

PROFESSIONAL SERVICES AGREEMENT

This Professional Services Agreement (this "Agreement") is made and entered into effective on June 14, 2022 (the "Effective Date") between City of John Day ("City"), an Oregon municipal corporation, whose address is 450 E Main Street, John Day, Oregon 97845, and CwM H2O, LLC ("Consultant"), an Oregon limited liability company, whose address is 1319 SE MLK Boulevard Suite 204, Portland, Oregon 97214.

RECITAL:

City desires to retain Consultant to perform certain on-call energy, water, and environmental consulting services and related services. Subject to the terms and conditions contained in this Agreement, Consultant will perform the Services (as defined below) for and on behalf of City.

AGREEMENT:

NOW, THEREFORE, in consideration of the parties' mutual obligations contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

1. Energy, Water and Environmental Consulting Services and Related Services.

1.1 Services; Standards. Subject to the terms and conditions contained in this Agreement, Consultant will perform the following energy, water, and environmental consulting services and related services for and on behalf of City (collectively, the "Services"): (a) those services and tasks identified in Consultant's "Water Resources, Water Rights, Groundwater Monitoring and Geotechnical Services Statement of Qualifications" dated June 28, 2021 attached hereto as Exhibit A (the "Proposal"); and (b) all other necessary or appropriate services customarily provided by Consultant in connection with its performance of those services identified in the Proposal. Consultant will (x) consult with and advise City on all matters concerning the Services reasonably requested by City, (y) communicate all matters and information concerning the Services to the city manager (or his or her designee) and report directly to the city manager (or his or her designee), and (z) devote such time and attention to performance of the Services as City deems necessary or appropriate.

1.2 On-Call Services. Notwithstanding anything contained in this Agreement to the contrary, City, in City's sole discretion, shall direct Consultant to perform the Services described in the Proposal through written Task Orders. Consultant will not provide the On-Call Services unless and until City provides Consultant written notice that the Services are requested (which notice will identify the specific Services requested, budget with not-to-exceed cost, and schedule for completing the Services). Consultant will timely provide any On-Call Services requested by City subject to and in accordance with this Agreement.

1.3 Coordination; Schedule of Services. Consultant will perform the Services as and when requested by City. Consultant will coordinate its performance of the Services with the city manager (or his or her designee). Consultant and City will routinely consult with each other to ensure effective and efficient provision of the Services.

1.4 Conditions Precedent. Notwithstanding anything contained in this Agreement to the contrary, City's performance of its obligations under this Agreement is conditioned on Consultant's performance of its obligations under this Agreement, including, without limitation, those Consultant obligations identified under Section 4.4.

2. Compensation.

2.1 Compensation. Subject to the terms and conditions contained in this Agreement, in consideration of Consultant's timely and faithful performance of its obligations under this Agreement, City will pay Consultant based on hourly rates defined in Consultant's Proposal. Consultant will submit monthly invoices to City concerning that portion

of the Services performed by Consultant during the immediately preceding month (each an "Invoice"). Each Invoice will contain the following information: (a) a summary of the Services (including any Additional Services, if applicable) performed by Consultant (and by whom); and (b) all other information and documentation City may reasonably request. City will pay the amount due under each Invoice within thirty (30) days after City has reviewed and approved the applicable Invoice. City's payment will be accepted by Consultant as full compensation for performing the Services to which the Invoice relates. No compensation will be paid by City for any portion of the Services not performed. Notwithstanding anything contained in this Agreement to the contrary, total compensation payable by City under this Agreement for performance of the Services will not exceed \$150,000.

2.2 No Benefits; Reimbursement. City will not provide any benefits to Consultant, and Consultant will be solely responsible for obtaining Consultant's own benefits, including, without limitation, insurance, medical reimbursement, and retirement plans. Consultant will provide, at Consultant's cost and expense, all materials, equipment, and supplies necessary or appropriate to perform the Services.

