

Master Joint Use Agreement between the City of San Antonio and the San Antonio River Authority

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1. Recitals.

WHEREAS, on August 8, 2012, the City of San Antonio (“City”) passed Ordinance No. 2012-08-02-0562 approving the terms and conditions of an Interlocal Agreement (“ILA”) between the City and the San Antonio River Authority (“SARA” or “Joint User”); and

WHEREAS, pursuant to the ILA, SARA agreed to provide the San Antonio Office of Emergency Management (“SAOEM”) “technical support in the development and maintenance of a FloodWorks flood forecasting system to be delivered to SAOEM via a web-based interface”; and

WHEREAS, in order to develop the FloodWorks flood forecasting system to cover the Salado Creek, Upper San Antonio, Leon Creek, Medina, and Cibolo watersheds, the parties agreed that the City of San Antonio Public Works Department will assist SARA in providing access on City rights-of-way, for the deployment of their gauging system in Bexar County; and

WHEREAS, SARA anticipates that it will need access to 40 to 50 sites on City property or rights-of-way for the installation of rain gauges mounted on monopoles for the purpose of gathering data to forecast flooding events;

NOW, THEREFORE, in order for SARA to have access to City property and rights-of-way, as appropriate, the parties agree to enter into this Master Joint Use Agreement (the “Agreement”) setting out the terms and conditions of use, and the process that SARA will follow in requesting access to City property and right-of-way sites for the installation of rain gauging equipment and facilities.

2. Pertinent Information.

Authorizing Ordinance:

SP No.:

City: City of San Antonio

City’s Address: City Hall, P.O. Box 839966, San Antonio, Texas 3966
(Attention: Director, Capital Improvements Management Services Department)

Joint User: San Antonio River Authority

Joint User’s Address: 100 East Guenther St. San Antonio, Texas 78283-9980

Term: Indefinite duration subject to rights of termination set out in this agreement.

Premises: Various sites.

Scope of Permission: Installation, construction, reconstruction, realignment, inspection, patrolling, operation, maintenance, repair, addition, removal and replacement of rain gauges and monopole structures, including all facilities and appurtenances convenient to accomplishing the purpose, and additions and replacements thereto.

Consideration: Share with Public Works data gathered by the rain gauge instruments, underlying model, and other data sources integrated into SARA’s FloodWorks forecasting system, and provide space for collocation of City instruments on all monopoles installations.

3. Permission, Term, and Purpose.

3.01. **Scope of Permission.** The City authorizes SARA as a Joint User to access City property and rights-of-way, on a case-by-case basis as specified herein, for the purpose of installing monopole structures and electronic rain gauge equipment to develop the FloodWorks flood forecasting system in Bexar County, and for no other purpose. The Joint User may request access to multiple City property and right-of-way sites (each site referred to as the “Premises”) not to exceed 50 sites.

3.02 The Joint User acknowledges and covenants that its use and activities, as specified in the Scope of Permission under this Section 3, will not interfere with the use of the Premises by the City. This permission is non-exclusive. This instrument does not create an easement, but only a license defined by the terms of this instrument. The City will coordinate with Joint User any access or use that could affect Joint User’s infrastructure within the Premises.

3.03. In the event the City constructs permanent improvements over the Premises that would interfere with the operation of the electronic rain gauge equipment or require the removal of said equipment and related infrastructure, the Joint User will remove the rain gauges and monopole structure at its own expense.

3.04. This permission does not exempt Joint User from rules of general applicability governing activities within the Scope of Permission or from getting permits required generally for activities within the Scope of Permission.

3.05. The City reserves the right to request the Joint User to remove its equipment and structures at its own expense in order for the City to develop the Premises in any way it sees fit.

3.06. The initial term of this Permission is five (5) years with three (3) renewal terms of the same period not to exceed twenty (20) years. Joint User may request renewal of the initial term by providing the City 90 days notice to renew. The City reserves the right to review and amend the terms and conditions of the Agreement prior to approval of each additional term. Prior to expiration of the twenty (20) year term, the parties will determine whether a new license agreement is necessary. If the parties determine that a new license agreement is in the public interest, they will begin negotiations on a new agreement six (6) months prior to final expiration of the Agreement.

