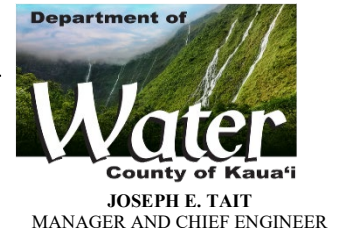


## **BOARD OF WATER SUPPLY**

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**JULIE SIMONTON**, CHAIR  
**TOM SHIGEMOTO**, VICE CHAIR  
**MICAH FINNILA**, SECRETARY

**KURT AKAMINE**, MEMBER  
**KA'AINA HULL**, EX-OFFICIO  
**TROY TANIGAWA**, EX-OFFICIO  
**VACANT**, EX-OFFICIO



### **REGULAR MONTHLY MEETING NOTICE AND AGENDA**

Thursday, January 23, 2025  
9:30 a.m. or shortly thereafter

Meetings of the Board of Water Supply, County of Kauai will be conducted in-person at the Department of Water Board Room, 2<sup>nd</sup> Floor located at 4398 Pua Loke Street, Lihue, Kauai, Hawaii, and remotely in accordance with Act 220, Session Laws of Hawai'i 2021 via interactive conference technology as follows:

**Click on the link below to join on your computer or mobile app by VIDEO:**

<https://us06web.zoom.us/j/84895595769>

**Passcode: 594754**

**OR**

**Dial phone number and enter conference ID to call in and join by AUDIO:**

**Phone: 888 788 0099 US Toll-free**

**Phone Conference ID: 848 9559 5769**

**Please Note:** If you do not provide a name, unique identifier, or alias when joining the meeting, you will be renamed to allow staff to address and manage individual guests.

In the event of a lost connection the Board will recess for up to 30 minutes to restore the connection. If the connection cannot be restored within 30 minutes, the Board will continue the meeting to 12:00 p.m. or shortly thereafter. If the visual link cannot be restored, the Board may reconvene with an audio-only link using the above dial-in phone number and conference ID. A lost connection only applies to remote connections provided as part of the remote meeting but does not apply to a public member being unable to access the meeting due to a connectivity issue on their end.

### **CALL TO ORDER**

### **ROLL CALL**

### **ANNOUNCEMENTS**

Next Scheduled Board Meeting: Thursday, February 20, 2025 – 9:30 a.m.

### **APPROVAL OF AGENDA**

### **MEETING MINUTES**

1. Regular Board Meeting – December 19, 2024

### **PUBLIC TESTIMONY**

## **OLD BUSINESS**

1. Discussion and Possible Action on Manager's Annual Evaluation timeline, process, and Criteria (*referred to PIG Committee at October 19, 2023 Board meeting; PIG committee report presented at October 17, 2024 Board meeting*)

## **NEW BUSINESS**

1. Manager's Report No. 25-18 Discussion and Possible Action to Extend the Authority to Remedy Customer Bills Delegated to the Department in the Board's Declaratory Order dated February 22, 2024
2. Manager's Report No. 25-19 Discussion and Possible Action to Request Board Approval for Indemnification and Unspecified Future Obligations for Quest Software, Inc. between the Board of Water Supply, County of Kaua'i and Quest Software, Inc.
3. Manager's Report No. 25-20 Discussion and Possible Action to Request Board Approval for Indemnification and Unspecified Future Obligations for Splashtop, Inc. between the Board of Water Supply, County of Kaua'i and Splashtop, Inc.
4. Manager's Report No. 25-21 Discussion and Possible Action to Request Board Approval for Indemnification and Unspecified Obligations for Autodesk, Inc. between the Board of Water Supply, County of Kaua'i and Autodesk, Inc.

## **STAFF REPORTS**

1. **Fiscal:**
  - a. Monthly dashboard
  - b. Budget Report for December 2024
  - c. Quarterly BAB Statement
2. **Operations** – Monthly dashboard
3. **Engineering**
  - a. Monthly dashboard
  - b. Quarterly Update
4. **Administration**
  - a. Monthly Dashboard
  - b. Human Resources – updates on Personnel Vacancies
5. **Manager and Chief Engineer** – Required communications to the Board, and update of Department activities

## **TOPICS FOR NEXT BOARD OF WATER SUPPLY MEETING: (February)**

## **TOPICS FOR FUTURE BOARD OF WATER SUPPLY MEETING:**

1. Resolutions for 2024 Employees of the Year

## **EXECUTIVE SESSION:**

Pursuant to Hawai'i Revised Statutes (HRS) §92-7(a), the Board may, when deemed necessary, hold an executive session on any agenda item without written public notice if the Executive Session was not anticipated in advance. Any such executive session shall be held pursuant to HRS §92-4 and shall be limited to those items described in HRS §92-5(a).

## **ADJOURNMENT**

## **WRITTEN TESTIMONY**

The Board is required to afford all interested persons an opportunity to present testimony on any agenda item. The Board encourages written testimony at least two (2) business days prior to a scheduled Board meeting. At each Board meeting, the Board will accept oral and written testimony on any agenda item during the Public Testimony portion.

Please include:

1. Your name and if applicable, your position/title and organization you are representing
2. The agenda item that you are providing comments on; and
3. Whether you are a registered lobbyist and, if so, on whose behalf you are appearing.

### Send written testimony to:

Board of Water Supply, County of Kaua'i  
C/O Administration  
4398 Pua Loke Street  
Līhu'e, Hawai'i 96766

E-Mail: [board@kauaiwater.org](mailto:board@kauaiwater.org)  
Phone: (808) 245-5406  
Fax: (808) 245-5813

### **Public Testimony**

You do not need to register to provide oral testimony on the day of the meeting. Please note that public testimony is taken after the approval of the meeting agenda to ensure public testimony is received before any action is taken on an agenda item. The length of time allocated to present oral testimony may be limited at the discretion of the chairperson.

### SPECIAL ASSISTANCE

If you need an auxiliary aid/service or other accommodation due to a disability, or an interpreter for non-English speaking persons, please call (808) 245-5406 or email [board@kauaiwater.org](mailto:board@kauaiwater.org) as soon as possible. Requests made as early as possible will allow adequate time to fulfil your request. Upon request, this notice is available in alternate formats such as large print, Braille, or electronic copy.

A horizontal splash of clear blue water with bubbles, positioned behind the text.

DRAFT

MINUTES

MINUTES  
BOARD OF WATER SUPPLY  
**Thursday, December 19, 2024**

The Board of Water Supply, County of Kaua‘i, met in a regular meeting in Lihu'e on Thursday, December 19, 2024. Chair Tom Shigemoto called the meeting to order at 9:41 a.m. The following Board members were present:

**BOARD:**

Mr. Tom Shigemoto, *Chair*  
Ms. Julie Simonton, *Vice Chair*  
Ms. Micah Finnila  
Mr. Troy Tanigawa

**EXCUSED:**

Mr. Kurt Akamine  
Mr. Ka‘aina Hull

Quorum was achieved with 4 members present at Roll Call.

**ANNOUNCEMENTS**

Next Scheduled Board Meeting: Thursday, December 19, 2024 – 9:30 a.m.

**APPROVAL OF AGENDA**

**The agenda was approved with no objections**

**MEETING MINUTES**

1. Regular Board Meeting – November 21, 2024
2. Executive Session – November 21, 2024

**The minutes of the November 21, 2024 regular meeting and November 21, 2024 executive session were received for the record**

**PUBLIC TESTIMONY**

None

**CORRESPONDENCE**

1. Email dated December 4, 2024, from Sherrie Toma and Howard Carvalho re: debris from Albizia tree on DOW property causing damage to their roof

In response to Chair Shigemoto’s questions, Chief of Operations Ryan Smith stated that the Department is aware of the albezia trees referenced in the email, which are on DOW property, and is aware that leaves and small branches do fall, but no one has informed the department of any large branches falling and causing damage or blocking the road. Vice-Chair Simonton referenced the photos that were submitted and asked for clarification on where the house is located in relation to the tree as there are no photos of the house. Mr. Smith stated the house is across the road from the property, but the tree doesn’t extend that far. He believes the home owners are talking about debris from falling leaves. Ms. Finnila commented that they stated that they had replaced their roof because of this, which she found to be strange. Ms. Simonton asked if there are additional albezia trees in the area to which Mr. Smith stated that on the left side outside of DOW’s fence line are a whole bunch of albezia’s. Ms. Simonton questioned that the only albezia tree being specified in this letter is the one on DOW property. That being the case she would be inclined to receive for the record noting that since this tree does not extend onto

their property and because there are other albezia's in the area, she feels it would be a slippery slope for DOW to accept responsibility for the damage being claimed.

Deputy County Attorney Saito suggested that the Board refer it to the Department to dispose of even if there is no expectation for action to be taken now. This will allow the Department to do its due diligence to investigate, and from a liability standpoint, the Board can say it was referred to the Department to investigate and respond as necessary.

**Board member Simonton moved to refer this correspondence to the Department, seconded by Ms. Finnila; with no objections, motion carried with 4 Ayes.**

### **NEW BUSINESS**

1. Discussion and Adoption of Resolution No. 25-04, Mahalo and Aloha to Dean Sacramed (Retiree), Maintenance Worker II, Operations Division

**Board member Simonton moved to adopt Resolution No. 25-04, seconded by Ms. Finnila; with no objections, motion carried with 4 Ayes.**

**The meeting recessed at 9:47 a.m.**

**The meeting reconvened at 9:52 a.m.**

2. *Manager's Report No. 25-15* Discussion and Possible Action to receive and expend grant funds from the Hawaii Community Foundation

**Board member Simonton moved to approve Manager's Report No. 25-15, seconded by Ms. Finnila; with no objections, motion carried with 4 Ayes.**

3. *Manager's Report No. 25-16* Discussion and Possible Action to Request Board Approval for the Indemnification Provisions of the Apple Business Manager Agreement between the Board of Water Supply, County of Kaua'i and Apple, Inc.

**Board member Simonton moved to approve Manager's Report No. 25-16, seconded by Ms. Finnila; with no objections, motion carried with 4 Ayes.**

4. *Manager's Report No. 25-17* Discussion and Possible Action for Adoption of Budget Resolution 25-05 for the acceptance and expenditure of grant monies from the Legislature of the State of Hawai'i Supplemental Appropriations Act of 2024 for the Kapa'a Homesteads Tanks, Two 0.5 MG Tanks, Package B

Engineering Division Head Jason Kagimoto stated that with the efforts of Deputy Manager Michael Hinazumi as well as the support from Representatives Nadine Nakamura and Ron Kouchi, the Department was able to secure an additional \$2.4 million appropriation for this project.

**Board member Simonton moved to approve Manager's Report No. 25-17, seconded by Ms. Finnila; with no objections, motion carried with 4 Ayes.**

5. Confirmation of Board Committee appointments for 2025

**Board member Simonton moved to confirm the Board Committee appointments for 2025, seconded by Ms. Finnila; with no objections, motion carried with 4 Ayes.**

## **STAFF REPORTS**

1. Fiscal:
  - a. Monthly dashboard
  - b. Budget Report for October 2024
2. Operations – Monthly dashboard
3. Engineering – Monthly dashboard
4. Administration:
  - a. Monthly dashboard
  - b. Human Resources – updates on Personnel Vacancies
5. Manager and Chief Engineer – Required communications to the Board, and update of Department activities

## **TOPICS FOR NEXT BOARD OF WATER SUPPLY MEETING: (December)**

### **TOPICS FOR FUTURE BOARD OF WATER SUPPLY MEETING:**

1. Resolutions for 2024 Employees of the Year

### **EXECUTIVE SESSION:**

Pursuant to Hawai'i Revised Statutes (HRS) §92-7(a), the Board may, when deemed necessary, hold an executive session on any agenda item without written public notice if the Executive Session was not anticipated in advance. Any such executive session shall be held pursuant to HRS §92-4 and shall be limited to those items described in HRS §92-5(a).

### **ADJOURNMENT**

The meeting was adjourned at 10:43 a.m.

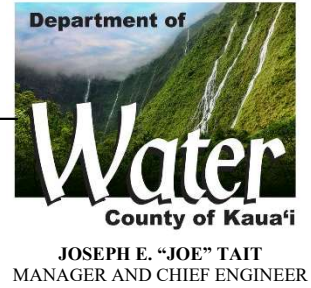
Respectfully submitted,

Cherisse Zaima  
Commission Support Clerk

A horizontal splash of clear blue water with bubbles and ripples, set against a white background. The water is in the center of the page, and the text is overlaid on it.

# OLD BUSINESS





## BOARD OF WATER SUPPLY

**TOM SHIGEMOTO**, CHAIR  
**JULIE SIMONTON**, VICE CHAIR  
**KURT AKAMINE**, SECRETARY

**MICAH FINNILA**, MEMBER  
**KA'AINA HULL**, MEMBER *Ex-Officio*  
**TROY TANIGAWA**, MEMBER *Ex-Officio*  
**VACANT**, MEMBER, *Ex-Officio*

### PERMITTED INTERACTION GROUP REPORT

October 8, 2024

Subject: Report of the Permitted Interaction Group of the Kaua'i County Board of Water Supply regarding Discussion and Possible Action on Manager's Annual Evaluation timeline, process, and criteria

The Permitted Interaction Group (PIG) met on February 15, 2024, March 7, 2024, July 16, 2024, and August 8, 2024, with **all three members (Micah Finnila, Kurt Akamine, and Ka'aina Hull) present**. The group reviewed the presentation slides provided by Ms. Finnila at the November 17, 2023, Board meeting and discussed Human Resources Best Practices using SHRM (Society for Human Resource Management) as a reference point and guideline.

The PIG agreed to develop a hybrid/combination Performance Evaluation policy, process and form utilizing elements of Manager's Report No. 22-55 Manager/Chief Engineer's Goals & Benchmarking, County of Kauai Department of Human Resources Evaluation Factors for Appointees, and SHRM/Joyaux Associates Best Practice Performance Appraisal Process for CEO from which the PIG developed a draft Board Policy that includes the evaluation process and form.

The members recommend that the PIG be disbanded and that the proposed policy titled The Performance Appraisal Process for the Manager & Chief Engineer & Delegation of Authority to the Board Chair be forwarded to the full Board for discussion and possible adoption.

Sincerely,

*Micah Finnila*  
 Micah Finnila (Oct 9, 2024 17:11 HST)

Micah Finnila  
 Permitted Interaction Group

MF/crz



# PIG Report - Mgr. Eval. Process

Final Audit Report

2024-10-10

Created:	2024-10-10
By:	Cherisse Zaima (czaima@kauaiwater.org)
Status:	Signed
Transaction ID:	CBJCHBCAABAAuN5QC34JsyZLINBFVSEitqOwQ1klcvZV

## "PIG Report - Mgr. Eval. Process" History

-  Document created by Cherisse Zaima (czaima@kauaiwater.org)  
2024-10-10 - 0:49:38 AM GMT
-  Document emailed to Micah Finnila (poipucrater30@gmail.com) for signature  
2024-10-10 - 0:49:42 AM GMT
-  Email viewed by Micah Finnila (poipucrater30@gmail.com)  
2024-10-10 - 3:10:07 AM GMT
-  Document e-signed by Micah Finnila (poipucrater30@gmail.com)  
Signature Date: 2024-10-10 - 3:11:19 AM GMT - Time Source: server
-  Agreement completed.  
2024-10-10 - 3:11:19 AM GMT

## BOARD OF WATER SUPPLY POLICY NO. XX

### **RE: THE PERFORMANCE APPRAISAL PROCESS FOR THE MANAGER & CHIEF ENGINEER AND DELEGATION OF AUTHORITY TO THE BOARD CHAIR**

#### **Purpose**

Pursuant to the Kaua‘i County Charter, the Board of Water Supply (“Board”) has the authority to manage, control and operate the waterworks of the County of Kaua‘i, which includes appointing and removing the Manager & Chief Engineer (“Manager”). Accordingly, the Board has inherent authority to conduct annual job performance appraisals of the Manager. The purpose of this policy is to establish the Board’s job performance appraisal process for the Manager and the form to be used and completed by the Board as a result of the Manager’s annual job performance appraisal process.

#### **Elements of the Performance Appraisal Process**

The Performance Appraisal Process will be documented using the attached form, titled Performance Appraisal Form (“Form”). The Form will aid the Board in conducting a careful review of the following:

- Accomplishment of goals for the review period (Section 1 of the Form)
- Performance on key responsibilities of the job description (Section 2 of the Form)
- Goals for upcoming review period with ample input from Board Chair and incumbent (Section 3 of the Form)
- Performance improvement plan (Section 4 of the Form)
  - Set jointly with Board and Manager, with monitored target dates as needed.
- Development Plan (Section 5 of the Form)
  - Set jointly with Board and Manager and includes monitored target dates.
- Potential for advancement to greater responsibilities.

#### **Delegation of Authority**

The Board delegates to the Board Chair the authority to commence and manage the Performance Appraisal Process in accordance with this policy. The Board retains final approval authority.

#### **Board Chair Responsibilities**

1. Initiate the formal Performance Appraisal Process, typically 2-3 months prior to the start of the new fiscal year. This time period allows completion of the Performance Appraisal Process, format review and action by the Board, meeting with the Manager, and then any necessary budget action.
2. The Chair sends the Manager the Form to complete as a self-appraisal. Once the Manager completes the Form, the Manager sends it to the Chair.
3. The Chair completes Sections 1-4 of the Form. The Chair then compares results to Manager’s self-appraisal.
4. The Chair prepares the final Form, completing Sections 1-4 of the Form and the “Overall performance rating” of the Form. The Chair may also make merit-based recommendations on salary and benefit adjustments for possible Board action, provided any such recommendations are not contrary to the maximum salary determined for the Manager position as established by the Salary Commission and/or any employee benefits regulated by the Department of Human Resources.
5. At a duly noticed meeting, the Board convenes in executive session, unless the Manager requests that the Performance Appraisal Process occur in open session, to discuss the results of the performance appraisal with the Manager. The Manager may comment on the Performance Appraisal Process and/or the results documented on the Form. The Board and the Manager jointly

outline the Performance Improvement Plan (Section 4 of the Form) and Development Plan (Section 5 of the Form). The Chair incorporates and updates the Form.

6. The Board shall take action on the results of the Performance Appraisal Process.
7. If approved, the Chair prepares and signs the final Performance Appraisal Form and presents the Form to the Manager for signature.
8. The fully executed Form and the Manager's self-appraisal Form is forwarded to the Department of Human Resources.

### **Performance appraisal ratings**

The Performance Appraisal Process shall use the following criteria in rating the Manager's performance:

- **Exceeds expectations** – The individual is making an exceptional, significant contribution to DOW. This person constantly accepts responsibilities beyond those of the job held and continuously exceeds expectations regarding completion of work assignments. There are few areas regarding performance of job responsibilities in which she could improve.
- **Meets expectations** – The individual is a steady, consistent, dependable performer and carries out duties in a fully responsible and effective manner. Meets and occasionally exceeds expectations regarding job responsibilities and completion of work assignments. Even though present performance is acceptable, there may be areas regarding performance of job responsibilities in which the person should improve.
- **Needs improvement** – The individual falls below standards or expectations. It is expected that with the appropriate improvement plan, performance will reach a fully satisfactory level within a specified time period.

APPROVED:

\_\_\_\_\_  
CHAIR  
BOARD OF WATER SUPPLY

\_\_\_\_\_  
Date

## Performance Appraisal Form DOW Manager & Chief Engineer

First & Last Name: \_\_\_\_\_

Current evaluation period \_\_\_\_\_

Date evaluation completed \_\_\_\_\_ Date of Board action \_\_\_\_\_

**Section 1: Achievement of goals from last review period** *(type in the agreed-upon goals decided during the last review period):*

**Section 2: Performance on key responsibilities of the job description:** *Use ratings: EE (Exceeds Expectations), ME (Meets Expectations), NI (Needs Improvement). When using NI, please give specific example(s) below the goal statement.*

### Performance appraisal ratings

- **Exceeds expectations** – The individual is making an exceptional, significant contribution to DOW. This person constantly accepts responsibilities beyond those of the job held and continuously exceeds expectations regarding completion of work assignments. There are few areas regarding performance of job responsibilities in which she could improve.
- **Meets expectations** – The individual is a steady, consistent, dependable performer and carries out duties in a fully responsible and effective manner. Meets and occasionally exceeds expectations regarding job responsibilities and completion of work assignments. Even though present performance is acceptable, there may be areas regarding performance of job responsibilities in which the person should improve.
- **Needs improvement** – The individual falls below standards or expectations. It is expected that with the appropriate improvement plan, performance will reach a fully satisfactory level within a specified time period.

<b><u>Responsibility</u></b>	<b><u>Rating</u></b>
<b><u>Mission, policy, planning</u></b>	
1. Helps Board monitor and evaluate organization's relevancy, effectiveness, and results.  Example(s):	
2. Keeps Board fully informed re: organization's condition and all important factors influencing it.  Example(s):	

<p>3. Assures that appropriate policies are in place to guide the organization’s work in all areas.</p> <p>Example(s):</p>	
<p><b><i>Management, administration</i></b></p>	
<p>4. Provides oversight of all DOW activities, manages day-to-day operations, and assures a smoothly functioning, efficient organization.</p> <p>Example(s):</p>	
<p>5. Assures DOW quality and organizational stability through development and implementation of standards and controls, systems and procedures, and regular evaluation.</p> <p>Example(s):</p>	
<p>6. Assures a work environment that recruits, retains, and supports quality staff.</p> <p>Example(s):</p>	
<p>7. Assures process for selecting, development, motivating, and evaluating staff.</p> <p>Example(s):</p>	
<p><b><i>Responsibility</i></b></p>	
<p>8. Recruits personnel, negotiates professional contracts, and assures development and maintenance of appropriate salary structures.</p> <p>Example(s):</p>	
<p><b><i>Governance</i></b></p>	
<p>9. Work effectively with Board, its officers and committees to define their roles and responsibilities; helps evaluate their performance regularly.</p> <p>Example(s):</p>	
<p>10. Works with Board Chair to enable Board to fulfill its governance functions and manages Boards’s due diligence process to ensure timely attention to core issues.</p> <p>Example(s):</p>	

<p>11. Works with Board Chair to focus Board attention on long-range strategic issues.</p> <p>Example(s):</p>	
<p>12. Works with Board officers and committee chairs to get best thinking and involvement of each Board member &amp; to stimulate each Board member to give his / her best.</p> <p>Example(s):</p>	
<p>13. Frames significant questions and complex issues in ways that facilitate Board dialogue and action.</p> <p>Example(s):</p>	
<p>14. Recommends Board and its committees.</p> <p>Example(s):</p>	
<b>Finance</b>	
<p>15. Oversees the fiscal activities of the organization, assures adequate controls.</p> <p>Example(s):</p>	
<p>16. With Board, ensures financing to support goals, including effective fund development program.</p> <p>Example(s):</p>	
<b>Relationship building</b>	
<p>17. Identifies the key relationships necessary to support an effective organization and assures proper planning, relationship building and communications to develop and maintain these.</p> <p>Example(s):</p>	
<p>18. Facilitates the integration of the organization into the community by assuring the use of effective marketing and communications activities.</p> <p>Example(s):</p>	
<p>19. Acts as an advocate, within the public and private sectors, for issues relevant to DOW, its services, and constituencies.</p> <p>Example(s):</p>	

20. Listens to s stakeholders in order to improve services.  Example(s):	
21. Works with legislators and regulatory agencies to promote legislative and regulatory policies that promotes the DOW's policies and priorities.  Example(s):	
<b>Leadership</b>	
22. Demonstrates initiative and creativity in identifying and addressing strategic issues facing the organization.  Example(s):	
23. Effectively manages continuity, change and transition.  Example(s):	
24. Sets and achieves clear and measurable goals and reasonable deadlines.  Example(s):	
25. Deals effectively with demanding situations and designs and implements effective interventions. Example(s):	
26. Consistently displays integrity and models the organization's values.  Example(s):	

**Section 3: Goals for the next review period:**

\_\_\_ Check if none.

Goal 1:	
Goal 2:	
Goal 3:	



**Section 4: Performance improvement plan:** *Outline any areas where the Manager & Chief Engineer needs improvement to reach higher levels of performance.*

\_\_\_ Check if none.

Needs Improvement:	
Needs Improvement:	
Needs Improvement:	

**Section 5: Development plan:** *Outline training / development that will enhance Manager & Chief Engineers contribution to the organization. Also specify areas of support and action that the Board can do to help the Manager & Chief Engineer.*

\_\_\_ Check if none.

Training/Development:	
Training/Development:	
Training/Development:	

**Overall performance rating:**

\_\_\_ Exceeds Expectations \_\_\_ Meets Expectations \_\_\_ Needs Improvement

**Comments for Manager & Chief Engineer for this evaluation period:**

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**Action and approvals**

APPROVED:  
BOARD OF WATER SUPPLY, COUNTY OF KAUA'I

\_\_\_\_\_  
Its: Chair

Dated: \_\_\_\_\_

Manager & Chief Engineer signature and meeting date: \_\_\_\_\_

*Please write any comments from Manager & Chief Engineer on the other side of these pages.*

A horizontal splash of clear blue water with bubbles, set against a white background. The splash is centered and extends across most of the width of the page.

NEW

BUSINESS

# DEPARTMENT OF WATER

County of Kaua'i

*"Water has no Substitute – Conserve It!"*

## MANAGER'S REPORT No. 25-18

December 19, 2024

Re: Discussion and Possible Action to extend the authority to remedy customer bills delegated to the Department in the Board's Declaratory Order dated February 22, 2024.

### **BACKGROUND:**

The Department of Water (Department) continues to replace island-wide transponder units that have failed. The Board of Water Supply (Board) discussed the practice of rendering bill adjustments to customers following the replacement of a failed transponder at the Regular Meeting on February 15, 2024 and Special Meeting on February 22, 2024. The Board issued a Declaratory Order authorizing the Department to make necessary adjustments to a customer's bill in order to terminate a controversy and/or to remove uncertainty pursuant to Part 1, Section VI, Subsection 1 of the Rules and Regulations of the Department of Water, County of Kauai (Rules). The Declaratory Order authorizes the Department to calculate the adjustment using the formula to equitably adjust bills when a meter fails to register or is found to be inaccurate pursuant to Part 2, Section X, Subsection 3 of the Rules. The equitable adjustment formula is as follows: "the Department will refund the consumer the overcharge based on past consumption, for a period not exceeding 6 months; unless it can be proved that the error was due to some cause, the date of which can be fixed, In this latter case, the overcharge shall be computed back to, but not beyond, such date."

The Declaratory Order terminated the Department's authority to remedy bills in the above manner one year from February 22, 2024. However, the transponder replacement project continues to progress and will not be completed before the Department's authority to remedy bills as described herein is terminated.

### **RECOMMENDATION:**

It is recommended that the Board approve extending the Department's authority to remedy customer bills as described in the Declaratory Order until the remaining failed and expected to fail transponder units are replaced. This authority shall expire on December 31, 2028, unless otherwise modified by the Board.

### **FUNDING:**

N/A

### **OPTIONS:**

**Option 1: Approve Manager's Report as recommended.**

Pro: The Department will be able to continue reviewing and equitably adjusting customers' accounts following the replacement of a transponder unit.

Con: The Department will adjust affected customers' bills accordingly and may result in credits.

**Option 2: Do Not Approve Manager's Report as recommended.**

Pro: The Department will not make equitable adjustments to customers' bills and Billing staff may redirect efforts to address other matters.

Con: The Department may receive complaints and be exposed to possible legal action.

RY/cz

Attachment(s): Declaratory Order approved February 22, 2024

THE BOARD OF WATER SUPPLY OF THE COUNTY OF KAUA'I  
STATE OF HAWAII

DECLARATORY ORDER

The Board of Water Supply, ("Board"), upon its own motion, and having considered the circumstances relating to and recognizing the controversies and/or uncertainties stemming from the Department of Water's ("Department") practice of rendering bill adjustments to customers following the replacement of a failed transponder, as discussed at the Regular Meeting on February 15, 2024, and a Special Meeting on February 22, 2024, and in order to terminate a controversy and/or to remove uncertainty pursuant to Part 1, Section VI, Subsection 1 of the Rules and Regulations of the Department of Water, County of Kaua'i ("Rules"), hereby ISSUES ITS DECLARATORY ORDER:

1. The Department shall timely adjust each customer's first monthly water bill that is to be rendered after the replacement of the customer's failed transponder;
2. The adjustment will be calculated using the formula to equitably adjust bills when a meter fails to register or is found to be inaccurate pursuant to Part 2, Section X, Subsection 3 of the Rules;
3. The equitable adjustment formula pursuant to Part 2, Section X, Subsection 3 of the Rules is as follows: "the Department will refund the consumer the overcharge based on past consumption, for a period not exceeding six months; unless it can be proved that the error was due to some cause, the date of which can be fixed. In this latter case, the overcharge shall be computed back to, but not beyond, such date."

4. The Department shall make the adjustment prior to sending the bill to the customer, and the adjustment shall be clearly reflected on the bill;

5. When the Department is unable to send a monthly bill to customers affected by a failed transponder, the Department shall send written notice, in lieu of a monthly bill, to the customer notifying the customer that the Department is reviewing the customer's monthly bill in order to make necessary adjustments consistent with this Declaratory Order, and that a subsequent water bill containing charges for actual water consumption for the missed month(s) will be rendered to the customer upon the conclusion of the Department's review;

6. The Department shall review all adjustments to monthly water bills following the replacement of a transponder that were made prior to this Declaratory Order, and shall take necessary and appropriate actions, consistent with this Declaratory Order, the Rules and all other applicable laws, to ensure prior adjustments strictly comport with the remedy provided in this Declaratory Order; and

7. The Department's authority to make adjustments to a customer's first monthly water that is to be rendered after the replacement of a failed transponder shall expire in one year from the date of this Declaratory Order or upon any subsequent Board action that renders this Declaratory Order moot, whichever occurs first.

DATED: Līhu'e, Kaua'i, Hawai'i, February 22, 2024.

