

**FINAL**

**CITY OF RICHMOND WASTEWATER TREATMENT FACILITY  
CAPITAL IMPROVEMENTS, OPERATIONS,  
MAINTENANCE AND MANAGEMENT AGREEMENT  
BY AND BETWEEN  
THE CITY OF RICHMOND, CALIFORNIA  
AND  
US FILTER OPERATING SERVICES, INC.  
DATED AS OF MAY 15 , 2002**

INDEX OF CLOSING DOCUMENTS

**CITY OF RICHMOND WASTEWATER  
TREATMENT FACILITY  
CAPITAL IMPROVEMENTS, OPERATIONS  
MAINTENANCE AND MANAGEMENT AGREEMENT  
BY AND BETWEEN  
THE CITY OF RICHMOND, CALIFORNIA AND  
US FILTER OPERATING SERVICES, INC.**

1. Improvements, Operations, Maintenance and Management Agreement
2. Guarantee of Vivendi Water
3. Tax Counsel Opinion Letter

## TABLE OF CONTENTS

<u>ARTICLE I - SCHEDULES</u> .....	1
Section 1.1 Schedules and Exhibits. ....	1
<u>ARTICLE II - CERTAIN DEFINITIONS</u> .....	4
Section 2.1 Definitions.....	4
<u>ARTICLE III - OPERATION, MAINTENANCE AND MANAGEMENT OF THE FACILITY</u> .....	19
Section 3.1 Conditions Precedent to the Commencement Date. ....	19
Section 3.1.1 Company Obligations. ....	19
Section 3.1.2 City Obligations. ....	20
Section 3.2 Satisfaction of Conditions Precedent. ....	20
Section 3.3 Overall Company Responsibilities. ....	21
Section 3.4 Sludge Disposal .....	23
Section 3.5 City Responsibilities. ....	23
Section 3.6 Repair and Replacement. ....	24
Section 3.7 Company Project Manager. ....	25
Section 3.8 Company Construction Manager. ....	26
Section 3.9 Personnel.....	26
Section 3.9.1 Orientation and Career Planning.....	27
Section 3.9.2 Comparable Employment. ....	27
Section 3.9.3 Continued Employment. ....	27
Section 3.10 Liquidated Damages .....	27
Section 3.11 Fees and Payments.....	30
Section 3.11.1 Reimbursement for Transaction Costs.....	30
Section 3.11.2 Pass Through Costs.....	30
Section 3.11.3 Service Fee.....	30
Section 3.11.4 Service Fee Adjustment. ....	31
Section 3.11.5 Cost Savings.....	32
Section 3.11.6 Absolute Maximum and Minimum Compensation.....	32
Section 3.12 Utilization of Effluent Wastewater and Methane Gas Production .....	32
Section 3.13 Grant Deviation Approval Letter.....	32
<u>ARTICLE IV - CAPITAL IMPROVEMENTS -DEVELOPMENT PHASE</u> .....	33
Section 4.1 Development Phase -Generally.....	33
Section 4.2 Site Suitability Confirmation .....	34
Section 4.2.1 Site Familiarity.....	34
Section 4.2.2 Assumption of Structural Suitability Risk. ....	34
Section 4.3 Company Responsibilities During the Development Period .....	34
Section 4.3.1 Obligation to Proceed. ....	34
Section 4.4 City Responsibilities During the Development Period.....	37

Section 4.4.1 Financing.....	37
Section 4.4.2 Legal Entitlements. ....	37
Section 4.4.3 Zoning. ....	37
Section 4.4.4 Representations. ....	38
Section 4.5 Construction Date Conditions.....	38
Section 4.5.1 Construction Date Conditions.....	38
Section 4.5.2 Required Development Milestone Completion Dates. ....	39
Section 4.5.3 Conditions to Legal Entitlements.....	39
Section 4.5.4 Denial of a Legal Entitlement. ....	40
Section 4.6 Closing the Development Period. ....	40
Section 4.6.1 Satisfaction of Conditions.....	40
Section 4.6.2 Failure of Conditions. ....	40
Section 4.7 City Termination and Suspension Options During the Development Period.....	41
Section 4.7.1 City Convenience Termination Option During the Development Period.....	40
Section 4.7.2 City Suspension Option During the Development Period. ....	41
Section 4.7.3 Cost of Records and Reporting. ....	41
Section 4.7.4 Delivery of Development Period Work Product to the City.....	42
Section 4.8 Termination for Cause During the Development Period. ....	42
Section 4.9 City Election to Initiate Construction Work. ....	42

**ARTICLE V - DESIGN AND CONSTRUCTION OF THE CAPITAL IMPROVEMENTS..... 43**

Section 5.1 Construction Period -Generally. ....	43
Section 5.2 Facility Ownership.....	43
Section 5.3 Authorized Representative.....	43
Section 5.4 Design and Construction Generally. ....	43
Section 5.4.1 Commencement of Design and Construction. ....	43
Section 5.4.2 Elements of the Capital Improvements Construction. ....	44
Section 5.4.3 Liens and Subcontracts. ....	44
Section 5.4.4 Payment of Costs. ....	44
Section 5.5 Company Design.....	45
Section 5.5.1 Sole Responsibility. ....	45
Section 5.5.2 City Interest in Design Requirements. ....	45
Section 5.5.3 Company Requested Changes.....	45
Section 5.5.4 City Approval of Changes. ....	46
Section 5.6 Construction Practice. ....	46
Section 5.7 Construction Period Insurance.....	46
Section 5.8 Compliance with Law and Equipment Operating Requirements. ....	47
Section 5.9 Legal Entitlements Necessary for Continued Construction.....	47
Section 5.10 Engagement of City Consultant. ....	47
Section 5.10.1 The Duties.....	47
Section 5.10.2 Fees. ....	48
Section 5.11 Monthly Progress Report. ....	48
Section 5.12 Construction Monitoring, Observations, Testing and Uncovering of Work. ....	48
Section 5.12.1 Observation and Design Review Program. ....	48
Section 5.12.2 Company Tests.....	49
Section 5.12.3 City Tests, Observations and Inspections. ....	49

Section 5.12.4 Certificates and Reports.....	49
Section 5.12.5 Notice of Covering Construction Work.....	50
Section 5.12.6 Meetings and Design and Construction Review.....	50
Section 5.13 Correction of Work.....	51
Section 5.13.1 Correction of Non-Conforming Construction Work.....	51
Section 5.13.2 Election to Accept Non-Conforming Construction Work.....	51
Section 5.13.3 Relation to Other Obligations.....	51
Section 5.14 Damage to the Construction Work.....	51
Section 5.14.1 Damage Prevention.....	51
Section 5.14.2 Restoration.....	51
Section 5.14.3 Notice and Reports.....	52
Section 5.15 Change Orders and Extra Construction Work.....	52
Section 5.15.1 Right to Issue Change Orders.....	52
Section 5.15.2 Obligation to Complete Extra Construction Work.....	52
Section 5.15.3 Effect of Company Fault.....	52
Section 5.15.4 Cost Reductions.....	52
Section 5.15.5 Proposal for Extra Work.....	53
Section 5.15.6 Conditions to the Obligation to Proceed.....	53
Section 5.15.7 Disputed Work.....	53
Section 5.15.8 Notice; Waiver.....	54
Section 5.16 Deliverable Material.....	54
Section 5.16.1 Delivery and Use.....	54
Section 5.16.2 Injunction on Use.....	54
Section 5.17 Payment of the Construction Price.....	54
Section 5.17.1 Construction Price Generally.....	55
Section 5.17.2 Fixed Construction Price.....	55
Section 5.17.3 Reduction in Fixed Construction Price Escalation.....	55
Section 5.17.4 Fixed Construction Price Adjustments.....	55
Section 5.17.5 Limitation on Payments for Construction Costs.....	55
Section 5.17.6 Construction Disbursement Procedure.....	56
Section 5.17.7 Information Supporting Requisition.....	56
Section 5.17.8 Permissible Withholdings.....	57
Section 5.17.9 Set-Off.....	58
Section 5.17.10 Rewired Company Certification.....	58
Section 5.18 Disbursement Dispute Procedures.....	58
Section 5.18.1 Dispute Notice.....	58
Section 5.18.2 Dispute Resolution.....	58
Section 5.19 Personnel.....	59
Section 5.19.1 Personnel Performance.....	59
Section 5.19.2 Prevailing Wages.....	59
Section 5.19.3 Company Construction Superintendent.....	59
Section 5.19.4 City Rights With Respect to Key Personnel.....	60
Section 5.19.5 Labor Disputes.....	60
Section 5.20 Construction Books and Records.....	60

ARTICLE VI - ACCEPTANCE OF THE FACILITY..... 60

Section 6.1 Acceptance -Generally.....	60
Section 6.2 Substantial Completion.....	61
Section 6.2.1 Requirements for Substantial Completion.....	61
Section 6.2.2 Final Punch List.....	62
Section 6.3 Notice of Start-Up Operations.....	62
Section 6.3.1 Submittal of Acceptance Test Plan.....	62
Section 6.3.2 Notice of Substantial Completion.....	62
Section 6.3.3 Notice of Commencement of Acceptance Test.....	63
Section 6.4 Transitional Operations.....	63
Section 6.5 Acceptance Date Conditions.....	63
Section 6.5.1 Construction Date Conditions.....	63
Section 6.5.2 Achievement of Acceptance Standards.....	63
Section 6.5.3 Substantial Completion.....	63
Section 6.5.4 Operating Legal Entitlements.....	63
Section 6.5.5 Record Documents.....	64
Section 6.5.6 Equipment Warranties and Manuals.....	64
Section 6.5.7 Contract Compliance Calendar.....	64
Section 6.5.8 No Default.....	64
Section 6.6 Written Test Report.....	64
Section 6.7 Concurrence or Disagreement with Test Results.....	64
Section 6.7.1 Acceptance Date Concurrence.....	64
Section 6.7.2 Acceptance Date Disagreement.....	65
Section 6.8 Extension Period.....	65
Section 6.9 Delay Liquidated Damages.....	66
Section 6.10 Failure to Meet Acceptance Standard.....	66
Section 6.11 Final Completion.....	66
Section 6.11.1 Requirements.....	66
Section 6.11.2 Final Voucher and Claims Statement.....	67
Section 6.12 No Acceptance, Waiver or Release.....	67

**ARTICLE VII- LIABILITY, INSURANCE, UNCONTROLLABLE CIRCUMSTANCES AND INDEMNIFICATION..... 68**

Section 7.1 Liability.....	68
Section 7.2 Insurance.....	68
Section 7.2.2 Insurers, Deductibles and City Rights.....	68
Section 7.2.3 Certificates, Policies and Notice.....	68
Section 7.3. Uncontrollable Circumstances.....	69
Section 7.3.1 Relief from Obligations.....	69
Section 7.3.2 Notice and Mitigation.....	69
Section 7.3.3 Conditions and Schedule Relief.....	70
Section 7.3.4 No Reimbursement for Costs Due to Delays Caused by Uncontrollable Circumstances.....	70
Section 7.3.5 Acceptance of Relief Constitutes Release.....	70
Section 7.4 Indemnification.....	70
Section 7.4.1 Indemnification by the Company.....	70
Section 7.4.2 Indemnification by the City.....	71

Section 7.5 Limitations of Liability .....	72
Section 7.6 Survivability of Article VII Provisions .....	72

**ARTICLE VIII - EVENTS OF DEFAULT, REMEDIES AND TERMINATION .....** 72

Section 8.1 Remedies for Breach.....	72
Section 8.1.1 General.....	72
Section 8.1.2 No Payment or Damages for City Delay. ....	72
Section 8.2 Events of Default by the Company.....	73
Section 8.2.1 Events of Default Without Requiring Notice or Opportunity to Cure.....	73
Section 8.2.2. Events of Default Requiring Notice and Cure Opportunity for Termination.	74
Section 8.2.3. Termination Damages and Other Legal Rights Upon Company Default. ....	74
Section 8.2.4. Enforcement Costs.....	75
Section 8.3 Events of Default by the City.....	75
Section 8.3. Events of Default Not Requiring Notice of Cure Opportunity for Termination.....	75
Section 8.3.2 Events of Default Requiring Notice and Cure Opportunity for Termination.	75
Section 8.3.3 Termination Liquidated Damages During the City Initial Term. ....	75
Section 8.4 City Discretionary Termination. ....	76
Section 8.4.1 Discretionary Termination Right. ....	76
Section 8.4.2 Discretionary Termination Amount. ....	76
Section 8.4.3 Payment of Amounts Owing Through the Termination Date.....	76
Section 8.4.4 Adequacy of Termination Payment. ....	77
Section 8.4.5 Completion or Continuance by City. ....	77
Section 8.5 Certain Obligations of the Company Upon Termination or Expiration .....	77
Section 8.5.1 Company Obligations Upon Termination.....	77
Section 8.5.2. Additional Obligations.....	78
Section 8.5.3. Company Payment of Certain Costs.....	78
Section 8.5.4. City Payment of Certain Costs.....	78
Section 8.6 No Waivers. ....	78
Section 8.7 No Consequential or Punitive Damages. ....	78
Section 8.8 Dispute Resolution.....	79
Section 8.8.1 Negotiation.....	79
Section 8.8.2 Independent Panel Establishment. ....	79
Section 8.8.3 Independent Panel Mediation. ....	79
Section 8.8.4 Binding Arbitration.....	80

**ARTICLE IX - REPRESENTATIONS AND WARRANTIES .....** 80

Section 9.1. Representations of the City.....	80
Section 9.1.1 Existence and Powers. ....	80
Section 9.1.2 Due Authorization and Binding Obligation.....	80
Section 9.1.3 No Conflict.....	80
Section 9.1.4 No Approvals Required. ....	81
Section 9.1.5 No Litigation.....	81
Section 9.1.6 No Implied Representations or Warranties.....	81
Section 9.2 Representations and Warranties of the Company.....	81

Section 9.2.1 Existence and Powers. ....	81
Section 9.2.2 Due Authorization and Binding Obligation. ....	81
Section 9.2.3 No Conflict. ....	82
Section 9.2.4 No Approvals Required. ....	82
Section 9.2.5 No Litigation. ....	82
Section 9.2.6 Practicability of Performance. ....	82
Section 9.2.7 Adequacy of Price and Schedule. ....	83
Section 9.2.8 Information Supplied by the Company. ....	83
Section 9.3 Representations and Warranties Against Patent Infringement. ....	83
Section 9.3.1 Patents and Licenses. ....	83
Section 9.3.2 Warrant Against Infringement. ....	83
Section 9.3.3 Preliminary Injunction. ....	83
Section 9.3.4 Permanent Injunction. ....	84
Section 9.3.5 Replacement. ....	84
Section 9.4 Non-Discrimination, Business Opportunity and Local Employment Programs ...	85
Section 9.4.1 Nondiscrimination - Company .....	84
Section 9.4.2 Richmond's Business Opportunity and Local Employment Program .....	84
Section 9.5 Survival of Representations and Warranties. ....	85

**ARTICLE X - TERM OF THE AGREEMENT .....85**

Section 10.1 Term of Agreement. ....	85
Section 10.1.1 Effective Date and Termination Rights. ....	85
Section 10.1.2 Survival of Certain Provisions. ....	85
Section 10.2 Renewal. ....	85
Section 10.3 Review at Expiration of Agreement. ....	85

**ARTICLE XI - MISCELLANEOUS ..... 86**

Section 11.1 Limited Recourse to City. ....	86
Section 11.1.1 No Recourse to General Fund. ....	86
Section 11.1.2 Rate Covenant. ....	87
Section 11.1.3 Enforcement of Collections. ....	87
Section 11.2 Company Business Activities and Guarantor Credit Standing. ....	87
Section 11.2.1 Company Business. ....	87
Section 11.2.2 Guaranty Agreement. ....	87
Section 11.2.3 Material Decline in Guarantor's Credit Standing. ....	87
Section 11.2.4 Credit Enhancement Prior to Commencement Date. ....	88
Section 11.2.5 Annual Financial Reports. ....	88
Section 11.3. Financial Security for the Performance of the Company's Obligations. ....	88
Section 11.3.1 Construction Performance and Labor and Materials Bonds. ....	88
Section 11.3.2 Operations Bond. ....	88
Section 11.4 Relationship of the Parties. ....	89
Section 11.5 Property Rights. ....	89
Section 11.6 Interest on Overdue Obligations. ....	89
Section 11.7 Subcontractors. ....	89

Section 11.7.1 Limited Review and Approval.....	89
Section 11.7.2. Indemnity for Subcontractor Claims.....	90
Section 11.8 Actions of the City in its Governmental Capacity.....	90
Section 11.8.1 Rights as Government Not Limited.....	90
Section 11.8.2 No City Obligation to Issue Legal Entitlements.....	90
Section 11.9 Assignment.....	90
Section 11.9.1 By the Company.....	90
Section 11.9.2 By the City.....	91
Section 11.10 Amendment.....	91
Section 11.11 No Other Agreements.....	91
Section 11.12 Notices.....	91
Section 11.13 Binding Effect.....	92
Section 11.14 Consent to Jurisdiction.....	93
Section 11.15 Further Assurances.....	93
Section 11.16 Counterparts.....	93
Section 11.17 Governing Law.....	93
Section 11.18 Headings.....	93
Section 11.19 Days.....	93
 ARTICLE XII - ADDITIONAL SERVICES .....	 94
Section 12.1 Description of Additional Services .....	94
Section 12.2 Payment for Additional Services .....	94

**CITY OF RICHMOND WASTEWATER TREATMENT FACILITY  
CAPITAL IMPROVEMENTS, OPERATIONS,  
MAINTENANCE AND MANAGEMENT AGREEMENT**

This CITY OF RICHMOND WASTEWATER TREATMENT FACILITY CAPITAL IMPROVEMENTS, OPERATIONS, MAINTENANCE AND MANAGEMENT AGREEMENT, dated as of \_\_\_\_\_ (date), is entered into by and between THE CITY OF RICHMOND, CALIFORNIA (the "City") and US FILTER OPERATING SERVICES, INC., a corporation, organized and existing under the laws of Delaware (the "Company") .

WITNESSETH

WHEREAS, City owns and operates the City of Richmond Wastewater Treatment Facility;

WHEREAS, the City issued a request for proposals in June 2001 for capital improvements to the Facility and for the long-term operation, maintenance and management of the Facility;

WHEREAS, in response to the RFP, the Company submitted a proposal for capital improvements to the Facility and for the long-term operation, maintenance and management of the Facility;

WHEREAS, the City has selected the Company, pursuant to the RFP as amended by the Proposal, to perform the capital improvements and to operate, maintain and manage the Facility, in accordance with the terms and subject to the conditions of this Agreement;

WHEREAS, the Company desires to perform the capital improvements and to operate, maintain and manage the Facility, in accordance with the terms and subject to the conditions of this Agreement;

WHEREAS, the Guarantor shall execute the Guaranty in the form of EXHIBIT B hereto, guaranteeing the Company's performance of its obligations under this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants, representations, warranties and agreements contained herein, and intending to be legally bound hereby, the parties agree as follows:

**ARTICLE I**

**SCHEDULES**

**Section 1.1 Schedules and Exhibits.**

The following Schedules and Exhibits are attached hereto and made a part of this Agreement. In the event of a conflict or inconsistency between or among the Schedules and this

Agreement, the provisions of this Agreement control over the Schedules unless otherwise agreed to in writing by the parties or unless otherwise specifically provided in this Agreement.

#### Schedule 1 PERFORMANCE STANDARDS

- 1.1 Treatment Requirements
- 1.2 Studies for Future Treatment Standards
- 1.3 Facility Design Criteria for Flow and Loadings

#### Schedule 2 OPERATION AND MAINTENANCE STANDARDS

- 2.1 General
- 2.2 Operations and Maintenance
  - 2.2.1 SCADA System
  - 2.2.2 Maintenance Management System
  - 2.2.3 Solids Handling and Sludge Disposal
  - 2.2.4 Odor Control Facilities
    - 2.2.4.1 Odor Hotline
    - 2.2.4.2 Response Plan
  - 2.2.5 Analytical Services and Industrial Pre-Treatment Program (IPP)
  - 2.2.6 Equipment and Chemicals
  - 2.2.7 Vehicle Maintenance
  - 2.2.8 Building Services
  - 2.2.9 Utilities
  - 2.2.10 Sewers and Collection System
- 2.3 Operations and Maintenance Costs
- 2.4 Operations Monitoring Review
  - 2.4.1 Monthly Operating Reports
  - 2.4.2 Annual Operation and Maintenance Report
  - 2.4.3 Facility Inspections
  - 2.4.4 Operations Records |
  - 2.4.5 Monthly Meetings
  - 2.4.6 Review at Expiration of Agreement
  - 2.4.7 City Offices and Operations

#### Schedule 3 FACILITY PLANS

- 3.1 Customer Service and Emergency Response Plan
- 3.2 Staffing and Training Plan
  - 3.2.1 Staffing Responsibilities
  - 3.2.2 Staffing Plan
  - 3.2.3 Training Plan
- 3.3 Operations and Maintenance Plan
- 3.4 Safety and Security Plan
- 3.5 Transition Plan
  - 3.5.1 Construction Inspection Activities
  - 3.5.2 Start-up and Preliminary Testing

Schedule 4 INSURANCE

- 4.1 Workers' Compensation
- 4.2 Commercial General Liability
- 4.3 Commercial Automobile Liability
- 4.4 Environmental Impairment Insurance
- 4.5 Certificate of Insurance

Schedule 5 ESCALATION INDICES

- 5.1 Fixed Construction Price Index

Schedule 6 PERMITS

- 6.1 Responsibilities

Schedule 7 WASTEWATER INFLUENT REQUIREMENTS

Schedule 8 MAXIMUM UTILITIES UTILIZATION

Schedule 9 EQUIPMENT AND CHEMICALS INVENTORY

Schedule 10 PASS THROUGH COSTS

Schedule 11 SERVICE FEE

Schedule 12 CAPITAL IMPROVEMENTS

- 12.1 Construction Drawdown Schedule for Proposal B Capital Improvements
- 12.2 Proposal A Repair and Replacement Improvements
- 12.3 Proposal B Capital Improvements
- 12.4 Long Term Repair and Replacement Budget During the Proposal B Period
- 12.5 Initial City Improvements

Schedule 13 ACCEPTANCE TESTING

- 13.1 Acceptance Test

Schedule 14 KEY COMPANY PERSONNEL and AFFILIATION

Schedule 15 TERMINATION PAYMENTS FOR EARLY TERMINATION

Schedule 16 SLUDGE DISPOSAL FACILITY, OPERATIONS, AND COSTS

EXHIBIT A WASTEWATER TREATMENT FACILITY

- 1.1 City of Richmond Wastewater Treatment Facility
  - 1.1.1 Wet Stream and Odor Control Treatment Facilities
  - 1.1.2 Sludge Treatment, Odor Control and Disposal
- 1.2 Laboratory, Analytical Services, and IPP Program

EXHIBIT B GUARANTEE

**ARTICLE II**

**CERTAIN DEFINITIONS**

**Section 2.1 Definitions.**

As used herein, the following terms shall have the following meanings:

"Acceptance" means demonstration by the Company in accordance with Article VI and Schedule 13 hereof that the Acceptance Test has been conducted and the Acceptance Standards have been achieved.

