binding upon, and inures to the benefit of each Party whose legally authorized representative has executed this Agreement, and the Parties’ directors, officers, agents, employees, attorneys, successors and assigns.

5.0 WITHDRAWAL.

5.1 Withdrawal. Any Party may withdraw from all participation in this Agreement upon thirty (30) days’ advance written notice to the MS4 Permittee Group. After the effective date of withdrawal, the withdrawing Party shall have no further obligation to pay for the Shared Costs of Common Counsel, but shall remain responsible for its share of all other Shared Costs, as set forth in the Implementation Agreement. Any Party who withdraws from this Agreement shall continue to protect the confidentiality of information it obtained during the time it was a Party, in accordance with Section 6.0 and 7.0.

6.0 CONFIDENTIALITY; LIMITATIONS.

6.1 Confidentiality. A Party may only produce confidential material relating to this Agreement in compliance with a court order or with the consent of all Parties to this Agreement. If the production of confidential material relating to this Agreement is required by a court of competent jurisdiction, the Party so ordered shall seek leave of court to file the confidential material relating to this Agreement under seal or subject to an order protecting their confidentiality.

- 6.2 Permitted Disclosure. Except for Joint Defense Information (as defined below), nothing contained in this Agreement prohibits a Party from disclosing: (i) its own information; (ii) its own work product (except for any portion of that work product that contains confidential material relating to this Agreement); (iii) material prepared by a Party that refers or relates solely to its own information, documents, or work product; (iv) material obtained from a source other than a Party covered under this Agreement; (v) material that was or becomes publicly available through no act, omission, or fault of the receiving Party; (vi) material that is discovered independently by a Party; or (vii) non-privileged material that is otherwise discoverable. Nothing in this Agreement prevents or restricts a Party from using, at its sole discretion, its own document or information that it has provided to any other Party under this Agreement, even if it is confidential material relating to this Agreement.
- 6.3 Discovery. This Agreement does not prevent or limit any Party's counsel from seeking documents from any other Party to this Agreement through formal discovery processes. By executing this Agreement, no Party waives any objections that may be asserted in response to a formal discovery request.
- 6.4 Admissibility. This Agreement is not admissible in evidence, nor may it be used as evidence in any action or proceeding for any purpose other than for the purpose of enforcing the terms of this Agreement or defending against a third-party motion to compel disclosure or production of documents covered under this Agreement.
- 6.5 Return of Confidential Information. Any Party that has produced privileged or confidential material relating to this Agreement may request, in writing, the return or destruction of the information provided under this Agreement, subject to any applicable federal and/or state laws mandating recordkeeping. The requirements of this Section are subject to any outstanding discovery obligations.
- 7.0 JOINT DEFENSE; ATTORNEY-CLIENT RELATIONSHIP. By executing this Agreement, each Party represents that it has been fully advised concerning the advantages and disadvantages of participation, joint defense, common interest, and confidentiality agreements, and that each Party understands this Agreement and knowingly and intelligently makes the representations and waivers contained herein.
- 7.1 Joint Defense Counsel. Pillsbury has been (or will be) engaged as joint defense/Common Counsel for the Parties in connection with the work under this Agreement.
- 7.2 Joint Defense Information. This Agreement applies to all communications that are: (i) related to the 2020 MS4 Permit and any appeals or litigation related thereto; (ii) protected by the attorney-client privilege, the work product doctrine and/or any other privileges, confidentialities and protections provided by law; and (iii) shared or exchanged among the Parties or their attorneys, representatives, consultants and/or experts ("Joint Defense Information"). Unless otherwise excluded herein, "Joint Defense Information" means any information, including any confidential or