Tom H. Shigemoto  
\_\_\_\_\_  
CHAIR  
BOARD OF WATER SUPPLY

Signature: Tom H. Shigemoto  
Tom H. Shigemoto (Mar 1, 2024 14:31 HST)

Email: tshigemoto@kauaiwater.org







# Proposed Declaratory Order\_billing FINAL

Final Audit Report

2024-03-02

Created:	2024-03-02
By:	Cherisse Zaima (czaima@kauaiwater.org)
Status:	Signed
Transaction ID:	CBJCHBCAABAAp2PiRWZ0xGIB4EfmX51tif9Sw9P7gYiq

## "Proposed Declaratory Order\_billing FINAL" History

-  Document created by Cherisse Zaima (czaima@kauaiwater.org)  
2024-03-02 - 0:17:00 AM GMT
-  Document emailed to tshigemoto@kauaiwater.org for signature  
2024-03-02 - 0:17:03 AM GMT
-  Email viewed by tshigemoto@kauaiwater.org  
2024-03-02 - 0:28:31 AM GMT
-  Signer tshigemoto@kauaiwater.org entered name at signing as Tom H. Shigemoto  
2024-03-02 - 0:31:15 AM GMT
-  Document e-signed by Tom H. Shigemoto (tshigemoto@kauaiwater.org)  
Signature Date: 2024-03-02 - 0:31:17 AM GMT - Time Source: server
-  Agreement completed.  
2024-03-02 - 0:31:17 AM GMT

# DEPARTMENT OF WATER

County of Kaua'i

*"Water has no Substitute – Conserve It!"*

## MANAGER'S REPORT No. 25-19

January 23, 2025

Re: Discussion and Possible Action to Request Board Approval for Indemnification and Unspecified Future Obligations for Quest Software, Inc. between the Board of Water Supply, County of Kaua'i and Quest Software Inc.

### **RECOMMENDATION:**

The Department recommends that the Board approve Option 1, which will allow the Department to move forward with the renewal of Quest Software, Inc.'s Rapid Recovery software.

### **FUNDING: N/A**

### **BACKGROUND:**

The Department's Information Technology Section continues to utilize Rapid Recovery to backup files on the network drive.

Renewal of the service is required to continue with its use. The agreement contains language for indemnification and unspecified future obligation provisions. The County Attorney's Office has reviewed and approved the Terms and Conditions for Quest Software, Inc.

The sections within the agreement that reference Indemnification and Unspecified Future Obligations are shown below:

### **QUEST Software Transaction Agreement:**

#### **12. Indemnity.**

(b) **Export Compliance Indemnity.** Either party shall indemnify the other from and against a Third Party Claim arising from their own party's violation of Section 9 (Export).

(c) **Customer Data Indemnity.** Customer shall indemnify Provider against a Third Party Claim arising from its Customer Data responsibilities under Appendix A- Software as a Service.

(d) **Indemnification Obligations.** Indemnification for a Third Party Claim shall exclusively consist of the following: indemnifying party shall (1) defend or settle the Third Party Claim at its own expense, (2) pay any judgments finally awarded against indemnified party under a Third Party Claim or any amounts assessed against indemnified party in any fines or settlements of a Third Party Claim, and (3) reimburse indemnified party for the reasonable administrative costs or expenses, including without limitation reasonable attorneys' fees, it necessarily incurs in responding to the Third Party Claim. Indemnifying party's obligations are conditioned upon indemnified party (i) giving prompt written notice of the Third Party Claim to the indemnifying



party, (ii) permitting indemnifying party to retain sole control of the investigation, defense or settlement of the Third Party Claim as long as such settlement shall not include a financial obligation on or admission of liability by indemnified party, and (iii) providing indemnifying party with cooperation and assistance as indemnifying party may reasonably request in connection with the Third Party Claim.

## 17. General.

(l) **Legal Fees.** If any legal action is brought to enforce obligations related to payment, compliance verification, or a violation of intellectual property rights, the prevailing party shall be entitled to recover its reasonable attorneys' fees, full costs and other collection expenses, in addition to any other relief it may be awarded.

### OPTIONS

#### **Option 1:**

Pro:

#### **Approve the Department's request.**

The Department will be able to move forward with the renewal and continued use of Quest Software Inc.'s Rapid Recovery software.

Cons:

The Department would have potential risk associated with indemnification and unspecified future obligation provisions of the Quest software agreement.

#### **Option 2:**

Pro:

#### **Deny the Department's request.**

No potential legal risk associated with indemnification and unspecified future obligation provisions of the Quest software agreement.

Cons:

The Department's server system would be vulnerable to data loss without having the software to create a backed up of its server file system.

MH/cz

Attachment(s): Quest Software Transaction Agreement



## Software Transaction Agreement

PLEASE READ THIS AGREEMENT CAREFULLY BEFORE USING THIS PRODUCT. BY DOWNLOADING, INSTALLING OR USING THIS PRODUCT, YOU ACCEPT AND AGREE TO THE TERMS AND CONDITIONS OF THIS AGREEMENT. FOR ORDERS PLACED OUTSIDE THE UNITED STATES OF AMERICA, PLEASE GO TO <https://quest.com/legal/sta.aspx> TO VIEW THE APPLICABLE VERSION OF THIS AGREEMENT FOR YOUR COUNTRY OR REGION. IF YOU DO NOT AGREE TO THE TERMS AND CONDITIONS OF THIS AGREEMENT OR THE APPLICABLE VERSION OF THIS AGREEMENT FOR YOUR COUNTRY OR REGION, DO NOT DOWNLOAD, INSTALL OR USE THIS PRODUCT. IF YOU HAVE A SIGNED AGREEMENT WITH PROVIDER THAT IS SPECIFICALLY REFERENCED IN AN ORDER THAT IS EXECUTED BETWEEN YOU AND PROVIDER, THEN THAT SIGNED AGREEMENT WILL SUPERSEDE THIS AGREEMENT.

This Software Transaction Agreement (the "**Agreement**") is made between you, the Customer ("**Customer**" or "**You**") and the Provider, as defined below.

**1. Definitions.** Capitalized terms not defined in context shall have the meanings assigned to them below:

- (a) "**Affiliate**" means any legal entity controlling, controlled by, or under common control with a party to this Agreement, for so long as such control relationship exists.
- (b) "**Appliance**" means a computer hardware product upon which the Software is pre-installed and delivered.
- (c) "**Documentation**" means the then current user manuals and documentation that Provider makes available for the Software either through the electronic download of the Software or from the Support Site, and all copies of the foregoing.
- (d) "**Effective Date**" means the date that Customer accepts the Agreement.
- (e) "**eStore**" means Provider's online Software ordering system located at <https://shop.quest.com/>.
- (f) "**License Type**" means the model by which the Software is licensed (e.g., by server, by mailbox, by managed user) as indicated in the applicable Order and defined in the Product Guide.
- (g) "**Maintenance Services**" means Provider's then current maintenance and support offering specified in the applicable Order and made available to Customer as stated in the *Maintenance Services* Section below.
- (h) An "**Order**" is defined in Section 2 (Ordering).
- (i) "**Partner**" means a reseller or distributor that is under contract with Provider or another authorized party and is authorized via such contract to resell the Products and/or Maintenance Services.
- (j) "**Product(s)**" means the Software and/or Appliance(s) provided to Customer by Provider.
- (k) "**Product Guide**" means the document available at [https://quest.com/docs/Product\\_Guide.pdf](https://quest.com/docs/Product_Guide.pdf) that contains the Product Terms.
- (l) "**Product Terms**" means the terms associated with each License Type and any other terms associated with an individual Product. The Product Terms for Products in a Signed Order or a Governing Quotation shall be as stated in the Signed Order or Governing Quotation. If no Product Terms are stated in the Signed Order or Governing Quotation, if the Order is placed with a Purchase Order ("**PO**") only, if the Order is placed through the eStore, or if the Products are purchased from a Partner, then the Product Terms for such Products shall be as stated in the Product Guide as of the date of the Order or purchase.
- (m) "**Provider**" means Quest Software Inc., with its principal place of business located at 20 Enterprise, Suite 100, Aliso Viejo, CA 92656. If an Order is placed through and approved by an Affiliate of Provider, then that Affiliate shall be the Provider under this Agreement.
- (n) "**Software**" means any and all software that is provided or made available to Customer under this Agreement as well as any new versions and releases of such software that are made available to Customer pursuant to this Agreement, and, where applicable, all copies of the foregoing. Software includes On-Premises Software and SaaS Software (as defined in Appendix A Software License Terms), along with software that is delivered on an Appliance.
- (o) "**Support Site**" means Provider's website defining support, available at <https://support.quest.com/essentials/support-guide>, and <https://support.quest.com>.
- (p) "**Use**" means Customer's installation, deployment, access of or provision of access to, or operation of a Product.

**2. Ordering.** Customer may place an order for Products through (i) an ordering document signed by Customer and Provider ("**Signed Order**"), (ii) a Provider quotation referenced on a PO that states that it is governed exclusively by such quotation ("**Governing Quotation**"), (iii) an order placed through the eStore, (iv) an order placed through a Partner, or (v) a Customer **PO** submitted to Provider (each of which is referred to herein as an "**Order**"). Each Order shall be Customer's irrevocable commitment to purchase and pay for the Products and/or Maintenance Services



stated in the Order and each Order placed with Provider shall be subject to approval by Provider in writing or by performance. Customer may place Orders for professional services and training under Provider's then current professional services terms.

**3. Software License.** Subject to Customer's compliance with the terms of this Agreement, Provider grants to Customer, and Customer accepts from Provider, a non-exclusive, non-transferable (except as otherwise set forth herein) and non-sublicensable license to Use the quantities of each item of Software licensed from Provider or a Partner within the parameters of the Product Terms associated with the applicable Software and License Type referenced in the Order and as described in Appendix A (a "**License**"). Except for MSP Licenses (as defined in Appendix A), Customer shall only Use the Software to support the internal business operations of itself and its worldwide Affiliates.

**4. Restrictions.** Customer may not, nor allow any third party to (a) Use the Software except as licensed hereunder, (b) reverse engineer, decompile, or otherwise seek to access the source code of the Software, except to the extent these restrictions are prohibited by applicable law and then only upon advance written notice to Provider, (c) copy, modify, create derivative works of, or remove proprietary notices from the Products or Documentation, (d) resell, sublicense, distribute or rent the Products or Documentation, (e) use the Software to provide a hosted or managed service to third parties, except for MSP Licenses, (f) use the Products or Documentation to create or enhance a competitive offering or for any other purpose which is competitive to Provider, or (g) conduct security or vulnerability tests of the Software, interfere with its operation or circumvent any access, licensing or copying restrictions.

**5. Proprietary Rights.** Customer understands and agrees that (i) the Products are protected by copyright and other intellectual property laws and treaties, (ii) Provider, its Affiliates and/or its licensors own the copyright, and other intellectual property rights in the Products, (iii) the Software is licensed, and not sold, (iv) this Agreement does not grant Customer any rights to use Provider's trademarks or service marks, and (v) Provider reserves any and all rights, implied or otherwise, which are not expressly granted to Customer in this Agreement.

**6. Title, Risk of Loss and Delivery.** Provider, its Affiliates and/or its licensors own the title to all Software. Title and risk of loss to an Appliance shall pass from Provider to Customer upon shipment (unless the Appliance is rented, leased or loaned to Customer). Delivery of or access to Products shall be by electronic download, access credentials, or FOB Shipping Point.

**7. Payment and Taxes.** Customer agrees to pay to Provider (or, if applicable, Partner) the fees specified in each Order, Customer will be invoiced promptly following delivery of, or granting of access to, the Products or prior to the commencement of any renewal Maintenance Period or renewed Software term. Customer shall make all payments due to Provider in full within thirty (30) days from the date of each invoice or such other period (if any) stated in a Signed Order. Provider reserves the right to charge Customer a late penalty of 1.5% per month (or the maximum rate permitted by law, whichever is less) for any amounts payable to Provider by Customer that are not subject to a good faith dispute and that remain unpaid after the due date until such amount is paid. Amounts payable under this Agreement shall be paid in full without set-off or deduction by the Customer, and such amounts shall not be subject to any other limitations or exclusions, whether under this Agreement or otherwise arising in law.

The fees stated in an Order may not include taxes. If Provider is required to pay sales, use, property, GST, value-added, other taxes based on the purchase or use of Products or Maintenance Services provided under this Agreement, then such taxes shall be billed to and paid by Customer. This Section does not apply to taxes based on Provider's income.

## **8. Term and Termination.**

(a) **Termination.** This Agreement or the Licenses granted hereunder may be terminated by (i) mutual written agreement of Provider and Customer, (ii) either party for a material breach of this Agreement by the other party that the breaching party fails to cure to the non-breaching party's reasonable satisfaction within thirty (30) days following its receipt of notice of the breach ("**Breach**"), and (iii) Provider for a Breach by a Third Party User or MSP Client.

(b) **Effect of License Termination.** Upon termination of this Agreement or expiration or termination of a License for any reason, all rights granted to Customer for the applicable Software shall immediately cease and Customer shall immediately: (i) cease using the applicable Software and Documentation, (ii) remove all copies, installations, and instances of the applicable Software from all Customer computers and any other devices on which the Software was installed, and ensure that all applicable Third Party Users and Clients do the same, (iii) return the applicable Software to Provider together with all Documentation and other materials associated with the Software and all copies of any of the foregoing, or destroy such items, (iv) cease using the Maintenance Services associated with the applicable Software, (v) pay Provider or the applicable Partner all amounts due and payable up to the date of termination and shall not be entitled to any refund, and (vi) give Provider a written certification, within ten (10) days, that Customer, Third Party Users and Clients, as applicable, have complied with all of the foregoing obligations.

(c) **Survival.** Any provision of this Agreement that requires or contemplates continued performance after (i) termination of this Agreement, (ii) a termination or expiration of a License, or (iii) the expiration of a SaaS Term, is enforceable against the other party and their respective successors and assignees notwithstanding such termination or expiration, including, without limitation, the *Restrictions, Export, Payment, Taxes, Effect of License Termination, Survival, Warranty Disclaimer, Indemnity, Limitation of Liability, Confidential Information, Compliance Verification, and General* sections of this Agreement. Termination of this Agreement or a License shall be without prejudice to any other remedies that the terminating party may have under law, subject to the limitations and exclusions set forth in this Agreement.

**9. Export.** The Products and Maintenance Services are subject to the export control laws, rules, regulations, restrictions, sanctions and national security controls of the United States, Europe, and other applicable countries and regions ("**Export Controls**") and each party agrees to abide by the Export Controls. Customer hereby agrees to use the Products and Maintenance Services in accordance with the Export Controls, and



shall not Use, export, re-export, sell, lease or otherwise transfer the Products or any copy, portion or direct product of the foregoing in violation of the Export Controls. Customer is solely responsible for obtaining all necessary licenses or authorizations relating to the Use, export, re-export, sale, lease or transfer of the Products and for ensuring compliance with the requirements of such licenses or authorizations.

**10. Maintenance Services.** If ordered, Maintenance Services are provided in accordance with Provider's then current Support Guide available on Provider's Support Site, which describes the Maintenance Services, including support offering levels, severity levels, response times, and contact information. The time period during which Customer is entitled to receive Maintenance Services is a "**Maintenance Period**."

The Support Guide is incorporated in this Agreement and subject to change at Provider's discretion; however, Provider will not materially reduce the level of technical support services provided during a paid support period. As part of the Maintenance Services Provider will (i) make available new releases and corrections of the Software when Provider makes them generally available to its supported customers at no additional license fee, and (ii) provide technical support for issues that are demonstrable in the currently supported release(s) of the Software. Maintenance Services fees are due and payable annually in advance of a support period. Except for non-perpetual Licenses (for which the Maintenance Period is equal to the duration of the License) and unless otherwise stated in the Order, each License includes an initial Maintenance Period beginning on the date of the initial delivery of the Software following an Order and lasting for twelve (12) months thereafter.

The Maintenance Period for perpetual Licenses will automatically renew for additional terms of 12 months, at the prices stated on a Maintenance Services renewal Quotation provided by Provider, unless the renewal has been cancelled by either party with at least sixty (60) days prior written notice (email is sufficient). Maintenance Services must be ordered for all copies of each licensed Product and may not be purchased for a subset of licenses of a Product only. The procedure and fees for reinstating Maintenance Services for Software after it has lapsed is posted on the Support Site.

#### **11. Warranties and Remedies.**

(a) **Software Warranty and Remedies.** Provider warrants that, during the applicable Warranty Period, the operation of the Software, as provided by Provider, will substantially conform to its Documentation (the "**Software Warranty**"). For On-Premises Software, the warranty shall be for ninety (90) days following the initial delivery of the Software pursuant to an Order; and for SaaS Software shall be the duration of the SaaS Term (the "**Warranty Period**").

Provided Customer notifies Provider of any breach of the foregoing warranty within the Warranty Period, Provider shall at its option (i) correct or provide a workaround for reproducible errors in the Software that caused the breach within a reasonable time considering the severity of the error and its effect on Customer or (ii) refund the license fees paid for the applicable nonconforming On-Premises Software in exchange for a return of such nonconforming On-Premises Software or provide a credit of the fees allocable to the period during which the SaaS Software was not operating in substantial conformance with the applicable Documentation. These are Customer's sole and exclusive remedies and Provider's sole obligation for any such breach of the Software Warranty.

(b) **Appliance Warranties.** Appliances are warranted in accordance with the warranty document delivered with the Appliance and/or included on the hardware manufacturers' website.

(c) **Warranty Exclusions.** The warranties set forth in this section shall not apply to any non-conformance (i) that Provider cannot recreate after exercising commercially reasonable efforts to attempt to do so; (ii) caused by misuse of the applicable Product or by using the Product in a manner that is inconsistent with this Agreement or the Documentation; or (iii) arising from the modification of the Product by anyone other than Provider.

(d) **Warranty Disclaimer.** THE EXPRESS WARRANTIES AND REMEDIES SET FORTH IN THIS SECTION OR IN A SIGNED ORDER OR GOVERNING QUOTATION ARE THE ONLY WARRANTIES AND REMEDIES PROVIDED BY PROVIDER HEREUNDER. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, ALL OTHER WARRANTIES OR REMEDIES ARE EXCLUDED, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, INTEROPERABILITY, FITNESS FOR ANY PARTICULAR PURPOSE, NON-INFRINGEMENT, SATISFACTORY QUALITY, AND ANY WARRANTIES ARISING FROM USAGE OF TRADE OR COURSE OF DEALING OR PERFORMANCE. PROVIDER DOES NOT WARRANT UNINTERRUPTED OR ERROR-FREE OPERATION OF THE PRODUCTS.

(e) **High-Risk Disclaimer.** THE PRODUCTS ARE NOT FAULT-TOLERANT AND ARE NOT DESIGNED OR INTENDED FOR USE AND MAY NOT BE USED IN HAZARDOUS ENVIRONMENTS REQUIRING FAIL-SAFE PERFORMANCE, SUCH AS IN THE OPERATION OF NUCLEAR FACILITIES, AIRCRAFT NAVIGATION OR COMMUNICATION SYSTEMS, AIR TRAFFIC CONTROL, WEAPONS SYSTEMS, LIFE SUPPORT MACHINES, OR ANY OTHER POTENTIALLY LIFE CRITICAL USES (COLLECTIVELY, "**HIGH RISK ACTIVITIES**"). PROVIDER SHALL NOT BE LIABLE FOR ANY CLAIMS BY CUSTOMER IN RESPECT OF OR WHICH RELATE DIRECTLY OR INDIRECTLY TO HIGH-RISK ACTIVITIES.

#### **12. Indemnity.**

(a) **Provider Software Indemnity.** Provider shall indemnify Customer from any claim, suit, action, proceeding brought by a third party (a "**Third Party Claim**") to the extent it is based on an allegation that the Software directly infringes any patent, copyright, trademark, or other proprietary right enforceable in the country in which Provider has authorized Customer to use the Software, including the country to which the Software is delivered to Customer, or misappropriates a trade secret in such country. Provider shall have no obligation hereunder to indemnify Customer as



described under this section against any Third Party Claim resulting from (1) Use of the Software other than as authorized by this Agreement, a Signed Order, or a Governing Quotation; (2) a modification of the Software other than by Provider, (3) Customer's Use of any release of the Software after Provider has provided a non-infringing update at no charge, or (4) Use of the Software in conjunction with other products, services, or data not supplied by Provider if the infringement would not have occurred but for such use. If, as a result of a Third Party Claim or an injunction, Customer must stop using any Software (the "**Infringing Software**"), Provider shall at its expense and option either (1) obtain for Customer the right to continue using the Infringing Software, (2) replace the Infringing Software with a functionally equivalent non-infringing product, (3) modify the Infringing Software so that it is non-infringing, or (4) terminate the License for the Infringing Software and (A) for On-Premises Software, accept the return of the Infringing Software and refund the license fee paid for the Infringing Software, pro-rated over a sixty (60) month period from the date of initial delivery of such Software following an Order, or (B) for SaaS Software, discontinue Customer's right to access and use the Infringing Software and refund the unused prorated portion of any license fees pre-paid by Customer for such Software. This section states Provider's entire liability and its sole and exclusive indemnification obligations with respect to a Third Party Claim and Infringing Software.

(b) **Export Compliance Indemnity.** Either party shall indemnify the other from and against a Third Party Claim arising from their own party's violation of Section 9 (Export).

(c) **Customer Data Indemnity.** Customer shall indemnify Provider against a Third Party Claim arising from its Customer Data responsibilities under Appendix A- Software as a Service.

(d) **Indemnification Obligations.** Indemnification for a Third Party Claim shall exclusively consist of the following: indemnifying party shall (1) defend or settle the Third Party Claim at its own expense, (2) pay any judgments finally awarded against indemnified party under a Third Party Claim or any amounts assessed against indemnified party in any fines or settlements of a Third Party Claim, and (3) reimburse indemnified party for the reasonable administrative costs or expenses, including without limitation reasonable attorneys' fees, it necessarily incurs in responding to the Third Party Claim. Indemnifying party's obligations are conditioned upon indemnified party (i) giving prompt written notice of the Third Party Claim to the indemnifying party, (ii) permitting indemnifying party to retain sole control of the investigation, defense or settlement of the Third Party Claim as long as such settlement shall not include a financial obligation on or admission of liability by indemnified party, and (iii) providing indemnifying party with cooperation and assistance as indemnifying party may reasonably request in connection with the Third Party Claim.

### 13. Limitation of Liability.

(A) **EXCLUSION OF DAMAGES.** EXCEPT AS OTHERWISE STATED IN SUBSECTION (C) BELOW, IN NO EVENT SHALL CUSTOMER OR ITS AFFILIATES OR PROVIDER, ITS AFFILIATES OR SUPPLIERS BE LIABLE FOR (X) ANY INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL LOSS OR DAMAGE OF ANY KIND OR (Y) LOSS OF REVENUE, LOSS OF ACTUAL OR ANTICIPATED PROFITS, LOSS OF BUSINESS, LOSS OF CONTRACTS, LOSS OF GOODWILL OR REPUTATION, LOSS OF ANTICIPATED SAVINGS, LOSS OF, DAMAGE TO OR CORRUPTION OF DATA, HOWSOEVER ARISING, WHETHER SUCH LOSS OR DAMAGE WAS FORESEEABLE OR IN THE CONTEMPLATION OF THE PARTIES.

(B) **LIABILITY CAP.** EXCEPT OTHERWISE STATED IN SUBSECTION (C) BELOW, THE MAXIMUM AGGREGATE AND CUMULATIVE LIABILITY OF CUSTOMER AND ITS AFFILIATES AND PROVIDER, ITS AFFILIATES AND SUPPLIERS, FOR DAMAGES UNDER THIS AGREEMENT, WHETHER ARISING IN OR FOR BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), BREACH OF STATUTORY DUTY, OR OTHERWISE, SHALL BE THE FEES PAID AND/OR OWED (AS APPLICABLE) BY CUSTOMER OR ITS AFFILIATES FOR THE ON-PREMISES PRODUCTS THAT ARE THE SUBJECT OF THE BREACH.

FOR MAINTENANCE SERVICES OR A PRODUCT SUBJECT TO RECURRING FEES SUCH AS SAAS SOFTWARE, THE MAXIMUM AGGREGATE AND CUMULATIVE LIABILITY SHALL BE THE ANNUALIZED AMOUNT PAID AND/OR OWED (AS APPLICABLE) FOR SUCH MAINTENANCE SERVICE OR PRODUCT DURING THE TWELVE (12) MONTHS IMMEDIATELY PRECEDING THE FIRST INCIDENT GIVING RISE TO THE BREACH.

(C) **EXCLUSIONS FROM LIABILITY CAP.** NOTHING IN THIS AGREEMENT SHALL EXCLUDE OR LIMIT A PARTY'S LIABILITY FOR: (I) ANY AMOUNTS DUE AND PAYABLE TO PROVIDER UNDER THIS AGREEMENT; (II) ANY BREACH OF THE *RESTRICTIONS* SECTION; (III) INDEMNITY OBLIGATIONS UNDER THE *INDEMNITY* SECTION; OR (IV) ANY LIABILITY TO THE EXTENT LIABILITY MAY NOT BE EXCLUDED OR LIMITED AS A MATTER OF APPLICABLE LAW.

The waivers and limitations in this Limitation of Liability section apply regardless of the form of action, whether in contract, tort (including negligence), strict liability, breach of statutory duty or otherwise and will survive and apply even if any limited remedy in this Agreement fails of its essential purpose and even if a party has been advised of the possibility of such liabilities or failures.

### 14. Confidential Information

(a) **Definition.** "**Confidential Information**" means information or materials disclosed by one party ("**Disclosing Party**") to the other party ("**Receiving Party**") that are not generally available to the public and which, due to their character and nature, a reasonable person under like circumstances would treat as confidential, including, without limitation, financial, marketing, and pricing information, trade secrets, know-how, proprietary tools, knowledge and methodologies, the Software (in source code and/or object code form), information or benchmark test results regarding the functionality and performance of the Software, any Software license keys provided to Customer, and the terms and conditions of this Agreement.





Confidential Information shall not include information or materials that (i) are generally known to the public, other than as a result of an unpermitted disclosure by the Receiving Party after the Effective Date; (ii) were known to the Receiving Party without an obligation of confidentiality prior to receipt from the Disclosing Party; (iii) the Receiving Party lawfully received from a third party without that third party's breach of agreement or obligation of trust; or (iv) are or were independently developed by the Receiving Party without access to or use of the Disclosing Party's Confidential Information

(b) **Obligations.** The Receiving Party shall (i) not disclose the Disclosing Party's Confidential Information to any third party, except as permitted in subsection (c) below, and (ii) protect the Disclosing Party's Confidential Information from unauthorized use or disclosure by exercising at least the same degree of care it uses to protect its own similar information, but in no event less than a reasonable degree of care. The Receiving Party shall promptly notify the Disclosing Party of any known unauthorized use or disclosure of the Disclosing Party's Confidential Information and will cooperate with the Disclosing Party in any litigation brought by the Disclosing Party against third parties to protect its proprietary rights. For the avoidance of doubt, this section shall apply to all disclosures of the parties' Confidential Information as of the Effective Date, whether or not specifically arising from a party's performance under this Agreement.

(c) **Permitted Disclosures.** Notwithstanding the foregoing, the Receiving Party may disclose the Disclosing Party's Confidential Information without the Disclosing Party's prior written consent to any of its Affiliates, directors, officers, employees, consultants, contractors or representatives (collectively, the "**Representatives**"), but only to those Representatives that (i) have a "need to know" in order to carry out the purposes of this Agreement or to provide professional advice in connection with this Agreement, (ii) are legally bound to the Receiving Party to protect information such as the Confidential Information under terms at least as restrictive as those provided herein, and (iii) have been informed by the Receiving Party of the confidential nature of the Confidential Information and the requirements regarding restrictions on disclosure and use as set forth in this section. The Receiving Party shall be liable to the Disclosing Party for the acts or omissions of any Representatives to which it discloses Confidential Information which, if done by the Receiving Party, would be a breach of this Agreement. Additionally, it shall not be a breach of this section for the Receiving Party to disclose the Disclosing Party's Confidential Information as may be required by operation of law or legal process, provided that the Receiving Party provides prior notice of such disclosure to the Disclosing Party unless expressly prohibited from doing so by a court, arbitration panel or other legal authority of competent jurisdiction.

#### 15. Data Protection.

(a) **Data Privacy.** Each party shall comply with all laws and regulations applicable to the processing of personal data in connection with any transactions related to this Agreement, such as but not limited to, the California Consumer Privacy Act as amended by the California Privacy Rights Act, the General Data Protection Regulation, or the UK Data Protection Act, including any implementation act(s) related thereto, or any other applicable laws regulations and other legal requirements related to (a) privacy and data security, and (b) the use, collection, retention, storage, security, disclosure, transfer, disposal and other processing of personal data ("**Privacy Laws**"). Each party is responsible for obtaining any necessary authorizations and consents prior to disclosing personal data to the other party or to any third party. The terms "controller", "personal data" and "processing" used in this section shall have the meaning set out in the applicable Privacy Laws. Either party may use personal data consisting of ordinary business contact data (e.g., name, phone number, email address, etc.) in its capacity as a controller strictly in accordance with applicable Privacy Laws in the normal course of business but only for the purpose of administration of the party's business relationship and performance of their obligations under this Agreement.

(b) **General Security.** Details on Provider's information security practices, data incident response policies, technical and organizational measures, and software development security practices are available at <https://www.quest.com/legal/security.aspx> (collectively "Security Site"). Customer agrees that Provider may modify its Security Site so long as it does not materially decrease the overall level of protection provided.

#### 16. License Verification.

(a) **Reporting.** Customer shall maintain and use systems and procedures that allow Customer to accurately and completely track, document, and report Customer's Use of each Product in the quantities and versions used in compliance with the Product Terms and this Agreement and allow Provider to audit the same (an "**Audit**"). Audits may be performed by Provider or its designated agents. Provider shall provide at least ten (10) days prior written notice to Customer before the start of an Audit and will conduct the Audit during normal business hours. Customer shall provide and will require its Clients and Third Party Users to provide their full cooperation and assistance with such audit and provide access to the applicable records and computers.

(b) **Confidentiality.** Provider agrees that any Customer information gathered during the performance of an audit shall be Customer's Confidential Information under this Agreement. Customer agrees that it will not require any further confidentiality or nondisclosure agreements to be executed by Provider or its designated agents in connection with the Audit. Prior to the Audit, Provider shall ensure that its agents are subject to confidentiality obligations at least as protective as those set forth herein.

