



April 23, 2019

Deputy Mayor and Councillors

Subject: Safe Clean Drinking Water Project – Global Settlement

RESOLVED that as recommended by the Committee of the Whole having met on May 13, 2019, Common Council approve that the Common Council Resolution pertaining to the Global Settlement on the Safe Clean Drinking Water Project adopted at the March 25th, 2019 meeting of Common Council be amended as follows:

1. The second paragraph of the resolution which authorizes the Mayor and Clerk to execute the Minutes of Settlement effecting the Global Settlement is deleted and replaced with the following:
- "2. That the Mayor and Clerk be authorized to execute the Minutes of Settlement effecting the Global Settlement and the appended Escrow Agreement in the form as attached to M&C No. 2019-114 and presented to Committee of the Whole at its May 13, 2019 meeting; and".

Sincerely,

A handwritten signature in black ink, appearing to read "Don Darling".

Don Darling
Mayor



**MINUTES OF SETTLEMENT
RELATED TO THE
AGREEMENT
TO DESIGN, BUILD, FINANCE, OPERATE AND MAINTAIN
A WATER TREATMENT PLANT AND STORAGE RESERVOIRS
AND
TO DESIGN, BUILD AND FINANCE
WATER TRANSMISSION SYSTEM IMPROVEMENTS
IN THE CITY OF SAINT JOHN**

**THE CITY OF SAINT JOHN
and
PORT CITY WATER PARTNERS**

April 30, 2019

MINUTES OF SETTLEMENT
RELATED TO THE
AGREEMENT
TO DESIGN, BUILD, FINANCE, OPERATE AND MAINTAIN A
WATER TREATMENT PLANT AND STORAGE RESERVOIRS
AND
TO DESIGN, BUILD AND FINANCE
WATER TRANSMISSION SYSTEM IMPROVEMENTS
IN THE CITY OF SAINT JOHN

THIS AGREEMENT (together with all appendices hereto, this “**Agreement**”) is made this 30th day of April, 2019

BETWEEN:

THE CITY OF SAINT JOHN
(the “**City**”)

AND:

PORT CITY WATER PARTNERS,
a general partnership formed under the laws of New Brunswick, by its partners Brookfield
(PCWP) Inc., NAC (PCWP) Inc. and Acciona Agua International Inc.
 (“**Project Co**”)

WHEREAS:

1. The City and Project Co (the “**Parties**”) entered into that certain agreement to design, build, finance, operate and maintain a water treatment plant and storage reservoirs and to design, build and finance water transmission system improvements in the City of Saint John dated February 4, 2016 (the “**Project Agreement**”).
2. Project Co is nearing Substantial Completion under the Project Agreement.
3. Certain disputes and differences have arisen between the Parties that they have agreed to settle comprehensively through these Minutes of Settlement.
4. The Parties have agreed to clarify the effect of the settlement upon their respective rights and obligations under the Project Agreement in the manner set forth below.

THEREFORE, the City and Project Co agree as follows:

1. DEFINITIONS AND INTERPRETATION

Capitalized terms used but not otherwise defined in this Agreement have the meanings given to them in the Project Agreement. The interpretation provisions set out in Section 1 (Definitions and Interpretation) of the Project Agreement apply to this Agreement *mutatis mutandis*.

2. PAYMENTS**2.1 Substantial Completion Payment Amount**

Upon Project Co's achievement of Substantial Completion under the Project Agreement, the City will pay Project Co the amount (the "**Substantial Completion Payment Amount**") that is calculated by subtracting from the Substantial Completion Payment of \$131,532,373.75 the following deductions: (a) an amount for City Substantial Completion Credits in accordance with Section 2.2 and Appendix A of these Minutes of Settlement, (b) an amount for legal costs and expenses in accordance with Section 9 of these Minutes of Settlement, and (c) the Substantial Completion Holdback Amount, as defined in Section 2.5 of these Minutes of Settlement.

2.2 Deduction of City Credits

Notwithstanding the definition of "Substantial Completion Payment" in s. 1.1 of the Project Agreement, the Parties agree that the Substantial Completion Payment under the Project Agreement shall be reduced by the amounts set out in Appendix A [City Substantial Completion Credits] to these Minutes of Settlement, to reflect certain deductive Changes and other agreed credits under the Project Agreement.

2.3 HST

HST shall be payable by the City on the Substantial Completion Payment Amount, and on holdback amounts released to Project Co, in accordance with the applicable provisions of the Project Agreement. The entire HST amount, including on holdback amounts, will be paid by the City at the time of payment of the Substantial Completion Payment Amount. When the holdback amounts are released at Final Completion, they will include no HST as the HST will already have been paid.

2.4 Settlement Payment

Upon Project Co's achievement of Substantial Completion under the Project Agreement, the City will pay Project Co, in addition to the Substantial Completion Payment Amount, a one-time payment of \$1,890,000, inclusive of HST (the "**Settlement Payment**"). The total payment by the City to Project Co, upon Project Co's achievement of Substantial Completion under the Project Agreement, shall thus consist of the Substantial Completion Payment Amount, HST on the Substantial Completion Payment Amount, and the Settlement Payment. Project Co hereby irrevocably directs the City to deposit the Settlement Payment to the Milestone and Substantial Completion Payment Account, as that term is defined in the Lending Agreements.

