

CITY OF BRIGHTON
PROFESSIONAL SERVICES AGREEMENT
for
WATERSMART SOFTWARE WATER CONSERVATION PROGRAM

THIS AGREEMENT made and entered into this _____ day of _____ in the year Two Thousand and Seventeen (2017) by and between the **CITY OF BRIGHTON, COLORADO**, a home rule municipal corporation, hereinafter referred to as the "*City*", and **WATERSMART SOFTWARE, INC.**, a Delaware corporation, authorized to conduct business in the State of Colorado, hereinafter referred to as "*Professional or WaterSmart*".

WITNESSETH:

In consideration of the mutual covenants and obligations herein expressed, it is agreed by and between the parties hereto as follows:

1. **SCOPE OF WORK.** The Professional agrees to provide the WaterSmart software-as-a-service ("Services") and implement and monitor a program aimed at improving awareness and efficiency of water use by the City's residential customers (the "Conservation Program") as more specifically set forth in the Scope of Work attached hereto as **Attachment "A"**, consisting of twenty seven (27) pages and **Attachment "B" Software-as-a-Service Provisions** consisting of two (2) pages, both of which are incorporated herein by this reference.
2. **PROFESSIONAL RESPONSIBILITY.** The Professional has held itself out to the City of Brighton as having the requisite expertise and experience to perform the required Services for the Project. Professional shall faithfully perform the Services required under this Agreement in accordance with standards of care, skill, training, diligence and judgment provided by highly competent professionals who perform Services of a similar nature to the Services described in this Agreement.
3. **THE WORK SCHEDULE.** The Services to be performed pursuant to this Agreement shall begin on April 1, 2017 and end on March 31, 2018, subject to renewal at the option of the City upon the parties' mutual written agreement to terms for renewal.
4. **TERM.** The term of this Agreement shall be for one (1) year, commencing on April 1, 2017, subject to extension as provided herein. All Services to be performed under this Agreement shall commence promptly after receipt of a fully executed copy of the Agreement to the extent that the Professional has been authorized to proceed by the City.

The City, at its sole discretion, may offer annually to extend this Agreement for up to two (2) additional one-year terms provided Professional has performed the Services satisfactorily and all terms and conditions of the Agreement have been fulfilled. Each extension must be mutually agreed upon in writing, by and between the City and the Professional, approved by the City of Brighton City Council, and shall be subject to the annual appropriation of funds therefor.

4. **EARLY TERMINATION BY CITY.** Notwithstanding the time periods contained herein, at any time during the term of the Agreement, City has the right to terminate the Agreement provided WaterSmart is given 30 days notice in writing. Upon such termination, WaterSmart will be compensated for the reasonable value of its services provided through the termination date, and such compensation may include any amounts already paid by City. Such payment shall be the Professional's sole right and remedy for such termination.

All notices provided under this Agreement shall be effective when mailed, postage prepaid and sent to the following addresses:

If Professional:

WaterSmart Software, Inc.
20 California Street
Suite 200
San Francisco, CA
94111

If City:

Director of Utilities

City of Brighton
500 South 4th Avenue
Brighton, CO 80601
303.655.2033

With Copy To:

City Procurement/
Contracts Manager
City of Brighton
500 South 4th Avenue
Brighton, CO 80601

City Manager

City of Brighton
500 South 4th Avenue
Brighton, CO 80601
303.655.2001

6. **COMPLIANCE WITH PATENT, TRADEMARK AND COPYRIGHT LAWS.** The Professional represents that all Services performed by Professional under this Agreement shall comply with all applicable patent, trademark and copyright laws, rules, regulations and codes of the United States. Professional shall not utilize any protected patent, trademark or copyright in performance of its Services unless Professional has obtained proper permission and all licenses, releases and other necessary documents.

The Professional releases, indemnifies and holds harmless the City of Brighton, its officers, agents, and employees from any and all claims, damages, suits, costs, expenses, liabilities actions or proceedings of any kind or nature whatsoever, of or by anyone whomsoever, in any way resulting from, or arising out of, directly or indirectly, the performance of Services and use of software under this Agreement which infringes upon any patent, trademark or copyright protected by law.

