

PEACE CREEK COOPERATION AGREEMENT

THIS PEACE CREEK COOPERATION AGREEMENT (the “Agreement” is entered into between the Polk Regional Water Cooperative (the “Cooperative”) and the City of Winter Haven (the “City”) (collectively, the “Parties”) with the Effective Date of the Agreement, as described herein.

WHEREAS, the Cooperative is an independent special district of the state of Florida created and currently existing pursuant to Sections 163.01, 189.031, 189.0311 and 373.713, Florida Statutes and an Interlocal Agreement composed of Polk County and the municipalities of Auburndale, Bartow, Davenport, Eagle Lake, Fort Meade, Frostproof, Haines City, Lake Alfred, Lakeland, Lake Wales, Mulberry, Polk City, Winter Haven, Dundee, and Lake Hamilton for the purpose of developing a fully integrated robust public water supply system comprised of diverse sources, which maximize the use of Alternative Water Supplies to the greatest extent practicable to meet the needs of its member governments; and

WHEREAS, the City is a municipality of the state of Florida located within Polk County, Florida and a member of the Cooperative; and

WHEREAS, on or about May 1, 2017, the Cooperative entered a Combined Projects Implementation Agreement with Polk County and the municipalities of Auburndale, Bartow, Davenport, Eagle Lake, Fort Meade, Haines City, Lake Alfred, Lakeland, Lake Wales, Mulberry, Polk City, Winter Haven, Dundee and Lake Hamilton for the purpose of evaluating and eventually implementing three approved projects; and

WHEREAS, one of three priority projects identified in the Combined Projects Implementation Agreement is the Peace Creek Integrated Water Supply Project (“Peace Creek Project”), which will reconfigure the Peace Creek Drainage Canal to restore at least 10 million gallons a day (“mgd”) of water resource benefit by recreating 5 wetland restoration areas to be credited to existing water supply permits and natural system restoration such as enhanced water quality, reduced environmental impacts, new habitat for fish and wildlife and increased flood protection; and

WHEREAS, the City is desirous to create a resilient and sustainable water future for its lakes and water supply and has identified numerous small scale wetland restoration and aquifer recharge projects for this purpose that could generate additional water supply and natural resource benefits that are not currently being considered by the Cooperative; and

WHEREAS, the Cooperative entered into a Cooperative Funding Agreement with Southwest Florida Water Management District (“District”) on or about August 15, 2017, which requires completion of the Phase 1 feasibility analysis contemplated in the Combined Projects Implementation Agreement on or about March 31, 2021; and

WHEREAS, it is contemplated under the Combined Projects Implementation Agreement that upon successful completion of the Phase I feasibility analysis the Cooperative and its member governments will decide whether to proceed to Phase 2 (i.e., construction and operations) with regards to any of the three approved projects, including the Peace Creek Project; and

WHEREAS, the Peace River is one of the largest watercourses in the State of Florida about 105 miles in length with a watershed covering approximately 2,350 square miles; and

WHEREAS, the Peace River originates in Polk County, drawing its headwaters from Lake Hancock, the Winter Haven Chain of Lakes and the confluence of the Peace Creek Drainage Canal and Saddle Creek, and flows south through Hardee, DeSoto and Charlotte Counties before discharging to Charlotte Harbor; and

WHEREAS, the District has established minimum flows pursuant to Sections 373.042 and 373.0421, Florida Statutes in Florida Administrative Code Rules 40D-8.041(5), (7) and (8); and

WHEREAS, one of the minimum flows established by the District for the Lower Peace River in Florida Administrative Code Rule 40D-8.041(8)(b) limits the total permitted maximum withdrawals from the Lower Peace River on any given day to 400 cubic feet per second (“cfs”) or 258 mgd (“MFL Maximum Daily Withdrawal”); and

