

WATER USER AGREEMENT

entered into between:

uMgungundlovu District Municipality

Represented herein by

DR RBM NGCOBO

In his capacity as the **Municipal Manager**,

being duly competent and authorised to conclude this Agreement

and

UMGENI WATER

Herein represented by

DR S. MANANA

In his capacity as **the Chief Executive Office**

**IN RESPECT OF PHASE I OF THE UMKHOMAZI WATER PROJECT -
RAW WATER COMPONENT (uMWP-1)**

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PURPOSE OF AGREEMENT

1. **Wherefore**, the purpose and objective of this Agreement is to record and regulate the relationship between the Municipality and Umgeni Water in writing, in respect of the augmentation of supply of potable water by Umgeni Water through the Implementation of the uMWP-1, which will be funded and implemented by TCTA under a directive from the Minister of Human Settlements, Water and Sanitation, and to provide the mechanism to repay the costs related to the project;
2. **Wherefore**, in particular, the Parties record in terms of this Agreement, that:
 - 2.1 Umgeni Water will augment the supply of potable water from the Mgeni System through the development of the uMWP-1 infrastructure. In consideration for increased Assurance of Supply of water, the Municipality will pay to Umgeni Water the uMWP-1 Capital Tariff, which represents the tariff required to repay the actual Project Costs within the repayment period of such actual Project Costs, i.e. the Project Costs will be amortised over the repayment period. The uMWP-1 Capital Tariff will be calculated based on the lower of (i) the forecast of water demand of Major Water Users in Umgeni Water's area of supply and (ii) the yield of the Mgeni System, over the debt repayment period and will be charged and recovered by Umgeni Water from all users in the Umgeni Water area of supply;
 - 2.2 Umgeni Water will supply such potable water to the Users within its area of supply, and recover the full costs of implementing the uMWP-1, including but not limited to capital, funding and administrative costs, Water Use Charges and the ongoing operations and maintenance costs, and will remit such payments to the Department of Water and Sanitation. The Department of Water and Sanitation shall, in turn pay over to TCTA, as the delegated authority tasked with funding and Implementing the Project, revenue derived in part or fully from the uMWP-1 Capital Tariff, that shall be sufficient to enable TCTA to repay Project Costs, including servicing of its loan obligations under the various Financing Agreements to be concluded with Funders, to fully repay all such loans by the end of the repayment period of Project Costs;

PART 1: INTRODUCTION

1. DEFINITIONS

In this Agreement and the Annexures hereto, unless the context indicates otherwise, the words and expressions set out below shall bear the meanings assigned to them and cognate words and expressions shall have a corresponding meaning:

- 1.1 “Administration Costs” means the sum of all costs of an administrative nature, not forming part of Capital Costs and Funding Costs, incurred for or in connection with the Implementation and debt management of the Project, all fees incurred in connection with the Project, all costs incurred in the procurement of funding for the Project and all operational costs of an administrative nature which will include the costs of any insurance placed by TCTA up to the date of operational declaration, incurred by DWS, and/or TCTA in connection with the Project, but which are not included in the operations and maintenance costs nor the betterment and refurbishment costs, and excluding all design and construction related professional fees;
- 1.2 “Agreement” means this agreement duly signed by the Parties and includes all annexures hereto which form an integral part of the agreement between the Parties;
- 1.3 “Assurance of Supply” means the probability, expressed as a percentage, that a water user will obtain its licensed water requirements or a portion thereof from the Mgeni System, without water restrictions.
- 1.4 “Bulk Water Supply Agreement” means the bulk water supply contract (including all annexures thereto and as amended from time to time), concluded between UW and the Municipality, in terms of which UW supplies potable water from the waterworks within the Mgeni System to the Municipality.

- 1.5 "Capital Costs" means the sum of all costs of a capital nature, including all design and construction related costs and professional fees, not forming part of the Funding Costs and the Administration Costs, to Implement the Project and such other post-completion costs and expenditure as may be regarded by DWS and/or TCTA to be costs of a capital nature;
- 1.6 "Construction Phase" means the period from the date of commencement of the first construction contract awarded by TCTA for the Project until the date set out in the final Taking-Over Certificate in respect of the construction contracts awarded by TCTA;
- 1.7 "Commencement Date" means the date on which the last Party signs this Agreement;
- 1.8 "CPI" means the Consumer Price Index (for all urban areas), as published by Statistics South Africa (Statistical Release P0141), or any similar replacement index thereof from time to time;
- 1.9 "DWS" or "Department" means the Department of Water and Sanitation of the National Government of the Republic of South Africa or its successor in title;
- 1.10 "Financing Agreements" means the financing and security documentation entered into between the Funders and TCTA in respect of the financing for the Implementation of the Project;
- 1.11 "Force Majeure" means any relevant event, occurrence, circumstance or condition beyond the reasonable control of UW (including but not limited to *casus fortuitus*, landslides, lightning, earthquakes, tornados, floods, draughts, other acts of God, acts of military or third party civil authorities, or public enemies, war blockade, sabotage, fire, explosion,

bombing, insurrection, riots, or civil disobedience), relating to the infrastructure which constitutes uMWP-1 which occurrence could not have been reasonably foreseen when the Agreement was entered into and which, despite the exercise of diligent efforts, could not have been prevented, limited or minimised and which results in UW not being able to fulfil its duties, rights and obligations in terms of the Agreement, excluding drought;