"Acceptance Date" means the earlier of: the date on which the Acceptance Test to demonstrate the ability of the Facility to achieve Acceptance Standards is approved, with the criteria for approval of the Acceptance Test as set forth in Schedule 13 hereto; or that date which is one day prior to the second anniversary of the Commencement Date.

"Acceptance Standards" means the standards for Acceptance set forth in Schedule 13 hereto.

"Acceptance Test(s) " or "Acceptance Testing" means the tests, plans and procedures set forth in Schedule 13 hereto.

"Accounting Records" has the meaning specified in Schedule 2.4.3 hereto.

"Affiliate(s) " means any person, corporation or other entity directly or indirectly controlling or controlled by another person, corporation or other entity or under direct or indirect common control with such person, corporation or other entity.

"Agreement" means the City of Richmond Wastewater Treatment Facility Capital Improvement, Operations, Maintenance and Management Agreement, dated as of DATE , 2002 by and between the City of Richmond, California and the Company.

"Analytical Services" has the meaning specified in Schedule 2.2.5 hereto.

"Annual Facility Inspection" has the meaning specified in Schedule 2.4.3 hereto.

"Annual Report" has the meaning specified in Schedule 2.4.2.

"Applicable Law" means any law, rule, regulation, requirement, action, determination, guideline, or order of, or any legal entitlement issued by any governmental body having jurisdiction, applicable from time to time to the siting, design, acquisition, construction, equipping, financing, ownership, possession, start-up, testing, operation, maintenance or repair of the Facility; the delivery, treatment, discharge or storage of wastewater; the transfer, handling, transportation or disposal of Residuals; or any other transaction or matter contemplated hereby including, without limitation, any of the foregoing which pertain to wastewater.

"Auditor" has the meaning specified in Section 10.3 hereof.

"Auditor's Report" has the meaning specified in Section 10.3 hereof.

"Authorized Representative" has the meaning specified in Section 5.3 hereof.

"Base Rate" means the interest rate announced from time to time as its "prime rate" by Wells Fargo Bank of San Francisco, CA.

"Billing Month" means each calendar month in a Contract Year.

"Biologically Toxic Substances" means any substance or combination of substances in sufficient quantities contained in the plant influent in violation of the City's Industrial Pre-treatment Ordinance that cannot be treated at the existing treatment facility and / or that negate the ability of the existing treatment processes and their operation to meet the discharge requirements of the City's NPDES Permit.

"BOD" means biochemical oxygen demand.

"Bonds" mean the Construction Performance Bond, the Operations Bond and the Labor and Materials Bond.

"Buildings Services" has the meaning specified in Schedule 2.2.9 hereto.

"Capital Improvement(s)" has the meaning specified in Subsection 5.4.2 and Schedules 12.1 and 12.3 hereof. Proposal A repair and replacement to be described and handled exclusively by Schedule 12.2.

"CE-PCI" shall have the meaning specified in Schedule 5 hereto.

"Certificates" means insurance certificates as specified in Schedule 4 hereto.

"Change in Law" means (a) the enactment, adoption, promulgation, modification or repeal after the Contract Date of any federal, State, or local law, ordinance, code, rule, regulation or other similar legislation or the repeal, modification or change in interpretation after the Contract Date, of any federal, State, or local law, ordinance, code, rule, regulation, official permit, license or approval by any regulatory or judicial entity having jurisdiction with respect to the design, construction, operation, maintenance, or management of the Facility, or (b) the imposition, after the Contract Date, of any material conditions on the issuance, modification or renewal of any official permit, license or approval necessary for the operation and maintenance

of the Facility, which, in either case, modifies the Company's obligations for capital construction or modifies the Company's obligations of Facility performance or decreases or increases the cost of the Company's operation or maintenance of the Facility and which are less or more burdensome than the most stringent requirements:

- (i) of Applicable Law in effect on the Contract Date;
- (ii) agreed to by the City in any applications for official permits, licenses or approvals for the Facility, other than any requirements set forth in said applications to comply with future laws, ordinances, codes, rules, regulations or similar legislation, or
- (iii) in the Performance Standards and guarantees set forth in Schedule 1 hereto and operation and maintenance standards set forth in Schedule 2 hereto; or
- (iv) "Prudent Industry Practices" meaning those methods, techniques, standards and practices which, at the time they are employed and in light of the circumstances known or believed to exist at the time, are generally accepted as reasonably prudent in the wastewater treatment industry or other industry in which services similar to the Services are provided as practiced in the United States with respect to a plant of similar type as the Facility.

For purposes of part (a) of this definition, no enactment, adoption, promulgation or modification of laws, ordinances, codes, rules, regulations or similar requirement or enforcement policy with respect to any such requirement shall be considered a Change in Law if, as of the Contract Date, such law, ordinance, code, rule, regulation or other similar requirement would have affected directly the continued management, operation and maintenance of the Facility by the City after the Commencement Date in the absence of this Agreement and such law, ordinance, code, rule, regulation or other similar requirement was either (i) officially proposed by the responsible agency and published in final form in the Federal Register or equivalent federal, State or local publication and thereafter becomes effective without further action or (ii) enacted into law or promulgated by the appropriate federal, State or local body before the Contract Date, and the comment period with respect to which expired on or before the Contract Date and any required hearing concluded on or before the Contract Date in accordance with applicable administrative procedures and which thereafter becomes effective without further action. In no event shall a change in any federal, State or local tax law be considered a Change in Law.

"Change Order" means a written order issued by the City to the Company after execution of this Agreement, authorizing or requiring: (1) Extra Construction Work, or deleted or omitted Construction Work, pursuant to Section 5.15 hereof; (2) an increase or reduction in the Fixed Construction Price; or (3) any other change in this Agreement prior to the Acceptance Date, including any change in the Design Requirements; or (4) any change in this Agreement after the Contract Date

"Chemical(s) " has the meaning specified in Schedule 2.2.6 hereto.

"City" means the City of Richmond, California.

"City Employee(s) " has the meaning specified in Section 3.9 hereof.

"City Consultant" means either (1) a consultant employed by the City, or (2) a nationally recognized consultant or firm, having experience with respect to the design, construction, testing, operation and maintenance of wastewater treatment facilities, in either case designated for purposes relating to this Agreement, as the City Consultant from time to time in writing by the City.

"City Fault" means any breach (including the untruth or breach of any City representation or warranty set forth herein), failure, nonperformance or noncompliance by the City under this Agreement (whether or not attributable to any officer, member, agent, employee, contractor, subcontractor of any tier, the City Consultant, or an independent contractor of the City), or of Applicable Law which is not directly attributable to any Uncontrollable Circumstance or Company Fault, and which materially and adversely affects the Company's right and obligations or ability to perform under this Agreement.

"City Indemnitees" has the meaning specified in Subsection 7.4.1 hereof.

"City's Enterprise Fund" means the City's wastewater utility departmental budget for revenues collected and expenses incurred by the wastewater utility.

"COD" means chemical oxygen demand.

"Collection System" means any wastewater collection, conveyance, or transmission piping, conduits, or underground electrical wiring not within the confines of the Facility or any pump station or siphon.

"Commencement Date" means the date upon which the Company begins Operations Services under this Agreement and is entitled to payment of the Service Fee from the City hereunder subsequent to the City giving the Company notice pursuant to Subsection 3.2 hereof.  
or

"Company" means US Filter Operating Services, Inc., a corporation organized and existing under the laws of Delaware, and its permitted successors and assigns, with which the City has entered into the Agreement.

"Company Construction Superintendent" has the meaning specified in Subsection 5.19.3 hereof.

"Company Fault" means any breach (including the untruth or breach of any Company representation or warranty set forth herein), failure, nonperformance or noncompliance by the Company under this Agreement (whether or not attributable to any officer, member, agent, employee, contractor, subcontractor of any tier, or an independent contractor of the Company or any Affiliate of the Company) which is not directly attributable to any Uncontrollable Circumstance or City Fault, and which materially and adversely affects the City's right and obligations or ability to perform under this Agreement.

"Company Indemnitees" has the meaning specified in Subsection 7.4.2 hereof.

"Compliance Plan" has the meaning specified in Section 3.10 hereof.

"Construction Contract" has the meaning specified in Subsection 4.3.1(j) hereof.

"Construction Date" means the first date on which all of the Construction Date Conditions shall be satisfied or waived, as agreed to in writing by the parties, pursuant to Section 4.6 hereof.

"Construction Date Conditions" has the meaning specified in Subsection 4.5.1 hereof.

"Construction Manager" has the meaning specified in Section 3.8 hereof.

"Construction Performance Bond" means the bond which guarantees the Company's and the Contractor's timely performance of their obligations under the Construction Contract for the benefit of the City.

"Construction Period" means the period from and including the Construction Date to the Acceptance Date.

"Construction Price" has the meaning specified in Subsection 5.17.1 hereof.

"Construction Work" means everything required to be furnished and done for and relating to the Facility or the Site pursuant to this Agreement during the Construction Period, including all design work and including the design and construction of the Capital Improvements for Proposal A Repair & Replacement Capital and Proposal B Capital Improvements. A reference to Construction Work shall mean any part and all of the Construction Work unless the context otherwise requires, and shall include all Extra Construction Work authorized by Change Order pursuant to Section 5.15 hereof.

"Contract Date" or "Agreement Date" means the date of the Agreement as executed by the parties.

"Contract Term" or "Term" has the meaning specified in Subsection 10.1.1 hereof.

"Contractor" means the contractor retained by the Company to perform all or part of the Construction Work.

"Contract Year" means the consecutive twelve (12) month period commencing on January 1 in any year and ending on December 31 of that year; provided, however, that the first Contract Year shall begin on the Commencement Date and shall end on the following December 31, and the last Contract Year shall commence on January 1 prior to the date this Agreement expires or is terminated, whichever is appropriate, and shall end on the last day of the Contract Term or the effective date of any termination, whichever is appropriate.

"Cost Substantiation" means, with respect to any cost reasonably incurred or to be incurred by the Company which is directly or indirectly chargeable in whole or in part to the City hereunder, delivery to the City of a certificate signed by an officer or an authorized representative of the Company, setting forth the amount of such cost and the provisions of this Agreement under which such cost is properly chargeable to the City, stating that such cost is a fair market price for the service or materials supplied or to be supplied and that such services and

materials are reasonably required pursuant to this Agreement, and accompanied by copies of such documentation as shall be necessary to reasonably demonstrate that the cost as to which Cost Substantiation is required has been or will be incurred. Such documentation shall include reasonably detailed information concerning (1) all Subcontracts; (2) the amount and character of materials furnished or to be furnished, the persons from whom purchased or to be purchased, the amounts payable therefor and related delivery and transportation costs and any sales or personal property Taxes, if any; (3) a statement of the equipment used or to be used and any rental payable therefor; (4) Company worker hours, duties, wages, salaries, benefits, assessments, taxes and premiums; and (5) Company expenses, including administrative expenses, bonds, insurance, overhead, and other expenses; and (6) Company profit calculated at 15% of all other costs,"CPI" means the Consumer Price Index as published by the United States Department of Labor, Bureau of Labor Statistics for the San Francisco Bay Area B/C communities with populations less than 1,500,000 as outlined in Schedule 5 hereof.

"Deliverable Material" has the meaning specified in Section 5.16 hereof.

"Discretionary Termination Amount" has the meaning specified in Subsection 8.4.2 hereof.

"Design Requirements" means the Design Requirements for the Capital Improvements set forth in Schedule 12 hereto, as the same may be changed or modified in accordance with this Agreement.

"Development Period" has the meaning specified in Section 4.1 hereof.

"Disposal Agreement" has the meaning specified in Section 3.5 hereof.

"Disposal Facility" has the meaning specified in Section 3.5 hereof.

"Disputed Work" has the meaning specified in Subsection 5.15.7 hereof.

"DMR(s) " means the monthly Discharge Monitoring Report(s) .

"Effluent Limits" means the requirements of Applicable Law with respect to the quality of the treated effluent discharge from the Facility as set forth in Schedule 1 hereto.

"Encumbrance(s) " means any lien, lease, mortgage, security interest, charge, judgment, judicial award, attachment or encumbrance of any kind with respect to the Site, other than Permitted Encumbrances."

"EPA" means the United States Environmental Protection Agency or any successor.

"Equipment" means all vehicles, machinery, structures, components, parts and materials located at the Facility that are utilized in the operation, maintenance, and management of the Facility.

"Equipment and Chemical Responsibilities" has the meaning specified in Schedule 2.2.6 hereto.

"Existing Facility" means the facility that exists at the Site during the Proposal A Period.

"Extension Period" means the period mutually agreed to by the City and the Company, extending the Acceptance Date and commencing on the day after the Acceptance Date or, in the event of one or more delays caused by Uncontrollable Circumstances, City-requested Change Orders or City Fault occurring during such period, the date which is the next business day following the date calculated by adding to the Acceptance Date the aggregate number of days of such delay plus a reasonable number of additional days in which to allow the Company to expeditiously remobilize its forces (if needed). In no case shall the remobilization period add more than ten (10) days to the Extension Period.

"Extra Construction Work" means any Construction Work ordered by the City in addition to the Construction Work originally required hereunder.

"Extra Payment" has the meaning specified in Subsection 5.15.2 hereof.

"Facility" means the City of Richmond Wastewater Treatment Facility, including but not limited to, all treatment processes, sludge disposal facilities, laboratory, outfall/discharge facilities, and fixtures, equipment, tools, and other property stored on or constituting the wastewater plant, pump stations, siphons, and associated Site properties but excluding pump stations and siphons and the Collection System. The Facility means the Existing Facility during the Proposal A Period and the improved Facility during the Proposal B Period.

"Facility Modification" means any improvement, alteration, addition or other modification to the Facility following Substantial Completion that is requested or approved by the City. Facility Modifications do not include maintenance, repair or replacement activities required to be undertaken by the Company pursuant to this Agreement.

"Fees and Costs" means reasonable fees and expenses of employees, attorneys, architects, engineers, expert witnesses, contractors, consultants and other persons, and costs of transcripts, printing of briefs and records on appeal, copying and other reimbursed expenses, and expenses reasonably incurred in connection with any Legal Proceeding.

"Final Audit" has the meaning specified in Schedule 2.4.6 hereto.

"Final Audit Report" has the meaning specified in Schedule 2.4.6 hereto.

"Final Completion" means completion of the Construction Work in compliance with the Design Requirements and the requirements of Section 6.11 hereof.

"Final Punch List" has the meaning specified in Subsection 6.2.2 hereof.

"Fiscal Year" means the fiscal year of the City.

"Fixed Construction Price" means \$ 6.977 million as itemized by the Company in Schedules 12.3 hereto.

"Fixed Construction Price Adjustments" has the meaning specified in Subsection 5.17.4 hereof.

"Fixed Construction Price Index" has the meaning specified in Schedule 5 hereto.

"Future Operation Period" means the time period, beginning with the Acceptance Date and ending on the last day of the Contract Term. Proposal B Period has the same meaning as the Future Operation Period.

"Governmental Body" means any federal, State, City or regional legislative, executive, judicial or other governmental board, agency, authority, City, administration, court or other body, or any official thereof having jurisdiction.

"Guarantee" means the agreement executed between the City and the Project Guarantor.

"Hazardous Substance" has the meaning given such term in CERCLA, applicable State law and the regulations promulgated thereunder.

"Hazardous Waste" means any hazardous, toxic or dangerous waste, substance or material, or contaminant, pollutant or chemical, oil or petroleum product or byproduct, known or unknown, defined or identified as such in (or for the purposes of) any existing or future local, State or federal law, statute, code, ordinance, rule, regulation, guideline, decree or order relating to human health or the environment or environmental conditions, including but not limited to the Resource Conservation and Recovery Act ("RCRA"), 42 U. S. C. § 6901 et seq.; the Toxic Substances Control Act ("TSCA"), 15 U. S. C. § 2601 et seq.; the Federal Water Pollution Control Act, 49 U. S. C. § 1801 et seq.; the Safe Drinking Water Act., 42 U. S. C. § 300 et seq.; the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U. S. C. § 9601.; the Clean Air Act, 42 U. S. C. § 7401 et seq.; the Hazardous Materials Transportation Act, 49 U. S. C. App. § 1802 et seq.; the Occupational Safety and Health Act, 29 U. S. C. § 651 et seq.; including all similar State of California laws and municipal ordinances; including all rules, regulations and guidelines promulgated under such statutes and including all amendments and supplements to such statutes and rules, regulations and guidelines, and any order or decree relating to or imposing liability or standards or conduct concerning, or prohibiting, limiting or regulating exposure to, any waste, material, substance, contaminant, pollutant or chemical.

"Indenture" means the Indenture, dated September 1, 1999 by and between the City and Union Bank of California, N.A., as trustee, as amended and supplemented from time to time in accordance with the terms thereof.

"Independent Panel" has the meaning specified in Subsection 8.8.2 hereof.

"Initial City Improvements" has the meaning specified in Schedule 12.5.

"Initial City Improvements Period" has the meaning specified in Schedule 12.5.

"Initial Improvements" means the activities to be undertaken by the Company at the Facility during the Initial Operation Period (Proposal A Period) as set forth on Schedule 12.2 hereto.

"Initial Improvements Period" means the time period beginning on the Contract Date and terminating on the Commencement Date during which the Company shall undertake the Initial Improvements.

"Initial Operation Period" means the time period beginning on the Commencement Date and terminating on the Construction Date during which time the Company shall operate the Facility in accordance with the Effluent Limits as set forth in Schedule 1 and shall initiate the repair and replacement work as described in and in accordance with Schedule 12.2.

"Initial Term" has the meaning as specified in Section 10.1.1 of this Agreement.

"Insurance" has the meaning specified in Schedule 4 hereto.

"Insurance Certificate" has the meaning specified in Schedule 4 hereto.

"Insurance Requirement(s)" means any rule, regulation, code, or requirement issued by any fire insurance rating bureau or any body having similar functions or by any insurance company which has issued a policy of Insurance under this Agreement, as in effect during the Contract Term, compliance with which is a condition to the effectiveness of such policy.

"Interim Operation Period" means the time period, beginning with the Commencement Date, and ending on the Acceptance Date during which the Company will operate the existing Facility in accordance with the Effluent Limits set forth in Schedule 1 and shall perform the Construction Work required to design and construct the Capital Improvements at the Facility described in Schedules 12.1 and 12.3. The Proposal A Period includes both the Initial Operations Period and the Interim Operations Period.

"Inventory Report" shall have the meaning specified in Schedule 9 hereto.

"Labor and Materials Bond" means the bond, in an amount equal to the Fixed Construction Price, delivered to the City with respect to this Agreement, which guarantees to the City the Company's timely payment for all labor, materials, supplies, implements, and machinery and equipment to be furnished with respect to the Facility.

"Legal Entitlement" means any and all Permits, licenses, approvals, authorizations, consents and entitlements of whatever kind and however described which are required under Applicable Law to be obtained or maintained by any person with respect to the construction of the Capital Improvements or the operation, maintenance and management of the Facility or the performance of any other obligation of the Company under this Agreement, including, without limitation, the Permits detailed in Schedule 6 hereto.

"Legal Proceeding" means every action, suit, litigation, arbitration, administrative proceeding, and any other legal or equitable proceeding having a bearing upon this Agreement.

"Letter of Credit" has the meaning specified in Subsection 11.2.4 hereof.

"Lien" means any and every lien against the Facility or the Site or against any moneys due or to become due from the City to the Company under this Agreement, for or on account of the Construction Work or the Services, including without limitation mechanics', materialmen's, laborers', and lenders' liens.

"Loss-and-Expense" means any and all loss, liability, forfeiture, obligation, damage, delay, penalty, judgment, order, deposit, cost, expense, claim, demand, charge, tax, or expense, including violation of any Federal, State, or local law, ordinances or regulations except as explicitly excluded or limited under any provision of this Agreement.

"Maintenance and Operation Costs" has the meaning assigned to that term in the Indenture.

"Maintenance Management System" has the meaning specified in Schedule 2.2.2 hereto.

"Manuals" shall mean the Operations Manual and related operations and maintenance manuals, including future operations manuals issued with new Equipment.

"Major Repair and Maintenance Fund" means the fund described in Schedule 11 that is created by the Company to perform and pay for major repair and maintenance activities exceeding \$10,000 in costs during the Proposal B Period.

"Material Decline in Guarantor's Credit Standing" has the meaning specified in Subsection 11.2.3 hereof.

"Monthly Meeting" has the meaning specified in Schedule 2.4.5 hereto.

"Monthly Reports" have the meaning specified in Schedule 2.4.1 hereto.

"Net Revenues" has the meaning assigned to that term in the Indenture.

"Notice to Proceed" has the meaning specified in Subsection 5.4.1 hereof.

"NPDES" means the National Pollutant Discharge Elimination System.

"NPDES Permit" has the meaning specified in Schedule 6 hereto

"Odor Complaint Log" has the meaning specified in Schedule 2.2.4.1 hereto.

"Odor Control Responsibilities" has the meaning specified in Schedule 2.2.4 hereto.

"Odor Hotline" has the meaning specified in Schedule 2.2.4.1 hereto.

"Operations and Maintenance Plan" or "O&M Plan" has the meaning specified in Schedule 3.3 hereto.

"Operations Services" means the services that the Company performs under this Agreement to operate, maintain and manage the Facility in accordance with the requirements of this Agreement.

"Operation Period" means the period of time commencing with and including the Commencement Date, through and including the last day of the Contract Term, including the Interim Operation Period and the Future Operation Period.

"Operation and Maintenance Manual" has the meaning specified in Section 3.3, hereof.

"Operations Bond" has the meaning specified in Section 11.3.2 hereof.

"Operations Records" has the meaning specified in Schedule 2.4.4 hereto.

"Pass Through Cost(s)" means that component of the monthly invoices from the Company to the City consisting of those costs of the Company listed on Schedule 10 hereto, but not included in the Service Fee.

"Payment Date" has the meaning specified in Schedule 5 hereto.

"Performance Guarantees" means the Construction Performance Bond, the Operations Bond, the Labor and Materials Bond, the Guaranty, the Letter of Credit, and the Unconditional Guaranty or any combination thereof.

"Performance Requirements" means the Performance Standards set forth in Schedule 1 hereto as well as any other performance requirements relating to the Facility set forth in this Agreement that are the responsibility of the Company.

"Performance Standards" has the meaning specified in Schedule 1 hereof.

"Permits" has the meaning specified in Schedule 6 hereto.

