

_____, 2016

AGREEMENT FOR THE CONSTRUCTION AND OPERATION
OF MILL CREEK PUMP STATION AND ANCILLARY FORCE MAINS IN THE
TOWN OF FALMOUTH

WHEREAS, the Town of Falmouth (hereinafter called the TOWN) and the Portland Water District (hereinafter called the DISTRICT) have agreed in principle that the current and the future sewage disposal needs of certain areas of the TOWN and of the Town of Cumberland can best be serviced by (i) replacing and upgrading the TOWN's Mill Creek Pump Station, including the construction, acquisition and installation of appurtenant structures and equipment (referred to as the "Pump Station Project"), and (ii) installing ancillary force sewer mains (referred to as the "Force Main Project" and together with the Pump Station Project, as the "Mill Creek Project"); and

WHEREAS, except as modified herein, the parties' relationship and respective obligations concerning the Mill Creek Pump Station and Mill Creek force main are governed by a Sewerage Service Contract by and between the DISTRICT and the TOWN, dated March 13, 1981, as amended on September 10, 2002, and February 24, 2015 (the "Sewerage Service Contract"); and

WHEREAS, the DISTRICT has approved the concept of the Pump Station Project as designed by Wright - Pierce in the plans and specifications entitled Mill Creek Pump Station Upgrade and dated November, 2015 (the "Mill Creek Project Plans") and will have the opportunity to review and approve the plans and specifications for the Force Main Project in the future (the "Force Main Plans"); and

WHEREAS, the parties agree that the Mill Creek Project is a part of the TOWN'S existing municipal sewage collection and treatment system and should ultimately be owned and

operated by the TOWN; and

WHEREAS, the DISTRICT is authorized by its Charter to contract with municipalities to construct, own, and finance municipal collection systems such as the Mill Creek Project in addition to its authority to provide interception and treatment for municipally collected sewage; and

WHEREAS, the DISTRICT has authorized issuance of up to \$6,138,000 of its sewer bonds to finance the Mill Creek Project (together with any renewal or refunding thereof, the “Mill Creek Debt”); and

WHEREAS, the Municipal Officers of the TOWN have authorized the Town Manager to enter into this agreement with the DISTRICT to provide for the construction, financing, and ownership of the Mill Creek Project for the period the Mill Creek Debt remains outstanding;

NOW, THEREFORE, the parties hereto agree as follows:

1. The Mill Creek Project shall consist of the Pump Station Project and the Force Main Project and will be constructed on TOWN owned property and within the public way of Foreside Road, Mussel Cove Lane, Depot Road, U.S. Route 1, and Clearwater Drive in Falmouth, Maine, and utility easements and rights of way of the TOWN, and adjacent property as shown in the Mill Creek Project Plans (the “Project Premises”).

2. The TOWN shall be solely responsible for the permitting, design, construction, installation and equipping of the Mill Creek Project and for the completion thereof in accordance with the Plans and Specifications therefore, in a good and workmanlike manner. The DISTRICT does not make any warranty, either express or implied, as to the Mill Creek Project or its condition or that it will be suitable for the TOWN's purposes or needs, or that the proceeds of the Mill Creek Debt will be sufficient to pay the costs of the Mill Creek Project. Review or approval

of engineering reports, facilities plans, design drawings and specifications or other documents or the inspection of Project construction by the DISTRICT does not relieve the TOWN of its responsibility to properly plan, design, build and effectively operate and maintain the Mill Creek Project as required by laws, regulations, permits and good management practices. Except as provided in the Sewerage Service Contract, neither the DISTRICT nor the District Representatives are responsible for increased costs resulting from defects in the plans, design drawings and specifications or other Mill Creek Project documents.

3. The TOWN has received competitive bids and has executed contracts for the construction of the Pump Station Project. Upon receipt of competitive bids and prior to the execution of contracts for the construction, acquisition and installation of the Force Main Project, the TOWN and the DISTRICT shall review and approve the Force Main Plans.