3. Relationship.

3.1 Independent Contractor. Consultant is an independent contractor of City. Consultant is not an employee of City. Consultant will be free from direction and control over the means and manner of performing the Services, subject only to the right of City to specify the desired results. This Agreement does not create an agency relationship between City and Consultant and does not establish a joint venture or partnership between City and Consultant. Consultant does not have the authority to bind City or represent to any person that Consultant is an agent of City. Consultant has the authority to hire other persons to assist Consultant in performing the Services (and has the authority to fire such persons).

3.2 Taxes; Licenses. City will not withhold any taxes from any payments made to Consultant, and Consultant will be solely responsible for paying all taxes arising out of or resulting from Consultant's performance of the Services, including, without limitation, income, social security, workers' compensation, and employment insurance taxes. Consultant will be solely responsible for obtaining all licenses, approvals, and certificates necessary or appropriate to perform the Services.

4. Representations; Warranties; Covenants.

In addition to any other Consultant representation, warranty, and/or covenant made in this Agreement, Consultant represents, warrants, and covenants to City as follows:

4.1 Authority; Binding Obligation; Conflicts. Consultant is duly organized, validly existing, and in good standing under applicable Oregon law. Consultant has full power and authority to sign and deliver this Agreement and to perform all Consultant's obligations under this Agreement. This Agreement is the legal, valid, and binding obligation of Consultant, enforceable against Consultant in accordance with its terms. The signing and delivery of this Agreement by Consultant and the performance by Consultant of all Consultant's obligations under this Agreement will not (a) breach any agreement to which Consultant is a party, or give any person the right to accelerate any obligation of Consultant, (b) violate any law, judgment, and/or order to which Consultant is subject, and/or (c) require the consent, authorization, and/or approval of any person, including, without limitation, any governmental body. By signing below, Consultant certifies that Consultant (and Consultant's principals) are not debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in and/or performing the Services under this Agreement.

4.2 Licenses; Quality of Services. Prior to Consultant's execution of this Agreement, Consultant obtained all licenses, approvals, and/or certificates necessary or appropriate to perform the Services. Consultant will perform the Services diligently, in good faith and in a professional manner, consistent with the degree of care and skill ordinarily exercised by the same or similar professional consultants, and consistent with the terms and conditions contained in this Agreement. The Services will be performed subject to and in accordance with the

Laws (as defined below). Consultant will be solely responsible for the Services. Consultant will make all decisions called for promptly and without unreasonable delay. All materials and documents prepared by Consultant will be accurate, complete, unambiguous, prepared properly, and in compliance with the Laws.

4.3 Insurance. During the term of this Agreement, Consultant will obtain and maintain, in addition to any other insurance required under this Agreement, the following minimum levels of insurance: (a) general liability insurance for all losses or claims arising out of or related to Consultant's performance of its obligations under this Agreement (including, without limitation, damages as a result of death or injury to any person or destruction or damage to any property) with limits of no less than \$1,000,000.00 per occurrence, \$2,000,000.00 in the aggregate; (b) comprehensive automobile liability insurance for all owned, non-owned, and hired vehicles (if any) that are or may be used by Consultant in connection with Consultant's performance of the Services with limits of no less than \$1,000,000.00 per occurrence, \$2,000,000.00 in the aggregate; (c) errors and omissions insurance with limits of no less than \$1,000,000.00; and (d) workers' compensation insurance in form and amount sufficient to satisfy the requirements of applicable Oregon law. Each liability insurance policy (except errors and omissions insurance) required under this Agreement will be in form and content satisfactory to City, will list City and each City Representative (as defined below) as an additional insured, and will contain a severability of interest clause; the workers' compensation insurance will contain a waiver of subrogation in favor of City. The insurance Consultant is required to obtain under this Agreement may not be cancelled without ten (10) days' prior written notice to City. Consultant's insurance will be primary and any insurance carried by City will be excess and noncontributing. Consultant will furnish City with appropriate documentation evidencing the insurance coverage (and provisions) and endorsements Consultant is required to obtain under this Agreement upon Consultant's execution of this Agreement and at any other time requested by City. If Consultant fails to maintain insurance as required under this Agreement, City may terminate this Agreement due to Consultant's default and pursue all rights and remedies provided under this Agreement and/or applicable law.

