STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD

IN RE: Application of
Invenergy Thermal Development LLC's
Proposal for Clear River Energy Center

Docket No. SB 2015-06

CONSERVATION LAW FOUNDATION'S MOTION FOR ORAL ARGUMENT AND FORMAL RULING ON INVENERGY'S REQUEST FOR ADDITIONAL HEARING IN BURRILLVILLE

Introduction

Conservation Law Foundation (CLF) respectfully requests that the Energy Facility Siting Board (EFSB or the Board) permit oral argument on Clear River Energy, LLC's (Invenergy's) October 19, 2017, request for yet another public hearing in Burrillville. CLF further requests a formal ruling from the EFSB on Invenergy's request, with the ruling reflected in a written Order of the Board.

A written Order, after full hearing, is necessary in order to create a clear record for appellate review in light of Invenergy's multiple contradictory, mutually exclusive statements about its water plan.

Facts

On October 29, 2015, Invenergy filed its original application (Invenergy Application), and told the EFSB that it would utilize water from Well 3A of the Pascoag Utility District (PUD) for cooling its proposed power plant. The Invenergy Application said that Invenergy "is expected to operate at a high capacity factor" – that is, be a baseload plant – and, in order for that

to be possible, "Water supply to the project must meet large volume requirements." Invenergy Application, Section 6.2.3.1, at p. 46.

Although the Invenergy Application stated that Invenergy would obtain water from PUD, in fact Invenergy had not entered into a water contract with PUD. Invenergy's assertion that it would obtain water from PUD was inaccurate; PUD refused to supply water to Invenergy.

Invenergy then sought water from the Harrisville Fire District, but was rebuffed.

Invenergy then sought water from the Nasonville Water District, but was rebuffed.

Invenergy then sought water from the City of Woonsocket, but was rebuffed.

In the autumn of 2016, it was clear that Invenergy's application was incomplete because Invenergy had no source of cooling water for its proposed plant.

On October 13, 2016, "Invenergy was ordered to show cause why its application proceedings should not be suspended due to an incomplete application caused by the absence of a water supply plan." EFSB Order 103, dated October 20, 2016, effective October 13, 2016. EFSB Order 103 concluded that "[t]he lack of information regarding Invenergy's water source render[s] its application incomplete and therefore not in compliance with" EFSB Rules.

On January 11, 2017, Invenergy filed an entirely new water plan with the EFSB. Under this new water plan, the Town of Johnston was to supply water to Invenergy and Invenergy was to truck that water from Johnston in far, far smaller quantities than initially contemplated. Invenergy's January 11, 2017 EFSB Filing, Section 2.0, at p. 1. Nevertheless, despite the change in water requirements, Invenergy insisted that it would continue to be a baseload plant.

In addition, Invenergy's January 11, 2017 filing identified Benn Water & Heavy Transport Corp. (Benn), but merely as a contingent back-up supplier of water.

Invenergy's contract with the Town of Johnston is being challenged in the Superior Court. See Conservation Law Found., Inc. v. Clear River Energy, LLC, No. PC 2017-1037 (and in a parallel suit brought by the Town of Burrillville; the two cases have been consolidated). On June 20, 2017, the Superior Court denied motions by Invenergy and the Town of Johnston to dismiss the case. Conservation Law Found., Inc., v. Clear River Energy, LLC, 2017 WL 2782312 (R.I. Super. June 20, 2017), per Silverstein, J.

In February and March 2017, the EFSB addressed multiple motions from the parties that arose, in part, from the on-going confusion over Invenergy's water plans. These motions included CLF's September 16, 2017 Motion To Dismiss the Application and Close the Docket (with Supplement dated January 30, 2017); and CLF's February 24, 2017 Motion Regarding Additional Advisory Opinions.

One core issue in these motions can be simply stated: Did Invenergy's January 11, 2017 filing of an entirely new water plan represent a substantial and material change in the Invenergy Application or was the January 11, 2017 filing just a minor tweak of little consequence? At the March 21, 2017, oral argument this question was put into stark contrast:

- **CLF argued** that Invenergy's January 11, 2017 water plan was a substantial and material change in the application. "What is before the Board today is a whole new proposal for a new power plant." March 21, 2017 Hearing Transcript, page 5, lines 10-12 (March 21 Transcript). CLF explained at some length why and how Invenergy's new plan for

obtaining different amounts of water from a different source and a new proposal for trucking that water rendered this a different project than the one described in Invenergy's originally application filed on October 29, 2015. March 21 Transcript, page 6, line 13 to page 7, line 18.