- 1.12 "Funders" means collectively or individually, funders who from time to time, provide funds through loans and other similar finance instruments under and in terms of the Financing Agreements and various other instruments to TCTA, to enable TCTA to meet its obligations in respect of the funding and Implementation of the Project;
- 1.13 "Funding Costs" means the sum of all costs of a funding nature, not forming part of Administration Costs and Capital Costs, being costs relating to interest, expenses, banking charges (including breakage costs where applicable) and the like incurred in connection with the raising of capital to fund the Project and to maintain such capital in force;
- 1.14 "Implement" means in relation to the Project or where applicable, any phase of the Project, the entire process of planning, designing, constructing, commissioning and supervising each of the aforesaid processes of the Project as a government waterworks, in accordance with the provisions of the NW Act and all other relevant legislation or administration action, and "Implementation" shall have a corresponding meaning;
- 1.15 "Major Water Users" means:

- 1.15.1 eThekweni Municipality;
- 1.15.2 Msunduzi Local Municipality; and
- 1.15.3 uMgungundlovu Municipality;

- 1.16 “Mgeni System” means the Mgeni Water System comprising the Mgeni River, Mooi River, Spring Grove Dam, Albert Falls Dam, Nagle Dam, Inanda Dam, weirs, abstraction works, bulk transfer pipelines and appurtenant works.
- 1.17 “Minister” means the Minister of Water and Sanitation.
- 1.18 “MMTS-2” means the Spring Grove Dam on the Mooi River, a pumping station at such dam, bulk transfer pipeline and appurtenant works and developments.
- 1.19 “MMTS-2 Additional Tariff” means the additional tariff on MMTS-2 over and above the MMTS-2 Capital Tariff, approved by the Minister in January 2019 following consultations with the users. The MMTS-2 Additional Tariff was implemented with effect from July 2019 and is aimed at facilitating the prepayment of the MMTS-2 debt by 2023/24 in order to accommodate the funding of the next augmentation scheme, the uMkhomazi Water Project;
- 1.20 “MMTS-2 Capital Tariff” means the capital unit charge levied by DWS pursuant to the MMTS-2 RWS Agreement with UW which is calculated and charged on the total yield from the Mgeni System, to recover in monthly instalments over the loan repayment period, all Project Costs to be incurred by DWS and/or TCTA in connection with the implementation of MMTS-2;
- 1.21 “the Municipality” means the Msunduzi Municipality;
- 1.22 “NW Act” means the National Water Act, No. 36 of 1998;

- 1.23 "Operating Phase" means the period commencing after the Construction Phase following the issue of the final Taking Over Certificate/s in respect of the Project;
- 1.24 "Parties" means the Municipality and UW;
- 1.25 "Pricing Strategy" means the pricing strategy for charges for any water use within the framework of relevant Government policy, established by the Minister in concurrence with the Minister of Finance and published pursuant to section 56(1) of the NW Act;
- 1.26 "Project" or "uMWP-1" means an inter-basin water transfer scheme through which raw water will be stored in the uMkhomazi River catchment and transferred to the uMlaza River catchment. The uMWP-1's Raw Water Component will consist of the following infrastructure:
- 1.26.1 Smithfield Dam in the uMkhomazi River near Bulwer;
- 1.26.2 a conveyance infrastructure from the Smithfield Dam to the water treatment works in the uMlaza River valley; and
- 1.26.3 all ancillary works relating to the uMWP-1;
- as set out in **Annexure A**;
- 1.27 "Project Area" means the project area as set out in **Annexure A**;
- 1.28 "Project Costs" means the aggregate of all Capital Costs, Funding Costs and Administration Costs incurred or to be incurred by TCTA for purposes of funding and Implementing the Project;
- 1.29 "MMTS-2 RWS Agreement" means the Raw Water Supply Agreement concluded between DWS and UW on **19 March 2011** (as amended from time to time) to regulate

the supply of raw water into the Mgeni System to augment the supply of water to users;

- 1.30 “RWS Agreement” means the Raw Water Supply Agreement to be concluded between DWS and UW to regulate the supply of raw water into the Mgeni System in relation to the Project to augment the supply of water to users;
- 1.31 “Taking-Over Certificate/s” means the certificate/s to be issued by TCTA’s appointed engineering consultant in accordance with the provisions of the relevant construction contracts relating to the Project, which contracts shall be based on the terms contained in the Federation Internationale des Ingenieurs-Conseils (FIDIC) Model Agreements;
- 1.32 “TCTA” means the Trans-Caledon Tunnel Authority established by Notice No. 2631 published in Government Gazette No. 10545 dated 12 December 1986, as replaced by Notice No. 277 published in Government Gazette No. 21017 dated 24 March 2000, and its successors-in-title;
- 1.33 “uMWP-1” or “Project” means “uMWP-1” or “Project” as defined in sub-clause 1.26, above;
- 1.34 “uMWP-1 Capital Tariff ” means the capital unit charge to be levied by DWS against UW pursuant to the RWS Agreement which represents the tariff required to repay the Project Costs within the repayment period (as described in paragraph B5.2 of Annexure B) and is calculated and charged on the lower of forecast demand of the main users and the total yield from the Mgeni System, to recover in monthly instalments over the loan repayment period, all Project Costs to be incurred by DWS and/or TCTA in connection with the Implementation of the Project, as set out in **Annexure B**;

- 1.35 “uMWP-1 Incremental Tariff” means the capital unit charge to be levied by DWS on all third parties or incidental users taking water from the uMWP-1, which is calculated and charged on the incremental yield of the uMWP-1, as set out in **Annexure B**;
- 1.36 “uMWP-1 Project Committee” means the uMWP-1 Project Committee, established by TCTA in respect of the Project, with functions and responsibilities as set out in 20.3 below hereto;
- 1.37 “Users” means each user that takes water from the Mgeni System;
- 1.38 “UW” means Umgeni Water, a water board established in terms of section 28 of the WS Act and its successors-in-title;
- 1.39 “VAT” means value-added tax levied in accordance with the Value-Added Tax Act, 1991;
- 1.40 "Water Use Charges" means all charges levied by DWS in accordance with the Pricing Strategy and/or in terms of statutory requirements, as the case may be, which are not already covered under the uMWP-1 Capital Tariff and the uMWP-1 Incremental Tariff;
- 1.41 “Water User Agreement” means this agreement and similar agreements concluded or to be concluded between UW and relevant municipalities and/or other users within its area of supply to make provision for payment of the relevant portion of the Project Costs by such municipalities and users to UW, arising from the Implementation of the uMWP-1;
- 1.42 “WS Act” means the Water Services Act, Number 108 of 1997; and.

