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AGREEMENT

This Agreement is made and entered into this ____ day of _____, 2011, by and between the SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT (DISTRICT), a unified air pollution control DISTRICT formed pursuant to California Health and Safety Code section 40150 et seq. (hereafter referred to as the "DISTRICT"), and the FRESNO COUNCIL OF GOVERNMENTS, (hereafter referred to as "FRESNO COG").

WITNESSETH:

WHEREAS, the San Joaquin Valley ("Valley") is currently classified as a nonattainment area for the federal health-based standards for ozone and fine particulate matter ("PM2.5"); and

WHEREAS, SB 375 requires each of the Metropolitan Planning Organizations ("MPOs") to prepare "Sustainable Community Strategies" to achieve greenhouse gas emission targets established by the California Air resources Board ("CARB"); and

WHEREAS, In establishing greenhouse gas emissions targets for the Valley, CARB recognized the need for enhanced modeling tools to properly assess appropriate target levels; and

WHEREAS, CARB committed to re-assess the greenhouse gas emissions targets in the Valley based upon the outputs of improved modeling tools; and

WHEREAS, the eight Valley MPOs have developed a model improvement program to develop the tools necessary to properly assess different land-use scenarios and their associated greenhouse gas emissions; and

WHEREAS, meeting the targets established by SB 375 will have co-benefits that will assist the Valley in reducing ozone and PM2.5 precursor emissions; and

1 **WHEREAS**, the DISTRICT desires to provide technical and financial
2 support to the Valley MPOs in their efforts to improve their modeling capabilities; and

3 **WHEREAS**, FRESNO COG on behalf of the eight Valley MPOs
4 represents that it is willing and able, through an agreement with the California
5 Department of Transportation ("CALTRANS"), to enhance the base data that the
6 transportation models rely upon by increasing the number of household travel surveys
7 that are conducted in the Valley; and

8 **WHEREAS**, FRESNO COG on behalf of the eight Valley MPOs
9 represents that it is willing and able, through an agreement with Citilabs, to purchase a
10 valleywide license for state of the art transportation modeling tools.

11 **NOW, THEREFORE**, based on their mutual promises, covenants, and
12 conditions, the parties hereby agree as follows:

13 **1. PROJECT**

14 (a) FRESNO COG through an agreement with CALTRANS will have
15 approximately 900 household travel surveys completed in the Valley, in addition to the
16 surveys that would have otherwise have been conducted, for a cost not to exceed
17 one hundred and fifty thousand dollars (\$150,000)

18 (b) FRESNO COG through an agreement with Citilabs will purchase a
19 valleywide license for transportation modeling software including Cube Base, Cube
20 Voyager, Cube Cluster and Cube Land and pay the first year software maintenance
21 fee for an amount not to exceed seventy nine thousand and seven hundred dollars
22 (\$79,700).

23 FRESNO COG agrees to furnish all labor, materials, equipment,
24 licenses, permits, fees, agreements and other incidentals necessary to perform and
25 complete, per schedule, in a professional manner, the services described herein.
26 FRESNO COG represents that it possesses the expertise necessary to adequately
27 perform the project.

28 //

1 **2. PERIOD OF PERFORMANCE/TIMETABLE**

2 (a) FRESNO COG through an agreement with CALTRANS will have
3 approximately 900 household travel surveys completed in the Valley, in addition to the
4 surveys that would have otherwise have been conducted by June 30, 2012, unless
5 this Agreement is terminated sooner.

6 (b) FRESNO COG through an agreement with Citilabs will purchase a
7 valleywide license for transportation modeling software including Cube Base, Cube
8 Voyager, Cube Cluster and Cube Land and pay the first year software maintenance
9 fee by June 30, 2012, unless this Agreement is terminated sooner.

10 If requested by the DISTRICT, FRESNO COG shall submit regular
11 progress reports, at intervals determined by the DISTRICT, detailing the work
12 performed; work planned; problems identified, solved, and/or unresolved; and the
13 percentage of each task completed.

14 **3. COMPENSATION**

15 (a) The total obligation of DISTRICT under this Agreement shall not
16 exceed one-hundred and fifty thousand dollars (\$150,000) for FRESNO COG, through
17 an agreement with CALTRANS, to complete 900 household travel surveys in the
18 Valley, in addition to the surveys that would have otherwise have been conducted.