2.5 Substantial Completion Holdback Amount

(a) Notwithstanding Section 6.18 of the Project Agreement, the Parties agree that:

- (i) the City will hold back an amount from the Substantial Completion Payment under the Project Agreement (in aggregate, the “**Substantial Completion Holdback Amount**”), on account of the Substantial Completion Mechanic’s Lien Holdback and the Substantial Completion Holdback;
 - (ii) the amount of the Substantial Completion Holdback will be twice the amount of the Independent Certifier’s estimate provided (and, if applicable, adjusted) in accordance with Section 6.17 of the cost to complete the work identified on the Substantial Completion Deficiency List, plus \$1,000,000.00;
 - (iii) the City will release the Substantial Completion Mechanic’s Lien Holdback to Project Co, without interest, upon the Independent Certifier certifying completion of the items set out in Sections 2 and 4 of Appendix C [Deferred Works] of these Minutes of Settlement (relating to Deferred Work relating to Component 4-4 and 4-2 respectively), in compliance with the *Mechanics’ Lien Act* (New Brunswick); and
 - (iv) The City will release the Substantial Completion Holdback to Project Co, without interest, when Final Completion is achieved.
- (b) Notwithstanding paragraph (k) of Schedule 7 to the Project Agreement, the Parties agree that a certificate of completion must be issued pursuant to section 15(4) of the *Mechanics’ Lien Act* (New Brunswick) no later than Final Completion. The requirement that a certificate of completion be issued prior to Substantial Completion is waived.

3. CHANGES

The Parties agree to the Changes outlined in Appendix A [City Substantial Completion Credits] and Appendix B [Cost-Neutral Changes]. There shall be no payment to Project Co by the City in respect of any of the Changes outlined in Appendix A or Appendix B. There shall be no credit to the City in respect of any of the Changes outlined in Appendix B.

4. RECORD DRAWINGS

Notwithstanding Schedule 7 (Substantial Completion Criteria) of the Project Agreement, it is agreed that:

- (a) the City does not require that Project Co supply Record Drawings for all Components as a requirement of achieving Substantial Completion;
- (b) Project Co will supply as-built drawings for all Components as a condition of achieving Substantial Completion, except those relating to Component 3-2: Latimer Lake Works and those related to the John T. McMillan crossing at Component 4-4, which will be due at or before Final Completion; and
- (c) Project Co will deliver compliant Record Drawings for all Components by no later than the following dates:

Component	Description	Record Drawings delivered by:
1-1 & 2-1	WTP & Storage Tanks	April 3 rd , 2019
3-1	Robertson Lake	April 29 th , 2019
3-2	Latimer Lake	Final Completion
4-1	LHPS to WTP	April 19 th , 2019
4-2	WTP to CHPS	May 17 th , 2019
4-3	Loch Lomond & Westmorland	March 29 th , 2019
4-4	East Pressure Modifications	Final Completion
5-1	LHPS to Westmorland	April, 29 th , 2019
5-2	Rothsay Ave.	March 29 th , 2019

The Final Completion Holdback Payment provided for in Section 6.22 of the Project Agreement shall not be payable if compliant Record Drawings for all Components have not been delivered.

5. DEFICIENCIES AND DEFERRED WORK

- (a) The Parties agree that Project Co is not required to complete or rectify the items set out in Appendix C [Deferred Works] in order to achieve Substantial Completion, and that such items shall form part of the Substantial Completion Deficiency List pursuant to Section 6.17 of the Project Agreement. The Parties shall instruct the Independent Certifier accordingly, and Project Co shall be responsible for completing or rectifying such deferred works by Final Completion.
- (b) Notwithstanding Section 5(a) of these Minutes of Settlement, the Parties agree that (i) deficiencies may be added to the Substantial Completion Deficiency List by the Independent Certifier, and otherwise in accordance with the provisions of the Project Agreement, (ii) the Independent Certifier shall have the right to add additional deficiencies to the Substantial Completion Deficiency List after the Substantial Completion Date in relation to any item outlined in Appendix C [Deferred Works], and (iii) Project Co must satisfy all Substantial Completion Criteria set out in the Project Agreement in order to achieve Substantial Completion, except to the extent any such criterion is explicitly modified within these Minutes of Settlement.
- (c) The Parties agree that, notwithstanding Section 6.24 of the Project Agreement:
 - (i) the Warranty Period for Work completed after Substantial Completion, including items on the Substantial Completion Deficiency List, shall begin at Final Completion, and end two years thereafter; and

- (ii) the date on which the value of the Warranty Letter of Credit shall be reduced to \$2,500,000 is one year after Final Completion.

6. NON-CONFORMANCE NOTICES

- (a) The Parties agree that Project Co shall not be required to resolve the Non-Conformance Notices set out in Appendix D [NCNs moved to Substantial Completion Deficiency List] in order to achieve Substantial Completion, and such items shall instead be moved to the Substantial Completion Deficiency List pursuant to Section 6.17 of the Project Agreement. The Parties shall instruct the Independent Certifier accordingly, and Project Co shall be responsible for completing or rectifying such deferred works by Final Completion.
- (b) The Non-Conformance Notices set out in Appendix E [Closed NCNs] will be closed without further action by Project Co required.
- (c) Project Co shall otherwise, prior to and as a condition of achieving Substantial Completion, resolve all other Non-Conformance Notices in accordance with the Project Agreement.
- (d) After execution of these Minutes of Settlement, the City will not open new Non-Conformance Notices in the Opus NCN System unless and until the Commissioner of Saint John Water or his designate makes reasonable good faith efforts to discuss them directly with Project Co's commercial team and its Design and Construction Subcontractor's executive team with a goal to resolving them.