7. **DESIGN, PROJECT, INDEMNITY AND INSURANCE RESPONSIBILITY.** The Professional shall be responsible for the professional quality, technical accuracy, timely completion and the coordination of all Services rendered by the Professional. The Professional shall perform its services in a timely and professional manner consistent with standards generally and reasonably expected of competent providers of software-as-a-service to utilities in the United States. WaterSmart has and shall maintain all applicable licenses or authorizations necessary to utilize its software and provide its Services to the City.

The Professional shall save, indemnify, defend, and hold harmless the City of Brighton, its officers, agents, and employees from and against all liability, claims, judgments, suits, demands for damages to persons or property with respect to the liability coverages, except Professional Liability coverage, specified herein which arise out of, result from or are in any manner connected with the Services to be performed under this Agreement, to the extent such injury, loss or damage is caused by, or is claimed to be caused by, the negligent acts, errors, or omissions of Professional, any subcontractor or subconsultant of Professional, or any officer, employee, or agent of Professional.

Professional agrees to indemnify and hold harmless the City of Brighton, and its officers, agents and employees, from and against all liability, claims judgments, suits, demands for damages to persons or property with respect to the Professional Liability coverages specified herein which arise out of, result from or are in any manner connected with the Work to be performed under this Agreement, to the extent such injury, loss or damage is caused by, or is claimed to be caused by, the negligent acts, errors or omissions of Professional, any Subcontractor or Subconsultant of Professional, or any officer, employee or agent of Professional.

Professional's duty to indemnify the City of Brighton shall arise at the time written notice of a claim is first provided to the City of Brighton regardless of whether claimant has filed suit on the claim. Professional's duty to indemnify the City of Brighton shall arise even if City of Brighton is the only party sued by claimant and/or claimant alleges that the City of Brighton's negligence was the sole cause of claimant's damages; provided, however, that Professional shall have no duty to defend or indemnify City for any matter involving intentional misconduct by City, its officers, agents or employees. Professional's indemnification obligation shall include, but not be limited to, any claim made against City of Brighton by (1) Professional's employee, subcontractor or subconsultant who has been injured on property owned by the City of Brighton; or (2) a third party claiming patent, copyright or trademark infringement.

The Professional shall maintain Insurance in the kinds and amounts set forth herein in Article 24.

8. **COMPENSATION.** In consideration of the Services to be performed pursuant to this Agreement, the City agrees to pay Professional an amount not to exceed \$63,346 according to the schedule set forth in **Attachment "A" (Exhibit B)** attached hereto, and by this reference made a part hereof. The City agrees to pay Professional for Services under Additional year renewals, if executed, an amount not to exceed \$62,078 annually.

The Professional shall bill its charges to the City periodically, but no more frequently than once each month. The itemized invoices from the Professional shall include:

The amounts of all such payments shall be based upon the Professional's City-verified progress in completing the Services to be performed pursuant hereto and upon the City's approval of the Professional's actual reimbursable expenses. The City shall make payment following acceptance of the work, and within thirty (30) days of invoice receipt. If anticipated grant funding sources are not received within timeframes initially anticipated by City despite City's best efforts to timely procure such funding, then City shall update Professional and upon Professional's request shall negotiate in good faith a quarterly schedule for payments for the remainder of the Agreement's term.