"Permitted Encumbrances" means, as of any particular time, any one or more of the following:

(1) encumbrances for utility charges, taxes rates and assessments payable by the Company (City) not yet delinquent or, if delinquent, the validity of which is being contested diligently and in good faith by the Company (City) and against which the Company (City) has established appropriate reserves in accordance with generally accepted accounting principles;

(2) any encumbrance arising out of any judgment rendered which is being contested diligently and in good faith by the Company, the execution of which has been stayed or against which a bond or bonds in the aggregate principal amount equal to such judgments shall have been posted with a financially sound insurer and which does not have a material and adverse effect on the ability of the Company to construct or operate the Facility;

(3) any encumbrance arising in the ordinary course of business imposed by law dealing with materialmen's, mechanics', workmen's, repairmen's, warehousemen's, landlords',

vendors' or carriers' encumbrances created by law, or deposits or pledges which are not yet due or, if due, the validity of which is being contested diligently and in good faith by the Company and against which the Company has established appropriate reserves;

(4) servitudes, licenses, easements, encumbrances, restrictions, rights-of-way and rights in the nature of easements or similar charges which will not in the aggregate materially and adversely impair the construction and operation of the Facility by the Company; and

(5) zoning and building bylaws and ordinances, municipal bylaws and regulations, and restrictive covenants which do not materially interfere with the construction and operation of the Facility by the Company.

"Plans" has the meaning specified in Schedule 3 hereto.

"Project Guarantor" or "Guarantor" means the entity financially guarantying the performance of the Company to fulfill the obligations of the Agreement by issuing the Guarantee.

"Proposal A Period" means the time period beginning on the Commencement Date and ending on the Acceptance Date during which the Company will be paid the Proposal A Service Fee. The Proposal A Period includes both the Initial Operations Period and the Interim Operations Period.

"Proposal A Repair & Replacement Capital" has the same meaning as the Initial Improvements.

"Proposal A Service Fee" means the Service Fee payable by the City during the Initial and Interim Operation Period as set forth on Schedule 11 hereto.

"Proposal B Capital Improvements" mean the capital improvements described in Schedules 12.1 and 12.3 that will be constructed by Company during the Proposal A Period and operated by Company during the Proposal B Period.

"Proposal B Period" means the same time period identified as the Future Operation Period during which the Company will be paid the Proposal B Service Fee.

"Proposal B Service Fee" means the Service Fee paid to Company during the Future Operations Period, otherwise known as the Proposal B Period.

"Rating Service" means Moody's Investors Service or Standard & Poor's Rating Services, or any of their respective successors.

"Record Documents" has the meaning specified in Subsection 6.5.6 hereof.

"Renewal Period Capital Improvements" has the meaning specified in Section 10.3 hereof.

"Repair & Replacement Plan" has the meaning specified in Schedule 3.3 hereto.

"Repair and Replacement Fund" has the meaning specified in Section 3.6 hereof.

"Residuals" or "Facility Residuals" means any semisolid or solid material removed from the wastewater treatment process at the Facility that requires disposal as waste material.

"Revenue Bonds" means the City's Wastewater Revenue Bonds, Series 1999 and any other bonds of the City issued under the Indenture.

"Revenues" has the meaning assigned to that term in the Indenture.

"RFP" means the Request for Proposals for Capital Improvements, Operations, Maintenance, and Management of City of Richmond Wastewater Treatment Facility, dated June 13, 2001 and all Requests for Clarifications and Interview Questions submitted by the City.

"Rolling Stock" means vehicular Equipment included in the Facility.

"Safety and Security Plan" has the meaning specified in Schedule 3.4 hereto.

"SCADA System" means the supervisory control and data acquisition system at the Facility.

"Schedule(s)" mean(s) the schedule(s) attached to the Agreement, which together with the Agreement and the Exhibits attached thereto constitute the entire Agreement with respect to the Capital Improvements, operations, maintenance, and management of the Facility.

"Service Fee" means the annual amount payable to the Company by the City for the Services, exclusive of Capital Improvements, provided under the Agreement as set forth in Schedule 11 hereto and including the Proposal A Service Fee and the Proposal B Service Fee.

"Service Territory" or "Service Area" means the area within the City of Richmond known as the Richmond Municipal Sewer District (RMSD) and all other territory in which customers are served by the Facility during the Contract Term.

"Services" means the Capital Improvements to, and operations, maintenance, and management of the Facility to be provided by the Company in accordance with the terms and provisions of the Agreement.

"Site" means the Facility together with the real property located at 601 Canal Street, Richmond, California on which the Facility is situated.

"Skilled Labor Index" has the meaning specified in Schedule 5 hereto.

"Sludge" or "Biosolid" means any liquid, semisolid or solid material resulting from the wastewater treatment process at the Facility and which requires disposal as waste material at the existing sludge drying bed facility provided by the City or at alternative facilities and locations that may subsequently be utilized by the Company should the drying beds no longer be made available for usage by the Company.

"Staffing Plan" has the meaning specified in Schedule 3.2.2 hereto.

"Staffing Responsibilities" has the meaning specified in Schedule 3.2.1 hereto.

"State" means the State of California and all its relevant administrative, contracting and regulatory agencies and offices.

"Subcontract" means an agreement between the Company and a Subcontractor, or between two Subcontractors, as applicable.

"Subcontractor" means every person (other than employees of the Company) employed or engaged by the Company or any person directly or indirectly in privity with the Company (including every subcontractor of whatever tier) whether for the furnishing of labor, materials, equipment, supplies, services, or otherwise.

"Substantial Completion" has the meaning specified in Section 6.2 hereof.

"System" means the City of Richmond wastewater treatment system as described in Exhibit A hereto, including any and all modifications to the System during the Contract Term, but excluding the wastewater Collection System, and appurtenances (pump stations and siphons), capital planning, policy development, long range and Service Area planning, the setting of customer rates and charges, meter reading, billing and collection.

"System Revenues" means all revenues derived by the City in connection with the operation of the System and accounted for under the City's Enterprise Fund.

"Termination for Convenience" has the meaning specified in Subsection 8.4.1 hereof.

"Total Company Operations Obligations" means the obligations of the Company hereunder to (i) perform the Operations Services required hereunder in return for the City's payment of the Service Fee, and (ii) pay for Pass Through Costs and any costs for electricity or natural gas in excess of the Guaranteed Maximum Utility Utilization described in Schedule 8.

"Training Plan" has the meaning specified in Schedule 3.2.3 hereto.

"Transaction Costs" has the meaning specified in Subsection 3.11.1 hereof.

"Transaction Cost Payment" has the meaning specified in Subsection 3.11.1 hereof.

"Transition Plan" has the meaning specified in Schedule 3.5 hereto.

"Transition Period" has the meaning specified in Schedule 3.9 hereto.

"Unconditional Guarantee" has the meaning specified in Subsection 11.2.4 hereof.

"Uncontrollable Circumstances" means any act, event or condition to the extent that it impacts the cost of performance of or materially and adversely affects the ability of either party to perform any obligation under the Agreement (except for payment of obligations), if such act, event or condition, in light of the circumstances known or reasonably believed to exist at the

time, is beyond the reasonable control and is not a result of the willful or negligent act, error or omission or failure to exercise reasonable diligence on the part of the party relying thereon; provided, however, that the contesting in good faith or the failure in good faith to contest such action or inaction shall not be construed as a willful or negligent act, error or omission or a lack of reasonable diligence of either party.

Subject to the foregoing, such acts, events or conditions may include, but are not limited to, the following:

(a) Inclusions.

(1) an act of God (but not including reasonably anticipated weather conditions for the geographic area of the Facility as of the date hereof), landslide, earthquake, fire, explosion, flood, sabotage or similar occurrence, acts of a public enemy, extortion, war blockade or insurrection, riot or civil disturbance;

(2) a Change in Law;

(3) the failure of any appropriate governmental agency or private utility to provide and maintain utilities; preemption, confiscation, diversion, destruction, or other interference in possession or performance of material or services by, on behalf of, or with authority of a governmental body in connection with a declared or asserted public emergency or any condemnation or other taking by eminent domain or similar action of any portion of the Facility;

(5) national or local strikes, work stoppages, or labor disputes other than those of the Company's employees, agents, contractors, or subcontractors;

(6) violations of the City's Industrial Pretreatment Program discharge limits which are of such a quantity and quality so as to cause substantial disruption in the operations or biological activity of the Facility provided that the Company undertakes best efforts to deal with the discharge;

PROVIDED, HOWEVER, none of the following acts, events, or conditions shall constitute Uncontrollable Circumstances:

(b) Exclusions.

(1) general economic conditions, interest or inflation rate fluctuations, commodity prices or changes in prices, or currency or exchange rate fluctuations;

(2) changes in the financial condition of the City, the Company, the Project Guarantor, or any of their affiliates or subcontractors;

(3) union work rules that increase the Company's operating cost for the Facility;

(4) any impact of prevailing wage laws on the Company's cost;

(5) the consequence of Company error, including any errors of Company Affiliates or Subcontractors;

(6) failure of any Subcontractor or supplier to furnish labor, services, materials or equipment on the dates agreed to;

(7) strikes, work stoppages or labor disputes of Company's employees, agents, contractors or sub-contractors;

(8) equipment failure (unless caused by an Uncontrollable Circumstance); or

(9) litigation against the Company.

"Utilities" means any and all utility services and installations whatsoever (including gas, heating, fuel oil, water, sewer, electricity, telephone, and telecommunication), and all piping, wiring, conduit, and other fixtures of every kind whatsoever related thereto or used in connection therewith.

"Vehicle(s) " means all cars, trucks, vans or other modes of transportation used in connection with the operation of the Facility for transporting people or things or used for other necessary functions in the operation or maintenance of the Facility.

"Vehicle Maintenance Responsibilities" has the meaning specified in Schedule 2.2.7 hereto.

"Written Test Report" has the meaning specified in Subsection 4.3.1 hereof.

### **ARTICLE III**

#### **OPERATION, MAINTENANCE AND MANAGEMENT OF THE FACILITY**

##### **Section 3.1 Conditions Precedent to the Commencement Date.**

###### **Section 3.1.1 Company Obligations.**

The Commencement Date shall be subject to the satisfaction by the Company of the following conditions precedent:

(a) The Guarantor shall have executed and delivered the Guarantee to the City set forth in Exhibit B

(b) The Company shall have delivered to the City (i) a certificate of an authorized officer of the Company, dated as of the Commencement Date, to the effect that each of the representations of the Company set forth in Section 9.2 of this Agreement is true and correct in all material respects as if made on such date, and (ii) an opinion of counsel to the

Company, in customary form and reasonably acceptable to the City, regarding matters of law set forth in Sections 9.2.1 through 9.2.5 hereof.

(c) The City shall have received documentation that all Insurance required to be obtained by the Company pursuant to this Agreement has been obtained.

(d) The Company shall have delivered to the City the Operations Bond duly executed by its issuer in the amount equal to the current year's Total Company Operation Obligations

(e) The Company shall have recruited, retained and employed all management and other personnel necessary for its performance of the Services hereunder, which personnel shall be duly licensed as and to the extent required by Applicable Law, and shall have delivered to the City a roster of all such personnel together with copies of the licenses of all personnel required to be licensed.

(f) The Company shall have obtained and shall have submitted to the City copies of all Legal Entitlements required to be obtained by the Company by Applicable Law as a condition of performing the Services hereunder, with the exception of those Legal Entitlements required for the Capital Improvements.

### **Section 3.1.2 City Obligations.**

The Commencement Date shall be subject to the satisfaction by the City of the following conditions precedent:

(a) The City shall have delivered to the Company a certificate of an authorized officer of the City, dated as of the Commencement Date, to the effect that each of the representations of the City set forth in Section 9.1 of this Agreement is true and correct in all material respects as if made on such date.

(b) The City shall have delivered to the Company an opinion of counsel to the City, in customary form and reasonably acceptable to the Company, regarding matters of law set forth in Sections 9.1.1 through 9.1.5 hereof.

### **Section 3.2 Satisfaction of Conditions Precedent.**

The Company and City shall satisfy or waive the conditions precedent identified in Section 3.1.1 and Section 3.1.2 on or before Commencement Date, or such later date mutually agreed to in writing by the parties hereto and each party shall give the other prompt notice when any condition precedent has been satisfied. Upon satisfaction of all such conditions precedent, the City shall give written notice to the Company and the Commencement Date shall occur on the earlier of (i) such date or (ii) 60 days after the Contract Date, so long as, as of such date:

(1) No action, suit, proceeding or official investigation shall have been overtly threatened or publicly announced or commenced by any person or federal, State or local governmental authority or agency other than the City in any federal, State or local court, that seeks to enjoin, assess civil or criminal penalties against, assess civil damages against or obtain any judgment, order or consent decree with respect to the City or the Company as a result of the City's or the Company's negotiation, execution, delivery or performance of the Agreement, other than any such action, suit, proceeding or investigation which would not, if adversely determined, materially adversely affect this Agreement or the performance by the parties of their respective obligations hereunder; or

(2) No changes shall have occurred after the Contract Date and on or before the Commencement Date in any applicable federal, State or local rule, regulation or ordinance thereunder, or in the interpretation thereof by any applicable regulatory authority, that would make the execution or delivery by the City or the Company of this Agreement or that would make compliance by the City or the Company with the terms and conditions of this Agreement, a violation of such law, rule, regulation or ordinance.

If all such conditions precedent are not so satisfied or waived on or before March 1, 2003, or such later date mutually agreed to in writing by the parties hereto, or if any circumstances described in clauses (1) or (2) above, if any, exist and continue as of March 1, 2003, or such later date mutually agreed to in writing by the parties hereto, then either party, by notice in writing to the other, may terminate this Agreement. If either party shall give written termination notice to the other, neither party shall be liable to the other for the termination of this Agreement, except on account of the failure of a party to satisfy its respective conditions precedent set forth in Section 3.1.1 or 3.1.2, respectively, and each party shall bear its respective costs and expenses attributable to the transactions herein contemplated.

### **Section 3.3 Overall Company Responsibilities.**

**Section 3.3.1** During the Initial Improvements Period, the Company shall undertake and complete the Initial Improvements. The cost of the Initial Improvements shall be paid by the Company and reimbursed by the City per the terms of this Service Agreement and are anticipated to include all items specified in Schedule 12.2 hereto. No reduction, modification, or removal of items listed in Schedule 12.2 shall be made without the prior written approval of the City's Director of Public Services.

**Section 3.3.2** On and after the Commencement Date and throughout the Contract Term the Company shall:

(1) operate, maintain and manage the Facility to process domestic raw sewage, commercial and industrial wastewater, all in accordance with this Agreement (including, without limitation, the requirements set forth in the Schedules hereto) and Applicable Law, said Company responsibilities including, without limitation, the following:

(a) preparing and delivering to the City an updated Operation and Maintenance Manual for the Facility including the Capital Improvements (the "Operation and Maintenance Manual") ;

(b) conducting day-to-day operations and monitoring, in accordance with this Agreement, including all Schedules hereto, and in compliance with Applicable Law;

(c) preparing and submitting to appropriate authorities all reports and plans mandated by this Agreement and by Applicable Law;

(d) complying with all emergency and safety requirements set forth in Schedule 3 hereto and required by Applicable Law;

(e) performing all scheduled maintenance to ensure the long-term efficient operation of Facility in accordance with established industry standards and manufacturer's requirements so as to be in accordance with and subject to the terms of this Agreement.;

(f) in addition to the Capital Improvements, performing maintenance repairs and replacements as needed on Facility infrastructure components in accordance with established industry standards and manufacturer's requirements so as to be in accordance with and subject to the terms of this Agreement;

(g) maintaining the inventory and inventory records for the consumable supplies and Equipment needed for the operations and maintenance of the System, including, without limitation, the Equipment and Chemicals Inventory described more particularly in Schedules 2 and 9 hereto;

(h) maintaining the grounds at the Site in a neat and orderly condition;

(i) moving and disposing of solid waste in accordance with and subject to the terms of this Agreement;

(j) disposing of Sludge at the site currently provided by the City (drying beds / lagoons) or using alternate facilities and site(s) to be recommended by the Company and approved by the City should the Company receive notification from the City that the existing facilities are no longer available. Compensation to the Company for the design, construction and operation of new sludge treatment and disposal facilities shall be made by the City as summarized in Schedule 16 hereto;

(k) integrating, on an on-going basis, the SCADA System with Facility operations, including, without limitation, (a) any staff training with regard to the SCADA System that may be required, and (b) any modifications to the SCADA System that may be required in connection with the Capital Improvements;

(l) hiring and retaining appropriate staff for the Facility while maintaining compliance with Section 3.9 hereof; and

(m) maintaining any and all appropriate records in connection with the activities specified above;

(2) The Company shall provide, except for Equipment, and other facilities and materials included in the Facility as of the Commencement Date, and except for the Capital Improvements (listed in Schedule 12.2 and 12.3), at its sole cost and expense, all labor, materials, machinery, vehicles, equipment, office equipment (i. e. copiers, computers, etc.) fuel, chemicals, supplies, spare parts, expendables, consumables, testing and laboratory analysis and any other items required for operation, maintenance repair, replacement, renewal and management of the Facility in accordance with this Agreement.

(3) As requested by the City, provide facilities and facility operation of any future Facility upgrades or expansions in accordance with terms and conditions mutually agreed to by the City and the Company.

### **Section 3.4 Sludge Disposal**

The Company also shall be responsible for the identification of an authorized disposal facility for the disposal of Facility Sludge (the "Disposal Facility"), and the negotiation and execution of a contract or other agreement with the Disposal Facility (the "Disposal Agreement") ; provided, however, that prior to the Company's entering into the Disposal Agreement, the terms and conditions of said Disposal Agreement shall be approved in writing by the City, which approval shall not be unreasonably withheld. The costs for transportation and disposal of Sludge shall be borne by the Company in accordance with Schedule 16 hereto. Notwithstanding anything to the contrary contained herein, in no event shall the Company (i) be deemed to have title to, or be the generator of, Sludge and/or (ii) have any custody chain exposure for Sludge provided the Company did not contribute the hazardous waste through its operations and the Company follows transportation and disposal methods that fully comply with all Applicable Law.

### **Section 3.5 City Responsibilities.**

On and after the Commencement Date and during the remainder of the Contract Term, the City shall:

(1) pay, or cause to be paid, the Service Fee to the Company in accordance with the terms and conditions of this Agreement for the Company's performance of its obligations under this Agreement;

(2) afford the Company access to the Facility to the extent necessary for the Company to perform its obligations hereunder.

(3) retain responsibility for the operation and maintenance of the Collection System and Pump Stations, perform meter reading and maintenance, enforce the Industrial Pretreatment Program, provide new sewer connections, and perform long-term System and Service Area planning;

(4) make available to the Company equipment warranty information, engineering drawings, calculations, maintenance manuals, operational records, logs, reports, submittals, repair records, audits, and Sludge disposal and wastewater disposal information which may be in the City's possession or that of its agents, relating to the design, condition, operation or maintenance of the Facility.

### **Section 3.6 Repair, Maintenance and Replacement.**

Notwithstanding anything to the contrary contained herein, the Company shall bear the costs associated with repair and replacement of all or any portion of the existing Facility which requires such repair or replacement for continued lawful and efficient operation. In addition, throughout the Contract term the Company shall at its sole expense pay for all regular, routine, preventative and predictive maintenance items.

#### **Section 3.6.1 Repair and Replacement During Proposal A Period**

During the Proposal A Period, the Company shall perform the Repair and Replacement activities as described in Schedule 12.2. The activities described in Schedule 12.2 shall be in addition to general obligations to perform repair and replacement described in the paragraph immediately preceding this Section 3.6.1.

#### **Section 3.6.2 Repair and Maintenance During the Proposal B Period**

The anticipated Major Repair and Maintenance Fund expenditures during the Proposal B Period of the Contract Term shall be in the amounts identified in Schedule 11.

The Company shall make all necessary Major Repair and Maintenance Fund expenditures and on a monthly basis shall submit to the City a report of expenses.

Any Major Repair and Maintenance Fund monies which remain unspent as of the end of any Fiscal Year shall be retained in the Major Repair and Maintenance Fund. Any Major Repair and Maintenance Fund monies which remain unspent at the termination or expiration of this Agreement shall revert to the City.

All Major Repair and Maintenance Fund expenditures in excess of amounts in the Repair and Maintenance Fund shall be borne by the Company.

During the Contract Term, the Contractor shall recommend and perform activities to be paid from the Major Repair and Maintenance Fund as follows:

(1) The Company shall demonstrate the necessity for performing any major repair and maintenance activities payable from the Major Repair and Maintenance Fund, and shall further demonstrate that all applicable and routine maintenance has been performed.

(2) The Company shall prepare written recommendations for all major repair and maintenance activities to be paid from the Major Repair and Maintenance Fund that the Company determines may be required to keep the Facility in a state of good operating repair and order, which recommendations shall include the approximate cost of completing such activities.

(3) The City, within fifteen (15) days of receipt of such written recommendations, shall review and comment on the indicated expenditures. The City's review and comment shall constitute either approval or denial of the Company's recommendation and shall in no manner limit or reduce the Company's obligations under this Service Agreement. The Company shall utilize its "best efforts" to incorporate and/or address the City's comments prior to proceeding. If the City fails to notify the Company, in writing, within such fifteen (15) day period of its comments, the City's comment period shall be deemed to have closed.

(4) Upon the satisfaction of the City comment period requirements ( item 3 above), the Company shall proceed with the recommended work and it shall be paid for from the Major Repair and Maintenance Fund or by the Company if no such Major Repair and Maintenance Funds are available; provided, however, that in the event of an emergency situation involving health and safety concerns, the Company may, upon prior notice to and approval of the City's Director of Public Services, immediately undertake work to be paid for from the Major Repair and Maintenance Fund, to the extent such funds are available, or paid directly by the Company without reimbursement from the City.

### **Section 3.7 Company Project Manager.**

The Company has designated Mr. E. J. Shalaby as the Company's full-time Project Manager and such Project Manager, and any City-approved successor, shall, within ninety (90) days after the Commencement Date, reside either within the City or within a reasonable distance from the Facility that will allow the Project Manager to reach the Site within one hour. The City has selected the Company to perform the overall scope of services contemplated under this Agreement based, in part, on the past successful experience and expertise of the designated Project Manager. As requested by the City, the Project Manager designated by the Company shall have overall responsibility and authority for the Company's obligations and performance under this Agreement. Accordingly, the Company shall not, absent good cause, replace such Project Manager during the term of this Agreement, without the prior approval of the City. If such Project Manager or any City-approved successor shall die, become incapacitated, retire, resign as Project Manager or otherwise cease employment with the Company or become unable to fulfill the duties of the Company's Project Manager hereunder, the Company shall not appoint a successor Project Manager without the prior written approval of the City which shall not be unreasonably withheld. If the City, in its sole discretion, determines that the Project Manager is performing in an unsatisfactory manner, or

if an unworkable relationship between the Project Manager and the City shall arise, the Company, upon notice by the City of such circumstance, shall promptly replace such Project Manager with a successor acceptable to the City; provided, however, the City represents that it will not give such notice to the Company unless and until the City, in its sole determination, has exercised reasonable good faith efforts to rectify to its satisfaction the adverse circumstance regarding the Project Manager.