4.4 Compliance with Laws. Consultant will comply and perform the Services in accordance with the Laws. Without otherwise limiting the generality of the immediately preceding sentence, Consultant will comply with each obligation applicable to Consultant and/or this Agreement under ORS 279B.220, 279B.225, 279B.230, and 279B.235, which statutes are incorporated herein by reference. Prior to the Effective Date, Consultant obtained all licenses, approvals, and/or certificates necessary or appropriate to perform the Services. For purposes of this Agreement, the term "Law(s)" means all applicable federal, state, and local laws, regulations, restrictions, orders, codes, rules, and/or ordinances related to or concerning, whether directly or indirectly, Consultant, this Agreement, and/or the Services, including, Oregon's prevailing wage rate laws (ORS 279C.800 through 279C.870) if applicable, all applicable City ordinances, resolutions, policies, regulations, orders, restrictions, and guidelines, all as now in force and/or which may hereafter be amended, modified, enacted, or promulgated.

4.5 Indemnification. Consultant will indemnify and hold City and each present and future City employee, officer, and representative (individually and collectively, "City Representative(s)"), harmless for, from, and against all claims, actions, proceedings, damages, liabilities, injuries, losses, and expenses of every kind, whether known or unknown, including, without limitation, attorney fees and costs, resulting from or arising out of the following: (a) damage, injury, and/or death to person or property caused by Consultant's negligent acts and/or omissions (and/or the acts and/or omissions of Consultant's members, managers, directors, officers, shareholders, employees, agents, and/or representatives (individually and collectively, "Consultant Representative(s)")); (b) Consultant's failure to pay any tax arising out of or resulting from the performance of the Services; and/or (c) Consultant's breach and/or failure to perform any Consultant representation, warranty, covenant, and/or obligation contained in this Agreement. Consultant's indemnification obligations provided in this Section 4.5 will survive the termination of this Agreement for a period of two years.

4.6 Assignment of Studies and Reports. Consultant will assign all studies, reports, data, documents, and/or materials of any kind produced under this Agreement (individually and collectively, the "Deliverable(s)") to City upon the earlier of City's request or termination of this Agreement. All Deliverables provided to City will become the property of City who may use them without Consultant's permission for any proper purpose relating to the Services, including, without limitation, additions to or completion of the Services. City acknowledges that

City's modification and/or reuse of the Deliverables without Consultant's prior approval will be at City's sole risk. Consultant will defend all suits or claims for infringement of patent, trademark, and/or copyright for which Consultant is responsible, and Consultant will be liable to City for all losses arising therefrom, including costs, expenses, and attorney fees.

4.7 Records. Consultant will maintain complete and accurate records concerning all Services performed, the number of hours each person spent to perform the Services, and all documents produced under this Agreement for a period of five years after the termination of this Agreement. Consultant's records concerning the Services will be maintained in accordance with sound accounting practices and in an acceptable cost account system. Consultant agrees to provide City access to any books, documents, papers, and/or records of Consultant which are directly pertinent to this Agreement and/or the Services, including, without limitation, Consultant's time and billing records, for the purpose of making audit, examination, excerpts and transcriptions. Consultant agrees to maintain all books, records, and/or reports required under this Agreement for a period of no less than five years after final payment is made and all pending matters are closed.