- 1.43 “yield” means the maximum annual abstraction from the Mgeni System at the level of Assurance of Supply after provision for the environmental water requirements.

2. INTERPRETATION

In this Agreement:

- 2.1 any reference to an enactment is to the relevant enactment as at the date of signature hereof, as amended or re-enacted from time to time;
- 2.2 a reference to natural persons shall include created entities (incorporated and unincorporated) and vice versa;
- 2.3 if any provision in a definition is a substantive provision conferring rights or imposing obligations on any Party, notwithstanding that it is contained in the Definitions clause, effect shall be given to it as if it is a substantive provision in the body of the Agreement;
- 2.4 when any number of days is prescribed in this Agreement, same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day falls on a Saturday, Sunday or public holiday, in which case the last day shall be the next succeeding day which is not a Saturday, Sunday or public holiday;
- 2.5 where figures are referred to in numerals and in words, and should there be a conflict between the two, the words shall prevail;
- 2.6 words importing any one gender shall include the other gender and the singular shall include the plural and vice versa;
- 2.7 expressions defined in the Definitions clause shall bear the same meanings in all Annexures to this Agreement which do not themselves contain their own definitions;
- 2.8 where any term is defined within the context of any particular clause in this Agreement, the term so defined, unless it is clear from the clause in question that the term so defined has limited application to the relevant clause, shall bear the meaning ascribed to it for all purposes in terms of this Agreement, notwithstanding that the term has not been defined in the Definitions clause;
- 2.9 the headings have been inserted for convenience only and shall not be used for nor assist in nor affect its interpretation;
- 2.10 the rule of construction that an agreement shall be interpreted against the Party responsible for the drafting or the preparation of the agreement shall not apply;

- 2.11 where any conflict arises between the provisions of this Agreement and the provisions of any Annexure hereto, then the provisions of this Agreement will prevail.

3. **PREAMBLE**

Whereas:

- 3.1 the Mgeni System supplies approximately 5.3 million people in the UW area of water supply, which includes the eThekweni Metropolitan Municipality, Msunduzi Local Municipality, uMgungundlovu District Municipality, Harry Gwala District Municipality, Ugu District Municipality, uThukela District Municipality and iLembe District Municipality (“**User Municipalities**”);
- 3.2 prior to its augmentation through uMWP-1, the Mgeni System comprises the Mgeni River, Mooi River, Midmar, Albert Falls, Nagle and Inanda dams, as well as the water transfer scheme from the Mooi River comprising the Mearns Weir, Spring Grove Dam and a conveyance system (“Mooi Mgeni Transfer Scheme” or “MMTS”) and bulk potable water distribution infrastructure. The Mgeni System is operated by UW on behalf of DWS;
- 3.3 the Mgeni System is in urgent need of augmentation to meet growing water demand for economic growth and human needs. The KwaZulu-Natal Coastal Metropolitan Reconciliation Strategy confirmed that the uMWP-1 is the next viable long-term scheme to augment the Mgeni System for immediate implementation;
- 3.4 a feasibility study conducted by DWS to explore options to augment the Mgeni System recommended the development of the uMWP-1;
- 3.5 the last augmentation scheme of the Mgeni System was Phase 2 of the MMTS (MMTS-2) which was successfully implemented by TCTA between 2011 and 2015, however, water demand from the system continues to grow and the system is currently in deficit;
- 3.6 MMTS-2 comprised the construction of the Spring Grove Dam on the Mooi River upstream of the Mearns Weir, a fish barrier upstream of Spring Grove Dam, a pumping station at the Spring Grove dam and a bulk transfer pipeline to the Umgeni River catchment;
- 3.7 MMTS-2 was financed and implemented by TCTA at a cost of R2.06 billion at completion, as an off-budget government waterworks and the costs are being recovered from the water users in the UW area of supply through a capital tariff as per the Ministerial directive issued to TCTA on 29 November 2007, and as amended on 11 December 2008. To finance MMTS-2, TCTA raised debt from financial institutions and manages gross outstanding debt of R1.3 billion as at 31 December 2020;