WHEREAS, the Peace River/Manasota Regional Water Supply Authority (“Authority”) is an independent special district of the state of Florida created and currently existing pursuant to Sections 163.01, 189.031, 189.0311 and 373.713, Florida Statutes and a Second Amended Interlocal Agreement and composed of Charlotte, DeSoto, Manatee and Sarasota Counties, which currently owns and operates a surface water treatment plant facility in DeSoto County, which withdraws water from the Peace River for treatment, storage and distribution to its member governments and the City of North Port; and

WHEREAS, the Authority currently withdraws water from the Lower Peace River pursuant to Water Use Permit 20010420.009 (the “Existing Permit”), which was issued by the District on August 25, 2015 and which authorizes the Authority to produce water for its customers at an annual average use of 34.855 mgd and a peak month use of 41.852 mgd and to withdraw water from the Lower Peace River at a maximum day withdrawal of 120 mgd through October 1, 2037; and

WHEREAS, on October 2, 2017, the Authority applied to the District for Water Use Permit 20010420.010 (the “Proposed Permit”), which requested renewal and modification of its Existing Permit to increase the maximum day withdrawal from the Lower Peace River from 120 mgd to 258 mgd (“Maximum Daily Quantity”) and to extend its permit duration from 37 years to 50 years; and

WHEREAS, on April 24, 2018, the District issued Notice of Agency Action to approve the Proposed Permit with an annual average use of 80 mgd and a maximum day withdrawal from the Lower Peace River of 258 mgd with an expiration date of May 22, 2068; and

WHEREAS, the Cooperative, Polk County, the City of Bartow, the City of Fort Meade, the City of Lakeland, the City of Wauchula and the City of Winter Haven (the “Petitioners”) timely filed petitions for hearing with the District challenging the Proposed Permit, which were referred by the District to the Florida Division of Administrative Hearing (“DOAH”), where they were assigned Case Nos. 18-3276, 18-3278, 18-3280, 18-3282, 18-3283, 18-3288 and 18-3289 and consolidated for final hearing (the “Litigation”); and

WHEREAS, the Litigation was scheduled for a final hearing starting on January 28, 2019, but the hearing was canceled and the Litigation placed in abeyance in order to allow the Petitioners, the Authority and the District to settle this matter; and

WHEREAS, the Petitioners and the Authority have entered into the Peace River Cooperation Settlement Agreement (“Settlement Agreement”) in order to settle the Litigation; and

WHEREAS, the Settlement Agreement requires the Petitioners, the Authority and the District within 5 days of its effective date to file the Settlement Agreement with DOAH and file a joint motion in the Litigation requesting the Administrative Law Judge to relinquish jurisdiction to the District and forward the Settlement Agreement to take final agency action and approved a modified version of the Proposed Permit (the “Final Permit”); and

WHEREAS, the Settlement Agreement contemplates that the Final Permit will contain a new special condition requiring the Authority to reduce its Maximum Daily Quantity by up to 48 mgd, to be credited against impact, if any, from the proposed withdrawal of water by the Cooperative from Peace Creek or the Upper or Middle Peace River for storage in reservoirs or other approved consumptive uses ultimately for potable use or natural system restoration; provided, however, the Cooperative receives a notice of intent to issue a water use permit to withdraw water from Peace Creek or the Upper or Middle Peace River within 10 years of the issuance date of the Final Permit; and

WHEREAS, the Settlement Agreement provides, if the Final Permit is issued with the specified modifications, upon becoming final agency action, the Petitioners' petitions for hearing shall be dismissed and shall be deemed dismissed with prejudice, thus ending the Litigation; and

WHEREAS, the City wishes to preserve its ability to develop water supply or natural system restoration projects in the Peace Creek Watershed should the Peace Creek Project prove infeasible, or the Cooperative decides not to implement the Peace Creek Project as a regional project or should the Peace Creek Project not utilize all the surface water available for consumptive use; and

WHEREAS, the Cooperative desires to extend and/or confirm to the City the benefits the Cooperative and/or the City will enjoy under the Settlement Agreement so that the City can develop water supply or natural system restoration projects in the Peace Creek Watershed should the Peace Creek Project prove infeasible, or the Cooperative decides not to implement the Peace Creek Project as a regional project or should the Peace Creek Project not utilize all the surface water available for consumptive use.