4. The DISTRICT agrees to use its best efforts to issue the Mill Creek Debt to finance the Mill Creek Project in an amount not to exceed \$6,138,000 through the Maine Municipal Bond Bank (the "Bond Bank") Clean Water State Revolving Fund ("CWSRF") program. Upon issuance of the Mill Creek Debt through the CWSRF program, the DISTRICT will enter into a loan agreement with the Bond Bank in the usual and customary form for the CWSRF program (the "CWSRF Loan Agreement"). The TOWN shall provide additional funds of the TOWN to pay for all costs of the Mill Creek Project, if any, in excess of the amount of the Mill Creek Debt that may be required to complete the Mill Creek Project in accordance with the Pump Station and the Force Main Plans and Specifications therefore (the "Additional Costs"). The DISTRICT shall pay the TOWN the DISTRICT's percentage of the Additional Costs of the Mill Creek Project in accordance with the Sewerage Service Contract.

5. Upon issuance of the Mill Creek Debt, proceeds shall be disbursed and used to

pay costs of the Mill Creek Project pursuant to the CWSRF Loan Agreement and the usual and customary requisition and disbursement procedures specified by the Bond Bank and the Maine Department of Environmental Protection thereunder.

6. While the Mill Creek Debt remains outstanding, the TOWN shall be solely responsible, at its sole cost and expense, for complying with, or assisting the DISTRICT in complying with, the various covenants and provisions contained in Articles IV and V of the CWSRF Loan Agreement, a copy of which is attached as Schedule 1 hereto and which covenants and provisions are hereby incorporated by reference.

7. Upon completion of construction of the Mill Creek Project, the TOWN shall notify the DISTRICT in writing. Subject to Paragraph 9 below and notwithstanding Paragraph 5 of the Sewerage Service Contract, the DISTRICT shall be the sole owner of the Mill Creek Project. However, notwithstanding the DISTRICT's ownership of the Mill Creek Project, the TOWN shall be solely responsible, at its cost and expense, for the operation, maintenance, repair and upkeep of the Mill Creek Project and for providing related services, including but not limited to repairing and cleaning or replacing the Mill Creek Project, repairing or replacing malfunctioning pump station components, repairing or replacing broken, leaking or plugged sewers, and providing customer services and inspection of private service connections to the Mill Creek Project. The TOWN shall budget and provide funds for its expenses incurred hereunder and pay such expenses directly. While the Mill Creek Debt remains outstanding, the TOWN hereby grants the DISTRICT permission and an irrevocable license to own the Mill Creek Project on the Project Premises and, while the DISTRICT owns the Mill Creek Project, the DISTRICT shall have the right to enter the Project Premises where the Mill Creek Project is located at any reasonable time to inspect the construction, operation, and maintenance of the Mill

Creek Project.

8. The TOWN shall maintain funds for renewal and replacement of the Mill Creek Project for use in keeping said Mill Creek Project operable. While the Mill Creek Debt is outstanding, the DISTRICT may provide (and shall have the right, in its sole reasonable discretion to provide, exercised in good faith) such oversight of the operation and maintenance of the facilities as may reasonably be required to evidence conservation of assets.

9. The TOWN shall be solely responsible for the payment of and agrees to pay the Mill Creek Debt and all amounts that are due under the CWSRF Loan Agreement and any other additional cost or expense incurred by the DISTRICT arising out of or incurred with respect to the DISTRICT's ownership or financing of the Mill Creek Project. The DISTRICT shall apportion the debt service on the Mill Creek Debt and all amounts that are due under the CWSRF Loan Agreement and any other additional cost or expense incurred by the DISTRICT arising out of or incurred with respect to the DISTRICT's ownership or financing of the Mill Creek Project to the TOWN pursuant to Sections 12 and 13 of the DISTRICT charter and shall include such amounts in the DISTRICT's annual assessment to the TOWN and the TOWN shall pay such assessment to the DISTRICT at the times and in the amounts prescribed pursuant to Sections 12 and 13 of the DISTRICT charter. Within twelve (12) months of payment in full of all the principal of and interest on the Mill Creek Debt and all amounts that are due under the CWSRF Loan Agreement and any other additional cost or expense incurred by the DISTRICT arising out of or incurred with respect to the DISTRICT's ownership or financing of the Mill Creek Project, the DISTRICT shall convey title to the Mill Creek Project to the TOWN.