7. ENGINEER OF RECORD

- (a) Project Co shall be entitled to submit the following documents in satisfaction of its obligation under subsection (j) of Schedule 7 to the Project Agreement [Substantial Completion Criteria]:
 - (i) a letter from Wood Group stating that the entire Project, with the exception of the design work having been completed by Stantec on WTP processes, and with the exception of the design work having been completed by Fundy Engineering on the Primary Infrastructure, has been designed in accordance with the requirements of the Project Agreement;
 - (ii) a letter from Stantec stating that the WTP Works it designed were designed in accordance with the requirements of the Project Agreement;
 - (iii) a letter from Fundy Engineering stating that the Primary Infrastructure it designed was designed in accordance with the requirements of the Project Agreement;
 - (iv) a letter from Gulf Operators stating that the portion of the Works it completed on the Primary Infrastructure was constructed in accordance with Project Co's Designs and the requirements of the Project Agreement;

- (v) a letter from NAC (PCWP) Inc. stating that the portion of the Works it completed on the Primary Infrastructure was constructed in accordance with Project Co's Designs and the requirements of the Project Agreement;
 - (vi) a letter from FCC stating that the portion of the Works it completed on the Primary Infrastructure was constructed in accordance with Project Co's Designs and the requirements of the Project Agreement;
 - (vii) a letter from Gulf Operators stating that the Additional Infrastructure was constructed in accordance with Project Co's Designs and the requirements of the Project Agreement;
 - (viii) a letter from Wood Group confirming that Robertson Lake Dam concrete repairs were designed in general conformance with the requirements of the Design Agreement with the Design and Construction Subcontractor, applicable portions of the Project Agreement and its Schedule 12 (including Section 1.5.1 Design Life), the applicable proposal extracts, and applicable law;
 - (ix) a letter from Acciona Agua International Inc., declaring on behalf of the Design and Construction Subcontractor and Project Co that the Works have been designed, constructed and performed in accordance with Project Co's Designs, the Detailed Designs, the Proposal Extracts and the Works Requirements, including, for greater certainty, the Quality Management System;
 - (x) a letter from Acciona Infrastructure Canada Inc., declaring on behalf of the Design and Construction Subcontractor and Project Co that the Works have been designed, constructed and performed in accordance with Project Co's Designs, the Detailed Designs, the Proposal Extracts and the Works Requirements, including, for greater certainty, the Quality Management System; and
 - (xi) a letter from Acciona Agua Canada Inc., signed by an engineer licensed to practice in the Province of New Brunswick, declaring that the Works have been designed, constructed and performed in accordance with Project Co's Designs, the Detailed Designs, the Proposal Extracts and the Works Requirements, including, for greater certainty, the Quality Management System.
- (b) Acciona Agua Canada Inc. shall provide a certificate of insurance, in form and substance satisfactory to the City, acting reasonably, demonstrating that it and/or the engineer referenced in Section 7(a)(xi) are and will be protected by at least \$10 million in errors & omissions liability insurance for the duration of the Warranty Period under the Project Agreement and these Minutes of Settlement, in connection with the declaration required under subsection (j) of Schedule 7 of the Project Agreement. If Final Completion is not achieved by the expiry date of the errors & omissions liability policy, then Project Co shall, prior to the expiry date of such policy, purchase, or cause to be purchased, additional errors & omissions liability insurance coverage in an amount not less than \$10 million, with a three year extended reporting period and otherwise satisfactory to the City, acting reasonably, and shall do so again from time to time thereafter prior to the expiry date of the then current errors & omissions liability policy until Project Co achieves Final

Completion. Project Co thus agrees that, regardless of the date when Final Completion is achieved, there shall be errors & omissions liability insurance coverage in an amount not less than \$10 million in place up to at least the date of Final Completion, with at least a three year extended reporting period after the date of Final Completion.

8. CONSTRUCTION NON-PERFORMANCE DEDUCTIONS

The City agrees to waive all outstanding Construction Non-Performance Deductions incurred by Project Co from Financial Close to the date hereof, effective upon Substantial Completion.

9. LEGAL AND ADMINISTRATIVE COSTS

The City and Project Co shall each pay half of the legal costs and expenses associated with preparing these Minutes of Settlement, and any associated ancillary documents and actions, the total cost of which is agreed to be \$40,000. Project Co's 50% share of these legal costs and expenses (\$20,000) shall be deducted when calculating the Substantial Completion Payment Amount.

10. COMPREHENSIVE FULL AND FINAL RELEASE AND INDEMNITY

10.1 Escrow Agent

For purposes of this Section 10 of the Minutes of Settlement, the Parties appoint Torys LLP as escrow agent for purposes of receiving from Project Co and delivering to the City, in accordance with this Section 10, the comprehensive full and final release and indemnity to be executed by Project Co (the "Escrow Agent"). An escrow agreement with the Escrow Agent will be executed for this purpose, in the form attached as Appendix G [Form of Escrow Agreement].

10.2 Execution and Delivery of Release to Escrow Agent

Project Co shall execute and deliver to the Escrow Agent, as a condition of these Minutes of Settlement and at the same time as the Parties execute these Minutes of Settlement, the comprehensive full and final release of claims and indemnity attached as Appendix F (the "Executed Release").

10.3 Delivery of Executed Release to the City

Upon Project Co's achievement of Substantial Completion under the Project Agreement, and following payment by the City to Project Co of the Substantial Completion Payment, the Escrow Agent will deliver the Executed Release to the City. The delivery of the Executed Release to the City will result in the termination of the Escrow Agreement.

11. GENERAL PROVISIONS

11.1 Other Amendments

Except as expressly amended, modified and supplemented hereby, the provisions of the Project Agreement (including the Schedules thereto and any amendments) are and shall remain in full force and effect and shall be read with this Agreement, *mutatis mutandis*.

11.2 Applicable Law

This Agreement shall be governed by and construed and interpreted in accordance with the laws of New Brunswick and the laws of Canada applicable therein.

11.3 Counterparts

This Agreement may be executed in counterparts, in which case (i) the counterparts together shall constitute one agreement, and (ii) communication of execution by fax or electronic transmission shall constitute good delivery.

11.4 Language

The City and Project Co hereby confirm that it is their wish that this Agreement shall be drawn up in the English language only.

11.5 Joint and Several

Where two or more persons execute this Agreement as Project Co, the liability under this Agreement of such persons executing this Agreement shall be joint and several.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the Parties have executed this Agreement.