NOW THEREFORE, in consideration of the mutual covenants and conditions contained herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree, as follows:

I. EFFECTIVE DATE. This Agreement shall become effective on the date it is duly executed by both Parties and upon the District taking final agency action approving the Permit and the Petitioners' petitions for hearing in the Litigation are dismissed with prejudice.

II. DURATION. This Agreement shall remain in effect for the duration of the Settlement Agreement.

III. COOPERATION REGARDING THE PEACE CREEK WATERSHED.

- a. Priority of the Peace Creek Project. The City may only develop water supply or natural system restoration projects in the Peace Creek Watershed that impact surface water availability including but not limited to, local projects that are determined to be feasible by the City with the Cooperative's prior written consent, which shall not be unreasonably withheld. The City may develop water supply or natural system restoration projects in the Peace Creek Watershed without the Cooperative's written consent under the following circumstances:
 - i. The Cooperative decides the Peace Creek Project is not feasible or otherwise decides not to implement it as a Cooperative project; or
 - ii. The Cooperative fails to obtain a notice of intent to issue a Water Use Permit from the District for the Peace Creek Project prior to March 31, 2022; or
 - iii. The Cooperative fails to make a decision to move forward with the Peace Creek Project under Phase 2 of the Combined Projects Implementation Agreement prior to March 31, 2022; or
 - iv. The Cooperative obtains a notice of intent to issue a Water Use Permit from the District and decides to move forward with the Peace Creek Project under Phase 2 of the Combined Projects Implementation Agreement prior to March 31, 2022 and there is a quantity of surface water available in the Peace Creek Watershed beyond what is needed to support the Peace Creek Project, as determined by the Cooperative and the City
- b. City Projects Within the Peace Creek Watershed. In the event the City is able to develop water supply or natural system restoration projects in the Peace Creek Watershed pursuant to Article III.a. above, the Cooperative, at the request of the City, shall execute any water use permit application as a co-applicant and shall take any other steps as needed to ensure that the Authority will reduce its Maximum Daily Quantity by up to 48 mgd, to be credited against impact, if any, from the proposed withdrawal from Peace Creek.
- c. The Cooperative expresses its intent to fully consider the hydrologic conditions of the entire watershed and the multiple benefits of proposed

projects, including lake levels, water quality, flooding, community benefits, and natural systems.

IV. TERMINATION. This Agreement may only be terminated by written consent of all the parties.

V. MISCELLANEOUS PROVISIONS.

- a. Notice. All notices, amendments, requests, consents and other communications required or permitted under this Agreement shall be in writing (including telex, facsimile or telecommunication) and shall be (as elected by the Party giving such notice) hand delivered by prepaid express overnight courier or messenger service, telecommunicated or mailed (air-mail if international) by registered or certified mail (postage prepaid), return receipt requested, to the following addresses or to such other address(es) as a Party may designate by prior written notice in accordance with this provision to the other Party:

As to the Cooperative Polk Regional Water Cooperative
330 W. Church Street
Bartow, FL 33831-9005
Attn: Ryan J. Taylor
Executive Director
Phone: (863) 534-6475
Fax: (863) 534-7069

With a copy to:
(Which Shall Not
Constitute Notice) de la Parte & Gilbert, P.A.
101 E. Kennedy Boulevard
Suite 2000
Tampa, FL 33601
Attn: Edward P. de la Parte, Jr. Esq.
Phone: (813) 229-2775
Fax: (813) 229-2712

As to Winter Haven City of Winter Haven
City Hall
451 Third Street NW
Winter Haven, FL 33881
Attn: Michael Herr
City Manager
Phone: (863) 291-5600
Fax: (863) 291-5623

With a copy to:
(Which Shall Not
Constitute Notice)

Boswell & Dunlap, LLP
245 South Central Avenue
Bartow, FL 33830
Attn: Frederick J. Murphy, Jr., Esq.
City Attorney
Phone: (863) 533-7117
Fax: (863) 533-7412

