

PHOSPHORUS OFFSET CREDIT AGREEMENT BY AND BETWEEN THE CITY OF  
SANTA ROSA AND THE TOWN OF WINDSOR

This agreement ("Agreement") is by and between the City of Santa Rosa, a municipal corporation ("CITY") and the Town of Windsor, a general law city ("TOWN") (together, the "PARTIES").

RECITALS

- A. On July 24, 2008, the North Coast Regional Water Quality Control Board ("Regional Water Board") adopted Resolution R1-2008-0061, thereby approving the Santa Rosa Nutrient Offset Program ("NOP") as a method of compliance with the "no net loading" effluent limitations for total nitrogen and total phosphorus contained in the CITY's National Pollutant Discharge Elimination System ("NPDES") permit authorizing discharges from what is now known as the Santa Rosa Regional Water Reuse System, Laguna Treatment Plant ("LTP").
- B. The NOP allowed CITY to offset the discharge of nitrogen and/or phosphorus contained in its treated wastewater effluent by conducting work that either prevented or removed equal or greater amounts of phosphorus from unregulated sources of discharge elsewhere in the Laguna de Santa Rosa watershed.
- C. On November 21, 2013, the Regional Water Board issued another NPDES permit to CITY (Order No. R1-2013-001) with the same "no net loading" effluent limitation for total phosphorus that was in the CITY's 2006 permit and incorporated similar requirements into a second NPDES permit (Order No. R1-2013-0042) for the TOWN's Windsor Wastewater Treatment, Reclamation and Disposal Facility ("Windsor Facility").
- D. The Regional Water Board subsequently adopted its Water Quality Trading Framework for the Laguna de Santa Rosa ("WQTF") on July 11, 2018, by Resolution No. R1-2018-0025, which provides for a system of tradable phosphorus credits ("P credits") that can be used by both CITY and TOWN as offsets to comply with the "no net loading" effluent limitation for total phosphorus contained in each of CITY and TOWN's NPDES permits.
- E. On August 20, 2020, the Regional Water Board issued the CITY a new NPDES permit by Order No. R1-2020-012, which included a revised version of the WQTF to replace the NOP as a method of compliance with the "no net loading" effluent limitation for total phosphorus and provided for the transfer of unused P credits previously approved under the NOP to the WQTF accounting system.
- F. On December 2, 2021, the Regional Water Board amended the WQTF and Fact Sheet portions of the CITY's NPDES permit (Amendment Order R1-2021-041), which clarified that the WQTF adopted with a NPDES permit was the operative framework for compliance purposes ("Permit WQTF") (the Permit WQTF is attached hereto as Exhibit A).

G. By letter dated March 1, 2022 (attached hereto as Exhibit B), the Executive Officer of the Regional Board confirmed a surplus of controlled phosphorus generated by CITY under the NOP may be transferred to the WQTF as P credits and confirmed that certain projects identified by CITY are eligible under the WQTF and may continue to generate P credits for the duration of their remaining project life, per Section 3.2.5 of the WQTF.

H. CITY and TOWN desire to buy and/or sell unused P credits in accordance with the Permit WQTF, including Section 2.2 of the WQTF, and the terms of this Agreement; in the event of a conflict between this Agreement and the WQTF, the WQTF shall apply.

In consideration of the foregoing recitals and the mutual covenants contained herein the PARTIES agree as follows:

1. **INCORPORATION OF RECITALS**

The above recitals are true and correct and are incorporated herein.

2. **DEFINITIONS AND TERMS**

- A. "Credit Seller" has the same meaning as that defined in Section 3.1.2 of the Permit WQTF.
- B. "Credit Buyer" has the same meaning as that defined in Section 3.1.1 of the Permit WQTF.
- C. "Active P credits" has the same meaning as "Active Credits" defined in Section 9.3 of the Permit WQTF, which meet the applicable WQTF standards, including the Improvement and Monitoring standards in Section 11 of the WQTF.
- D. "Credit Trade Notices" has the same meaning as that used in Section 9.4 of the Permit WQTF.
- E. "Designated Administrator" shall be the Regional Water Board or a qualified third-party designee as provided for in Section 9.5 of the Permit WQTF.

3. **TERM**

- A. This Agreement shall be in effect for an initial term of three (3) years effective upon the date of execution by both parties and shall automatically renew for subsequent one-year periods, unless terminated pursuant to Section 8 below.