THE CITY OF SAINT JOHN

Per: _____
Name:
Title:

Per: _____
Name:
Title:

PORT CITY WATER PARTNERS, by its
partners

BROOKFIELD (PCWP) INC.

Per: _____
Name:
Title:

Per: _____
Name:
Title:

NAC (PCWP) INC.

Per: _____
Name:
Title:

Per: _____
Name:
Title:

**ACCIONA AGUA INTERNATIONAL
INC.**

Per: _____
Name:
Title:

Per: _____
Name:
Title:

APPENDIX A – CITY SUBSTANTIAL COMPLETION CREDITS

	ITEM	AMOUNT
<i>Changes</i>		
1.	Credit related to the de-scoping of concrete surface work on the walls of the active sluiceway and on the west wing wall of the Robertson Lake Dam	\$85,000
2.	Changes identified in the chart titled “SCDWP – Summary of Changes – Approved Credits as of March 20, 2019,” attached to this Appendix A (to be adjusted if applicable to reflect additional Approved Credits between March 20, 2019 and Substantial Completion)	\$323,641.21 as of March 20, 2019
<i>Settlement of Non-Conformance Notices</i>		
3.	City Determinations under Sch. 14 of the Project Agreement which result in credits to the City (to be adjusted if applicable to reflect additional Determinations between March 20, 2019 and Substantial Completion)	\$86,692.00 as of March 20, 2019
<i>Independent Certifier Costs</i>		
4.	Amount carried by Project Co in its bid for payment of Independent Certifier costs	\$175,000
5.	Project Co’s share of Independent Certifier costs from Financial Close to the date hereof	\$125,000
	<u>TOTAL</u>	<u>\$795,333.21 as of March 20, 2019</u>

APPENDIX B – COST-NEUTRAL CHANGES/WORK

1. Change Request 92 (Component 5-2 restrainers)
2. Change Request 102-1 (Component 4-2 mechanical restrainers)
3. Change Approval 107 (Component 3-1 Latimer Lake Intake Elevation)
4. De-scoping of voids underneath the Sluiceway at Robertson Lake Dam for which a Change Directive will be issued

APPENDIX C - DEFERRED WORKS

1. Deferred Works in connection with Component 3-2:
 - a. Pavement
 - b. Swale/culvert
 - c. Top soil placement
 - d. Hydroseeding
2. Deferred Works in connection with Component 4-4:
 - a. Stream crossing and final connections at John T. McMillan which includes but is not limited to the commissioning and final connections to the live system at 3 locations:
 - i. Belgian Rd.;
 - ii. Upland Rd. and
 - iii. Golden Grove Rd.
3. Deferred Works (multiple Components):
 - a. Landscaping
 - b. Asphalt reinstatement
4. Deferred Works in connection with Component 4-2:
 - a. If, for reasons beyond the reasonable control of Project Co, the connection of the IOL 500 mm main cannot be completed on or before April 15, 2019, then this item is also included in the list of Deferred Works

APPENDIX D - NCNs MOVED TO SUBSTANTIAL COMPLETION DEFICIENCY LIST

132	4-4	Repairs to asphalt patches
310	4-1	200 mm Potable Water Line Record Drawing
325	4-2	Asphalt investigation
389	4-2	Record drawings due for issue
390	5-2	Record drawings due for issue
391	1-1	Record drawings due for issue
407	5-2	Chamber cover
425	4-3	Non-conforming asphalt
426	4-3	Failure to submit Record Drawings that meet PA requirements
427	4-3	Failure to submit Red Book notes that meet PA requirements
432	4-1	Deficiencies from valve box audit
433	4-3	Deficiencies from valve box audit
444	5-2	Superpave 12.5 air void content
472	1-1	Silt fence maintenance and erosion control
489	4-2	Drawing Of Records
511	4-1	Failure to Submit Record Drawings within 30 days of testing and disinfection
516	4-3	Tracer Wire end cap
520	4-3	Wrong manhole cover type
524	5-2	Manhole cover compliance
529	1-1	Manhole cover compliance
530	5-2	Failure to remove valve boxes or chambers outside limits of excavations

534	4-3	Incorrect manhole cover
542	4-1	Failure to label all new valves with unique ID
543	4-1	Failure to implement and coordinate a corrective/preventative action plan
544	1-1	Silt fence maintenance and erosion control – Access road berm
546	3-2	Failure to implement and coordinate a corrective/preventative action plan
550	Project	Failure to resolve NCN 442
554	4-4	Failure to install tracer wire to meet Standard Detail # 14
555	4-4	Failure to install valve boxes to meet Standard Detail # 3 requirements
560	4-1	Tracer wire compliance
562	4-3	Removal of abandoned valves
564	4-3	Asphalt crack on Lock Lomond Rd.
565	4-2	ARV Snorkel Height
566	4-2	Spliced Ends Of Tracer Wire Connection
568	1-1	Failure to submit Red Book notes that meet PA requirements
569	4-1	Failure to submit Red Book notes that meet PA requirements
570	5-2	Failure to submit Red Book notes that meet PA requirements
573	5-1	30 Day Record Drawing & Red Book Submission
576	4-4	Failure to submit Record Drawings and Red Books within 30 Days
579	4-2	Failure to clearly mark hydrants on untreated water lines
581	3-2	Hydrostatic Pressure Test Notice
582	4-1	Failure to meet Sch. 12, section 1.2.4 constraints for asphalt placement
583	4-2	Failure to meet Sch. 12, section 1.2.4 constraints for asphalt placement
584	4-4	Failure to meet temperature constraints for asphalt placement

APPENDIX E – CLOSED NCNs

442	2-1	Failure to follow Project Co's designs – HDPE Fusing
481	2-1	Failure to follow Design Guides and Manual
533	1-1	Failure to follow Project Co's designs – Sanitary manhole