- **Invenergy strongly disagreed**, insisting that its new January 11, 2017 water plan did not represent a material change: "I think in response to CLF's arguments is that this is not a different power plant project that you're facing. This is the same power plant that you were presented with essentially from the very beginning. Yes, there has been a change to the water supply component . . . [but] the project otherwise is relatively conceptually the same. Yes, there are some -- there are some adjustments that have been made . . . So to suggest that this is now an entirely new application is just false." March 21 Transcript, page 47, line 7 to page 48, line 13 (emphasis supplied).

CLF's motions were heard by the EFSB on February 6, 2017, and March 21, 2017. In reliance on Invenergy's argument that the new water plan was not a material change, the EFSB denied outright CLF's Motion to Dismiss, and further denied several of CLF's requests that new Advisory Opinions be obtained relating to the new water plan. In addition, the EFSB denied CLF's request that the matter be returned for the PUC for consideration of newly available evidence from the ISO-New England demonstrating that the Invenergy plant is not needed.

Unbeknownst to the EFSB, CLF, or the other parties in this lawsuit, on or about August 17, 2017, Benn entered into a 10-page written contract with the City of Fall River, Massachusetts, under which Fall River would supply potable water to Benn for Benn to supply to

Invenergy. CLF attaches a true and accurate copy of the contract as Exhibit A. On August 17, 2017, when the contract was signed between Benn and Fall River, Benn had only been identified to the EFSB by Invenergy as a possible, contingent, back-up supplier of water to Invenergy.

The contract between Benn and Fall River states that the water at issue will be provided to "the Clear River Energy Center located in Burrillville, Rhode Island."

A month after the contract was executed, on September 15, 2017, the EFSB heard oral argument on variety of motions. Once again, Invenergy's water plan was central to issues under discussion.

On September 15, 2017, Invenergy's counsel stated: "If there is another alternative water supply arrangement that agrees to provide water, you will see that agreement. We will provide that to you." September 15, 2017 Hearing Transcript (September 15 Transcript), at page 83, lines 9 - 13. However, counsel did not acknowledge the existence of the Fall River water contract entered into the previous month.

Also on September 15, 2017, EFSB Chairperson Margaret E. Curran told Invenergy's counsel: "If there were an additional agreement reached with any other entity for another water supply plan, then that certainly would have to come before the Board." September 15, 2017 Transcript, page 95, lines 5- 9. However, Invenergy's counsel did not acknowledge the existence of the water contract entered into the previous month.

In fact, Invenergy has not informed the EFSB of the existence of the contract between Fall River and Benn to this day.

On September 28, 2017, Invenergy filed yet another new water plan with the EFSB (Invenergy's September 28 Filing). Under this further new plan, Benn Water was no longer the contingent back-up trucker of water for Invenergy; instead, Benn now became for the first time the principal trucker of water to Invenergy. Invenergy's September 28 Filing, Section 2.0, at 1. According to Invenergy's September 28 Filing, Benn Water was to have a not-publicly-disclosed municipality as its principal source of water. Id.

Invenergy's September 28 Filing also disclosed that Invenergy had signed some type of contingent, back-up water deal with the Narragansett Indian Nation (Narragansett Indians). Id. Invenergy's supposed deal with the Narragansetts led the Town of Charlestown to move to intervene in this proceeding because the Town of Charlestown and the Narragansetts both drew water from the same sole source aquifer. On October 17, 2019, the EFSB granted limited intervention to the Town of Charlestown. In addition, a public hearing will be held in Charlestown, with 30 days' advance public notice, pursuant to the Energy Facility Siting Act.

On October 20, 2017, there was a further challenge to Invenergy's contract with the Narragansetts. On that date, the Tribal Council of the Narragansett Indian Tribe filed a Motion to Intervene, claiming that the Narragansett Indians' contract with Invenergy was illegal and improper.

On October 19, 2017, Invenergy e-mailed the EFSB a terse letter (four sentences long) requesting a new public hearing in Burrillville to discuss "the Water Supply Plan filed on January 11, 2017 and the supplement filed on September 28, 2017." Once again, Invenergy did not acknowledge the existence of the Fall River water contract entered into two months earlier.

Later on October 19, 2017, CLF e-mailed the EFSB supporting Invenergy's request for a hearing on the new water plan. CLF's letter stated, in relevant part: "Invenergy has now told the EFSB that it (belatedly) agrees with CLF concerning the material nature of Invenergy's changes from its original proposal."

On October 20, 2017, Invenergy e-mailed a letter to the EFSB saying that CLF had misunderstood Invenergy's October 19 letter and that the many changes that had been made in Invenergy's water plans over the months did not, after all, add up to any material change. Again, Invenergy did not divulge to the EFSB the secret contract between Benn and Fall River that had named Invenergy as the recipient of Fall River's water.

Neither Invenergy's October 19, 2017 letter nor its October 20, 2017 letter gave any indication – nor even hint – as to which aspects of Invenergy's newly filed water plans of January 11, 2017 and September 28, 2017 warranted or necessitated that an additional hearing be held in Burrillville.