4. Construction, Maintenance, and Operations.

4.01. **Costs.** Joint User is solely responsible for all costs of construction, installation, repairs, maintenance, operation, removal, relocation, and the like of any property placed by Joint User in the Premises.

4.02. **Installation and Maintenance.** The Joint User will be responsible for installation of the monopole and mounting equipment pursuant to engineering drawings and industry standards. The Joint User must maintain all improvements constructed or installed by Joint User. In so doing, Joint User must adhere to all applicable safety standards and must adhere to all applicable federal, state, or local laws, rules, or regulations. Without limiting the foregoing,

Joint User must assure that nothing it does causes the Premises to fail to comply with any aspect of the Unified Development Code relating to drainage.

4.03. **No Power to Bind.** Joint User cannot bind or permit another to bind City for payment of money or for any other obligation.

4.04. **Contractors and Subcontractors.** Joint User must promptly pay anyone who could file a mechanics' or materialmen's lien on the Premises, unless there is a good faith dispute about the right to payment. If any such lien is filed, Joint User shall pay or bond around such claim within 30 days after Joint User's notice of the lien, failing which, City may treat it as an event of default and terminate this Permission as provided in Section 7 below entitled "Termination." Joint User remains obligated to clear the lien without cost to City even after termination.

4.05. **Restoration.** When the Joint User installs the monopole structure, Joint User must restore the original contours and vegetation disturbed by the partial burial of the structure to a condition substantially equivalent to its pre-existing condition, substantial equivalence to be determined by City. If an area has a natural appearance, Joint User must restore that natural appearance unless City otherwise agrees in writing. City's determination of natural appearance controls.

4.06. **Collocation.** The Joint User shall leave space in every monopole structure installed under this Agreement for the collocation of City-owned equipment and/or instruments on said monopole.

4.07. **No Interference.** The Joint User shall verify that the rain gauge instruments installed pursuant to this Agreement do not interfere with any City operated or managed wireless communications devices, equipment, or systems. In the event of interference, the Joint User shall immediately remedy the interference. If the interference cannot be eliminated the City may request the rain gauge instruments to be temporary or permanently removed.

5. Process for Requesting Access to City Property or Right-of-Way Sites.

5.01. Every time Joint User requests access to a City property or right-of-way site for the purpose of installing a monopole and electronic rain gauging equipment, Joint User will use the Rain Gauge Special Project Canvassing Sheet attached as Exhibit A. The Joint User will be required to submit an aerial photograph of the proposed site and engineering diagrams of the proposed installation. The Director of Public Works will authorize access to the requested site only after all approvals to the Rain Gauge Special Project Canvassing Sheet have been obtained.

5.02. The Rain Gauge Special Project Canvassing Sheet will be subject to approvals from the following City departments: (1) Public Works Department; (2) Capital Improvements Management Services Department ("CIMS"); (3) Information Technology Services Department ("ITSD"); (4) Office of City Attorney; (5) Office of the City Clerk; and (6) Office of Emergency Management. At the discretion of the Director of Public Works, other necessary approvals may

be added to the installation process. A flow chart of the process for obtaining city sites for rain gauge installations is attached as Exhibit B.

5.03. CIMS will verify that the site requested by the Joint User is owned by the City or that the City otherwise owns or controls a property interest in the site that allows the City to authorize the Joint User to install the required equipment and facilities.

5.04. ITSD will verify whether the installation of the proposed electronic equipment will result in any interference with any City wireless equipment that may be deployed in the vicinity of the requested site.

5.05. Public Works will verify that the propose installation does not interfere with scheduled mowing of the site, or in the alternative provide notice to the proper party(ies) responsible for mowing of the proposed installation. The Right-of-Way Management Office will determine whether the proposed installation request will require the issuance of a right-of-way permit.

5.06. Each site request will be treated as a separate installation under this Agreement and subject to the terms and conditions of the Agreement. The Joint User may make up to 50 such requests. Each request will be under a separately numbered Rain Gauge Special Project Canvassing Sheet. The Office of the City Attorney will compile all the necessary documents related to each request which will be incorporated into this Agreement as Attachments 1 to 50.