APPENDIX F – COMPREHENSIVE FULL AND FINAL RELEASE AND INDEMNITY

In exchange for the City's agreement to enter into the Minutes of Settlement to which this release and indemnity is an appendix, and other good and valuable consideration, the receipt and sufficiency of which is acknowledged,

- (a) The undersigned Port City Water Partners ("**Project Co**") (a general partnership formed under the laws of New Brunswick, by its partners Brookfield (PCWP) Inc., NAC (PCWP) Inc. and Acciona Agua International Inc.), for itself, its partners and any of their present or former parents, subsidiaries, affiliates and related companies and each of their respective present and former directors, officers, shareholders, employees, administrators, trustees, successors and assigns and any party or parties who claim a right or interest through them (including, for greater certainty, Acciona Agua Canada Inc. and Acciona Infrastructure Canada Inc.) (collectively, the "**Project Co Releasors**"),

HEREBY FULLY AND FINALLY RELEASES AND FOREVER DISCHARGES,
WITHOUT QUALIFICATION OR LIMITATION:

the City of Saint John (the "**City**") and its present and former officers, councillors, employees, servants, agents, administrators, trustees, successors and assigns) (collectively, the "**City Releasees**")

from all manner of claims, demands, losses, obligations, liabilities, damages, legal fees and costs, actions, causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, complaints, monies, indemnity, interest in loss, extension of time, or injuries howsoever arising (including, without limitation, under legislation or under the law of contract, tort, unjust enrichment, fiduciary duty, property or otherwise) which have been, heretofore may have been or may hereafter be sustained by any of the Project Co Releasors, in connection with the Project Agreement between Project Co and the City dated February 4, 2016 (the "**Project Agreement**") or the Works or Works Requirements under the Project Agreement, for the period up to and including Final Completion ("**Claims**").

- (b) For greater certainty, and without limitation of the scope of the release set out in paragraph (a) above, the release set out in paragraph (a) above fully and finally releases and discharges:
- (i) all claims for payment or schedule relief on account of delay relating in any way to any portion of the period of time up to and including Final Completion;
 - (ii) all other claims for payment by the City to Project Co or any other party other than as contemplated in the Minutes of Settlement;
 - (iii) all other claims for schedule relief under the Project Agreement;
 - (iv) all claims alleging a Relief Event, Additional Infrastructure Condition, Unknown or Mislocated Utility, or any other circumstance alleged to give rise to an

- additional payment entitlement or schedule extension entitlement under the Project Agreement;
- (v) all Notices of Dispute (including, for greater certainty, all Notices of Dispute up to and including Notice of Dispute #20), as well as all Notices of Non-Acceptance relating to Recommendations of the Dispute Resolution Board;
 - (vi) all Change Requests; and
 - (vii) Claims arising prior to the date of execution of the Minutes of Settlement by Project Co but which are not known or anticipated and which later develop or are discovered after, on or before Final Completion, including all the effects and consequences thereof.
- (c) Project Co hereby withdraws, with prejudice, all notices and claims relating to the Claims.
- (d) Without limiting the generality of the foregoing, Project Co declares, on behalf of the Project Co Releasors, that the intent of this release and indemnity is to conclude all issues arising from the matters set forth above and it is understood and agreed that this release and indemnity is intended to cover, and does cover, not only all known injuries, losses and damages, but also injuries, losses and damages not now known or anticipated but which may later develop or be discovered, including all the effects and consequences thereof.
- (e) Notwithstanding any other term herein, Project Co does not release any Damage Event, Force Majeure Event, negligent act or omission of the City, willful misconduct of the City or willful breach of contract by the City, or related Claims, with respect to acts, circumstances, omissions or events arising after the date of execution of these Minutes of Settlement by Project Co. Otherwise, Project Co's release is comprehensive.
- (f) Project Co shall fully defend, indemnify and hold harmless the City, and any other City Releasee, against which or against whom a Claim is brought by any party other than Project Co (including, for greater certainty, by the Design and Construction Subcontractor), seeking any of the types of relief falling within the scope of the release set out herein.
- (g) Project Co represents and warrants, for all purposes of this release and indemnity, that it is the agent of all Project Co Releasors, and that it has full authority and capacity to release its rights and interests, and those of the Project Co Releasors, against the City Releasees in the terms outlined herein.
- (h) The release and indemnity set out herein are intended in part for the benefit of third parties to this release and indemnity. The Parties agree that any City Releasee may enforce the terms of this release and indemnity as though he, she or it were a contracting party to the release and indemnity.
- (i) Project Co represents and warrants that it has not assigned to any person, firm or corporation any of the Claims it has released by operation of this release and indemnity.

- (j) Project Co undertakes and agrees that neither it nor any Project Co Releasor will take any steps or initiate any proceedings against any person, partnership, insurer, corporation or any other entity which may be entitled to claim contribution, indemnity or other relief against the City or any other City Releasee with respect to the subject matter addressed herein. This release and indemnity shall operate conclusively as an estoppel in the event of any claim, action, complaint or proceeding which might be brought in the future by a Project Co Releasor with respect to the matters covered by this release and indemnity. Project Co agrees that, in the event of any such claim, it shall defend, indemnify and hold harmless the City Releasee(s) affected.
- (k) Project Co represents and warrants that the terms of this release and indemnity are fully understood, that the consideration stated herein is the sole consideration for this release and indemnity and that the said payment, or promise of payment, is accepted voluntarily for the purpose of making full and final resolution of all claims and proceedings against the City Releasees, now or hereafter brought, for damages, loss or injury resulting from the matters set forth above.
- (l) Project Co acknowledges that it has carefully read this release and indemnity, has received the advice of a lawyer as to the nature and effect of this release and indemnity, understands all of the terms in this release and indemnity, and has executed this release and indemnity voluntarily and with knowledge of the consequences thereof.
- (m) This release and indemnity shall not be operable, enforceable, binding or effective until a Certificate of Substantial Completion is properly issued pursuant to the Project Agreement and Substantial Completion Payment made. The executed release and indemnity shall be held in escrow in accordance with the Minutes of Settlement, and shall be released from escrow to the City upon the Escrow Agent being provided with a copy of the properly issued Certificate of Substantial Completion and with written notice from the City that it has paid the Substantial Completion Payment to Project Co.