- b. Authority to Enter Agreement. The Parties each have the power, authority and legal right to enter into and perform the obligations set forth in this Agreement, and the execution and delivery and performance hereof by the Parties has been duly authorized by the governing authority of each of the Parties.
- c. Entire Agreement. This Agreement represents the entire understanding and agreement between the Parties with respect to the subject matter hereof. This Agreement also supersedes and replaces all prior representations, statements and understandings between the Parties with respect to the matters and things addressed herein, either written and oral.
- d. Other Agreements. This Agreement shall not supersede or modify any prior agreements between the Parties, including, but not limited to the Interlocal Agreement Relating to the Establishment of the Polk Regional Water Cooperative, the Combined Projects Implementation Agreement or the Peace River Cooperation Settlement Agreement. In the event of a conflict between this Agreement and the Interlocal Agreement Relating to the Establishment of the Polk Regional Water Cooperative, the Combined Projects Implementation Agreement, or the Peace River Cooperation Settlement Agreement or any modification or amendment of said agreements, those agreements or modifications or amendments shall control over this Agreement.
- e. Binding Effect. All of the terms and provisions of this Agreement, whether so expressed or not, shall be binding upon, inure to the benefit of, and be enforceable by the Parties and their respective legal representatives, successors and permitted assigns.

f. Default and Remedy.

- i. Default. Failure on the part of any Party to observe, comply with, perform or maintain in any material way any term, covenant, condition, duty, obligation, representation or express warranty contained in this Agreement shall constitute a Default under this Agreement.
- ii. Notice of Default and Opportunity to Cure. Upon occurrence of an alleged Default by any Party, the other Party shall deliver written notice to the Party allegedly in Default that identifies the specific nature of the alleged Default. The Party receiving such notice shall have thirty (30) days within which to cure the alleged Default. Provided, that if the alleged Default is of such nature that it cannot be reasonably cured within thirty (30) days, the Party allegedly in Default shall have such additional time as may be reasonably necessary to cure the alleged Default, so long as within said period, the alleged defaulting Party commences the cure and diligently prosecutes such cure until completion.
- iii. Remedy for Default. For any alleged Default not cured as provided in Article V.e.ii of this Agreement, the non-Defaulting Party may seek any remedy it may have available in law or in equity against the alleged Defaulting Party.
- iv. Mediation. Prior to seeking any legal remedy for a Default as provided in Article V.e.iii of this Agreement, a Party shall be required to mediate the dispute with the Party in Default. A Party submitting a dispute to mediation shall do so by delivering to the other Party a notice requesting mediation of the dispute and providing a list of three mediators acceptable to the requesting Party. Within 10 business days after receipt of the notice from the requesting Party, the other Party shall in writing provide notice of either the selection of one of the mediators proposed by the requesting Party or offer a list of three additional mediators for consideration. Within 10 business days of the requesting Party's receipt of the notice of selection or list of alternative mediators, the Parties shall meet for the purpose of selecting one of the mediators proposed by the Parties. The mediators proposed by the Parties shall be Florida Supreme Court certified mediators, and, to the extent practicable, mediators shall have special competence and experience with respect to the subject matter

under consideration. Within 20 days after a mediator is agreed upon, a reasonable time and date for the mediation shall be scheduled between the Parties and documented in writing. The mediation shall be conducted expeditiously and the location of the mediation shall be at a location mutually selected by the Parties, or at a location in Hillsborough County of the mediator's choosing if the Parties cannot agree on a location. The Parties shall share equally in the fees and expenses of the mediator. Each Party shall pay their respective attorney's fees, expert fees and other expenses related to the mediation. Any settlement achieved through mediation shall be made in writing approved by the Parties. If a settlement is not reached within 120 days after the initiation of mediation or, if the mediator declares an impasse, then the non-Defaulting Party may seek any and all legal or equitable remedies for the alleged Default. The mediation process set forth herein is intended to be a waiver of or a substitute or replacement for the conflict resolution process set forth in Chapter 164, Florida Statutes.