4. **P CREDITS**

- A. Pursuant to the Permit WQTF and the terms and conditions set forth in this Agreement, CITY and TOWN may elect to buy and/or sell P credits and use them as offsets to comply with the "no net loading" effluent limitation for total phosphorus contained in each of CITY and TOWN's NPDES permits

#### B. Purchase Process

1. Each at its own discretion, TOWN or CITY may elect to buy or sell Active P credits at any time during the year, for the TOWN, at the discretion of the TOWN Public Works Director, and for the CITY at the discretion of the CITY Water Director.
2. Whenever feasible, Active P credits with the shortest credit life and/or those Active P credits nearest to expiration will be bought and sold first; provided however, that nothing shall preclude the buying or selling of other Active P credits.
3. Either TOWN or CITY may file a formal request for purchase with the other party. The Credit Seller must then respond within 14 (fourteen) calendar days to the Credit Buyer with an approval, denial or other response pertaining to the Active P credit purchase request.
4. Once the Credit Seller approves the request for purchase of Active P credits, the Credit Buyer shall prepare and submit a Credit Trade Notice with the Regional Board pursuant to Section 9.4 of the Permit WQTF.
5. TOWN and CITY shall coordinate efforts to ensure that P credits are appropriately registered and tracked by the Regional Water Board or qualified third-party designee pursuant to Section 9.5 of the Permit WQTF

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#### C. Credit Valuation and Payment

1. Each Active P credit shall be assigned a value based on the generating project cost per credit received. For example, a \$50,000.00 project that generated 1,000 P credits will result in a P credit value of \$50.00 per credit.
2. For purposes of buying and selling Active P credits, each active P credit shall be assessed an administrative fee equal to 20% of the value of that Active P credit to account for staff time and other resources expended by the Credit Seller in relation to the credit generation and trading process. For example, an Active P credit valued at \$50.00 will have a \$10.00 associated administrative fee, resulting in a \$60.00 per credit trading value.
3. Timing of Payments. Unless otherwise noted in this Agreement, payments shall be made within sixty (60) days of presentation of an invoice by the Credit Seller.

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#### 5. ASSIGNMENT AND DELEGATION

Consent: Neither of the PARTIES shall assign, delegate, sublet, or transfer any interest in or duty under this Agreement without the prior written consent of the other, and no such transfer shall be of any force or effect whatsoever unless and until the other party shall have so consented. Nothing in this provision shall limit the PARTIES' ability to transfer Active P credits, to the extent it is permitted to do so by the Regional Water Board in accordance with the WQTF.

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6. **METHOD AND PLACE OF GIVING NOTICE, SUBMITTING BILLS, AND MAKING PAYMENTS**

- A. Method of Delivery: All notices, invoices, and payments shall be made in writing and shall be given by personal delivery, U.S. Mail, courier service, or electronic mail (sender receipt requested). Notices, bills, and payments shall be addressed as specified in Paragraph [6](#) C.
- B. Receipt: When a notice, invoice, or payment is given by a generally recognized overnight courier service, the notice, invoice, or payment shall be deemed received on the next business day. When a copy of a notice, invoice, or payment is sent by electronic means, the notice, bill, or payment shall be deemed received upon transmission as long as (1) the original copy of the notice, invoice, or payment is deposited in the U.S. mail and postmarked on the date of the electronic transmission (for a payment, on or before the due date), (2) the sender has a written confirmation of the electronic transmission, and (3) the electronic transmission is transmitted before 5 p.m. (recipient's time). In all other instances, notices, invoices, and payments shall be effective upon receipt by the recipient.

C.

CITY: Attention: Director – Santa Rosa Water  
City of Santa Rosa  
69 Stony Circle  
Santa Rosa, CA 95401

TOWN: Attention: Public Works Director  
Town of Windsor  
PO Box 100  
Windsor, CA 95492

7. **INDEMNIFICATION**

- A. If any party fails to maintain compliance status under the WQTF, NPDES permit or other regulatory action, then:
1. TOWN shall indemnify and defend CITY from and against any claim against the CITY caused by or arising out of the failure to obtain Active P credits by TOWN to meet such offset standards and shall reimburse the CITY for all out-of-pocket costs incurred by CITY as a result of such failure.
  2. CITY shall indemnify and defend TOWN from and against any claim against the TOWN caused by or arising out of the failure to obtain Active P credits by CITY to meet such offset standards and shall reimburse the TOWN for all out-of-pocket costs incurred by TOWN as a result of such failure.
- B. CITY shall indemnify, hold harmless, defend, and release TOWN, its agents and employees from any and all liability, actions, claims, damages, costs or expenses, including attorney's fees and costs and expenses of suit that may be asserted by any person arising out of or in connection with the action or inaction of CITY in the

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course of the performance of this agreement where CITY is actively negligent, and TOWN is passively negligent.

- C. TOWN shall indemnify, hold harmless, defend, and release CITY, its agents and employees from any and all liability, actions, claims, damages, costs or expenses, including attorney's fees and costs and expenses of suit that may be asserted by any person arising out of or in connection with the action or inaction of TOWN in the course of the performance of this agreement where TOWN is actively negligent, and CITY is passively negligent.
- D. The indemnification obligations set forth in this Agreement shall not be limited in any way by any limitation on the amount or type of damages or compensation payable to or for the indemnifying party under workers' compensation acts, disability benefit acts, or other employee benefit acts.