The Standard Governing This Motion

Even where a tribunal is vested with broad discretion, "it must articulate the reasons underlying its decisions to allow for appellate review." American Atheists, Inc. v. City of Starke, 509 F. Supp.2d 1221, 1226 (M.D. Fla. 2007).

Discussion

The EFSB itself and all the litigants before it are entitled to a clear understanding of Invenergy's plans for obtaining water.

Either the many new aspects of Invenergy's new water plans filed January 11, 2017 and changed yet again on September 28, 2017 do constitute a material change to Invenergy's application or they do not. Invenergy cannot have it both ways. Invenergy cannot be permitted to assert on March 17, 2017 that the change in the water plan is not material; assert on October 19, 2017 that the change is so material that a new public meeting in Burrillville must be had; and then assert on October 20, 2017 that nothing has changed.

If the new January 11, 2017 and September 28, 2017 water plans do constitute material changes to the application, then Invenergy is surely entitled to a new public meeting in Burrillville. CLF said this in its October 19, 2017, letter to the EFSB. However, if the new water plan is a material change in the Invenergy application, then, respectfully, CLF requests reconsideration of the denial of its earlier motions for dismissal or for additional Advisory Opinions.[1] Those motions were turned down by the EFSB in reliance on Invenergy's assertion that the new plans did not involve material changes.

On the other hand, if the new January 11, 2017 and September 28, 2017 water plans do not include material changes to the application, then there is no legal basis for holding another hearing. CLF will be left to assert its argument that the changes are material on appeal.

[1] To take but a single example, the Department of Environmental Management should be asked for an Advisory Opinion on the effects of the contract with the Narragansetts on Charlestown's sole source water aquifer.

There are three reasons why the EFSB should permit oral argument on Invenergy's October 19, 2017 request for a new hearing in Burrillville, then make a formal ruling on Invenergy's request, and reflect the ruling in a written Order of the Board.

First, all the other parties need to know whether Invenergy's new water plan is (or is not) a material change in the application so that they can prepare their cases accordingly. The non-Invenergy parties are entitled to know Invenergy's position on this key question. Mullane v. Central Hanover Bank, 339 U.S. 306 (1950) (notice and opportunity to be heard is central to due process).

Second, the EFSB must address the issue squarely so that, if this case proceeds to a Final Hearing, there is a clear record.

Third, in any later appeal, the reviewing Court will require that the EFSB will have made clear rulings with articulated reasons in order to facilitate appellate review. Agathos v. Starlite Motel, 977 F.2d 1500, 1510 (3d Cir. 1992).

Conclusion

WHEREFORE, for the foregoing reasons, CLF respectfully requests that the EFSB: (1) allow oral argument on Invenergy's October 19, 2017 request for an additional hearing in Burrillville; (2) issue a formal ruling on the request; and (3) memorialize its formal decision in a written Order.

CONSERVATION LAW FOUNDATION,
by its Attorneys,

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CERTIFICATE OF SERVICE

I certify that the original and three copies of this Motion were hand delivered to the Energy Facility Siting Board. In addition, copies of the Response were served electronically on the full service list of this Docket. I certify that the foregoing was done on October 23, 2017.

Exhibit A

WATER SUPPLY AGREEMENT

THIS WATER SUPPLY AGREEMENT (the "**Agreement**") is entered into as of August 17, 2017 (the "**Effective Date**") by and between the City of Fall River, a municipal corporation organized under the laws of the Commonwealth of Massachusetts, County of Bristol, acting through its Watuppa Water Board (hereinafter the "**City**") and Benn Water & Heavy Transport Corp., a corporation organized under the laws of the State of Rhode Island ("**Benn**"). The City and Benn may each be referred to herein individually as a "Party", and collectively as "Parties".

RECITALS

WHEREAS, the City owns and operates a treatment works in order to treat and supply, potable water to out-of-City customers pursuant to Chapter 74 of the Revised Ordinance of the City of Fall River, Massachusetts, 1999, as amended (the "**Water System**");

WHEREAS, Benn is in the business of water re-sale for residential, commercial and industrial processes, including but not limited to supplementing supply of water for residences, providing water for construction sites, supplementing process water from manufacturing customers, providing water to commercial ice skating rinks, and providing water for commercial irrigation purposes;

WHEREAS, Benn supplies water to such processes in an amount between 5-8 million gallons annually;

WHEREAS, Benn requires a reliable water supply source to provide a contingent water supply up to an anticipated demand for a commercial project to which it has contracted to sell water (the "**Project**");

WHEREAS, the Project is a major energy facility and Benn has entered into a contract to provide water supply thereto known as the Clear River Energy Center located in Burrillville, Rhode Island;

WHEREAS, based on Benn's historical volume of water sales, plus the demand represented by the Project, Benn requires a contingent water supply for the Project, as well as its existing business;

WHEREAS, the protocols adopted pursuant to Section 3(a)(ii) of this Agreement, Benn shall submit the list of facilities to which the water supplied by the City was delivered to by Benn with the payment of said invoice; and

WHEREAS, the City has the available water supply capacity and has agreed to supply Benn with potable water on the terms and conditions set forth herein.

