

EM SUBMISSION NO.: EME4172014

PRESENTED: 7/25/14

ADOPTED: 8/6/14

BY THE EMERGENCY MANAGER:

RESOLUTION APPROVING THE EMERGENCY BACKUP WATER SUPPLY AGREEMENT BETWEEN THE CITY OF FLINT AND THE COUNTY OF GENESEE

The Board of Commissioners of the County of Genesee, pursuant to Public Act 342 of 1939, have authorized and established the Genesee County Water Supply System; and

The parties have agreed to enter into an Emergency Backup Water Supply Agreement, attached hereto and made a part hereof, to provide water to the County of Genesee in the event of the inability of the Detroit Water and Sewerage Department to deliver water for any reason; and

Both the City of Flint and the County of Genesee recognize that there is a direct and continuing benefit to entering into this Emergency Backup Water Supply Agreement; and

That this Emergency Backup Water Supply Agreement shall become effective upon execution by all parties, and upon receiving the approval from the Michigan Department of Treasury.

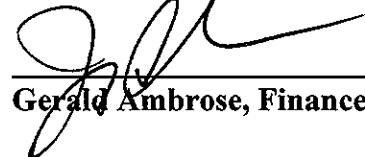
IT IS RESOLVED that the Emergency Manager hereby approves entering into an Emergency Backup Water Supply Agreement between the City of Flint and the County of Genesee, pursuant to the provisions contained therein.

IT IS FURTHER RESOLVED that the Emergency Backup Water Supply Agreement shall become effective upon execution by all parties, and upon receiving approval of the Michigan Department of Treasury.

APPROVED AS TO FORM:


Peter M. Bade, City Attorney

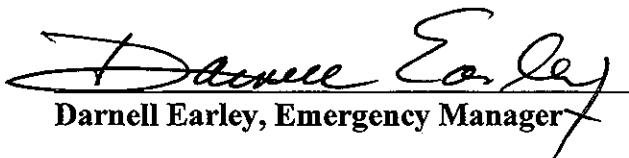
APPROVED AS TO FINANCE:


Gerald Ambrose, Finance Director

EFM DISPOSITION:

ENACT + FAIL _____

DATED 8-6-14


Darnell Earley, Emergency Manager

EMERGENCY BACKUP WATER SUPPLY AGREEMENT

**EMERGENCY BACKUP WATER SUPPLY AGREEMENT BETWEEN THE CITY
OF FLINT, MICHIGAN, A MICHIGAN HOME RULE CITY AND
THE COUNTY OF GENESEE, A MICHIGAN COUNTY CORPORATION, BY
AND THROUGH ITS DRAIN COMMISSIONER**

THIS EMERGENCY BACKUP WATER SUPPLY AGREEMENT ("Agreement") is made this ____ day of _____, 2014 ("Execution Date"), and effective June 1, 2014 ("Effective Date"), by and between the City of Flint, a Michigan home rule city (hereinafter "Flint"), and the Genesee County Drain Commissioner, as County Agency, a public agency pursuant to the County Public Improvement Act of 1939, as amended (the " Agency"). If the State of Michigan Department of Treasury fails to approve this Agreement prior to _____, 2014, then the Agreement shall be effective immediately upon the Michigan Department of Treasury approving this Agreement.

RECITALS

WHEREAS, Flint is a home rule city and authorized to execute this Agreement by the Flint Charter; and

WHEREAS, the Board of Commissioners of the County of Genesee had authorized and directed that there be established, pursuant to the provisions of Act 342 of the Michigan Public Acts of 1939, as amended ("Act 342"), a water supply system designated as the Genesee County Water Supply System consisting of a source of water supply transmission mains and all other facilities necessary to supply water to the various units of government located within and without of Genesee County; and

WHEREAS, the Agency has been designated by the County of Genesee as the agency of the county pursuant to Act 342 in connection with the establishment, maintenance and operation of systems of water supply system improvements, facilities and services and as the person to have supervision and control of the operation of the same; and

WHEREAS, the Agency may execute a contract for the supply of water to its water customers with the Detroit Water and Sewerage Department ("DWSD"); and

WHEREAS, the parties hereto have agreed to execute this Agreement to provide the Agency and its water customers with an emergency backup water supply in the event of the inability of DWSD to deliver water to the Agency for any reason; and