- g. Time Extensions. The Parties by joint written consent may extend or change any of the deadlines specified in this Agreement.
- h. Amendment or Modification. This Agreement may only be amended or modified, in whole or in part, at any time, through a written instrument that sets forth such changes and which is signed by all the Parties.
- i. Waiver. Any failure by a Party to exercise any right, power or privilege under this Agreement shall not constitute a waiver of that right, power, or privilege under this Agreement.
- j. Assignability. This Agreement may not be assigned without the prior written consent of all the Parties to this Agreement.
- k. Third Parties. Nothing in this Agreement, whether express or implied, is intended to confer any rights or remedies under or by reason of this Agreement, on any person other than the Parties their legal representatives, successors and permitted assigns. Nothing in this Agreement is intended to relieve or discharge the obligation of any third person to any Party nor shall any provision of this Agreement be interpreted to give any third person any right of subrogation or action over or against the Parties.

- l. Recording. The Parties intend this Agreement to be an interlocal agreement pursuant to Section 163.01, Florida Statutes and it shall be recorded by the Cooperative with the Clerk of the Circuit Court in and for Polk County, Florida.
- m. Severability. If any part of this Agreement is contrary to, prohibited by or deemed invalid under applicable law or regulation, such provision shall be inapplicable and deemed omitted to the extent so contrary, prohibited or invalid, but the remainder hereof shall not be invalidated thereby and shall be given full force and effect so far as possible.
- n. Governing Law and Venue. This Agreement and all transactions contemplated by this Agreement shall be governed by, and construed and enforced in accordance with the laws of the State of Florida without regard to any contrary conflicts of law principle. Venue of all proceedings in connection herewith shall be exclusively in Polk County, Florida and each Party hereby waives whatever their respective rights may have been in the selection of venue.
- o. Headings. The headings contained in this Agreement are for convenience of reference only, and shall not limit or otherwise affect in any way the meaning or interpretation of this Agreement.
- p. Attorney's Fees. The Parties agree that each Party shall bear its own attorney's fees and costs incurred in connection with this Settlement Agreement.
- q. Waiver of Jury Trial. The Parties expressly and specifically hereby waive the right to a jury trial as to any issue in any way connected to this Agreement.
- r. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.
- s. No Construction Against Drafting Party. The Parties to this Agreement expressly recognize that this Agreement results from a negotiation process in which each Party was given the opportunity to consult with counsel and contribute to the drafting of this Agreement. Given this fact, no legal or other presumptions against the Party drafting any portion of this Agreement concerning its construction, interpretation, or otherwise shall accrue to the benefit of any Party to this Agreement and

each Party expressly waives the right to assert such presumption in any proceeding or disputes connected with, arising out of, or involving this Agreement.

t. Miscellaneous Provisions.

- i. No Party shall be deemed to be an agent of any other Party nor shall represent that it has the authority to bind any other Party.
- ii. In computing any time period under this Agreement, any reference to days shall mean calendar days, unless business days are specifically referenced. In computing any period of time under this Agreement, exclude the day of the event that triggers the computation of the period of time. If the last day of a period of time is a Saturday, Sunday or legal holiday, the period of time shall run until the end of the next calendar day which is not a Saturday, Sunday or legal holiday.
- iii. Nothing in this Agreement shall be deemed a waiver of any Party's police powers.

**POLK REGIONAL
WATER COOPERATIVE**

By: _____
Tim Pospichal, Chair

Date: _____

Approved as to Form:

Edward P. de la Parte, Jr.
Legal Counsel

ATTEST:

[Seal]

Eugene Fultz, Secretary/Treasurer

CITY OF WINTER HAVEN

By: _____
Bradley T. Dantzler, Mayor

Date: _____

Approved as to Form and Correctness:

Frederick J. (“John”) Murphy, Jr.
City Attorney

ATTEST:

[Seal]

By: _____
Vanessa Castillo, MMC, City Clerk