(c) **Excess Use.** If an Audit indicates that Customer's installations, deployment, access of or provision of access to, or operation of each Product exceeds the quantity of licenses owned or is otherwise not in compliance with the scope of the license granted ("**Overuse**"), then Customer shall pay for all Overuse quantities at Provider's then current list price plus any interest on past due amounts and prior Maintenance Service fees. If the Overuse is more than five percent (5%) of Customer's license entitlements, then Customer shall reimburse Provider for Provider's reasonable cost of performing the Audit. Strict performance by Customer in accordance with this provision is an express condition to all or any licenses granted in this Agreement.



## 17. General.

(a) **Governing Law and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, without giving effect to any conflict of laws principles that would require the application of laws of a different state. Any action seeking enforcement of this Agreement or any provision hereof shall be brought exclusively in the state or federal courts located in the State of Delaware. Each party hereby agrees to submit to the jurisdiction of such courts. The parties agree that neither the United Nations Convention on Contracts for the International Sale of Goods, nor the Uniform Computer Information Transaction Act (UCITA) shall apply to this Agreement, regardless of the states in which the parties do business or are incorporated.

(b) **Assignment.** Except as otherwise set forth herein, Customer shall not, in whole or part, assign or transfer any part of this Agreement, the Licenses granted under this Agreement or any other rights, interest or obligations hereunder, whether voluntarily, by contract, by operation of law or by merger (whether that party is the surviving or disappearing entity), stock or asset sale, consolidation, dissolution, through government action or order, or otherwise without the prior written consent of Provider. Any attempted transfer or assignment by Customer that is not permitted by this Agreement shall be null and void.

(c) **Severability.** If any provision of this Agreement shall be held by a court of competent jurisdiction to be contrary to law, such provision will be enforced to the maximum extent permissible by law to affect the intent of the parties and the remaining provisions of this Agreement will remain in full force and effect. Notwithstanding the foregoing, the terms of this Agreement that limit, disclaim, or exclude warranties, remedies or damages are intended by the parties to be independent and remain in effect despite any failure or unenforceability thereof. The parties have relied on the limitations and exclusions set forth in this Agreement in determining whether to enter into it.

(d) **Use by U.S. Government.** The Software is a "commercial item" under FAR 12.201. Consistent with FAR section 12.212 and DFARS section 227.7202, any use, modification, reproduction, release, performance, display, disclosure or distribution of the Software or Documentation by the U.S. government is prohibited except as expressly permitted by the terms of this Agreement. In addition, when Customer is a U.S. government entity, the language in Subsection (a)(ii) of the *Infringement Indemnity* Section of this Agreement and the *Injunctive Relief* Section of this Agreement shall not be applicable.

(e) **Notices.** All notices provided hereunder shall be in writing and addressed to the legal department of the respective party or to such other address as may be specified in an Order or in writing by either of the parties to the other in accordance with this section. Except as may be expressly permitted herein, notices may be delivered personally, sent to an email address specified by the receiving party, sent via a nationally recognized courier or overnight delivery service, or mailed by first class mail, postage prepaid. All notices, requests, demands or communications shall be deemed effective upon personal delivery or, if sent by mail, four (4) days following deposit in the mail in accordance with this paragraph. Provider may also send operational notices via the SaaS Software, Documentation, or make available on the Support Site.

(f) **Disclosure of Customer Status.** Provider may include Customer in its listing of customers and, upon written consent by Customer, announce Customer's selection of Provider in its marketing communications.

(g) **Waiver.** Performance of any obligation required by a party hereunder may be waived only by a written waiver signed by an authorized representative of the other party, which waiver shall be effective only with respect to the specific obligation described therein. Any waiver or failure to enforce any provision of this Agreement on one occasion will not be deemed a waiver of any other provision or of such provision on any other occasion.

(h) **Injunctive Relief.** Each party acknowledges and agrees that in the event of a material breach of this Agreement, including but not limited to a breach of the *Software License*, *Restrictions* or *Confidential Information* Sections of this Agreement, the non-breaching party shall be entitled to seek immediate injunctive relief, without limiting its other rights and remedies.

(i) **Force Majeure.** Each party will be excused from performance for any period during which, and to the extent that, it is prevented from performing any obligation or service as a result of causes beyond its reasonable control, and without its fault or negligence, including without limitation, acts of God, strikes, lockouts, riots, acts of war, epidemics, pandemics, and third party utility or Internet failures. For added certainty, this section shall not operate to change, delete, or modify any of the parties' obligations under this Agreement (e.g., payment), but rather only to excuse a delay in the performance of such obligations.

(j) **Equal Opportunity.** Provider is a federal contractor and Affirmative Action employer (M/F/D/V) as required by the Equal Opportunity clause C.F.R. § 60-741.5(a).

(k) **Headings.** Headings in this Agreement are for convenience only and do not affect the meaning or interpretation of this Agreement. This Agreement will not be construed either in favor of or against one party or the other, but rather in accordance with its fair meaning. When the term "including" is used in this Agreement it will be construed in each case to mean "including, but not limited to."

(l) **Legal Fees.** If any legal action is brought to enforce obligations related to payment, compliance verification, or a violation of intellectual property rights, the prevailing party shall be entitled to recover its reasonable attorneys' fees, full costs and other collection expenses, in addition to any other relief it may be awarded.

(m) **Entire Agreement.** This Agreement contains the total agreement between the two parties regarding the subject matter covered herein and supersedes any other agreements, written, oral, expressed, or implied, including any confidentiality agreement between the parties. Unless there



is a prevailing signed Agreement between the Parties, all Orders are governed solely and exclusively by this Agreement and any additional or varying terms stated on a Signed Order or a Governing Quotation. In the event of a conflict between the terms of this Agreement and the terms contained in a Signed Order or Governing Quotation, the terms of a Signed Order or Governing Quotation shall control. For all other Orders, the terms of this Agreement shall exclusively control. Neither this Agreement, nor an Order, may be modified or amended except by a written agreement executed by a duly authorized representative of each party. No other act, document, usage or custom shall be deemed to amend or modify this Agreement or an Order and Customer agrees that all additional or inconsistent terms that may be contained in any purchase order or other documentation submitted by Customer in connection with an Order are not applicable. Customer agrees that all of Customer's licenses for such Product, regardless of license date, will be governed by the version of the Software Transaction Agreement and applicable Product Terms in effect on the date of the most recent license purchase.

## **APPENDIX A: SOFTWARE LICENSE TERMS**

(1) **On-Premises Software.** If Software is delivered to Customer for (i) Customer's installation and use on its own equipment or (ii) pre-installed by Provider on an Appliance ("**On-Premises Software**"), the License term shall be perpetual (unless otherwise stated on the Order) and shall also include the right to (i) make a reasonable number of additional copies of the On-Premises Software to be used solely for non-productive archival or passive disaster recovery purposes, provided such copies are kept in a secure location and are not used for production purposes unless the associated primary copy of the On-Premises Software is no longer being used for production purposes, and (ii) make and use copies of the Documentation as reasonably necessary to support Customer's authorized users in their Use of the On-Premises Software. Each License for On-Premises Software shall only be installed by Customer in the country in which the On-Premises Software is initially delivered to Customer.

(2) **Software as a Service.** If an Order provides Customer with a right to access and use Software installed on equipment hosted by Provider or its suppliers ("**SaaS Software**"), the License for such SaaS Software shall be granted for the duration of the term stated in the Order (the "**SaaS Term**"), as such SaaS Term may be extended by automatic or agreed upon renewals. If any item of On-Premises Software to be installed on Customer's equipment is provided in connection with SaaS Software, the License duration for such Software shall be for the corresponding SaaS Term, and Customer shall promptly install any updates to such Software as may be provided by Provider. "**SaaS Environment**" means the systems to which Customer is provided access in connection with its use of the SaaS Software.

(a) **Availability.** Provider will make commercially reasonable efforts to make the SaaS Software available twenty-four hours a day, seven days a week except for scheduled maintenance, the installation of updates, those factors that are beyond the reasonable control of Provider, Customer's failure to meet any minimum system requirements communicated to Customer by Provider, and any breach of the Agreement or this Addendum by Customer that impacts the availability of the SaaS Software. Provider shall provide reasonable advance notice to Customer of any scheduled maintenance. Provider can limit or suspend Customer's access to the SaaS Software if it is sufficiently probable that the continued use of the SaaS Software may result in harm to the SaaS Software, other Provider customers, or the rights of third parties in such a way that immediate action is required to avoid damages or Customer is in breach of the Agreement. If circumstances allow and if reasonably practicable, Provider will give Customer notice so that Customer may seek to promptly avoid the issue and avoid suspension.

(b) **Customer Data.** Customer represents and warrants that it (i) has all rights necessary to use any data, content or materials that Customer (including its users) submits or includes from third-party platforms to the SaaS Environment ("**Customer Data**") without violating third-party intellectual property, privacy or other rights and grants Provider the right to access, transmit, process and use Customer Data to provide and support the SaaS Software as set out in the Agreement, and (ii) will use industry-standard measures to avoid introducing viruses, malicious code or similar harmful materials into the SaaS Environment. Between the parties, Customer is responsible for the content and accuracy of Customer Data.

(c) **Data Processing.** If Provider processes any personal data on behalf of the Customer through the Customer's use of the SaaS Software then Provider's standard data processing addendum at <https://www.quest.com/legal/dpa.aspx> or such separate terms as mutually agreed in writing, will apply to such data processing and will become a part of this Agreement. For clarity, any data protection or security agreement relating to data processed under this Agreement will always be considered a part of this Agreement and not a stand-alone agreement.

(d) **Cooperation.** Customer shall cooperate with Provider's reasonable investigation of SaaS Environment outages, security issues, and any suspected breach of this *Software as a Service* section.

(3) **MSP License.** If an Order indicates that Software is to be used by Customer as a managed service provider, Customer shall be granted a License to use such Software and the associated Documentation to provide Management Services (an "**MSP License**"). "**Management Services**" include, without limitation, application, operating system, and database implementation, performance tuning, and maintenance services provided by Customer to its customers (each, a "**Client**" or an "**MSP Client**"). If an Order indicates that an MSP License will be used to support a specific Client, Customer may not Use the MSP License to support any Client other than the Client named on the Order.

(a) **Customer Responsibilities.** Customer shall ensure that (i) each Client only uses the Software and Documentation as part of the Management Services provided to it by Customer, (ii) such use is subject to the restrictions and limitations contained in this Agreement, including, but not limited to those in the *Restrictions* and *Export* sections of this Agreement, and the applicable Order, and (iii) each Client cooperates with Provider during any compliance review that may be conducted by Provider or its designated agent. Customer agrees that the acts and omissions of its Clients in connection with their use of the Software and Documentation shall be deemed the acts and omissions of Customer.





(b) **Client Support.** Customer shall be solely responsible for supporting its Client, including but not limited to, conducting all activities required to install the Software and for providing any training to its Client and any system integrators regarding the installation, use and operation of the Software. Customer will provide Management Services to its Client in a manner that does not degrade the goodwill and reputation of Provider or the Software and will not undertake any action that would impair or disrupt Provider's relationship with its customers or potential customers. Customer will make no representations or warranties related to the Software in excess of Provider's representations or warranties contained in this Agreement. At the conclusion of any Management Services engagement with a Client, Customer shall promptly remove any Software installed on its Client's computer equipment or require the Client to do the same.

(c) **Perpetual MSP License Assignment.** In the event Customer acquires a perpetual MSP License, Customer may assign the Software to its Client for the Client's internal use, provided that Customer obtains Provider's prior written consent for the assignment and the Client agrees to be bound by Provider's then current license agreement. Customer understands and agrees that Customer shall have no right to charge a fee to its Client(s) for such an assignment and that following such an assignment, Customer shall have no further rights to use the assigned Software, and the applicable License shall terminate in accordance with the terms of this Agreement. Any attempted transfer or assignment of the Software to a Client in violation of the foregoing shall be null and void.

(4) **Evaluation License.** If an Order indicates that Software is to be used by Customer for evaluation purposes, or if Software is otherwise obtained from Provider for evaluation purposes, Customer shall be granted a License to Use such Software and the associated Documentation solely for Customer's own non-production, internal evaluation purposes (an "**Evaluation License**"). Each Evaluation License shall be granted for an evaluation period of up to thirty (30) days from the date of delivery of the On-Premises Software or from the date that access is granted to the SaaS Software, plus any extensions granted by Provider in writing (the "**Evaluation Period**"). There is no fee for an Evaluation License during the Evaluation Period, however, Customer is responsible for any applicable shipping charges or taxes which may be incurred, and any fees which may be associated with Use beyond the scope permitted herein. Customer will only be granted one Evaluation License per release of any item of Software. Notwithstanding anything otherwise set forth in this Agreement, Customer understands and agrees that Evaluation Licenses are provided "AS IS" and that Provider does not provide warranties or Maintenance Services for Evaluation Licenses.

(5) **Freeware License.** If Customer downloads a freeware version of Software from a Provider website, the terms of Use of such Software shall be governed by the applicable Freeware definition set forth in the Product Guide (a "**Freeware License**"). Notwithstanding anything otherwise set forth in this Agreement, Customer understands and agrees that Freeware Licenses are (i) provided "AS IS", (ii) Provider does not provide warranties or Maintenance Services for Freeware Licenses, and (iii) Freeware Licenses are for internal use only and may not be distributed to any third party.

(6) **Use by Third Parties.** Customer may allow its services vendors, outsourcing providers, and contractors (each, a "**Third Party User**") to Use the Software and Documentation, provided that Customer ensures that (i) the Third Party User's access to or use of the Software and Documentation is subject to the restrictions and limitations contained in this Agreement, including, but not limited to those in the Export Section, and the applicable Order(s), (ii) the Third Party User cooperates with Provider during any compliance review that may be conducted by Provider or its designated agent, and (iii) the Third Party User promptly removes any Software installed on its computer equipment upon the completion of the Third Party's need to access or use the Software as permitted by this Section. Customer agrees that the acts and omissions of its Third Party Users related to this Agreement, the Software, and Orders shall be deemed the acts and omissions of Customer.

(7) **Open Source.** Software distributed to Customer (if any) may include third party open source software ("**Open Source**") as listed in the Documentation or by Provider upon request. If Customer elects to use the Open Source on a stand-alone basis, that use is subject to the applicable Open Source license and not this Agreement.

*End of Appendix A / End of Software Transaction Agreement*

# DEPARTMENT OF WATER

County of Kaua'i

*"Water has no Substitute – Conserve It!"*

## MANAGER'S REPORT No. 25-20

January 23, 2025

Re: Discussion and Possible Action to Request Board Approval for Indemnification and Unspecified Future Obligations for Splashtop, Inc. between the Board of Water Supply, County of Kaua'i and Splashtop, Inc.

### **RECOMMENDATION:**

The Department recommends that the Board approve Option 1, which will allow the Department to move forward with the renewal of Splashtop, Inc.'s Remote Desktop software.

### **FUNDING: N/A**

### **BACKGROUND:**

The Department's Information Technology Section continues to utilize Splashtop, Inc.'s Remote Desktop to remotely support employees' workstations, as it provides access wherever the employee may be located.

Renewal of the Splashtop Remote Desktop service is required to continue with its use. The agreement contains language for unspecified future obligations, indemnification, jurisdiction, and governing law provisions. The County Attorney's Office has reviewed and approved the Terms of Service for Splashtop, Inc.'s Remote Desktop software.

The sections within the agreement that reference Indemnification and Unspecified Future Obligations are shown below:

### **SPLASHTOP TERMS of SERVICE:**

#### **13. INDEMNIFICATION**

You hereby agree, at Your sole expense, to indemnify, defend and hold Splashtop and its Affiliates, employees, officers, directors, owners, information providers, agents, licensees, licensors (the "Indemnified Parties") harmless from and against any and all liabilities, claims, costs, including reasonable attorneys' fees, incurred by the Indemnified Parties in connection with any demand, claims, action, suit, or loss arising as a result of (a) any breach by You of these Terms or claims arising from Your Splashtop Account; (b) any fraud or manipulation by You; (c) a third-party claim, action or allegation of infringement based on information, data, files or other content submitted by You; or (d) any claims of credit card fraud based on any information released by You. You agree to use best efforts to cooperate with Splashtop in the defense of any demand, claim, action or suit. Splashtop reserves the right to assume the exclusive defense of any matter subject to indemnification by You at Splashtop's own expense.

## 15. HIGH-RISK USE

You agree to hold Splashtop and its officers, directors, employees, Affiliates, and licensors harmless from any claims or losses resulting from any of the foregoing uses of the Services.

### **OPTIONS**

#### **Option 1: Approve the Department's request.**

Pro: The Department will be able to move forward with the renewal and continued use of Splashtop, Inc's Remote Desktop software.

Cons: The Department would have potential risk associated with indemnification and unspecified future obligation provisions of Splashtop Inc's agreement.

#### **Option 2: Deny the Department's request.**

Pro: No potential legal risk associated with indemnification and unspecified future obligation provisions of Splashtop, Inc.'s agreement.

Cons: IT staff would not be able to continue remote system support and would be required to be physically present to update, repair and maintain systems.

MH/cz

Attachment(s): Splashtop, Inc. Terms of Service

## Terms of Service

These terms apply to customers in our Global service region (using [my.splashtop.com](https://my.splashtop.com), [my.vault.splashtop.com](https://my.vault.splashtop.com) and/or [YOUR COMPANY NAME].us.ssw.splashtop.com). The [EU Terms of Service](#) apply to customers using our EU service region (using [my.splashtop.eu](https://my.splashtop.eu), [eu.vault.splashtop.com](https://eu.vault.splashtop.com) and/or [YOUR COMPANY NAME].eu.ssw.splashtop.com).

These Terms of Service ("Terms") between You (defined below) and Splashtop (defined below) describes the terms and conditions of Your use of Splashtop's Services (defined below). BY COMPLETING THE ELECTRONIC ACCEPTANCE PROCESS, YOU AFFIRM THAT YOU (i) ARE AT LEAST 18 YEARS OF AGE OR OLDER AND (ii) HAVE READ, UNDERSTAND AND AGREE TO BE BOUND BY ALL OF THESE TERMS. IF YOU ARE ENTERING INTO THESE TERMS ON BEHALF OF A COMPANY OR OTHER LEGAL ENTITY, YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO BIND SUCH COMPANY OR OTHER LEGAL ENTITY TO THESE TERMS, IN WHICH CASE THE TERMS "YOU" OR "YOUR" AS DEFINED HEREIN SHALL REFER TO SUCH ENTITY. IF YOU DO NOT AGREE TO ALL OF THE TERMS, DO NOT PROCEED ON THE ELECTRONIC ACCEPTANCE PROCESS AND YOUR REGISTRATION PROCESS WILL BE DISCONTINUED.

Splashtop reserves the right, exercised at its sole discretion, to modify, add or delete portions of these Terms from time to time without notice to You, and You further agree to be bound by such modified Terms. The most current version of the Terms can be viewed at <https://www.splashtop.com/legal/terms-of-service>.

### 1. DEFINITIONS

**"Affiliate"** means any entity, now or hereafter existing that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with Splashtop, including but not limited to Foxpass Inc. For purposes of this definition, "control" means direct or indirect possession of the power to direct or cause the direction of the management and policies of an entity, whether through the ownership of voting securities, by contract or otherwise. An entity shall be considered an "Affiliate" only so long as that entity meets the foregoing definition.

**"Documentation"** means any electronic or printed materials made available to accompany the Software and/or Services that provide instructions for installation, operation, maintenance, and use thereof, as may be updated from time to time by Splashtop.

**"Intellectual Property Rights"** means all intellectual property rights or similar proprietary rights, including (a) patent rights and utility models, (b) copyrights and database rights, (c) trademarks, trade names, domain names and trade dress and the goodwill associated therewith, (d) trade secrets, (e) mask works, and (f) industrial design rights; in each case, including any registrations of, applications to register, and renewals and extensions of, any of the foregoing in any jurisdiction in the world.

**"Licensed User"** means an individual with a valid seat license for the Splashtop Personal, Splashtop Business line of products, Splashtop Classroom, Splashtop On-Prem, the Mirroring360 line of products, Splashtop Secure Workspace, Splashtop Vault or Foxpass. The Splashtop Business line of products currently includes Splashtop Business Access, Splashtop Remote Support, Splashtop SOS, and Splashtop Enterprise (collectively, the "Splashtop Business

Products”). The Mirroring360 line of products currently includes Mirroring360 and Mirroring360 Pro (collectively, the “Mirroring360 Products”).

“**Malicious Code**” means viruses, worms, time bombs, Trojan horses and other harmful or malicious code, files, scripts, agents or programs.

“**Open Source Software**” means all software that is available under the GNU Affero General Public License (AGPL), GNU General Public License (GPL), GNU Lesser General Public License (LGPL), Mozilla Public License (MPL), Apache License, BSD licenses, or any other license that approved by the Open Source Initiative ([www.opensource.org](http://www.opensource.org)).

“**Services**” means the services and related Software provided by Splashtop or any Splashtop Affiliate to You under these Terms including Splashtop Personal, the Splashtop Business Products, Splashtop Classroom, Splashtop On-Prem, the Mirroring360 Products, Splashtop Secure Workspace, Splashtop Vault or Foxpass. Services shall also include any standard support and maintenance services offered by Splashtop or its Affiliates under these Terms.

“**Software**” means certain software applications, in object code format only, that are required for You to use the Services and licensed to You subject to these Terms.

“**Splashtop**” means Splashtop Inc., its Affiliates as defined herein, and its successors and assigns.

“**Splashtop Account**” means a user account created with Splashtop that uniquely identifies You with a user name and password.

“**Third Party Software**” means certain software that Splashtop license from third parties and provide to You in connection with the Services and incorporated into the Software.

“**You or Your**” means you as a Licensed User or an employee or agent of a legal entity that is authorized to represent and legally bind such entity to these Terms.

## **2. ONLINE REGISTRATION (Subsections a. and b. below not applicable to Splashtop On-Prem)**

To use the Services, You may be required to complete the online registration process, including Your electronic acceptance of these Terms. Splashtop may reject an online registration by You at its sole discretion and is not obligated to provide a reason for its rejection.

a. **Registration Data.** As part of the online registration process for a Splashtop Account, Splashtop will collect certain limited information about You (“Registration Data”). All Registration Data provided by You must be current, complete, and accurate, and You are solely responsible for updating the Registration Data as necessary. Splashtop may terminate all rights to access, receive, use and license the Services if (i) Splashtop discovers that any of Your Registration Data is incomplete, inaccurate, or not current, or (ii) Splashtop determines, at its sole discretion, that You are not the appropriate user of the Services.

b. **Passwords.** Except for Splashtop Secure Workspace and Splashtop Vault, as part of the online registration process, You must use Your email address as Your user name and choose a password for access to Your Splashtop Account. You are entirely responsible for maintaining the confidentiality of Your password and agree to carefully safeguard all of Your passwords. You are solely responsible for any and all activities that occur under Your Splashtop Account and agree to

immediately notify Splashtop of any unauthorized use of Your Splashtop Account or any other breach of security. Furthermore, You are solely responsible for obtaining consent from Your users before collecting, transmitting or transferring any content from their devices through the Services. Splashtop shall not be liable for any loss that You may incur as a result of a third party using Your Splashtop Account, either with or without Your knowledge. You may be held liable for losses incurred by Splashtop or another party due to a third party using Your Splashtop Account, either with or without Your knowledge, or Your failure to comply with the terms set forth in this section.

c. Security. Splashtop will use commercially reasonable efforts to maintain appropriate administrative, physical and technical safeguards for protection of the security, confidentiality and integrity of Registration Data. Notwithstanding the foregoing, You acknowledge that, notwithstanding any security precautions deployed by Splashtop, the use of, or connection to, the internet provides the opportunity for unauthorized third parties to circumvent such precautions and illegally gain access to the Services and Registration Data. Splashtop cannot and does not guarantee the privacy, security, integrity or authenticity of any information transmitted over or stored in any system connected to or accessible via the internet or otherwise or that any such security precautions will be adequate or sufficient.

d. Subscription to Use the Software. When You subscribe to use the Services, You are agreeing to the Splashtop Terms of Sale, which can be viewed at

(1) <https://www.splashtop.com/legal/terms-of-sale> for Splashtop Personal, Splashtop Business Products, Splashtop Classroom, Splashtop On-Prem, Splashtop Secure Workspace, Splashtop Vault or Foxpass; or

(2) <https://www.mirroring360.com/terms/sale> for Mirroring360 Products.

e. Trial and Promotional Offers. From time to time, Splashtop may offer certain trial and/or promotional offers. Splashtop reserves the right to modify or discontinue any trial or promotional offers at its sole discretion and without notice. Any trial or promotional offers are limited to one (1) per customer and may not be combined with any other offers.

### **3. PAYMENTS AND TAX LIABILITY**

Your acceptance of these Terms constitutes Your agreement to make timely payment(s) due to Splashtop including, where applicable, any and all state and local taxes, duties and fees. Unless stated otherwise, all prices and fees shown by Splashtop are exclusive of taxes and regulatory fees. Where applicable, taxes and regulatory fees will be charged on the invoices electronically issued by Splashtop in accordance with local laws and regulations. Splashtop, at its sole discretion, will calculate the amount of taxes due. The taxes and regulatory fees charged can be changed without notice.

Starting from February 1, 2024, Splashtop will begin collecting sales tax on its sales in the following States: CO, GA, KY, LA, MD, MI, and NJ.

Currently, Splashtop collects sales tax in the following states: AZ, CT, DC, HI, LA, MA, NM, NY, OH, PA, RI, SC, SD, TN, TX, UT, WA, WI & WV.

- **Tax exemptions.** If You are exempt from any taxes or fees, You will be responsible for providing Splashtop with all appropriate tax exemption certificates and/or other documentation satisfactory to the applicable taxing authorities to substantiate such exemption status. Splashtop reserves the right to review and validate tax exemption documentation.
- **Payment of Taxes and Fees.** You will pay to Splashtop any applicable taxes and fees. You are solely responsible for paying any and all taxes and fees owing as a result of Splashtop's provision of the Services to You. If You are required to pay any taxes and fees, You shall pay such amounts with no reduction or offset in amounts payable to Splashtop hereunder and You will pay and bear such additional amount, as shall be necessary to ensure that Splashtop receives the full amount of payment required as if no such reduction or offset were required.
- **Tax determination.** Tax determination is principally based on the location where You have established Your business, or for individuals where that individual permanently resides. Splashtop reserves the right to cross reference this location against other available evidence to validate whether Your location is accurate. In the event that Your location is inaccurate, Splashtop reserves the right to charge You any outstanding taxes and fees.

Splashtop reserves the right to determine pricing for Splashtop Services based on the geographical location of the user or the actual usage of the Services. Pricing may vary according to the location. The location of purchase should match where the user physically resides and where the Services will be primarily used and deployed. Splashtop reserves the right to verify Your location. If it is determined that pricing was incorrectly applied to Your purchase of Splashtop Services, whether in error or as a result of Your conduct, Your pricing for Splashtop Services will be updated accordingly and all amounts that should have been due under standard pricing shall immediately become due and payable within thirty (30) days of notice thereof.

Splashtop may suspend or terminate the Services on Your Splashtop Account due to any payment delinquency and You agree to reimburse Splashtop for all reasonable costs and expenses incurred in collecting such delinquent amounts.

#### 4. END USER LICENSE AGREEMENT

These end user license terms grant You a right and license to use the Software under certain limits, restrictions, terms and conditions ("EULA"). You agree to be bound by this EULA before using the Software.

a. License Grant. You are granted a non-transferable, non-sublicensable, non-exclusive license to use the Software and Documentation, subject to Your full compliance with this Section 4.

b. Commercial Use. The Splashtop Business Products, Splashtop Classroom, Splashtop On-Prem, and Mirroring360 Products are fully licensed for commercial use in a professional environment. Splashtop Personal is for non-commercial use only, i.e. use it to access Your personal computers for non-work related purposes. Splashtop Secure Workspace, Splashtop Vault and Foxpass may be licensed for either commercial or non-commercial use.



c. **Software Restrictions.** You shall not, directly or indirectly, nor shall You cause or permit any other person to: (i) in whole or in part, copy, reproduce, transfer, create derivative works from, translate, reverse engineer, disassemble, decompile, or otherwise attempt to derive the source code or underlying ideas or algorithms of Splashtop; (ii) alter, modify or create derivative works based on the Software, or remove any portion thereof; (iii) remove, alter, cover or obfuscate any copyright notices or other proprietary rights notices placed or embedded by Splashtop on or in any Software or Documentation; (iv) sell, resell, rent, lease, lend, distribute, assign, or otherwise transfer Your rights to use the Software or Documentation or use it for commercial time sharing, rental, service bureau use or any other form of use for the benefit of any person or entity other than You; (v) use the Software or any component thereof for any illegal purposes; or (vi) use the Software or Documentation, or any component thereof, to enable copyright protection-circumvention devices or to violate or circumvent in any manner any content copyright, content protection scheme, or content copy policies; (vii) publish or disclose to third parties any evaluation of the Services without Splashtop's prior written consent; (viii) use the Services for any other purpose than its intended purpose; (ix) interfere with or disrupt the integrity or performance of the Services; (x) introduce any Open Source Software into the Services; or (xi) attempt to gain unauthorized access to the Services or related systems or networks.

d. **Service Restrictions.** By using the Services, You agree not to and shall not allow any of Your users to (i) use the Services in violation of any applicable laws or regulations, (ii) transmit any material that may violate or infringe the intellectual property, privacy or other rights of any third party, (iii) harvest or otherwise collect or store any information of a third party without his/her consent, (iv) use the Services in a way that may cause harm or disruption to Splashtop network, Splashtop Accounts or other Splashtop services or (v) use the Services to send any spam, malware or any fraudulent, obscene or unlawful content.

e. **Use Limitations\*.** You agree to comply with the following applicable term while using the respective Services:

(i) For Splashtop Personal, the total number of Splashtop Streamers that are logged in with Your Splashtop Account shall not exceed five (5). Splashtop Personal is also restricted to non-commercial use only, per Section 4(b) above.