### **Section 3.8 Company Construction Manager.**

The Company has designated Mr. Kurt Maddern of the Company as the Company's manager of the Construction Work (the "Construction Manager") to be provided by the Company to design and construct the Capital Improvements at the Facility (Schedule 3.A and 3.B and Schedules 12.1 and 12.2) during the 24 month schedule provided by the Company as Schedule 12 C hereto. The City has selected the Company to perform the services contemplated under this Agreement based, in part, on the past successful experience and expertise of the designated Construction Manager. Accordingly, the Company shall not, absent good cause, replace such Construction Manager during the term of this Agreement, without the prior approval of the City. If such Construction Manager or any City-approved successor shall die, become incapacitated, retire, resign as Construction Manager or otherwise cease employment with the Company, or become unable to fulfill the duties of the Company's Project Manager hereunder, the Company shall not appoint a successor Construction Manager without the prior written approval of the City which shall not be unreasonably withheld. If the City, in its sole discretion, determines that the Construction Manager is performing in an unsatisfactory manner, or if an unworkable relationship between the Construction Manager and the City shall arise, the Company, upon notice by the City of such circumstance, shall promptly replace such Construction Manager with a successor acceptable to the City; provided, however, the City represents that it will not give such notice to the Company unless and until the City, in its sole determination, has exercised reasonable good faith efforts to rectify to its satisfaction the adverse circumstance regarding the Construction Manager.

### **Section 3.9 Personnel.**

On or before the commencement of the Initial Operation Period, the Company shall complete its interviewing of all current City employees of the Facility whether or not represented by collective bargaining representatives (the "City Employees") who are interested in and apply for a position with the Company. City Employees who apply for employment with the Company shall be offered positions providing comparable wages and benefits to their current City positions at the Facility as summarized in Schedule 3 of this Agreement and as discussed below. All City Employees may be required to take and pass lawful drug testing as a condition of employment. Additionally, City Employees may be required to take a medical examination, the results of which shall not be a factor in their employment. During the Initial Operation Period and during the first three (3) years of the Contract Term (the "Transition Period"), the Company shall, in accordance with Section 3.9.3 below, employ all City Employees hired as its employees at the Facility.

### **Section 3.9.1 Orientation and Career Planning.**

Within the first two (2) weeks of the Initial Operation Period, the Company shall conduct a Company orientation and career planning workshop or workshops at the Company's sole cost and expense for City Employees. The workshop(s) shall apprise City Employees of applicable legal requirements relative to their employment rights, and shall orient the City Employees to the Company's management, operation and maintenance policies and approaches (and its plan for providing such services under this Agreement) , its career planning policy, its hiring program and criteria and its compensation and benefits plans. Interview and employment schedules shall be established at these workshops.

### **Section 3.9.2 Comparable Employment.**

The Company shall provide City Employees with a total package of compensation and benefits comparable to or better than compensation and benefits provided by the City for a minimum of three years following the Commencement Date. The Company acknowledges that it has agreed to recognize and bargain in good faith with the City Employees' collective bargaining representatives to determine the specific terms and conditions of employment to which such City Employees will be subject. The Company shall provide the City with wages and benefits specifics at least ten (10) days prior to the Commencement Date of the Initial Operation Period. All City Employees shall receive year for year credit for years employed by the City for purposes of eligibility and vesting in the Company's benefits programs. All City Employees and dependents currently covered by the City's health insurance program shall be covered during the employment of the City Employees under the Company's health insurance program without disqualification for pre-existing conditions.

### **Section 3.9.3 Continued Employment.**

Following the three-year Transition Period, it is the City's and the Company's desire to maximize continued employment opportunities for the City Employees hired by the Company at the Facility. Therefore, Interim Operations shall include training and development provisions for then existing personnel to transition to future operations. The Company may reduce staffing numbers following the three (3) year period with preferred approaches being voluntary attrition, buyouts, relocation and transfers rather than layoffs. Involuntary layoffs of City Employees hired by the Company are not permissible during the Transition Period. Employees may be terminated for cause or work-related performance at any time. Notwithstanding the foregoing, the Company's commitment to employ a City Employee shall end upon the earlier of: (i) the Transition Period; (ii) said City Employee reaching retirement age or (iii) earlier as mutually agreed by the City Employee and the Company

## **Section 3.10 Liquidated Damages**

### **3.10.1 Failure to Meet Effluent Standards**

Company is required to satisfy the requirements of all Applicable Law, including Effluent Limits, with respect to the quality of treated effluent discharged from the Facility as set forth in Schedule 1 hereto except during events of Uncontrollable Circumstances. Except where such failure is due to Uncontrollable Circumstances, failure to satisfy such requirements, or failure to operate the Facility in such a manner as to minimize public complaints concerning noise and/or odor emanating from the Facility, shall result in the imposition on the Company of liquidated damages in the manner, and in the amounts set forth in this Section 3.10. If the Company fails to meet the Effluent Limits as and when required hereunder:

(1) the Company shall immediately take all reasonable and appropriate action to satisfy all Effluent Requirements as applicable;

(2) the Company shall provide a plan to the City outlining corrective actions for achieving compliance with Effluent Limits as applicable (the "Compliance Plan") within twenty-four (24) hours of written notice of noncompliance given by the City;

(3) the City will review and provide written comments on the Compliance Plan within twenty-four (24) hours after receipt; and

(4) the Company shall immediately implement the Compliance Plan, which shall address the City's comments. The Company will be responsible for performing any and all operational modifications as specified by the Compliance Plan. Failure to either provide a Compliance Plan or to implement the corrective actions set forth in the Compliance Plan shall result in Company liability for liquidated damages in the amount of \$5,000 per day from such time that either (i) the Compliance Plan should have been submitted, or (ii) the date on which corrective actions should have commenced pursuant to the Compliance Plan.

Neither the review of or comment on, nor the failure of the City to comment on, any Compliance Plan proposed by the Company, shall relieve the Company of any of its responsibilities under this Agreement, be deemed to constitute a representation by the City that the corrective actions proposed in any such Compliance Plan will cause the Facility to be in compliance with the Effluent Limits, as applicable, or otherwise impose any liability on the City.

All fines or penalties imposed on the City or the Company by any Governmental Body as a result of failure of the Facility to conform to Effluent Limits shall be the sole obligation of and shall be paid by the Company, except to the extent that such failure or noncompliance results from an Uncontrollable Circumstance. Nothing contained herein shall obligate the Company to bear any cost or expense associated with fines or other liabilities previously incurred or imposed on or after the Contract Date with respect to operation of the Facility prior to the Contract Date and the City shall indemnify the Company with respect to such matters in accordance with Section 7.4.2 hereof.

### 3.10.2 Failure to Meet Additional Performance Standards

Company is required to meet all requirements of Applicable Law and to provide the City with demonstrated performance as specified in this Service Agreement for specific performance items except during periods of Uncontrollable Circumstances. Failure by the Company to demonstrate the specified performance for the items enumerated below shall be noticed by the City to the Company and the Company shall promptly submit to the City a corrective action program for review and acceptance by the City. The City's approval shall not be unreasonably withheld.

Failure of the Company to correct the specified performance deficiency within thirty (30) days of the Company's receipt of notice thereof from the City of the City's receipt and acceptance of the Company's corrective action program (or to begin to correct such deficiency within such thirty day period if the correction will take longer than 30 days) shall allow the City to impose liquidated damages as specified below until such time as the specified performance deficiency is corrected by the Company.

Following the process described in this Section 3.10.2, the following four (4) performance items shall be the subject of the specified liquidated damages should the Company fail to perform as specified by the Service Agreement and fail to correct such deficiency within the time period specified above.

Failure to provide:

1) Demonstrated compliance with maintenance standards and maintenance requirements of this Service Agreement to include maintenance records, physical condition of the Facility equipment and systems.

\$ 1,000 / day

2) On – going provision of major Repair & Replacement capital items during the twenty (20) term of the Service Agreement per the requirements of the Service Agreement

\$ 1,000/day

3) Timely submittal of weekly, monthly, and annual reports in acceptable detail as outlined by this Service Agreement. These reports shall address Facility Operations & Maintenance results and status as requested by the City and as mutually agreed by the City and the Company.

\$ 1,000 / day

4) Maintenance of staffing levels consistent with provisions of this Service Agreement and / or regulatory requirements and Applicable Law.

\$ 1,000 / day

These liquidated damage provisions of Sections 3.10.1 and 3.10.2 are in addition to any other provisions of this Agreement except for the requirements of Section 3.11.6 – Maximum and Minimum Compensation.

### **Section 3.11 Fees and Payments.**

#### **Section 3.11.1 Reimbursement for Transaction Costs.**

Within three (3) days following the Commencement Date, the Company shall pay to the City a one-time payment for the fees and expenses paid or incurred by the City to or for its consultants relative to the planning, preparation and procurement through contract execution with respect to this Agreement (the "Transaction Costs") in an amount not to exceed three hundred thousand dollars (\$300,000) (the "Transaction Cost Payment") . With respect to the Transaction Cost Payment, the City shall provide to the Company an invoice for the Transaction Cost Payment together with reasonable documentation of the Transaction Costs. The invoice for the Transaction Cost Payment shall be delivered by the City to the Company on or prior to the Commencement Date.

#### **Section 3.11.2 Pass Through Costs.**

Pass Through Costs for any Billing Month shall be the sum of the costs and expenses set forth in Schedule 10 hereto which were incurred by the Company during such Billing Month, to the extent of Company substantiation for such costs and expenses, exclusive of profit to the Company or any Company Affiliate; provided, however, that electricity and natural gas Pass Through Costs shall be reimbursed up to the maximum amount set forth in Schedule 10.

During the course of the Contract Term, the City shall have the right to equitably adjust the cap for the maximum quantity of utilities that shall be provided by the City for electrical power and natural gas. This adjustment shall be made only if the 12 month moving average for flow or loadings falls outside of the +/- 10% ban of the annual range specified in Table S2-1 of Schedule 2 hereof. In such case, the Company and the City shall negotiate in good faith to adjust the maximum utilities quantity usage cap upward or downward , as the case may be, in accordance with the adjustment methodology set forth in Schedule 5 incorporated by reference herein and made a part hereof. The City shall remain responsible for providing the utilities up to the maximum utilities usage cap so specified.

#### **Section 3.11.3 Service Fee.**

During the term of this Agreement, the City shall pay the Company the Service Fee described in Schedule 11. Commencing with the first Billing Month and for each Billing Month thereafter, the City shall pay to the Company a Service Fee for managing, operating and maintaining the Facility pursuant to the terms and conditions of this Agreement. The Service Fee paid shall be dependent upon the phase of operation of the Facility. The initial Service Fee shall be the Proposal A Service Fee. The Proposal A Service Fee shall terminate on the Acceptance Date and the Proposal B Service Fee shall commence on the day after the Acceptance Date. Except as otherwise provided in this Agreement, the Service Fee includes all compensation to the Company for managing, operating and maintaining the Facility. The Service Fee shall be paid in increments of 1/12th each during each month of a Contract Year.

#### **Section 3.11.4 Service Fee Adjustment.**

The City shall have the right to equitably adjust the Service Fee payment formula over the course of the Contract Term as follows:

(1) as necessary, to comply with the private activity limitations described in Section 141 of the Internal Revenue Code and regulations and official interpretations issued thereunder, including, without limitation, Revenue Procedure 97-13. Any such adjustments shall be such that the fixed and variable components of the Service Fee are within the specified percentages allowed by the private activity limitations described in Section 141 of the Internal Revenue Code and regulations issued thereunder. Adjustments shall not entitle the Company to additional compensation. Should such adjustments not be possible so that continued compliance with the private activity limitations described in Section 141 of the Internal Revenue Code and regulations issued thereunder is not possible, the City reserves the right to terminate this Agreement upon thirty (30) days notice to the Company. Any such termination shall be deemed to be a Termination for Convenience pursuant to and governed by Section 8.4.1 hereof;

(2) if the average ranges for flow and loadings fall +/- 10% outside of the annual ranges specified in Schedule 1 hereof, the Company and the City shall negotiate in good faith to adjust the Service Fee upward or downward, as the case may be, in accordance with the adjustment methodology set forth in Schedule 5 incorporated by reference herein and made a part hereof;

(3) as provided in Section 4.5.3 (Conditions to Legal Entitlement) hereof;

(4) by (i) mutual agreement of the parties as to the amount and/or methodology and (ii) determination by the City that any such adjustment will not contravene the Applicable Law (including, without limitation, any law relating to procurement) or the private activity limitations described in Section 141 of the Internal Revenue Code and regulations and official interpretations issued thereunder, including, without limitation Revenue Procedure 97-13; and,

(5) annually on the anniversary date of the Commencement Date, the Service Fee will be adjusted to reflect changes in the CPI index less energy costs published

by the United States Department of Labor -Bureau of Labor Statistics for all urban consumers (" CPI-U") for the San Francisco Bay Area B/C communities with populations less than 1,500, 000 as outlined in Schedule 5 hereto. Such adjustment shall utilize the percentage change in CPI-U for the most recent 12 month period using all monthly indices published for that 12 month period as compared to the available indices published for the prior 12 month time period.

### **Section 3.11.5 Cost Savings.**

The Company shall actively pursue improvements in the effectiveness and efficiency of the operation, maintenance and management of the Facility that may reduce the Service Fee or Pass Through Costs. Any Company proposals for such improvements, including the costs, benefits and anticipated net savings, shall be provided to the City in writing. If the City approves any such proposals, and if implementation of any such proposal results in net savings to the City as determined by the City, the City shall pay the Company an amount equal to forty percent (40%) of the aggregate net savings to the City resulting from the implementation of any such proposal. Such share of net savings shall be, at the discretion of the City, either (i) a one time payment to the Company, or (ii) an annual payment, depending on the nature of the modification and the resulting net savings. Any such payment shall be consistent with the private activity limitations described in Section 141 of the Internal Revenue Code and regulations and official interpretations issued thereunder, including, without limitation, Revenue Procedure 97-13.

### **Section 3.11.6 Absolute Maximum and Minimum Compensation**

NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, THE AGGREGATE TOTAL COMPENSATION PAID BY THE CITY TO THE COMPANY IN ANY CONTRACT YEAR SHALL NOT EXCEED \$ 2,199,721 (THE MAXIMUM COMPENSATION") OR BE LESS THAN \$1,759,777 (THE "MINIMUM COMPENSATION") AS ADJUSTED FOR CHANGES IN THE CPI INDEX. THE ADJUSTMENT OF THE MAXIMUM COMPENSATION AND THE MINIMUM COMPENSATION FOR CHANGES IN THE CPI INDEX WILL BE IN THE SAME MANNER AS THE ADJUSTMENT OF THE SERVICE FEE DESCRIBED IN SECTION 3.11.4(5). FURTHERMORE, THE AMOUNT OF BOTH THE MAXIMUM COMPENSATION AND THE MINIMUM COMPENSATION WILL BE ADJUSTED UPWARD BY THE FIXED DOLLAR AMOUNT OF COMPENSATION RELATING TO ANY ADDITIONAL SERVICES PROVIDED UNDER SECTION 12 OR SCHEDULE 16 (RELATING TO NEW SLUDGE DISPOSAL OPERATIONS AND FACILITIES) AT THE TIME, IF ANY, THE CITY OPTS TO PROCURE SUCH SERVICES UNDER THE AGREEMENT. AS USED IN THIS SECTION, THE TERM "AGGREGATE TOTAL COMPENSATION" INCLUDES ALL PAYMENTS MADE OR TO BE MADE TO THE COMPANY BY THE CITY LESS ALL PAYMENTS MADE OR TO BE MADE TO THE CITY BY THE COMPANY, EXCLUDING ALL PAYMENTS FOR (1) CONSTRUCTION WORK, (2) PASS THROUGH COSTS ACTUALLY PAID BY THE CITY, AND (3) STUDIES AS DESCRIBED IN SCHEDULE 6. IN DETERMINING THE AMOUNT OF THE AGGREGATE TOTAL COMPENSATION IN ANY CONTRACT YEAR, THE AMOUNT

WILL BE ADJUSTED DOWNWARD BY ANY AMOUNT WHICH THE COMPANY HAS TO PAY FOR ELECTRICITY OR NATURAL GAS (AN "EXCESS PASS THROUGH COST"), UNLESS THE CITY OBTAINS, WITH RESPECT TO SUCH EXCESS PASS THROUGH COST, AN UNQUALIFIED OPINION OF NATIONALLY RECOGNIZED BOND COUNSEL THAT NOT MAKING SUCH ADJUSTMENT TO AGGREGATE TOTAL COMPENSATION WILL NOT ADVERSELY AFFECT THE EXCLUSION FROM GROSS INCOME OF INTEREST ON ANY TAX-EXEMPT BORROWING THE PROCEEDS OF WHICH WERE ALLOCATED TO THE CITY OF RICHMOND WASTEWATER TREATMENT FACILITY (AN "OPINION OF COUNSEL"). THIS SECTION IS NOT INTENDED TO COVER ADJUSTMENTS TO AGGREGATE TOTAL COMPENSATION DUE TO A CHANGE IN LAW OR UNCONTROLLABLE CIRCUMSTANCES, WHICH ADJUSTMENTS TO AGGREGATE TOTAL COMPENSATION WILL BE SPECIALLY NEGOTIATED AT THE TIME BASED ON THE SPECIFIC CONTEXT AT THAT TIME, SO LONG AS SUCH ADJUSTMENTS TO AGGREGATE TOTAL COMPENSATION ARE APPROVED BY AN OPINION OF COUNSEL.

### **Section 3.12 Utilization of Effluent Wastewater and Methane Gas Production.**

Except for such amounts as are used by Company to heat the Facility digesters and buildings, the City retains and reserves the right to utilize, sell, and/or otherwise dispose of the treated wastewater effluent and/or excess methane gas produced by the Facility. The Company shall have no liability or responsibility with respect to such wastewater effluent and/or methane gas used, sold and/or disposed of by the City. The Company shall utilize its experience and expertise to maximize the production of methane gas consistent with all applicable laws, regulations, and industry standards.

### **Section 3.13 Grant Deviation Approval Letter**

The City and Company shall mutually determine the need for a "Grant Deviation Approval Letter". In the event that the parties determine that such letter is required, the Company shall work in an expeditious manner with cooperation from the City to obtain such letter from the US EPA in order to divest the Facility of any ongoing interest resulting from Federal construction grant funds being utilized for Facility construction.

## **ARTICLE IV**

### **CAPITAL IMPROVEMENTS -DEVELOPMENT PHASE**

#### **Section 4.1 Development Phase -Generally.**

The period beginning on the Commencement Date and ending on the Construction Date shall be referenced herein as the "Development Period." During the Development Period, the obligations of the parties with regard to the Capital Improvements shall be as provided for in this Article and the obligations of the parties to proceed with their respective

obligations during the Construction Period shall not commence until all Construction Date Conditions have been satisfied.

## **Section 4.2 Site Suitability Confirmation**

### **Section 4.2.1 Site Familiarity.**

The Company acknowledges that the Company's agents and representatives have visited, inspected and are familiar with the Site, its surface physical condition relevant to the obligations of the Company pursuant to this Agreement, including surface conditions, normal and usual soil conditions, roads, utilities, topographical conditions and air and water quality conditions; that the Company is familiar with all local and other conditions which may be material to the Company's performance of its obligations under this Agreement (including, but not limited to transportation; seasons and climate; access, availability, disposal, handling and storage of materials and Equipment; and availability and quality of labor and Utilities) , and has received and reviewed all information regarding the Site provided to it as part of the RFP process or obtained in the course of performing its obligations hereunder.

### **Section 4.2.2 Assumption of Structural Suitability Risk.**

Based on the Site investigations and other inquiries made by the Company prior to the Contract Date, which the Company acknowledges to be sufficient for this purpose, the Company assumes the risk of all subsurface geotechnical conditions at the Site as they may affect the structural suitability of the Site or the Company's excavation or construction costs or schedules, and agrees that any such subsurface geotechnical condition revealed during excavation for or construction of the Capital Improvements which has such an effect shall not be an Uncontrollable Circumstance.

## **Section 4.3 Company Responsibilities During the Development Period**

### **Section 4.3.1 Obligation to Proceed.**

Promptly following the Contract Date, the Company shall exercise good faith and due diligence in order to promptly satisfy all of the following Company responsibilities:

(a) Site Conditions. Prior to the Construction Date, a geotechnical investigation may be performed by qualified professionals consistent with prudent industry practices, and as necessary for construction of the required Capital Improvements as determined by the Company

(b) Permit Applications and Fee Payments. The Company shall prepare and submit, on behalf of the City as applicant, applications, including any and all required studies and supporting documentation, for any and all required Permits and approvals. The Company shall pay all standard Permit fees, permitting agency costs and charges due in connection therewith, and shall take all action necessary on behalf of the City as applicant in connection with all associated permitting and land use proceedings before all appropriate Governmental

Bodies if and to the extent required in order to obtain, designate and provide for the use of the Site for the purposes of this Agreement.

(c) Legal Entitlements. The Company shall submit, on behalf of the City as applicant, applications and take all other steps which are necessary to obtain all Legal Entitlements required to be issued under Applicable Law before the Construction Date, in form and substance satisfactory to the City.

(d) Site-Related Plans. The Company shall prepare and submit to the appropriate Governmental Body, as required, any and all plans necessary for issuance of any Permit, including but not limited to, (a) a clearing and grading plan, (b) an erosion and sediment control plan, (c) a drainage plan, and (d) a landscaping plan.

(e) Supplemental Environmental Impact Statement. If required, Company shall prepare for the City all supplements and addenda to any environmental impact statement prepared by the City with respect to the Site which are required under Applicable Law to undertake and complete the Capital Improvements or to obtain any necessary Permits and approvals.

(f) Information to Support Site Easements. In the event that the City is required to grant Utility easements on the Site in connection with the Capital Improvements, the Company shall provide complete descriptions of all Utility connections and routes on the Site necessary for such purposes.

(g) Land Use. If necessary, the Company shall apply to the appropriate Governmental Body for any required land use approval applicable to the Site caused by the Capital Improvements so that, no later than the Construction Date, a zoning ordinance, or a variance or special exception thereto, shall then be effective which permits the construction of the Capital Improvements, and the Company shall furnish confirming evidence thereof to the City.

(h) Utilities. The Company shall make all arrangements necessary to secure the availability of all Utilities required to support the Facility including the Capital Improvements in the capacities required hereunder, and shall evidence such availability by letters from the providers of such Utilities.

(i) Technical Materials and Safety Plans. The Company shall provide to the City copies of all plans, technical specifications, blueprints, drawings, reports and other design documents and safety plans prepared by or on behalf of the Company prior to the Construction Date for permitting, regulatory compliance, financing, bonding, credit enhancement and insurance purposes. Documents to support Permit applications shall be submitted to the City for review prior to submittal to permitting agencies.