9. **CITY REPRESENTATIVE.** The City designates its Water Resources Specialist as its project representative who shall make, within the scope of his authority, all necessary and proper decisions with reference to the Project. All requests for contract interpretations, change orders, and other clarification or instruction shall be directed to the City Representative.
10. **PROFESSIONAL REPRESENTATIVE.** The Professional designates Chris Patton as its project manager to manage and supervise the performance of this Agreement on behalf of the Professional. Associated with the project manager shall be staff members whose experience and qualifications are appropriate for this Project.
11. **PROJECT DOCUMENTS/DELIVERABLES.** City shall own all deliverables and documents which are prepared and provided by WaterSmart during the term of the Agreement based on data from City ("Custom Deliverables"). These include print and electronic Water Reports, survey reports, and reports which either party may generate from the Customer Portal or Utility Dashboard. The respective intellectual property and data rights of the parties are further clarified by the "SaaS Provisions" attached hereto as Attachment B and incorporated herein by this reference, which sets forth various provisions customary in the SaaS sector. WaterSmart shall not be responsible for any unauthorized modification or use of Custom Deliverables beyond the intended purposes of the Conservation Program. Upon conclusion of the Project and before final payment, the Professional shall provide to the City the final written work product(s) required by the Scope of Work. The Professional shall

not provide copies of any Custom Deliverables to any other person or entity without the prior written consent of the City, unless required by law or court order to be disclosed.

12. **PROGRESS REPORT.** Professional shall comply with the requirements of the Scope of Work regarding progress meetings and the obligations related thereto. Failure to provide any required monthly report or conduct the required progress meetings may, at the option of the City, suspend the processing of any partial payment request.
13. **INDEPENDENT CONTRACTOR.** The Services to be performed by Professional are those of an independent contractor providing the work and services to the City's Water Utility Enterprise concerning the users and customers of the Utility and is not an employee, agent, or officer of the City of Brighton. The City shall not be responsible for withholding any portion of Professional's compensation hereunder for the payment of FICA, Workers' Compensation, other taxes or benefits or for any other purpose.
14. **INSPECTION.** The City, through its authorized representatives, has the right at all reasonable times to inspect or otherwise evaluate the work performed or being performed under this Agreement.
15. **CHANGES.** The City may, from time to time, require changes in the Scope of the Work to be performed hereunder, which changes shall be mutually agreed upon by the Parties in writing. In the event such changes cause an increase or decrease in the work to be performed by the Professional or the time for such performance, the compensation to be paid to the Professional and time of performance shall be equitably adjusted. The value of any such extra work or change shall be determined according to established hourly billing rate (if applicable) or Professional's standard flat fees, as mutually agreed upon by the Parties.
16. **SUSPENSION.** Without terminating this Agreement or breaching the obligations hereunder, the City may, at its sole discretion, suspend the Services of the Professional hereunder. Such suspension may be accomplished by giving the Professional written notice, which shall set forth the reasons for the suspension, seven (7) days in advance of the suspension date. Upon receipt of such notice, the Professional shall cease its work in as efficient a manner as possible in order to keep its total charges to the City for services under the Agreement to a minimum. In the event that the period of suspension exceeds ninety (90) days, either party may terminate this Agreement.
17. **PERSONAL SERVICES.** It is understood that the City enters into this Agreement based on the special abilities of the Professional. Accordingly, the Professional shall neither assign any responsibilities nor delegate any duties arising under this Agreement without the prior written consent of the City; provided, however, that Professional may assign this Agreement without consent in the context of Professional's merger, acquisition or other change in control. While consent is not required in the context of Professional's merger, acquisition or other change in

control, the Professional must provide at least 30 days written notice of such changes.