(ii) For the Splashtop Business Products:

a. Splashtop Business Access – 2 computers per user seat license for Splashtop Business Access Solo, 10 computers per user seat license for Splashtop Business Access Pro, and 10 computers per user seat license for Splashtop Business Access Performance. The number of users is limited by the number of user seat licenses.

b. Splashtop Remote Support – the number of computers is limited by the package You subscribed to.

The Splashtop Remote Support license is for technicians and IT personnel to remotely support their and other users' computers.

Remote Support Basic and Plus do not include secondary user access.



Remote Support Premium includes limited secondary user access.

c. Splashtop SOS – the number of computers is limited by the package You subscribed to. The number of users is limited by the number of licenses.

d. Splashtop SOS+ – Software Patch is powered by Chocolatey for Windows and Homebrew for macOS. Windows users may be subject to use limitations and other restrictions, including rate limits. Please consult Chocolatey's [Legal Terms](https://docs.chocolatey.org/en-us/information/legal/) (https://docs.chocolatey.org/en-us/information/legal/) and [Packages Disclaimer](https://docs.chocolatey.org/en-us/community-repository/community-packages-disclaimer/#rate-limiting) (https://docs.chocolatey.org/en-us/community-repository/community-packages-disclaimer/#rate-limiting) for details. Splashtop will not assume any responsibility for changes, including damages of any sort, which may result from the Software Patch add-on.

e. Splashtop Enterprise (Cloud) – limits on technicians, users, computers, and concurrency are subject to the particular plan You subscribed to.

f. Splashtop Enterprise+ (Cloud) - Software Patch is powered by Chocolatey for Windows and Homebrew for macOS. Windows users may be subject to use limitations and other restrictions, including rate limits. Please consult Chocolatey's [Legal Terms](https://docs.chocolatey.org/en-us/information/legal/) (https://docs.chocolatey.org/en-us/information/legal/) and [Packages Disclaimer](https://docs.chocolatey.org/en-us/community-repository/community-packages-disclaimer/#rate-limiting) (https://docs.chocolatey.org/en-us/community-repository/community-packages-disclaimer/#rate-limiting) for details. Splashtop will not assume any responsibility for changes, including damages of any sort, which may result from the Software Patch add-on.

(iii) For Splashtop Classroom, the total number of Splashtop Streamers that are logged in with Your Splashtop Account shall not exceed ten (10).

(iv) For Splashtop On-Prem, the use of the Services is limited to the particular plan You subscribed to.

(v) For Mirroring360 Products, the maximum number of the deployed Mirroring360 software on the computers is limited by the number of licenses You subscribed to.

(vi) For Foxpass, the Services are purchased as user subscriptions and such use is limited to the number of users specified in the applicable order form. User subscriptions are for designated users only and cannot be shared or used by more than one user but may be reassigned to new users replacing former users who no longer require ongoing use of the Services.

Splashtop may, at its sole discretion, suspend any account in violation of this provision or require You to purchase additional seat licenses to correct any overage.

f. Third Party Software. Certain Third Party Software provided in or with the Software is subject to various other terms and conditions imposed by the licensors of such Third Party Software. Your use of the Third Party Software is subject to and governed by the respective Third Party Software licenses, which relevant licenses for such Third Party Software You may view from within such Software. Any acquisition by you of such Third Party Software, including any exchange of data between You and any provider of Third Party Software, is solely between You and the applicable provider of the Third Party Software. Splashtop does not warrant, support or assume any liability for any Third Party Software, regardless of whether or not such Third Party Software is designated by

Splashtop as “certified” or otherwise, except as specified in writing in an order form or Documentation.

The Services may contain features designed to interoperate with Third Party Software (e.g., Google, Facebook or Twitter applications). To use such features, You may be required to obtain access to such Third Party Software from their providers. If the provider of any Third Party Software ceases to make the Third Party Software available for interoperation with the corresponding Service features on reasonable terms, Splashtop may cease providing such features without notice, and You acknowledge that You will not be entitled to any refund, credit, or other compensation resulting therefrom.

Splashtop may use the services of one or more third parties to deliver any part of the Services. You agree to comply with any acceptable use policies and other terms of any Third Party Software provider that are provided or otherwise made available to You through such Third Party Software from time to time.

g. Reservation of Rights. Except as expressly granted in these Terms, there are no other licenses granted to You, express, implied or by way of estoppel. All rights not granted in these Terms are reserved by Splashtop.

## **5. INTELLECTUAL PROPERTY PROTECTION**

Splashtop or its licensors retain ownership of all Intellectual Property Rights in or associated with the Services that are protected by United States and international copyright and other intellectual property laws and international trade provisions. You further acknowledge that the Services may contain unpublished information and embody valuable trade secrets proprietary to Splashtop and/or its licensors. Splashtop and/or its licensors reserve all rights in the Services not expressly granted herein. The license granted hereunder and Your right to use the Services terminate automatically if You violate any part of the Terms.

## **6. CONFIDENTIAL INFORMATION**

“Confidential Information” means any non-public business or technical information of Splashtop including, without limitation, any information relating to Splashtop’s trade secrets or know-how that is designated as “confidential,” either orally or in writing, or that You know or should know is considered confidential or proprietary by Splashtop. You agree to maintain the Confidential Information in strict confidence and not to use Confidential Information except as expressly authorized by these Terms. You shall ensure that no unauthorized persons shall have access to the Confidential Information. Notwithstanding the foregoing, Confidential Information shall not include information that (i) becomes part of the public domain through no breach of the Terms by You; (ii) is independently developed by You without reference to any Confidential Information; or (iii) is rightfully disclosed to You by a third party without restriction on disclosure.

## **7. TRADEMARKS**

You acknowledge and agree that the term Splashtop and other related logos and designs provided hereunder (collectively, the “Splashtop Trademarks”) are the exclusive trademarks of Splashtop, registered in the United States and elsewhere, and that You shall not use or reproduce the

Splashtop Trademarks without first obtaining a trademark license from Splashtop. All other trademarks and service marks referenced in the Services or Splashtop website are the exclusive property of their respective owners. All rights reserved.

## 8. PRIVACY

Splashtop's use of any information provided by You, including without limitation, Registration Data and payment information, is set forth in Splashtop's current Privacy Policy, which can be found at (1) <https://www.splashtop.com/legal/privacy-policy> for Splashtop Personal, Splashtop Business Products, Splashtop Classroom, Splashtop On-Prem, Splashtop Secure Workspace, Splashtop Vault and Foxpass; or (2) <https://www.mirroring360.com/privacy> for Mirroring360 Products.

## 9. UPDATES AND SUPPORT

Splashtop may, from time to time, at its sole discretion, and without any obligation to do so, make updates to the Services available via the Internet or other sources. All such updates shall be deemed to be included within the definition of Services and shall be subject to these Terms. Splashtop reserves the right to charge fees for any future versions of, or updates to, the Services. If Splashtop is Your support provider for the Services, You may visit

(1) <https://www.splashtop.com/support> for Splashtop Personal, Splashtop Business Products, Splashtop Classroom, Splashtop On-Prem, Splashtop Secure Workspace or Splashtop Vault; or (2) <https://www.mirroring360.com/f-a-q> for Mirroring360 Products to utilize online knowledgebase or contact Splashtop support team to resolve any technical issues You might have. For Foxpass, You may email [help@foxpass.com](mailto:help@foxpass.com) for standard technical support. You may also have the option to separately purchase upgraded or premium support services pursuant to an order form for expedited response times.

## 10. TERM AND TERMINATION

These Terms shall commence on the date of Your electronic acceptance. These terms continue until the termination of Your Splashtop Account. You may terminate these Terms at any time by terminating Your subscription, removing the Software and Documentation from Your system, deleting Your Splashtop Account, and stopping to use the Services.

For Splashtop subscriptions paid via my.splashtop.com, You may terminate Your subscription by logging into your Splashtop account at my.splashtop.com, clicking on the "Subscriptions" tab under "Account Info," and turning off auto-renewal. Your subscription will no longer auto-renew, and Your account will not be charged automatically at the end of Your current subscription period. The Products You have purchased will remain usable until the end of the current subscription period.

For Splashtop subscriptions procured via Splashtop sales personnel (not directly purchased by You at my.splashtop.com), You may cancel Your subscription by providing written notice of Your intent not to renew in the manner set forth in Section 16(e) herein, sent **no later than thirty (30) days prior to automatic renewal.**

For Foxpass, You may terminate Your subscription by giving notice of non-renewal to Splashtop at least thirty (30) days prior to the expiration of the then current subscription term, in accordance with Section 16(e) herein.

Splashtop may immediately terminate these Terms and Your subscription, license, and right to the Services if (i) You breach these Terms; (ii) You, as a legal entity, declare bankruptcy, are involved in any bankruptcy proceedings or are otherwise insolvent; or (iii) Splashtop decides, at its sole discretion, to discontinue offering the Services, in which case Splashtop shall notify You in advance, whenever possible, and provide You with alternative plans or options to minimize any inconvenience that may be caused by such termination. Splashtop shall not be liable for any damages resulting from a termination of these Terms as provided for herein. Upon termination of these Terms: (a) all license rights granted hereunder will automatically terminate without further notice to You; and (b) You will immediately discontinue all access to and use of the Services and destroy the Software and Documentation, and all copies thereof. Sections 1, 5, 6, 7, 8, 10, 11, 12, 13, 14 and 16 shall survive the expiration or termination of these Terms in full force and effect.

#### **11. DISCLAIMER OF WARRANTIES**

THE SERVICES, SOFTWARE, ANY UPDATES THERETO, ANY DOCUMENTATION AND INFORMATION ARE PROVIDED "AS-IS" WITHOUT WARRANTY OF ANY KIND. SPLASHTOP, ON BEHALF OF ITSELF AND ITS LICENSORS, DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, ARISING OUT OF OR IN CONNECTION WITH THESE TERMS AND ANY SAMPLE, SPECIFICATION OR PROPOSAL PROVIDED BY SPLASHTOP, INCLUDING, BUT NOT LIMITED TO, THE WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT OF THIRD PARTY RIGHTS. SPLASHTOP DOES NOT GUARANTEE THE ACCURACY, COMPLETENESS, SATISFACTORY QUALITY OF THE SERVICES OR THAT THE SERVICES WILL BE FREE OF DEFECTS, RUN ERROR-FREE OR UNINTERRUPTED, MEET YOUR REQUIREMENTS, BE FREE OF VIRUSES OR THAT SPLASHTOP WILL CORRECT ALL ERRORS. YOU UNDERSTAND AND AGREE THAT ANY MATERIAL OR DATA DOWNLOADED OR OTHERWISE OBTAINED THROUGH THE USE OF THE SERVICES IS DONE AT YOUR SOLE RISK AND THAT YOU WILL BE SOLELY RESPONSIBLE FOR ANY DAMAGE TO YOUR COMPUTER SYSTEM OR LOSS OF DATA THAT RESULTS FROM THE DOWNLOAD OF SUCH MATERIAL AND/OR DATA. SOME LAWS DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES, SO, TO THAT EXTENT, THIS LIMITATION MAY NOT APPLY TO YOU.

#### **12. LIMITATION OF LIABILITY**

IN NO EVENT SHALL SPLASHTOP, OR ITS LICENSORS OR SUPPLIERS, BE LIABLE FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR INDIRECT DAMAGES WHATSOEVER (INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF PROFITS, BUSINESS INTERRUPTION, LOSS OF INFORMATION, OR OTHER PECUNIARY LOSS) ARISING OUT OF OR IN CONNECTION WITH THESE TERMS, IRRESPECTIVE OF THE CAUSE OF ACTION, WHETHER IN CONTRACT, TORT (INCLUDING, WITHOUT LIMITATION, NEGLIGENCE, GROSS NEGLIGENCE, NEGLIGENT MISREPRESENTATION) OR PRODUCT LIABILITY, EVEN IF SPLASHTOP HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO TO THAT EXTENT THE ABOVE LIMITATIONS OR EXCLUSIONS MAY NOT APPLY TO YOU.

IN NO EVENT WILL SPLASHTOP'S CUMULATIVE LIABILITY ARISING OUT OF OR IN CONNECTION WITH THESE TERMS EXCEED THE TOTAL FEES PAID BY YOU IN THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE INCIDENT GIVING RISE TO SUCH LIABILITY).

### **13. INDEMNIFICATION**

You hereby agree, at Your sole expense, to indemnify, defend and hold Splashtop and its Affiliates, employees, officers, directors, owners, information providers, agents, licensees, licensors (the "Indemnified Parties") harmless from and against any and all liabilities, claims, costs, including reasonable attorneys' fees, incurred by the Indemnified Parties in connection with any demand, claims, action, suit, or loss arising as a result of (a) any breach by You of these Terms or claims arising from Your Splashtop Account; (b) any fraud or manipulation by You; (c) a third-party claim, action or allegation of infringement based on information, data, files or other content submitted by You; or (d) any claims of credit card fraud based on any information released by You. You agree to use best efforts to cooperate with Splashtop in the defense of any demand, claim, action or suit. Splashtop reserves the right to assume the exclusive defense of any matter subject to indemnification by You at Splashtop's own expense.

### **14. EXPORT CONTROLS**

You acknowledge and agree that the Services licensed under these Terms are subject to the export control laws and regulations of the United States (including, without limitation, the Export Administration Regulations ("EAR"), and sanctions regimes of the U.S. Department of Treasury, Office of Foreign Asset Controls.). You shall, at Your own expense, comply with all applicable laws, ordinances, regulations, rules and other requirements. You shall not, without prior U.S. government authorization, export, re-export or transfer any Software, Services or technology subject to these Terms, either directly or indirectly (i) into any country subject to a U.S. trade embargo or to any resident or national of any such country, or (ii) to any person or entity listed on the "Entity List" or "Denied Persons List" maintained by the U.S. Department of Commerce or the list of "Specifically Designated Nationals and Blocked Persons" maintained by the U.S. Department of Treasury. By downloading Software or using the Services, You are agreeing to the foregoing and You represent and warrant that You are not located in, under the control of, or a national or resident of any such country or on any such list.

### **15. HIGH-RISK USE**

You hereby acknowledge that the Services are not designed or intended for access and/or use in or during high-risk activities and shall not be used in connection with any system where malfunction can reasonably be expected to result in personal injury, death or damage to property, environment, or business. Without limiting the foregoing, the Services shall not be used in connection with any life support system. Splashtop and its licensors hereby expressly disclaim any express or implied warranty of fitness for such purposes. You agree to hold Splashtop and its officers, directors, employees, Affiliates, and licensors harmless from any claims or losses resulting from any of the foregoing uses of the Services.

### **16. GENERAL**

a. These Terms constitute the entire agreement between You and Splashtop concerning Your use of the Services and by accepting these Terms, You expressly acknowledge that these Terms supersede any prior or contemporaneous agreements, communications and/or understandings, written or oral, concerning Your use of the Services. Splashtop will not be bound by any provision of any purchase order, receipt, acceptance, confirmation, correspondence, or otherwise, regardless of whether these Terms are silent on the matter, under any circumstances, unless Splashtop expressly agrees to the provision in a written, executed document.

b. If any provision of these Terms shall be held to be invalid, illegal or unenforceable, such provision shall be enforced to the maximum extent permitted by law and the remaining provisions shall not be affected.

c. These Terms are governed by the laws of the State of California without reference to conflicts of laws provisions. You and Splashtop expressly disclaim the applicability of the United Nations Convention on the Sale of Goods. You agree that all claims and disputes arising out of or in connection with these Terms shall be heard exclusively by any federal or state court of competent jurisdiction located in Santa Clara County, California, U.S.A., and You irrevocably consent to the personal and exclusive jurisdiction of, and venue in, such courts, and waive any objection to any proceedings brought in any such court.

d. You may not assign or transfer these Terms or any rights or obligations under these Terms. Any assignment or transfer of these Terms made in contravention of the terms hereof shall be null and void. Subject to the foregoing, these Terms shall be binding on and inure to the benefit of the parties' respective successors and permitted assigns. Splashtop may assign its rights under these Terms to its Affiliates and to any successor by way of merger, acquisition, consolidation, reorganization, or sale of all or substantially all of its assets that relate to these Terms, without action on Your part, in which case references to Splashtop herein shall be deemed to refer to the assignee.

e. Notices by Splashtop to You may be sent to the email address provided by You during the online registration process or otherwise by any means that Splashtop determines at its sole discretion as likely to come to Your attention. All notices by You to Splashtop regarding these Terms shall be in writing and sent by express carrier or certified mail at the address of Splashtop set forth herein.

f. You agree not to bring or participate in any class action lawsuits against Splashtop or any of its employees or Affiliates. You agree that You will not bring a claim under these Terms more than two (2) years after expiration or termination of these Terms. No waiver of any provision or consent to any action by Splashtop shall constitute a waiver of any other provision or consent to any other action, whether or not similar. No waiver or consent by Splashtop shall constitute a continuing waiver or consent except to the extent specifically set forth by Splashtop in writing.

g. You acknowledge that Splashtop may provide software, solutions, and services to third parties, including competitors of You, which are the same or similar to the software, solutions, and services provided to You hereunder.

h. Splashtop will not be responsible for any delay, interruption, or other failure to perform under these Terms due to acts beyond Splashtop's reasonable control.

i. If You have any ethical, integrity, safety, security, and/or compliance concerns about Splashtop or its employees, You are encouraged to report the incident anonymously at <https://www.splashtop.com/anonymous-reporting>.

\* In certain situations, Splashtop may “grandfather” customers into the use limitations under which they initially subscribed.

Splashtop Inc.  
10050 North Wolfe Road, Suite SW2-S260  
Cupertino, California 95014

Last updated: October 17, 2024



# DEPARTMENT OF WATER

County of Kaua'i

*"Water has no Substitute – Conserve It!"*

## MANAGER'S REPORT No. 25-21

January 23, 2025

Re: Discussion and Possible Action to Request Board Approval for Indemnification and Unspecified Future Obligations for Autodesk, Inc. between the Board of Water Supply, County of Kaua'i and Autodesk, Inc.

### **RECOMMENDATION:**

The Department recommends that the Board approve Option 1, which will allow the Department to move forward with the software update and renewal of Autodesk, Inc.'s InfoWater software.

### **FUNDING: N/A**

### **BACKGROUND:**

The Department's Engineering team continues to utilize Autodesk's InfoWater software to prepare hydraulic models to assist with its engineering planning and design operations. Additionally, it is used to help identify and anticipate potential impacts to short- and long-term operational adjustments.

Update of the software from the current "legacy" version to the current cloud based service is required to continue with its use. The agreement contains language for indemnification and unspecified future obligation provisions. The County Attorney's Office has reviewed and approved the General Terms for Autodesk, Inc.

The section within the agreement that reference Unspecified Future Obligations is shown below:

### **QUEST Software Transaction Agreement:**

#### **8.5 Use of Your Content**

You will indemnify and hold harmless (and, at Autodesk's request, defend) Autodesk against any and all losses, liabilities, expenses (including reasonable attorneys' fees) suffered or incurred by Autodesk by reason of any claim, suit or proceeding arising out of or relating to (1) Your Content; (2) Your (including Your Authorized Users') use of Offerings, including any Output or other results produced by such use; and (3) Your (including Your Authorized Users') breach of these Terms (including any Additional Agreement, Special Terms, or other applicable terms).party, (ii) permitting indemnifying party to retain sole control of the investigation, defense or settlement of the Third Party Claim as long as such settlement shall not include a financial obligation on or admission of liability by indemnified party, and (iii) providing indemnifying party with cooperation and assistance as indemnifying party may reasonably request in connection with the Third Party Claim.



## **OPTIONS**

### **Option 1:**

Pro:

#### **Approve the Department's Request.**

The Department will be able to move forward with the renewal, update and continued use of Autodesk, Inc.'s InfoWater software.

Cons:

The Department would have potential risk associated with indemnification and unspecified future obligation provisions of the Autodesk, Inc. software agreement.

### **Option 2:**

Pro:

#### **Deny the Department's Request.**

No potential legal risk associated with indemnification and unspecified future obligation provisions of the Quest software agreement.

Cons:

The Department's would no longer be able to utilize the InfoWater software and the staff that have been utilizing it would be required to revert to a manual process to conduct their planning, design and operational impact assessments.

MH/cz

Attachment(s): Autodesk General Terms

# Terms of Use

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Last updated: May 26, 2023

## General Terms

These Terms apply to your account with Autodesk and to our Offerings and constitute a binding contract between us.

**PLEASE NOTE THAT SECTION 17.4 (AUTODESK PARTY, GOVERNING LAW, DISPUTE RESOLUTION) BELOW CONTAINS MANDATORY ARBITRATION AND CLASS ACTION WAIVER PROVISIONS THAT MAY GOVERN ANY RESOLUTION OF DISPUTES BETWEEN YOU AND AUTODESK. PLEASE READ THESE TERMS (INCLUDING SECTION 17.4) CAREFULLY.**

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## 1. Acceptance

By accepting these General Terms during your account registration or subscription process, or by accessing or using our Offerings, you confirm your acceptance of these General Terms and other applicable Terms and your agreement to be a party to this binding contract. If you do not agree to these Terms, you must not access or use our Offerings.

You agree to these Terms on behalf of the company or other legal entity for which you are acting (for example, as an employee or contractor) or, if there is no company or legal entity, on behalf of yourself as an individual (in either case, "You"). You represent and warrant that you have the right and authority (as well as the capacity—for example, you are of sufficient legal age) to act on behalf of and bind such entity (if any) and yourself. Additional capitalized terms are defined in these Terms, including in Section 18 (Definitions) below.

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## 2. Special Terms

Some Offerings may be subject to special terms set forth in the Special Terms (<https://www.autodesk.com/company/terms-of-use/en/special-terms>) or in the Documentation for the Offerings ("Special Terms").

You agree to the Special Terms, if any, for an Offering that You subscribe to, access, or use.

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### 3. Return for Refund

For a limited period, if You (a) object to any of these Terms, (b) object to any Autodesk terms of purchase or auto-renewal applicable to the purchase or renewal, or (c) are dissatisfied (for any reason) with the Offering to which You subscribed, You may return the Offering and may qualify for a refund under the Autodesk Return Policy (<https://www.autodesk.com/customer/help?guid=GUID-0D758126-DBBC-4489-8DBF-924977E9DC94#refund-policy>).

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### 4. Your Account

You are responsible for anyone who obtains, accesses, or uses Offerings through You or Your account (including Your Authorized Users) and their compliance with these Terms as though each of them is You. In certain cases, Your Authorized Users may be required to set up individual accounts or agree to applicable terms in order to obtain, access, or use Offerings, but You remain responsible. You also agree to secure and not share user IDs or passwords (except with authorized account administrators). If You suspect unauthorized use of Your account, please contact <https://www.autodesk.com/trust/contact-us> (<https://www.autodesk.com/trust/contact-us>).

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### 5. You Own Your Work

You will retain Your ownership rights to files, designs, models, data sets, images, documents or similar material created by You (or Your Authorized Users) and submitted or uploaded to an Offering by You (or Your Authorized Users).

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### 6. Privacy

Autodesk is committed to protecting Your privacy and letting You know what Autodesk will do with Your personal data. Autodesk's Privacy Statement (<https://www.autodesk.com/company/legal-notices-trademarks/privacy-statement>) sets forth how Autodesk may collect, use, store and process personal data of or relating to You, and how You may request access to or deletion of Your personal data.

Autodesk offers a Data Processing Addendum, available on our [Trust Center](https://www.autodesk.com/trust/privacy) (<https://www.autodesk.com/trust/privacy>), which sets forth Autodesk's obligations as a processor for personal data under the General Data Protection Regulation.

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## 7. Offering Term

Each subscription to an Offering is for a fixed, limited time period (the "Offering Term"). The length of the Offering Term will be indicated in the Offering Identification.

Certain subscriptions may renew automatically. If you would like to cancel any automatic renewal, please see [Cancelling Automatic Renewal for Subscriptions](https://www.autodesk.com/support/account/manage/billing/cancel) (<https://www.autodesk.com/support/account/manage/billing/cancel>).

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## 8. Offerings

### 8.1 Rights to Offerings

For any Offering consisting of Software or a Cloud Service that Autodesk makes available or provides to You, and subject to compliance with these Terms and all payment obligations, including any taxes and other fees, Autodesk grants to You a non-exclusive right to use the Offering (and permit Your Authorized Users to use the Offering) solely (a) during the Offering Term, (b) in accordance with any applicable Special Terms, and (c) within the scope of Your subscription, including the permitted number, Offering Type, Territory and other attributes specified for the type and level that You selected when subscribing for the Offering. If Your Offering Identification does not specify those attributes, the Offering will have the attributes of a Trial Version.

Except as expressly authorized by these Terms, or as otherwise expressly permitted in writing by Autodesk, You will not: (i) reproduce, modify, adapt, translate, port, or create derivative works of all or any portion of any Offering, except as expressly permitted by applicable law notwithstanding a contractual prohibition to the contrary, or (ii) sublicense, transfer, distribute, transmit, sell, lease, rent, loan, or otherwise make available all or any portion or functionality of any Offering to a third party (whether on a service bureau basis or otherwise).

Any Software (including any Update or Upgrade) that Autodesk makes available or delivers to You is licensed for a limited subscription period, not sold. You may make one archival copy of the Software You subscribed to solely for Your backup and archival purposes for the duration of the Offering Term.

### 8.2 Access to Software and Cloud Services

Subject to compliance with these Terms, Autodesk will, during the Offering Term, make Offerings available to You through Your account or other electronic means. Autodesk will not be liable for any losses or other liability incurred by You or others due to sending Your account information to an incorrect address. You may be required to log into Your account or provide Autodesk additional information to activate, access, or use an Offering. Some Offerings may cause Your computers or other devices to automatically connect to the internet (intermittently or on a regular basis)—for example, to validate the proper use of Your subscription, provide You with access to services (including third-party services), or download and install Updates or Upgrades, all without further notice to You. You and Your

Authorized Users agree to such connection and to validation of Your subscription and to the automatic downloading and installation of Updates and Upgrades. You may not be able to adjust Your Update or Upgrade settings for certain Offerings, including those for which automatic Updates or Upgrades are required for operation or security of the Offering.

During the Offering Term, Autodesk may make available or deliver Updates or Upgrades to Software. You will promptly install any mandatory Updates.

### **8.3 Autodesk APIs**

In connection with an Offering, you may have access to standard application programming interfaces, software development kits, tools, libraries, scripts, sample source code and similar developer material (collectively, "APIs"). Unless otherwise specified in the applicable Special Terms (including Documentation), You may use the APIs only (a) for the Offering for which you have a subscription and for which the APIs are provided, (b) during the Offering Term, (c) in accordance with the Special Terms (including Documentation) specific to the APIs, and (d) to develop applications, services, modules, or components solely for Your internal business use.

### **8.4 Use of Third-Party Material and Services**

Autodesk may provide You with content, designs, models, data sets, project information, documents, libraries, audio, links, data, applications and other software, services, or other material of a third party (collectively, "Third-Party Material/Services") in connection with Offerings. Any Third-Party Material/Services may be governed by different terms found in or with such Third-Party Material/Services (for example, in the "About Box," a .txt file, or accompanying license terms), on a registration page of a third party, or in the Special Terms (including Documentation) for the Offering for which the Third-Party Materials/Services are provided (collectively, "Third-Party Terms"). If there are no Third-Party Terms, Your use will be (a) subject to the same terms as the Offering for which You received the Third-Party Material/Services, (b) solely in connection with Your use of such Offering, and (c) limited to the Offering Term. You take sole responsibility for determining, obtaining and complying with all Third-Party Terms. Autodesk will have no responsibility for, and makes no representations or warranties regarding, (i) any Third-Party Material/Services or Your use of Third-Party Material/Services, and (ii) any Third-Party Terms or Your compliance with such Third-Party Terms.

### **8.5 Use of Your Content**

In order for You to access or use certain Offerings, or for Autodesk to provide You with certain services, You may wish to upload or otherwise share Your Content. Autodesk personnel will not use Your Content except (a) at Your request, or with Your consent; (b) in connection with providing and improving Offerings (including maintaining, securing, updating, or otherwise modifying Offerings); or (c) in connection with legal obligations, enforcement, investigations, or proceedings. ( )Autodesk may block or remove Your Content for any reason, including non-compliance with these Terms. When You provide or make accessible Your Content, You authorize Autodesk and its designees to use, reproduce, modify, distribute and make available Your Content in connection with providing You with Offerings and the other activities contemplated by these Terms.

You are responsible for ensuring that (i) Your Content and its use with any Offering comply with all applicable laws and regulations and these Terms, (ii) Your Content will not infringe or misappropriate any intellectual property or proprietary rights of any person, and (iii) You secure backup copies of Your Content at all times. You acknowledge that online services may suffer disruptions or outages, and You may not be able to retrieve Your Content as a result.

You will indemnify and hold harmless (and, at Autodesk's request, defend) Autodesk against any and all losses, liabilities, expenses (including reasonable attorneys' fees) suffered or incurred by Autodesk by reason of any claim, suit or proceeding arising out of or relating to (1) Your Content; (2) Your (including Your Authorized Users') use of Offerings, including any Output or other results produced by such use; and (3) Your (including Your Authorized Users') breach of these Terms (including any Additional Agreement, Special Terms, or other applicable terms).

## 8.6 Collaboration and Sharing of Your Content

Some Offerings permit You to collaborate with others, including sharing or publishing Your Content. If You choose to share or publish Your Content, others may be able to use, sell, reproduce, modify, distribute, make available, display, transmit and communicate Your Content, and suspending or terminating access will not delete or inhibit access to any of Your Content that was earlier shared or published. If You do not want others to have any such access or any of those rights, do not use the sharing, publishing, or other collaboration features of the Offerings and set Your permissions accordingly. Keep in mind that forums and galleries may be public, and submissions are generally public.

An Offering may feature links to Third-Party Material/Services. Such links are provided as a convenience to You. Autodesk does not monitor or control what such third parties will do with Your Content. You are responsible for ensuring the appropriate level of access to Your Content by any third party. If You authorize any of Your Content to be shared with any third party, Autodesk may make Your Content available to such third party; Autodesk will, however, have no responsibility or liability for the actions of such third party.