(j) Construction Contract. Not later than forty-five (45) days prior to the Construction Date, the Company shall enter into a construction contract with a contractor (the "Contractor") experienced in constructing projects similar to the Capital Improvements (the "Construction Contract"). The Construction Contract shall provide for the performance of all construction work related to the Capital Improvements, except that to be performed by the Company. All drawings, blueprints, plans and specifications prepared under the Construction Contract shall be consistent with all terms and conditions of this Agreement. The Construction Contract shall be subject to review and comment by the City. No such review or comment by the City shall amend, alter or affect this Agreement or the Company's obligations hereunder in any manner, nor shall the City incur any liability or expense as a result thereof. The Contractor shall pay prevailing wages under the Construction Contract.

(k) Construction Performance Bond and Labor and Materials Bond. On or before the Construction Date, the Company shall provide financial security for the performance of its and the Contractor's Construction Period obligations hereunder through Construction Performance and Labor and Materials Bonds issued by a surety acceptable to the City. The Construction Performance and Labor and Materials Bonds shall be issued in a form as approved by the City no later than ten (10) days prior to the Construction Date and in the amount of the Fixed Construction Price.

(l) Applicable Law Compliance. The Company shall comply with all other requirements of Applicable Law pertaining to the activities constituting the Construction Date Conditions.

(m) The Guarantee. The Guarantor shall execute and deliver to the City the Guarantee substantially in the form of Exhibit B hereto.

(n) Insurance. The Company shall submit to the City the necessary Certificates and copies of insurance policies and/or such other evidence as the City in its sole discretion shall determine to be satisfactory, for all Insurance specified in Schedule 4 hereto.

(o) Emergency Response Plan. The Company shall have completed and furnished to the City, and the City shall have accepted, the Emergency Response Plan described in Schedule 3 hereto.

(p) Financing Assistance. The Company shall cooperate with and assist the City in providing any information, certifications or documents which reasonably may be required in connection with the issuance of City revenue obligations or otherwise obtaining the funds necessary to pay the Fixed Construction Price.

(q) Representations. The representations of the Company set forth in Sections 9.2 and 9.3 hereof and of the Guarantor set forth in the Guarantee shall be true and correct in all material respects as of the Construction Date as if made on and as of the Construction Date, and the Company shall deliver to the City a certificate of an authorized officer of each to that effect, together with appropriate certified authorizing resolutions and incumbency certificates.

(r) Documents Evidencing Required Activities. The Company shall have provided to the City copies of all filings and reports conducted, prepared or obtained with respect to or evidencing the Company's activities pursuant to this Section 4.3.

(s) Financial Condition. The Company and Guarantor shall have provided to the City the financial information and documentation required in Section 11.2.5 of this Agreement in accordance with Section 11.2.6 of this Agreement and there shall not have occurred any change, financial or otherwise, in the condition of the Company or the Guarantor that would materially and adversely affect the ability of the Company or the Guarantor to perform its respective obligations under this Agreement or the Guarantee.

(t) Opinions of Counsel. The Company shall deliver to the City such favorable opinions of counsel for the Company as to the enforceability of this Agreement and the Guarantee, in customary form for financing transactions, as to the matters of law covered by the representations of the Company set forth in Sections 9.2 and 9.3 hereof, the representations of the Guarantor set forth in the Guarantee, and as to such other matters of law as the City may reasonably request.

(u) Notice of Default. The Company shall provide to the City, promptly following the receipt thereof, copies of any notice of default, breach or noncompliance received under or in connection with any Permit or any other matter pertaining to the Development Period.

#### **Section 4.4 City Responsibilities During the Development Period.**

Promptly following the Contract Date, the City shall proceed at its own cost and expense to exercise good faith and due diligence in order to satisfy all of the following City responsibilities.

##### **Section 4.4.1 Financing.**

The City shall obtain financing, through the public or private sector, for the Capital Improvements. The capital improvements and operations will be performed by the Company for the City so as to comply with all Federal, State, and local laws and regulations as required for the City to obtain its financing.

##### **Section 4.4.2 Legal Entitlements.**

The City shall cooperate with the Company in the submittal, on behalf of the City as applicant, all applications for Permits and Legal Entitlements which the Company is obligated to submit pursuant to Section 4.3 hereof.

##### **Section 4.4.3 Land Use.**

If requested by the Company, the City will assist the Company in any application for any change in land use approval that may be required to undertake the Capital

Improvements. This City assistance shall not be construed to be approval of the project or the process by the City.

**Section 4.4.4 Representations.**

The representations of the City set forth in Section 9.1 hereof shall be true and correct in all material respects as of the Construction Date as if made on and as of the Construction Date, and the City shall deliver to the Company a certificate of an authorized official to that effect, together with appropriate certified authorizing resolutions and incumbency certificates.

**Section 4.5 Construction Date Conditions.**

**Section 4.5.1 Construction Date Conditions.**

The obligations of the Company and the City to proceed with their respective obligations hereunder during the Construction Period shall not commence until all of the following conditions are satisfied or waived in writing by the City and the Company (the "Construction Date Conditions") :

(a) **Company Development Period Responsibilities.** The Company shall have fulfilled all of its responsibilities with respect to the Development Period under Section 4.3 hereof.

(b) **City Development Period Responsibilities.** The City shall have fulfilled all of its responsibilities with respect to the Development Period under Section 4.4 hereof.

(c) **Legal Entitlements.** All Permits and other Legal Entitlements required to commence construction of the Capital Improvements shall have been issued or obtained and shall be in full force and effect.

(d) **Acceptability and Effectiveness of Documents.** All of the documents, instruments and agreements identified in this Section 4 shall be in form and substance reasonably satisfactory to both parties, and shall be valid, in full force and effect and enforceable against each party thereto as of the Construction Date. No such documents, instruments or agreements shall be subject to the satisfaction of any outstanding condition precedent except those expressly to be satisfied after the Construction Date, no party to any such document, instrument or agreement shall have repudiated or be in default or imminent default thereunder, and each party shall have received such certificates or other evidence reasonably satisfactory to it of such facts as such party shall have reasonably requested. The City and the Company shall each proceed at their own cost and expense, in good faith and with due diligence, to take such actions as may reasonably be under their respective control in order to satisfy the condition set form in this Subsection 4.5.1(d).

(e) **Legal Proceedings.** There shall be no Legal Proceeding which (1) challenges, or might challenge, directly or indirectly, the authorization, execution, delivery,

validity or enforceability of this Agreement or the Guarantee, or (2) seeks to enjoin or restrict the use of the Site for the purposes contemplated by this Agreement or seeks damages, fines, remediation or any other remedy in connection with the environmental condition or any other factor pertaining to the Site.

(f) **No Change In Law.** No Change In Law shall have occurred after the Contract Date that would make the authorization, execution, delivery, validity, enforceability or performance of this Agreement or the Guarantee a violation of Applicable Law.

**Section 4.5.2 Required Development Milestone Completion Dates.**

Without limiting the Company's obligations under Section 4.3 hereof, and notwithstanding the occurrence of any Uncontrollable Circumstance, the Company shall meet, complete and satisfy in full the following milestones by the dates indicated:

<u>Milestone</u>	<u>Guaranteed Completion Date</u>
(1) Submit to the City the final implementation plan	(1) 60 days after the Contract Date for the Capital Improvements
(2) Submit to the City all applications for legal Entitlements required to commence construction of the Capital Improvements	(2) 60 days after the Contract Date

**Section 4.5.3 Conditions to Legal Entitlements.**

The Company shall apply on behalf of the City for any Legal Entitlement required to assure that the terms and conditions are not inconsistent with the Company's obligations hereunder, and shall notify the City of any terms and conditions proposed by the issuing or approving Governmental Body that are more stringent or burdensome than the standards set forth in Schedule 1 hereto. Within ten (10) days of the receipt of information as to proposed terms, conditions or requirements to be contained in any draft or final Legal Entitlement, the Company shall provide the City with written notice of its determination and reasoning as to whether and why the terms and conditions of any such draft or final Legal Entitlement are more burdensome or stringent than those set forth in Schedule 1 hereto. In the event the Company claims that such Legal Entitlement contains conditions or requirements which are

more burdensome or stringent than those set forth in Schedule 1, and therefore constitutes a Change In Law, the Company shall provide the City with notice and information required pursuant to Subsection 5.14.3 hereof.

**Section 4.5.4 Denial of a Legal Entitlement.**

In the event that at any time during the Development Period any application (or appeal from the denial of an application) for a Legal Entitlement required to be obtained by the Company hereunder for the Capital Improvements is denied, the City may elect either (1) to direct the Company to appeal the denial at the sole cost and expense of the City, or (2) terminate the Agreement, with the same effect as if the Company had terminated the Agreement upon a failure of the parties to satisfy the Construction Date Conditions contained in Section 4.5 hereof by the time required under Subsection 4.6.2 hereof. The City shall make any such election within sixty (60) days of the date it receives final formal notice of the denial action. If the City elects to direct the Company to appeal the initial denial, denial at a higher appellate level of the same Legal Entitlement shall give rise to additional termination options. Any election by the City to direct an appeal shall not operate to extend the date by which either party may terminate this Agreement under Subsection 4.6.2 hereof.

**Section 4.6 Closing the Development Period.**

**Section 4.6.1 Satisfaction of Conditions.**

The parties will give each other prompt notice when each Construction Date Condition has been achieved. Upon the satisfaction or waiver in writing by both the City and the Company of all such Construction Date Conditions, the parties shall mutually certify in writing that the Construction Date has occurred. Written documents or instruments constituting or evidencing satisfaction of the Construction Date Conditions shall be furnished to each party prior to or on the Construction Date.

**Section 4.6.2 Failure of Conditions.**

If within six (6) months of the Commencement Date, or such later date as may be agreed upon by the City and the Company, any of the Construction Date Conditions are not satisfied, or have not been waived, either party may, by notice in writing to the other party, terminate this Agreement. Neither party shall be liable to the other for the termination of this Agreement pursuant to this Section 4.6.2, and each of the parties shall bear its respective costs and expenses incurred in seeking to satisfy the Construction Date Conditions.

**Section 4.7 City Termination and Suspension Options During the Development Period**

**Section 4.7.1 City Convenience Termination Option During the Development Period**

The City shall have the right at any time prior to the Construction Date, exercisable in

its sole discretion for any reason by written notice to the Company, to terminate this Agreement. Upon any such termination, the City shall reimburse the Company for its substantiated actual direct costs incurred and any expenses paid or incurred to third parties from the Contract Date to the date on which the Agreement is terminated by the City, less any amounts already paid to the Company; provided, however, that all such costs and expenses must have been (a) directly related to the Company's performance of its Development Period obligations hereunder, and (b) necessary to be performed prior to the Construction Date, provided, however, that the total payment due to the Company under items (a) and (b) shall not exceed a maximum amount of \$250,000.

#### **Section 4.7.2 City Suspension Option During the Development Period.**

The City shall have the right at any time prior to the Construction Date, exercisable in its sole discretion, for any reason by written notice to the Company and without terminating this Agreement, to suspend the obligations of the Company and the City to seek the fulfillment of the Construction Date Conditions. Upon any such suspension, the City shall reimburse the Company, subject to the maximum reimbursement limitation set forth in Section 4.7.1 hereof, for its substantiated actual direct costs incurred and expenses paid or incurred to third parties from the Contract Date to the date on which the Agreement is suspended by the City, less any amounts already paid to the Company; provided, however, that all such costs and expenses must have been (a) directly related to the Company's performance of its Development Period obligations hereunder, and (b) necessary to be performed prior to the Construction Date. The Company shall not be further obligated during the suspension to seek to fulfill the Construction Date Conditions. The City may in its sole discretion, at any time thereunder, upon written notice to the Company, reinstate the obligations of the Company to fulfill the Construction Date Conditions, and thereupon an amount equal to all expenses previously reimbursed to the Company shall be deducted from the Fixed Construction Price and the obligations of the Company as to the Construction Date Conditions shall resume; provided, however, that the Fixed Construction Price shall be increased by the costs of demobilizing and remobilizing Company's personnel and activities. Such reinstatement shall also extend the dates by which the Construction Date Conditions must be fulfilled by the number of days of the suspension. If the City does not reinstate the obligation of the Company to seek to fulfill the Construction Date Conditions within twelve (12) months following the suspension, the Company may, at any time thereafter, terminate this Agreement upon written notice to the City.

#### **Section 4.7.3 Cost of Records and Reporting.**

During the Development Period, the Company shall prepare and maintain proper, accurate and complete records of the cost and description of the permitting and other Development Period costs of the Company since the Contract Date which are directly related to the Company's obligations under this Agreement, the cost of which would be the responsibility of the City if the City were to elect to suspend or terminate this Agreement pursuant to Subsection 4.7.1 or 4.7.2 hereof. All financial records of the Company and its Subcontractors shall be maintained in accordance with generally accepted accounting

principles and auditing standards. The Company shall submit all books and records or a reasonably detailed summary thereof acceptable to the City, together with a summary statement of monthly and aggregate reimbursable expenses incurred, to the City on a monthly basis after the Contract Date until either the City exercises its right to suspend or terminate this Agreement or until the Construction Date occurs, whichever is earlier. If the Company fails to provide such monthly reports to the City within sixty (60) days from the last business day of any such month, the Company waives its right to claim and receive any reimbursable expenses incurred for that month. Specific requests by the Company for the payment of reimbursable expenses shall include documentation substantiating such expense. In addition, on the Contract Date and on the first day of each month thereafter, the Company shall provide to the City an itemized list of all work related to the Capital Improvements expected to be undertaken in the following month and the expected costs thereof. The City shall have the right to question the Company's decision to undertake such activities and to provide notice to the Company that such costs will not be reimbursed.

#### **Section 4.7.4 Delivery of Development Period Work Product to the City.**

Concurrent with payment by the City to the Company of any amount due on termination or suspension of this Agreement by the City under this Section 4.7, the Company shall deliver to the City all its Development Period work product for the Capital Improvements during the period commencing on the Contract Date and ending on the date of payment. Such work product immediately shall become the property of the City and shall include, without limitation, all plans, specifications, designs, drawings, renderings, blueprints, manuals, equipment layouts, and Legal Entitlements and related applications, submittals and other information prepared for the purpose of planning, designing, constructing and operating the Capital Improvements and securing Legal Entitlements.

#### **Section 4.8 Termination for Cause During the Development Period.**

The City shall have the right during the Development Period to terminate this Agreement for cause and to pursue all remedies available pursuant to Article VIII hereof, without cost or liability to the City, based upon (1) any failure of the Company to satisfy the Development Period responsibilities specified in Section 4.3 hereof by the required date or (2) the occurrence of an Event of Default during the Development Period by the Company. The Company shall have the right during the Development Period to terminate this Agreement for cause and pursue all remedies available pursuant to Article VIII hereof, based upon the occurrence of an Event of Default during the Development Period by the City.

#### **Section 4.9 City Election to Initiate Construction Work.**

Notwithstanding anything in this Agreement to the contrary and without changing any of the obligations of the City or the Company other than those expressly changed under this Section 4.9, the City may provide written notice to the Company during the Development Period authorizing the Company to initiate certain portions of the Capital Improvements prior to the Construction Date. If the City provides such written notice to the Company to so authorize the commencement of certain portions of the Capital Improvements, then the costs

and expenses payable under Section 4.7.1 shall include such portions of the Capital Improvements which are authorized to be initiated prior to the Construction Date. There shall be no change in the Fixed Construction Price as a result of an election by the City under this Section 4.9.

## ARTICLE V

### DESIGN AND CONSTRUCTION OF THE CAPITAL IMPROVEMENTS

#### **Section 5.1 Construction Period -Generally.**

The period beginning on the Construction Date and ending on the Acceptance Date shall be referred to as the Construction Period. The Company shall complete all Capital Improvements during the Construction Period; provided, however, that the Company shall not begin construction at the Site until after issuance by the City of the Notice to Proceed. During this period, the Company shall be entitled to payments for construction of the Capital Improvements as provided in this Article, and will be entitled to the Proposal A Service Fee as set forth in Schedule 11 hereto.

#### **Section 5.2 Facility Ownership.**

The Facility shall be owned by the City at all times. The Company shall perform the Capital Improvements and other Services provided for herein as an independent contractor and shall not have any ownership or other property interest in the Facility or the Site.

#### **Section 5.3 Authorized Representative.**

The City and the Company shall each designate in writing by the Construction Date a person to transmit instructions, receive information and otherwise coordinate service matters arising pursuant to this Agreement during the Construction Period (each, an "Authorized Representative") . The designated representative of the Company (City) shall be responsible and authorized to represent the Company (City) on all aspects of this Agreement and the indicated scope of services (operations and capital). Either party may designate a successor or substitute Authorized Representative at any time by written notice to the other party.

#### **Section 5.4 Design and Construction Generally.**

##### **Section 5.4.1 Commencement of Design and Construction.**

Following the Construction Date, the City shall have the right to issue a written Notice to the Company to begin the Construction Work (the "Notice to Proceed") . The Notice to Proceed shall be issued within thirty (30) days of the Construction Date unless the City provides a reason to the Company that the Notice to Proceed cannot be issued within such period. Immediately following the issuance of the Notice to Proceed, except as otherwise provided in Section 5.4 hereof, the Company shall commence and proceed to undertake, perform and complete the Capital Improvements at its sole cost and expense in accordance with all provisions of this Agreement. The time for the Company's construction of the Capital Improvements work shall be computed from the date of issuance of the Notice to Proceed. The Company's failure to achieve

Acceptance on or before the Acceptance Date shall result in the assessment of delay liquidated damages under Section 6.9 hereof.

#### **Section 5.4.2 Elements of the Capital Improvements Construction.**

Company shall be responsible for identifying the need for and overseeing the design and construction of all necessary wastewater system capital improvements to upgrade the Facility and assure that the Facility has the capabilities to continue to meet the Effluent Limits, including large scale repairs of capital infrastructure and the replacement of capital components, as well as all capital improvement requirements or Facility modifications necessary to achieve compliance with all Applicable Law, including but not limited to the Capital Improvements set forth in Schedule 12.1 and 12.3 hereto (the "Capital Improvements"). In constructing the Capital Improvements generally, the Company shall in accordance with all of the terms and conditions of this Agreement (1) prepare and excavate the Site, (2) demolish and remove any existing facilities or systems as necessary, (3) reroute or replace any underground Utilities, pipes or systems as necessary, (4) dispose of any demolition or construction debris on the Site and any soil excavated there from as necessary (provided the City shall be considered the generator of such debris and soils and shall retain title thereto), (5) supply and install all labor, materials and equipment necessary to design and construct the Capital Improvements, (6) monitor the Capital Improvements construction work, (7) maintain continuous compliance with all Legal Entitlements and Applicable Law, (8) allow free and unlimited access to the Facility by the City and/or its representatives, subject to compliance with safety rules and procedures as enforced and monitored by the Company, (9) trouble shoot and shake down the Capital Improvements and operations, (10) conduct the Acceptance Tests required, and (11) operate, maintain and manage the Capital Improvements and the existing Facility as an integrated system following completion and endorsement of the Acceptance Tests, all so that the Facility is suitable and adequate for meeting the Effluent Limits as provided herein.

#### **Section 5.4.3 Liens and Subcontracts.**

The Company shall promptly discharge or bond any liens or encumbrances arising out of the Company's construction of the Capital Improvements or operation of the Facility and shall provide evidence to the City of such bond or discharge within ten (10) business days of the placement of such lien or encumbrance. Contracts and Subcontracts entered into by the Company for the construction of the Capital Improvements shall neither supersede nor abrogate any of the terms or provisions of this Agreement.

#### **Section 5.4.4 Payment of Costs.**

The Company shall pay directly all costs and expenses of the design and construction of the Capital Improvements of any kind or nature whatsoever, without payment or reimbursement from the City except through payment of the Fixed Construction Price, including any Fixed Construction Price Adjustments, based on achievement of milestones listed in the drawdown schedule set forth in Schedule 12 hereto. Such costs and expenses, without limiting the generality of the foregoing, shall include all costs of permitting, regulatory compliance and Legal Proceedings brought against the Company; obtaining and maintaining all forms of Company credit enhancement required hereunder during the Development Period and Construction Period;

payments due under the Construction Contract, contracts with Subcontractors or otherwise for all labor and materials and equipment; legal, financial, engineering, architectural and other professional services of the Company; general supervision by the Company of all design and construction; the cost of all design and construction performed by or on behalf of the Company; Company preparation of schedules, budgets and reports; keeping all construction accounts and cost records; and all other costs required to achieve Acceptance. In accordance with Applicable Law, the Company shall pay all wages and benefits to its employees when due and require its Subcontractors to pay all wages and benefits of its employees when due.

## **Section 5.5 Company Design.**

### **Section 5.5.1 Sole Responsibility.**

The Company shall have the sole and exclusive responsibility for the design of the Capital Improvements hereunder and the preparation of all plans, technical specifications, drawings, blueprints or other design documents necessary or appropriate to construct the Capital Improvements. The Company warrants that the Facility, upon the occurrence of the Acceptance Date will be capable of achieving the performance requirements specified in Schedules 1, 2, and 13 hereof. Notwithstanding the foregoing, all components, materials, equipment and workmanship incorporated in the Work shall be of first class quality and in accordance with Prudent Industry Practices. The City shall have the right to review such design documents and the energy requirements for the equipment included in the design, but shall have no right of approval with respect thereto except in order to confirm the compliance and consistency of the design documents with the requirements set forth in Schedules 1 and 12 hereto. Any architects and engineers engaged by the Company related to the construction of the Capital Improvements shall be licensed in the State, if required by law, experienced and qualified to perform such services and shall be selected in the manner provided in Section 5.19 hereof.

### **Section 5.5.2 City Interest in Design Requirements.**

The Company acknowledges the City's material interest in each provision of the Design Requirements and, notwithstanding the Acceptance Standards and Performance Guarantees of the Company and associated non-performance remedies of the City, agrees that no change to the Design Requirements shall be made except upon the terms and conditions set forth in this Section and pursuant to a City Change Order given under Section 5.15 hereof.

### **Section 5.5.3 Company Requested Changes.**

The Company shall have the right to request changes to the Design Requirements. At its sole cost and expense, it must give written notice to the City containing detailed information concerning the design changes and the expected effects thereof on the Facility's Performance and the Company's Performance Guarantees. The notice shall contain sufficient information to determine that such changes (1) do not adversely affect the ability of the Facility to be operated so as to meet the Performance Guarantees set forth in the Agreement, (2) do not impair the quality, integrity, durability or reliability of the Facility as set forth in the Design Requirements, (3) do not impair and are necessary for the Company to fulfill all of its obligations under the Agreement, and (4) are feasible.