4.8 Confidential Information. During the term of this Agreement, and at all times thereafter, Consultant will maintain all Confidential Information (as defined below) in the strictest confidence and will not directly or indirectly use, communicate, or disclose any Confidential Information to any person, or remove or make reproductions of any Confidential Information, except that Consultant may (a) use Confidential Information to perform the Services to the extent necessary, and (b) communicate or disclose Confidential Information in accordance with a judicial or other governmental order or as required by applicable law, but only if Consultant promptly notifies the city manager of the order and complies with any applicable protective or similar order. Consultant will promptly notify the city manager of any unauthorized use, communication, or disclosure of any Confidential Information and will assist City in every way to retrieve any Confidential Information that was used, communicated, or disclosed by Consultant and will exert Consultant's best efforts to mitigate the harm caused by the unauthorized use, communication, or disclosure of any Confidential Information. Upon the earlier of City's request or termination of this Agreement, Consultant will immediately return to City all documents, instruments, or materials containing any Confidential Information accessed or received by Consultant, together with all copies and summaries of such Confidential Information. If requested by City, Consultant will execute a written certification satisfactory to City pursuant to which Consultant will represent and warrant that Consultant has returned all Confidential Information to City in accordance with the terms of this Agreement. Notwithstanding anything contained in this Agreement to the contrary, the terms of this Agreement do not operate to transfer any ownership or other rights in or to the Confidential Information to Consultant or any other person. For purposes of this Agreement, the term "Confidential Information" means all documentation, information, and/or materials identified by City as confidential and/or any documentation, information, and/or materials relating to or concerning City's future plans, business affairs, employment, legal, and litigation matters that need to be protected from improper disclosure, in whatever form (e.g., hard and electronic copies, etc.), that is received or assessed by Consultant; provided, however, the term "Confidential Information" does not include City's public records which are non-exempt public records under applicable federal, state, and/or local laws.

5. Term; Termination.

5.1 Term of Agreement; Termination. Subject to the terms and conditions contained in this Agreement, the term of this Agreement commenced on the Effective Date and will remain in full force and effect for a period of twelve (12) months thereafter, unless sooner terminated or extended as provided in this Agreement. Notwithstanding anything contained in this Agreement to the contrary, (a) this Agreement may be terminated at any time by the mutual written agreement of City and Consultant, and/or (b) City may terminate this Agreement for convenience and without cause by giving thirty (30) days' prior written notice of such termination to the other party. Upon receipt of the notice of termination, except as explicitly directed by City, Consultant must immediately discontinue performing all Services.

5.2 Immediate Termination. Notwithstanding anything contained in this Agreement to the contrary, City may terminate this Agreement immediately upon notice to Consultant upon the happening of any of the

following events: (a) Consultant engages in any form of dishonesty or conduct involving moral turpitude related to Consultant's independent contractor relationship with City or that otherwise reflects adversely on the reputation or operations of City; (b) Consultant fails to comply with any applicable law related to Consultant's independent contractor relationship with City; (c) problems occur in connection with the performance of the Services; and/or (d) Consultant breaches and/or otherwise fails to perform any Consultant representation, warranty, covenant, and/or obligation contained in this Agreement. The determination as to whether any of the aforementioned events have occurred will be made by City in its sole discretion.

5.3 Consequences of Termination. Upon termination of this Agreement, City will not be obligated to reimburse or pay Consultant for any continuing contractual commitments to others or for penalties or damages arising from the cancellation of such contractual commitments, subject to City's obligations under Section 5.2. Notwithstanding anything contained in this Agreement to the contrary, termination of this Agreement by City will not constitute a waiver or termination of any rights, claims, and/or causes of action City may have against Consultant. Within a reasonable period of time after termination of this Agreement (but in no event later than five days after termination), Consultant will deliver to City all materials and documentation related to or concerning the Services.

5.4 Remedies. If a party breaches and/or otherwise fails to perform any of its representations, warranties, covenants, and/or obligations under this Agreement, the non-defaulting party may, in addition to any other remedy provided to the non-defaulting party under this Agreement, pursue all remedies available to the non-defaulting party at law or in equity. All available remedies are cumulative and may be exercised singularly or concurrently.

6. Miscellaneous.

6.1 Severability; Assignment; Binding Effect. Each provision contained in this Agreement will be treated as a separate and independent provision. The unenforceability of any one provision will in no way impair the enforceability of any other provision contained herein. Any reading of a provision causing unenforceability will yield to a construction permitting enforcement to the maximum extent permitted by applicable law. Consultant will not assign this Agreement to any person without City's prior written consent. Subject to the immediately preceding sentence, this Agreement will be binding on the parties and their respective heirs, personal representatives, successors, and permitted assigns, and will inure to their benefit. This Agreement may be amended only by a written agreement signed by each party.