**Deleted:** <#>CITY shall indemnify, hold harmless, defend, and release TOWN, its agents and employees from any and all liability, actions, claims, damages, costs or expenses, including attorney's fees and costs and expenses of any enforcement action that may be asserted by the Regional Board against the CITY arising out of or in connection with the Active P Credits reflected on Exhibit B or any other Active P Credits the CITY sells to the TOWN.¶

## 8. **TERMINATION**

- A. This Agreement may be terminated by either CITY or TOWN after providing 90 days' advance written notice to the other.
- B. Notwithstanding any other provision of this Agreement, should either party fail to perform any of its obligations hereunder, within the time and in the manner herein provided, or otherwise violate any of the terms of this Agreement, the other party may terminate this Agreement by giving the other party sixty (60) days' written notice of such termination, stating the reason for termination.
- C. Notwithstanding any other provision of this Agreement, in the event of unforeseen circumstances that make performance under this Agreement impracticable, including, but not limited to, earthquake, flood, or other natural disaster; major operational problems; an act of God, terrorism, war, or insurrection; or unforeseen changes in regulatory requirements, either party may terminate this Agreement by giving the other party sixty (60) days' written notice of such termination, stating the reason for termination.

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## 9. **MEDIATION OF DISPUTES**

- A. If a dispute arises out of or relates to this Agreement, or an alleged breach of it, and if the dispute cannot be settled through negotiation, TOWN and CITY agree to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Rules, with the following exceptions to those Rules:
  - 1. The mediation shall be conducted at Santa Rosa, California.
  - 2. Unless otherwise agreed in writing by all parties participating in the mediation, the mediation shall be concluded no later than ninety (90) days after initiation of the mediation.
  - 3. Not later than thirty (30) calendar days after initiation of mediation, the parties shall exchange all relevant non-privileged documents.
  - 4. Any mediation proceeding shall be confidential and shall not be admissible in a subsequent proceeding. If any party commences a court action based on a dispute

or claim to which this section applies without first attempting to resolve the matter through mediation, then the other party may apply to such judge for an order staying the court action pending mediation.

10. **AMENDMENT**

This Agreement may be amended by mutual written agreement.

11. **MISCELLANEOUS PROVISIONS**

- A. No Waiver of Breach. The waiver by either of the PARTIES of any breach of any term or promise contained in this Agreement shall not be deemed to be a waiver of such term or promise or any subsequent breach of the same or any other term or promise contained in this Agreement.
- B. Construction. To the fullest extent allowed by law, the provisions of this Agreement shall be construed and given effect in a manner that avoids any violation of statute, ordinance, regulation, or law. The PARTIES covenant and agree that in the event that any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions hereof shall remain in full force and effect and shall in no way be affected, impaired, or invalidated thereby. CITY and TOWN acknowledge that they have each contributed to the making of this Agreement and that, in the event of a dispute over the interpretation of this Agreement, the language of the Agreement will not be construed against one party in favor of the other. CITY and TOWN acknowledge that they have each had an adequate opportunity to consult with counsel in the negotiation and preparation of this Agreement.
- C. Consent. Wherever in this Agreement the consent or approval of one party is required to an act of the other party, such consent or approval shall not be unreasonably withheld or delayed.
- D. No Third-Party Beneficiaries. Nothing contained in this Agreement shall be construed to create and the parties do not intend to create any rights in third parties.
- E. Applicable Law and Forum. This Agreement shall be construed and interpreted according to the substantive law of California, regardless of the law of conflicts to the contrary in any jurisdiction. Any action to enforce the terms of this Agreement or for the breach thereof shall be brought and tried in Santa Rosa or in the forum nearest to the City of Santa Rosa, in the County of Sonoma.
- F. Merger. This writing is intended both as the final expression of the Agreement between the PARTIES hereto with respect to the included terms and as a complete and exclusive statement of the terms of the Agreement, pursuant to Code of Civil Procedure section 1856. Each of the PARTIES acknowledges that, in entering into

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this Agreement, it has not relied on any representation or undertaking, whether oral or in writing, other than those which are expressly set forth in this Agreement. No modification of this Agreement shall be effective unless and until such modification is evidenced by a writing signed by both PARTIES.

G. Captions. The captions in this Agreement are solely for convenience of reference. They are not a part of this Agreement and shall have no effect on its construction or interpretation.

H. Survival of Terms. All express representations, waivers, indemnifications, and limitations of liability included in this Agreement will survive its completion or termination for any reason.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as set forth below.

Reviewed as to substance by the City of Santa Rosa:

Reviewed as to substance by the Town of Windsor:

Director Santa Rosa Water

Public Works Director

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Reviewed as to form by City of Santa Rosa Counsel:

Reviewed as to form by Town Attorney:

Assistant City Attorney

Town Attorney

Deleted: Counsel

Attest:

Attest:

Recording Secretary, Board of Public Utilities

Town Clerk

Deleted: City Clerk

**CITY OF SANTA ROSA**

**TOWN OF WINDSOR**

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

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

Daniel J. Galvin, III

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Chair, Board of Public Utilities

Town Manager

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

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

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