WHEREAS, to achieve the respective goals of the Agency and Flint and to achieve efficient use of resources, it is necessary for the Agency and Flint to enter into a contractual relationship for the emergency backup water supply; and

WHEREAS, the Agency and Flint desire to have a partnership for delivery of treated water and the supply and use of the treated water in an emergency situation; and

WHEREAS, the Agency will be committed through this Agreement to pay for standby capacity of treated water from Flint, which shall be made available by the Agency under this Agreement, which reasonably conforms to the collective and individual needs of the Agency; and

WHEREAS, a partnering approach requires an agreement between the Agency and Flint that provides for proportional benefits for each party and that avoids disproportionate benefits for one party at the expense of the other party; and

WHEREAS, Flint recognizes that there is a direct and continuing benefit to Flint by reserving capacity of treated water in its water distribution system to supply the Agency in an emergency situation and the Agency recognizes that there is a direct and continuing benefit to the Agency by requesting Flint to reserve capacity of treated water to be made available to the Agency in an emergency situation by Flint; and

WHEREAS, the consistent supply of treated water must be protected for the present and for the future needs of the water customers of the Agency; and

WHEREAS, both the Agency and Flint acknowledge that the dependability of capacity of treated water being made available hereunder may be subject to change due to imposition or amendments of State or federal law or other actions not within the control of Flint, provided that the Agency and Flint represents that it will not authorize, seek to authorize, or support any actions that would reduce the ability to reliably make treated water available to the Agency except those actions specifically set forth in this Agreement; and

WHEREAS, Flint agrees to operate the facilities to and Flint's water distribution system to the point of delivery of the Agency's water distribution system to Flint's standards and specifications at the sole expense of Flint; and

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, Flint agrees to reserve capacity in its water distribution system and deliver treated water at the capacity set forth in this Agreement to the Agency in an emergency situation; and, the Agency agrees to

receive treated water when necessary and timely pay for the standby capacity of treated water, to wit:

ARTICLE I **INTRODUCTORY PROVISIONS**

Section 1.01. Adoption of Preamble and Recitals. All of the matters stated in the recitals of this Agreement are true and correct and are hereby incorporated into the body of this Agreement as through fully set forth in their entirety herein, provided that in cases of conflict, provisions of this Agreement shall control over matters stated in the recitals.

Section 1.02. No effect on Current Contracts. Except as provided in ARTICLE IV of this Agreement, the parties hereto agree that the prior contracts involving the Agency and Flint that are still valid and binding which do not conflict with this Agreement shall not be effected by the execution of this Agreement, unless expressly set forth herein. This Agreement is being entered into for the sole purpose of Flint reserving capacity of treated water in its water distribution system for use by the Agency in an emergency situation.

ARTICLE II **TREATED WATER**

Section 2.01. Supply of Treated Water. Flint pursuant to this Agreement shall supply the Agency with treated water in an emergency situation in the amount of capacity as set forth in this Agreement which shall be made available to the Agency at the point of delivery set forth in Exhibit A which is attached hereto and incorporated herein by reference. For the purpose of this Agreement, an emergency situation shall be defined as the inability of DWSD to deliver treated water to the Agency for distribution to its customers, the malfunction of the Agency's treatment facility, or any other event that prevents the Agency from delivering treated water to its water users.

Section 2.02. Point of Delivery. Treated water shall be provided to the Agency at a point of delivery set forth in **Exhibit A** attached hereto and herein incorporated by reference.

Section 2.03. Access. Flint agrees to provide ingress and egress for the Agency's representatives to the point of delivery to assist Flint's employees with the delivery of treated water to the Agency in an emergency situation.

Section 2.04. Title to Water; Indemnification. Title to all treated water supplied to the Agency shall be in Flint from the point of collection up to the point the water passes the first shut off valve shown on Exhibit A at which

point title shall pass to the Agency. Flint and the Agency agree to save and hold each other harmless, to the extent authorized by law, from all claims, demands, and causes of action which may be asserted by anyone on account of the transportation and delivery of said treated water while title remains in such party.