NOW THEREFORE, in consideration of these promises and mutual benefits to be derived by the parties hereto an Agreement is prepared in the following form:

1. Recitals. The foregoing recitals are hereby incorporated herein by this reference.

2. Water Supply.

(a) Agreement to Provide, Sell and Supply. The City agrees to provide and sell to Benn, water sufficient to satisfy the demand set forth herein.

(b) Flow Rate. During the Term (defined below), Benn will purchase from the City and the City shall supply to Benn potable, treated water. City acknowledges it's requirement to comply with all applicable state and federal drinking water standards ("**Potable Water**") for use by and in connection with the

Project. The City shall supply Potable Water to Benn upon request up to the Average Demand Flow Rate at all times, and up to the Maximum Demand Flow Rate. The daily water demand for the Project will be supplied by trucks that are filled at a location located within the City limits. The approximate number of trucks required to satisfy the water usage rates (as set forth herein) are based upon the assumption that the trucks have a maximum capacity of 8,000 gallons. Benn shall provide the City with notice forty-eight (48) hours in advance of delivery when reasonably allowed. In those situations where forty-eight (48) hour notice is not reasonably allowed, Benn shall provide as much advance notice to the City as practical and then, from the first day of such delivery, provide the City with a two (2) week schedule projected demand going forward.

(i) Average Operating Conditions. Benn estimates water usage rates during the summer season of approximately 18,720 gallons per day ("**GPD**"). In turn, Benn estimates that up to three (3) truck deliveries per day will be required to satisfy expected water use needs of the Project. In order to appropriately respond to certain operational occurrences and weather related impacts, however, Benn may require up to 40,000 GPD which may necessitate up to five (5) truck deliveries per day (the "**Average Demand Flow Rate**").

(ii) Maximum Demand Flow Rate. Upon the occurrence of certain events at the Project, Benn may require up to 88,000 GPD, which in turn may necessitate up to eleven (11) truck deliveries per day (the "**Maximum Demand Flow Rate**").

(c) Point of Delivery. The City shall deliver all Potable Water pursuant to this Agreement through a mutually designated point of delivery ("**Point of Delivery**") at the Water Department Facility at 1620 Bedford Street, Fall River, MA, or a designated hydrant of point of delivery, which shall be equipped with a backflow preventer. The City shall ensure that the Point of Delivery is capable of docking the trucks required for the Average and Maximum Demand Flow Rates. Benn shall cooperate with the City to assure that trucks comply with the City's delivery procedures (the "**Delivery Procedures**") set forth on **Exhibit A** attached hereto. Benn shall take title to and be solely responsible for the Potable Water at the Point of Delivery.

(d) Quantity/Quality. the City shall immediately notify Benn of any material condition in the Water System of which it learns may materially affect the quality or quantity of water supplied to Benn by the City.

3. **Water Supply Terms**.

(a) Water Supply Rates.

(i) *Rate*. As full consideration for the City's supply of Potable Water to the Project up to the Maximum Demand Flow Rate, Benn shall pay to the City the tariff rate otherwise charged by the City to bulk water customers. The City and Benn agree to the rate schedule as delineated below.

A. First 500,000 gallons per calendar year: $0.012 per gallon.

B. 501,000 to 1,000,000 gallons: $0.010 per gallon.

C. Over 1,000,000 gallons: $0.008 per gallon.

D. All trucks to be billed at full capacity.

(ii) *Invoices*. The City shall send monthly invoices to Benn detailing Benn's usage per the receiving log during the month proceeding the date of the invoice and the amount due from Benn for its usage pursuant to this Agreement (an "**Invoice**"). Benn shall submit the list of facilities that the water was delivered to with payment of said invoice.

(iii) *Audit*. The City shall maintain records documenting all relevant charges and usage by Benn, and the City shall make the same available to Benn for viewing and copying upon reasonable notice. The Benn driver shall sign and acknowledge the receiving log of each delivery of water.–Benn shall have the right, within thirty (30) days following receipt of any Invoice, to dispute any item shown on such Invoice (including, without limitation, the payment due and usage) by giving written notice to the City of such dispute. Following Benn's delivery of any such dispute notice, the Parties shall work in good faith to determine whether the relevant Invoice contains incorrect information. However, Benn shall remain required to pay all undisputed amounts of any Invoice.