IN WITNESS WHEREOF the undersigned have executed this release and indemnity by their hands and seals effective this 5th day of April, 2019.

Brookfield (PCWP) Inc.

Per: _____
Name of
Signing Officer: _____

"I HAVE AUTHORITY TO BIND THE CORPORATION"

NAC (PCWP) Inc.

Per: _____

Name of

Signing Officer: _____

“I HAVE AUTHORITY TO BIND THE CORPORATION”

Acciona Agua International Inc.

Per: _____

Name of

Signing Officer: _____

“I HAVE AUTHORITY TO BIND THE CORPORATION”

APPENDIX G – FORM OF ESCROW AGREEMENT

ESCROW AGREEMENT

ESCROW AGREEMENT (this "Agreement") dated as of April ■, 2019,

BY AND AMONG: **THE CITY OF SAINT JOHN (the "City")**

AND: **PORT CITY WATER PARTNERS ("Project Co")**

AND: **TORYS LLP, (the "Escrow Agent").**

WHEREAS the City and Project Co have entered into Minutes of Settlement that provide for a full and final release and indemnity (the "**Release**") to be executed by Project Co and placed in escrow pending the City's payment of the Substantial Completion Payment (as defined in the Minutes of Settlement), and for that Release to then be released from escrow and delivered to the City;

WHEREAS the City and Project Co wish to appoint the Escrow Agent to act as escrow agent in connection with the Minutes of Settlement; and

WHEREAS the foregoing recitals are representations and statements of fact made by the City and Project Co and not by the Escrow Agent;

NOW, THEREFORE, THIS AGREEMENT WITNESSES THAT, in consideration of the foregoing recitals, the covenants and agreements hereinafter contained and other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged), the parties hereby agree as follows:

- 1. Definitions.** Capitalized terms used in this Agreement and not otherwise defined herein shall have the respective meanings assigned to them in the Minutes of Settlement. For the purposes of this Agreement, the following term shall have the following meaning:

 - (a)** "Business Day" means any day (prior to 4:30 p.m.), other than a Saturday or a Sunday, when Canadian chartered banks are open for regular business in the city of Toronto, Ontario.
- 2. Appointment of Escrow Agent.** The City and Project Co hereby appoint the Escrow Agent to act as agent on their behalf pursuant to this Agreement, and the Escrow Agent hereby accepts such appointment on the terms and conditions of this Agreement.
- 3. Delivery of the Release to the Escrow Agent.** Project Co shall remit to the Escrow Agent the executed Release on the day that Project Co executes the Minutes of Settlement. The Escrow Agent will verify that the Release has been executed and will notify both the City and Project Co its confirmation of receipt of the executed Release. The Escrow Agent is not required to verify the authenticity of the signatures used to execute the Release. The Escrow Agent will hold the Release in Escrow until the requirements for release from escrow are met as set out in Section 4 (Release from Escrow) of this Agreement.

- 4. Release from Escrow.** The Release shall be released by the Escrow Agent in any of the following circumstances:
- (a) upon receipt of written notice from the City that it has paid the Substantial Completion Payment to Project Co;
 - (b) upon receipt of a joint written direction from the City and Project Co; or
 - (c) by order of a court or arbitrator of competent jurisdiction.
- 5. Responsibility of Escrow Agent; Indemnification.**
- (a) The City and Project Co acknowledge and agree that the Escrow Agent acts hereunder as an escrow agent only and (i) shall not be responsible or liable in any manner whatsoever for the sufficiency, correctness, genuineness or validity of any instrument deposited with it, for the form or execution of such instruments, for the identity, authority or right of any Person or party executing or depositing such instruments or for determining or compelling compliance therewith, and shall not otherwise be bound thereby; (ii) shall be obligated only for the performance of such duties as are expressly and specifically set forth in this Agreement on its part to be performed, and no implied duties or obligations of any kind shall be read into this Agreement against or on the part of the Escrow Agent; (iii) shall not be required to take notice of any default or to take any action with respect to such default involving any expense or liability, unless notice in writing of such default is formally given to the Escrow Agent, and unless it is indemnified and funded, in a manner satisfactory to it, against such expense or liability; (iv) may rely on and shall be protected in acting or refraining from acting upon any written notice, joint written notice, instruction (including, without limitation, wire transfer instructions, whether incorporated herein or provided in a separate written instruction), instrument, statement, certificate, request or other document furnished to it hereunder and believed by it to be genuine and to have been signed or presented by the proper Person, and shall have no responsibility for determining the accuracy thereof; and (v) may employ and consult counsel satisfactory to it, including in-house counsel, and the opinion of such counsel shall be full and complete authorization and protection in respect of any action taken, suffered or omitted by it hereunder in good faith and in accordance with the opinion of such counsel.
 - (b) The Escrow Agent may employ such counsel and advisors as it may reasonably require for the purpose of discharging its duties under this Agreement, and the Escrow Agent may act and shall be protected in acting in good faith on the opinion or advice or on information obtained from any such parties, without limiting the Escrow Agent's obligations hereunder, and shall not be responsible for any misconduct on the part of any of them. The reasonable costs of such services shall be added to and be part of the Escrow Agent's fee hereunder.
 - (c) The Escrow Agent shall retain the right not to act and shall not be held liable for refusing to act unless it has received clear and reasonable documentation which complies with the terms of this Agreement. Such documentation must not require the exercise of any discretion or independent judgment.
 - (d) No provision of this Agreement shall require the Escrow Agent to expend or risk its own funds or otherwise incur financial liability in the performance of its duties or the

exercise of any of its rights or powers unless indemnified as provided for herein, other than as a result of its own gross negligence, wilful misconduct or bad faith.