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## 9. Trial Versions

Autodesk may make available or deliver Offerings (or features of an Offering) described as "not for resale," "free," "evaluation," "trial," "pre-release," "beta," or another similar designation (collectively, "Trial Versions"). Except as expressly set forth in the Documentation for the Trial Version or applicable Special Terms, (a) you may access or use the Trial Version only for a period of 30 days from download or receipt, (b) Your use will be limited to non-commercial evaluation purposes, (c) the use of a Trial Version will be only by You as an individual or, if You are an entity, by one named employee, and (d) the Trial Version may only be used within the Territory where You acquired the Offering.

Notwithstanding any other provisions in these Terms, (i) Autodesk makes no commitments with respect to Trial Versions, including any commitment to continue any Trial Version or to convert any Trial Version into an Offering; (ii) Autodesk constantly conducts research to improve our Offerings and makes no commitment that such research will be commercially released in an Offering; and (iii) Trial Versions may contain code that is not fully tested, including errors and faults that may cause total data loss or system failure. Subscriptions to Trial Versions do not include subscription Benefits, and Autodesk reserves the right, without any further notice, to end any Trial Versions at any time.

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## 10. Feedback

If You provide Autodesk with ideas for improvement, suggestions, or other feedback (collectively, "Feedback"), You hereby grant to Autodesk a non-exclusive, transferable, irrevocable, worldwide,

royalty-free license (with rights to sublicense) to make, use, sell, offer to sell, reproduce, modify, distribute, make available, publicly display and perform, disclose and otherwise exploit the Feedback and any Offerings using the Feedback.

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## 11. Limitations on Use

### 11.1 Offerings are tools

The Offerings are tools and are intended only to assist You with Your design, analysis, simulation, estimation, testing and other activities and are not a substitute for Your professional judgment or Your own independent design, analysis, simulation, estimation, testing, or other activities, including, for example, those with respect to product stress, safety and utility. You acknowledge that the Offerings may not have been designed or tested for Your specific use, and the Offerings and Output may not achieve the results You desire within Your constraints. It is Your responsibility to (a) determine whether the use of an Offering is appropriate for Your purposes, (b) determine the appropriate use for the Offerings, and (c) select the Offerings and other computer programs and materials, in each case to help achieve Your intended results or Output. You acknowledge that as between You and Autodesk, You are solely responsible for (i) Your (including Your Authorized Users') use of the Offerings and any results produced by the Offerings, including any Output, and (ii) establishing the adequacy of independent procedures for testing the reliability, safety, accuracy, completeness, compliance with applicable legal requirements and industry standards, and other characteristics of any Output, including insights, recommendations, and all items designed with the assistance of the Offerings. Autodesk will not be responsible or liable in any manner whatsoever for the results obtained through use of the Offerings, including any Output.

### 11.2 Offerings Not Designed for Sensitive Personal Data

The data storage functionality associated with Offerings is NOT suitable for the storage of Social Security numbers, credit or debit card numbers, financial account numbers, driver's license numbers, medical information, or health insurance information; data about personal characteristics or other personal data, such as race or ethnic origin, religion or philosophical beliefs, political affiliation or opinions, genetic or biometric data, sexual orientation, or trade union membership; or other information that may expose, or pose a risk of harm to, an individual if improperly disclosed or used (collectively, "Sensitive Personal Data"). Except as expressly required by Autodesk (for example, a credit card number used to purchase a subscription), You will not upload or otherwise make available to Autodesk any Sensitive Personal Data, including any files containing Sensitive Personal Data, in connection with Your use of any Offering.

### 11.3 Acceptable Use of Offerings

You will access and use (and permit access to and use of) Offerings only in compliance with the [Acceptable Use Policy \(https://www.autodesk.com/company/terms-of-use/en/acceptable-use\)](https://www.autodesk.com/company/terms-of-use/en/acceptable-use) and all applicable laws.

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## 12. Confidentiality

You or Autodesk (as the “Disclosing Party”) may disclose or make available Confidential Information to the other party (as the “Receiving Party”) in connection with these Terms. The Receiving Party will use the same degree of care as to the Disclosing Party’s Confidential Information that it uses to protect its own confidential information of like kind (but in no event less than reasonable care) and will (a) use the Confidential Information of the Disclosing Party only in connection with Offerings, and (b) except as otherwise authorized by the Disclosing Party in writing, limit access to the Confidential Information of the Disclosing Party to those of its employees, consultants, contractors, service providers, professional advisors and other individuals who need such access for purposes related to Offerings and who are subject to confidentiality obligations with the Receiving Party no less stringent than those in these Terms. The Receiving Party may disclose Confidential Information of the Disclosing Party if it is compelled by law to do so. The Receiving Party will give the Disclosing Party prior notice of such compelled disclosure (to the extent legally permitted) and take reasonable steps to limit such disclosure. Autodesk may also disclose Your Confidential Information to comply with any governmental or regulatory body request (including subpoenas or court orders), as part of a legal proceeding involving Autodesk, or at Your request. If disclosure is made at Your request, You may be responsible for the costs of compiling and providing access to Your Confidential Information.

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### 13. Autodesk Proprietary Rights

You acknowledge and agree that Autodesk and its licensors and suppliers will have ownership of and all rights with respect to (a) the Offerings, Documentation, APIs, and other information or material made available to You by Autodesk, including any copies of the foregoing, (b) any materials or other information based on, derived from, or otherwise using any of the foregoing (including Metrics), and (c) all rights under trade secrets, copyrights, trademarks, patents, and any other intellectual property or proprietary rights relating to any of the foregoing. The structure and organization, the underlying algorithms and other internals, the protocols, data structures and other externals, and the source code of the Offerings and the APIs constitute proprietary and confidential information of Autodesk, and You will not disclose such information to third parties, or use such information for any purpose other than as required for ordinary-course access to and use of the Offerings as set forth in these Terms, without Autodesk’s prior written consent. You will not access or attempt to access the Offerings by any means other than the interface Autodesk provides or authorizes. You will not engage in any decompiling, disassembling, or other reverse engineering, or otherwise attempt to discover, learn, or study the structure or organization, underlying algorithms or other internals, protocols, data structures or other externals, or the source code of the Offerings or APIs, except as expressly permitted under applicable law notwithstanding a contractual prohibition to the contrary. Autodesk may make available or provide access to other confidential and proprietary information (either marked as such or understood to be such under the circumstances) to enable Your access or use of the Offerings, and any such information will be deemed to be Autodesk Confidential Information.

You have only the rights expressly granted to You under these Terms (including the Special Terms). All rights not expressly granted are reserved by Autodesk and its licensors and suppliers; Autodesk and its licensors and suppliers expressly disclaim (and You agree not to assert) any other rights.

You will not take any action, or authorize, encourage, or assist any third party to take any action, inconsistent with this Section 13.

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## 14. Limited Warranty, Disclaimers, Limitations on Liability

### 14.1 Limited Warranty

Autodesk warrants that, for any paid subscription, as of the date on which the subscribed-for Offering is made available to You and for 90 days thereafter or, if the Offering Term is shorter, such shorter period (“Warranty Period”), the Offering will provide the general features and functions described in the end-user Documentation for the Offering. Autodesk’s entire obligation and liability, and Your sole and exclusive remedy, for Autodesk’s breach of this warranty will be for Autodesk, at its option, (a) to attempt reasonably to remedy the breach or (b) to refund the amounts received for the affected subscription and terminate such subscription. You will bring any warranty claim for any Offering within its applicable Warranty Period, and any warranty claims You bring after such Warranty Period will be excluded.

### 14.2 Disclaimers

EXCEPT FOR THE EXPRESS LIMITED WARRANTY SET FORTH IN SECTION 14.1 (LIMITED WARRANTY) ABOVE, AND ANY EXPRESS WARRANTIES SET FORTH AS SUCH IN ANY ADDITIONAL AGREEMENT OR SPECIAL TERMS, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, (a) THE OFFERINGS (INCLUDING ANY RELATED SOFTWARE, CLOUD SERVICE, DOCUMENTATION, APIS, OR OTHER MATERIALS) ARE PROVIDED “AS IS,” “WITH ALL FAULTS,” AND WITHOUT WARRANTY OR CONDITION OF ANY KIND AND (b) AUTODESK AND ITS LICENSORS AND SUPPLIERS MAKE, AND YOU RECEIVE, NO WARRANTIES, REPRESENTATIONS, CONDITIONS, OR COMMITMENTS OF ANY KIND, EXPRESS OR IMPLIED, ORAL OR WRITTEN, WITH RESPECT TO ANY OF THE OFFERINGS OR ANY OUTPUT, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT, OR QUIET ENJOYMENT, ANY WARRANTIES OR CONDITIONS IMPLIED BY STATUTE, OR ANY WARRANTIES OR CONDITIONS BASED ON A COURSE OF DEALING, USAGE OF TRADE OR INDUSTRY STANDARDS. Any statements by Autodesk or its third-party agents, representatives, or service providers about the Offerings (including any statements about their functionality or performance) or Output, or other communications with You (including any insights, recommendations, guidance, assessments, projections, estimates or opinions), that are not contained in these Terms (including any Additional Agreement or Special Terms) are for information purposes only and do not constitute a warranty, representation, condition, or other commitment. Without limiting the generality of the foregoing, Autodesk and its licensors and suppliers do not warrant or otherwise commit that (i) the Offerings or Output, or Your access thereto or use thereof, will be available, uninterrupted, timely, error-free, secure, accurate, reliable, or complete, (ii) the Offerings will meet any particular performance, availability or service-level criteria, (iii) Your Content will not be lost or damaged, or (iv) errors or defects will be corrected or any particular support requests will be resolved to meet Your needs or expectations. Also, for clarity, (1) any reference to “unlimited” access, use, storage, or otherwise with respect to an Offering is subject to the technical limitations of the Offering, and (2) some Offerings or functionality may not be available in all locations (including the Territory) or languages.

### 14.3 Limitations on Liability

NEITHER AUTODESK NOR ANY OF ITS LICENSORS OR SUPPLIERS WILL HAVE ANY LIABILITY (DIRECTLY OR INDIRECTLY) FOR ANY INCIDENTAL, SPECIAL, INDIRECT, CONSEQUENTIAL, OR PUNITIVE DAMAGES; LOSS OF PROFITS OR REVENUE; BUSINESS INTERRUPTION OR LOSS OF USE; COST OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES OR OTHER COVER; FAILURE OF, OR DEFECTS IN, THE OUTPUT; LOSS, CORRUPTION, OR DELETION OF (OR FAILURE TO DELETE) DATA OR

YOUR CONTENT; OR DAMAGES RESULTING FROM FORCE MAJEURE. THE AGGREGATE LIABILITY OF AUTODESK AND ITS LICENSORS AND SUPPLIERS WITH RESPECT TO ANY OFFERING OR OUTPUT THEREOF WILL IN NO EVENT EXCEED THE GREATER OF (a) THE AMOUNT PAID OR PAYABLE BY YOU FOR THE OFFERING IN THE ONE-YEAR PERIOD BEFORE THE EVENTS OR CIRCUMSTANCES GIVING RISE TO THE LIABILITY FIRST OCCURRED, OR (b) US\$1000. YOU ACKNOWLEDGE AND AGREE THAT THE DISCLAIMERS AND LIMITATIONS OF LIABILITY IN THESE TERMS CONSTITUTE AN ESSENTIAL ELEMENT OF THE BARGAIN BETWEEN YOU AND AUTODESK, AND THAT AUTODESK WOULD NOT HAVE PROVIDED THE OFFERINGS TO YOU WITHOUT YOUR AGREEMENT TO EACH OF THESE TERMS. THE LIMITATIONS ON LIABILITY IN THESE TERMS WILL APPLY TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW TO ANY DAMAGES OR OTHER LIABILITY, HOWEVER CAUSED AND REGARDLESS OF THE THEORY OF LIABILITY, WHETHER BASED ON CONTRACT, TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY), INDEMNIFICATION, RECOURSE, STATUTE, OR OTHERWISE, AND EVEN IF AUTODESK HAS BEEN ADVISED OF THE POSSIBILITY OF THE LIABILITY OR THE LIABILITY IS OTHERWISE FORESEEABLE, AND REGARDLESS OF WHETHER THE LIMITED REMEDIES IN THESE TERMS FAIL OF THEIR ESSENTIAL PURPOSE.

NOTHING IN THESE TERMS RESTRICTS OR EXCLUDES AUTODESK'S LIABILITY FOR (i) DEATH OR PERSONAL INJURY CAUSED BY AUTODESK'S WILLFUL MISCONDUCT OR GROSS NEGLIGENCE, OR (ii) YOUR DAMAGES OR LOSSES CAUSED BY AUTODESK'S FRAUD. ALSO, AUTODESK DOES NOT SEEK TO LIMIT YOUR WARRANTIES, YOUR OTHER RIGHTS AND REMEDIES, OR THE LIABILITY OF AUTODESK FOR DAMAGES OR LOSSES TO THE EXTENT THE LIMITS ARE NOT PERMITTED BY APPLICABLE LAW (SUCH AS STATUTORY WARRANTIES, CONDITIONS, REMEDIES, OR LIABILITIES THAT CANNOT BE EXCLUDED BY APPLICABLE LAW). THESE TERMS GIVE YOU SPECIFIC LEGAL RIGHTS, AND YOU MAY ALSO HAVE OTHER LEGAL RIGHTS, WHICH VARY FROM JURISDICTION TO JURISDICTION, INCLUDING LEGAL RIGHTS DESCRIBED IN SECTION 19 (COUNTRY/JURISDICTION-SPECIFIC TERMS) BELOW.

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## 15. Indemnity

Subject to these Terms, Autodesk will defend You against any claim brought against You by a third party alleging that any Covered Offering infringes such third party's patent, copyright, trademark, or trade secret rights ("IP Claim"), and Autodesk will pay damages finally awarded against You (or any settlement amount agreed to in writing by Autodesk) as a result of the IP Claim, provided You (a) promptly notify Autodesk of the IP Claim, (b) give Autodesk sole control of the defense and settlement of the IP Claim, and (c) promptly provide Autodesk with any assistance and cooperation requested by Autodesk in connection with the defense and settlement. These defense and payment obligations do not apply if (i) the IP Claim arises from, or is based on, the use or combination of the Covered Offering with any software, hardware, data, material, or service not provided by Autodesk, (ii) the IP Claim covers any method or process not fully embodied in the Covered Offering, (iii) there is available an Update or Upgrade that avoids the infringement alleged in the IP Claim, or (iv) You have been in breach of these Terms. If Autodesk receives information about an infringement claim related to any Offering, Autodesk may, in its discretion, (1) modify or replace the Offering, (2) obtain a license for Your continued use of the Offering, and/or (3) terminate Your subscription for the Offering and refund any prepaid fees covering the remainder of the Offering Term of the terminated subscription. This Section 15 states Autodesk's sole obligations and Your exclusive remedy for any infringement of any third-party intellectual property rights.

## **16. Term, Termination, Suspension**

These Terms become effective on the first date accepted in accordance with Section 1 (Acceptance) above and continue in effect indefinitely unless terminated in accordance with the provisions of these Terms, including this Section 16.

### **16.1 Your Right to Terminate**

You may terminate Your subscriptions and these Terms if Autodesk is in material breach of these Terms and fails to cure such breach within 30 days after written notice of the breach.

### **16.2 Autodesk's Right to Terminate or Suspend a Subscription or Account**

Autodesk may terminate (or disable or suspend Your access to and use of) any or all of Your subscriptions or other Offerings, or terminate these Terms and Your account, if (a) You have no current paid subscriptions; (b) You have failed to timely pay any amounts (including fees and taxes) owing to Autodesk; (c) You (including any of Your Authorized Users) are otherwise in material breach of these Terms and fail to cure such breach within 30 days after written notice of the breach; or (d) You become subject to bankruptcy or insolvency proceedings, become insolvent, make an arrangement with or affecting Your creditors (including an assignment for the benefit of creditor) or commence a process of liquidation. These Terms will automatically terminate without further notice or action by Autodesk if You go into liquidation. Autodesk may also immediately disable or suspend Your access to and use of Offerings and Your Content if Autodesk believes in good faith that Your (or Your Authorized Users') conduct or failure to act, or Your Content, may (i) pose a security risk, constitute illegal activity, or otherwise adversely impact Offerings, systems, or other users, (ii) constitute or enable tampering with, removing, disabling or otherwise limiting the effectiveness of any technical protections, or (iii) subject Autodesk, or its suppliers, resellers, distributors, users, or any similar third parties, to liability.

### **16.3 Effect of Termination of Subscription**

Upon expiration or termination of a subscription or other Offering for any reason, Your rights with respect to that Offering, including any related Software license, Cloud Service access, and Benefits, will end. At that time, You will stop all access to and use of the Offering and uninstall any and all copies of materials related to such Offering (including any related Software, Documentation, APIs, or other material from Autodesk). In addition, at Autodesk's request, You will destroy any such copies or return them to Autodesk or the party from which You acquired the Offering. You will retain proof that You returned or destroyed all such copies. In connection with the expiration or termination of a subscription, (a) as a convenience to You for some Cloud Services, Autodesk may provide You with a brief period (for example, 30 days) in which You may retrieve Your Content after expiration or termination of the Cloud Services, if You are in compliance with these Terms and pay the applicable fees, if any (for example, Autodesk's then-current professional services fees for any assistance Autodesk provides), and (b) otherwise, Autodesk may delete, without notice, any or all of Your Content, including backup and other copies thereof.

### **16.4 Effect of Termination of Terms or Account**

Upon any termination of these Terms for any reason, (a) Your account and Your subscriptions and other Offerings, including those of Your Authorized Users, will immediately terminate, and (b) the effects described above with respect to expiration or termination of a subscription or other Offering will apply to all subscriptions and other Offerings attached to Your account. Your payment obligations, Your responsibility for anyone who obtains, accesses, or uses Offerings through You or Your account

(including Your Authorized Users) (including the responsibility described in Section 4 (Your Account)), and the following sections of these General Terms will survive termination for any reason: Section 5 (You Own Your Work); Section 8.3 (Autodesk APIs); Section 8.4 (Use of Third-Party Material and Services); Section 8.5 (Use of Your Content); Section 8.6 (Collaboration and Sharing of Your Content); Section 10 (Feedback); Section 11 (Limitations on Use); Section 12 (Confidentiality); Section 13 (Autodesk Proprietary Rights); Section 14.2 (Disclaimers); Section 14.3 (Limitations on Liability); Section 16.3 (Effect of Termination of Subscription); this Section 16.4; Section 17 (Miscellaneous), including Section 17.4 (Autodesk Party, Governing Law, Dispute Resolution); Section 18 (Definitions); and Section 19 (Country/Jurisdiction-Specific Terms).

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## 17. Miscellaneous

### 17.1 Changes to the Offerings

Autodesk reserves the right from time to time to (a) modify, discontinue, or substitute an Offering (including any Benefits, features, functionality, or supporting services related to the Offering), or (b) add or modify license keys, authorizations or other means of controlling or measuring access to or use of the Offerings. Autodesk will endeavor to notify You of any major changes to an Offering in the applicable release notes or other Documentation for the Offering.

### 17.2 Changes to Terms

To the maximum extent permitted by applicable law, Autodesk reserves the right from time to time to (and You acknowledge that Autodesk may) modify these Terms. Autodesk will endeavor to notify You of any changes to these Terms ("Terms Modification Notice"), including by posting to this site. It is your responsibility to regularly check this site for updates, including Terms Modification Notices. Except as otherwise expressly set forth in these Terms, if any modification to the Terms has a material adverse effect on You and You do not agree to the modification, You may reject the modification by notifying Autodesk of the rejection within 30 days of the Terms Modification Notice. If You reject a modification under these circumstances, (a) Your access to and use of any Offerings affected by the modification will continue to be governed by the terms in effect immediately before the modification (except to the extent the modification was made for security, privacy, or legal compliance reasons, in which case the modification will be effective immediately) until the earlier of (i) the end of the applicable Offering Term, or (ii) 180 days after the Terms Modification Notice; and (b) Your rights to such Offerings, including any related subscription Benefits, will then terminate. In the event of such a termination by You, Autodesk (or the party from whom You purchased Your subscription) will refund the prorated portion of any prepaid fees applicable to the remaining Offering Term of Your subscription for the affected Offerings after the effective date of termination. In any event, if any subscription is renewed or extended, it will be under the then-current Terms. Notices by You or Autodesk will be provided as set forth below, except that You may also provide Your notice of rejection via email (within the 30-day period described above) to the following email address [Terms.Modification.Rejection@autodesk.com](mailto:Terms.Modification.Rejection@autodesk.com) (<mailto:Terms.Modification.Rejection@autodesk.com>), or in any other manner specified in the Terms Modification Notice.

Notwithstanding the forgoing, if the Special Terms, Offering Types and Benefits, or other policies include different terms or procedures for modification thereof, modification may, at Autodesk's option, be handled as described therein.

You acknowledge that Your commitments with respect to the Offerings and subscription Benefits are not contingent on delivery of future features or functionality (or oral or written statements about

future features or functionality).

### 17.3 Language of Terms, Interpretation

The English language version of these Terms will be the version used when interpreting or construing these Terms, and any notices or other communications in connection with these Terms will be provided in the English language. Any reference in these Terms to “days” are to calendar days unless otherwise specified. The words “including” and “for example” or “e.g.,” and words of similar import, are not limiting or exclusive and will be deemed followed by “without limitation,” whether or not such language is included. Section and other headings are for ease of reference only and are not to be used to interpret the meaning of any provision. Any rights and remedies provided for in these Terms are cumulative and are in addition to, and not in lieu of, any other rights and remedies available under applicable law.

### 17.4 Autodesk Party, Governing Law, Dispute Resolution

#### (a) General

Depending on where Your principal place of business is (or, if You are an individual, where You are resident), these Terms are between You and the Autodesk Party set out below. The governing law for these Terms, including any rights, obligations and claims of the parties, will be as specified below. Similarly, any dispute or claim arising out of or relating to these Terms, including the breach, performance, termination, enforcement, interpretation, or validity of these Terms (and whether under contract, tort, including strict liability, competition law, or otherwise), and including the determination of the scope or applicability of the dispute resolution provisions of these Terms, will be finally determined under the law, in the location and by the dispute resolution process specified below (except as may be specified in Section 19 (Country/Jurisdiction-Specific Terms) below.

Your principal place of business (or, if You are an individual, the place of Your residency)	References to “Autodesk Party” means the following Autodesk entity:	Governing law is:	Exclusive jurisdiction/forum for dispute resolution:
United States and Canada	Autodesk, Inc., a Delaware corporation	(i) State of California, and (ii) to the extent controlling, federal laws of the United States	Arbitration administered by ADR Services, Inc. (“ADR Services”), pursuant to Section 17.4(b) below and (to the extent not inconsistent with such section) in accordance with the arbitration rules of ADR Services as in effect when the notice of arbitration is submitted. The seat of the

			arbitration will be San Francisco.
Mainland China, Hong Kong, and Macau	Autodesk, Inc., a Delaware corporation	Singapore	Arbitration administered by the Singapore International Arbitration Centre (“SIAC”) in accordance with the Arbitration Rules of the SIAC as in effect when the notice of arbitration is submitted. The seat of the arbitration will be Singapore.
Australia	Autodesk Australia Pty. Ltd.	(i) State of New South Wales, and (ii) to the extent controlling, federal laws of Australia	Courts of New South Wales
Asia, Oceania, and the Asia-Pacific region, other than Mainland China, Hong Kong, Macau and Australia	Autodesk, Inc., a Delaware corporation	Singapore	Courts of Singapore
Europe, the Middle East, and Africa	Autodesk Ireland Operations Unlimited Company, an Irish company	Ireland	Courts of Ireland
Worldwide (unless in a country or region described above), including	Autodesk, Inc., a Delaware corporation	(i) State of California, and (ii) to the extent controlling, federal laws of the United States	(i) United States District Court for the Northern District of California in San Francisco, or (ii) courts of the State of California, County of San Francisco.

Mexico,  
South  
America,  
Central  
America,  
Caribbean  
region,  
and

(b) Binding Arbitration and Dispute Resolution for United States and Canada

If Your principal place of business (or, if You are an individual, Your residence) is in the United States or Canada, the following informal dispute resolution and binding arbitration provisions apply to You:

(i) Informal Dispute Resolution and Binding Arbitration

Autodesk seeks to resolve any claim or dispute (“Claim”) informally. If You or Autodesk have a Claim arising out of or relating to an Offering or these Terms, You and Autodesk will first seek to resolve the Claim informally by providing notice of the Claim in the manner described below for Notices and cooperating with the other party to try to address the matter amicably. If the Claim is not resolved through informal dispute resolution within 30 days after receipt of the notice of a Claim, either party may proceed with formal dispute resolution.

You and Autodesk agree to binding individual arbitration of any Claim arising out of or relating to an Offering or these Terms and waive any right to go to court and have a trial in front of a judge or jury. The United States Federal Arbitration Act, including its procedural provisions, and not state law, governs the interpretation and enforcement of this dispute-resolution provision. Arbitration will be conducted by ADR Services pursuant to its rules and as set forth in this Section 17.4. To commence arbitration, a party must send a written demand for arbitration that describes the Claim and request for relief with the details required by the ADR Services rules (“Demand”). Any Demand from You to Autodesk must be sent to Autodesk, Inc., The Landmark @ One Market, Suite 400, San Francisco, California 94105 USA, Attention: Chief Legal Officer. Any Demand from Autodesk to You must be sent to the address You provided during the informal dispute-resolution process described above or, if no address was provided, sent as described in Section 17.11 (Notices) below.

(ii) Fees for Binding Arbitration

Payment of all arbitrator fees will be governed by the ADR Services rules, except to the extent that any fees (including attorneys’ fees) and costs paid by either party are reallocated upon order of the arbitrator following a determination that (1) You or Autodesk breached any of the provisions of this Section 17.4, (2) the substance of Your or Autodesk’s Claim or the relief sought by You or Autodesk was frivolous or brought for an improper purpose, or (3) reallocation is otherwise permitted under applicable law. If Autodesk brings a Claim against You, Autodesk will pay all ADR Services fees associated with the Claim. If You bring a Claim against Autodesk, You and Autodesk will split those fees evenly. Further, if the arbitrator determines that You are unable to pay any part of those ADR Services fees, Autodesk will pay them for You.

(iii) Mass Filings



If You bring a Claim against Autodesk that is similar to the Claims of at least 24 other customers or users, or if You and at least 24 other customers or users with Claims against Autodesk are represented by the same lawyers or by lawyers who are coordinating with each other (in either case, a “Mass Filing”), you and Autodesk agree to the following protocol:

ADR Services will randomly assign sequential numbers to each of the Claims included in a Mass Filing, after which the Claims numbered 1-10 will be designated the “Initial Test Cases” and will proceed to arbitration. The filing fees will be paid only for the Initial Test Cases; for all other Claims, the filing fees (together with any arbitrator consideration of the other Claims) will be held in abeyance, and neither You nor Autodesk will be required to pay any such filing fees. The arbitrator will render a final award for the Initial Test Cases within 180 days after the initial pre-hearing conference, unless such period is extended by the arbitrator. Thereafter, the results of the Initial Test Cases will be given to a mediator, and such mediator and the parties will have 90 days from the mediator’s appointment (the “Mediation Period”) to agree on a resolution or substantive methodology for resolving the remaining Claims. If the parties are unable to resolve the remaining Claims during the Mediation Period, either party may choose to opt out of the binding arbitration process and proceed in court with the remaining Claims. Notice of any opt-out must be provided in writing within 60 days after the close of the Mediation Period. Absent notice of an opt-out, the remaining Claims will be arbitrated individually in the order determined by the sequential numbers assigned to the Claims in the Mass Filing. Filing fees for each Claim will be due upon commencement of the arbitration of such Claim.

(iv) Determination of Arbitrability, Enforcement of Rights

The arbitrator will have the right to determine the arbitrability of any Claim.

Notwithstanding the foregoing arbitration provision, each party may enforce its, or its licensors’, patent, copyright, or trademark rights in any court of competent jurisdiction.

(c) Waiver of Class or Consolidated Actions

All Claims arising out of, or relating to, an Offering or these Terms must be arbitrated or litigated on an individual basis and not on a class basis. Claims of more than one customer or user cannot be arbitrated or litigated jointly or consolidated with those of any other customer or user.

(d) Injunctive and Other Equitable Relief

Notwithstanding any other provisions of these Terms, if a Claim is subject to resolution in the specified court or courts under Section 17.4(a) (General) above, Autodesk may apply for injunctive relief and other equitable remedies (or their equivalent) in any jurisdiction or forum, including any available court. If a Claim is subject to arbitration, either party may apply to a court of competent jurisdiction for interim measures necessary to preserve the parties’ rights, including pre-arbitration attachments or injunctions, and any such request will not be deemed incompatible with, or a waiver of, the agreement to arbitrate.

## 17.5 Force Majeure

Neither party will be responsible or have any liability for any delay or failure to perform to the extent due to unforeseen circumstances or causes beyond its reasonable control, including acts of God, earthquake, fire, pandemic, flood, sanctions, embargoes, strikes, lockouts or other labor disturbances, civil unrest, unavailability or delay of suppliers or licensors, riots, terrorist or other malicious or criminal acts, war, failure or interruption of the internet or third party internet connections or infrastructure, power failures, acts or orders of civil and government authorities and severe weather

("Force Majeure"). The affected party will give the other party prompt written notice (when possible) of the failure to perform and use its reasonable efforts to limit the resulting delay in its performance.

## **17.6 Export**

When You obtain, access or use an Offering, You will comply with the export control and international trade laws and regulations of the United States and of any other country whose laws apply to You or Your Content. You will not access or use any Offering from within a U.S. sanctioned location or if You appear on any U.S. government restricted parties list. You will obtain U.S. government and any other required authorization before You obtain, access or use, or allow any person or entity to obtain, access or use, any Offering for a U.S.-restricted end use. Restricted end uses include work on nuclear, chemical or biological weapons or on missile systems capable of delivering them. You may not upload or otherwise provide Autodesk with any content or materials (including Your Content) that constitute classified information or that are subject to the International Traffic in Arms Regulations ("ITAR") or its foreign counterparts. You may not upload or otherwise provide Autodesk with any content or materials that cannot legally be transferred from Your location to the United States or from the United States to Your location. You are solely responsible for compliance with all export control requirements applicable to Your Content and You may not use any Offering to make Your Content or any other content or materials available to any country, entity or other party that cannot legally receive them under U.S. and other applicable law. Autodesk reserves the right to suspend or terminate Your Offerings for failure to comply with requests for additional export control related assurances or if Autodesk determines in its sole discretion that sanctions and/or export control related laws and regulations restrict the provision of products, services and/or other financial benefit.