19 (b) The total obligation of the DISTRICT under this Agreement shall not
20 exceed seventy nine thousand and seven hundred dollars (\$79,700) for FRESNO
21 COG, through an agreement with Citilabs, to purchase a valleywide license for
22 transportation modeling software including Cube Base, Cube Voyager, Cube Cluster
23 and Cube Land and pay the first year software maintenance fee.

24 **A. Payments:**

25 (1) The DISTRICT will disburse the funds to FRESNO COG
26 following FRESNO COG entering into an agreement with CALTRANS to conduct 900
27 household travel surveys that would have otherwise not been conducted, and upon
28 receipt of proper invoice and verification that CALTRANS has satisfactorily completed

1 the work for which compensation is sought. The DISTRICT will issue payment to
2 FRESNO COG within thirty (30) calendar days.

3 (2) The DISTRICT will disburse the funds to FRESNO COG
4 following FRESNO COG entering into an agreement with Citilabs and upon receipt of
5 proper invoice and verification that Citilabs has completed the work for which
6 compensation is sought. The District will issue payment to FRESNO COG within thirty
7 (30) calendar days.

8 (3) FRESNO COG shall submit all invoices for work completed
9 within sixty days of completing the project by the dates specified in paragraph (2) or
10 upon termination of this agreement.

11 **B. Surplus Funds:** Any compensation which is not expended by
12 FRESNO COG pursuant to the terms and conditions of this Agreement by the project
13 completion date shall automatically revert to DISTRICT. Only expenditures incurred
14 by FRESNO COG in the direct performance of this Agreement will be reimbursed by
15 DISTRICT. If the actual costs of the project are lower than the anticipated costs as
16 stated in Section 3(a) and Section 3(b) of this Agreement, the DISTRICT shall only
17 pay the actual costs. If the actual costs of the project exceed the anticipated costs as
18 stated in paragraph 3(a) and paragraph 3(b) of this Agreement, the DISTRICT will not
19 be responsible for the additional costs.

20 **4. NON-ALLOCATION OF FUNDS**

21 The terms of this Agreement and the services to be provided thereunder
22 are contingent on the approval of funds by the appropriating government agency.
23 Should sufficient funds not be allocated, the services provided may be modified or this
24 Agreement terminated at any time by giving FRESNO COG thirty (30) days' prior
25 written notice.

26 **5. INDEPENDENT CONTRACTOR**

27 In performance of the work, duties, and obligations assumed by
28 FRESNO COG under this Agreement, it is mutually understood and agreed that

1 FRESNO COG, including any and all of its officers, agents, and employees, will at all
2 times be acting and performing as an independent contractor and shall act in an
3 independent capacity and not as an officer, agent, servant, employee, joint venturer,
4 partner, or associate of the DISTRICT. Furthermore, the DISTRICT shall have no
5 right to control or supervise or direct the manner or method by which FRESNO COG
6 shall perform its work and function. However, the DISTRICT shall retain the right to
7 administer this Agreement so as to verify that FRESNO COG is performing its
8 obligations in accordance with the terms and conditions thereof. FRESNO COG and
9 the DISTRICT shall comply with all applicable provisions of law and the rules and
10 regulations, if any, of governmental authorities having jurisdiction over matters the
11 subject thereof.

12 Because of its status as an independent contractor, FRESNO COG shall
13 have absolutely no right to employment rights and benefits available to DISTRICT
14 employees. FRESNO COG shall be solely liable and responsible for providing to, or
15 on behalf of, itself all legally required employee benefits. In addition, FRESNO COG
16 shall be solely responsible and save DISTRICT harmless from all matters relating to
17 payment of FRESNO COG's employees, including compliance with social security,
18 withholding, and all other regulations governing such matters. It is acknowledged that
19 during the term of this Agreement, FRESNO COG may be providing services to others
20 unrelated to the DISTRICT or to this Agreement.

21 **6. TERMINATION**

22 **A. Breach of Agreement:** DISTRICT may immediately suspend or
23 terminate this Agreement, in whole or in part, where in the determination of DISTRICT
24 there is:

- 25 1. An illegal or improper use of funds;
- 26 2. A failure to comply with any term of this Agreement;
- 27 3. A substantially incorrect or incomplete report submitted to DISTRICT;

28 or

1 4. Improperly performed services.

2 In no event shall any payment by DISTRICT constitute a waiver by
3 DISTRICT of any breach of this Agreement or any default which may then exist on the
4 part of FRESNO COG. Neither shall such payment impair or prejudice any remedy
5 available to DISTRICT with respect to the breach or default. DISTRICT shall have the
6 right to demand of FRESNO COG the repayment to DISTRICT of any funds disbursed
7 to FRESNO COG under this Agreement which in the judgment of DISTRICT were not
8 expended in accordance with the terms of this Agreement. FRESNO COG shall
9 promptly refund any such funds upon demand.