#### **Section 5.5.4 City Approval of Changes.**

The City shall have the right to review all changes requested by the Company under this Section, and if the City agrees in writing that the requested change meets the design change criteria set forth in Subsection 5.5.3, then the City shall permit the change to the Design Requirements, and the Company shall be responsible for all additional costs, including additional costs to the City, resulting from such changes to the Design Requirements. Cost savings resulting from such change to the Design Requirements shall be to the benefit of the City after the Company receives a payment equal to 10% of the savings. If the City and the Company cannot agree that a requested change meets the design change criteria set forth in Section 5.5.3, then the dispute shall be submitted to the Independent Panel in accordance with Section 8.8.2 hereof. No such change shall result in an increase in the Fixed Construction Price or an extension of the Acceptance Date unless otherwise agreed by the City in its sole discretion.

#### **Section 5.6 Construction Practice.**

Unless the Design Requirements or this Agreement expressly provide otherwise, the Company shall perform the Construction Work in a good and workmanlike manner and in accordance with generally accepted construction practice and shall have exclusive responsibility for all construction means, methods, techniques, sequences, and procedures necessary or desirable for the correct, prompt, and orderly prosecution and completion of the Capital Improvements as required by this Agreement. The responsibility to provide the construction means, methods, techniques, sequences and procedures referred to above shall include, but not be limited to, the obligation of the Company to provide the following construction requirements: temporary power and light, temporary offices and construction trailers, required design certifications, required approvals, weather protection, site clean-up and housekeeping, construction trade management, temporary parking, safety and first aid facilities, correction of or compensation for defective work or equipment, Subcontractors' insurance, storage areas, workshops and warehouses, temporary fire protection, site security, temporary utilities, potable water, phone, sanitary, gas, Subcontractor and vendor qualification, receipt and unloading of delivered materials and equipment, erection rigging, temporary supports, and construction coordination. Laydown and staging areas for construction material shall be located on the Site, or at other locations approved by and arranged and paid for by the Company.

#### **Section 5.7 Construction Period Insurance.**

The Company or, with the consent of the City, the Company's approved General Contractor or construction manager, shall, at its own cost and expense, obtain and maintain the Insurance in accordance with Schedule 4 hereto. If the Company fails to pay any premium for the Insurance, or if any insurer cancels any Insurance and the Company fails to obtain replacement coverage so that the Facility and the Site remains insured on a continuous basis, then, at the City's election (but without any obligation to do so), the City may pay such premium or procure similar insurance coverage from another company or companies and upon such payment by the City the amount thereof shall be immediately reimbursable to the City by the Company or deducted by the City from any payment(s) due the Company. The Company shall not perform any construction work on the Capital Improvements, or allow any of the Company's or any Subcontractor's employees on the Site, during any period when any policy of Insurance is

not in effect. The Company shall take all steps necessary to assure the Facility remains continuously insured in accordance with the requirements of this Agreement during the Contract Term, and that no gaps in coverage occur. Should any such gap in coverage occur, the Company shall bear, indemnify and defend the City against any and all expense arising out of the failure of the Company to provide such continuous Insurance coverage. Deductible amounts shall be the responsibility of the Company or the City, as the case may be. The City and its employees, officers and consultants shall be additional insureds on all Company Insurance policies in accordance with Schedule 4 hereto.

### **Section 5.8 Compliance with Law and Equipment Operating Requirements.**

In designing, constructing, starting-up and testing the Capital Improvements, the Company shall comply with Applicable Law, shall operate all Equipment and systems comprising the Facility in accordance with good engineering practice and applicable equipment manufacturer's specifications and recommendations, and shall observe the same safety standards as are set forth in Schedule 3.4 hereof with respect to the operation of the Facility.

### **Section 5.9 Legal Entitlements Necessary for Continued Construction.**

The Company, at its own cost and expense and on behalf of the City as applicant, shall make all further filings, applications and reports necessary to obtain and maintain all Legal Entitlements required to be made, obtained or maintained under Applicable Law in connection with the continuance of work with respect to the design, construction, start-up and testing of the Capital Improvements. The City shall cooperate with the Company in connection with the foregoing undertaking, execute all applications and documents necessary for Company to fulfill its obligations hereunder, and shall provide the Company with such relevant data or documents as are within its control which are reasonably required for such purpose.

### **Section 5.10 Engagement of City Consultant.**

#### **Section 5.10.1 The Duties.**

The Company shall fully cooperate with any City Consultant designated by the City to assist it in connection with the administration of this Agreement. In the performance of such services, the Company agrees that the City Consultant may, without limiting other possible services to the City: review and monitor construction progress, payments and procedures; confirm the completion of specified portions of the Construction Work and review the release of City funds in payment of the Construction Price; review proposed changes to the Design Requirements pursuant to Section 5.5.4 hereof; review Facility plans, drawings and specifications for compliance with the Design Requirements; monitor the Acceptance Tests undertaken by the Company pursuant to Article VI hereof and Schedule 13 hereto; review the validity of the Company's written notice that an Uncontrollable Circumstance has occurred; review and advise the City with respect to material changes to the Facility during the Contract Term; and provide certificates and perform such other duties or may be specifically conferred on the City Consultant hereunder. It is understood that the services intended to be provided by the City Consultant shall be of an observational and review nature only, and that the City Consultant shall not have authority to interfere with, halt or delay in any way the construction of the Facility

or to require or approve changes to the Design Requirements or the Company's plans and specifications made in accordance therewith. The Company agrees to cooperate with all reasonable requests made by the City Consultant in connection with the performance of such duties for the City.

#### **Section 5.10.2 Fees.**

Any fees of the City Consultant prior to the Acceptance Date shall initially be paid by the City, but shall be reimbursed by the Company to the City together with allocable costs of City personnel, to the extent any such fees and costs are attributable to the failure of the Company to cause Acceptance to occur on or before the Acceptance Date. The Company also shall reimburse the City for the reasonable fees and expenses of the City Consultant and costs of City personnel for services in connection with repetition of any Acceptance Tests unless such additional or repeated Acceptance Tests are required as a result of City Fault or Uncontrollable Circumstances. Any fees of the City Consultant and City personnel after the Acceptance Date shall be paid by the City without reimbursement by the Company except as otherwise specifically provided by this Agreement.

#### **Section 5.11 Monthly Progress Report.**

The Company shall submit to the City a monthly progress report detailing work accomplished and an updated schedule. The monthly progress report shall include a summary of work activities during the reporting month, a listing of upcoming work activities, a listing of submittals delivered during the reporting month, a listing of submittals scheduled for delivery the following month, a listing of any permit violations, and an updated schedule which reflects critical path activities. The updated schedule shall set forth major activities and reflect any change in the Company's estimated construction progress schedule from the schedule submitted the prior month. The Company agrees that the Company's submission of the monthly progress report is for the City's information only, and the City's acceptance of the monthly progress report shall not bind the City in any manner. Thus, the City's acceptance of the monthly progress report shall not imply that the City: (1) approves the Company's proposed staffing or scheduling of the Construction Work; (2) agrees or guarantees to the Company or any other person that the Company has the capacity or ability to complete the Construction Work in accordance with the progress schedule, or that the Construction Work can or will be completed in accordance with the monthly progress schedule; or (3) consents to any changes in scheduling, or agrees to any extension of time, unless the City agrees specifically in writing to the applicable change.

#### **Section 5.12 Construction Monitoring, Observations, Testing and Uncovering of Work.**

##### **Section 5.12.1 Observation and Design Review Program.**

During the progress of the Construction Work through Acceptance, the Company shall at all times during normal working hours afford the City and the City Consultant every reasonable opportunity for observing all Construction Work at the Site. During any such observation, all representatives of the City and the City Consultant shall comply with all safety and other rules and regulations applicable to presence in or upon the Site or the Facility, including those adopted by the Company, and shall in no material way interfere with the Company's performance of any

Construction Work. The Company shall provide the City with a reproducible and five (5) copies of the construction design drawings, blueprints, detailed plans and technical Design Requirements and of all other Deliverable Materials, including manufacturing and shop drawings.

#### **Section 5.12.2 Company Tests.**

The Company shall conduct all tests of the Construction Work (including shop tests) or inspections required by good engineering practice, by the Design Requirements, by Applicable Law or for Insurance purposes. The Company shall give the City and the City Consultant reasonable advance notice of tests or inspections prior to the conduct thereof; provided, however, that in no event shall the inability, failure or refusal to attend or be present of the City or the City Consultant at or during any such test or inspection delay the conduct of such test or inspection or the performance of the Construction Work. If required by Applicable Law or for Insurance purposes, the Company shall engage a registered engineer or architect at its sole cost and expense to conduct or witness any such test or inspection. All analyses of test samples shall be conducted by persons appearing on lists of laboratories authorized to perform such tests by the State or federal agency having jurisdiction or, in the absence of such an authorized list in any particular case, shall be subject to the approval of the City, which consent shall not be reasonably withheld. Acceptance Testing shall be conducted in accordance with Schedule 13 hereto.

#### **Section 5.12.3 City Tests, Observations and Inspections.**

The City, its employees, agents, representatives and contractors (which may be selected in the City's sole discretion) , and all Governmental Bodies having lawful jurisdiction, may at any reasonable time and with reasonable notice conduct such on-Site observations and inspections, and such civil, structural, mechanical, electrical, chemical, or other tests as the City deems necessary or desirable to ascertain whether the Construction Work complies with this Agreement. The City shall pay for any test, observation or inspection requested by the City and any Governmental Bodies, and the costs of such test, observation or inspection shall be borne by the City unless such test, observation or inspection reveals a material failure of the Construction Work to comply with this Agreement or Applicable Law, in which event the Company shall bear all reasonable costs and expenses of such test, observation or inspection. In the event that any requested test, observation or inspection causes a material delay in the construction schedule, the Acceptance Date shall be extended to reflect the actual period of time needed for completion as directly caused by the requested testing, but only if such testing, observation or inspection does not reveal any material failure or noncompliance as set forth herein.

#### **Section 5.12.4 Certificates and Reports.**

The Company shall secure and deliver to the City promptly, at the Company's sole cost and expense, all required certificates of inspection, test reports, work logs, certified payroll or approvals with respect to the Construction Work as and when required by the Design Requirements, Applicable Law or the Insurance Requirements. The Company shall provide to the City, immediately after the receipt thereof, copies of any notice of default, breach or noncompliance received by the Company under or in connection with, any Legal Entitlement,

Subcontract, Construction Performance Bond, the Guarantee or agreement pertaining to the Construction Period.

#### **Section 5.12.5 Notice of Covering Construction Work.**

The Company shall give the City reasonable notice of its upcoming schedule with respect to the covering and completion of any Construction Work. The City shall give the Company reasonable notice of any intended inspection or testing of such Construction Work in progress prior to its covering or completion, which notice shall be sufficient to afford the City a reasonable opportunity to conduct a full inspection of such Construction Work. At the City's written request, the Company shall take apart or uncover for inspection or testing any previously-covered or completed Construction Work; provided, however, that the City's right to make such requests shall be limited to circumstances where there is a reasonable basis for concern by the City that the disputed Construction Work conforms with the requirements of this Agreement. The cost of uncovering, taking apart or replacing such Construction Work along with the costs related to any delay in performing Construction Work caused by such actions, shall be borne as follows: (1) by the Company, if such Construction Work has been covered prior to any observation or test requested by the Design Requirements, Applicable Law or the Insurance Requirements or if such Construction Work has been covered prior to any observation or test as to which the City has provided reasonable advance notice hereunder; and (2) in all other cases, as follows: (a) by the Company, if such observation or test reveals that the Construction Work does not comply with this Agreement, or (b) by the City, if such observation or test reveals that the Construction Work complies with this Agreement.

In the event such Construction Work does comply with this Agreement, the delay caused by such observation or test shall be treated as having been caused by an Uncontrollable Circumstance and any costs incurred with respect to such observation or test shall be borne by the City (through and only through a Fixed Construction Price Adjustment) . Either the City or the Company may request confirmation of the test results by the Independent Panel, pursuant to Section 8.8.3 of this Agreement.

#### **Section 5.12.6 Meetings and Design and Construction Review.**

During the Construction Period, the Company and the City shall conduct meetings on a monthly basis at a minimum. At such meetings, discussions shall be held concerning all aspects of the construction of the Capital Improvements including, but not limited to, construction schedule, progress payments, Extra Construction Work, shop drawings, catalogued and dated progress photographs, and any soil boring data and shop test results. Monthly project construction progress reports containing all relevant information shall be prepared by the Company and provided to the City at least five (5) business days prior to each monthly meeting, together with a list of agenda items for the meeting. The Company shall also attend any on-call meeting which may be required by the City from time to time in connection with the Construction Work, provided that the Company has at least twenty-four (24) hours notice of such meeting. The Company shall provide to the City, for its planning, budgeting and financing purposes, monthly estimates of the commencement date for start-up operations, the date upon which the Acceptance Tests shall commence, and the Acceptance Date.

**Section 5.13 Correction of Work.**

**Section 5.13.1 Correction of Non-Conforming Construction Work.**

Throughout the Contract Term, including the period of any renewal pursuant to Section 10.2 hereof, the Company at its sole cost and expense, shall complete, repair, replace, restore, rebuild and correct promptly any Construction Work which does not conform with the Design Requirements and all other requirements of this Agreement.

**Section 5.13.2 Election to Accept Non-Conforming Construction Work.**

The City may elect by Change Order, at the Company's request, to accept Construction Work that does not conform to the Design Requirements and charge the Company (by a reduction in the Fixed Construction Price) for the amount agreed upon by the parties by which the value of the Company's services or Construction Work has been reduced.

**Section 5.13.3 Relation to Other Obligations.**

The obligations specified in this Section establish only the Company's specific obligation to correct the Construction Work and shall not be construed to establish any limitation with respect to any other obligations or liabilities of the Company under this Agreement. This Section is intended to supplement (and not to limit) the Company's obligations under the Acceptance Test procedures and standards, the Effluent Limits and any other provisions of this Agreement or Applicable Law.

**Section 5.14 Damage to the Construction Work**

**Section 5.14.1 Damage Prevention.**

From the Construction Date until Acceptance (or whenever earlier or later performing Construction Work on the Site) , the Company shall use care and diligence, and shall take all appropriate precautions, to guard the Construction Work and the Site and the property of other persons (including any materials, equipment, or other items furnished by the City) from damage prior to the Acceptance Date. For such purpose, the Company shall provide fencing, protective features (such as tarpaulins, boards, boxing, frames, canvas guards, and fireproofing) , and other safeguards to the extent the Company reasonably determines such are necessary and proper in the performance of the Construction Work.

**Section 5.14.2 Restoration.**

In case of damage or destruction to the Construction Work or the Site resulting from any cause, and regardless of the extent thereof or the estimated cost of repair, replacement or restoration, and whether or not any insurance proceeds are sufficient or available for the purpose, the Company shall immediately undertake and complete the repair, replacement and restoration of the damage or destruction to Construction Work to the character and condition thereof existing immediately prior to the damage or destruction in accordance with the construction procedures set forth herein, as applicable, all at the Company's sole cost and expense, except in the event that such damage or destruction is caused by City Fault. Company shall use all

available means and efforts to complete the Construction Work within the original schedule. Requests for extensions of the Acceptance Date and the Construction Period shall be submitted in writing to the City only for those situations where the damage or destruction was caused by an Uncontrollable Circumstance. For other cases, extensions of the Acceptance date and Construction Period shall be at the sole discretion of the City.

#### **Section 5.14.3 Notice and Reports.**

The Company shall notify the City immediately of any damage or destruction to the Construction Work or the Site or any accident or permit violation on the Site, including but not limited to, Hazardous Substance spills or releases, damage to sensitive areas, permit conditions violations, fires and injuries. Additionally, the Company shall notify the insurers under any risk insurance and all applicable Insurance of any damage or destruction to the Construction Work or the Site, or any accidents on the Site, as promptly as possible after the Company learns of any such damage, destruction or accidents. As soon as practicable after learning of any such occurrence, the Company shall submit a full and complete written report to the City. The Company shall also submit to the City within twenty-four (24) hours copies of all reports relating to the subject matter of this subparagraph which are filed with, or given to the Company by, any insurance company, adjuster, or Governmental Body. All other notices shall be given by the Company to the City as soon as reasonably possible under the circumstances.

#### **Section 5.15 Change Orders and Extra Construction Work**

##### **Section 5.15.1 Right to Issue Change Orders.**

The City, subject to the provisions of Subsection 5.15.6, may issue Change Orders pertaining to any and all aspects of the Construction Work at any time and for any reason whatsoever, even if such Change Orders revise this Agreement, add Extra Construction Work or omit Construction Work or affect the Acceptance Date.

##### **Section 5.15.2 Obligation to Complete Extra Construction Work.**

The Company shall, except to the extent excused under Subsection 5.15.6, undertake and complete promptly all Extra Construction Work authorized under this Section. The Company shall not perform any Extra Construction Work without a Change Order authorized by the City. The Company shall be entitled to additional compensation for Extra Construction Work determined in accordance with this Section (" Extra Payment" ) .

##### **Section 5.15.3 Effect of Company Fault.**

The Company shall not be entitled to any Extra Payment for any Extra Construction Work, if required by reason of any Company Fault Including Company's contractors and subcontractors. The Fixed Construction Price shall be reduced for omitted Construction Work resulting from any Company Fault by the greater of: (1) the reduction in value of the Facility due to the omitted Construction Work, or (2) the reduction in the Company's cost of the omitted Construction Work.

##### **Section 5.15.4 Cost Reductions.**

The Fixed Construction Price shall be reduced if and to the extent that any Change Order, whether for omitted Construction Work or otherwise, results in any reduction in the Company's cost of the Construction Work. In addition, if the Change Order directs Company to omit Construction Work, Company shall advise City of any effect on the progress schedule, the Performance Guarantees, the Acceptance Date, the Service Fee and any other obligations of the City or rights of the Company under this Agreement

**Section 5.15.5 Proposal for Extra Work.**

The Company shall submit a written quotation on a lump-sum basis for Extra Construction Work covered by any proposed Change Order. The Company shall include with each quotation Cost Substantiation therefor and, with respect to any Extra Construction Work necessitated by Uncontrollable Circumstances, the Company shall be limited to four percent (4.0%) profit with respect thereto. Any such quotation shall be deemed the Company's offer to the City, binding for one hundred twenty (120) days to perform the Extra Construction Work at the price quoted. In addition, each quotation shall include the effect, if any, of the Extra Construction Work on the progress schedule, the Facility, the Performance Guarantees, the Acceptance Date, the Fixed Construction Price, the Service Fee and any of the other obligations of the Company under this Agreement.

**Section 5.15.6 Conditions to the Obligation to Proceed.**

The parties shall promptly proceed to negotiate in good faith to reach agreement on the price to be paid the Company for the Extra Construction Work and on the effect of the Extra Construction Work on any other obligations of the Company under this Agreement, including without limitation, the schedule requirements and time extensions. The Company acknowledges that it shall not be entitled to seek nor shall it receive a price for the Extra Construction Work which is in excess of the fair market price of such Extra Construction Work, whether such work is to be performed solely by the Company or by a Subcontractor under the Company's supervision. The Company shall not be obligated to proceed with the Extra Construction Work except following agreement as to the price to be paid therefor and as to any adjustments to the Performance Guarantees and its other obligations hereunder which are necessitated by the Change Order requiring the Extra Construction Work. Payments for Extra Construction Work shall be paid only as a Fixed Construction Price Adjustment, in accordance with Section 5.17.6. Except to the extent that the City and the Company shall agree, no such work shall modify the Acceptance Date, or impair the ability of the Company to meet the Performance Guarantees, comply with any other term or condition of this Agreement, affect any right of the Company or impose any additional liability or obligation on the Company under this Agreement; but the Company shall have no right of objection with respect to such work if the City affords the Company price, schedule and any other relief hereunder agreed to by the parties to be necessary to avoid any such impairment.

**Section 5.15.7 Disputed Work.**

If the Company is of the opinion that any Construction Work which it elects to perform in the absence of any agreement hereunder is Extra Construction Work and not original

Construction Work ("Disputed Work") , the Company shall give the City a written notice of dispute before commencing the Disputed Work.

**Section 5.15.8 Notice; Waiver.**

The Company shall give at least fifteen (15) days advance notice to the City in writing of the scheduling of all Extra Construction Work and all Disputed Work. The Company's failure to give such written notice of Disputed Work under this Section shall constitute a waiver of Extra Payment, any extension of time, and all other Loss-and-Expense whatsoever relating to the particular Disputed Work.

**Section 5.16 Deliverable Material.**

**Section 5.16.1 Delivery and Use.**

The Design Requirements and all other documents forming any part of this Agreement shall be and remain the property of the City and may be utilized for all appropriate public purposes in reference to the Facility, provided that the City use of any such documents shall be at its own risk. As the Construction Work progresses (or upon the termination of the Company's right to perform the Construction Work) , the Company shall deliver to the City all equipment, process, and materials required for the Construction Work (" Deliverable Material") , as described and set forth in Schedule 12 hereto together with the Operations and Maintenance Manual described at Section 3.3 hereof. If any Deliverable Material utilized in the Construction Work is patented or copyrighted by other persons (or is or may be subject to other protection from use or disclosure) , the City shall, upon and following the Construction Date, have a royalty-free perpetual license to use the same, but solely for purposes of the ownership, construction, and operation of the Facility. However, if the Company does not have the right to grant such a license, the Company shall obtain for the City such rights of use as the City may request, without separate or additional compensation, whether such Deliverable Material is patented or copyrighted or becomes subject to other protection from use before, during or after performance of the Construction Work. The City shall have the right from and after the Agreement Date to use (or permit use) of all such Deliverable Material, process or equipment, all oral information whatsoever received by the City in connection with the Construction Work, and all ideas or methods represented by such Deliverable Material, process or equipment, without additional compensation.

**Section 5.16.2 Injunction on Use.**

If the Company or the City is enjoined from using any Deliverable Material (or any affected Construction Work) from and after the Construction Date for reasons other than Uncontrollable Circumstances or City Fault, the City may, at the City's option, require the Company (1) to provide, at the Company's expense, equivalent substitutes for the Deliverable Material (and any affected Construction Work) , (2) to take such steps necessary to eliminate the injunction or to otherwise obtain the right to use the Deliverable Materials; or (3) to take such steps as to make the Deliverable Materials non-infringing on any patent, copyright, trade secret or other intellectual property right.

**Section 5.17 Payment of the Construction Price.**

### **Section 5.17.1 Construction Price Generally.**

The Company shall be entitled to receive the Construction Price for the Construction Work on a progress basis in accordance with the terms of this Section. The Construction Price shall be the sum of the Fixed Construction Price and the Fixed Construction Price Adjustments, as adjusted by Change Orders.

### **Section 5.17.2 Fixed Construction Price.**

The Fixed Construction Price is the amount detailed in Schedules 12.1 and 12.3, and shall be escalated pursuant to Schedule 5. The Fixed Construction Price Index for the month in which the Notice to Proceed is issued shall be prorated such that the Fixed Construction Price escalates only through the date the Notice to Proceed is issued and not through such entire month. The Fixed Construction Price shall not be adjusted after the date the Notice to Proceed is issued.

### **Section 5.17.3 Reduction in Fixed Construction Price Escalation.**

In the event the Company fails to use good faith efforts to perform its Development Period responsibilities set forth in Section 4.3 hereof and such failure causes a delay in the occurrence of the Construction Date, the Fixed Construction Price will not be escalated to the Construction Date, but will be escalated to the date prior to the Construction Date reasonably estimated by the City to be the date on which the Construction Date would have occurred had the Company used good faith efforts to perform its Development Period responsibilities set forth in Section 4.3 hereof.

### **Section 5.17.4 Fixed Construction Price Adjustments.**

The following items shall constitute the Fixed Construction Price Adjustments: (1) an adjustment for Change Orders given pursuant to Section 5.15 hereof; (2) an adjustment for the cost due to Uncontrollable Circumstances as required under Section 7.3 hereof; (3) an adjustment for any increases in the following specific taxes: (a) increases in taxes imposed by the City at any time during the Term of the Agreement and (b) increases in sales taxes imposed by the State during the period from the Agreement Date through the Acceptance Date; and (4) an adjustment pursuant to Section 4.5.3 hereof.

### **Section 5.17.5 Limitation on Payments for Construction Costs.**

The Company agrees that the Construction Price shall be the Company's entire compensation and reimbursement for the performance of the Construction Work, including obtaining all Utilities that the Company will require to perform the Construction Work. In no event shall the Company be entitled to any payment for Construction Work in excess of the Construction Price identified in Schedules 12.1 and 12.3 (including the adjustments provided for pursuant to Subsections 5.17.2, 5.17.3 and 5.17.4), notwithstanding any cost overruns, except for additional amounts payable to the Company on account of Uncontrollable Circumstances or Change Orders (except in the event of any City Fault, as and to the extent provided in Article VIII hereof). The Company shall pay for or finance any such excess Construction Work that are the Company's responsibility in any manner it chooses without reimbursement from or other claim upon the City.

### **Section 5.17.6 Construction Disbursement Procedure.**

Upon the issuance of the Notice to Proceed by the City, the Company shall be entitled to submit a requisition for the initial payment of the Fixed Construction Price set forth in the milestone payments provided for in Schedule 12.1 hereto. Following the initial payment, the Company shall be entitled to submit requisitions on a monthly basis based on percentage completion of the engineering services as certified by the Company and these monthly payments shall be paid by the City per the requirements of this Agreement. The Company shall receive from the City the remainder of the milestone payments, which (1) shall be made only upon completion of the milestone required to be completed as the basis for such payment as set forth in Schedule 12.1 hereto, including additional intermediate milestones to be developed as allowed by Schedule 12.1; (2) shall be subject to the maximum payment limitations for each major milestone specified in Schedule 12.1 hereto; and (3) shall be subject to the conditions of payment regarding disbursement disputes set forth in Section 5.18 hereof. Any Fixed Construction Price Adjustments shall be payable monthly when and as the cost or expense constituting the Fixed Construction Price Adjustment is paid or incurred. Each requisition shall be accompanied by a certificate of an authorized representative of the Company certifying (1) the portion of the Fixed Construction Price which is payable to the Company, (2) the amount of Fixed Construction Price Adjustments which are payable to the Company, together with Cost Substantiation for such amounts, (3) that the Company is neither in default under this Agreement nor in breach of any material provision of this Agreement such that the breach would, with the giving of notice or passage of time, constitute an Event of Default, and (4) that all items applicable to the milestone entitling the Company to request payment under the milestone payment schedule in Schedule 12 hereto have been completed in accordance therewith and with the Design Requirements (as the same may be amended or changed pursuant to terms of this Agreement).. In addition, the Company shall submit all completed payment forms. The City shall review the Company's certified requisitions to the City for each Fixed Construction Price payment and for Fixed Construction Price Adjustment payments, and within ten (10) business days of receipt of the Company's written submission shall verify or dispute in writing (or by telecommunication promptly confirmed in writing) the Company's certification that the Company has achieved the level of progress indicated and is entitled to payment. The Company shall be entitled to payment within forty (40) days of the expiration of such ten (10) business day period if (1) the City determines that the work has progressed to the milestone indicated in the Company's certified requisition or that the costs constituting Fixed Construction Price Adjustments have been paid or incurred and the City provides written notice thereof to the Company, or (2) the City fails to verify or dispute the certified requisition within ten (10) business days of receipt. Disputes regarding payments of the Fixed Construction Price and Fixed Construction Price Adjustments shall be resolved in accordance with Section 5.18 hereof.

### **Section 5.17.7 Information Supporting Requisition.**

The Company shall submit to the City, with each requisition the following:

- (a) a verified statement setting forth the information required under any Applicable Law pertaining to prevailing wages;

(b) a reasonably detailed description of all Construction Work actually completed to date;

(c) revisions to the progress schedule (or a revised progress schedule) which shall reflect changes in the Company's construction schedule since the date of the last requisition;

(d) revisions to the critical path schedule which shall reflect changes in the critical path schedule since the date of the last requisition;

(e) notice of any Liens which have been filed against the Company with respect to which the Company has knowledge, together with evidence that the Company has bonded against any such Liens;

(f) any other documents or information relating to the Construction Work or this Agreement requested by the City or the City Consultant as may be required by Applicable Law, this Agreement or generally accepted accounting practices and principles; and

(g) any construction progress photographs as may be requested by the City.

**Section 5.17.8 Permissible Withholdings.**

The City may disapprove and withhold and retain all or any portion of any payment requested in a requisition in any amount equal to the sum of:

(a) any amounts which are permitted under this Section hereof to be withheld from any payment requested in any requisition;

(b) any amounts which are due the City under this Article;

(c) any delay liquidated damages which are payable under Article VI hereof;

(d) any indemnification amounts which are due and owing to the City under Section 7.4 hereof;

(e) any other deductions which are required by Applicable Law;

(f) any payments with respect to which documents to be delivered in connection therewith are not correct and complete;

(g) an amount equal to the cost to the City of performing any work in the event of a failure by the Company or any Subcontractor to timely perform its obligations hereunder;

(h) any payments with respect to which the Construction Work covered by such requisition (or any previous requisition) does not comply with this Agreement;

(i) any payments with respect to which any person has filed a Lien resulting from the acts or omissions of the Company in performing the Construction Work, where such Lien remains unreleased or unbonded;

(j) any payments by the City due to the failure of the Company to make payment properly to Subcontractors or for labor, materials and equipment; and

(k) all requisitioned payments, if an Event of Default of the Company has occurred under Section 8.2 hereof.

#### **Section 5.17.9 Set-Off.**

Company hereby grants to City a lien, security interest and right of set-off, as security for all liabilities and obligations of Company to City arising under or relating to this Agreement or any other documents related thereto, upon and against all deposits, credits, collateral and property of Company, including any and all payments due Company, now or hereafter in the possession, custody, safekeeping or control of City or any entity under the control of City. ANY AND ALL RIGHTS TO REQUIRE CITY TO EXERCISE ITS RIGHTS OR REMEDIES WITH RESPECT TO ANY OTHER COLLATERAL WHICH SECURES ANY SUCH LIABILITY OR OBLIGATION, PRIOR TO EXERCISING ITS RIGHT OF SETOFF WITH RESPECT TO SUCH PROPERTY OF THE COMPANY, ARE HEREBY KNOWINGLY, VOLUNTARILY AND IRREVOCABLY WAIVED.

#### **Section 5.17.10 Company Certification.**

Any notice, certification, report or requisition delivered by the Company to the City in connection with the Construction Work or payment therefor under this Agreement shall be accompanied by a certificate of the Company affirming the accuracy thereof to the best knowledge of the Company.

#### **Section 5.18 Disbursement Dispute Procedures.**

##### **Section 5.18.1 Dispute Notice.**

If the City disputes in writing pursuant to Section 5.17.6 that the Construction Work required for any payment has progressed to the milestone indicated or disputes any requisition for Fixed Construction Price Adjustments, such dispute notice from the City shall include the City's reasons for such dispute, in detail reasonably available to the City. After receiving such dispute notice, the Company may make the necessary corrections and resubmit a certified requisition to the City, or the City may agree on a revised amount, requisition or estimate, as applicable, in which case the Company shall be entitled to payment. The City shall pay, under the terms of this Agreement, the undisputed portion of any Company invoice.

##### **Section 5.18.2 Dispute Resolution.**

If the Company is unable to reach agreement with the City as to the progress of work or the amount or entitlement to payment under Section 5.17, the Company may exercise its right to Dispute Resolution pursuant to Section 8.8 hereof. The Company shall not be entitled to payment

of the amount so requisitioned and disputed except upon resolution of the dispute in accordance with this Section 8.8.; provided, however, that the Company shall be entitled to all requisitioned amounts which are not in dispute. Nothing contained in this Section shall be deemed to alter the rights of the parties, if any, under Article VIII hereof. The Company shall continue the Construction Work while the dispute is being resolved.

## **Section 5.19 Personnel**

### **Section 5.19.1 Personnel Performance.**

The Company shall enforce discipline and good order at all times among the Company's employees and all Subcontractors. All persons engaged by the Company for Construction Work shall have requisite skills for the tasks assigned. The Company shall employ or engage and compensate engineers and other consultants to perform all engineering and other services specified in this Agreement and as required for the layouts, locations, and levels of the Construction Work. Each such engineer and consultant shall have current professional registration or certification to practice in the State (if required by law) .

### **Section 5.19.2 Prevailing Wages.**

The Company shall take all action necessary directly and through its Subcontractors to assure that all laborers performing services in connection with the Construction Work are paid prevailing wages under Applicable Law whether or not such legal prevailing wage requirements are held to be applicable to the Construction Work. Certified payrolls and other relevant information shall be furnished to the City in order to permit the City to monitor compliance by the Company with this Section.

### **Section 5.19.3 Company Construction Superintendent.**

The Company shall designate an employee of the Company, any Affiliate of the Company, or the Company's General Contractor or construction manager (the "Company Construction Superintendent") , who shall be present on the Site with any necessary assistants on a full time basis when the Company or any Subcontractor is performing Construction Work on the Site. The Company Construction Superintendent shall, among other things:

- (a) be familiar with the Construction Work and all requirements of this Agreement;
- (b) coordinate the Construction Work and give the Construction Work regular and careful attention and supervision;
- (c) maintain a daily status log of the Construction Work; and
- (d) attend monthly construction progress meetings with the City.

The Company may change the person assigned as Company Construction Superintendent, subject to the provisions of Subsection 5.19.4.

**Section 5.19.4 City Rights With Respect to Key Personnel.**

The Company acknowledges that the identity of the key management and supervisory personnel proposed by the Company and its Subcontractors was a material factor in the selection of the Company to perform this Agreement. Such personnel and their affiliations are set forth in Schedule 14 hereto. The Company shall utilize such personnel to direct services unless such personnel are unavailable for good cause shown, however "good cause" for this purpose shall not include performing services on other projects but shall include, without limitation, the death, injury, resignation, termination, or incapacitation of such person. In the event of any such unavailability for good cause, the Company shall utilize replacement key management and supervisory personnel of equivalent experience and reputation. Any such personnel change shall be proposed to the City for its approval within a reasonable advance time period.

**Section 5.19.5 Labor Disputes.**

The Company shall have exclusive responsibility for all disputes or jurisdictional issues among unions or trade organizations representing employees of the Company or its Subcontractors. The City shall have no responsibility whatsoever for any such disputes or issues.

**Section 5.20 Construction Books and Records.**

In order to insure that the City can review and approve changes in the Construction Price, the Company shall prepare and maintain proper, accurate and complete books and records regarding the Construction Work and all other transactions related to the permitting, design, construction, start-up and testing of the Facility, including all books of account, bills, vouchers, invoices, personnel rate sheets, cost estimates and bid computations and analyses, Subcontracts, purchase orders, time books, daily job diaries and reports, correspondence, and any other documents showing all acts and transactions in connection with or relating to or arising by reason of the Construction Work, this Agreement, any Subcontract or any operations or transactions in which the City has or may have a financial or other material interest hereunder. The Company shall produce such construction books and records (except financial ledgers and statements) for examination and copying in connection with the costs of Change Orders, Extra Construction Work, Uncontrollable Circumstance costs, or other costs in addition to the Fixed Construction Price on the basis of which the City may be responsible for increases in the Service Fee payable hereunder with respect to work performed prior to the Acceptance Date. The Company shall keep and maintain all such construction books and receipts for at least six (6) years after the Acceptance Date, or such longer period during which any Legal Proceeding with respect to the Facility commenced within six (6) years of the Acceptance Date may be pending.

**ARTICLE VI**

**ACCEPTANCE OF THE FACILITY**

**Section 6.1 Acceptance -Generally.**

At such time during the Construction Period that the Company accomplished Substantial Completion of the Facility, the Company shall then conduct the Acceptance Test as provided for in this Article. Once the Acceptance Test has been successfully passed and Final Completion shall have occurred, the Construction Period and Interim Operation Period shall end and the Future Operation Period shall begin, provided, however, that in no event shall the Future Operation Period begin after the second anniversary of the Commencement Date (as such date may be extended pursuant to the terms of this Agreement) without the written approval of the City.

## **Section 6 . 2 Substantial Completion.**

### **Section 6.2.1 Requirements for Substantial Completion.**

The Company shall not commence operations in preparation for conducting the Acceptance Tests until Substantial Completion has occurred. Substantial Completion shall occur only when all of the following conditions have been satisfied:

- (1) a preliminary or temporary certificate of occupancy has been issued for the Facility, if required by the Applicable Law;
- (2) the Company is authorized, on a temporary or permanent basis, to operate the Facility under Applicable Law, and such authorization has not been withdrawn, revoked, superseded, suspended, or materially impaired or amended;
- (3) all Utilities specified or required under this Agreement are connected and functioning properly;
- (4) the Company and the City have agreed in writing upon the Final Punch List (or, if they are unable to agree, the City shall have prepared and issued the Final Punch List to the Company within fifteen (15) business days of the Company having submitted its Final Punch List to the City) ;
- (5) the City has approved in writing, such approval not to be unreasonably withheld, the certification by the Company that all Construction Work, excepting the items on the Final Punch List, is complete and in all respects is in compliance with this Agreement;
- (6) the Company has delivered to the City written certification from equipment manufacturers that all major items of machinery and equipment have been properly installed and tested in accordance with the manufacturers' recommendations and requirements;
- (7) the Company has delivered to the City a claims statement setting forth in detail all claims of every kind whatsoever of the Company connected with, or arising out of, this Agreement or the Construction Work and arising out of or based on events prior to the date when the Company gives such statement to the City;
- (8) the Company has delivered to the City the initial operating protocol and the Operations and Maintenance Manual required to be delivered by Section 3.3 hereof;

(9) the Company has submitted to the City and the City has reviewed and approved the plan for Acceptance Testing as required by Schedule 13 hereto;

(10) if applicable, the Regional Water Quality Control Board has approved the plan for Acceptance Testing and has authorized the Acceptance Tests to be conducted;

(11) the Company has submitted to the City and the City has reviewed and approved the Transition Plan; and

(12) the Company has submitted written certification that all of the foregoing conditions have been satisfied and the City has approved the Company's certification, which approval shall be effective as of the date of the Company's certification.

Alternatively, Substantial Completion shall occur on such earlier date (than would otherwise be required by this Subsection) as certified by the City, which shall have the discretion to waive any of the foregoing conditions.

**Section 6.2.2 Final Punch List.**

The Company shall submit a proposed Final Punch List to the City and the City Consultant when the Company believes that the Construction Work has been substantially completed in compliance with this Agreement. The "Final Punch List" shall be a statement of repairs, corrections and adjustments to the Construction Work, and incomplete aspects of the Construction Work, which in the Company's opinion:

(a) the Company can complete before the Company's agreed date for Final Completion and with minimal interference to the occupancy, use and lawful operation of the Facility; and

(b) would represent, to perform or complete, a total cost of not more than one and one-half percent (1.5%) of the Fixed Construction Price and any Fixed Construction Price Adjustments agreed to in writing under the provisions of this Agreement unless the City determines that a higher percentage is acceptable) .

The Final Punch List shall be approved by the City, and completion of the Final Punch List work shall be verified by a final walk-through of the Facility conducted by the City and the City Consultant with the Company and the Company Engineer.

**Section 6.3 Notice of Start-Up Operations**

**Section 6.3.1 Submittal of Acceptance Test Plan.**

The Company shall prepare and submit an Acceptance Test Plan, which shall conform to the requirements of Schedule 13 hereto in all respects.

**Section 6.3.2 Notice of Substantial Completion.**

The Company shall give the Authorized Representative of the City at least thirty (30) days prior written notice of the expected date of Substantial Completion and of commencement of start-up operations at the Facility in preparation for conducting the Acceptance Tests.

**Section 6.3.3 Notice of Commencement of Acceptance Test.**

The Company shall also provide the City with at least thirty (30) days prior written notice of the expected initiation of the Acceptance Tests in accordance with the requirements of Schedule 13 hereto. At least ten (10) days prior to the actual commencement of Acceptance Testing, the Company shall certify in writing that it is ready to begin Acceptance Testing in accordance with the Acceptance Test Plan and Schedule 13 hereto.

**Section 6.4 Transitional Operations.**

At least one hundred eighty (180) days before the Acceptance Date, the Company shall prepare and submit to the City for its approval a detailed Transition Plan. If the Company and City are unable to agree upon an acceptable Transition Plan within thirty (30) days of such submission, their inability to agree shall be treated as an engineering dispute subject to construction period alternative dispute resolution as set forth in Section 8.8. The Transition Plan shall ensure that operations and Acceptance Testing of the Facility are conducted in a manner which has no adverse affect on the ability of the City to process wastewater to meet the Effluent Limits of Schedule 1 or as revised in writing at all times without interruption and in accordance with Applicable Law, subject to Uncontrollable Circumstances.

**Section 6.5 Acceptance Date Conditions.**

The following conditions shall constitute the "Acceptance Date Conditions," each of which may be satisfied in all material respects by the Company at its cost, expense and risk in order for the Acceptance Date to occur, and each of which must be and remain satisfied as of the Acceptance Date.

**Section 6.5.1 Construction Date Conditions.**

Each of the Construction Date Conditions shall be and remain satisfied as of the Acceptance Date.

**Section 6.5.2 Achievement of Acceptance Standards.**

The Company shall have completed the Acceptance Tests and such tests shall have demonstrated that the Facility has met the Acceptance Standards.

**Section 6.5.3 Substantial Completion.**

The Company shall demonstrate that Substantial Completion has occurred.

**Section 6.5.4 Operating Legal Entitlements.**

Legal Entitlements required under Applicable Law which are necessary for the continued routine operation of the Facility shall have been duly obtained by the Company and shall be in full force and effect. Copies of all such Legal Entitlements, to the extent not in the City's possession, certified by the Company shall have been delivered to the City.

**Section 6.5.5 Record Documents.**

The Company shall maintain current as-built or record drawings and documents, including but not limited to shop drawings and manufacturer's guarantees (" Record Documents") at the Facility for inspection by the City. The Company also shall have delivered to the City a final and complete reproducible set of Record Documents, together with six copies thereof, in a size and form required by the City and as required by the Design Requirements and shall certify that the Capital Improvements were constructed in accordance with the Design Requirements, including any Change Orders. Such Record Documents shall include one mylar copy. The Company shall also provide an electronic file of the Record Documents in such format as the City may specify.

**Section 6.5.6 Equipment Warranties and Manuals.**

The Company shall be in possession of, and shall have delivered to the City, copies of the warranties of machinery, Equipment, fixtures and Rolling Stock constituting a part of the Facility, together with copies of all related operating manuals supplied by the equipment supplier.

**Section 6.5.7 Contract Compliance Calendar.**

The Company shall have delivered to the City a calendar schedule of all required activities to be performed by both parties under this Agreement during the Future Operation Period.

**Section 6.5.8 No Default.**

There shall be no Event of Default by the Company under this Agreement or by the Guarantor under the Guaranty Agreement, or event which with the giving of notice or the passage of time would constitute an Event of Default by the Company hereunder or an Event of Default by the Guarantor under the Guaranty Agreement.

**Section 6.6 Written Test Report.**

Within twenty (20) days following conclusion of the Acceptance Test, the Company shall furnish the City and the City Consultant with an Acceptance Test report consistent with the requirements of Schedule 13.

**Section 6.7 Concurrence or Disagreement with Test Results**

**Section 6.7.1 Acceptance Date Concurrence.**

If the Company certifies in its Acceptance Test report delivered pursuant to Section 6.6 hereof that the full Acceptance Standards have been achieved, the City shall determine within thirty (30) days of its receipt of such report, whether it concurs in such certification. If the City states in writing that it concurs with the Company's certification, the Facility shall be deemed to have achieved Acceptance and the Acceptance Date shall be deemed to have been established on a permanent basis on the later of (i) the date of the Company's original certification of the Acceptance Date; or (ii) that date which is one day prior to the second anniversary of the Commencement Date.

#### **Section 6.7.2 Acceptance Date Disagreement.**

If the City determines at any time during such thirty (30) day review period that it does not concur with the Company's certification that the full Acceptance Standards have been achieved, the City shall immediately send written notice to the Company of the basis for its disagreement.

In the event of any such non-concurrence by the City, or in the event the City fails to act within such thirty (30) day review period, the dispute shall be referred to the Independent Panel for resolution pursuant to Section 8.8. Acceptance shall not be deemed to have been achieved unless the Acceptance Test is conducted in a unified and continuous manner as provided in the Acceptance Test Plan and Schedule 13 hereto, and demonstrates that all of the Acceptance Standards have been met. In the event the Company, in conducting such Acceptance Test, does not successfully meet each Acceptance Standard, the City shall have the right, in its sole discretion, to permit the Company to re-test the Facility for compliance only with the Acceptance Standards not previously achieved through an earlier Acceptance Test. Nothing in this Section shall prevent the Company from repeating any Acceptance Test in order to establish the achievement of Acceptance.

#### **Section 6.8 Extension Period.**

If Acceptance shall not have occurred on or before the that date which is one day prior to the second anniversary of the Commencement Date (as such date may be extended in writing pursuant to the terms of this Agreement) for any reason other than Uncontrollable Circumstances or City Fault, the Company shall be entitled to conduct or repeat the Acceptance Test at its sole cost and expense as often as it desires in order to secure Acceptance of the Facility during the Extension Period, if applicable.

## **Section 6.9 Delay Liquidated Damages.**

If the Acceptance Date occurs subsequent to that date which is one day prior to the second anniversary of the Commencement Date (as such date may be extended in writing pursuant to the terms of this Agreement), then the Company shall pay to the City, in addition to other costs and expenses required to be paid pursuant to this Agreement, daily delay liquidated damages in the amount of \$10,000 for each day that the Acceptance Date falls after that date which is one day prior to the second anniversary of the Commencement Date until any termination of this Agreement for an Event of Default; provided, however, that liquidated damages shall not accrue with respect to the period during which the City reviews a certification of Acceptance achievement from the Company submitted in good faith, but shall commence immediately after notice of non-concurrence is provided by the City. The parties agree that since the City's actual damages if the Acceptance Date occurs subsequent to that date, which is one day prior to the second anniversary of the Commencement Date, would be difficult or impossible to ascertain, the liquidated damages provided for in this Section are intended to place the City in the same economic position it would have been in had the Acceptance Date occurred on that date which is one day prior to the second anniversary of the Commencement Date.