- 3.8 the capital tariff in respect of MMTS-2 is a charge levied on all bulk water supplied by UW (from the Mgeni System or any scheme not forming part of the Mgeni System) to its customers in its area of supply. The purpose of that tariff is to recover all project costs incurred or to be incurred by TCTA and/or the DWS towards the funding and implementation of MMTS-2. The supply of bulk water by UW to its customers is regulated by bulk water supply agreements;
- 3.9 the User Municipalities supported the augmentation of the Mgeni System through the implementation of MMTS-2;
- 3.10 as part of the funding model and institutional arrangements for MMTS-2, each of the eThekweni Metropolitan Municipality, the Msunduzi Local Municipality and the uMgungundlovu District Municipality concluded water user agreements with UW. However, all water users in the UW area of supply are obliged to pay all water use charges including the MMTS-2 capital tariff, for use of government waterworks, whether or not they have concluded a water use agreement with UW;
- 3.11 the purpose of the water user agreements was to record the municipalities' support for the implementation of MMTS-2 and their commitment to contribute to the recovery of MMTS-2 project costs through the capital tariff. In turn, UW concluded a MMTS-2 RWS Agreement with DWS, in terms of which DWS through TCTA procured the implementation of MMTS-2 and supplied bulk raw water to UW in the augmentation of the Mgeni System. DWS entered into an implementation agreement with TCTA as its funding and implementing agent to raise funding for and implement MMTS-2;
- 3.12 the Municipality was consulted on, and participated in, the DWS feasibility study for the augmentation of the Mgeni System with uMWP-1, and supported its outcomes, including the recommended option to augment the Mgeni System through the implementation of uMWP-1;
- 3.13 uMWP-1 will be an inter-basin water transfer scheme as described in clause 1.26;
- 3.14 on 22 February 2019, the Minister of Water and Sanitation directed TCTA to raise funding for, and to implement uMWP-1 as an off-budget government waterworks. In terms of the Directive, the Minister directed that the Project Costs be recovered from the direct and indirect beneficiaries of the Project through a capital tariff to be levied on water supplied by UW to its customers, and that all Mgeni System water users shall be deemed to be beneficiaries of the uMWP-1;
- 3.15 in anticipation of the funding of uMWP-1 and to alleviate the burden of overlapping debt service on the water users, an Additional Tariff for MMTS-2 was introduced from July

- 2019 and charged on water users to facilitate the accelerated repayment of outstanding MMTS-2 debt by 2023;
- 3.16 the Municipality has agreed to, and supports the augmentation of the Mgeni System by implementing uMWP-1 by TCTA in order to improve the level of Assurance of Supply and increased supply of water in the Mgeni System;
- 3.17 in consideration for the costs incurred or to be incurred by TCTA and/or DWS in funding and implementing uMWP-1, the Municipality has agreed to pay the uMWP-1 capital tariff as part of water use charges, which shall be so determined as to, in aggregate, recover such project costs over a repayment period;
- 3.18 the cost of the uMWP-1 raw water component is estimated to be R23 billion (excluding VAT and funding costs) as determined in April 2019;
- 3.19 as part of the institutional arrangements, it is agreed that UW shall conclude and/or amend the RWS Agreement with DWS, TCTA will conclude an Implementation Agreement with DWS, and the Municipality will conclude this Agreement with UW;
- 3.20 the RWS Agreement provides that DWS undertakes the supply of bulk raw water from the uMWP-1 infrastructure to UW and, in turn, UW will accept such supplies of bulk raw water, purify such water and on-supply such water to the User Municipalities in terms of Bulk Water Supply Agreements concluded or to be concluded with each of them; and
- 3.21 the Implementation Agreement will record the responsibilities of TCTA in undertaking the funding and implementation of uMWP-1, and for DWS to ensure that TCTA is sufficiently funded to meet its obligations.

PART 2: OBJECTIVE AND OPERATION OF THE AGREEMENT

4. OBJECTIVE

- 4.1 Pursuant to the RWS Agreement, DWS undertook to augment the supply of bulk raw water from the uMWP-1 to UW and in turn, UW hereby undertakes to increase the Assurance of Supply and/or the supply of potable water to the User Municipalities with effect from the Operating Phase, as per clause 9.
- 4.2 The Municipality hereby accepts the increase in the Assurance of Supply of potable water because of the Implementation of the uMWP-1, under such terms and conditions as provided for in this Agreement.

4.3 In consideration for the infrastructure to be Implemented under the uMWP-1 for the supply of water, the Municipality shall pay over to UW, over and above any existing costs for the current supply of water by UW, the uMWP-1 Capital Tariff and the Water Use Charges referred to in this Agreement and **Annexure B** hereto.

4.4 Therefore, the Parties recognize that the objectives of the uMWP-1 are to:

4.4.1 augment the yield of the Mgeni System by an estimated 214 million cubic metres per annum; and

4.4.2 increase the assurance of supply to the Water Users in the Mgeni System area of supply.

5. **COMMENCEMENT AND DURATION**

5.1 Subject to its earlier termination as provided for elsewhere in this Agreement, this Agreement will come into effect on the Commencement Date and will remain in force until full repayment of the Municipality's share of Project Costs.

5.2 The Municipality's share of Project Costs shall be determined based on water use over a 12 (twelve) month period preceding the Signature Date, as set out in Annexure B. Each Municipality's share of Project Costs shall be determined as follows:

5.2.1 for the first year of commencement of the uMWP-1 Capital Tariff, the Municipality's share of Project Costs shall be based on that Municipality's actual water use from the Mgeni System from 1 July to 30 June of the financial year preceding the commencement of the uMWP-1 Capital Tariff, as a percentage of the yield of the Mgeni System; and

5.2.2 for the subsequent years, the Municipality's share of Project Costs shall be based on that Municipality's actual water use from the Mgeni System over the period commencing from 1 July to 30 June of the preceding financial year, as a percentage of the yield of the Mgeni System.

5.3 Repayment of the Municipality's share of Project Costs will commence with effect from the earlier of operational declaration of uMWP-1 and final repayment of the MMTS-2 project costs and will continue for a period of 20 (twenty) years after the issuing of the final Taking-Over Certificate under the last construction contract or full repayment of the Municipality's share of Project Costs, whichever shall be the later, provided that once full payment of the Municipality's share of Project Costs has been made, all further payment obligations in respect of the uMWP-1 Capital Tariff by the Municipality shall cease; whereafter any further charges levied in terms of the Pricing Strategy will be recovered in the normal course of providing water to the users. Notwithstanding the aforesaid, the

uMWP-1 Capital Tariff may be phased-in before operational declaration if agreed between the Parties.