Section 2.05. Waiver of Claims. The Agency hereby affirmatively and expressly waive and agrees never to claim in any forum any and all rights to treated water, preference or priority in any manner or circumstances, including but not limited to drought conditions or circumstances, acts of God, strikes, lockouts or other disturbances, acts of public enemy, malfunction of Flint's system, emergencies or public health and safety concerns, which would have the effect of altering, extending or voiding the term of this Agreement, increasing the quantities of treated water made available under this Agreement or which would allow the Agency to continue use of treated water without a written agreement. Specifically, the Agency will have no claim to continue the use of treated water from Flint after expiration of this Agreement, other than those rights that may arise from express provisions in this Agreement.

Section 2.06. Reserved Capacity. The Agency agrees that the total reserved capacity of treated water being made available to the Agency by Flint for standby emergency water service shall be the amount the Flint is able to provide in an emergency situation. Flint will make every attempt to provide a minimum of 3 million gallons per day average ("MGD").

Section 2.07. Cost of Reserved Capacity. The Agency shall pay to Flint the charges for the reserved capacity of treated water as set forth in **Exhibit B** attached hereto and incorporated herein. It is expressly understood that after the third (3rd) year of the effective date of this Agreement that the Agency may execute an agreement with DWSD to provide water in an emergency situation and/or the parties hereto will execute an addendum to continue this Agreement for a mutually acceptable term at the rate set forth in **EXHIBIT B**.

Section 2.08. Benefit Equal to Fee. The Agency acknowledges that the fees established hereunder are necessary to provide emergency standby treated water to the Agency which is the subject of this Agreement, and the Agency agrees that by standby emergency capacity of treated water from Flint, the Agency will receive a real, present and substantial benefit in an amount equal to the fees charged. The Agency waives any claim it may have against Flint in connection with or arising out of the fees paid under this Agreement, including specifically any claim that the Agency may have under Article IX, Section 31 of the Michigan Constitution.

ARTICLE III INDEMNIFICATION

Section 3.01. Indemnification. In further consideration of Flint's entry into this Agreement, the parties hereto agree that:

- A.** The Agency, all elected officials and appointed officials, all employees and volunteers, and the Agency Attorney, shall not be liable for any loss, cost, injury, or death to any representative or agent of Flint, which at any time may be suffered or sustained during the performance of this Agreement or in the performance of any service or action authorized by this Agreement.
- B.** The Agency, all elected officials and appointed officials, all employees and volunteers, and the Agency Attorney, shall not be liable for any loss, cost, injury, or damage to any property of Flint or its representatives or agents, which at any time may be suffered or sustained by Flint, its representatives and agents, or persons while Flint is performing services or any action authorized pursuant to this Agreement.
- C.** The Agency, all elected officials and appointed officials, all employees and volunteers, and the Agency Attorney, shall not be liable for any claims of Flint's employees and agents for violations of Federal, State, or local laws, including, but not limited to, laws governing fair labor law practices, and claims for payment of material and equipment purchased, claims for payment of material and equipment leased or rented.
- D.** Flint shall indemnify, hold harmless and defend the Agency, all elected officials and appointed officials, all employees and volunteers, and the Agency Attorney, from and against all claims, liabilities, losses or damages whatsoever including, without limitation, attorneys' fees on account of any such loss, injury, violation of law, breach of this Agreement, any environmental issues, suffered or sustained in connection with Flint's employees and agents performing services or any action authorized by this Agreement.
- E.** Both the Agency and Flint agree to be responsible for their own respective negligent acts.

ARTICLE IV
TERMINATION OF PROVISIONS OF ANY PRIOR AGREEMENTS BETWEEN
THE FLINT AND THE COUNTY AGENCY

Except for the WATER TRANSMISSION MAIN ACQUISITION AGREEMENT BY AND BETWEEN CITY OF FLINT AND THE GENESEE COUNTY DRAIN COMMISSIONER AS COUNTY AGENCY, DATED MAY 30, 2014, and effective May 30, 2014, any provisions of any prior agreements that are in conflict with this Agreement are hereby revoked, including, but not limited to, specifically, Section I.E of the 4th AMENDMENT TO 1973 CITY/COUNTY WATER SUPPLY AGREEMENT.

ARTICLE V
EMERGENCY WATER TO FLINT

In an emergency situation, the Agency shall provide, to the extent the Detroit Water and Sewerage Department ("DWSD") has available capacity, treated water to Flint upon Flint's request. If the request is verbal, Flint shall supply written confirmation of the request within four (4) hours to the Agency via personal service, email, or facsimile.