10. Nothing in this agreement is considered to be in conflict with the DISTRICT's Charter. However, in the event of a conflict between the DISTRICT's Charter and this

agreement, the Charter shall prevail. In the event the DISTRICT's Charter prevents conveying any portion of the Mill Creek Project to the TOWN, the TOWN, at its discretion, may continue to provide the operation, maintenance and repair and replacement services on any portion not conveyed to the TOWN in accordance with the terms hereof.

11. In the event the Bond Bank does not approve the DISTRICT's application to issue the Mill Creek Debt under its CWSRF program, this agreement shall be null and void and of no further force and effect.

12. (a) Neither the DISTRICT nor any of the District's trustees, officers or employees (the "District Representatives") shall be liable to the TOWN for, and the TOWN hereby releases the DISTRICT and the District Representatives from all liability to the TOWN for, all Losses (as defined below) that directly or indirectly arise out of or relate to the issuance of the Mill Creek Debt, the CWSRF Loan Agreement or the operation, use, occupancy, maintenance or ownership of the Mill Creek Project or any part thereof.

(b) The TOWN agrees to indemnify, defend and hold harmless the DISTRICT and its trustees, officers and employees (the "District Representatives") against any and all Claims (as defined below) and any and all Losses directly or indirectly arising out of, or related to, any Claim.

(c) In case any action or proceeding is brought against the DISTRICT or any District Representative by reason of any such Claim or Loss, the TOWN will defend the same with counsel reasonably acceptable to the DISTRICT, at the TOWN's sole expense. In so doing, the TOWN shall not take any action that would result in a determination of guilt or liability against the DISTRICT or any District Representative without the express written consent of the DISTRICT and such District Representative.

(d) The indemnity provided this Section 12 includes reimbursement for expenses reasonably incurred by the DISTRICT with respect to (i) investigation of any Claim and (ii) defense of any Claim if the TOWN declines to assume the defense or fails to use counsel reasonably acceptable to the DISTRICT.

(e) Subject to Section 11 above, the provisions of this Section 12, and the obligations of Borrower hereunder, shall survive the payment or defeasance of the Mill Creek Debt and the expiration or termination of this Agreement, and shall apply to all Claims or Losses, whether such Claims or Losses, or both are asserted prior to the expiration or termination of this Agreement and full payment of the Mill Creek Debt or thereafter.

(f) The terms "Claims" and "Loss" shall have the following meanings:

- The term “Claims” shall mean any and all claims, lawsuits, demands or other legal or administrative proceedings of whatsoever nature, against the DISTRICT or any District Representative arising out of or relating to (i) any noncompliance with or violation of any Environmental Law, or (ii) any noncompliance with or violation of any law relating to equal employment opportunity or age discrimination, wage payment, or otherwise relating to claims or rights of employees including, but not limited to, federal, state and local safety, disability and accessibility acts (e.g., the Occupational Safety and Health Act, the Americans with Disabilities Act, etc.), and that directly or indirectly arise out of, or relate to, the TOWN’s operation, use, occupancy, or maintenance of the Mill Creek Project or any part thereof, or the DISTRICT’s ownership thereof and that arise while the Mill Creek Debt is outstanding.
- The term “Losses” shall mean any and all fines or penalties, including, but not limited to, costs, disbursements and expenses and reasonable attorneys’, consultants’ and experts’ fees, litigation and court costs, amounts paid in settlement, judgments and amounts paid to discharge judgments related thereto, incurred or imposed with respect to (i) any noncompliance with or violation of any Environmental Law, or (ii) any noncompliance with or violation of any law relating to equal employment opportunity or age discrimination, wage payment, or otherwise relating to claims or rights of employees including, but not limited to, federal, state and local safety, disability and accessibility acts (e.g., the Occupational Safety and Health Act, the Americans with Disabilities Act, etc.), and that directly or indirectly arise out of, or relate to, the TOWN’s operation, use, occupancy, or maintenance of the Mill Creek Project or any part thereof, or the DISTRICT’s ownership thereof and that arise while the Mill Creek Debt is outstanding.
- “Environmental Law” means any present and future federal, state and local law, statute, ordinance, rule, regulation and the like, as well as common law, relating to the safety, welfare and protection of human health or the environment or any natural resource, relating to any hazardous substance, material or pollutant.

(g) The parties acknowledge that each is a government entity that enjoys limited immunity and other protections under state law from tort claims. Further, no indemnification by the TOWN pursuant to this Paragraph 12 shall be deemed or construed to operate in practical effect to waive any statutory immunity or statutory limitation of liability of the TOWN from claims of any third party.