PART 3: AUGMENTATION OF SUPPLY

6. IMPLEMENTATION OF uMWP-1

The Parties record that:

- 6.1 the uMWP-1 involves the development of water resource infrastructure within the Project Area, as set out in **Annexure A**;
- 6.2 the water resources of the uMWP-1 shall be developed, operated, utilised and managed with the objective of benefiting all water users in UW's designated area of supply;
- 6.3 DWS will augment the yield of Mgeni System and increase its assurance of supply through the uMWP-1 under the terms of the RWS Agreement and which will benefit the water users in the Mgeni System area of supply;
- 6.4 as a result of the augmentation of the Mgeni System through uMWP-1, UW will augment the supply of bulk potable water and increase the assurance of supply to the Municipality;
- 6.5 the augmentation of the Mgeni System and consequently the bulk potable water supply to the Municipality will increase the assurance of supply;
- 6.6 in recognition of such augmentation and increase in the assurance of supply, the Municipality undertakes to unconditionally make payments to UW, of such charges that will be added to tariffs on bulk potable water supplied by UW to the Municipality, in order to repay the actual costs that will be incurred by DWS and TCTA in connection with the funding and implementation of the Project, within the repayment period of such costs as provided for in terms of Annexure B (attached hereto) and other relevant documents;
- 6.7 the Municipality hereby confirms its support for:
 - 6.7.1 the augmentation of the Mgeni System;
 - 6.7.2 the implementation of uMWP-1 and the funding mechanism set out in this Agreement, particularly that the costs of the Project will be recovered through payment of a capital tariff which shall be included in water use charges; and
 - 6.7.3 the payment of capital tariffs as determined by the Minister, following annual consultation processes; and
- 6.8 the indicative Project Costs to be incurred by DWS and/or TCTA in the funding and implementation of uMWP-1 raw water component are estimated to be about R23 billion (excluding funding costs) as determined in April 2019.

7. RESTRICTIONS OF SUPPLY

7.1 Unless otherwise provided in a Bulk Water Supply Agreement between the Parties:

7.1.1 if, on reasonable grounds, it is believed that a water shortage exists or is imminent, or in any other circumstances necessitating its intervention, and DWS has applied restrictions on the water supply to UW from the uMWP-1 as may be appropriate at that time, in terms of the NW Act or any other applicable legislation, and such restriction has an impact on the supply from the Mgeni System to the users, UW may extend such restrictions on the water supply to UW from the uMWP-1 to the Municipality;

7.1.2 in the event of the likelihood of the imposition of water restrictions, UW shall use all reasonable endeavors to consult with the Municipality at least 2 (two) months before such water restrictions are imposed, as far as it is reasonably practicable to do so; and

7.1.3 give the Municipality at least 2 (two) month's written notice of any scheduled interruption or restriction of supplies of water by DWS as soon as UW receives such written notice from DWS of any scheduled interruption or restriction of supplies of water from the uMWP-1 for purposes of testing, renewing, examining, repairing or maintaining any part of the uMWP-1 infrastructure, if such restriction will impact on the supply of water from the Mgeni System.

7.2 The Municipality recognises that DWS will manage the water resources of the uMWP-1, on a systems basis, and reliability criteria will determine the implementation of restrictions, the extent thereof and the equitable distribution of water among different user categories, depending on the nature and severity of the circumstances experienced at the time.

PART 4: OBLIGATIONS AND CONDITIONS

8. GENERAL OBLIGATIONS OF THE MUNICIPALITY

The Municipality undertakes to:

8.1 pay the uMWP-1 Capital Tariff as provided for in this Agreement and in terms of payment arrangements that are provided for in the Bulk Water Supply Agreement.

8.2 provide information to UW as reasonably requested by UW.

8.3 promote the efficient use of water; and

8.4 to use its best endeavours to adhere to all water conservation policies and water demand measures as may be adopted from time to time.

9. GENERAL OBLIGATIONS OF UW

- 9.1 In addition to any other duties provided for elsewhere in this Agreement, UW undertakes to augment the water supply to the Municipality based on receiving an increased Assurance of Supply of water from the uMWP-1.

PART 5: THE UMWP-1 CAPITAL TARIFF, WATER USE CHARGES AND PAYMENT

10. THE uMWP-1 CAPITAL TARIFF AND UMWP-1 INCREMENTAL TARIFF

- 10.1 This Agreement and, in particular **Annexure B**, makes provision for the uMWP-1 Capital Tariff levied by DWS on UW, and by UW on the Municipality, and to be paid by the Municipality to UW.

- 10.2 The Parties recognize that:

10.2.1 the uMWP-1 Capital Tariff will be calculated and charged from time to time by DWS based on the lower of the projected demand for water from the Mgeni System and the yield of the Mgeni System over the Project Costs repayment period, taking into account annual adjustments to the UMWP-1 Capital Tariff and the Pricing Strategy;

10.2.2 the uMWP-1 Capital Tariff represents the tariff required to enable TCTA to service its debt obligations to the Funders in respect of the Project Costs. It will be charged and recovered by DWS from UW, who will in turn charge and recover it from the Municipality.

10.2.3 the uMWP-1 Incremental Tariff represents the cost of a unit of water supplied by DWS to third party or incidental users and is payable by such third party or incidental users to DWS;

10.2.4 the uMWP-1 Incremental Tariff shall be calculated in the manner set out in Annexure B hereto; and

10.2.5 all amounts received in connection with the uMWP-1 Incremental Tariff shall be applied to the reduction of the Debt.

11. WATER USE CHARGES

The Municipality shall pay the Water Use Charges to UW levied in terms of the Pricing Strategy by DWS separately to the uMWP-1 Capital Tariff and which will be determined by the Pricing Strategy and/or other statutory requirements in force at the relevant time and will be applicable both during and after the period of repayment of the uMWP-1 Capital Tariff.