(b) Capacity Reserve Payment to The City.

(i) *Capacity Reserve Payment*. Commencing on March 1, 2018 and continuing until the expiration or termination of this Agreement, Benn shall pay to the City Twenty-five Thousand and 00/100 Dollars ($25,000.00) per year (the "**Capacity Reserve Payment**") for the City to reserve (for Benn's potential use in accordance with this Agreement) water capacity up to the Maximum Demand Flow Rate and otherwise act as a contingent supplier of Water for the Project. Notwithstanding, anything to the contrary herein, the Capacity Reserve Payment shall be deemed full and final compensation to the City in the event that Water consumption by Benn in any calendar year is eight (8) million gallons or less notwithstanding the rates paid for the water actually taken If Benn exceeds the breakpoint of eight (8) million gallons in any one calendar year, Benn shall pay a Retroactive Capacity Reserve Payment for that year equal to an additional Twenty Thousand and 00/100 ($20,000.00) Dollars. The Capacity Reserve Payment up to the breakpoint of eight (8) million gallons shall be paid in a lump sum on January 1 of each year.. However, the Retroactive Capacity Reserve Payment shall be paid in a lump sum as soon as the breakpoint eight of (8) million gallons has been exceeded.

4. **Notice of Alternate Supplier Status**. The City acknowledges and agrees that as a contingent water supplier for the Project, Benn's daily water demand may be as low as 0 GPD. Notwithstanding, Benn shall remain obligated to pay the Capacity Reserve Payment.

5. **Term**. This Agreement shall be for an initial term ("**Initial Term**") commencing on the Effective Date and continuing until the third (3rd) anniversary of the commercial operations date of the Project (the "**Term**"). Benn has an option of extending the Agreement for two (2) successive, three (3) year periods subject to the consent of the City, such consent shall not being unreasonably withheld. Rates are subject to review and renegotiation at the end of the second third year extension, should the City choose to review or renegotiate.

6. **Termination**.

(a) Benn's Right to Terminate. Benn has the right to terminate this Agreement for any reason within Benn's sole discretion upon written notice to the City by and through the Watuppa Water Board, sixty (60) days before the date on which an annual Capacity Reserve Payment is due to the City. Thereafter, Benn still reserves the right to terminate the Agreement for any reason upon sixty (60) day written notice to the City by and through the Watuppa Water Board; however, a Capacity Reserve Payment due for that calendar year must be paid in full despite the date of termination.

(b) The City's Right to Terminate the Agreement. The City shall have the right to terminate this Agreement for cause upon sixty (60) days written notice from the City to Benn. As used herein, "**Cause**" means Benn's failure to make the payments under Section 2 hereof for a period of thirty (30) days after receipt of any invoice from the City, or for Benn's failure to abide by the Delivery Procedures attached hereto as Exhibit A, after Benn has received a thirty (30) day notice to cure which specifies the procedures being violated and allows Benn a thirty (30) day period to correct said violation.

7. **Emergency Conditions.** Benn agrees that, in the event of an emergency which causes the City to impose limitations or conditions upon the use of water by its customers, that the City will impose and enforce the same limitations and conditions upon Benn. The City, however, acknowledges during such emergency it will treat Benn no less favorably than it will treat its industrial and residential customers within the geographic limits of the City.

8. **Revised Ordinances of the City of Fall River.** Benn agrees to be subject to and bound by the provisions of the revised Ordinances of the City of Fall River as applicable to rates to be paid by bulk water customers, as set forth in Paragraph 3 (a)(i).

9. **Representations and Warranties.**

(a) Benn's Representations and Warranties. Benn hereby represents, warrants and covenants to the City that Benn has the unrestricted right and authority to execute this Agreement. Each person signing this Agreement on behalf of Benn is authorized to do so. Upon execution by all Parties hereto, this Agreement shall constitute a valid and binding agreement enforceable against Benn in accordance with its terms. Benn shall provide a corporate resolution of authorization acknowledging authority to enter into this contract and accept the terms thereof. This Agreement shall constitute a valid and binding agreement enforceable against the City in accordance with its terms.

(b) The City's Representations and Warranties. The City hereby represents, warrants and covenants to Benn that:

(i) The City is the sole owner of the Water System and has been explicitly authorized to enter into this Agreement pursuant to a vote of the Watuppa Water Board attached hereto as Exhibit B (the "**WSA Approval**").

(ii) The City has the unrestricted right and authority to supply Potable Water up to the Maximum Daily Flow Rate to Benn for any use (including, without limitation, for Benn's use or for resale by Benn to a third party).

(iii) The City has the unrestricted right and authority to execute this Agreement. Each person signing this Agreement on behalf of the City is authorized to do so. Upon execution by all Parties hereto, and upon approvals as may be required by the City as a regulated water supplier, this Agreement shall constitute a valid and binding agreement enforceable against the City in accordance with its terms.