- privileged information, shared to facilitate the purposes of this Agreement, including, without limitation, all verbal and written exchanges of information among the Parties and/or their attorneys, representatives, consultants and/or experts, and all documents containing Joint Defense Information shared or exchanged among such parties, including, without limitation, memoranda, correspondence, electronic mail, and all summaries and compilations, data, mental impressions, strategies, legal theories, legal research, work performed or prepared by consultants or experts at the direction of counsel for the Parties, interviews with prospective witnesses and/or all other information and analysis and the work product of any Party's attorney in any format from and after the Effective Date. The Parties agree that all communications between Parties and their attorneys, representatives, consultants and/or experts, in furtherance of the purpose of this Agreement shall be protected by the attorney-client privilege, the attorney work-product privilege and the joint defense privilege to the fullest extent provided by law. Joint Defense Information does not include any publicly available information or information that a Party obtains from a public or non-confidential source, even if that information is also provided in confidence by one Party to another.
- 7.3 The Parties understand and agree that the sharing or exchanging of Joint Defense Information between or among the Parties, and the joint creation, development or solicitation of Joint Defense Information by two or more Parties (or their employees or agents) in connection with the 2020 MS4 Permit, shall be accomplished pursuant to the attorney-client privilege, the work product doctrine, the "common interest" doctrine, the "joint defense" doctrine and any other applicable rights, privileges and doctrines, and that any and all such shared or exchanged Joint Defense Information shall be and remain protected against disclosure to any third party to the fullest extent allowed by law.
- 7.4 Except as otherwise provided in this Agreement, Joint Defense Information shall be held in strict confidence by the Parties and will be disclosed only to Parties (including their governing boards or councils, employees and counsel). No Party shall use Joint Defense Information that it has received from another Party for any purpose other than the joint defense and common interest purposes outlined in this Agreement.
- 7.5 Use of Joint Defense Information. If any third party requests or demands any Joint Defense Information via a subpoena, discovery request, Public Records Act Request, or otherwise, the Party receiving such request or demand shall endeavor to notify all other Parties within a reasonable time after receiving the request. The Party receiving such request or demand reserves the right to assert all applicable privileges, protections, exclusions, defenses, and confidentiality rights. Each Party shall take all reasonable and appropriate measures necessary to protect Joint Defense Information from disclosure to third parties not subject to this Agreement, including in the event such Joint Defense Information is subpoenaed or sought in a California Public Records Act request. Unless otherwise required by law, none of the Joint Defense Information obtained by any Party shall be disclosed to third parties without the written consent of all of the Parties. The Party who received the

disclosure request will not release or disclose such information prior to making a good faith determination that the disclosure is required by applicable law, or pursuant to court order, and will inform all other Parties prior to making such disclosure.

- 7.6 No Waiver/Protection from Discovery. The Parties intend that no claim of work product, attorney-client privilege, or other privilege shall be waived by reason of disclosure of Joint Defense Information to other Parties or to any third persons. The Parties further intend that all Joint Defense Information exchanged in connection with this Agreement shall be protected from discovery by the joint defense doctrine recognized in *Oxy Resources California LLC v. Superior Court*, 115 Cal.App.4th 874 (2004) and *Waller v. Financial Corp. of America*, 828 F.2d 579, 583 n. 7 (9th Cir. 1987) (“The joint defense privilege, which is an extension of the attorney client privilege, has been long recognized by this circuit.”) See also *Raytheon v. Superior Court*, 208 Cal.App.3d 683, 687-88 (1989) (“[A] disclosure in confidence of a privileged communication is not a waiver of the privilege ‘when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted. . . .’” quoting Evidence Code section 912(d)); *Insurance Co. of North America v. Superior Court*, 108 Cal.App.3d 758, 771 (1980); California Evidence Code Sections 912(d), 952.
- 7.7 Survival. The obligations of the Parties under this Section shall survive the termination of this Agreement and shall remain in full force and effect, to the extent permitted by law, without regard to whether the 2020 MS4 Permit is finalized in any form, and without regard to whether any individual Party withdraws from this Agreement.
- 7.8 Conflict of Interest. As provided in the recitals and Paragraph 3.2 of this Agreement, SBCFCD may, from time-to-time, assign to Pillsbury work that relates only to the SBCFCD, on issues not directly related to the 2020 MS4 Permit. This work has the potential of creating a conflict of interest. In the event that a potential conflict of interest arises, SBCFCD shall timely notify the Parties to determine whether a waiver would be appropriate. Nothing set forth in this Agreement shall require any Party to consent to such waiver.
- 8.0 NEW PARTIES. New Parties may be added to this Agreement with the written consent of all Parties after written agreement is reached on the new Party’s funding contribution and the adjusted cost share formula for all Parties.
- 9.0 NO WAIVER, RELEASE, OR ADMISSION.
- 9.1 No Waiver or Release. Except as expressly provided herein, by entering into this Agreement and sharing confidential information under this Agreement, the Parties are not waiving or releasing any rights, claims, defenses, or privileges they may have against each other or any other person or entity, nor does the Agreement modify in any way any other written agreements or written contractual arrangements of the Parties. Any Party asserting a claim against any other Party

is not entitled to use Joint Defense Information (or other confidential information) received under this Agreement in support of the claim, except to the extent that the Joint Defense Information (or other confidential information) has been or is obtained through discovery.