12. PROCUREMENT OF THE SERVICE PROVIDERS FOR THE MAIN WORKS (DAM AND ASSOCIATED INFRASTRUCTURE, AND WATER CONVEYANCE INFRASTRUCTURE (I.E. TUNNEL AND PIPELINE)

- 12.1 Prior to the approval of the evaluation reports for the appointment of the service providers for the main works contracts, TCTA shall submit a request to each User's municipal or city manager (as case may be) for a no objection to award such contracts. The same letter to be copied to each municipality's representative in the Project Committee.
- 12.2 Each city/municipal manager shall respond within 7 (seven) days of receipt of the letter. It is the responsibility of each User's representative on the Project Committee to follow up with their municipal/city manager and ensure that the response is provided timeously.
- 12.3 If a User responds with an objection and decides to withdraw from this Agreement, its decision will be subject to the regime agreed under 13 below.
- 12.4 If a User responds with an objection and a proposal to negotiate, such negotiations will take place within the Project Committee and will have to be concluded within a period of 14 (fourteen) days. If no resolution is achieved, the matter will be referred to DWS for a decision, which decision will be binding on all parties.
- 12.5 Notwithstanding anything stated above, a User can only object on the basis of cost/budget related issues.

13. TERMINATION AND TERMINATION COSTS

- 13.1 In the event that the Implementation of the Project is terminated prior to the effectiveness of this Agreement, DWS shall be responsible for and absorb all the costs incurred in respect of the Project.
- 13.2 From the Commencement Date, the User shall have a right to withdraw from the Agreement in the event that the actual Project Costs at the time of conclusion of the construction contracts, exceed the estimated Project Costs by more than 15%.
- 13.3 Any decision to withdraw from the Agreement must be based on a unanimous decision or support by Users representing at least 75% of water use. If all Users pull out, they must bear 100% of the Termination Costs. Those Users who do not wish to pull out of the Agreement, will not be required to pay the Termination Costs.
- 13.4 The right to withdraw as contemplated in clause 13.2 herein will lapse from the date of conclusion of the major construction contracts.

- 13.5 In the event of any User failing to conclude the respective water user agreement under the Project, such User shall pay the incremental tariff for any water delivered to it in excess of the water supplied to that User in the 12-month period immediately prior to the uMWP-1 becoming effective and operational.

PART 6: LIABILITY, BREACH AND FORCE MAJEURE

14. GENERAL BREACH

- 14.1 In the event of a breach of any of the terms or conditions of this Agreement by either Party hereto, and the failure of such Party to remedy such breach within 21 (twenty one) days after receipt of a written demand by the aggrieved Party to effect such remedy, the aggrieved Party shall be entitled to terminate this Agreement forthwith. on written notice to the other Party, and such termination shall be without prejudice to any right of the aggrieved Party to recover, inter alia, any costs, damages or expenses arising from or consequent upon such breach. For the purposes of this Agreement and without in any way limiting the generality of this clause, the following shall be deemed to be material breaches of this Agreement by the Parties

14.1.1 any failure to comply with any of the terms and/or conditions of this Agreement, all of which are deemed to be material;

14.1.2 any attempt by the Municipality to compromise or enter into a scheme of compromise, composition or arrangement with its creditors (or if the Municipality is placed under administration); which will compromise the payment of all the costs and tariffs to be paid in terms of this Agreement;

14.1.3 the failure of the Municipality to pay the uMWP-1 Capital Tariff on due date and such failure is not remedied by payment of the amount due within 21 (twenty-one) business days after the date of a written notice from UW demanding payment thereof, unless the failure of the Municipality to pay the uMWP-1 Capital Tariff is caused by circumstances contemplated in clause 16, then the provisions of clause 14 shall prevail.

15. CONSEQUENCES OF NON-PAYMENT

- 15.1 Subject the consequences of failure to pay the uMWP-1 Capital Tariff by the Municipality include the following:

15.1.1 UW shall not be liable for any penalty that arises as a direct result of the action of, or failure to act by the Municipality, as required in accordance with the Water User Agreement.

- 15.1.2 UW shall give the Municipality a written notice if an account is outstanding, informing the Municipality that it intends to reduce the bulk water supply services to the Municipality by 20% (twenty per cent) within 30 (thirty) days of such notice if at least 50% (fifty per cent) of the account is not paid within this period or the Municipality fails to enter into an agreement with UW for the payment of the account in instalments;
- 15.1.3 where UW has reduced the bulk water supply services by 20% (twenty per cent) but the Municipality still has not settled the outstanding account, UW shall again give the Municipality notice in a manner similar to that stated in sub-clause 17.1.2 above, and advise the Municipality that the bulk water supply services will be limited by a further 20% (twenty per cent);
- 15.1.4 the phased reduction in bulk water supply services may, on further notice, exceed 40% (40 per cent), provided that bulk water supply services will under no circumstances whatsoever be reduced at the existing customer connections by a percentage that will limit the provision of basic water supply services to the Municipality's consumers. The Parties will agree on the quantity of water required for basic water supply services.
- 15.1.5 UW shall send copies of the notices given in terms of sub-clause 17.1.2 to 17.1.4 to the Minister, the Minister of Provincial and Local Government, the Member of the Executive Committee responsible for local government in the Province of KwaZulu-Natal; and
- 15.1.6 should the Municipality fail to make a payment notwithstanding the steps taken by UW in terms of the provisions of sub-clauses 17.1.2 to 17.1.5 above, UW shall initiate a dispute resolution process in terms of section 44 of the Local Government: Municipal Finance Management Act, Number 56 of 2003, as amended.