(h) Notwithstanding provisions of this Paragraph 12 to the contrary, to the extent that costs associated with any Claims or Losses are not covered by insurance policies maintained by the TOWN or exceed the limitations of damages established by the Maine Tort Claims Act, such costs not covered by insurance policies maintained by the Town or in excess of the limitations of the Maine Tort Claims Act shall be allocated between the TOWN and the DISTRICT as provided in Section 11(c) of the Sewage Service Contract,

except that the DISTRICT's allocation shall not exceed \$50,000 for single or multiple instances of noncompliance with or violation of any Environmental Law or labor law (as described above) arising from a single occurrence and shall not exceed \$150,000 combined for all occurrences of the nature described in this Paragraph arising during the term of this Agreement.

13. Other than with respect to the DISTRICT's ownership of the Mill Creek Project while the Mill Creek Debt remains outstanding, nothing in this Agreement shall modify, amend or change the terms of the Sewerage Service Contract.

IN WITNESS WHEREOF, the parties have executed this agreement by their duly authorized representative this ___ day of _____, 2016.

Schedule 1

CWSRF Loan Agreement
ARTICLES IV & V

For all purposes of this Agreement and of applying the CWSRF Loan Agreement covenants and provisions set out below:

- All references to the Municipality are references to the TOWN.
- All references to the Bank are references to the Bond Bank.
- All references to the Loan Agreement are references to the CWSRF Loan Agreement.
- All references to the Loan or the proceeds of the Loan are references to the Mill Creek Debt and the proceeds of the Mill Creek Debt.
- All references to the Project are references to the Mill Creek Project.
- All provisions relating to notices or deliverables to the Bank shall require that such notices or deliverables be provided to the Bond Bank and the DISTRICT.
- Capitalized terms below shall have the meaning given such terms in the CWSRF Loan Agreement.

NOTE: will be updated to cover actual Articles IV and V in 2016 CWSRF Loan Agreement, including Asset Management Plan

ARTICLE IV
THE PROJECT

Section 4.1. Completion of the Project.

(A) The Municipality agrees that it will undertake and complete the Project for the purposes and in the manner set forth in this Loan Agreement and in accordance with all Federal, State and local laws, ordinances and regulations applicable thereto. The Municipality shall obtain all necessary approvals from any and all governmental agencies requisite to the completion of the Project. Upon completion of the Project, the Municipality shall obtain all required permits and authorizations from appropriate authorities, if required, for operation and use of the Project as contemplated by this Loan Agreement.

(B) The Municipality shall provide or cause to be provided payment and performance bonds assuring the performance of the work to be performed under all construction contracts entered into with respect to the Project and payment of all contractors and subcontractors thereunder. All payment and performance bonds required hereunder shall be issued by independent surety companies authorized to transact business in the State.

(C) The Municipality will take and institute such proceedings as shall be necessary to cause and require all contractors and material suppliers to complete their contracts diligently and in accordance with the terms of the contracts including, without limitation, the correcting of defective work.

Section 4.2. Payment of Additional Project Costs. In the event that Loan proceeds are not sufficient to pay the costs of the Project in full, the Municipality shall nonetheless complete the Project and pay that portion of the Project Costs as may be in excess of available Loan proceeds, and shall not be entitled to any reimbursement therefor from the Bank or the holders of any Bonds, except from the proceeds of additional financing which may be provided by the Bank pursuant to a project financing agreement.

Section 4.3. Completion Certificate. The Municipality shall deliver to the Bank and the Technical Consultant a certificate of an authorized officer stating that the Project has been completed in accordance with this Loan Agreement within seven (7) Business Days following such completion. The Municipality shall in addition notify the Bank and the Technical Consultant in writing within thirty (30) days of the actual date of initiation of operation of the Project.

Section 4.5. Insurance.

(A) The Municipality will keep, or cause to be kept, the Project insured against loss or damage by fire, flood, lightning, windstorm, vandalism, malicious mischief and other hazards, casualties, contingencies and all other "extended coverage" risks to their full insurable value, and will promptly pay when due all premiums on such insurance. In addition, the Municipality will at the direction of the Bank maintain insurance against the abatement of User Fees arising out of any loss or damage to the Project.

(B) Each insurance policy maintained pursuant to Section 4.5(A) shall contain in a form acceptable to the Bank (1) a provision to the effect that the policy will not be cancelled without at least ten days prior written notice to the Bank, (2) the standard waiver of subrogation and endorsement, and (3) any other endorsement required by the Bank. The Municipality shall deliver satisfactory evidence of continuing coverage to the Bank at least thirty days before the expiration of the old policies.

(C) The Municipality shall carry and maintain such public liability insurance for personal injuries or property damage to the extent and in the manner customary for similar municipalities similarly situated. Any insurance issued in compliance with this subsection 4.5(C) shall contain a provision to the effect that the policy will not be cancelled without at least ten days prior written notice. The Municipality shall deliver satisfactory evidence of continuing coverage to the Bank at least thirty days before the expiration of the old policies.

ARTICLE V COVENANTS

Section 5.1. Application of Loan Proceeds. The Municipality will apply the proceeds of the Loan solely for Project Costs.

Section 5.2. Construction of the Project. The Municipality will cause the Project to be designed and constructed in accordance with plans and specifications delivered to the Technical Consultant and consistent with Exhibit A to the Loan Agreement, and will proceed with the acquisition and construction of the Project in conformity with law and with all applicable requirements of governmental authorities having jurisdiction with respect thereto, subject to such modifications of plans and specifications as may be approved by the Technical Consultant as necessary or advisable to effectuate the purposes of the Act.

Section 5.3. Completion of the Project. The Municipality shall, with all practical dispatch and in a sound and economical manner consistent in all respects with Section 4.2 of the Loan Agreement, complete or cause to be completed the acquisition and construction of the Project, and do all other acts and things necessary and possible to entitle it to receive User Fees with respect to the Project at the earliest practicable time and obtain from the Technical Consultant a certification of completion of the Project. The Municipality shall cause there to be prepared as-built plans and specifications for the Project at or prior to completion thereof.

Section 5.4. Operation and Maintenance. After completion of the Project the Municipality shall at all times operate the Project or otherwise cause the Project to be operated properly and in a sound and economical manner and shall maintain, preserve and keep the Project or cause the Project to be maintained, preserved and kept, in good repair, working order and condition, and shall from time to time make, or cause to be made, all necessary and proper repairs, replacements and renewals so that at all times the operation of the Project may be properly conducted in a manner that is consistent with prudent engineering and operating practices, and the Municipality shall not discontinue operation of or sell or otherwise dispose of the Project, except for portions of the Project sold or otherwise disposed of in the course of ordinary repair and replacement of obsolete or worn out parts, without the approval of the Bank so long as the Loan is outstanding. Any request for approval shall be accompanied by a letter from the Technical Consultant approving the proposed discontinuance, sale or disposition.

Section 5.5. Compliance With Law. The Municipality will at all times construct and operate the Project and otherwise cause the Project to be constructed and operated in compliance with all applicable Federal, State and local laws, ordinances, rules, regulations, permits, approvals and this Loan Agreement.

Section 5.6. N/A.

Section 5.7. Establishment of Project Accounts; Audits. The Municipality shall maintain Project accounts in accordance with generally accepted government accounting standards and directions issued by the Bank. The Municipality will permit the Technical

Consultant and the Bank or their authorized representatives to review or audit all records relating to the Project, and will produce or cause to be produced all records relating to any work performed under the terms of this Loan Agreement for examination at such times as may be designated by any of them or their authorized representatives, and shall permit extracts and copies of Project records to be made by them or their authorized representatives, and shall fulfill information requests by them or their authorized representatives.

Section 5.8. Records. The Municipality will retain all files and records relating to construction of the Project for at least six years following the date of completion of the Project as certified pursuant to Section 4.3 of the Loan Agreement. All other files and records relating to the Project shall be retained so long as this Loan Agreement remains in effect. As-built plans and specifications for the Project shall be retained for the useful life of the Project.

Section 5.9. Project Access. The Municipality shall permit representatives of the Technical Consultant and the Bank to have access to the Project at all reasonable times, and all contracts for construction or operation of all or a portion of the Project shall contain provisions that permit such access and shall permit extracts and copies of Project records to be made by the foregoing persons.