Flint agrees that in an emergency situation where treated water is requested to be provided by the Agency via DWSD to Flint, Flint shall pay a commodity charge for the water delivered at the prevailing rate as charged by DWSD and any additional charges, fees, special charges, and penalties, as billed by DWSD to the Agency for the excess usage by the Agency in connection with the Agency supplying emergency water to Flint.

ARTICLE VI
GENERAL PROVISIONS

Section 6.01. Force Majeure. If by reason of force majeure either party hereto shall be rendered unable wholly or in part to carry out its obligations under this Agreement, other than the obligation of the Agency to make the payments required under this Agreement, then if such party shall give notice and full particulars of such force majeure in writing to the other party within a reasonable time after occurrence of the event or cause relied on, the obligation of the party giving such notice, so far as it is affected by such force majeure, shall be suspended during the continuance of the inability then claimed, but for no longer period, and any such party shall endeavor to remove or overcome such inability with all reasonable dispatch. If the event results in an insurance claim and settlement are authorized, the settlement proceeds shall be in the name of the Agency and the name of Flint. The Agency and Flint shall mutually determine if the Agency, Flint, or both shall be entitled to a share of the insurance proceeds. The term "**Force Majeure**" as employed herein shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of public enemy, orders of any kind of the Government of

the United States or the State, or any civil or military authority, insurrection, riots, epidemics, landslides, lightning, earthquake, fires, hurricanes, storms, floods, washouts, droughts, arrests, restraint of government and people, civil disturbances, explosions, breakage or accidents to machinery, pipelines or canals, partial or entire failure of treated water supply, or on account of any other causes not reasonably within the control of the party claiming such inability.

Section 6.02. Term of Agreement. This Agreement shall remain in effect for five (5) years, unless terminated by the Agency or Flint upon one (1) year written notice of intent to terminate is served on the other party. As long as this Agreement is in effect, it shall inure to the benefit of and be binding upon, the parties hereto, their successors and assigns.

Section 6.03. Exhibits. The following Exhibits attached hereto are incorporated by reference herein:

- Exhibit A – Point of Delivery
- Exhibit B – Cost of Reserved Capacity

Section 6.04. Severability. The parties hereto specifically agree that in case any one or more of the sections, subsections, provisions, clauses or words of this Agreement or the application of such sections, subsections, provisions, clauses or words to any situation or circumstance should be, or should be held to be, for any reason, invalid or unconstitutional, under the laws or constitutions of the State or the United States of America, or in contravention of any such laws or constitutions, such invalidity, unconstitutionality or contravention shall not affect any other sections, subsections, provisions, clauses or words of this Agreement or the application of such sections, subsections, provisions, clauses or words to any other situation or circumstance, and it is intended that this Agreement shall be severable and shall be construed and applied as if any such invalid or unconstitutional section, subsection, provision, clause or word had not been included herein, and the rights and obligations of the parties hereto shall be construed and remain in force accordingly.

Section 6.05. Venue. All amounts due under this Agreement, including, but not limited to, payments due under this Agreement or damages for the breach of this Agreement, shall be paid and be due at the location of the principal administrative offices of Flint. It is specifically agreed among the parties to this Agreement that Genesee County, State of Michigan is the place of performance of this Agreement. In the event that any legal proceeding is brought to enforce this Agreement or any provision hereof, the same shall be brought in the Genesee County Circuit Court.

Section 6.06. Assignability and Successor Interest. This Agreement may be assigned, or the agreement rights may otherwise be transferred from the Agency to a duly formed successor Agency. This Agreement may be assigned or the agreement rights may otherwise be transferred from Flint to a duly formed successor agency or entity, or to the State, provided that no obligations of Flint set forth in this Agreement shall be affected by any such assignment or transfer. If either party desires to make such transfer or assignment, they shall first provide thirty (30) days written notice to the other party to provide opportunity for comments.

Section 6.07. Interpretation. For purposes of interpretation of this Agreement, neither Flint nor the Agency shall be deemed to have been the drafter of this Agreement.

Section 6.08. Construction. This Agreement has been prepared and negotiations have occurred in connection with said preparation pursuant to the joint efforts of the parties hereto. This Agreement therefore shall not be construed against any party to this Agreement.

Section 6.09. Modification. This Agreement shall not be modified, altered, or amended except through a written amendment signed by a duly authorized representative of both Flint and the Agency.