18. **ACCEPTANCE NOT WAIVER.** The City's approval of reports, and work or materials furnished hereunder, shall not in any way relieve the Professional of responsibility for the quality or technical accuracy of the work. The City's approval or acceptance of, or payment for, any part of the Services shall not be construed to operate as a waiver of any other rights or benefits provided to the City under this Agreement.
19. **DEFAULT.** Each and every term and condition hereof shall be deemed to be a material provision of this Agreement. In the event either party should fail or refuse to perform according to the terms of this Agreement, such party may be declared in default.
20. **REMEDIES.** In the event a party has been declared in default, such defaulting party shall be provided written notice and allowed a period of ten (10) days within which to cure said default. In the event the default remains uncorrected, the party declaring default may elect to (a) terminate the Agreement and seek damages; (b) treat the Agreement as continuing and require specific performance; or (c) avail itself of any other remedy available at law or in equity. If the non-defaulting party commences legal or equitable actions against the defaulting party, the defaulting party shall pay the non-defaulting party for the non-defaulting party's reasonable attorney fees and costs incurred in connection therewith.
21. **BINDING EFFECT/AMENDMENT.** This writing, together with all exhibits hereto, constitutes the entire agreement between the parties and shall be binding upon said parties, their officers, employees, agents and assigns and shall inure to the benefit of the respective survivors, heirs, personal representatives, successors and assigns of said parties. This Agreement may be amended only by the mutual consent of the parties in writing.
22. **LAW/SEVERABILITY.** The laws of the State of Colorado shall govern the construction, interpretation, execution and enforcement of this Agreement. In the event any provision of this Agreement shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision of this Agreement.
23. **ILLEGAL ALIENS.**
 - A. At all times during the performance of the contract, the Professional shall strictly adhere to all applicable Federal, State and City laws prohibiting the employment of or contracting with undocumented workers or illegal aliens.
 - B. The Professional shall not knowingly employ or contract with an undocumented worker or illegal alien to perform work under this Agreement or knowingly contract with a subcontractor who knowingly employs or contracts with undocumented workers (illegal aliens) to perform work under this Contract.

C. The Professional shall take affirmative action to insure that it does not employ or contract with undocumented workers or illegal aliens to perform work on this public contract for services with the City by participation in either of the following options:

OPTION 1- E-VERIFY PROGRAM

- (1) Execute a Memorandum of Understanding with the Social Security Administration and Department of Homeland Security for participation in the E-Verify Program for the verification of immigration status of employees hired after the date of execution of the Memorandum of Understanding.
- (2) Verify or attempt to verify through participation in the E-Verify Program that the Professional does not and will not employ undocumented workers or illegal aliens.
- (3) The Professional shall comply with all terms and conditions of the Memorandum of Understanding related to the E-Verify Program, and in particular shall not use the process for verification of immigration status to verify and applicant employment eligibility; submit a request for verification until after the employee is hired and the Form I-9 is completed and submitted; or, to reverify employees hired prior to the date of the Memorandum of Understanding.

OPTION 2- STATE OF COLORADO DEPARTMENT OF LABOR AND EMPLOYMENT PROGRAM (“DEPARTMENT PROGRAM”)

- (1) The Professional shall notify the Department and the City of Brighton of its intent to participate in the Department Program, and the Professional’s consent in writing to the Department conducting random audits of the affidavits of the Professional filed with the City and the related documents maintained by the Professional.
- (2) The Professional shall within twenty days after hiring new employees to perform work on this public contract for services with the City, filed with the Department an affidavit affirming that the Professional has examined the legal work status of such employees, retained file copies of the required documents related thereto, and has not altered or falsified the documents for such employees.
- (3) The Professional shall provided a written, notarized copy of the affirmation to the City on or before its filing with the Department.

If the Professional has not entered in to a Memorandum of Understanding to participate in the E-Verify Program and is awarded the contract herein proposed and Option 1 or Option 2 is required as specified above, the Professional shall participate in the Department Program and comply with all requirements thereof during the term of the contract.

D. The Professional shall require all subcontractors of the Professional to certify in writing to the Professional that the subcontractor does not knowingly employ or contract with undocumented workers or illegal aliens and further to agree

in writing not to knowingly employ or contract with an undocumented worker or illegal alien to perform work under this public contract for services.

(1) The Professional shall not enter into a contract with a subcontractor that fails to certify to the Professional that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this public contract for services.

(2) If the Professional obtains actual knowledge that a subcontractor performing work under the public contract for services knowingly employs or contracts with an illegal alien, the Professional shall:

(a) Notify the subcontractor and the City within three days that the Professional has actual knowledge that the subcontractor is employing or contracting with an illegal alien; and

(b) Terminate the subcontract with the subcontractor if within three days of receiving the notice required pursuant to subsection D (2) (a), the subcontractor does not terminate the employment or contract with the illegal alien; except that the Professional shall not terminate the contract with the subcontractor if during such three days the subcontractor provides information to establish that the subcontractor has not knowingly employed or contracted with an illegal alien.