(iv) No litigation is pending, and, to the best of the City's knowledge, no actions, claims or other legal or administrative proceedings are pending, threatened or anticipated with respect to, or which could affect, the Water System or the ability to deliver the Water Demand. If the City learns that any such litigation, action, claim or proceeding is threatened or has been instituted, the City shall promptly deliver notice thereof to Benn and provide Benn with periodic updates of the status of said litigation, action, claim or proceeding that is ongoing.

10. **Assignment**.

(a) Collateral Assignments. Benn shall have the absolute right in its sole and exclusive discretion, without obtaining the consent of the City, to finance, mortgage, encumber, hypothecate, pledge or transfer to one or more Mortgagees (defined below) any and all of the rights granted hereunder, and/or any or all rights and interests of Benn in and to the Project.

(b) Non-Collateral Assignments. Benn shall have the right, without the prior consent of the City, to sell, convey, assign or transfer any or all of its rights hereunder provided such transfer is related to the Project. Benn shall be relieved of all of its obligations arising under this Agreement from and after the effective date of such transfer, provided such rights and obligations have been assumed by such transferee.

(c) Acquisition of Interest. The acquisition of all interests, or any portion of interest, in Benn by another person shall not require the consent of the City or constitute a breach of any provision of this Agreement and the City shall recognize the person as Benn's proper successor; however said successor agrees to be bound by the terms and conditions of this agreement and City is to be notified of any successor, ten (10) business days prior to any successor taking delivery of any water from the City. Furthermore, any successor or assignee shall execute this document acknowledging its terms and conditions and also become a party thereto.

11. **Mortgagee Protection**. In the event that any document memorializing a security interest in this Agreement or in any part of the Project (a "**Mortgage**"), is entered into by Benn, then any person who is the mortgagee, grantee or beneficiary of a Mortgage (a "**Mortgagee**") shall, for so long as its Mortgage is in existence and until the lien thereof has been extinguished, be entitled to the protections set forth in this Section 10. Benn shall send written notice to the City of the name and address of any such Mortgagee; provided that failure of Benn to give notice of any such Mortgagee shall not constitute a default under this Agreement and shall not invalidate such Mortgage.

(a) Notice of Default; Opportunity to Cure. As a precondition to exercising any rights or remedies as a result of any default of Benn, the City shall give a Notice of Default (defined below) to Benn. In the event the City gives a Notice of Default, the following provisions shall apply:

(i) The Mortgagee shall have the same period after receipt of the Notice of Default to remedy the default, or cause the same to be remedied, as is given to Benn, plus, in each instance, the following additional time periods: (i) thirty (30) days in the event of any monetary default; and (ii) sixty (60) days in the event of any non-monetary default. The Mortgagee shall have the absolute right to substitute itself for Benn and perform the duties of Benn hereunder for purposes of curing such default. the City expressly consents to such substitution, agrees to accept such performance. the City shall not take any action to terminate this Agreement in law or equity prior to the expiration of the cure periods available to a Mortgagee as set forth above.

(ii) Neither the bankruptcy nor the insolvency of Benn shall be grounds for terminating this Agreement as long as all material obligations of Benn under the terms of this Agreement are performed by the Mortgagee in accordance with the terms hereunder.

(b) New Agreement to Mortgagee. If this Agreement terminates because of Benn's default or if this Agreement is rejected or disaffirmed pursuant to bankruptcy law or other law affecting creditors' rights, the City shall, upon written request from any Mortgagee within ninety (90) days after such event, consider a new water supply agreement on the following terms and conditions:

(i) The terms of the new agreement shall commence on the date of termination, rejection or disaffirmance and shall continue for the remainder of the Term and subject to the same terms and conditions set forth in this Agreement.

(ii) The new agreement may be executed within thirty (30) days after receipt by the City of written notice of the Mortgagee's election to enter a new agreement, provided said Mortgagee: (i) pays to the City all monetary charges payable by Benn under the terms of this Agreement up to the date of execution of the new agreement, as if this Agreement had not been terminated, rejected or disaffirmed; (ii) performs all other obligations of Benn under the terms of this Agreement, to the extent performance is then due and susceptible of being cured and performed by the Mortgagee; and (iii) agrees in writing to perform, or cause to be performed, all non-monetary obligations which have not been performed by Benn and would have accrued under this Agreement up to the date of commencement of the new agreement, except those obligations which constitute non-curable defaults.

(iii) The provisions of this Section 10 shall survive the termination, rejection or disaffirmance of this Agreement and shall continue in full force and effect thereafter to the same extent as if this Section 10 were a separate and independent contract made by the City, Benn and such Mortgagee, and, from the effective date of such termination, rejection or disaffirmation of this Agreement to the date of execution and delivery of such new agreement, such Mortgagee may use and enjoy the Potable Water, provided that all of the conditions for a new agreement as set forth herein are complied with.