10 In addition to immediate suspension or termination, DISTRICT may
11 impose any other remedies available at law, in equity, or otherwise specified in this
12 Agreement.

13 **B. Without Cause:** Either party may terminate this Agreement at
14 any time upon giving the other party at least thirty (30) days' advance written notice of
15 intention to terminate. In such case, FRESNO COG shall, subject to paragraph 3, be
16 paid the reasonable value of all services satisfactorily rendered and actual, reasonable
17 costs incurred up to the time of the termination.

18 **7. MODIFICATION**

19 Any matters of this Agreement may be modified from time to time by the
20 written consent of all the parties without in any way affecting the remainder.

21 **8. NON-ASSIGNMENT**

22 No party to this Agreement shall assign, transfer, or subcontract this
23 Agreement, nor their rights or duties under this Agreement, without the prior express,
24 written consent of the other parties.

25 **9. INDEMNIFICATION**

26 FRESNO COG agrees to indemnify, save, hold harmless, and at
27 DISTRICT's request, defend DISTRICT, its boards, committees, representatives,
28 officers, agents, and employees from and against any and all costs and expenses

(including reasonable attorneys' fees and litigation costs), damages, liabilities, claims, and losses (whether in contract, tort, or strict liability, including, but not limited to, personal injury, death, and property damage) occurring or resulting to DISTRICT which arises from any negligent or wrongful acts or omissions of FRESNO COG, its officers, agents, subcontractors, or employees in their performance of this Agreement.

10. INSURANCE

A. FRESNO COG warrants that it is self-insured and that it has sufficient funds and assets to provide coverage of at least One Million Dollars (\$1,000,000) per occurrence for general commercial liability and commercial automobile liability. FRESNO COG's responsibility for worker injuries is governed by California law, and/or other applicable statutes.

B. If FRESNO COG acquires applicable insurance coverages during the term of this Agreement, FRESNO COG shall provide certifications of insurance on the applicable policies to DISTRICT, stating that such insurance coverages have been obtained and are in full force; that DISTRICT, its officers, agents, and employees will not be responsible for any premiums on the policies; that such coverages shall apply as primary insurance, and any other insurance maintained by DISTRICT, its officers, agents, and employees shall be excess only and not contributing with insurance provided under FRESNO COG's policies herein. This insurance shall not be canceled or changed without a minimum of thirty (30) days' advance, written notice given to DISTRICT by FRESNO COG.

C. In the event FRESNO COG fails to keep in effect at all times insurance coverage as herein provide, DISTRICT may, in addition to other remedies it may have, suspend or terminate this Agreement upon the occurrence of such event.

11. AUDITS AND INSPECTIONS

FRESNO COG shall at any time during regular business hours, and as often as DISTRICT may deem necessary, make available to DISTRICT for examination all of its records and data with respect to the matters covered in this

1 Agreement. FRESNO COG shall, and upon request by DISTRICT, permit DISTRICT
2 to audit and inspect all of such records and data necessary to ensure FRESNO COG's
3 compliance with the terms of this Agreement.

4 FRESNO COG shall be subject to an audit by the DISTRICT or its
5 authorized representative to determine if the revenues received by FRESNO COG
6 were spent for the reduction of pollution and to determine whether said funds were
7 utilized as provided by law and this Agreement. If, after an audit DISTRICT makes a
8 determination that funds provided to FRESNO COG pursuant to this Agreement were
9 not spent in conformance with this Agreement or any other applicable provisions of
10 law, FRESNO COG agrees to immediately reimburse DISTRICT all funds determined
11 to have been expended not in conformance with said provisions.

12 FRESNO COG shall retain all records and data for activities performed
13 under this Agreement for at least three (3) years from the date of final payment under
14 this Agreement or until all state and federal audits are completed for that fiscal year,
15 whichever is later.

16 Because this Agreement exceeds Ten Thousand Dollars (\$10,000),
17 FRESNO COG shall be subject to the examination and audit of the auditor general for
18 a period of three (3) years after final payment under contract (Government Code §
19 10532).