E. The Professional shall comply with any reasonable request by the City or the Colorado Department of Labor and Employment made in the course of an investigation that the City or the Department is undertaking for the purpose of determining the immigration status of all newly hired employees or contractors working on this Contract, including, but not limited to:

(1) Inspections and/or interviews at such locations as this Contract are being performed;

(2) Review documentation related to the immigration status and/or employment eligibility of any newly hired employees or contractors performing work on this public contract for services; or,

(3) Any other reasonable steps that are necessary to determine whether a Professional or subcontractor is complying with the provisions of this Contract related to the employment of or contracting with undocumented workers or illegal aliens.

F. The Professional shall, upon request, provide to the City copies of documentation and verification of immigration status and employment eligibility received by the Professional for itself or from subcontractors; and, if requested, copies of information received from a subcontractor submitted to establish that the subcontractor has not knowingly employed or contracted with an illegal alien.

G. If a Professional violates a provision of this Section 23, **Illegal Aliens**, the City may terminate the Contract for a breach of the Contract. If the Contract is so terminated, the Professional shall be liable for actual and consequential damages to the City.

24. INSURANCE

The Professional will be required to furnish a Certificate of Insurance including Professional Liability. The City will be named as Additional Insured on Commercial General Liability and Auto Liability policies and listing the name of the Project and project number if applicable.

A. The Professional agrees to procure and maintain in full force and effect during the term of the Agreement, at its own cost, the following coverages:

1. Workers' Compensation insurance as required by the Labor Code of the State of Colorado and Employers' Liability Insurance.
2. Commercial General or Business Liability Insurance with minimum combined single limits of One Million (\$1,000,000) each occurrence and One Million (\$1,000,000) general aggregate.
3. Automobile Liability Insurance with minimum combined single limits for bodily injury and property damage of not less than One Million (\$1,000,000) for any one occurrence, with respect to each of the Professional's owned, hired or non-owned vehicles assigned to or used in performance of the Services. In the event that the Consultant's insurance does not cover non-owned automobiles, then the Consultant guarantees to the City that the requirements of this paragraph shall be met by each employee, subcontractor or other agent of the Professional who utilizes an automobile in providing services to the City of Brighton under this Agreement.
4. Errors and Omissions Insurance with limits of liability of at least One Million Dollars (\$1,000,000) per claim and One Million (\$1,000,000) in the aggregate.

B. If approved by the City of Brighton prior to the commencement of any work or services under this Agreement, evidence of qualified self-insured status may be substituted for one or more of the foregoing insurance coverages.

C. Professional shall procure and maintain, and shall cause any subcontractor of the Professional to procure and maintain, the minimum insurance coverages listed herein. Such coverages shall be procured and maintained with forms and insurers acceptable to the City of Brighton. All coverages shall be continuously maintained to cover all liability, claims, demands, and other obligations assumed by the Professional in connection with providing any work or services under this Agreement. In the case of any claims made, the necessary retroactive dates and extended reporting periods shall be procured to maintain such continuous coverage.

D. A Certificate of Insurance shall be completed by the Professional's insurance agent(s) as evidence that policies providing the required coverages,

conditions, and minimum limits are in full force and effect, and shall be subject to review and approval by the City of Brighton prior to commencement of any work or services under this Agreement. The Certificate shall identify this Agreement and shall provide that the coverages afforded under the policies shall not be cancelled, non-renewed or reduced in coverage or limits until at least thirty (30) days prior written notice has been given to the City of Brighton. The completed Certificate of Insurance shall be sent to:

City of Brighton
500 South 4th Avenue
Brighton, CO 80601
Attention: Pamela Roeding
Procurement & Contracts Manager

E. Failure on the part of the Professional to procure or maintain policies providing the required coverages, conditions, and minimum limits shall constitute a Material Breach of Contract upon which the City of Brighton may immediately terminate this Agreement, or at its discretion the City of Brighton may procure or renew any such policy or any extended reporting period thereto and may pay any and all premiums in connection therewith, and all monies so paid by the City of Brighton shall be repaid by the Professional to the City of Brighton upon demand, or the City of Brighton may offset the cost of the premiums against any monies due to Professional from the City of Brighton.