16. FORCE MAJEURE

- 16.1 The Municipality agrees that in any event of Force Majeure, neither Party shall be held liable for any failure to fulfil its duties and obligations in terms of this Agreement.
- 16.2 The Party affected by a Force Majeure event shall promptly notify the other Party in writing, and, if possible, advise the estimated extent and duration of such Party's inability to perform its duties and obligations.
- 16.3 Upon the cessation of the event, occurrence, circumstance or condition referred to in 18.2 above, the Party affected thereby shall notify the other Party of such cessation.

- 16.4 If as a result of Force Majeure, the performance of a Party's duties and obligations is only partially affected, such Party shall remain liable for the performance of those duties and obligations not affected by the event.
- 16.5 If the Force Majeure event causes material and unavoidable physical damage, or destruction to all or any of the Parties infrastructure or materially delays or prevents the performance of any duties and obligations in terms of this Agreement, or interrupts services and continues for more than 90 (ninety) consecutive days after any notification thereof, the Parties shall request the Minister to determine the manner in which the obligations of the Parties shall be restored.

17. DISPUTE RESOLUTION

- 17.1 The Parties shall make every effort to settle disputes in a spirit of cooperative governance. Should any dispute or difference arise out of or in connection with this Agreement, or its interpretation, the Parties shall use their best endeavors to resolve such dispute or difference in an amicable manner through good faith negotiations within 21 (twenty-one) days of their meeting. In the event that the dispute or difference is not resolved through such good faith negotiations, then the dispute will be escalated to senior representatives of each of the Parties who shall similarly negotiate in good faith and use their best endeavors to resolve such dispute between them within 21 (twenty-one) days of their meeting.
- 17.2 In the event that the Parties are unable to resolve such dispute or difference as provided for above, then either Party shall be free to utilize the mechanisms set out in the Intergovernmental Relations Framework Act 13 of 2005, to facilitate settlement of the dispute or matters connected therewith, in accordance with the procedures set out thereunder.
- 17.3 In the event that the Parties are unable to resolve the dispute between them within 3 (three) months of the date of a referral in terms of the Intergovernmental Relations Framework Act 13 of 2005, then either of the Parties shall be free to refer the matter to mediation for resolution by a mediator to be agreed and appointed by them and failing agreement on a mediator, by a mediator nominated by the Arbitration Foundation of Southern Africa ("AFSA"), on the written request of either Party. The costs of a mediator shall be borne by the Parties in equal shares.
- 17.4 Should the dispute not be resolved by mediation within 3 (three) months from such dispute having been declared or such other period as may be agreed by the Parties in writing, then either Party shall have the right to require that the dispute be referred to arbitration, in which event it shall be submitted to and be determined by arbitration in accordance with the Rules of AFSA by an arbitrator appointed by AFSA, provided that:

- 17.4.1 the arbitration shall be held in a summary manner with a view to it being completed as soon as possible.
- 17.4.2 the decision of the arbitrator shall be final and binding, subject to the Parties right to appeal in terms of the rules of AFSA and either Party will be entitled to apply to the High Court of South Africa to make such decision an order of court; and
- 17.4.3 the cost of the arbitration proceedings shall be borne by the Parties as determined by the arbitrator provided that where the arbitrator's decision is silent as to costs, the Parties shall each bear their own costs.
- 17.5 Nothing contained in this clause shall preclude any Party from applying to court for a temporary interdict or other relief of an urgent and temporary nature, pending the award of the arbitrator.

PART 7: GENERAL

18. uMWP-1 GOVERNANCE ARRANGEMENTS

- 18.1 The Parties record that the Project participants intend to Implement the Project in a consultative manner involving the participation of relevant stakeholders as may be reasonably practicable. Institutional arrangements and processes are required to ensure meaningful participation by TCTA, DWS, UW and the Municipalities at the strategic and operational level of the Project. Such institutional arrangements will take into consideration the Directive and all applicable legislation including but not limited to the WS Act and the Intergovernmental Relations Framework Act, 2005.
- 18.2 The Municipality may participate at its own cost in the Project Committee established during the Implementation to ensure that information is exchanged between the Parties, to procure consensus seeking decisions and/or recommendations formulated within the context of relevant Delegations of Authority and/or mandates.
- 18.3 The Project Committee shall determine the procedural aspects relating to its mandate and TCTA shall be responsible for managing the arrangements relating to the functioning of such Project Committee.

19. DOMICILIUM CITANDI ET EXECUTANDI

19.1 The Parties choose as their domicilium citandi et executandi for all purposes under this Agreement, whether in respect of court process, notices or other documents or communications of whatsoever nature, the following addresses:

19.1.1 The Municipality:
uMgungundlovu District Municipality
242 Langalibalele Street
Pietermaritzburg
Email: mm@umdm.gov.za
Attention: Dr RBM Ngcobo

19.1.2 Umgeni Water
310 Burger Street
Pietermaritzburg
Email: siphomanana@umgeni.co.za
Attention: Dr S Manana

19.2 Any notice or communication required or deemed given in terms of this Agreement shall be valid and effective if reduced to writing and sent to the Party's physical address.

19.3 Any notice to a Party:

19.3.1 sent by pre-paid registered post in a correctly addressed envelope to it at its domicilium address shall be deemed to have been received on the 5th (fifth) business day after posting;

19.3.2 delivered by hand to a responsible person during ordinary business hours at its domicilium address shall be deemed to have been received on the day of delivery; or

19.3.3 sent by electronic mail to its chosen electronic mail address as stipulated above, during normal business hours, shall be deemed to have been received on the date of dispatch.

Notwithstanding anything to the contrary contained herein, a written notice or communication actually received by a Party shall be an adequate written notice or communication to it notwithstanding that it was not sent to or delivered at its chosen domicilium citandi et executandi.