- (e) The Escrow Agent shall not be liable for any error of judgment, or for any act done or step taken or omitted by it in good faith, or for any mistake of fact or law, or for anything which it may do or refrain from doing in connection herewith, except for its own gross negligence, wilful misconduct or bad faith.
- (f) The City and Project Co shall share equally as between themselves, and be jointly and severally liable to the Escrow Agent for, the costs and expenses reasonably charged by the Escrow Agent for its services hereunder, in connection with the administration of the escrow created hereby or the performance or observance of its duties hereunder. If, after execution of this Agreement, there is no dispute between the City and Project Co in connection with the administration of the escrow, the Escrow Agent's flat fee for its services shall be \$3,000.00. In the event that, after execution of the Agreement, there is disagreement or dispute between the City and Project Co over the administration of the escrow, including without limitation over the delivery of the Release into escrow, the delivery of the Release out of escrow, the timing of such delivery, or any other matter, then the Escrow Agent will bill for its services under this Agreement on an hourly basis based on the regular hourly rate charged by the Escrow Agent for the individual(s) performing the services.
- (g) The City and Project Co shall jointly and severally indemnify the Escrow Agent and its affiliates, their successors, assigns and each of their directors, officers, employees and agents (the "Indemnified Parties") and save them harmless against all actions, proceedings, liability, claims, damages, costs and expenses (including reasonable expert consultant and reasonable legal fees and disbursements on a full indemnity basis) whatsoever arising from the performance of the Escrow Agent's duties hereunder (unless arising from the Escrow Agent's gross negligence, wilful misconduct or bad faith) and including any action or liability brought against or incurred by the Indemnified Parties in relation to or arising out of any breach by the City or Project Co. This indemnity shall survive the resignation or removal of the Escrow Agent and the termination or discharge of this Agreement.
- (h) Notwithstanding any other provision of this Agreement, and whether such losses or damages are foreseeable or unforeseeable, the Escrow Agent shall not be liable under any circumstances whatsoever for any (i) breach by any other party of securities law or other rule of any securities regulatory authority, (ii) lost profits or (iii) special, indirect, incidental, consequential, exemplary, aggravated or punitive losses or damages, except in the case of any breach of confidentiality or privacy laws.
- (i) The Escrow Agent does not have any interest in the Release but is serving as escrow agent only.
- (j) The Escrow Agent shall have no duties except those which are expressly set forth herein, and it shall not be bound by any notice of a claim or demand with respect to, or any waiver, modification, amendment, termination or rescission of this Agreement, unless received by it in writing, and signed by the parties hereto and if its duties herein are affected, unless it shall have given its prior written consent thereto.

- (k) The Escrow Agent accepts the duties and responsibilities under this Agreement as agent, and no trust is intended to be, or is or will be, created hereby and the Escrow Agent shall owe no duties hereunder as trustee.
 - (l) The Escrow Agent will have no responsibility for seeking, obtaining, compiling, preparing or determining the accuracy of any information or document, including the representative capacity in which a party purports to act, that the Escrow Agent receives as a condition to a release from escrow under this Agreement.
 - (m) This Section shall survive notwithstanding any termination of this Agreement or the resignation or removal of the Escrow Agent.
- 6. CONFLICT WAIVER.** The City and Project Co acknowledge and agree that:
- (a) The Escrow Agent is, has been and may in future be legal counsel to the City in connection with the Safe Clean Drinking Water Project, including the preparation of this Agreement and the Minutes of Settlement, as well as other matters;
 - (b) The Escrow Agent is, has been and may in future be legal counsel to entities affiliated with or otherwise related to or connected with some or all of the partners of Project Co; and
 - (c) By signing this Escrow Agreement, the City and Project Co:
 - i. consent, with full knowledge of these other engagements and possible future engagements described in paragraphs 6(a) and 6(b), to the Escrow Agent acting as Escrow Agent;
 - ii. waive any conflicts of interest that may exist in connection with the Escrow Agent acting simultaneously as Escrow Agent and on the engagements and possible future engagements described in paragraphs 6(a) and 6(b);
 - iii. confirm that the Escrow Agent need not obtain any separate written consents or waivers, beyond those set out in this section, in order to act simultaneously as Escrow Agent and on the engagements and possible future engagements described in paragraphs 6(a) and 6(b);
 - iv. agree that the engagement of the Escrow Agent does not, itself, create a conflict of interest in connection with any future engagement of the Escrow Agent as legal counsel by either the City, a partner of Project Co, or any entity affiliated with or otherwise related to or connected with any of the partners of Project Co (and waive in advance any such conflict of interest that may be deemed by law); and
 - v. agree that, in the event of a dispute between the City and Project Co under the Escrow Agreement, the Escrow Agent may act as legal counsel to the City and opposite Project Co on the dispute, and on any other dispute, negotiation or other matter whatsoever relating to the Safe Clean Drinking Water Project.
 - (d) This Section shall survive notwithstanding any termination of this Agreement or the resignation or removal of the Escrow Agent.