## **17.7 Government**

This Section 17.7 applies if You are a United States federal or other Governmental Entity. The Offerings are "commercial computer software" as defined at 48 C.F.R. § 2.101 and 48 C.F.R. § 252.227-7014(a)(1) and as the term is used in 48 C.F.R. §§ 12.212 and 227.7202, and, where services, are "commercial services" as defined in 48 C.F.R. § 2.101. The Offerings and related Documentation are provided to You and your Authorized Users, for use by You or on Your behalf, subject to these Terms and with only those rights as are granted to all other Autodesk customers and their Authorized Users pursuant to these Terms. These Terms apply to Governmental Entity customers and Authorized Users except to the limited extent You are prohibited by the laws of Your jurisdiction from accepting any provisions of these Terms. If and to the extent any provision of these Terms is so prohibited, such provision will be deemed modified only to the extent reasonably necessary to conform to applicable law but to give maximum effect to the provision as written.

## **17.8 Verification of Compliance**

Autodesk reserves the right to verify Your compliance with these Terms and may, at its discretion, do so by providing you with a report regarding Your noncompliant use of Offerings and/or by conducting a remote or on-site audit (any such action, a "Verification").

If a remote or on-site audit is required, Autodesk or its representative will provide You electronic written notification. You must use an Autodesk-approved tool to gather information from all devices accessing Your Offerings and obtain any necessary access and consent from Your Authorized Users. Within 15 calendar days of audit notification, You must submit Your audit results to the notifying party. Audit results must include machine IDs, serial numbers, Autodesk IDs, NT/Windows username, device ID and other information relating to Your Offerings.

If, through a Verification, Autodesk determines You are in violation of these Terms, You must immediately purchase new Offerings at least equal to the total of the value of the identified noncompliance and Autodesk's reasonable costs to complete the Verification.

Failure to comply with this Section 17.8 is a material breach of these Terms. Autodesk reserves the right to suspend and/or terminate Your access to Offerings as set forth in Section 16.2 (Autodesk's Right to Terminate or Suspend a Subscription or Account) above, as well as to seek any other remedies available at law or in equity as set forth in Section 17.4 (Autodesk Party, Governing Law, Dispute Resolution) above.

### **17.9 Assignment**

You may not assign or otherwise transfer these Terms or Your rights or obligations under these Terms (whether by operation of law or otherwise) without Autodesk's prior written consent, and Autodesk may terminate these Terms (including Your rights under these Terms) if You are acquired by, or come to be controlled by, any other person or entity (whether by acquisition of shares, merger, or other transaction) without such written consent of Autodesk. Autodesk may assign or otherwise transfer these Terms (without Your consent or notice to You) as part of a reorganization, merger, sale of assets or other transaction that involves all or a portion of the Offerings or related business.

### **17.10 Severability**

If and to the extent any provision of these Terms is held unenforceable under applicable law, (a) such provision will be deemed modified to the extent reasonably necessary to conform to applicable law but to give maximum effect to the intent of the parties set forth in these Terms, and (b) such provision will be ineffective only as to the jurisdiction in which it is held unenforceable without affecting enforceability in any other jurisdiction.

### **17.11 Notices**

Any notices by You to Autodesk will be sent by postal mail or delivery service to Autodesk, Inc., The Landmark @ One Market, Ste. 400, San Francisco, CA 94105 USA, Attention: Chief Legal Officer. Such notices will be effective when received by Autodesk.

Except as otherwise expressly stated in these Terms (including any Additional Agreement or Special Terms), any notices by Autodesk to You will be provided (a) by email to the registered email address associated with Your account, (b) by posting to Your account, (c) by posting within an Offering (for example, through an in-Offering notification function or sign-in notification), (d) by postal mail or delivery service to the address associated with Your account, or (e) in any other manner deemed reasonable by Autodesk that involves specific notification to You. Notices from Autodesk to You will, (i) in the case of notices by email, be effective one day after being sent and (ii) in the case of other notices, five days after being posted or sent. You hereby agree to service of process being effected on You by registered mail sent to the address set forth on Your Customer Information Form (or, if no Customer Information Form has been provided, Your last address known by Autodesk) if so permitted by applicable law.

### **17.12 Entire Agreement, No Waiver**

These Terms, including any Additional Agreement and any Special Terms (which are incorporated by reference in these Terms), constitute the entire agreement between You and Autodesk (and merge and supersede any prior or contemporaneous agreements, discussions, communications, representations, warranties, advertising or understandings) with respect to the subject matter hereof. Any access to or

use of an Offering is expressly conditioned on the application of these Terms, and any other terms are expressly rejected.

If there is any conflict between these General Terms and any Special Terms, the Special Terms will control in relation to their subject matter. If there is any conflict between these General Terms or the Special Terms and the Additional Agreement, the Additional Agreement will control in relation to its subject matter to the extent set forth in the Additional Agreement.

Failure to enforce or exercise any provision of these Terms is not a waiver of such provision, unless such waiver is specified in writing and signed by the party against which the waiver is asserted.

### **17.13 DMCA**

The Digital Millennium Copyright Act of 1998 (the "DMCA") provides recourse for copyright owners who believe that material appearing on the internet infringes their rights under U.S. copyright law. If You believe in good faith that materials made available by or through Autodesk infringe Your copyright, You (or Your agent) may send Autodesk a notice requesting that Autodesk remove the material or block access to it. If You believe in good faith that someone has wrongly filed a notice of copyright infringement against You, the DMCA permits You to send Autodesk a counter-notice. Notices and counter-notices are required to meet the then-current statutory requirements imposed by the DMCA. See <http://www.copyright.gov/> (<http://www.copyright.gov/>) for details. Notices and counter-notices should be sent to:

Copyright Agent  
Autodesk, Inc.

The Landmark @  
One Market, Ste. 400  
San Francisco, CA 94105  
USA

E-mail: [copyright.agent@autodesk.com](mailto:copyright.agent@autodesk.com)  
(<mailto:copyright.agent@autodesk.com>)Tel: +1 (415) 507.5000  
Fax: + 1 (415) 507.6128

Autodesk suggests that You consult Your legal advisor before filing a notice or counter-notice.

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## **18. Definitions**

"Additional Agreement" means any agreement signed directly with an Autodesk entity that expressly supplements or amends the Terms (for example, an enterprise business agreement).

"Authorized Users" or "Your Authorized Users" means (a) You (if You are an individual) and (b) identified individuals (such as Your individual employees, consultants and contractors and other individuals accessing and using an Offering) for whom You have acquired a subscription to an Offering. If an Offering allows You to designate Authorized Users for such Offering, You will be responsible for providing notice to, and obtaining agreement from, any such Authorized Users regarding the application of these Terms to their access to and use of such Offering prior to their access and use.

**Autodesk** means Autodesk, Inc., a Delaware (United States) corporation, together with its subsidiaries and other affiliates.

**Autodesk Party** means the particular Autodesk entity identified in Section 17.4 (Autodesk Party, Governing Law, Dispute Resolution) above.

**Benefits** means any benefits made available to You or Your Authorized Users by Autodesk. Benefits are typically based on the type or level of Offering for which You subscribe. Benefits may include access to Updates and Upgrades, rights to previous versions, additional Software or Cloud Services, pre-release versions, APIs, global use rights, technical support, training, webinars, forums, events, galleries, newsletters and usage data. Benefits may also include account benefits such as single sign-on and management of Your profile, security settings, linked accounts and preferences.

**Cloud Service** means a web- or cloud-based service made available by Autodesk, whether or not provided as part of a subscription and whether or not provided for a fee. Cloud Services may include software as a service (SaaS) and remote storage or processing of data.

**Confidential Information** means information not generally known to the public that is (a) made available or disclosed by a Disclosing Party to a Receiving Party in writing and (b) designated by the Disclosing Party in writing as Confidential. Nonetheless, Confidential Information does not include (i) any information that (1) becomes generally known to the public without breach of any obligation owed to the Disclosing Party; (2) was known to the Receiving Party before receipt from the Disclosing Party without breach of any obligation (and without a duty of confidentiality) owed to the Disclosing Party; (3) is received from a third party without breach of any obligation (and without a duty of confidentiality) owed to the Disclosing Party; or (4) was independently developed by the Receiving Party; ii) any of Your Content that You send to, or allow to be accessed by, a third party through an Offering; or (iii) any Feedback. Autodesk Confidential Information in any event includes the non-public aspects of (A) any Offerings and any related product plans, technology and other technical information (including APIs and any elements of Your Development using, disclosing or based on use of the APIs) and (B) business negotiations.

**Covered Offering** means any Offering for which you have paid Autodesk a subscription fee of more than US\$100 in the previous 12 months, excluding any Offering that has been modified by You or at your direction, and excluding any Third-Party Material/Services.

**Customer Information Form** means a form completed by or on behalf of You and submitted to Autodesk (or to a reseller, distributor, or other third party), directly or indirectly, in connection with Your account, a subscription or other Offering.

**Documentation** means the then-current end-user documentation (including online, printed, or other documentation) and any technical or legal requirements for an Offering.

**Governmental Entity** means any nation or government, including the United States federal government, any state, municipality, or other political subdivision thereof, and any entity, body, agency, commission, department, board, bureau, or judicial body pertaining to government, and any employee or official thereof.

**Metrics** means data and other information regarding access to and use of any Offerings (including Your access and use). Metrics includes information regarding usage of features, functions, storage and indexes and information regarding usage, volume, type, storage and processing of Your Content (but not Your Content itself). If Metrics includes any personal data, treatment of such personal data

will be pursuant to the Privacy Statement (<https://www.autodesk.com/company/legal-notice-trademarks/privacy-statement>).

“**Offerings**” means Software, Cloud Services, and Benefits provided by Autodesk, and any subscriptions for such items.

“**Offering Identification**” means one or more designations by Autodesk that set forth (as applicable) the name of an Offering; the Offering Type; and the permitted number, Territory, and length of Your subscription. The Offering Identification may be (a) provided in a written confirmation or other notice issued to You by Autodesk, posted to Your account, transmitted via email, or otherwise made available to You; (b) located in the Offering or on or with any Autodesk packaging; or (c) obtained from Autodesk on request. Offering Identification does not include any designation, confirmation, packaging or other document provided by a reseller, distributor, or other third party.

“**Offering Type**” means the license type specified by Autodesk for a subscription (for example, single-user, multi-user, or Flex). Offering Types are set forth on Offering Types and Benefits (<https://www.autodesk.com/company/terms-of-use/en/offering-types-and-benefits>).

“**Output**” means all results, work product, designs, prototypes or other items created or generated by or through any use of any Offering, including any products, parts or services based on or using such results, work product, designs, prototypes, or other items.

“**Software**” means any software or similar materials, including any modules, components, features and functions, made available by Autodesk, whether or not provided as part of a subscription and whether or not provided for a fee. Software includes Updates and Upgrades.

“**Terms**” (including “these Terms”) means these General Terms and the other terms referenced in these General Terms, including the Special Terms and Additional Agreement (if any), together with any other applicable terms.

“**Territory**” means the country or jurisdiction where You acquired Your subscription. Autodesk may indicate the applicable Territory in an Offering Identification. For additional information regarding the definition of Territory see Section 19 (Country/Jurisdiction-Specific Terms) below.

“**Updates**” means security fixes, hot fixes, patches and other updates (including new features, new functions and other modifications released between Upgrades).

“**Upgrades**” means new versions of Offerings, or add-ons to or additional products associated with Offerings, as determined by Autodesk.

“**Your Content**” means (a) any files, designs, models, data sets, images, documents, or similar material submitted or uploaded to any Offering by You (or Your Authorized Users) and (b) Your specific output generated from the use of any Offering based on Your own raw data or information.

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## 19. Country/Jurisdiction-Specific Terms

Notwithstanding the other provisions of these Terms, if Your principal place of business is in (or, if You are an individual, You are a resident of) a country or jurisdiction identified below, the terms set forth below for such country or jurisdiction will apply to You:

### 19.1 United Kingdom; Member States of the European Union and European Economic Area



- (a) If You acquired Your subscription in a Member State of the European Union or the European Free Trade Association, the applicable "Territory" for such subscription is all the countries of the European Union and the European Free Trade Association.
- (b) If Your principal place of business is in (or, if You are an individual, You are resident of) a Member State of the European Union or the European Economic Area and there are any court proceedings in a Member State between You and a third party relating to the use of an Offering, (i) You will inform Autodesk promptly in writing of such court proceedings, and (ii) You will not serve Autodesk with a third party notice regarding such proceedings unless Autodesk requests in writing that You do so.
- (c) Nothing in these Terms will exclude or restrict (i) Autodesk's liability for death or personal injury caused by Autodesk's negligence or willful misconduct, (ii) other damages caused to You by Autodesk's fraud, willful misconduct or gross negligence, (iii) if applicable, Autodesk's strict liability for defects of products under applicable statutory law of a Member State of the European Union or the European Economic Area (e.g., the German Product Liability Act), or (iv) any other liability that cannot be excluded or restricted under applicable law.
- (d) The following provisions apply if You are contracting with Autodesk Ireland Operations Unlimited Company ("Autodesk Ireland") as a consumer and are a resident of either the United Kingdom or a country that is a Member State of the European Union or the European Economic Area. These provisions will control in case of a conflict with other provisions of these Terms.

(i) Governing Law and Jurisdiction. If you are a consumer resident of the United Kingdom, these Terms are governed by English law. If you are a consumer resident of a country that is a Member State of the European Union or European Economic Area, these Terms are governed by Irish law. Nothing in these Terms will deprive You of the protections granted to You by the law of the country where you reside that cannot be derogated from by contract pursuant to the law of such country. Autodesk Ireland may bring a claim with respect to an Offering against You only in the courts of the country where You reside, and You have the right to bring a claim with respect to an Offering against Autodesk Ireland either in the courts of Ireland or in the courts of the country where You reside. In any case, You and Autodesk Ireland have the right to bring a counterclaim in the court in which, in accordance with this provision, the original claim is pending.

(ii) Assignment. If Autodesk assigns or otherwise transfers these Terms, Autodesk will notify you of such transfer in advance and ensure that such transfer does not prejudice Your rights under these Terms. You may terminate these Terms (including any subscriptions hereunder) within thirty (30) days of receipt of such notice of transfer, and, if a resident of the United Kingdom, receive a refund for the prorated portion of any prepaid fees applicable to the remaining Offering Term of Your affected subscriptions. If You wish to assign or otherwise transfer these Terms (and your rights and obligations under these Terms) to another entity, You must deliver written notice to Autodesk requesting consent to such transfer. Autodesk's consent to such transfer is subject to (1) Your demonstration that the transferee will comply with these Terms, (2) Your agreement to remain responsible for the transferee's compliance, (3) Your agreement to no longer access or use any Offerings subject to these Terms, and (4) any other conditions deemed reasonable by Autodesk.

(iii) Changes to Terms. If Autodesk modifies any of these Terms (whether needed to comply with applicable law or regulation, or for justified commercial, technical, security or operational reasons), Autodesk will provide reasonable notice of such modifications to You in advance of their effective date.



(1) If You are a consumer resident of a Member State of the European Union or the European Economic Area, You may reject any such modifications (except those required by law or regulation) by providing notice of rejection via email (within 30 days of the effective date) to the following email address [Terms.Modification.Rejection@autodesk.com](mailto:Terms.Modification.Rejection@autodesk.com) (<mailto:Terms.Modification.Rejection@autodesk.com>), or in any other manner, specified in the notice of modification. If you do not provide notice of rejection within such time period, You are deemed to have consented to any noticed modifications, unless Your explicit consent is required under the laws applying to You.

(2) If You are a consumer resident of the United Kingdom and do not agree with such modifications, You may terminate these Terms before the noticed effective date and receive a refund for the prorated portion of any prepaid fees applicable to the remaining Offering Term of Your affected subscriptions.

(iv) Changes to Offerings. You acknowledge that Autodesk may change (including suspend or withdraw) Offerings to which You have subscribed from time to time, including when needed to comply with applicable law or regulation, for justified commercial, technical, security, or operational reasons, or to make any improvements to Your access to and use of the Offerings. For existing subscriptions, any such changes will be made without additional cost to You, and Autodesk will provide reasonable advanced notice of any such changes, in a clear and comprehensible manner, where required under applicable law. If You do not agree with such changes, You may terminate your subscription to the changed Offering within 30 days of the later of (1) Your receipt of the notice of Offering change or (2) the effective date of the change, and You will receive a pro-rata refund for the unused Offering Term.

(v) Liability of Autodesk. Notwithstanding Section 14.3 (Limitations on Liability) above and Section 17.12 (Entire Agreement, No Waiver) above, such sections will not exclude Autodesk's liability to You for: (1) misrepresentations in voluntary statements about an Offering made by Autodesk to You that You rely on in purchasing the Offering; (2) failure to provide pre-contract information regarding an Offering that Autodesk is required by the law of the country where You reside to provide to You before purchasing the Offering; (3) if applicable, Autodesk's breach of implied terms that cannot be excluded or restricted under English law (including implied terms relating to satisfactory quality of, fitness for a particular purpose of, conformance to pre-contractual information relating to, or Autodesk's right to supply, digital content); or (4) if applicable, consequential or indirect losses that cannot be excluded or restricted under English law.

(vi) Statutory Warranties. You may have statutory warranty rights under the law applying to You that cannot be excluded or restricted by agreement between You and Autodesk in advance. Such warranty rights will remain unaffected by these Terms. Autodesk offers or makes no further implied or statutory warranties or conditions regarding the Offerings, and explicitly disclaims all implied warranties and conditions to the maximum extent permitted by applicable law.

(vii) Consumer Right of Withdrawal. Under applicable law, consumer residents of a Member State of the European Union or the European Economic Area have a statutory right to withdraw from their subscription to an Offering within 14 days of its purchase. How this right may apply is explained in [Consumer Right of Withdrawal Information](https://damassets.autodesk.net/content/dam/autodesk/www/company/terms-of-use/EU-and-EEA-Consumer-Right.pdf) (<https://damassets.autodesk.net/content/dam/autodesk/www/company/terms-of-use/EU-and-EEA-Consumer-Right.pdf>). Please note that Your more favorable rights of return for refund that Autodesk voluntarily grants You under Section 3 (Return for Refund) above are not affected by this statutory right of withdrawal.

(e) Contact Us. You may contact Autodesk Ireland by calling +353 1 571 8800, emailing [Autodesk.Ireland.Inquiries@autodesk.com](mailto:Autodesk.Ireland.Inquiries@autodesk.com) (<mailto:Autodesk.Ireland.Inquiries@autodesk.com>), or writing to Autodesk Ireland Operations Unlimited Company, 1 Windmill Lane, 2nd Floor, Dublin, Ireland D02 F206.

(f) In addition, notwithstanding any limitations on Territory in these Terms, these Terms do not limit cross-border access or use (such as access or use in one Member State of the European Union of Offerings purchased in another Member State of the European Union) that is expressly authorized by applicable law.

## 19.2 Australia (updated as at 1 September 2024)

These Terms form a contract between You and the Autodesk Party set out in Section 17.4 (Autodesk Party, Governing Law, Dispute Resolution) above which governs Your access to, and use of, Offerings. However, You may have Additional Agreements with local Autodesk affiliates, subsidiaries, or their resellers, distributors, or similar third parties for the purchase of those Offering(s). The following provisions apply to such purchases by Australian consumers:

For the purpose of this provision, Australian Consumer Law means The Australian Consumer Law as embodied in Schedule 2 to the Competition and Consumer Act 2010 (Cth). Nothing in these Terms are intended to exclude any non-excludable statutory rights you may be entitled to at law, including as a consumer under Australian Consumer Law.

(a) **Assignment.** If Autodesk assigns or otherwise transfers these Terms, Autodesk will notify you of such transfer in advance and ensure that such transfer does not prejudice Your rights under these Terms. You may terminate these Terms (including any subscriptions hereunder) within thirty (30) days of receipt of such notice of transfer, and, if a resident of Australia, receive a refund for the prorated portion of any prepaid fees applicable to the remaining Offering Term of Your affected subscriptions. If You wish to assign or otherwise transfer these Terms (and your rights and obligations under these Terms) to another entity, You must deliver written notice to Autodesk requesting consent to such transfer. Autodesk's consent to such transfer is subject to (1) Your demonstration that the transferee will comply with these Terms, (2) Your agreement to remain responsible for the transferee's compliance, (3) Your agreement to no longer access or use any Offerings subject to these Terms, and (4) any other conditions deemed reasonable by Autodesk.

(b) **Changes to Terms.** If Autodesk modifies any of these Terms (whether needed to comply with applicable law or regulation, or for justified commercial, technical, security or operational reasons), Autodesk will provide reasonable notice of such modifications to You in advance of their effective date.

i You may reject any such modifications (except those required by law or regulation) by providing notice of rejection via email (within 30 days of the effective date) to the following email address [Terms.Modification.Rejection@autodesk.com](mailto:Terms.Modification.Rejection@autodesk.com) (<mailto:Terms.Modification.Rejection@autodesk.com>) (<mailto:Terms.Modification.Rejection@autodesk.com>), or in any other manner, specified in the notice of modification. If you do not provide notice of rejection within such time period, You are deemed to have consented to any noticed modifications, unless Your explicit consent is required under the laws applying to You.

ii If You do not agree with such modifications, You may terminate these Terms before the notice effective date and receive a refund for the prorated portion of any prepaid fees applicable to the remaining Offering Term of Your affected subscriptions.

(c) **Changes to Offerings.** You acknowledge that Autodesk may change (including suspend or withdraw) Offerings to which You have subscribed from time to time, including when needed to comply with applicable law or regulation, for justified commercial, technical, security, or operational reasons, or to make any improvements to Your access to and use of the Offerings. For existing subscriptions, any such changes will be made without additional cost to You, and Autodesk will provide reasonable advance notice of any such changes, in a clear and comprehensible manner, where required under applicable law. If You do not agree with such changes, You may terminate your subscription to the changed Offering within 30 days of the later of (1) Your receipt of the notice of Offering change or (2) the effective date of the change, and You will receive a pro-rata refund for the unused Offering Term.

(d) **Liability of Autodesk.** Notwithstanding Section 14.3 (Limitations on Liability) above and Section 17.12 (Entire Agreement, No Waiver) above, such sections will not exclude Autodesk's liability to You for: (1) misrepresentations in voluntary statements about an Offering made by Autodesk to You that You rely on in purchasing the Offering; (2) failure to provide pre-contract information regarding an Offering that Autodesk is required by the law of the country where You reside to provide to You before purchasing the Offering; (3) if applicable, Autodesk's breach of implied terms that cannot be excluded or restricted under applicable law (including implied terms relating to satisfactory quality of, fitness for a particular purpose of, conformance to pre-contractual information relating to, or Autodesk's right to supply, digital content); or (4) if applicable, consequential or indirect losses that cannot be excluded or restricted under Australian law.

(e) **Limitation of Liability.** Nothing in the Terms restricts or excludes Autodesk's liability for fraudulent misrepresentation.

(f) **Return for Refund.** The Autodesk Return Policy is in addition to the statutory rights you may be entitled to as a consumer under the Australian Consumer Law, and similar legislation.

(g) **Autodesk Proprietary Rights.** For the avoidance of doubt, nothing in clause 13 *Autodesk Proprietary Rights*, is intended to exclude non-excludable statutory rights you may be entitled to at law, including as a consumer under the Australian Consumer Law.

(h) **Effect of Termination of Subscription.** At Autodesk's request, unless required to be maintained by applicable law or statute, You will destroy any and all copies of materials related to such Offering (including any related Software, Documentation, APIs, or other material from Autodesk) or return them to Autodesk or the party from which You acquired the Offering.

(i) **Limited Warranty, Disclaimers, Limitations on Liability:** CERTAIN LEGISLATION, INCLUDING THE AUSTRALIAN CONSUMER LAW, MAY LIMIT THE ABILITY TO EXCLUDE LIABILITY OR MAY IMPLY WARRANTIES OR CONDITIONS OR IMPOSE OBLIGATIONS WHICH CANNOT BE EXCLUDED, RESTRICTED OR MODIFIED EXCEPT TO A LIMITED EXTENT. CLAUSE 14 MUST IN ALL CASES BE READ SUBJECT TO THESE STATUTORY PROVISIONS.

DESPITE ANYTHING ELSE IN THESE TERMS, IF ANY OFFERING IS SUBJECT TO THE MANDATORY WARRANTIES OR GUARANTEES OF THE COMPETITION AND CONSUMER ACT (CTH) OR OTHER APPLICABLE LAW IN AUSTRALIA (THE "LAW"), AND SUCH LAW PERMITS AUTODESK TO LIMIT ITS LIABILITY FOR BREACH OF THESE WARRANTIES OR CONDITIONS, THEN AUTODESK'S LIABILITY FOR BREACH OF ANY SUCH WARRANTY OR GUARANTEE WILL BE LIMITED, AT AUTODESK'S OPTION, TO THE REPAIR, REPLACEMENT OR REPERFORMANCE (OR THE COST OF DOING SO) OF THE RELEVANT OFFERING.

(j) The warranty provided in Section 14.1 (Limited Warranty) above is provided by Autodesk Australia Pty Ltd, or the Autodesk subsidiary or affiliate indicated on your quote, invoice or Offering Identification. Please use the address and contact details set out on your quote, invoice or other Offering Identification, or contact Autodesk Australia Pty Ltd at Level 17, 1 Denison Street, North Sydney, NSW 2060, Australia (phone: (02) 9844 8000; email: [Autodesk.Australia.Warranty.Claims@autodesk.com](mailto:Autodesk.Australia.Warranty.Claims@autodesk.com) (<mailto:Autodesk.Australia.Warranty.Claims@autodesk.com>)), to make a claim under the warranty provided in Section 14 (Limited Warranty) above. Please have details of Your Offering, serial number, place of purchase, details of the defect and Your return contact details prior to contacting us. The warranty provided in Section 14 (Limited Warranty) above is in addition to other rights and remedies you have at law.

(k) Our goods and services come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the service, you are entitled:

(a) to cancel your service contract with us; and

(b) to a refund for the unused portion, or to compensation for its reduced value.

(l) You are also entitled to choose a refund or replacement for major failures with goods. If a failure with the goods or a service does not amount to a major failure, you are entitled to have the failure rectified in a reasonable time. If this is not done, you are entitled to a refund for the goods and to cancel the contract for the service and obtain a refund of any unused portion. You are also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the goods or service.

(m) Autodesk will not be responsible for user error and may refer any such issues to a supporting reseller, distributor or similar third party, if any. You may be required to return the Offering to the address we provide to You at the time, at Your own cost.

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A horizontal splash of clear blue water with bubbles, positioned behind the text.