20 **12. NOTICES**

21 The persons and their addresses having authority to give and receive
22 notices under this Agreement are as follows:

23 **FRESNO COG**

24 Mike Bitner
25 Fresno Council of Governments
26 2035 Tulare St., Suite 201
Fresno, CA 93721

DISTRICT

Sayed Sadredin
Executive Director/APCO
1900 East Gettysburg Ave.
Fresno, CA 93726

27 Any and all notices between the DISTRICT and FRESNO COG provided
28 for or permitted under this Agreement or by law shall be in writing and shall be

1 deemed duly served when personally delivered to one of the parties, or in lieu of such
2 personal service, when deposited in the United States mail, postage prepared,
3 addressed to such party.

4 **13. POLITICAL ACTIVITY PROHIBITED**

5 None of the funds, materials, property, or services provided under this
6 Agreement shall be used for any political activity, or to further the election or defeat of
7 any candidate for public office contrary to federal or state laws, statutes, regulations,
8 rules, or guidelines.

9 **14. LOBBYING PROHIBITED**

10 None of the funds provided under this Agreement shall be used for
11 publicity, lobbying, or propaganda purposes designed to support or defeat legislation
12 before the Congress of the United States of America or the Legislature of the State of
13 California.

14 **15. CONFLICT OF INTEREST**

15 No officer, employee, or agent of DISTRICT who exercises any function
16 or responsibility for planning and carrying out the services provided under this
17 Agreement shall have any direct or indirect personal financial interest in this
18 Agreement. FRESNO COG shall comply with all federal and state conflict of interest
19 laws, statutes, and regulations, which shall be applicable to all parties and
20 beneficiaries under this Agreement and any officer, agent, or employee of DISTRICT.

21 **16. GOVERNING LAW**

22 This Agreement shall be governed in all respects by the laws of the
23 State of California. Venue for any action arising out of this Agreement shall only be in
24 Fresno County, California.

25 **17. BINDING ON SUCCESSORS**

26 This Agreement, including all covenants and conditions contained
27 herein, shall be binding upon and inure to the benefit of the parties, including their
28 respective successors-in-interest, assigns, and legal representatives.

1 **18. TIME IS OF THE ESSENCE**

2 It is understood that for FRESNO COG's performance under this
3 Agreement, time is of the essence. The parties reasonably anticipate that FRESNO
4 COG will, to the reasonable satisfaction of DISTRICT, complete all activities provided
5 herein within the time schedule outlined in paragraph 2 of this Agreement, provided
6 that FRESNO COG is not caused unreasonable delay in such performance.

7 **19. NO THIRD-PARTY BENEFICIARIES**

8 Notwithstanding anything else stated to the contrary herein, it is
9 understood that FRESNO COG's services and activities under this Agreement are
10 being rendered only for the benefit of DISTRICT, and no other person, firm,
11 corporation, or entity shall be deemed an intended third-party beneficiary of this
12 Agreement.

13 **20. SEVERABILITY**

14 In the event that any one or more of the provisions contained in this
15 Agreement shall for any reason be held to be unenforceable in any respect by a court
16 of competent jurisdiction, such holding shall not affect any other provisions of this
17 Agreement, and the Agreement shall then be construed as if such unenforceable
18 provisions are not a part hereof.

19 **21. SPECIAL CONDITIONS**

20 Funds may not be used to meet Americans with Disabilities Act (ADA)
21 requirements.

22 **23. ENTIRE AGREEMENT**

23 This Agreement constitutes the entire agreement between FRESNO
24 COG and the DISTRICT with respect to the subject matter hereof and supersedes all
25 previous negotiations, proposals, commitments, writings, advertisements, publications,
26 and understandings of any nature whatsoever unless expressly included in this
27 Agreement.

28 //

1 **IN WITNESS WHEREOF**, the parties hereto have caused this Agreement
2 to be executed as of the day and year first hereinabove written.

3
4 **FRESNO COG**

5 Fresno Council of Governments

6
7 _____
8 Tony Boren

9 _____
10 Tax I.D. No.

DISTRICT

San Joaquin Valley Unified Air Pollution
Control District

J
. Steven Worthley
Governing Board Chair

Recommended for approval:
San Joaquin Valley Unified Air Pollution
Control District

Seyed Sadredin
Executive Director/APCO

Approved as to legal form:
San Joaquin Valley Unified Air Pollution
Control District

Catherine Redmond
District Counsel

Approved as to accounting form:

Cindi Hamm
Director of Administrative Services

For accounting use only:
San Joaquin Valley Unified Air Pollution
Control DISTRICT

Program: _____
Account No: _____