(c) Mortgagee's Consent to Amendment, Termination or Surrender. Notwithstanding any provision of this Agreement to the contrary, the Parties agree that so long as there exists an unpaid Mortgage, this Agreement shall remain in effect. This provision is for the express benefit of and shall be enforceable by such Mortgagee.

(d) Benn's Reimbursement to the City for Professional Fees and/or Expenses. In the event that the City incurs any professional fees and/or expenses in undertaking the steps required in Sections 10 or 11 of this Agreement, Benn shall reimburse the City for those professional fees and/or expenses within ten (10) day's notice from the City. Benn's obligation to reimburse the City is an express condition to any steps required by the City under Section 10 and 11.

12. **Default/Remedies**.

(a) Default. If a Party defaults in or otherwise fails to perform an obligation under this Agreement, the non-defaulting Party shall not have the right to exercise any remedies hereunder if the default is cured by the defaulting Party within thirty (30) days of receiving written notice of such default specifying in detail the default and the requested remedy (a "**Notice of Default**"); provided, that if the nature of the default requires, in the exercise of reasonable diligence, more than thirty (30) days to cure, the non- defaulting Party shall not have the right to exercise any remedies hereunder as long as the defaulting Party commences performance of the cure within thirty (30) days of receipt of Notice of Default and thereafter completes such cure with reasonable diligence.

(b) Remedies. Should a default remain uncured beyond the applicable cure periods, the non-defaulting Party shall have the right to exercise any and all remedies available to it at law or in equity, all of which remedies shall be cumulative, including the right to enforce this Agreement by injunction, specific performance or other equitable relief and the right to terminate this agreement.

13. Indemnities. Each Party (the "**Indemnifying Party**") shall defend, indemnify, and hold harmless the other Party (the "**Indemnified Party**"), including its agents, servants, employees, affiliates, contractors, licensees, invitees, and/or elected officials, from and against all liability, damage, loss, costs, (including reasonable attorneys' fees) claim, demands, and actions of any nature whatsoever for any personal injury, death, physical damage or fines which arise out of or are connected with, or claimed to arise out of or be connected with, the Indemnifying Party's violation of any applicable water use regulations, hazardous materials regulations, or regulations promulgated by the Massachusetts Department of Environmental Protection and/or the Massachusetts Department of Public Health.

14. Safety. Benn warrants that all drivers and operators of its equipment are licensed to operate the trucks utilized to take water delivery within the Commonwealth of Massachusetts. Moreover, Benn will have its drivers and employees meet with the City's Water Department to make sure that Benn's employees are trained in the use of the City apparatus and equipment to be utilized by Benn at the Point of Delivery.

15. Insurance. Benn shall provide the City with proof of insurance on its commercial general liability policy in the amount of $1,000,000. Such policy shall include the City as an additional insured for bodily injury and/or property damage claims brought against the City resulting from the actions of Benn or its employees take in furtherance of this agreement.

16. Notice. All notices or other communications required or permitted by this Agreement, including payments to the City, shall be in writing and shall be deemed given when personally delivered to the City or Benn, the same day if sent via facsimile or email, with confirmation, or the next business day if sent via overnight delivery or five (5) days after deposit in the United States mail, first class, postage prepaid, certified, addressed as follows:

If to the City:	If to Benn:
Terrance J. Sullivan	Benn Water & Heavy Transport Corp.
Dept. Community Utilities	29 Moonlight Drive
1 Government Ctr.	Westerly, RI 02891
Fax: 508-324-2103	Fax: _____
Attn: Terry Sullivan	Attn: Jeffrey R. Benn
Email: Water@fallriverma.org	Email: benwater@icloud.com

Either Party may change its address for purposes of this paragraph by giving written notice of such change to the other Parties in the manner provided in this paragraph.

Notwithstanding, forty-eight (48) hours' notice under Section 2(b) shall be provided by Benn to the City by electronic mail to the following:

Water@fallriverma.org
tsullivan@fallriverma.org
jlittle@fallriverma.org

17. Miscellaneous.

(a) Emergency. Either party may terminate or suspend its obligations under this Agreement by reasonable advance written notice to the other in order to protect the public health and safety of its

agents, servants, employees, affiliates, contractors, licensees, invitees and inhabitants pursuant to a written declaration of a health or safety emergency by either Party. Both Parties shall forthwith thereafter jointly address any such issues so as to promptly remedy the same and effectuate the intention and purposes of this Agreement. Any purported emergency termination by Benn does not alleviate the obligation to pay the outstanding amount of a Capacity Reserve Payment for the year in which the Agreement is terminated as pursuant to Section 6(a). Notwithstanding anything to the contrary herein, however, Benn shall not be responsible to pay any outstanding Capacity Reserve Payment for that year, if the emergency termination is undertaken as a result of the City's actions or omissions in causing the emergency situation on which the termination is based.