7. **Dispute Resolution.Arbitration.** Any disputes with respect to this Agreement shall be resolved by arbitration and any party hereto may demand by written notice to the other parties hereto that the matter be submitted to arbitration. The notice shall set out the reasons for the dispute and reasonable details to support the dispute. The City and Project Co shall cooperate in completing any arbitration as expeditiously as possible, the procedure to commence no later than thirty (30) days from the date the notice was sent. All of the costs and expenses of the arbitration shall be borne equally by the City and Project Co. Any award rendered by the arbitrator shall be final and binding on the parties hereto.
8. **Resignation of Escrow Agent; Successor by Merger.**
- (a) The Escrow Agent may at any time resign as such, subject to this Section, by delivering written notice of resignation to the other parties to this Agreement and by delivering the Release to any successor escrow agent designated by the City and Project Co in writing, or by a court of competent jurisdiction, whereupon the Escrow Agent shall be discharged of and from any and all further obligations arising in connection with this Agreement. The resignation of the Escrow Agent will take effect on the earlier to occur of (the "Resignation Date"): (i) the appointment of a successor escrow agent as aforesaid or by a court of competent jurisdiction; or (ii) the day which is thirty (30) days after the date of delivery of the Escrow Agent's written notice of resignation to the other parties hereto, or such shorter notice as the parties accept as sufficient. If the Escrow Agent has not received written notice of the designation of a successor escrow agent by the Resignation Date, the Escrow Agent's sole responsibility after such time shall be to retain and safeguard the Release until receipt of written notice of the designation of a successor escrow agent hereunder or pursuant to a final non-appealable order of a court of competent jurisdiction. If a successor escrow agent has not been appointed within two (2) years after the date of the delivery of its written notice of resignation, the Escrow Agent shall deliver the Release to Project Co and all of the Escrow Agent's duties and obligations under this Agreement shall thereupon cease immediately. The City and Project Co, acting together, shall have power at any time to remove the existing Escrow Agent and to appoint a successor escrow agent.
9. **Notices.** Except as otherwise expressly provided herein, all notices, demands and other communications to be given or delivered under or by reason of the provisions of this Agreement shall be in writing and shall be deemed to have been given (a) when personally delivered, (b) when transmitted as a scanned or pdf attachment to an email (with electronic confirmation of receipt), (c) the day following the day (except if not a Business Day then the next Business Day) on which the same has been delivered prepaid to a reputable national overnight air courier service or (d) the third (3rd) Business Day following the day on which the same is sent by certified or registered mail, postage prepaid, in each case to the respective parties hereto at the address set forth below, or at such other address as such party hereto may specify by written notice to the other parties hereto:

to the City at:

Common Clerk The City of Saint John P.O. Box 1971 15 Market Square, 8 th Floor Saint John, NB E2L 4L1	
And with a copy to Torys LLP at:	
79 Wellington St. W., 30th Floor, Box 270, TD South Tower Toronto, Ontario M5K 1N2	
Attention:	David Outerbridge
Email:	douterbridge@torys.com
and to Project Co at:	
[•]	
Attention:	
Email:	
and to the Escrow Agent at:	
Torys LLP 79 Wellington St. W., 30th Floor, Box 270, TD South Tower Toronto, Ontario M5K 1N2	
Attention:	Arlen Sternberg
Email:	asternberg@torys.com

Any such communication shall be deemed to have been validly and effectively given and received on the date of personal delivery or similar means of recorded communication in accordance with this Section if such date is a Business Day and such delivery was made prior to 5:00 p.m. and otherwise on the next Business Day. Any party to this Agreement may change its address for service from time to time by notice given in accordance with the foregoing and any subsequent notice shall be sent to such party at its changed address.

10. Miscellaneous.

- (a) The section headings contained in this Agreement are for reference purposes only and shall not affect the meaning or interpretation of this Agreement.
- (b) Unless the context shall otherwise require, the singular shall include the plural and *vice versa*, and each pronoun in any gender shall include all other genders.
- (c) This Agreement may be executed in any number of counterparts and any party hereto may execute any such counterpart by facsimile or other electronic means, each of which when executed and delivered shall be deemed to be an original and all of which counterparts taken together shall constitute but one and the same instrument. This Agreement shall become binding when one or more counterparts taken together shall have been executed and delivered by all of the parties hereto. It shall not be necessary in making proof of this Agreement or any counterpart hereof to produce or account for any of the other counterparts.
- (d) This Agreement or any provision hereof may be amended or waived only by written instrument duly signed by each of the parties hereto.
- (e) No waiver of any of the provisions of this Agreement shall be deemed to constitute a waiver of any other provision (whether or not similar), nor shall such waiver be binding unless executed in writing by the party hereto to be bound by the waiver.
- (f) If one or more of the provisions hereof shall for any reason be held to be invalid, illegal or unenforceable in any respect under applicable law, such invalidity, illegality or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein, and the remaining provisions hereof shall remain in full force and effect.
- (g) This Agreement is for the sole and exclusive benefit of the parties hereto, and nothing in this Agreement, express or implied, is intended to confer or shall be construed as conferring upon any other person any rights, remedies or any other type or types of benefits.
- (h) No party hereto may assign its rights hereunder without the prior written consent of the other parties.
- (i) This Agreement shall enure to the benefit of, and be binding upon, the parties hereto and their respective heirs, representatives, successors and permitted assigns.
- (j) This Agreement shall be governed by and interpreted and enforced in accordance with the laws of the Province of New Brunswick and the federal laws of Canada applicable therein.
- (k) Any reference to time of day or date means the local time or date in Saint John, New Brunswick.

(SIGNATURE PAGE FOLLOWS)

IN WITNESS WHEREOF, the parties hereto have executed this Agreement to be effective as of the date first above written.

THE CITY OF SAINT JOHN

Per: _____
Name: _____
Title: _____

Per: _____
Name: _____
Title: _____

PORT CITY WATER PARTNERS, by its
partners

BROOKFIELD (PCWP) INC.

Per: _____
Name: _____
Title: _____

Per: _____
Name: _____
Title: _____

NAC (PCWP) INC.

Per: _____
Name: _____
Title: _____

Per: _____
Name: _____
Title: _____

**ACCIONA AGUA INTERNATIONAL
INC.**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

TORYS LLP as Escrow Agent

By: _____

Name:

Title: