

**REPORT TO THE  
CITY COUNCIL**  
*City of Salinas, California*

Agenda Item Number

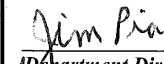

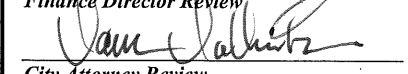
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DATE: June 11, 2013

FROM: Ray E. Corpuz, Jr., City Manager

BY: Jim Pia, Assistant City Manager

SUBJECT: **COOPERATION AND FUNDING AGREEMENT  
BETWEEN THE CITY OF SALINAS AND  
DEEPWATER DESAL, LLC**

 Department Director Approval
 Finance Director Review
 City Attorney Review
 City Manager Approval

**RECOMMENDATION:**

It is recommended that the City Council approve a resolution authorizing the City Manager to sign the attached Cooperation and Funding Agreement between the City of Salinas and DeepWater Desal LLC (Developer).

**DISCUSSION:**

On December 18, 2012, the City Council approved an agreement between the City and DeepWater Desal, LLC (DeepWater), to explore the purchase of water and wholesale power, which would result from a proposed desalination facility that DeepWater hopes to build in Moss Landing. The initial DeepWater proposal called for building a desalination facility at Moss Landing in an effort to supply potable water to water agencies and water utilities operating in Monterey and Santa Cruz Counties. It is anticipated that this project could serve both Salinas and the Monterey Peninsula. Additionally, Deepwater and the City agreed to work together to explore the establishment of a wholesale power purchase agreement with a wholesale power generator located in Moss Landing. This could allow for the City's purchase of power and resale of such power for businesses operating within Salinas and Monterey County.

Following the December agreement, the City Council approved a follow-up agreement on February 26, 2013, among Deepwater, California Water Service and the City of Salinas, with the intent and purpose of establishing a wholesale purchase agreement with a wholesale power generator from which the City could purchase power and would resell such power.

The attached agreement leverages the prior agreement of February 26, 2013 between the parties, and provides a strategy for cooperation and funding. It further provides for the creation of third-party professional services agreements, including the appropriate engineering and environmental review pursuant to the California Environmental Quality Act (CEQA). Additionally, the Agreement will allow for economic consultant(s) to provide a financial feasibility evaluation of the City's acquisition and operation of the electric power source, and related services.

**ISSUE:**

Shall the City Council approve a resolution authorizing the City Manager to sign the attached Agreement between the City of Salinas and DeepWater Desal LLC?

**FISCAL IMPACT:**

According to the Agreement, the Developer shall be solely responsible for all costs and expenses incurred by the environmental and economic consultants as set forth in the applicable professional services agreements. Staff time of City employees, however, as well as its own costs and expenses, shall be the responsibility of the City. It is anticipated that these expenses will be borne by the existing budgets of the affected City Departments. To the extent there becomes a potential for greater fiscal impact to the City, such additional actions will be brought back to the City Council for review and consideration before the expenditure of funds.

**TIME CONSIDERATION:**

DeepWater and the City of Salinas would like to enter into this Agreement so that they can begin exclusive negotiations to facilitate the implementation of the February 26, 2013 Power Purchase Agreement.

**ALTERNATIVES/IMPLICATIONS:**

1. Not adopt the resolution and provide staff direction on how to proceed.

**CONCLUSION:**

Approval of the proposed resolution authorizing the City Manager to sign the attached agreement between the City of Salinas and DeepWater Desal, LLC, enables the City to continue to move toward the purchase of electric power which it could make available to established and potential business operations. The DeepWater project arose in part, out of the Steinbeck Innovation Cluster project, one of the Council's key objectives under the goal of Economic Diversity and Prosperity. This will promote economic development and further promote the City's efforts to create new economic opportunities, including jobs, in the City and the region.

Distribution:  
City Council  
City Manager  
City Attorney  
Department Directors

Back Up Pages:  
Resolution  
Agreement

RESOLUTION NO. \_\_\_\_\_ (N.C.S.)

**A RESOLUTION AUTHORIZING THE CITY MANAGER TO SIGN A  
COOPERATION AND FUNDING AGREEMENT BETWEEN THE CITY OF SALINAS  
AND DEEPWATER DESAL, LLC**

**WHEREAS**, Deep Water Desal, LLC ("Developer") is proposing to build a desalination facility at Moss Landing to supply potable water to water agencies and water utilities operating in Monterey County and Santa Cruz County, and wishes to plan for any potential future demand for desalinated water by the City of Salinas; and

**WHEREAS**, the City and Developer wish to work together to explore the establishment of a wholesale power purchase agreement with a wholesale power generator located in Moss Landing, California, to allow for the City's purchase of power and resale of such power for businesses operating with the City and Monterey County; and

**WHEREAS**, the City and Developer wish to implement the purpose of the Power Purchase Agreement entered into on February 26, 2013, subject to the preconditions set forth in that agreement; and

**WHEREAS**, the Deep Water Desalination project arose in part out of the Steinbeck Innovation Cluster project, one of the Council's key objectives under the goal of Economic Diversity and Prosperity.

**NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF SALINAS**, that the City Manager of Salinas is hereby authorized and directed for and on behalf of the City of Salinas to execute the attached Cooperation and Funding Agreement between the City of Salinas and Developer.

**PASSED AND ADOPTED** this 11<sup>th</sup> day of June 2013, by the following votes:

**AYES:**

**NOES:**

**ABSENT:**

\_\_\_\_\_  
Joe Gunter, Mayor

Attest:

\_\_\_\_\_  
Patricia Barajas, City Clerk

## COOPERATION AND FUNDING AGREEMENT

This Cooperation and Funding Agreement (this "Agreement") is entered into as of \_\_\_\_\_, 2013 (the "Effective Date") by and between the City of Salinas, a California charter city and municipal corporation (the "City"), and DeepWater Desal, LLC, a California limited liability company (the "Developer"), each of which may individually be referred to herein as a "Party", and may collectively be referred to herein as "Parties".

### RECITALS

WHEREAS, City wishes to ensure and improve the supply of clean water to the City and its residents and businesses, to enable the City to purchase and resell power to the Developer and other businesses operating outside the City and within Monterey County, to support the development of new technologies, to encourage the development of jobs and economic enterprises in the City, and to increase revenues which the City can use to provide essential services to its residents and businesses (collectively referred to as "City's Objectives"); and

WHEREAS, Developer wishes to develop a desalinization project and selected coastal dependent businesses in Monterey County including but not limited to a digital data center campus and associated voice and data transmission infrastructure located at Moss Landing, California ("Site Area") and a fiber-optic ring ("Ring"), to be used for voice and data transmission services throughout the City, which would be connected to, and be managed from, the data center campus (collectively referred to as "Project"); and

WHEREAS, City and Developer agree that the Project would advance the City's Objectives; and

WHEREAS, on February 26, 2013, the City, Developer and the California Water Service Company entered into an agreement with regard to a wholesale power purchase agreement, a copy of which is attached hereto for reference ("Power Agreement"); and

WHEREAS, City and Developer wish to implement the Purpose of the Power Agreement, subject to the preconditions set forth in the Power Agreement; and

WHEREAS, Developer is willing, as set forth in this Agreement, to provide funding for the City and Developer to analyze the Project and to facilitate the implementation of the Project and the Power Agreement.

### AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein and for other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties mutually agree as follows:

ARTICLE 1.  
EXCLUSIVE NEGOTIATIONS RIGHT

Section 1.1 Good Faith Negotiations. The City and the Developer shall negotiate diligently and in good faith, during the Negotiating Period. During the Negotiating Period, the parties shall use good faith efforts to accomplish the respective tasks outlined in Article 2 to facilitate the implementation of the Project and of the Power Agreement.

Section 1.2 Negotiating Period.

(a) Subject to early termination in accordance with the provisions of subsection (b) below, the negotiating period (the "Negotiating Period") under this Agreement shall be three (3) years, commencing on the Effective Date, with two one (1) year extensions, if the parties mutually agree that the necessary authorizations for the Project are being actively pursued.

(b) If mutually acceptable agreements to achieve implementation of the Project and the Power Agreement ("Implementation Agreements") have not been executed by the City and the Developer by the expiration of the Negotiating Period (as the Negotiating Period may be extended by operation of subsection (a) above), then this Agreement shall terminate and neither party shall have any further rights or obligations under this Agreement except as set forth in Sections 2.8, 2.9, 3.2, 3.3, 3.4, 3.5 and 3.6 which shall survive such termination. If mutually acceptable Implementation Agreements have been executed by the City and the Developer then, upon such execution, this Agreement shall terminate, and all rights and obligations of the parties shall be as set forth in the executed Implementation Agreements.

Section 1.3 Exclusive Negotiations. During the Negotiating Period (as such Negotiating Period may be extended by operation of 1.2(a)), unless Developer consents in writing, the City shall not negotiate with any entity, other than the Developer, regarding the development of the Project or any portion thereof or the sale of electricity and/or the acquisition of electric transmission services, ancillary services and electric distribution services or facilities to serve, or intended to serve, electricity, or the development or sale of data centers and related services and associated voice and data transmission infrastructure at the Site or associated with the proposed Ring, except to the extent required by City municipal code provisions. Notwithstanding the foregoing, the City may have discussions or enter into agreements with its current franchisees, and those persons or entities which obtain franchises to operate within the City, concerning the provision of high bandwidth network service and other cable-related service, video-related service, or communication-related service within the City.

ARTICLE 2.  
NEGOTIATION TASKS AND DEVELOPER FUNDING

Section 2.1 Overview. To facilitate negotiation of Implementation Agreements, the Parties shall use reasonable good faith efforts to accomplish the tasks set forth in this Article 2 in a timeframe that will support negotiation and execution of mutually acceptable Implementation Agreements prior to the expiration of the Negotiating Period.

Section 2.2 Consultants. Within one (1) month following the Effective Date, Developer shall select one or more economics consultants, engineering consultants and energy law counsel all of which must be acceptable to City. Energy and Environmental Economics, Inc. is acceptable to City as an economics consultant and Howard V. Golub ("Golub") is acceptable to City as an energy law counsel. City shall have the right to retain independent legal counsel to review any work performed by energy law counsel or consultants and provide general advice to the City regarding the project. Developer shall be responsible for one-half of the amount charged to the City by such independent legal counsel; provided, that Developer's responsibility for such charges shall not exceed fifty thousand dollars (\$50,000) unless otherwise agreed to in writing by the Parties.

Section 2.3 Facilities Plan. Within four (4) months of the Effective Date, the engineering consultant(s) shall provide a conceptual design and description of the electric transmission and distribution facilities necessary to provide electric service within the Site Area and of the Ring. The City Attorney and the energy law counsel shall provide the engineering consultant(s) with such information as the engineering consultant may reasonably require for this purpose.

Section 2.4 Financial Feasibility. Within four (4) months of the Effective Date, the economics consultant(s) shall provide a financial feasibility evaluation of the City's acquisition and operation of an electric power source, transmission services, ancillary services and distribution services or facilities and the sale of electricity to those portions of the Project within the Site Area. The City Attorney and the energy law counsel shall provide the economics consultant(s) with such information as the economics consultant may reasonably require for this purpose.

Section 2.5 Compliance Requirements. Within six (6) months of the Effective Date, the City Attorney shall provide an opinion to the City on City's authority to enter into the Implementation Agreements and requirements to comply with applicable law, including compliance with the California Environmental Quality Act. Energy law counsel shall provide the City Attorney with such advice and information as the City Attorney may reasonably require for this purpose.

Section 2.6 CEQA Review. Developer acknowledges that it may be necessary to undertake environmental review. The Developer will pay all costs charged by the City in conjunction with the applications for City permits and approvals including all costs associated with appropriate environmental review pursuant to the California Environmental Quality Act ("CEQA") and documentation required by law as a result of the Implementation Agreements.

Section 2.7 Information. City and Developer shall make best efforts to provide the engineering consultant(s), the economics consultant, the City Attorney, the energy law counsel and such consultants as may be necessary for CEQA review, with such information as they may reasonably require for the purposes described above.

Section 2.8 Developer Funding. Developer shall be solely responsible for all costs for professional services and other costs and expenses incurred by the engineering consultant, economics consultant and energy law counsel pursuant to Sections 2.3, 2.4 and 2.5. The scope

of CEQA review pursuant to Section 2.6 is not yet known but within one (1) month of receipt of the opinion of the City Attorney pursuant to Section 2.5, City shall select one or more environmental consultants, and City and Developer shall negotiate in good faith to develop mutually acceptable professional services agreements for said services, and Developer shall be solely responsible for all costs and expenses incurred by the environmental consultants as set forth in said professional services agreements. Staff time of City employees and City out-of-pocket expenses shall not be reimbursable under this Agreement. Developer may, in its sole discretion, terminate its obligations under this Agreement to make payments for professional services and other costs and expenses not yet incurred as of the time of termination, provided, however, that Developer shall not be relieved of its obligation to pay for professional services and other costs and expenses incurred prior to the time of termination. In the event that Developer exercises its right to terminate said payments, the City, in its sole discretion, may terminate its obligations under this Agreement except that the provisions of Sections 3.2, 3.3, 3.4, 3.5 and 3.6 shall survive such termination.

Section 2.9 Defense and Indemnification. Developer shall defend and indemnify the City and its officers, employees and agents from and against any and all claims, liabilities, damages or costs of any type, including attorney's fees and court costs, arising out of the execution of this Agreement, but not arising out of the independent actions of the City implementing this Agreement (such as the fees paid to consultants hired by the City other than as provided in Sections 2.2, 2.3, 2.4, 2.6 and 2.8 of this Agreement or the staff costs incurred by the City with respect to the objectives of this Agreement).

Section 2.10 Progress Reports. From time to time as reasonably agreed upon by the Parties, each Party shall make oral or written progress reports advising the other Party on studies being made and matters being evaluated by the reporting party with respect to this Agreement.

### ARTICLE 3. GENERAL PROVISIONS

Section 3.1 Limitation on Effect of Agreement. This Agreement (and any extension of the Negotiating Period) shall not obligate the City or the Developer to enter into any agreement or enter into an agreement containing any particular terms. Execution of this Agreement by the City is merely an agreement to conduct a period of negotiations in accordance with the terms hereof, reserving for subsequent City action the final discretion and approval regarding the execution of any Implementation Agreements and all proceedings and decisions in connection therewith. Any Implementation Agreement resulting from negotiations pursuant to this Agreement shall become effective only if and after such Implementation Agreement has been considered and approved by the City Council, following conduct of all legally required procedures, and executed by duly authorized representatives of the City and the Developer. Until and unless Implementation Agreements are signed by the Developer, approved by the City Council, and executed by the City, no agreement drafts, actions, term sheets, outlines, deliverables, memoranda or communications arising from the performance of this Agreement shall impose any legally binding obligation on any party to enter into or support entering into any Implementation Agreement or be used as evidence of any oral or implied agreement by any party to enter into any other legally binding document. As such, the City and the Developer retain the

absolute discretion before the execution of Implementation Agreements to determine not to proceed with Implementation Agreements.

Section 3.2 Notices. Formal notices, demands and communications between the City, the Agency and the Developer shall be sufficiently given if, and shall not be deemed given unless, dispatched by certified mail, postage prepaid, return receipt requested, or sent by express delivery or overnight courier service, to the office of the parties shown as follows, or such other address as the parties may designate in writing from time to time:

City: City of Salinas  
200 Lincoln Avenue  
Salinas, CA 93901  
Attention: City Manager

With a copy to: City Attorney  
City of Salinas  
200 Lincoln Avenue  
Salinas, CA 93901

Developer: DeepWater Desal, LLC  
Brent R. Constantz  
Managing Member  
7532 Sandholdt Road, Suite 6  
Moss Landing, CA 95039

Such written notices, demands and communications shall be effective on the date shown on the delivery receipt as the date delivered or the date on which delivery was refused.

Section 3.3 Costs and Expenses. Except as otherwise expressly provided in this Agreement, each Party shall be responsible for its own costs and expenses in connection with any activities and negotiations undertaken in connection with this Agreement, and the performance of each party's obligations under this Agreement.

Section 3.4 No Commissions. Each party represents and warrants that it has not entered into any agreement, and has no obligation, to pay any real estate commission in connection with the transaction contemplated by this Agreement and any resulting Implementation Agreements. If a real estate commission is claimed through either party in connection with the transaction contemplated by this Agreement or any resulting Implementation Agreements, then the party through whom the commission is claimed shall indemnify, defend and hold the other parties harmless from any liability related to such commission. The provisions of this section shall survive termination of this Agreement.

Section 3.5 Defaults and Remedies.

(a) Default. Failure by any Party to negotiate in good faith as provided in this Agreement shall constitute an event of default hereunder. A non-defaulting Party shall give written notice of a default to the defaulting party and the other party, specifying the nature of the default and the required action to cure the default. If a default remains uncured ten (10) days



after receipt by the defaulting Party of such notice, the non-defaulting Party may exercise the remedies set forth in subsection (b).

(b) Remedies. In the event of an uncured default by the City, the Developer's sole remedy shall be to terminate this Agreement in writing effective five (5) days after delivery, and reimbursement by City to Developer of one-half (1/2) of the payments for professional services and other costs and expenses incurred by Developer pursuant to Section 2.8 prior to the time of termination, and no Party shall have any further right, remedy or obligation under this Agreement; provided, however, that the Developer's obligations pursuant to Sections 2.8, 2.9, 3.2, 3.3, 3.4, 3.5 and 3.6 and City's obligations pursuant to Section 1.3 shall survive such termination.

In the event of an uncured default by the Developer, the City's sole remedy shall be to terminate this Agreement in writing effective five (5) days after delivery. Following such termination, no party shall have any further right, remedy or obligation under this Agreement; provided, however, that the Developer's obligations pursuant to Sections 2.8, 2.9, 3.2, 3.3, 3.4, 3.5 and 3.6 shall survive such termination.

Except as expressly provided above, no Party shall have any liability to the others for damages or otherwise for any default, nor shall any Party have any other claims with respect to performance under this Agreement. Each Party specifically waives and releases any such rights or claims they may otherwise have at law or in equity.

Section 3.6 Attorneys' Fees. In the event of any action or proceeding brought by any Party against another Party under this Agreement, the prevailing Party shall be entitled to recover all costs and expenses including its attorneys' fees in such action or proceeding in such amount as the court may adjudge reasonable. Attorneys' fees for in-house City Attorney staff, if awarded, shall be calculated at the market rate. The prevailing Party shall be determined by the court based upon an assessment of which Party's major arguments made or positions taken in the proceedings could fairly be said to have prevailed over the other Party's major arguments or positions on major disputed issues in the court's decision. If the Party which shall have commenced or instituted the action, suit or proceeding shall dismiss or discontinue it without the concurrence of the other Party, such other Party shall be deemed the prevailing Party. The provisions of this Section shall survive the termination of this Agreement. Venue shall be in the Superior Court of the County of Monterey.

Section 3.7 Confidentiality of Information. The City will use their best efforts to maintain the confidentiality of proprietary information provided by Developer subject to the requirements imposed on the City and Agency by the Public Records Act (Government Code Section 6253 et seq.). The Developer acknowledges that the City may share information provided by the Developer of a financial and potential proprietary nature with third party consultants who have been contractually engaged to advise the City concerning matters related to this Agreement and to City Council as part of the negotiation and decision making process subject to agreements sufficient to maintain the confidentiality of such information. If this Agreement is terminated without the execution of Implementation Agreements, the City shall return to the Developer any confidential information submitted by the Developer under this Agreement. If any litigation is filed seeking to make public any information Developer

submitted to the City in confidence, the City and Developer shall cooperate in defending the litigation. The Developer shall pay the City's reasonable costs of defending such litigation and shall indemnify the City against all costs and attorneys fees awarded to the plaintiff in any such litigation.

Section 3.8 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

Section 3.9 Entire Agreement. This Agreement constitutes the entire agreement of the Parties regarding the subject matters of this Agreement.

Section 3.10 Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same agreement.

Section 3.11 Assignment. Neither Party may transfer or assign any or all of its rights or obligations under this Agreement except upon one (1) month's prior written notice to the other Party.

Section 3.12 No Third Party Beneficiaries. This Agreement is made and entered into solely for the benefit of the City and the Developer and no other person shall have any right of action under or by reason of this Agreement.

Section 3.13 Actions By the City. Whenever this Agreement calls for or permits the approval, consent, authorization or waiver of the City, the approval, consent, authorization, or waiver of the City Manager shall constitute the approval, consent, authorization or waiver of the City without further action of the City Council.

Section 3.14 Modification of Agreement. This Agreement represents the entire understanding of the City and the Developer as to those matters contained herein. No prior oral or written understanding shall be of any force or effect with respect to those matters contained herein. This Agreement may not be modified or altered except by an amendment in writing signed by both parties.

IN WITNESS WHEREOF, this Agreement has been executed, in triplicate, by the parties on the date first above written.

**CITY:**

CITY OF SALINAS, a charter city

APPROVED AS TO FORM:

By: \_\_\_\_\_  
Ray E. Corpuz, Jr., City Manager

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

**DEVELOPER:**

DEEPWATER DESAL, LLC, a California limited liability company

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

Name: \_\_\_\_\_

Its: \_\_\_\_\_

**RESOLUTION NO. 20344 (N.C.S.)**

**A RESOLUTION AUTHORIZING THE CITY MANAGER TO SIGN AN AGREEMENT AMONG THE CITY OF SALINAS; DEEP WATER DESAL, LLC; AND CALIFORNIA WATER SERVICE COMPANY WITH REGARD TO A WHOLESALE POWER PURCHASE AGREEMENT**

WHEREAS, Deep Water Desal, LLC is proposing to build a desalination facility at Moss Landing to supply potable water to water agencies and to water utilities operating in Monterey County and Santa Cruz County and wishes to plan for any potential future demand for desalinated water by the City of Salinas; and

WHEREAS, on December 18, 2012, the City of Salinas and Deep Water Desal, LLC (Deep Water Desal) entered into an Agreement to Explore the Purchase of Water and a Wholesale Power; and

WHEREAS, since December 18, 2012, the City and Deep Water Desal have explored the establishment of a wholesale power purchase agreement and the potential for supplying electric power to support the power needs of existing and potential businesses, including those within the city of Salinas; and

WHEREAS, the City and Deep Water Desal, along with California Water Service Company (Cal Water) desire to continue exploring the establishment of a Power Purchase Agreement which would enable the City to acquire an electric power source, transmission services, ancillary services, and distribution services or facilities to support the power needs of existing and potential businesses.

NOW THEREFORE BE IT RESOLVED BY THE COUNCIL OF SALINAS that the City Manager of Salinas is hereby authorized and directed for and on behalf of the City of Salinas to enter into an agreement among the City of Salinas; Deep Water Desal, LLC; and California Water Service Company with regard to a wholesale power purchase agreement.

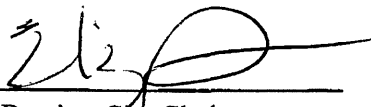
PASSED AND ADOPTED this 26<sup>th</sup> day of February 2013, by the following vote:

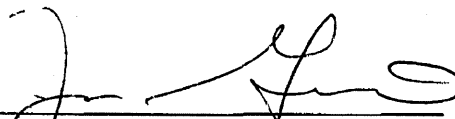
AYES: Councilmembers: Barrera, Craig, De La Rosa, Lutes, McShane and Mayor Gunter

NOES: Councilmember Castaneda

ABSENT: None

ABSTAIN: None

  
\_\_\_\_\_  
Patricia Barajas, City Clerk

  
\_\_\_\_\_  
Joe Gunter, Mayor

**EXHIBIT**

**AGREEMENT AMONG THE CITY OF  
SALINAS, DEEPWATER DESAL LLC, AND CALIFORNIA WATER SERVICE  
COMPANY WITH REGARD TO A WHOLESALE POWER PURCHASE AGREEMENT**

This Agreement with regard to a Wholesale Power Purchase Agreement is entered into this 26<sup>th</sup> day of February 2013, by and among the **City of Salinas**, a California charter city and municipal corporation hereinafter referred to as "the City," **Deep Water Desal, LLC**, a California limited liability company hereinafter referred to as "DWDS," and **California Water Service Company**, a California corporation hereinafter referred to as "CWS", all of which may sometimes collectively be referred to herein as "the Parties" or individually as "a Party".