20. **CONFIDENTIALITY**

- 20.1 Subject to applicable law, each Party shall keep confidential and not disclose any trade secrets, confidential documentation, proprietary information, technical know-how and data, systems, methods, commercial, financial and technical information which may be disclosed to it by the other Party to this Agreement, to any other party, other than to persons employed by them and/or authorised by them and who are required to have such information for purposes of fulfilling their respective obligations under this Agreement.
- 20.2 Each Party hereby acknowledges that the confidential documentation and/or information is of substantial value and each Party undertakes not to disclose any confidential information to any other party, except for the purposes contemplated under this Agreement.
- 20.3 The confidentiality obligations will not apply to information which:
- 20.3.1 is public knowledge, or becomes public knowledge at any time through no fault of the Party receiving such confidential information; or
 - 20.3.2 is disclosed to any of the Parties by another party with the lawful right to make such disclosure and which did not obtain such information directly or indirectly from the disclosing Party; or
 - 20.3.3 was known to the receiving Party prior to the date of disclosure by the disclosing Party as it is able to prove through documentary material in its possession; or
 - 20.3.4 is required to be disclosed in terms of an order of court, law, regulation or any forum or regulatory authority (including without limitation, a stock exchange body).
- 20.4 The Parties record that the confidentiality obligations set out herein shall remain in force indefinitely notwithstanding termination of this Agreement.
- 20.5 Notwithstanding the confidentiality provisions contained in this clause 20, the User shall freely share Project information with other Major Water Users.

21. GENERAL

- 21.1 Should the responsibility for the supply of potable water from the Mgeni System to the Municipality be assigned or delegated to a water management institution as defined in the NW Act, or any other institution or body created in terms of any subsequent legislation replacing or amending the NW Act, and such institution takes over the supply of potable water from the Mgeni System to the Municipality, the Municipality undertakes to continue to pay for the provision of potable water to such institution or body as provided in this Agreement and will sign any documentation to perfect any assignment or delegation to ensure the continuity of the payment for the provision of the water from uMWP-1.
- 21.2 Any provision in this Agreement that is or may become illegal, invalid or unenforceable in any jurisdiction affected by this Agreement shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability and shall be severed from the remainder of this Agreement without invalidating the remaining provisions of this Agreement.
- 21.3 The Parties to this Agreement shall preserve all documents and accounting records relating to water sales and payments received for a period of 3 (three) years after this Agreement has expired or terminated. The Parties shall allow each other access to such documents and records at any reasonable time and shall allow the other Party to have them audited by a person or persons nominated and paid for by that other Party.
- 21.4 Subject to any conditions to the contrary and the successful completion of the Project, this Agreement shall expire or be terminated by mutual agreement after full recovery of the Project Costs. Such expiration or termination shall not affect the provisions of this Agreement as far as it expressly provides that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this.
- 21.5 The Parties undertake at all times to do all such things, perform all such actions and take all such steps and to procure the doing of all such things, the performance of all such actions and taking of all such steps as may be open to them and necessary or incidental to the putting into effect or maintenance of the terms, conditions and import of this Agreement.
- 21.6 Where it is specified in this Agreement that certain matters are to be agreed between the Parties, any failure to reach agreement in respect of such matter will not affect the validity and enforceability of the remaining provisions of this Agreement.
- 21.7 This Agreement constitutes the whole agreement between the Parties as to the subject matter hereof and no terms, conditions, representations, undertakings or warranties between the Parties other than those recorded herein shall be binding on the Parties.

- 21.8 No addition to or variation, consensual cancellation or novation of this Agreement and no waiver of any right arising from this Agreement shall be of any force or effect unless reduced to writing and signed by both Parties.
- 21.9 Any extension of time or waiver or relaxation of any of the terms or conditions of this Agreement that either Party may grant to the other shall not prejudice such Party in respect of its rights under this Agreement nor preclude such Party thereafter from exercising its rights strictly in accordance with this Agreement. Any such extension, waiver or relaxation so given shall be construed as relating strictly to the matter for which it was given.
- 21.10 Under no circumstances shall anything in this Agreement fetter, or be deemed to fetter, the Minister's discretion as provided for in the NW Act, any regulations published thereunder or any other applicable legislation.
- 21.11 Notwithstanding anything to the contrary contained in this Agreement, in the case where the Municipality has defaulted in paying any amount/s by due date and has failed to remedy its default, UW may cede to DWS or TCTA, its right to institute such action as may be appropriate for recovery of the full amount outstanding with effect from the time that such amount/s became due and payable, to enable TCTA or DWS to institute whatever action is required against the Municipality, and the Municipality hereby consents to such cession.
- 21.12 This Agreement shall be binding on any successor in title of UW and any successor in title of the Municipality.

22. GOVERNING LAW

This Agreement will at all times be governed by, interpreted, and construed in accordance with the laws of the Republic of South Africa.

23. COSTS

Each Party shall be liable for its own costs in respect of the preparation, drafting, negotiation and settling of this Agreement.

24. COUNTERPARTS

Notwithstanding anything to the contrary contained in this Agreement or the Annexures hereto, this Agreement may be executed in counterparts, each of which will constitute the same document.

THE SIGNATORIES HEREUNDER WARRANT THEIR AUTHORITY TO SO SIGN

THUS, DONE AND SIGNED AT _____ ON THE ____ DAY OF _____ 2022

WITNESSES:

1. _____

THE MUNICIPALITY

2. _____

FULL NAMES: DR RBM NGCOBO

CAPACITY: MUNICIPAL MANAGER

THUS, DONE AND SIGNED AT _____ ON THE ____ DAY OF _____ 2022

WITNESSES:

1. _____

UMGENI WATER

2. _____

FULL NAMES: DR S. MANANA

CAPACITY: CHIEF EXECUTIVE OFFICER