5.07. Only after the activities in Sections 5.03 to 5.06 have been complied with, will the Director of Public Works sign the Rain Gauge Special Project Canvassing Sheet.

5.08. Each separately numbered Rain Gauge Special Project Canvassing Sheet and all related documents will be filed with the Office of the City Clerk as an attachment to this Agreement and shall become part of the Ordinance approving the Agreement.

5.09. Once the Rain Gauge Special Project Canvassing Sheet has been signed by the Director of Public Works, the Joint User may proceed to obtain the appropriate permits to proceed with the installation. The Joint User is responsible for obtaining any other necessary permits or approvals for the proposed installation as required by city, state and federal law.

5.10. The work site for each rain gauge installation will be subject to appropriate city inspections. Prior to acceptance by the City, the rain gauge equipment will be subject to a testing protocol to ensure the delivery of data to the Emergency Operations Center.

6. Insurance and Claims Liability.

6.01. Joint User and City are political subdivisions of the State of Texas. As such they are subject to, and comply with, the applicable provisions of the *Texas Tort Claims Act*, as set out in the Civil Practice and Remedies Code, Section 101.001, *et. seq.*, and the remedies authorized therein regarding claims or causes of action that may be asserted by third parties for accident, injury or death.

6.02 Joint User and City shall provide insurance, as they deems necessary to insure against loss of property and personal injury to employees and third parties.

6.03. IN THE EVENT CITY AND JOINT USER ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS, FEDERAL, OR INTERNATIONAL LAW.

7. Termination.

7.01. City may terminate the Permission as to any installation at any time before expiration by giving Joint User 90 days written notice where the Director of Public Works finds that a rain gauge installation interferes with use of the Premises. Joint User shall have 30 days within which to remove and relocate its infrastructure.

7.02. Upon expiration or termination of any given installation, all rights and privileges cease, and Joint User must promptly cease use of the Premises, remove its infrastructure, and return the Premises to its original conditions.

7.03. Rain gauge installations not removed within 90 days after termination of the Permission, whether by expiration or otherwise, become the property of City to dispose of as the City sees fit.

7.04. Joint User may terminate this License at any time as to any and all installations by delivering notice to City and removing the rain gauge equipment and monopole structures.

8. No Assignment.

8.01. This Permission is for the exclusive benefit of the Joint User and cannot be assigned to any third party.

8.02. Subject to the City's rights of termination set out in Section 7 above, if City sells the Property of which the Premises are a part for any given installation, the City shall terminate the Permission for that installation and the Joint User will be required to remove its infrastructure at its own expense. In such event, the City will make available an alternative site for the rain gauge installation.

9. Condemnation.

If the Premises for any given installation are taken, in whole or in part, by eminent domain not for the benefit of City, then the Permission for that installation ceases on the date title to the land so taken or transferred vests in the condemning authority. Joint User waives all rights to any

condemnation proceeds, and will be required to remove its infrastructure at its own expense. In such event, the City will make available an alternative site for the rain gauge installation.

10. Taxes.

City is a governmental entity and does not expect to pay taxes. Joint User is responsible for taxes, if applicable, and Joint User may not claim tax exempt status arising from its use of the Premises under this Agreement. In no case will City ever be responsible for taxes, local, state, or federal, if any, that may be assessed against Joint User.

11. Appropriations.

All obligations of the City under this instrument are funded through the City of San Antonio General Fund and are subject to the discretion of City Council whether to appropriate funding for any given year of a term. If the City Council fails to appropriate money for an obligation arising under this agreement, the City cannot be required to fulfill the obligation.

12. Dispute Resolution.

12.01. As a condition precedent to bringing any action arising out of or relating to this Agreement or any aspect thereof, including an action for declaratory relief but not an action specifically excepted below, the disputants must first submit in good faith to mediation. The parties may not assert limitations, laches, waiver, and estoppel based upon attempts to mediate.