Section 5.10. Engineering Inspection. The Municipality shall provide competent and adequate resident inspection of all Project construction, under the direction of a professional engineer licensed in the State. The Municipality shall direct such engineer to inspect work necessary for the construction of the Project and to determine whether such work has been performed in accordance with the approved plans and specifications. Any work not in accordance with approved plans and specifications shall be remedied, unless such noncompliance is waived by DEP and the Bank.

Section 5.11. N/A.

Section 5.12. User Fee Covenant.

(A) The Municipality hereby certifies that it has established and will charge User Fees with respect to the Project in accordance with law and in amounts such that revenues of the Municipality with respect to the Project shall be sufficient, together with other funds available to the Municipality for such purposes, to pay all costs of operating and maintaining the Project in accordance with this Loan Agreement, including the establishment of reasonable or required reserves, and to pay all amounts due under this Loan Agreement and the Municipal Bonds.

(B) The Municipality covenants that it shall, from time to time, revise and charge User Fees with respect to the Project such that the revenues and funds described in paragraph (A) shall be sufficient to pay the costs described in paragraph A.

Section 5.13. Notice of Impaired System. In the case of any material damage to or destruction of the Project or any part thereof, or actual or threatened proceedings for the purpose of taking or otherwise affecting by condemnation, eminent domain or otherwise, all or a

part of the Project, any action, suit or proceeding at law or in equity or by or before any governmental instrumentality or agency, or any other event whatsoever which may impair the ability of the Municipality to construct or operate the Project or set and collect User Fees, the Municipality shall promptly notify the Bank.

Section 5.14. Compliance With Federal Program Requirements. The Municipality covenants that the Project will comply with the Federal requirements applicable to activities supported with Federal funds, a list of which is included as Exhibit H to the Loan Agreement. The Municipality further covenants that the Project will be constructed in compliance with State objectives for women's and minority business enterprises participation in projects financed with Federal funds under the Federal Clean Water Act. The Municipality will comply with all Federal and State laws, rules and regulations relating to maintenance of a drug free workplace at the Project.

Section 5.15. Compliance With Wage Rate Requirements. The Municipality agrees to comply with section 513 of the Federal Water Pollution Control Act (33 U.S.C. 1372) regarding prevailing wage rates ("Davis-Bacon"). The Municipality or its designee, acting as contract administrator, shall be responsible for monitoring compliance of contractors and subcontractors concerning federal wage rates under Davis-Bacon. The Municipality or its designee, acting as contract administrator shall review certified payrolls, conduct employee interviews and complete any other actions required to determine compliance, using forms approved by the DEP. Certified payrolls and signed compliance review forms shall be submitted to the DEP with each requisition.

Section 5.16. Compliance With Federal Single Audit Act. The Municipality covenants to comply with the requirements of the Federal Single Audit Act, to the extent it applies to the expenditure of Federal funds, including the Loan or any portion thereof. To demonstrate compliance with this requirement, the Municipality agrees to undertake the following activities during construction of the Project and throughout the entire life of the Loan:

(A) Maintaining an annual accounting system, on a fiscal year basis, and identifying all expenditures of Federal financial assistance. The Bank will provide detail of any federal expenditures made from the Loan during the Municipality's fiscal year. A statement of federal funds allocated to the Loan made by under this agreement is provided in Exhibit J to the Loan Agreement.

(B) Conducting a Single Audit in those fiscal years when expenditures of total Federal financial assistance exceeds \$500,000. It is the Municipality's responsibility for determining if the \$500,000 threshold is reached and a Single Audit is required.

(C) Submitting to the Bank its Single Audit when it is completed. The audit must be submitted within a period of nine (9) months following the end of the audit period.

(D) Notifying the Bank when there are findings and recommendations pertaining to any federal funds advanced from the loan and initiating corrective actions for audit reports with findings and recommendations that impact the Loan provided under this agreement.

Management decisions for corrective actions shall be made within six months of the receipt of the audit report.

Section 5.17. Compliance With Other Conditions of Approval. The Municipality covenants to comply with all additional requirements made a condition of approval of the Loan as set forth in Exhibit K to the Loan Agreement relating to implementation of an asset management program.

Section 5.18. Continuing Information. The Municipality agrees to submit to the Bank when available its annual report and audited annual financial statements.