9.2 No Modification of Legal Obligations or Authority. Except as specifically provided in this Agreement, no rights or obligations created by this Agreement are intended to amend, modify, supplement, or replace any legal or contractual obligation or authority created by any other agreement entered into at any time by any Party to this Agreement or any affiliated entity of any other Party. This Agreement is not intended to have any effect on any indemnification, contribution, or warranty obligations between or among the Parties or affiliated entities and may not be used by any Party to advance any argument that any Party (including affiliated entities of any Party) either does, or does not, have any obligation to indemnify, provide contribution, or provide a warranty to any other Party (including affiliates or subsidiaries of any Party).

9.3 No Admission. Nothing in this Agreement constitutes, or may be construed as, an admission that any Party is liable to any other Party or to any person not a party to this Agreement.

10.0 NOTICE. All notices required or permitted to be given must be in writing and sent via mail or e-mail to the undersigned counsel for the Parties.

11.0 APPLICABLE LAW. This Agreement is governed by and construed in accordance with the laws of the State of California, without giving effect to the choice-of-law rules of the State of California. The Parties agree that any dispute arising under or relating to this Agreement must be adjudicated in the appropriate court in the State of California, and the Parties consent to jurisdiction in those courts. This Agreement does not, however, affect the applicable law governing the Work or disputes under this Agreement.

12.0 CONSTRUCTION OF AGREEMENT. This Agreement is jointly drafted and may not be construed in any way, against any Party on the ground that the Party or its counsel drafted this Agreement.

13.0 ENTIRE AGREEMENT. This Agreement is an integrated document representing the entire understanding of the Parties with respect to participation in the MS4 Permittees Group as it relates to the Work. This Agreement supersedes and supplants all prior or contemporaneous agreements, proposals, or understandings, whether written or oral, between the Parties on the same subject matter.

14.0 MODIFICATION OF AGREEMENT. Modification of the Agreement does not affect the rights and duties of Parties that have withdrawn from the Agreement prior to its modification. All modifications to this Agreement must expressly state that it is the intention of the Parties to amend or modify this Agreement and must be:

- (a) in writing;
- (b) signed by a duly authorized representative of each Party; and

(c) approved of by all then-current Parties to this Agreement.

- 15.0 **SEVERABILITY.** Any provision of this Agreement held to be invalid, illegal, or unenforceable is ineffective to the extent of the invalidity, illegality, or unenforceability without affecting the validity, legality, or enforceability of the remaining provisions.
- 16.0 **EXECUTION AND COUNTERPARTS.** The execution of this Agreement by the undersigned representatives and counsel for the Parties has been duly authorized and is the valid, binding, and enforceable act of each of the Parties upon whose behalf the representatives and counsel have executed the Agreement. Each Party to this Agreement agrees that this Agreement and all obligations arising under it are binding on any counsel employed in the future by that Party, as if the counsel had signed the Agreement. This Agreement may be executed in one or more counterparts, each of which, when so executed, is deemed to be an original and all of which taken together constitute one Agreement.
- 17.0 **TERMINATION.** The term of this Agreement shall extend until the later of: (a) the date the 2020 MS4 Permit becomes final pursuant to applicable law; (b) the conclusion of any administrative or judicial proceedings challenging any final Order regarding the 2020 MS4 Permit issued by the Regional Board, or (c) termination by written agreement of all Parties, but in no event later than December 31, 2022.
- 18.0 **RECITALS.** The recitals of this Agreement are incorporated herein by this reference.

WITNESS WHEREOF, this **AGREEMENT**, has been fully executed on behalf of the Parties and Pillsbury by their duly authorized representatives.

Pillsbury Winthrop Shaw Pittman LLP

By: _____

Name: CHRIS M. AMANTEA

Title: Senior Counsel

Date: _____

**SAN BERNARDINO COUNTY
FLOOD CONTROL DISTRICT**



Curt Hagman, Board Chairman

Dated:

SIGNED AND CERTIFIED THAT A
COPY OF THIS DOCUMENT HAS
BEEN DELIVERED TO THE
CHAIRMAN OF THE BOARD

Lynna Monell, Clerk of the Board

By: _____
Deputy

APPROVED AS TO LEGAL FORM:

Michelle D. Blakemore, County Counsel

By: _____
Sophie A. Akins
Deputy County Counsel

COUNTY OF SAN BERNARDINO



Curt Hagman, Board Chairman

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By: _____
Deputy

APPROVED AS TO LEGAL FORM:

Michelle D. Blakemore, County Counsel

By: _____
Suzanne Bryant
Deputy County Counsel

-- Agency Signature Pages to Follow --