F. The City of Brighton reserves the right to request and receive a copy of any endorsement required to comply with the above requirements. Professional agrees to execute any and all documents necessary to allow the City of Brighton access to endorsements pertaining to this particular Project.

G. The parties hereto understand and agree that the City of Brighton, its officers, and its employees, are relying on, and do not waive or intend to waive by any provision of this Contract, the monetary limitations (presently \$350,000 per person and \$990,000 per occurrence) or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, C.R.S. 24-10-101 et seq., as from time to time amended, or otherwise available to the City of Brighton, its officers or its employees.

H. In addition to procuring and delivering to the City such written Certificates of Insurance, demonstrating that the Professional has obtained and will maintain all policies of insurance coverage in the amounts required herein, the Professional shall also cause the City to be named as an Additional Insured party entitled to coverage under such policies of insurance, and for that purpose the Professional shall obtain and maintain, or cause to be obtained and maintained, any and all necessary policy endorsements, additional coverage documents, or other instruments or Certificates, such as will provide such insurance coverage to the City at all times during the Professional's performance of the Project.

I. All Certificates of Insurance shall be submitted on an Acord 25-S form or most current.

EXECUTED BY THE PARTIES HERETO ON THE DATE SET FORTH ABOVE.

THE CITY OF BRIGHTON, COLORADO,
a home rule municipal corporation

BY: _____
Manuel Esquibel, City Manager

ATTEST:

Natalie Hoel, City Clerk

APPROVED AS TO FORM:

Margaret R. Brubaker, Esq.
City Attorney

WATERSMART SOFTWARE, INC.
a Delaware corporation, authorized to conduct
business in the State of Colorado

BY: _____
Robin Gilthorpe, CEO

ATTEST:

Corporate Secretary (Corporate Seal)

Attachment A – SOW

ATTACHMENT "B"

SOFTWARE-AS-A-SERVICE PROVISIONS

The Professional, being familiar with all of the requirements of this Agreement, shall furnish all labor, material, tools, equipment, transportation, services and all other things necessary for the completion of the Services in accordance with the requirements and intent of the Agreement documents within the time of completion as set forth herein.

BACKGROUND: WaterSmart's services are to be provided primarily by utilization of WaterSmart's proprietary software hosted on WaterSmart's computer systems and accessed by authorized users over the Internet. This is a shared cost software utilization model which enables customers to achieve substantial cost savings versus commissioning custom development of software or licensing software for installation and maintenance on customers' computer systems. Companies like WaterSmart are commonly referred to as "SaaS (software-as-a-service)" providers. Certain supplemental provisions which are customary within the SaaS sector and essential to enabling WaterSmart's SaaS service model and providing substantial cost savings for City, are set forth below and incorporated by reference in the Agreement.