12.02. Filing suit on a claim that should be mediated hereunder waives the filer's right to demand mediation. But one party's waiver does not affect another party's right. A defendant does not waive mediation for so long as, within a reasonable time after appearing, the defendant gives written notice to the plaintiff or its counsel of intent to require compliance with this paragraph.

12.03. Mediation must be conducted in San Antonio, Bexar County, Texas.

12.04. The party desiring relief has the burden to initiate mediation. Waiting for another party to initiate mediation does not waive the right to it.

12.05. If the parties can otherwise agree on a mediator, they may do so. Alternatively, either party may petition any court of competent jurisdiction to appoint a mediator. The only predicate issues the court need consider before appointing a mediator are whether (i) the copy of the contract before the court is authentic, and (ii) the contract was duly signed and delivered by all parties to be bound to mediate. If neither of those issues is denied under oath, the court may appoint a mediator upon motion, without trial.

12.06. Mediator fees must be borne equally.

12.07. The parties need not mediate before going to court to seek emergency injunctive relief.

13. Miscellaneous Provisions.

13.01. **Relationship Limited.** This instrument creates only the relationship of City and Joint User. The parties are not principal and agent, partners, joint venturers, or participants in any common enterprise.

13.02. **Release From Liability/Notice of Sale.** If City transfers ownership of the Premises to any given installation, City shall comply with the requirements of this Agreement but will have no liability or obligation relating to the period after transfer.

13.03. **Consent/Approval of City.** As to any matter hereunder in which City's consent is required, the consent may be granted by the Public Works Director, as designee of the City Manager, without City Council action, unless the City Charter requires City Council action.

13.04. **Severability.** If any portion hereof is determined to be invalid or unenforceable, the determination does not affect the remainder hereof.

13.05. **Integration. This Written Permission Represents The Final Agreement Between The Parties And May Not Be Contradicted By Evidence Of Prior, Contemporaneous, Or Subsequent Oral Agreements Of The Parties. There Are No Oral Agreements Between The Parties.**

13.06. **Modification.** This Permission may not be changed orally but only by a written agreement, signed by the party against whom enforcement of any modification is sought. No such modification, express or implied, affects the right of the modifying party to require observance of either (i) any other term, or (ii) the same term or condition as it applies on a subsequent or previous occasion.

13.07. **Third Party Beneficiaries.** This Permission is intended for the benefit of the parties hereto. There are no third party beneficiaries hereof.

13.08. **Notices.** Any notice provided for or permitted hereunder must be in writing and by certified mail, return receipt requested, addressed to the parties at their respective addresses set forth at the beginning. The giving of notice is complete three days after its deposit, properly addressed and postage prepaid, with the United States Postal Service. Failure to use certified mail does not defeat the effectiveness of notice actually received, but such notice is effective only on actual receipt. Address for notice may be changed by giving notice hereunder.

13.09. **Captions.** Paragraph captions in this Permission are for ease of reference only and do not affect the interpretation hereof.

13.10. **Counterparts.** This Permission may be executed in multiple counterparts, each of which is an original, whether or not all parties sign the same document. Regardless of the number of counterparts, they constitute only one agreement. In making proof of this Permission, one need not produce or account for more counterparts than necessary to show execution by or on behalf of all parties.

13.11. **Further Assurances.** The parties must execute and deliver such additional documents and instruments as may be required to effect fully the provisions hereof. But no such additional document(s) may alter the rights or obligations of the parties as contained in this Permission.

14. Public Information.

Joint User acknowledges that this instrument is public information within the meaning of Chapter 552 of the Texas Government Code and accordingly may be disclosed to the public.

In Witness Whereof, the parties have caused their representatives to set their hands.

City:

City of San Antonio, a Texas municipal corporation

By: _____

Printed Name: _____

Title: _____

Date: _____

Joint User:

San Antonio River Authority, a political subdivision of the State of Texas

By: _____

Printed Name: _____

Title: _____

Date: _____

Approved As To Form:

City Attorney

Exhibit A – Rain Gauge Special Project Canvassing Sheet

DRAFT

Exhibit B – SARA Rain Gauge Planning/Implementation Process

DRAFT