6.2 Attorney Fees; Dispute Resolution. If any arbitration or litigation is instituted to interpret, enforce, and/or rescind this Agreement, including, without limitation, any proceeding brought under the United States Bankruptcy Code, the prevailing party on a claim will be entitled to recover with respect to the claim, in addition to any other relief awarded, the prevailing party's reasonable attorney fees and other fees, costs, and expenses, including costs and disbursements specified in ORCP 68 A(2), incurred in connection with the arbitration, the litigation, any appeal or petition for review, the collection of any award, or the enforcement of any order, as determined by the arbitrator or court. If any claim, dispute, or controversy arising out of or related to this Agreement occurs (a "Dispute"), City and Consultant will exert their best efforts to seek a fair and prompt negotiated resolution of the Dispute and will meet at least once to discuss and seek a resolution of the Dispute. If the Dispute is not resolved by negotiated resolution, either party may initiate a suit, action, arbitration, or other proceeding to interpret, enforce, and/or rescind this Agreement.

6.3 Governing Law; Venue. This Agreement is governed by the laws of the State of Oregon, without giving effect to any conflict-of-law principle that would result in the laws of any other jurisdiction governing this Agreement. Any action or proceeding arising out of this Agreement will be litigated in courts located in Grant County, Oregon. Each party consents and submits to the jurisdiction of any local, state, or federal court located in Grant County, Oregon.

6.4 Attachments; Further Assurances; Notices. Any exhibits, schedules, instruments, documents, and other attachments referenced in this Agreement are part of this Agreement; provided, however, if any exhibit, schedule, instrument, document, and/or other attachment conflicts with this Agreement, the terms contained in this Agreement will control. The parties will sign other documents and take other actions reasonably necessary to further effect and evidence this Agreement. Time is of the essence with respect to Consultant's performance of its obligations under this Agreement. All notices or other communications required or permitted by this Agreement must be in writing, must be delivered to the parties at the addresses set forth above, or any other address that a party may designate by notice to the other party, and are considered delivered upon actual receipt if delivered personally, by fax or email transmission (with electronic confirmation of delivery), or by a nationally recognized overnight delivery service, or at the end of the third business day after the date of deposit if deposited in the United States mail, postage pre-paid, certified, return receipt requested.

6.5 Waiver; Entire Agreement. No provision of this Agreement may be modified, waived, or discharged unless such waiver, modification, or discharge is agreed to in writing by City and Consultant. No waiver of either party at any time of the breach of, or lack of compliance with, any conditions or provisions of this Agreement will be deemed a waiver of other provisions or conditions hereof. This Agreement contains the entire agreement and understanding between the parties with respect to the subject matter of this Agreement and contains all the terms and conditions of the parties' agreement and supersedes any other oral or written negotiations, discussions, representations, or agreements. Consultant has not relied on any promises, statements, representations, or warranties except as set forth expressly in this Agreement.

6.6 Person; Interpretation; Execution. For purposes of this Agreement, the term "person" means any natural person, corporation, limited liability company, partnership, joint venture, firm, association, trust, unincorporated organization, government or governmental agency or political subdivision, or any other entity. All pronouns contained herein and any variations thereof will be deemed to refer to the masculine, feminine, or neutral, singular or plural, as the identity of the parties may require. The singular includes the plural and the plural includes the singular. The word "or" is not exclusive. The words "include," "includes," and "including" are not limiting. The titles, captions, or headings of the sections herein are inserted for convenience of reference only and are not intended to be a part of or to affect the meaning or interpretation of this Agreement. The parties may execute this Agreement in separate counterparts, each of which when executed and delivered will be an original, but all of which together will constitute one and the same instrument. Facsimile or email transmission of any signed original document will be the same as delivery of an original. At the request of either party, the parties will confirm facsimile or email transmitted signatures by signing and delivering an original document.

[end of agreement – signature page immediately follows]

IN WITNESS WHEREOF, the undersigned have caused this Agreement to be made effective for all purposes as of the Effective Date.

CITY:

City of John Day,
an Oregon municipal corporation

CONSULTANT:

CwM H2O, LLC.
an Oregon limited liability company

By: Ron Lundbom, Mayor

Federal Tax Id. No.: 93-6002192

By:

Federal Tax Id. No.: _____

Exhibit A

Energy, Water and Environmental Consulting Services and Related Services Proposal

[attached]