Section 6.10. No Third Party Beneficiaries. This Agreement is not intended to confer upon any person or entity, other than the parties hereto, any rights or remedies of any kind or nature whatsoever.

Section 6.11. Counterparts. This Agreement may be executed in several counterparts each of which shall be deemed one and the same Agreement. It shall be binding upon and inure to the benefit of the parties to it and their respective successors and assigns.

Section 5.12. Captions and Bylines. The captions and bylines used in this Agreement are for the convenience of reference only and in no way define, limit or describe the scope of intent of any provision of this Agreement.

Section 6.13. Addresses and Notice. Unless otherwise provided herein, any notice, communication, request, reply or advice (herein severally and collectively, for convenience, called "Notice") herein provided or permitted to be given, made or accepted by any party to any other party must be in writing and may be given or be served by depositing the same in the United States mail postpaid and registered or certified and addressed to the party to be notified, with return receipt requested, or by delivering the same to an officer of such party, or by prepaid telegram when appropriate, addressed to the party to be notified. Notice deposited in the mail in the manner described above shall be conclusively deemed to be effective, unless otherwise stated

herein, from and after the expiration of three (3) days after it is so deposited. Notice given in any other manner shall be effective only if and when received by the party to be notified. For the purposes of notice, the addresses of the parties shall, until changed as hereinafter provided, be as follows:

If to Flint, to:

The City of Flint
Attn: Mayor
1101 South Saginaw Street
Flint, Michigan 48502

If to Agency, to:

Genesee County Drain Commissioner
Division of Water and Waste Services
Attn: Drain Commissioner
G-4610 Beecher Road
Flint, Michigan 48532

The parties hereto shall have the right from time to time and at any time to change their respective addresses and each shall have the right to specify as its address any other address by at least fifteen (15) days written notice to the other party hereto.

IN WITNESS WHEREOF, the parties hereto acting under the authority of their respective governing bodies have caused this Agreement to be duly executed in several counterparts, each of which shall constitute an original, all as of the day and year first above written, which is the Agreement Date.

AGENCY

By: _____
Jeff Wright, Genesee County Drain Commissioner, County Agency

ATTEST:


By: _____

(OFFICIAL SEAL)

APPROVED AS TO FORM AND LEGALITY:

By: _____
Kevin K. Kilby, Counsel for the County Agency

FLINT

By: 
Darnell Earley, Emergency Manager

(OFFICIAL SEAL)

APPROVED AS TO FORM:

By: 
Pete Bade, City Attorney

This Agreement was prepared by:

McGraw Morris P.C.
Attorney Kevin Kilby (P68599)
2075 West Big Beaver Road
Suite 750
Troy, Michigan 48084
(248) 502-4000
kkilby@mcgrawmorris.com

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EXHIBIT A
POINT OF DELIVERY

The parties hereto have reviewed and inspected all of the existing interconnects between the Flint and the Agency and have identified the following as viable sources for interconnects:

1. 3047 Donaldson – meter pit – service to Flint Township
2. 3348 Flushing (Santa Cruz) – meter pit – services Sunridge Apartments

Additionally, the parties are investigating the following areas that may be used for interconnects in the future; however, it is believed at this time that some significant improvements to allow these interconnects will be required:

3. Center and Pierson Roads – mainline interconnect – no meter – currently isolated
4. 3518 Bristol Road – meter pit/pump station – unknown condition but could connect Hammerberg to Maple Road watermain

The parties will continue to investigate site Number 3 and Number 4. Site Number 3 could be the main method for Flint to supply the Agency in an emergency and could also allow the Agency to supply Flint in an emergency. The Agency is scheduled to remove a section of pipe during the summer of 2014 at Pierson and Center Roads. Any modifications will be considered at that time.

EXHIBIT B
COST OF RESERVED CAPACITY

From the Effective Date of this Agreement through June of 2017, the Agency shall pay to Flint forty thousand dollars (\$40,000) per month, due on the first day of each month for which service shall be provided.

For service provided July 1, 2017 through July 1, 2019, and each consecutive term thereafter, the rate shall increase by 5% for each term.

If Flint provides the Agency with water at anytime during this Agreement, the Agency agrees to pay to Flint the then effective commodity rate for the water that the Agency receives from Flint. As used herein, the term commodity rate shall mean the cost of water only and not any ready-to-serve charge or any other fees or charges.