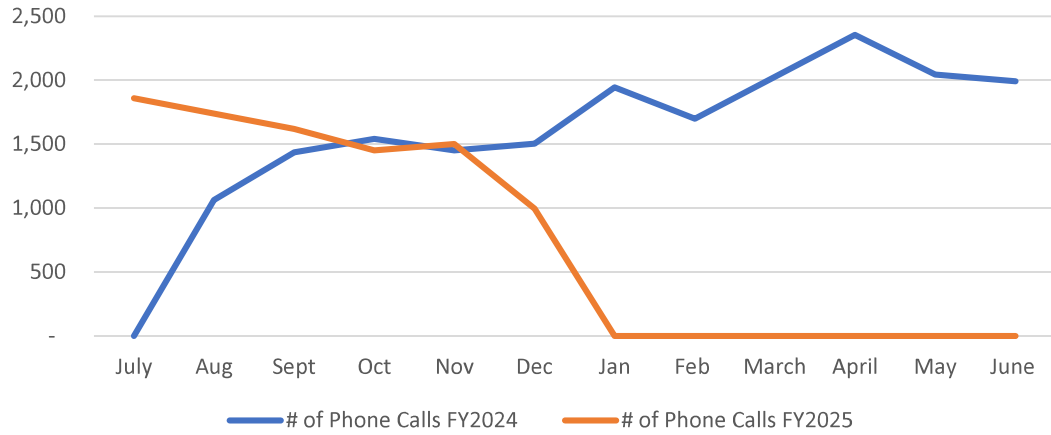
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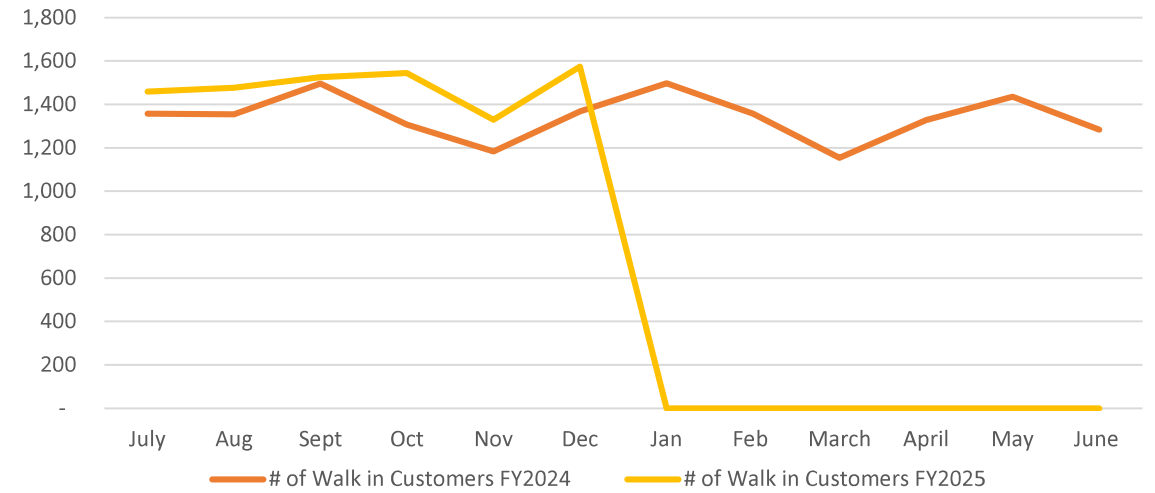


# FISCAL DIVISION DASHBOARD

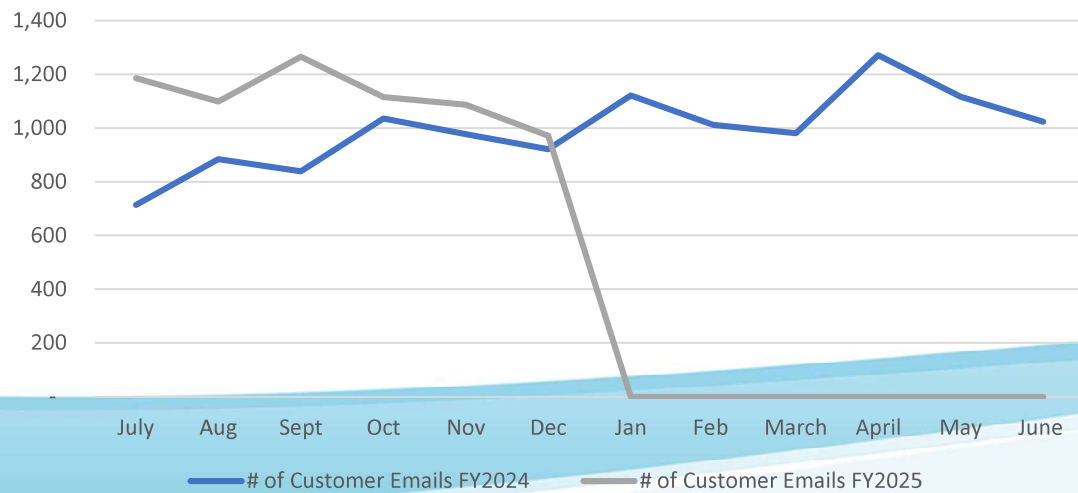
### # of Customer Service Calls



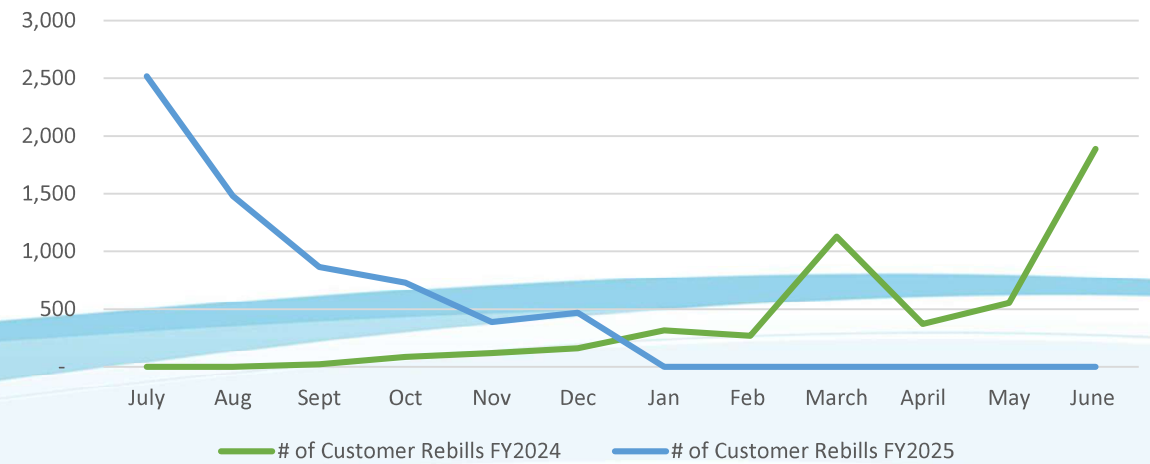
### # of Walk in Customers



### # of Customer Emails and Correspondence



### # of Customer Rebills

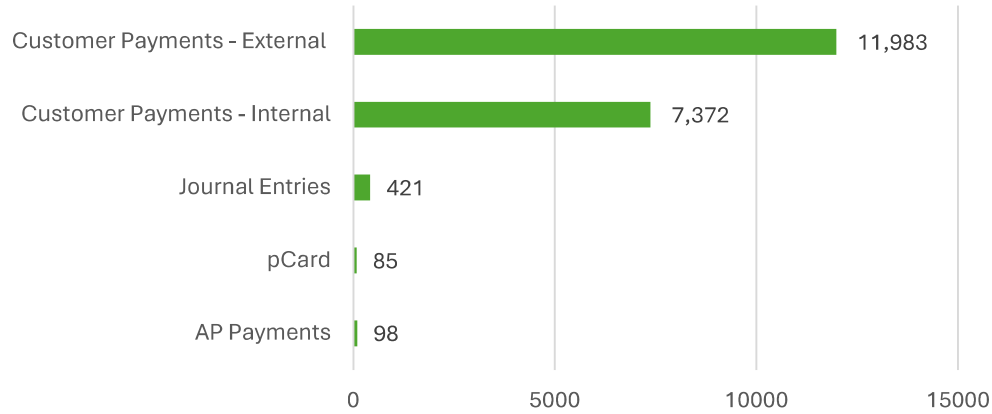






# FISCAL DIVISION DASHBOARD

## Accounting Highlights

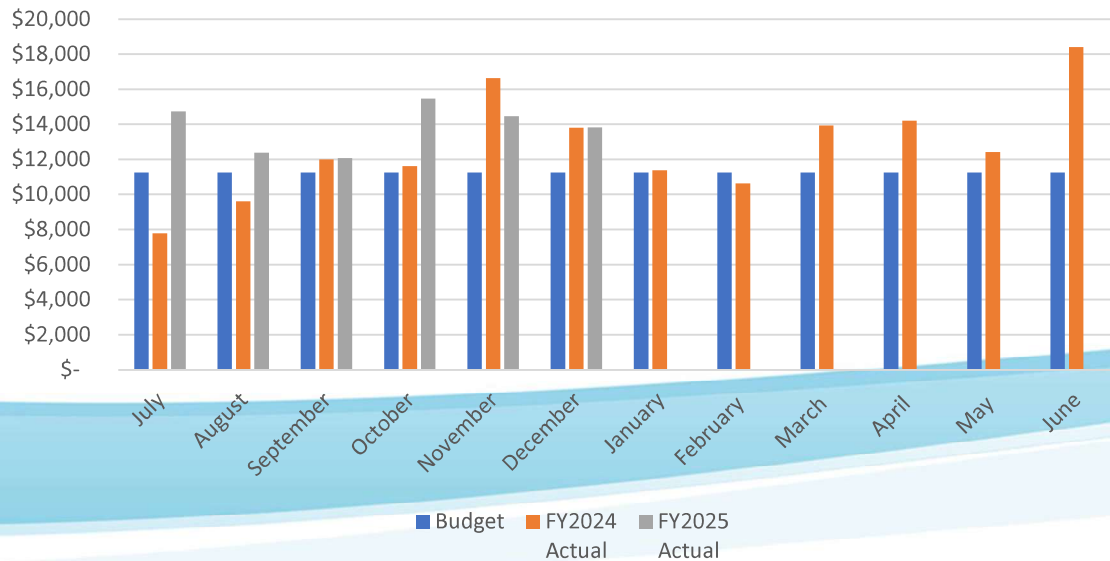


**Transponder Replacement Highlights:**

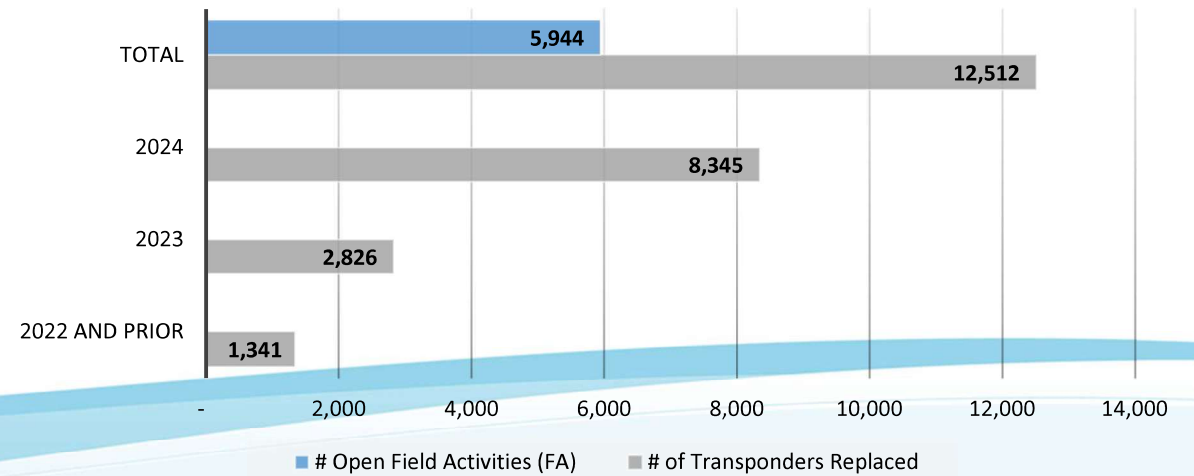
- 588 Transponders Replaced in December 2024.
- 54% Replaced to date.
- 26% Failed; awaiting replacement.
- 20% Active; expected to fail soon.

Monthly Transactional Volume processed and reconciled by the Accounting Team.

## Overtime



## Transponder Replacement Progress (Calendar Year)



**Department Of Water Budget Report for December 2024**

	December 2024			Fiscal Year 2025			
	Budget	Actual	Variance	Year to Date Budget	Year to Date Actual	Variance	Variance %
<b>Operating Revenue</b>	\$ 2,765,742.00	\$ 3,595,820.26	\$ 830,078.26	\$ 16,594,452.00	\$ 22,397,561.72	\$ 5,803,109.72	35.0%
<b>Expenses</b>							
Labor *	\$ 1,166,793.00	\$ 1,165,728.36	\$ 1,064.64	\$ 7,000,758.00	\$ 7,053,086.66	\$ (52,328.66)	(0.7%)
Services	1,341,633.30	368,852.53	972,780.77	8,049,799.80	\$2,575,329.49	5,474,470.31	68.0%
Utilities & Materials	952,621.84	1,297,610.18	(344,988.34)	5,715,731.03	\$4,954,602.36	761,128.67	13.3%
<b>Total Operating Expenses</b>	<b>\$ 3,461,048.14</b>	<b>\$ 2,832,191.07</b>	<b>\$ 628,857.07</b>	<b>\$ 20,766,288.83</b>	<b>\$ 14,583,018.51</b>	<b>\$ 6,183,270.32</b>	<b>29.8%</b>
<b>Debt Service Principal &amp; Interest</b>	<b>59,210.00</b>		<b>59,210.00</b>	<b>5,588,355.00</b>	<b>5,595,500.28</b>	<b>(7,145.28)</b>	<b>(0.1%)</b>
<b>Operating and Debt Expenses</b>	<b>\$ 3,520,258.14</b>	<b>\$ 2,832,191.07</b>	<b>\$ 688,067.07</b>	<b>\$ 26,354,643.83</b>	<b>\$ 20,178,518.79</b>	<b>\$ 6,176,125.04</b>	<b>23.4%</b>
<b>Net Income (Loss)</b>	<b>\$ (754,516.14)</b>	<b>\$ 763,629.19</b>	<b>\$ 1,518,145.33</b>	<b>\$ (9,760,191.83)</b>	<b>\$ 2,219,042.93</b>	<b>\$ 11,979,234.76</b>	<b>122.7%</b>

\* Current month's labor is estimated

**Capital Projects and Purchases\*\***

	Fiscal Year Budget	December YTD Actual	Remaining Budget
<b>Water Utility Funded Projects</b>			
IT-RandR Capital Purchases--	\$ 350,610.55	\$ 4,905.55	\$ 345,705.00
IT-Expansion Capital Purchases--	968,434.45	34,868.73	933,565.72
Eng 11-04 LO-10 Lawai 6n8inch Main Replacement	200,000.00	25,985.57	174,014.43
Eng-69%R-11-07 HE-03 Hanapepe & Koloa Well MCC	571,650.00	2,895.00	568,755.00
Eng-ALLR-23-07 Rehabilitate Puupilo Steel Tank	169,783.00	6,111.00	163,672.00
Eng-Job 18-3 -Kuhio Hwy Hardy-Oxford 16IN Main	2,808,941.82	8,253.39	2,800,688.43
Eng-56%R-Job 23-03 Kuhio Hwy Papaloa to Waikaea	318,284.46	93,453.70	224,830.76
23-02 WK-34, Kuamoo Rd 8" Main Replace (6,500')	13,085.45	28,008.00	(14,922.55)
Cns-44%R-09-01 Yamada Tank Clearwell, Conn Pipe	2,777,114.24	(62,105.46)	2,839,219.70
Ops-R&R-Upgrade and Replace SCADA RTU and PLC	261,281.91	77,994.60	183,287.31
Ops-RandR Capital Purchases	2,193,999.05	24,121.98	2,169,877.07
Ops-Expansion Capital Purchases	631,573.69	42,686.19	588,887.50
	<b>\$ 22,941,081.18</b>	<b>\$ 287,178.25</b>	<b>\$ 22,653,902.93</b>

**FRC Funded Projects**

Eng-ALLE-12-02 WK-23 UH Expmntal Storage Tank	\$ 304,981.00	\$ 89,231.00	\$ 215,750.00
Eng 04-08 WK-39 Drill Kapaa Homestead Well 4	2,521,934.49	1,050.00	2,520,884.49
Projects with budget but no activity	6,075,153.36		6,075,153.36
	<b>\$ 6,165,434.36</b>	<b>\$ 90,281.00</b>	<b>\$ 6,075,153.36</b>

**Build America Bonds Funded Projects**

Projects with budget but no activity	9,418,863.75		9,418,863.75
	<b>\$ 9,418,863.75</b>	<b>\$ -</b>	<b>\$ 9,418,863.75</b>

**State Allotment Funded Projects**

WK-08-Kapaa Homesteads 2-0.5MG Tanks	\$ 2,400,000.00		\$ 2,400,000.00
WK-39, Kapaa Homesteads Well No. 4 Pump and Controls	2,400,000.00		2,400,000.00
PLH-27 Kūhiō Highway (Hardy-Oxford) 16' Main Replacement	2,500,000.00		2,500,000.00
	<b>\$ 7,300,000.00</b>	<b>\$ -</b>	<b>\$ 7,300,000.00</b>

**State Revolving Funded Projects**

WK-08, Kapaa Homsteads 2.0 5MG Tanks	\$ 5,200,000.00		\$ 5,200,000.00
Kalaheo Water System Improvements	6,926,518.00	3,100,939.84	3,825,578.16
	<b>\$ 12,126,518.00</b>	<b>\$ 3,100,939.84</b>	<b>\$ 9,025,578.16</b>

**Total Capital Projects**

	<b>\$ 57,951,897.29</b>	<b>\$ 3,478,399.09</b>	<b>\$ 54,473,498.20</b>
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**Selected Divisions**

	December 2024			Fiscal Year 2025			
	Budget	Actual	Variance	Year to Date Budget	Year to Date Actual	Variance	Variance %
Engineering	\$ 881,339.59	\$ 338,020.73	\$ 543,318.86	\$ 5,288,037.54	\$ 2,052,551.95	\$ 3,235,485.59	61.1%
Fiscal	245,832.78	207,187.38	38,645.40	1,474,996.68	1,312,157.85	162,838.83	11.1%
Operations	1,561,895.28	1,832,369.80	(270,474.52)	9,371,371.68	8,476,530.85	894,840.83	10.0%
	<b>\$ 2,689,067.65</b>	<b>\$ 2,377,577.91</b>	<b>\$ 311,489.74</b>	<b>\$ 16,134,405.90</b>	<b>\$ 11,841,240.65</b>	<b>\$ 4,293,165.25</b>	<b>27%</b>

CASH RECEIPTS	(Preliminary 2024 is not closed)	TOTAL	2025 @ 12/31/24	2024	2023	2022	2021	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010
BEGINNING CASH BALANCE		\$ 60,000,000.00												\$ -	\$ -	\$ -	\$ -	\$ 60,000,000.00
Bond Proceeds																		
Interest Income		\$ 2,462,663.03	\$ 206,969.56	\$ 406,245.12	\$ 10,145.00	\$ (321,259.46)	\$ 1,406.49	\$ 318,033.00	\$ 239,725.76	\$ 136,213.08	\$ 43,433.92	\$ 62,650.14	\$ 246,093.42	\$ 1,113,007.00				
<b>TOTAL RESOURCES</b>		<b>\$ 62,462,663.03</b>	<b>\$ 206,969.56</b>	<b>\$ 406,245.12</b>	<b>\$ 10,145.00</b>	<b>\$ (321,259.46)</b>	<b>\$ 1,406.49</b>	<b>\$ 318,033.00</b>	<b>\$ 239,725.76</b>	<b>\$ 136,213.08</b>	<b>\$ 43,433.92</b>	<b>\$ 62,650.14</b>	<b>\$ 246,093.42</b>	<b>\$ 1,113,007.00</b>	\$ -	\$ -	\$ -	\$ 60,000,000.00
201-01 BAB - CIP		\$ -																
Cost of Issurance		\$ 535,838.66																\$ 535,838.66
217 EA-194 Hanalei River & Moelepe Stream Pipeline		\$ 741,141.50																\$ 741,141.50
218 Job 02-18	Pipeline replacement, Kapaa Homesteads	\$ 2,941,979.00														\$ 966,229.51	\$ 1,975,749.49	
219 Job 04-02	Main replacement, Vivian Heights and Apopo Road and Kanahele Road	\$ 2,651,730.99													\$ 105,007.40	\$ 476,365.60	\$ 2,070,357.99	
220 Job 03-02	Anahola 0.15 MG Tank Renovation	\$ 1,571,169.09												\$ 417,459.47	\$ 738,342.29	\$ 348,437.12	\$ 66,930.21	
684 Job 05-01	Waimea Main Replacement	\$ 3,272,975.12														\$ 112,524.38	\$ 3,160,450.74	
687 Job 02-03	Kekaha 12" Main Replacement and Waimea Canyon Drive 12" Main Replacement	\$ 677,234.29														\$ 8,796.00	\$ 668,438.29	
221 Job 10-01	Pipeline replacement, Anini Road	\$ 724,652.00							\$ 320.25		\$ 40,444.75	\$ 99,727.00		\$ 75,360.00	\$ 91,600.00	\$ 331,800.00	\$ 85,400.00	
222 Job 10-02 & 13-03	Kaumualii Hwy widening, Anonou St to Lihue Mill Bridge	\$ 5,208,503.03												\$ 603,320.00		\$ 4,368,972.73	\$ 236,210.30	
223 Job 05-06	PLH-25, 8" Main Replacement, Eiwa, Umi, Akahi, Elua & Hardy/Alohi Streets	\$ 2,710,970.00													\$ 207,527.45	\$ 1,837,108.24	\$ 666,334.31	
224 Job 02-16	Rehabilitation of Maka Ridge Deepwell Tank, Pipeline and Rdway, Ohana, Anolani & Kuamoo Roads	\$ 1,381,988.40												\$ 70,243.40	\$ 816,129.43	\$ 495,615.57		
227 Waimea Well A Renovation		\$ 639,282.53													\$ 299,937.43	\$ 308,235.45	\$ 31,109.65	
326 Job 02-02	Omao 0.5 MG Tank and connecting Pipeline	\$ 2,519,540.05														\$ 1,105,978.21	\$ 1,413,561.84	
228 Koloa Tank Site Acquisition		\$ 500,991.73															\$ 500,991.73	
230 Job 02-08	Rehabilitation of Eleele Twin 0.4 MG Steel Tanks	\$ 2,018,853.05												\$ 419,657.59	\$ 820,325.86	\$ 654,054.56	\$ 124,815.04	
231 Job 02-19	Waipouli Main Replacement to Akulikui	\$ 2,229,690.39												\$ 140,809.76	\$ 460,829.74	\$ 1,628,050.89		
232 Job 02-14	Kapaa Homesteads 0.5 MG Tank #2 and Kapahi 1.0 MG Tank	\$ 410,240.21		\$ 104,355.40	\$ 12,281.25				\$ 28,276.20	\$ 181,031.23	\$ 33,913.47				\$ 4,820.46	\$ 44,327.74	\$ 1,234.46	
233 Job 09-01 K-01, K-12	Kalaheo 1111' & 1222' Water System Improvement	\$ (0.00)		\$ (1,117,183.23)	\$ 54,579.24	\$ 5,326.25	\$ 30,660.00	\$ 67,910.95	\$ 40,510.00	\$ 252,930.74	\$ 4,084.44	\$ 41,155.98	\$ 29,424.45		\$ 54,561.67	\$ 505,005.23	\$ 31,034.28	

CASH RECEIPTS		(Preliminary 2024 is not closed)	TOTAL	2025 @ 12/31/24	2024	2023	2022	2021	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010
683 Job 04-06	Kekaha Well B Renovation	\$ 627,165.43														\$ 42,828.60	\$ 265,223.57	\$ 319,113.26	
234	Kukuiolono Water Tank Site Acquisition	\$ 302,396.47																\$ 302,396.47	
235 Job 05-05	Nawiliwili, Niumalu and Kupolo 6", 8" and 12" Main replacement	\$ 3,150,226.75														\$ 689,732.75	\$ 2,460,494.00	\$ -	
237 Job 11-02	Replacement Grove Farm Tanks #1 & #2	\$ 201,658.00								\$ 24,767.90	\$ 33,185.10	\$ -	\$ 67,905.00	\$ 44,165.00	\$ -	\$ 31,635.00	\$ -		
692 PLH-39 Lihue Baseyd		\$ 7,755,133.98							\$ 15,035.86	\$ 544,777.77	\$ 575,693.09	\$ 5,951,097.31	\$ 1,510.40	\$ 1,466.25	\$ 382,445.74	\$ 283,107.56	\$ -		
621 Job 02-06	Kilauea 1.0 MG Tank	\$ 16,329.20		\$ (234,643.96)					\$ 17,438.16	\$ 13,380.00				\$ 73,995.00	\$ 93,310.00	\$ 52,850.00			
238 Job 11-04	Lawai-Omao Water Main Replacement & Service Improvements	\$ 71,737.50												\$ 5,967.45	\$ 30,745.05	\$ 35,025.00			
239 Job 02-17	Maka Ridge Facilities Rehabilitation and Princeville Interconnection Plan	\$ 2,333,850.55												\$ 244,226.89	\$ 276,328.78	\$ 1,813,294.88			
240 Job 11-03	Land and Well Acquisition, Moloaa and Waimea, Kauai	\$ 159,938.00								\$ 3,678.00	\$ 25,300.00	\$ 14,160.00		\$ 23,290.00	\$ 71,730.00	\$ 21,780.00			
242 Job 02-11	Moloaa Land Acquisition	\$ -																	
243 Job 11-06	Rehabilitate Moelelpe Tunnel and improve access road	\$ 19,200.00															\$ 19,200.00		
244 K-05A Kukuiolono 0.5 MG 886' Tank		\$ 193,578.95								\$ 67,715.05	\$ 61,552.30			\$ 64,311.60					
Job 11-10	8" WL Halewili Kaumalii to Hale	\$ 694,331.55									\$ 282,186.78	\$ 412,144.77							
Job 11-07	MCC Chlor Koloa Well16-A,B,E	\$ 3,667,032.67							\$ 44,513.76	\$ 1,623,383.03	\$ 1,999,135.88								
Job 04-08	Kapaa Homesteads Well #4	\$ 1,502,796.10			\$ 32,504.61	\$ 162,138.43	\$ 43,250.00	\$ 588,360.39	\$ 676,542.67										
<b>TOTAL</b>		\$ 51,432,155.19	\$ -	\$ (1,351,827.19)	\$ 191,439.25	\$ 179,745.93	\$ 73,910.00	\$ 700,785.10	\$ 2,401,506.17	\$ 3,087,416.57	\$ 1,056,359.93	\$ 6,518,285.06	\$ 349,034.19	\$ 2,210,406.85	\$ 6,723,168.75	\$ 16,360,816.36	\$ 11,654,128.06	\$ 1,276,980.16	
<b>Cash &amp; Investment Balance</b>		\$ 11,030,507.84																	

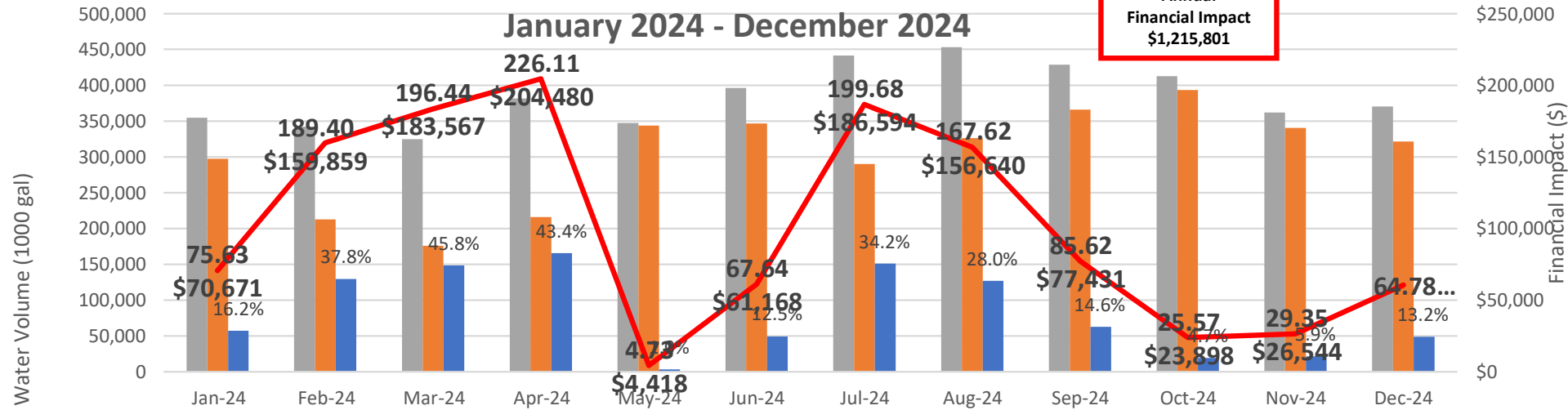


# OPERATIONS DASHBOARD

## Monthly Water Audit

January 2024 - December 2024

**Annual Financial Impact \$1,215,801**

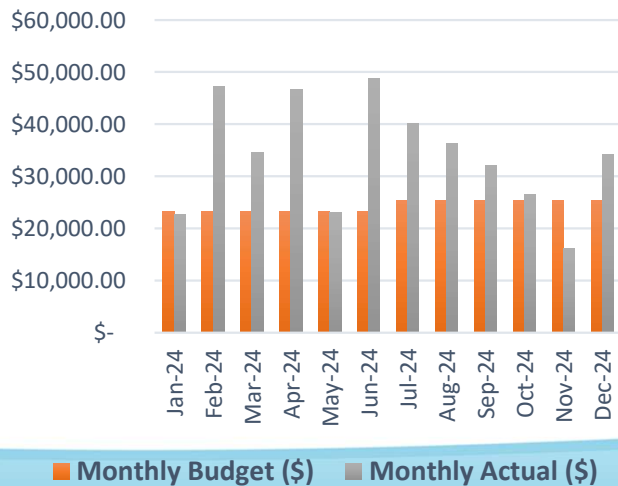


	Jan-24	Feb-24	Mar-24	Apr-24	May-24	Jun-24	Jul-24	Aug-24	Sep-24	Oct-24	Nov-24	Dec-24
Produced (Kgals)	354,475	342,356	324,631	381,800	347,331	396,223	441,367	452,933	428,498	412,714	361,950	370,356
Customer Read (Kgals)	297,225	212,855	175,924	216,151	343,752	346,671	290,208	326,039	365,771	393,354	340,447	321,320
Non-Rev Water (Kgals)	57,250	129,501	148,707	165,649	3,579	49,552	151,159	126,894	62,727	19,360	21,503	49,036
Financial Impact	\$70,671	\$159,859	\$183,567	\$204,480	\$4,418	\$61,168	\$186,594	\$156,640	\$77,431	\$23,898	\$26,544	\$60,531

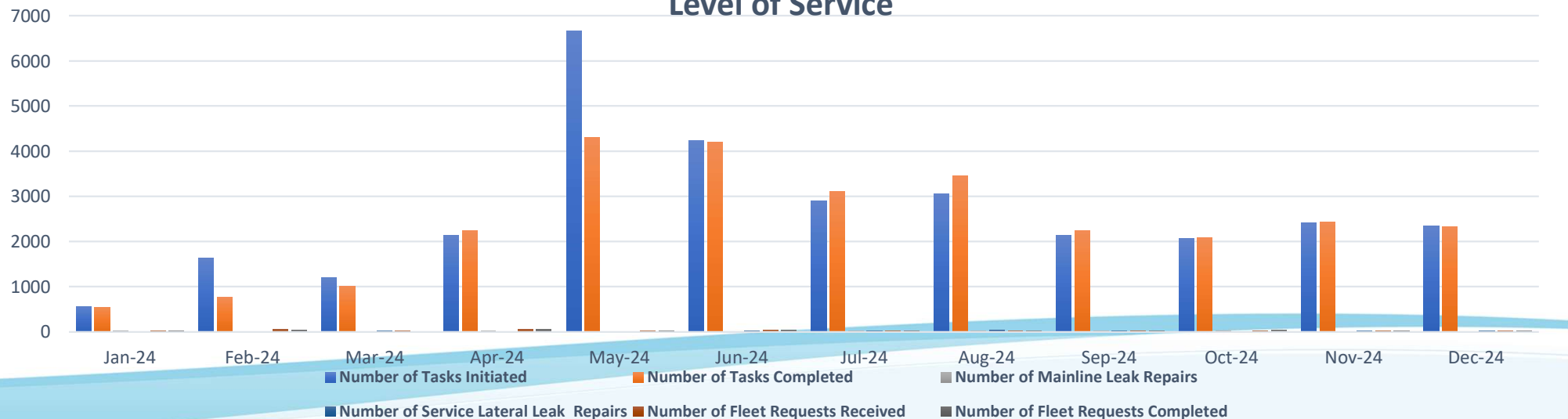
### Ops Highlights:

1. Hired Water Meter Mechanic Helper and Automotive Mechanic I, interviewed for Maintenance Worker II.
2. Meter transponder changeout in progress in Lāwa'i and Hanamaulu.
3. Training conducted for Workday Talent Module and Alternative A/C Pipe Removal in Place Process.