**RECITALS**

**WHEREAS**, the City and its residents are currently served by two municipal water purveyors, both of which are authorized by the California Public Utilities Commission to act as water utilities within the City: California Water Service Company and Alisal Water Corporation dba Alco Water; and

**WHEREAS**, DWDS is proposing to build a desalination facility at Moss Landing to supply potable water to water agencies and water utilities operating in Monterey and Santa Cruz counties, and wishes to plan for any potential future demand for desalinated water by the City of Salinas; and

**WHEREAS**, in the event DWDS or some other entity or organization builds a desalination facility ("Desal Facility") and is able to produce potable drinking water, or purer water of the quality needed to attract high technology industry to the City, such new source of water may become available to the City for conveyance to and use by water customers, including those residing within the City of Salinas; and

**WHEREAS**, on December 18, 2012, the City and DWDS entered into an Agreement to Explore the Purchase of Water and a Wholesale Power Purchase Agreement and pursuant to said agreement have explored the establishment of a wholesale power purchase agreement.

**NOW, THEREFORE**, the City, DWDS and CWS agree as follows:

**TERMS**

**1. Purpose.** It is the intent and the purpose of this Agreement (Agreement) to set forth the intention of the Parties to establish a wholesale power purchase agreement with a wholesale power generator from which the City would purchase power and would resell such power to DWDS and selected other coastal dependent businesses operating within Monterey County proximate to the Desal Facility but outside the City, hereinafter collectively referred to as Water Project.

**2. Further Considerations as to Power Purchase.** Subject to the preconditions of this Agreement, including without limitation thereto, sections 2, 3 and 4 hereof, the Parties intend to establish a wholesale power purchase agreement as follows:

- City and DWDS to cooperate in the City's acquisition of an electric power source, transmission services, ancillary services and distribution services or

facilities suitable to the Water Project, hereinafter collectively referred to as Water Project Power.

- City would purchase electric power and would resell Water Project Power to Water Project.
- Water Project would purchase Water Project Power from City.
- Water Project would pay City an amount equal to all of the City's costs of procuring and delivering Water Project Power plus a reasonable fee.
- Approvals of any power purchase agreement by any and all appropriate federal, state, and local authorities to the extent required by law, shall be obtained.
- All provisions shall comply with all laws and regulations applicable to City and/or DWDS.

**3. Limitation of Effect of Agreement.** This Agreement shall not obligate the City, DWDS or CWS to enter into any particular project agreement, water purchase agreement or power purchase agreement, or to enter into a project agreement, a water purchase agreement or a power purchase agreement on any particular terms or conditions. By executing this Agreement, neither the City nor DWDS nor CWS are committing themselves to or agreeing to participate in any Desal Facility or to purchase or to supply any water or power produced by a Desal Facility. Execution of this Agreement by the City and by DWDS and by CWS is merely an agreement to collaboratively consider in good faith the objectives described in this Agreement and to conduct a period of further review and consideration of the objectives described in this Agreement, reserving for subsequent action the final discretion and approval regarding any project agreement or approval and all proceedings and decisions in connection therewith. Any agreement or approval resulting from negotiations pursuant to this Agreement shall become effective only if and after such agreement has been considered and approved by the City and by DWDS and by CWS in their sole discretion.

It is also the intent of the Parties that this Agreement not constitute a "project" for purposes of the California Environmental Quality Act ("CEQA"), and that any future actions or agreements between the Parties as may be described herein be subject to all requirements of law, including CEQA.

**4. Term.** This Agreement shall commence as of the date first written above and shall continue in full force and effect for a period of five (5) years unless terminated earlier by either Party or by the mutual determination of the Parties or unless extended by mutual written agreement of the Parties. Either Party may terminate this Agreement for any reason or for no reason whatsoever and without further obligation to the other Parties with respect to the subject matter of this Agreement by providing written notice of such termination to the other Parties. Such termination shall take effect immediately upon the date of termination set forth in such notice. This Agreement may only be renewed upon the mutual written consent of the Parties.

**5. Defense and Indemnification.** DWDS shall defend and indemnify the City and its officers, employees and agents from and against any and all claims, liabilities, damages or costs of

any type, including attorney's fees and court costs, arising out of the execution of this Agreement, but not arising out of the independent actions of the City implementing this Agreement (such as the fees paid to consultants hired by the City to assist the City in its analysis of the objectives of this Agreement or the staff costs incurred by the City with respect to the objectives of this Agreement).

**6. Amendments.** This Agreement may only be amended by the mutual written agreement of the Parties.

**7. Waivers.** No waiver of any provision of this Agreement will be valid unless it is in writing and signed by the Parties. Waiver by any Party at any time of any breach of this Agreement cannot be deemed a waiver of or consent to a breach of the same or any other provision of this Agreement. If a Party's action requires the consent or approval of the other Party, the consent or the approval on any one occasion cannot be deemed a consent or approval of that action on any later occasion or consent or approval of any other action.

**8. Governing Law; Jurisdiction.** This Agreement will be governed by the laws of the State of California and jurisdiction of any disputes hereunder shall be had in Monterey County, or in the appropriate federal court or state or federal agency with jurisdiction over the matter. In the event of any litigation brought with respect to this Agreement, the prevailing party in such action shall be entitled to attorney fees and costs as may be awarded by the court. The City's attorney fees, if awarded, shall be calculated at the market rate.

**9. Notices.** Any notices or other communications to be sent by one Party to the other under this Agreement shall be in writing and shall be given by personal delivery to the persons designated below, with copies delivered as indicated, or by U.S. Mail, return receipt requested, with copies mailed as indicated:

**If to City:**

City Manager City of Salinas  
200 Lincoln Avenue  
Salinas, California 93901

**With a copy to:**

City Attorney City of Salinas  
200 Lincoln Avenue  
Salinas, California 93901

**If to DWDS:**

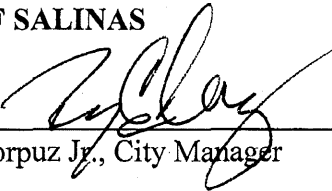
DeepWater Desal LLC  
Brent R. Constanz, Managing Member  
7532 Sandholt Road, Suite 6  
Moss Landing, California 95039

**If to CWS:**

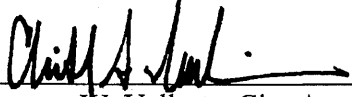
California Water Service Company  
Francis S. Ferraro  
Vice President, Regulatory Matters and Corporate Relations  
1720 North First Street  
San Jose, California 95112

**IN WITNESS WHEREOF**, the undersigned as authorized representatives of the City of Salinas, of Deep Water Desal LLC, and of California Water Service Company have entered into this Agreement as of the date first written above.


**CITY OF SALINAS**

  
\_\_\_\_\_  
Ray E. Corpuz Jr., City Manager

**APPROVED AS TO FORM:**

  
\_\_\_\_\_  
Vanessa W. Vallarta, City Attorney  
By  
Christopher A. Callihan, Assistant City Attorney

**ATTEST:**

  
\_\_\_\_\_  
Patricia Barajas, City Clerk

**Deep Water Desal LLC**

\_\_\_\_\_  
By: Brent R. Constanz  
Its: Managing Member and Chief Executive Officer

**California Water Service Company**

\_\_\_\_\_  
By: Francis S. Ferraro  
It's: Vice President, Regulatory Matters and Corporate Relations



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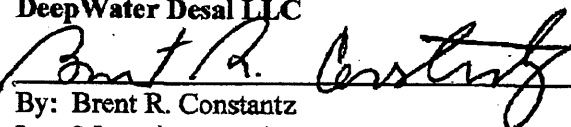
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Its: Managing Member and Chief Executive Officer

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