(b) Force Majeure. If performance of this Agreement or of any obligation hereunder is prevented or substantially restricted or interfered with by reason of an event of Force Majeure (defined below), the affected Party, upon giving notice to the other Party, shall be excused from such performance to the extent of and for the duration of such prevention, restriction or interference, and the time to so perform herein shall be extended for such period of time. The affected Party shall use its reasonable efforts to avoid or remove such causes of nonperformance and shall continue performance hereunder whenever such causes are removed. As used herein, **Force Majeure**" means fire, earthquake, flood, or other casualty, condemnation or accident; strikes or labor disputes; war, civil strife or other violence; any law, order, proclamation, regulation, ordinance, action, demand or requirement of any government agency or utility; or any other act or condition beyond the reasonable control of a Party hereto.

(c) Successors/Assigns. This Agreement shall inure to the benefit of and be binding upon Benn, its successors and assigns and the City and, to the extent provided in any assignment or other transfer permitted hereunder, any transferee, and their respective heirs, transferees, successors and assigns, and all persons claiming under them.

(d) Entire Agreement/Amendments. This Agreement, together with all exhibits attached hereto, constitutes the entire agreement between the City and Benn respecting its subject matter, and supersedes any and all oral or written agreements. All of the provisions of any exhibit hereto shall be treated as if such provisions were set forth in the body of this Agreement and shall represent binding obligations of each of the Parties as part of this Agreement. Any agreement, understanding or representation respecting the Property, or any other matter referenced herein not expressly set forth in this Agreement or a previous writing signed by both Parties is null and void. No purported modifications or amendments, including without limitation any oral agreement (even if supported by new consideration), course of conduct or absence of a response to a unilateral communication, shall be binding on either Party unless in a writing signed by both Parties. Provided that no material default in the performance of Benn's obligations under this Agreement shall have occurred and remain uncured, the City shall cooperate with Benn in amending this Agreement from time to time to include any provision that may be reasonably requested by Benn for the purpose of implementing the provisions contained in this Agreement or for the purpose of preserving the security interest of any transferee of Benn or Mortgagee.

[*signatures on following page*]

IN WITNESS WHEREOF, Benn and the City, acting through their duly authorized representatives, have executed this Agreement with the intent that it be effective as of the Effective Date, and certify that they have read, understand and agree to the terms and conditions of this Agreement.

THE CITY OF FALL RIVER

By its Mayor, duly authorized,

Jasiel F. Correira, II

Approved as to Form & Manner:

Joseph L. Macy, Corporation Counsel
CITY OF FALL RIVER

WATUPPA WATER BOARD
By John Friar, II, Clerk

John Friar, II

FIRST ASSIGNEE

By: _____
Name: _____
Title: _____

LEGAL REVIEWED THT

BENN WATER & HEAVY TRANSPORT CORP., a Rhode Island Corporation

By: _____
Name: JEFFREY BENN
Title: PRESIDENT

EXHIBIT A

Delivery Procedures

Benn and the City agree that the following procedures shall be utilized at the Point of Delivery:

1. Benn shall not have trucks line up or idle outside of the gates that separate the Water Department Facility from Bedford Street.

2. Benn shall take delivery during daylight hours. The exception to the daylight hour requirement shall be those instances in which Benn has to arrange for delivery of Maximum Demand Flow Rate during the months of November through March. During that time period, the evening hours for delivery may be extended to 7:00 p.m. upon twenty-four (24) hour notice to the City.

3. Notwithstanding the procedures set forth herein, in the event that the parties find issues in complying with the procedures, the parties shall work in good faith to identify a hydrant location elsewhere in the City that is mutually acceptable to Benn and the City and not located within a residential area.

EXHIBIT B

City of Fall River
The Watuppa Water Board
One Government Center
Fall River, MA 02722

JAZIEL F. CORREIA II
Mayor

JOHN FRIAR
Clerk

TO: T. J. Sullivan

FROM: John Friar, Clerk

DATE: September 13, 2017

RE: Contract between the Watuppa Water Board / City of Fall River and Benn Water & Heavy Transport, Inc., a Rhode Island corporation.

Be advised that at a meeting held on August 17, 2017, the Watuppa Water Board approved a contract for the "Contingent Supply of Water" by the Water Department of the City to Benn Water & Heavy Transport, Inc., a Rhode Island Corporation.

The contract was approved on a roll-call vote, with President Normand Valiquette and Member Christopher Ferreira voting in the affirmative and Member Robert Pearson voting in the negative.

Attest