## Overtime



## Level of Service



# OPERATIONS

	Last Month		Current Month		Previous FY		Current FY	
					Year to Date		Year to Date	
<b>STAFFING</b>								
Budgeted Staff   Vacancies	48	11	47	12	50	7	47	12
<b>OVERTIME</b>								
Budget (\$)   Actual (\$)	\$25,416.67	\$16,087.77	\$25,416.67	\$34,218.70	\$139,700.00	\$191,530.64	\$152,500.00	\$185,456.89
<b>FLEET MANAGEMENT</b>								
# of Vehicles Active per day	40		38		42		41	
# of Vehicles Active per month	760		801		873		856	
<b>METER PROGRAM</b>								
# of Existing Meters Replaced	75		3		13		246	
# of Existing Meters Repaired	107		587		988		2306	
# of New Meters Installed	20		27		41		80	
# of New Laterals Installed	0		0		7		2	



# OPERATIONS



## LEVEL OF SERVICE

	Last		Current		Previous		Current	
	Month	Month	Month	Month	FY YTD	FY YTD	FY YTD	FY YTD
# of Tasks Initiated	2424		2348		2595		14929	
# of Tasks Completed	2439		2335		2413		15662	
# of Mainline Leak Repairs	10		9		66		94	
# of Service Lateral Leak Repairs	17		13		90		106	
# of Calls for Service	199		207		1191		1283	
# of Temporary Hydrant Meters Installed	2		4		18		15	
# One Call Request Received   Completed	38	39	45	47	273	272	242	242
# of Auto Shop Requests Received   Completed	15	19	24	18	184	176	126	130
# of Hydrant Hits	0		1		17		8	

## WATER AUDIT

	Last	Current Month	Previous	Current
	Month		FY YTD	FY YTD
Water Produced (Million Gallons)	361.950	370.356	2390.835	2467.818
Customer Meter Reading (Million Gallons)	340.447	321.320	1817.708	2037.139
Non-Revenue Water (Million Gallons)	21.503	49.036	573.127	430.679
Non-revenue %	6%	13%	24%	17%
Financial Impact	\$26543.73	\$60,531.02	\$707,479.04	\$531,638.77



# ENGINEERING DASHBOARD

	Last Month		Current Month		Previous FY Year to Date		Current FY Year to Date	
<b>STAFFING</b>								
Budgeted Staff   Vacancies	25	4	25	4	23	5	-	-
<b>OVERTIME</b>								
Budget (\$)   Actual (\$)	\$12,900	\$27,600	\$12,900	\$21,600	\$29,500	\$102,800	\$77,500	\$138,500

## CIP Project Highlights:

- Kūhiō Hwy (Hardy-Oxford) 18” Main Replacement
  - Working on construction ROEs
  - Bid out 11/8/24, Bid opens 1/24/25
- Weke, ‘Anae, Mahimahi and He‘e Roads 6” and 8” Main Replacement
  - Reviewing/responding to submittals
- Hanapēpē Town Well MCC, Chlorination Facilities
  - Executed contract
  - Issued NTP for 3/3/25
- Līhu‘e Administrative Building Fencing
  - Executing contract
  - Issuing NTP for 1/15/25
- Līhu‘e Baseyard Electrical Relocation
  - Issued bid 12/2/24, Bid opens 2/7/25

	Last Month		Current Month	
<b>PROJECT MANAGEMENT</b>				
DOW Projects In Design   In Construction	15	8	12	10
Private Projects Design Approved   In Construction	4	165	1	165
Private Projects Construction Completed	0		3	



# ENGINEERING DASHBOARD

	Last Month		Current Month		Previous FY Year to Date		Current FY Year to Date	
<b>WATER RESOURCES AND PLANNING</b>								
Number of Customer Requests Received   Completed								
Subdivision Applications, Zoning, Land Use and Variance Permits	14	10	9	4	43	42	42	33
ADU/ARU Clearance Applications	0	0	3	3	8	31	17	17
Building Permits	145	111	86	115	818	854	852	841
Water Service Requests	29	72	25	17	125	130	175	189
Government Records Request	4	3	4	4	11	13	22	17
Backflow Inspection # of Devices Tested	97		80		610		668	

## DOW Project Highlights:

- Kaua'i Water Use and Development Plan (KWUDP) Update
  - Coordinating with CWRM staff for possible adoption with conditions
- Water Systems Investment Plan (WSIP)
  - Evaluating CIP project list
  - Working on FRC update
- As-Needed Grant Writing and Preparation Services
  - Applied for Drought Resiliency Grant with USBR for Hā'ena 0.2 MG Tank Construction 10/7/24
  - Applied for WaterSMART Grant for AMI Meters 11/13/24
- AWIA RRA/ERP
  - Contracting

# QUARTERLY UPDATE

Period of October 1, 2024 to December 31, 2024

## ENGINEERING DIVISION

Submitted by: Jason Kagimoto, P.E.

DEPARTMENT OF WATER

January 23, 2024

# Overview

- **Water Resources and Planning Section**

- Subdivision-Land Use Applications Completed = 14
- ADU/ARU Clearance Applications Completed = 5
- Building Permit Applications Reviewed = 347
- Water Service Requests Completed = 102
- Backflow Devices Inspected and Tested = 236
- Kaua'i Water Use and Development Plan Update – Possibly Requesting Adoption at January Board Meeting
- Water Systems Investment Plan – Evaluating CIP program and Working on FRC Update
- As-Needed Grant Writing and Preparation Services – Applied for 3 grants
  - Awarded HCF Freshwater Initiative Grant for \$100k
  - Waiting to hear back on USBR Drought Resiliency Grant
  - Waiting to hear back on USBR WaterSMART Grant

- **Project Management Section**

- 12 active DOW CIP design projects
- 10 active DOW CIP construction projects (\$70M total)
- Rehabilitate Paua Valley Tank No. 1 – In construction, nearing completion
- Kalāheo Water System Improvements – In construction
- Kapa'a Homesteads 325' Tanks – NTP 9/3/24
- Weke, 'Anae, Mahimahi and He'e Roads Main Replacement – Submittals started
- Kapa'a Homesteads Well No. 4 Pump and Controls – NTP 10/1/24
- Kūhiō Highway (Hardy-Oxford) 16" Main Replacement – Bid opens 1/24/25
- Hanapēpē Town Well MCC, Chlorination Facilities – NTP 3/3/25
- Līhu'e Administrative Building Fencing – Executing contract



# Water Restriction Areas

Water System/Sub-System	Restrictions (5/8-inch water meter or number units per lot)	Inadequate Facilities	Comments
Upper Lāwaʻi	2	Storage	Administration Approved
Poʻipū	300	Storage	Board Approved (50% of new tank allowed for new development; 50% to make up storage deficit)
Wailua Homesteads	5	Storage	Administration Approved
Upper Wailua Homesteads	2	Storage	Administration Approved
Kapaʻa Homesteads	5	Source	Board Approved
Moloaʻa	0	Source and Storage	Water Purchase Agreement
Kīlauea-Kalihiwai	5	Source and Storage	Administration Approved
Aliomanu – Kukuna Road	0	Transmission	Administration Approved
ʻAnini	1	Source and Storage	Water Purchase Agreement
Upper Wainiha Valley	1	Storage	Administration Approved
Wainiha – Hāʻena	3	Storage	Administration Approved

# Water Plan 2020 Construction Project Status

WP 2020 NUMBER	JOB NO	PROJECT TITLE	% COMPLETE DEC 2024	ORIGINAL ESTIMATE TO COMPLETE	CURRENT ESTIMATE TO COMPLETE	CURRENT CONTRACT AMOUNT
WK-08	02-14	Kapa'a 325' Tanks – Package A Drain Line	90%	Q3 2019	Q2 2025 (1)	\$2,354,293.35
WK-08	02-14	Kapa'a 325' Tanks – Package B 2 0.5MG Tanks	0%	Q1 2027	Q1 2027	\$23,347,000.00 (2)
WK-39		Drill and Test Kapa'a Homestead Well No. 4	80%	Q3 2019	Q3 2025 (1)	\$2,605,418.35
K-01 & K-12	09-01	Kalaheo Water System Improvements Package A – 0.5 MG Yamada Reservoir Package B – 0.1 MG Clearwell Reservoir Package C – Water Main Installation	50%	Q1 2025	Q1 2026	\$21,792,073.48 (3)
PLH-35B	16-02	Kapaia Haul Cane Road 18" Transmission Line	10%	Q3 2019	Q4 2026 (4)	\$4,127,545.00
WKK-03	16-04	Kilauea Wells Nos. 1 and No. 2, MCC, Chlorination Facilities	40%	Q3 2024	Q3 2025	\$3,358,569.10 (5)
KW-07	17-10	Rehabilitate Paua Valley Tank No. 1, 0.5 MG Tank	90%	Q2 2021	Q1 2025	\$3,394,829.86 (6)
H-05	23-05	Weke, Anae, Mahimahi and Hee Roads 6" and 8" Main Replacement	0%	Q4 2026	Q4 2026	\$3,089,000.00
	24-05	Kapa'a Homesteads Well No. 4 Pump and Controls	0%	Q4 2027	Q4 2027	\$7,683,000.00 (7)
	23-08	Hanapēpē Town Well MCC, Chlorination Fac.	0%	Q3 2025	Q3 2025	\$150,000.00
					TOTAL =	\$71,901,729.10

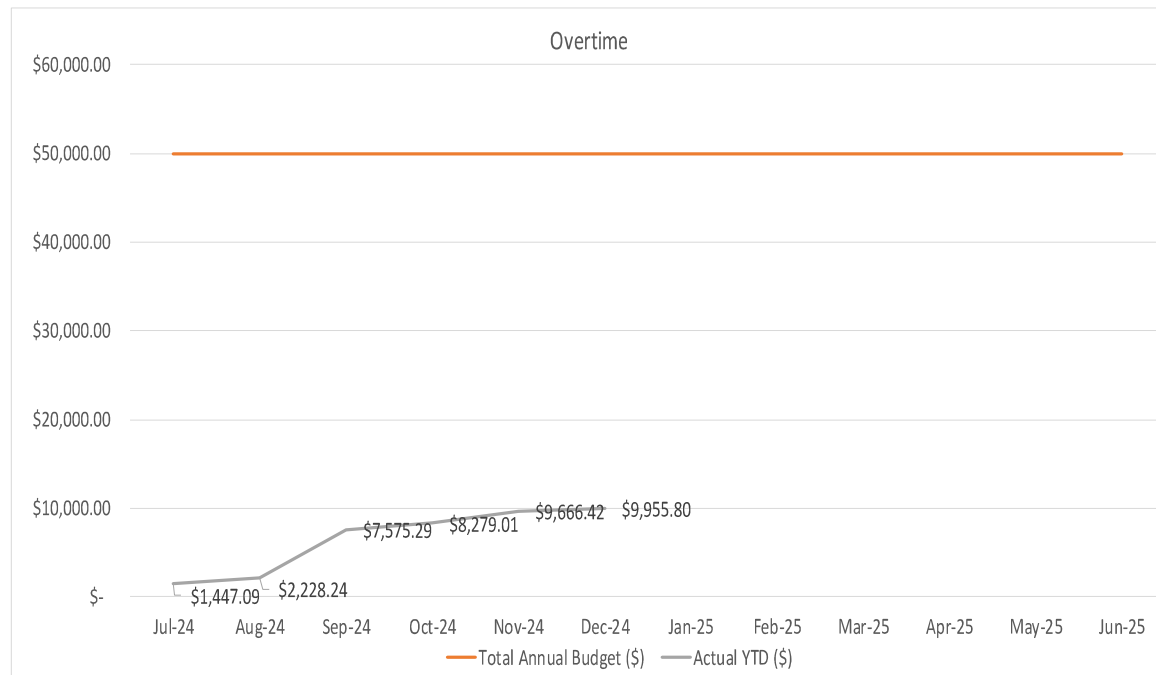
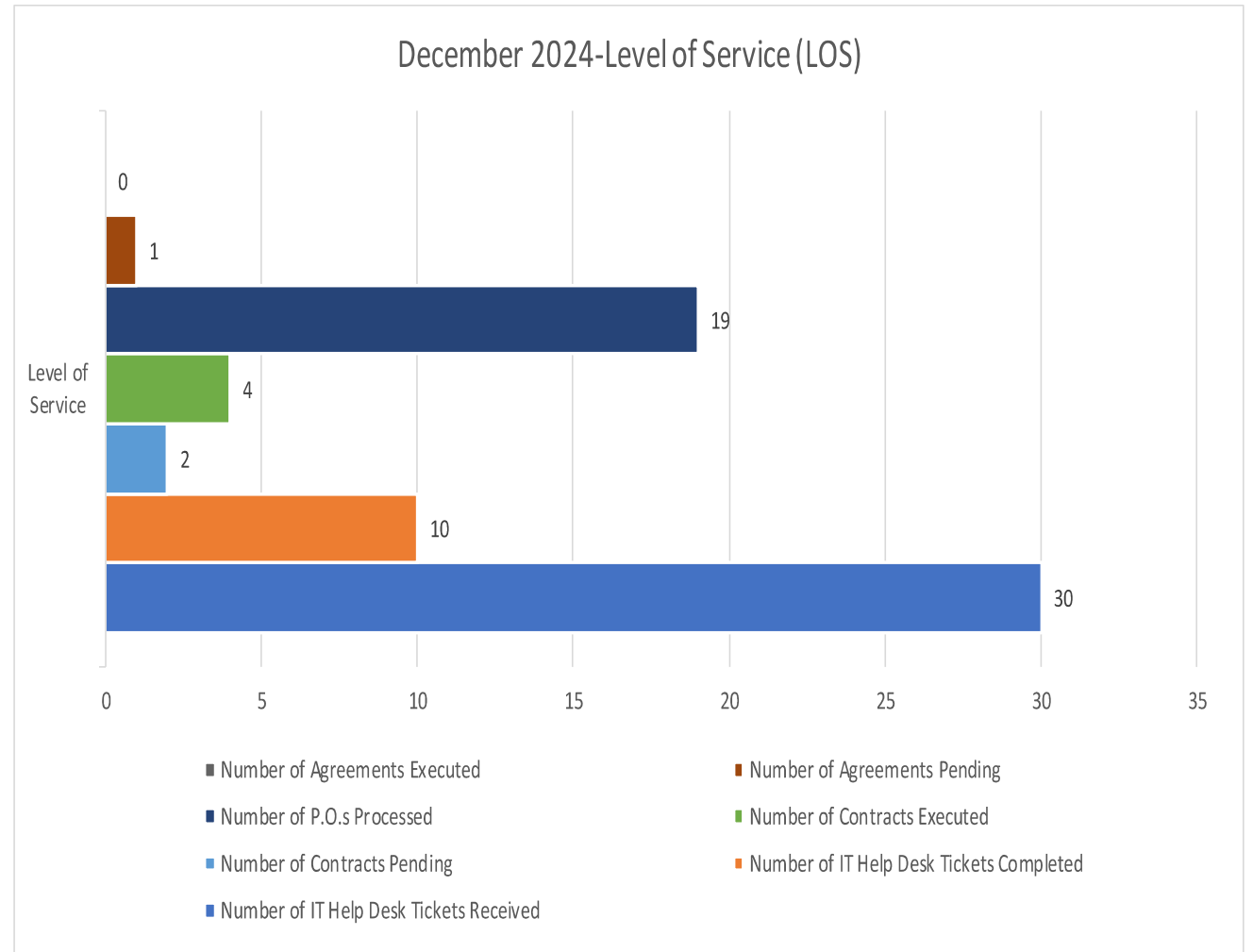
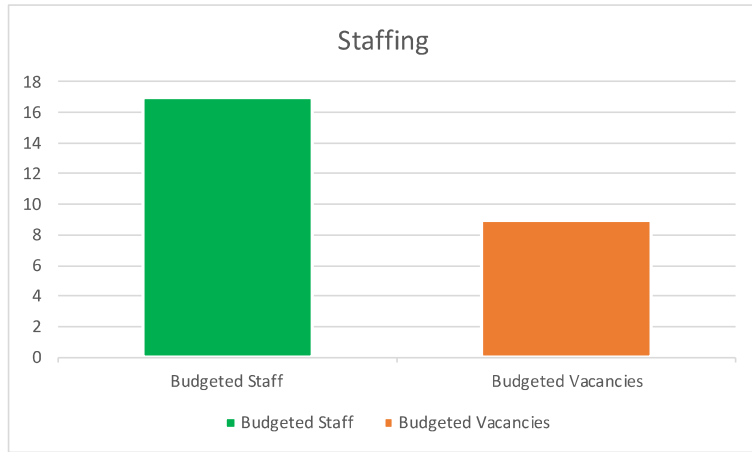
- (1) Additional contract time required to perform environmental assessment, re-design drainage system and obtain land-owner approval for DOW drainage easement.
- (2) \$7.25M State appropriation
- (3) \$10.2M State appropriation, \$5.2M DWSRF Loan Principal Forgiveness
- (4) Project issued stop work order and is on hold while performing environmental permitting.
- (5) \$2.6M State appropriation
- (6) \$1.2M State appropriation
- (7) \$2.6M State appropriation



# Supplemental Support Services

Contract Number	Company	Professional Service	Contract Amount	Amount Invoiced	Number of PAOs
728	RM Towill, Inc.	As-Needed CM	\$1,000,000	\$32,000	4
747	Kennedy/Jenks	As-Needed PM and Inspectional Services	\$1,000,000	\$250,000	5
763	Brown and Caldwell	As-Needed GIS and Hydraulic Modeling Services	\$99,600	\$67,000	1
767	Maddaus Water Management	As-Needed Grant Writing and Preparation Services	\$100,000	\$86,800	4

# ADMINISTRATION DASHBOARD



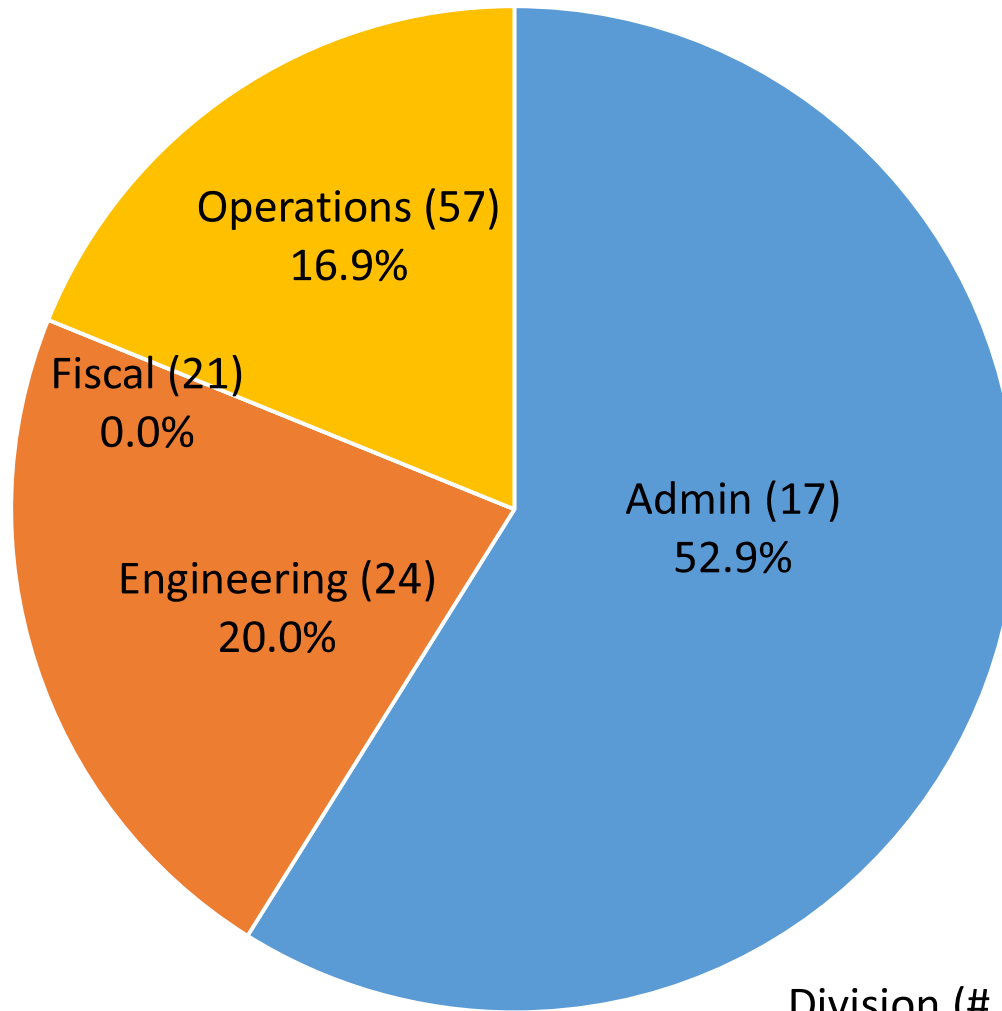
# ADMINISTRATION

	Nov-24		Dec-24		Previous FY YTD		Current FY YTD	
<b>STAFFING</b>								
Budgeted Staff vs Vacancies (Admin-HR-IT-PR)	17	9	17	9	17	8	17	9
<b>OVERTIME</b>								
Budget (\$) vs Actual (\$)	\$ 4,166.67	\$ 1,387.41	\$ 4,166.67	\$ 289.38	\$ 25,000.00	\$ 51,164.37	\$ 25,000.00	\$ 9,955.80

	Nov-24		Dec-24		Previous FY YTD		Current FY YTD	
<b>LEVEL OF SERVICES</b>								
# of IT Help Desk Tickets Received   Completed	37	31	30	10	240	154	290	243
# of Legal Claims Outstanding   Resolved	0	0	0	1	2	0	0	2
# of Contracts Pending   Executed	2	1	2	4	3	7	4	7
# of Purchase Orders Processed	18		19		148		126	
# of Agreements Pending   Executed	1	14	1	0	0	7	1	23
# of MOU   MOA Pending	0	0	0	0	0	0	0	0
# of MOU   MOA Executed	0	1	0	0	1	0	1	1

Notes: DOW Dashboard data tracking started November 2022 & Legal claims are compiled quarterly as of March, June, September, & December

## % Vacancy Within Each Division Level



Division (# Auth) - % Vacant

DEPARTMENT OF WATER

County of Kaua'i

*"Water has no substitute – Conserve It!"*

MANAGER’S UPDATE

January 23, 2025

*Pursuant to Board Policy No. 3*

**1. CONTRACT AWARD TO EVERON, LLC FIRE ALARM MONITORING SERVICES**

RECOMMENDATION:

It is recommended that the Manager approve a contract award to Everon, LLC to perform fire alarm monitoring services per NASPO Contract No. 23-20.

FUNDING:

Account No.	10-40-60-561-000		
Acct Description	WU/Ops/TandD/Repairs and Maintenance – Other than Water System		
Funds Available	<i>Verified by WWC</i>		\$9,499.00
Contract No.	PO#5953		
Vendor	Everon, LLC		
	Contract Amount	\$9,499.00	
	5% Contingency	\$0.00	
	Total Funds Certified	\$9,499.00	<\$9,499.00>

BACKGROUND:

The Department requires fire alarm monitoring services for the fire panels in the Admin Building, Microlab Building, and Operations Warehouse/Garage. The Board approved a budget to cover these services. The services were solicited through NASPO Contract No. 23-20, and three vendors were contacted (SPO-010). Everon, LLC is the only responsive vendor and can perform the services requested.

**2. CONTRACT AWARD TO CUTTER FORD, INC.  
GS-2025-03 ONE (1) 4-WHEEL DRIVE 18,000 LB. GVWR TRUCK CAB AND CHASSIS WITH SERVICE BODY, UNDER CHASSIS PTO AIR COMPRESSOR AND ACCESSORIES**

RECOMMENDATION:

It is recommended that the Manager approve a contract award to Cutter Ford, Inc. to furnish and deliver the subject vehicle.

FUNDING:

Account No.	10-40-00-604-999		
Acct Description	WU/Ops/Capital Outlay – R&R/Misc. Capital Purchases (Line 3)		
Funds Available	<i>Verified by WWC</i>		\$200,000.00

Contract No.	775		
Vendor	Cutter Ford, Inc.		
	Contract Amount	\$169,032.53	
	5% Contingency	\$0.00	
	Total Funds Certified	\$169,032.53	<\$169,032.53>
Fund Balance			\$30,967.47

**BACKGROUND:**

The Board approved replacement of CK-2237, a truck with over 200,000 engine run hours, which is over 11 years old.

**3. FOURTH AMENDMENT TO CONTRACT NO. 567 WITH ESAKI SURVEYING AND MAPPING, INC.  
 JOB NO. 12-2, WK-23, U.H. EXPERIMENTAL STATION 605' TANK**

**RECOMMENDATION:**

It is recommended that the Manager approve the Fourth Amendment to Contract No. 567 for additional funds to relocate the access road for the tank from the north end to the south end of the property at U.H.'s request.

**FUNDING:**

Account No.	10-20-10-540-010		
Acct Description	WU/Eng/Admin/Professional Services		
Funds Available	Verified by WWC		\$22,476.00
Contract No.	567		
Vendor	Esaki Surveying and Mapping, Inc.		
	Contract Amount	\$38,500.00	
	5% Contingency	\$0.00	
	First Amendment (03/24/17)	\$0.00	
	Second Amendment (04/20/23)	\$278,149.00	
	Third Amendment (10/17/24)	\$19,322.00	
	Total Funds Certified To Date	\$335,971.00	
Fourth Amendment:			
	Relocate the access road for the tank	\$22,476.00	
	Total Amendment	\$22,476.00	<\$22,476.00>
Contract Amount To Date		\$358,447.00	

**BACKGROUND:**

Contract NTP Date: [03/05/2013] July 5, 2013  
 Original Contract End Date: April 1, 2014

New Contract End Date: October 21, 2026 (from Third Amendment)

The DOW is moving forward with the design of the U.H. Experimental Station 605' Tank. After the most recent design update review, U.H. requested that the access road for the tank be relocated from the north side of the property to the south side of the property.

**4. CHANGE ORDER NO. 5 FOR CONTRACT NO. 735 WITH DERRICK'S WELL DRILLING & PUMP SERVICES, LLC.  
 JOB NO. 23-01, KŌLOA WELL "A" PUMP REPLACEMENT**

RECOMMENDATION:

It is recommended that the Manager approve Change Order No. 5 for a contract time extension of 77 calendar days to the contract time.

FUNDING:

Account No.	10-40-50-560-000		
Acct Description	WU/Ops/PandP/Repairs and Maintenance – Water System		
Funds Available	Verified by WWC		\$N/A
Contract No.	735		
Vendor	Derrick's Well Drilling & Pump Services, LLC		
	Contract Amount	\$169,316.00	
	5% Contingency	\$8,466.00	
	Change Order No. 1 (05/18/23)	\$0.00	
	Change Order No. 2 (02/15/24)	\$0.00	
	Change Order No. 3 (04/18/24)	\$0.00	
	Change Order No. 4 (09/19/24)	\$0.00	
	Total Funds Certified To Date	\$177,782.00	
Change Order No. 5:			
	Contract Time Extension of 77 calendar days	\$0.00	
	Total Change Order	\$0.00	<\$N/A>
Contract Amount To Date	\$169,316.00		
Fund Balance			\$N/A

BACKGROUND:

Contract NTP Date: May 1, 2023  
 Original Contract End Date: January 26, 2024  
 New Contract End Date: December 31, 2024

This contract change order is to add a no cost time extension, no funds requested. There was an emergency pump repair on Hawaii Island that delayed the crew to Kaua'i. The Department finds this request to be reasonable considering the emergency on Hawaii Island.



**5. CHANGE ORDER NO. 2 FOR CONTRACT NO. 753 WITH HAWAII DRILLING & PUMP SERVICES, LLC  
 JOB NO. 24-10, PIWAI WELL NO. 3 REPAIR**

RECOMMENDATION:

It is recommended that the Manager approve Change Order No. 2 for Contract No. 753 with Hawaii Drilling & Pump Services, LLC.

FUNDING:

Account No.	10-40-60-561-000		
Acct Description	WU/Ops/T and D/Repairs and Maintenance – Other than Water System		
Funds Available	Verified by WWC		\$N/A
Contract No.	753		
Vendor	Hawaii Drilling & Pump Services, LLC		
	Contract Amount	\$245,000.00	
	5% Contingency	\$11,640.00	
	Change Order No. 1 (06/20/24)	\$610.00	
	Total Funds Certified To Date	\$257,250.00	
Change Order No. 2:			
	Contract Time Extension for Field Support	\$0.00	
	Total Change Order	\$0.00	
	Contract Amount To Date	\$245,610.00	

BACKGROUND:

Contract NTP Date: February 26, 2024  
 Original Contract End Date: November 22, 2024  
 New Contract End Date: May 31, 2025

Delays in field support from manufacturer to troubleshoot new pump motor. Contractor is working out a schedule for manufacturer to be on-site.

**6. AGREEMENT BETWEEN KUKUI GROVE CENTER INVESTMENT GROUP, INC. AND BOARD OF WATER SUPPLY, COUNTY OF KAUAI**

RECOMMENDATION:

It is recommended that the Manager approve the agreement with the Kukui Grove Investment Group, Inc. which outlines the BWS's responsibilities in reviewing and processing plans and permits submitted by the Owner and the Center's tenants in accordance with the Manager and Chief Engineer's limited waiver of the perpetual easement requirement, and the Owner's responsibilities in granting the applicable perpetual easements to BWS.

FUNDING:

No funds requested.

**BACKGROUND:**

At the request of Kukui Grove Investment Group, Inc., the Manager and Chief Engineer granted a limited waiver to the perpetual easement requirement pursuant to Part 3, Section XIII – Modification of Requirements of the Rules. This decision became final after the Board was notified at its regular monthly meeting on November 21, 2024. The limited waiver allows the Department of Water to review and process plans and permits submitted by the Owner and the Center's tenants without strict compliance with the perpetual easement requirement prior to processing the plans and permits.

This agreement outlines the BWS' responsibilities in reviewing and processing plans and permits submitted by the Owner and the Center's tenants and the Owner's responsibilities in granting the applicable perpetual easements to BWS.

**CONVEYANCE OF WATER FACILITIES NONE**