A. **WaterSmart's reservation of intellectual property rights**

City acknowledges that services contemplated by the Agreement are to be provided primarily by remote online utilization of WaterSmart's proprietary software. WaterSmart has created, acquired or otherwise currently has rights in, and may, in connection with the performance of the Agreement or otherwise develop, create, employ, provide, modify, acquire or otherwise obtain rights in various inventions, concepts, ideas, methods, methodologies, procedures, processes, know-how, techniques, models, templates, software, applications, documentation, user interfaces, screen designs, source code, object code, databases, algorithms, development framework repositories, system designs, processing techniques, tools, utilities, routines and other property or materials, including without limitation any and all subject matter protected or which may be protected under patent, copyright, mask work, trademark, trade secret, or other laws relating to intellectual property, whether existing now or in the future, whether statutory or common law, in any jurisdiction in the world ("WaterSmart IP"). City acknowledges that WaterSmart owns and shall own all intellectual property rights in and to the WaterSmart IP and derivative works of WaterSmart IP (whether independently or jointly conceived), and that City shall acquire no right or interest in the same except for (a) ownership of "Custom Deliverables" as defined and stated in Section 11 of the Agreement, and (b) the following license grant with respect to WaterSmart IP. WaterSmart hereby grants to City a perpetual, non-exclusive, non-sublicenseable, non-transferable, license and right to use the WaterSmart IP embodied in the "Custom Deliverables" within City's utilities service territory. City may not build or sublicense others to build an additional work of improvement that embodies or derives from WaterSmart IP without WaterSmart's prior written consent. All rights not expressly granted by WaterSmart are reserved.

B. City's cooperation in providing necessary inputs

Custom Deliverables to be provided by WaterSmart via its proprietary software require certain data from City. City shall provide WaterSmart with those data, records, reports, approvals and other inputs identified for City to provide herein or otherwise requested by WaterSmart. City shall ensure that such inputs are accurate and within City's legal rights to share with WaterSmart subject to the confidentiality and other applicable provisions of the Agreement. Time is of the essence, and City shall provide its inputs within the timeframes specified for City herein. WaterSmart shall not be responsible for delays outside WaterSmart's control, and deadlines for WaterSmart's performance shall be adjusted, if necessary, to accommodate delays by City.

C. Confidentiality and WaterSmart's use of aggregated data

All data, documents and other information received from City by WaterSmart for performance of this Agreement are deemed confidential and shall not be disclosed by WaterSmart without City's prior written consent. For this purpose, City confidential information shall not include (i) information that, at the time of disclosure, is publicly available or generally known or available to third parties, or information that later becomes publicly available or generally known or available to third parties through no act or omission by WaterSmart; (ii) information that WaterSmart can demonstrate was in its possession prior to receipt from City; (iii) information received by WaterSmart from a third party who, to WaterSmart's knowledge and reasonable belief, did not acquire such information on a confidential basis from City; or (iv) information WaterSmart can demonstrate was independently developed by it or a third party; or (v) information that WaterSmart is legally required or compelled by a court to disclose.

The foregoing confidentiality obligations are subject to the following clarification of the parties' rights and obligations with respect to aggregated and anonymous data. City hereby gives its permission to WaterSmart to use and disclose on an anonymous and/or aggregated basis (excluding any personally identifiable information) any data pertaining to City end customers and their water consumption, including without limitation derivative data and data combined with the data of other utilities, for purposes of project evaluation and any research, product development, marketing, or other legitimate business purposes, so long as the customer has not opted out of the Program.

D. Software corrections and third party acts

In the event that WaterSmart's services fail to meet specifications or other requirements specified herein, City shall promptly notify WaterSmart and WaterSmart shall promptly correct any defect or substitute services, software, or products to achieve the functionality and benefits originally intended. If WaterSmart promptly makes such correction or substitution, WaterSmart shall have no further liability with respect to said defect(s), notwithstanding any other provision of the Agreement. All warranties not expressly stated in the Agreement are disclaimed. City understands that City's use of WaterSmart's services provided online may be interrupted by circumstances beyond WaterSmart's control involving third parties, including without limitation computer, telecommunications, Internet service provider or hosting facility failures or delays involving hardware, software or power systems not within WaterSmart's possession or direct control, and network intrusions or denial of service attacks (collectively, "Third Party Acts"). WaterSmart shall not be

responsible or otherwise liable for any Third Party Acts, including, without limitation, any delays, failures, or security breaches and damages resulting from or due to any Third Party Acts, provided that WaterSmart has exercised due care. However, in the case of any Third Party Act which will delay or prevent WaterSmart from providing online services to City, WaterSmart will promptly notify City and assist in mitigating any impact, and adjust the fees payable by the City during such delay.