## **Section 6.10 Failure to Meet Acceptance Standard.**

If, as of the last day of the Extension Period (if applicable), the Acceptance Test has not been conducted or has failed to demonstrate that the Facility operates at a standard equal to or greater than the full Acceptance Standard, an Event of Default by the Company will be deemed to have occurred under Section 8.2 hereof notwithstanding any absence of notice, further cure opportunity or other procedural rights accorded the Company thereunder, and the City shall thereupon have the right to terminate this Agreement upon written notice to the Company. Upon any such termination, the City shall have all of the rights provided in Article VIII hereof upon a termination of the Company for cause.

## **Section 6.11 Final Completion.**

### **Section 6.11.1 Requirements.**

"Final Completion" shall occur when all of the following conditions have been satisfied:

- (a) **Certificate of Occupancy Issued.** If required by Applicable Law, a certificate of occupancy has been issued for the Facility;
- (b) **Acceptance Achieved.** The Acceptance Test has been conducted, the Acceptance Standards have been achieved and Acceptance has occurred;
- (c) **Construction Work Completed.** All Construction Work (including all items on the Final Punch List) is complete and in all respects is in compliance with this Agreement;
- (d) **Deliverable Material and Record Documents Furnished.** The Company has furnished to the City all Deliverable Material and Record Documents required to be delivered prior to Acceptance.

### **Section 6.11.2 Final Voucher and Claims Statement.**

The Company shall also prepare and submit to the City as soon as practicable following the Acceptance Test, for purposes of demonstrating Final Completion and obtaining Final Completion payment of the Construction Price, (1) a voucher for payment of the Construction Price, accompanied by a certificate of an authorized officer of the Company certifying (a) the amount of the Fixed Construction Price which is payable, (b) the amount of Fixed Construction Price Adjustments which are to be added or subtracted from the Fixed Construction Price (together with Cost Substantiation if not previously submitted), (c) that all Construction Work has been completed in accordance herewith and with the Design Requirements, and (d) that Acceptance of the Facility has occurred, and (2) a Claims Statement setting forth in detail all claims of every kind whatsoever against the City in connection with or arising out of this Agreement or the Construction Work the Company may have. The City shall review the certified voucher to the City for the Construction Price and the Claims Statement and shall verify or dispute them in writing within thirty (30) days of receipt. When the City determines them to be correct, the Company shall be entitled to payment of the remainder of the Construction Price as of the date of the City's determination. In the event of disputes regarding the certification, the parties shall attempt in good faith to resolve the dispute and, if they are unable to do so, the Company may exercise its right to submit the dispute to resolution pursuant to Section 8.8 hereof.

### **Section 6.12 No Acceptance, Waiver or Release.**

Unless other provisions of this Agreement specifically provide to the contrary, none of the following shall be construed as the City's acceptance of any Construction Work which is defective, incomplete, or otherwise not in compliance with this Agreement, as the City's release of the Company from any obligation under this Agreement, as the City's extension of the Company's time for performance, as an estoppel against the City, or as the City's acceptance of any claim by the Company:

- (1) the City's payment to the Company or any other person of all or any portion of the Fixed Construction Price;
- (2) the City's approval or acceptance of any drawings, submissions, punch lists, other documents, certifications (other than certificates relating to completion or Acceptance of the Capital Improvements), or Construction Work of the Company or any Subcontractor;
- (3) the City's review of (or failure to prohibit) any construction applications, means, methods, techniques, sequences, or procedures for the Construction Work;
- (4) the City's entry at any time on the Site (including any area in which the Construction Work is being performed) ;
- (5) any inspection, testing, or approval of any Construction Work (whether finished or in progress) by the City or any other person; or

(6) the failure of the City or any City consultant to respond in writing to any notice or other communication of the Company.

## **ARTICLE VII**

### **LIABILITY, INSURANCE, UNCONTROLLABLE CIRCUMSTANCES AND INDEMNIFICATION**

#### **Section 7.1 Liability.**

The Company shall be liable for injuries and death to any and all persons and for damage to the Facility and the property of the City or others which result from the acts, errors or omissions by the Company occurring in connection with, or arising out of, the design, construction, start-up, testing, operation and maintenance of the Facility.

#### **Section 7.2 Insurance.**

##### **Section 7.2.1 General Requirements.**

At all times during the Contract Term, the Company shall maintain or cause to be maintained insurance as required by Schedule 4 hereto and this Agreement against such risks and for such amounts as are indicated on Schedule 4 hereto paying, as the same became due and payable, all premiums with respect thereto.

##### **Section 7.2.2 Insurers, Deductibles and City Rights.**

All Insurance shall be procured and maintained from financially sound and generally recognized responsible insurance companies selected by the Company with the consent of the City, which consent shall not be unreasonably withheld, and authorized to write such insurance in the State. Such insurance may be written with deductible amounts comparable to those on similar policies carried by other companies engaged in businesses similar in size, character and respects to those in which the Company is engaged. The Company shall be responsible for any deductible amounts. All policies evidencing such insurance shall provide for (1) payment of the losses to the City, and to the Company as their respective interests may appear, and (2) at least forty-five (45) days prior written notice of the cancellation or material change in the policy thereof to the Company and the City. All policies of insurance required by this Section shall be primary insurance without any right of contribution from other insurance carried by the City. The City, and its Mayor, Council members, officers, employees, agents and persons under the City's control or supervision shall be named as Additional insured under these policies (excluding the worker's compensation insurance policy).

##### **Section 7.2.3 Certificates, Policies and Notice.**

The Company shall deliver to the City, as soon as practicable after the execution of this Agreement and within sixty (60) days prior to each Contract Year thereafter a certificate setting

forth in reasonable detail the particulars as to all insurance policies which the Company is required to maintain pursuant to this Section, listing the risks that are covered thereby, the name of the insurers issuing such insurance, certifying that the same are in full force and effect and giving the amounts and expiration dates of such insurance; the Company shall also complete the City of Richmond's Coverage Verification Form and supply the completed form to the City. The Company shall also supply the City with certified copies of said policies promptly following issuance by the insurers. Such policies shall contain an endorsement to the effect that the insuring company shall notify the City at least forty-five (45) days prior to the effective date of the cancellation or change in the provision of such policy or policies. Whenever a Subcontractor is utilized, the Company shall either procure and maintain or require the Subcontractor to procure and maintain during either the Construction Period or the Operation Period comprehensive general liability, worker's compensation and motor vehicle liability insurance coverage subject to the requirements of Schedule 4, covering damage caused by actions of the Subcontractor or its employees.

### **Section 7.3. Uncontrollable Circumstances**

#### **Section 7.3.1 Relief from Obligations.**

Neither party to this Agreement shall be liable to the other for any loss, damage, delay or failure to perform any obligation to the extent it results from an Uncontrollable Circumstance. The occurrence of an Uncontrollable Circumstance shall not excuse or delay the performance of a party's obligation to pay monies previously accrued and owing under this Agreement.

#### **Section 7.3.2 Notice and Mitigation.**

The party experiencing an Uncontrollable Circumstance shall notify the other party by telephone or facsimile, on or promptly after the date the party experiencing such Uncontrollable Circumstance first knew of the commencement thereof, followed within fifteen (15) days by a written description of (1) the Uncontrollable Circumstance and the cause thereof (to the extent known), (2) the date the Uncontrollable Circumstance began, its estimated duration, the estimated time during which the performance of such party's obligations hereunder shall be delayed, and the impact, if any, on the Acceptance Date, (3) the amount, if any, by which the Construction price or the Service Fee is proposed to be adjusted as a result of such Uncontrollable Circumstance, (4) its estimated impact on the other obligations of such party under this Agreement, and (5) any areas where costs might be reduced and the approximate amount of such cost reductions. Each party shall provide prompt written notice of the cessation of such Uncontrollable Circumstance. Whenever such act, event or condition shall occur, the party claiming to be adversely affected thereby shall, as promptly and as reasonably possible, use its best efforts to eliminate the cause therefor, reduce costs and resume performance under this Agreement. While the delay continues, the affected party shall give notice to the other party, before the first day of each succeeding month, updating the information previously submitted. The Company shall furnish promptly (if and to the extent available to the Company) any additional documents or other information relating to the Uncontrollable Circumstance reasonably requested by the City. As soon as reasonably possible after the giving and receipt of such notices, the Company's schedule to the extent justified and accepted by the City, shall be equitably adjusted by the parties, based upon documented schedule impacts provided by the

Company and accepted by the City, to the extent reasonably necessitated by the Uncontrollable Circumstance.

### **Section 7.3.3 Conditions and Schedule Relief.**

If and to the extent that Uncontrollable Circumstances interfere with, delay or increase the cost of the Company's performing the Construction Work or the Operation Services in accordance herewith, and the Company has given timely notice as required by this Section, the Company shall not be entitled to an increase in the Construction Price or the Service Fee but may be entitled to an extension of the schedule for performance equal the time lost as a result thereof. In the event that the Company believes it is entitled to any schedule relief on account of any Uncontrollable Circumstance, it shall furnish the City written notice of the specific relief requested and detailing the event giving rise to the claim within thirty (30) days after the giving of notice delivered pursuant to Subsection 7.3.2. Within thirty (30) days after receipt of such a timely submission from the Company the City shall issue a written determination as to the extent, if any, it concurs with the Company claim for schedule relief, and the reasons therefor.

### **Section 7.3.4 No Reimbursement for Costs Due to Delays Caused by Uncontrollable Circumstances.**

If an Uncontrollable Circumstance causes the Company a delay in performance of any of its obligations under this Agreement, the sole remedy available to the Company shall be a reasonable extension of time pursuant to Section 7.3.3 hereof. The Company shall not be entitled to any reimbursement of costs due to any such delay caused by Uncontrollable Circumstances.

### **Section 7.3.5 Acceptance of Relief Constitutes Release.**

The Company's acceptance of any Schedule relief under this Section shall be construed as a release of the City by the Company (and all persons claiming by, through, or under the Company) for any and all Loss-and-Expense resulting from, or otherwise attributable to, the event giving rise to the relief claimed.

## **Section 7.4 Indemnification.**

### **Section 7.4.1 Indemnification by the Company.**

The Company agrees that it shall protect, indemnify, defend and hold harmless the City, and its Mayor, Council members, officers, employees, agents and persons under the City's control or supervision (the "City Indemnitees"), from and against any and all claims, liabilities, suits and actions for any damages, sickness, death, or injury to persons or property or for Loss or expense arising from or in any way connected with, either directly or indirectly, the negligent acts, omissions, or willful misconduct of the Company and its directors, officers, employees, agents, representatives, assigns, attorneys, servants, contractors, and subcontractors in connection with its obligations or rights under this Agreement and in their operations, activities and performance of services under this Agreement, save and except for the claims or litigation arising from the sole negligence or willful misconduct of the City Indemnitees. The Company shall reimburse the City for all expenditures, including reasonable attorney's fees, incurred by the City in pursuit or defense of the matters that are the subject of this indemnification. If

requested by the City, the Company shall defend any claims or litigation to which this indemnification applies at the sole cost and expense of the Company.

A City Indemnitee shall promptly notify the Company of the assertion of any claim against it for which it is entitled to be indemnified hereunder, shall give the Company the opportunity to defend such claim, and shall not settle the claim without the approval of the Company. These indemnification provisions are for the protection of the City Indemnitee only and shall not establish, of themselves, any liability to third parties. This indemnification obligation shall be unconditional and shall include, but is not limited to, all claims against the City by an employee or former employee of the Company, the Guarantor or any Subcontractor and the Company expressly waives with respect to the claims of the City Indemnities under this indemnity only all immunity and limitation on liability under any Industrial Insurance Act, other worker's compensation act, disability benefit act, or other employee benefit act of any jurisdiction which would otherwise be applicable in the case of such a claim; provided, however, this waiver shall not be enforceable by any party other than the City Indemnified Parties. Notwithstanding anything contained in this Section 7.4.1 hereof to the contrary, the liability of the Company pursuant to this Section 7.4.1 hereof or under this Agreement shall not exceed \$75,000,000 (the "Liability Cap") cumulatively for the Contract Term; provided, however, that the foregoing limitation shall be reduced by any amounts paid to the City by or on behalf of the Company or its insurers with respect to claims of the City under this Section 7.4.1 hereof or under this Agreement, and provided, further, however, that in no event shall any fines or penalties incurred by the Company count toward the Liability Cap. The provisions of this Section shall survive termination of this Agreement.

#### **Section 7.4.2 Indemnification by the City.**

The City agrees that, to the extent permitted by Applicable Law, it shall protect, indemnify, defend and hold harmless the Company and its Affiliates and their respective officers, directors, shareholders, agents and employees (the "Company Indemnitees") from and against all claims for Loss and Expense in any lawsuit, including appeals, for personal injury to, or death of, any person, or loss or damage to property arising out of (1) the sole negligence, wrongful conduct of the City or any of its Mayor, Councilmembers, officers, employees, agents, representatives, contractors or subcontractors in connection with its obligations or rights under this Agreement, or (2) the performance or nonperformance of the City's obligations under this Agreement.

The City shall not, however, be required to reimburse or indemnify any Company Indemnitee for any Loss-and-Expense due to (a) the negligence or other wrongful conduct of any Company Indemnitee or (b) due to any Uncontrollable Circumstance or any act or omission of any Company Indemnitee judicially determined to be responsible for or contributing to the Loss-and-Expense, and the Company Indemnitee whose negligence or other wrongful conduct, act or omission is adjudged to have caused such Loss-and-Expense shall be responsible therefore in the proportion that its negligence or wrongful conduct caused or contributed to the Loss-and-Expense.

A Company Indemnitee shall promptly notify the City of the assertion of any claim against it for which it is entitled to be indemnified hereunder, shall give the City the opportunity to defend such claim, and shall not settle the claim without the approval of the City. These indemnification provisions are for the protection of the Company Indemnitee only and shall not establish, of themselves, any liability to third parties. The provisions of this Section shall survive termination of this Agreement.

#### **Section 7.5 Limitations of Liability**

Notwithstanding anything contained in this Agreement to the contrary, the liability of the Company and the Guarantor under this Agreement, including, without limitation, liability for liquidated damages, liability for fines and penalties, liability under the indemnities contained in this Article VII, liability for damages under Article VIII and/or any and all other liabilities or damages arising under or in connection with this Agreement, whether arising under breach of contract, tort (including negligence and strict liability), statute or any other theory of law or equity, shall not exceed \$75,000,000 (the "Liability Cap") cumulatively for the Contract Term.

#### **Section 7.6 Survivability of Provisions**

The provisions contained in this Article VII shall survive termination of this Agreement.

### **ARTICLE VIII**

#### **EVENTS OF DEFAULT, REMEDIES AND TERMINATION**

##### **Section 8.1 Remedies for Breach.**

###### **Section 8.1.1 General.**

The parties agree, except as otherwise specifically provided for in this Agreement, that (1) neither party shall have the right to terminate this Agreement, and (2) in the event that either party breaches any obligation under this Agreement, or in the event any representation made by either party hereunder is untrue in any material respect, the other party shall have the right to take any action at law or in equity it may have to enforce the payment of any damages or to secure the performance of any obligation hereunder, and that such right to recover damages or to secure the performance of such obligations as provided herein shall ordinarily constitute an adequate remedy for any breach of such obligation or any material untruth in any such representation.

###### **Section 8.1.2 No Payment or Damages for City Delay.**

If the Company shall claim to have sustained any damages or costs by reason of delays, extraordinary or otherwise, or hindrances which it claims to be due to any action, omission or direction of the City, the Company shall be entitled only to an extension of time and shall not have or assert any other claim, cause or action against the City based on such delay or hindrance.

## **Section 8.2 Events of Default by the Company.**

### **Section 8.2.1. Events of Default Without Requiring Notice or Opportunity to Cure**

Due to the opportunity already given to cure or the seriousness of the Event of Default, each of the following shall constitute an Event of Default by the Company upon which the City may terminate this Agreement without any requirement to provide notice or further opportunity to cure:

(1) **Failure to Apply for Certain Legal Entitlements.** The failure of the Company without excuse for Uncontrollable Circumstances or City Fault, to submit applications or required submittals, it deems in good faith to be complete for the milestones by the dates and in the manner required by Subsection 4.5.2 hereof;

(2) **Failure to Achieve Acceptance.** The failure of the Company to achieve Acceptance prior to the Acceptance Date as such date may be extended for the Extension Period.

(3) **Failure to Comply with Applicable Law.** Failure to comply with the Standards set forth in Schedule 1 hereto or to otherwise comply with Applicable Law for ten (10) cumulative days in any Contract Year.

(4) **Abandonment.** The failure to operate or the abandonment of the Facility, except to the extent excused by Uncontrollable Circumstances, for a period of one (1) or more consecutive days.

(5) **Failure to Pay or Credit.** The failure of the Company to pay or credit undisputed amounts (including performance liquidated damages) owed to the City under this Agreement as and when such payments become due and owing.

(6) **Failure to Provide, Extend or Replace Security.** The failure of the Company to provide, extend or replace any Bond or Letter of Credit when and if required by Section 11.3 hereof.

(7) **Defaults of Company or Guarantor.** The failure of the Company or the Guarantor to satisfy their respective covenants and agreements, the material untruth of any representation or warranty of the Company contained in the Agreement or of the Guarantor contained in, the Guarantee Agreement, or the failure of the Company or the Guarantor to comply with the terms and conditions of Section 11.2 hereof.

(8) **Bankruptcy.** The filing by the Company or the Guarantor of a petition seeking relief under the Federal Bankruptcy Code or any Federal or State statute intended to provide relief for entities that are insolvent or unable to meet their obligations as they come due.

(9) **Failure to Perform Any Other Material Obligation.** The failure of the Company to perform any material obligation hereunder, and said failure is caused by any job action, including, but not limited to, a labor strike or slow down, a work stoppage, a walkout, or a secondary boycott, by employees of the Company performing services pursuant to this Agreement, provided that Company is first given notice of and opportunity to cure such failure under Section 8.2.2 below.

**Section 8.2.2. Events of Default Requiring Notice and Cure Opportunity for Termination.**

It shall be an Event of Default by the Company upon which the City may terminate this Agreement if the Company fails or refuses to perform any material obligation under this Agreement (unless such failure or refusal is excused by an 'Uncontrollable Circumstance or City Fault), except that no such failure or refusal (other than those set forth in Section 8.2.1) shall constitute an Event of Default giving the City, the right to terminate this Agreement for cause under this Subsection unless:

(1) the City has given prior written notice to the Company stating that a specified failure or refusal to perform exists which shall, unless corrected, constitute a material breach of this Agreement on the part of the Company and which shall, in its opinion, give the City a right to terminate this Agreement for cause under this Section unless such default is corrected within a reasonable period of time necessary to cure the default, but in no event greater than sixty (60) days; and

(2) the Company has neither challenged in an appropriate forum the City's conclusion that such failure or refusal to perform has occurred or constitutes a material breach of this Agreement nor corrected or diligently taken steps to correct such default within a reasonable period of time, but not more than sixty (60) days, from receipt of the notice given pursuant to the preceding paragraph (but if the Company shall have diligently taken steps to correct such default within a reasonable period of time, the same shall not constitute an Event of Default for as long as the Company is continuing diligently to take such steps to correct such default) .

**Section 8.2.3. Termination Damages and Other Legal Rights Upon Company Default.**

The right of termination provided under this Section upon an Event of Default by the Company is not exclusive. Upon the occurrence of an Event of Default by the Company, the City may exercise without prejudice any rights provided by law to the City to bring appropriate legal action to recover actual damages for failure in the performance by the Company of its obligations pursuant to this Agreement for the remaining Contract Term. In calculating actual damages, the Company's obligation to pay delay liquidated damages accruing during the Extension Period in accordance with Section 6.9 hereof shall in no way limit the right of the City to receive damages for any delay beyond the Extension Period. No such termination or other exercise of legal rights shall affect the right of the City to exercise its rights under any Bonds, nor shall any value in the Facility created on account of the surety's performance under any Bonds be offset against, credited or otherwise reduce the amount of such actual damages.

**Section 8.2.4. Enforcement Costs.**

The Company agrees to pay to the City all Fees and Costs incurred by or on behalf of the City in enforcing payment or performance of the Company's obligations hereunder.

**Section 8.3 Events of Default by the City**

**Section 8.3.1 Events of Default Not Requiring Notice of Cure Opportunity for Termination.**

Each of the following shall constitute an Event of Default by the City upon which the Company may terminate this Agreement without any requirement of notice or cure opportunity:

(a) Bankruptcy. The filing by the City of a petition seeking relief under the Federal Bankruptcy Code or any Federal or State statute intended to provide relief for political subdivisions which are insolvent or unable to meet their obligations as they mature.

(b) Failure to Pay. The failure of the City to pay undisputed amounts owed to the Company under this Agreement within ninety (90) days following the due date for such payment.

**Section 8.3.2 Events of Default Requiring Notice and Cure Opportunity for Termination.**

It shall be an Event of Default by the City upon which the Company may terminate this Agreement if the City fails or refuses to perform any material obligation under this Agreement (unless such failure or refusal is excused by an Uncontrollable Circumstance or Company Fault), except that no such failure or refusal (other than those set forth in Subsection 8.3.1) shall constitute an Event of Default giving the Company the right to terminate this Agreement for cause under this subsection unless:

(1) the Company has given prior written notice to the City stating that a specified failure or refusal to perform exists which shall, unless corrected, constitute a material breach of this Agreement on the part of the City and which shall, in its opinion, give the Company a right to terminate this Agreement for cause under this Section unless such default is corrected within a reasonable period of time, but not more than sixty (60) days subject to the procedure specified in Subsection (2) below; and

(2) the City has neither challenged in an appropriate forum the Company's conclusion that such failure or refusal to perform has occurred or constitutes a material breach of this Agreement nor corrected or diligently taken steps to correct such default within a reasonable period of time but not more than sixty (60) days from the date of the notice given pursuant to the preceding paragraph (but if the City shall have diligently taken steps to correct such default within a reasonable period of time, but in no event greater than sixty (60) days, the same shall not constitute an Event of Default for as long as the City is continuing diligently to take such steps to correct such default) .

**Section 8.3.3 Termination Liquidated Damages During the City Initial Term.**

If this Agreement is terminated by the Company for cause as a result of an Event of Default by the City during the Initial Term, the City shall be obligated to pay the Company, as liquidated damages upon any such termination, the sum specified in Section 8.4 hereof which would be payable if this Agreement were terminated during the Initial Term, according to the year of termination, at the election of the City for convenience and without cause. The parties agree that since the Company's actual damages upon termination of the City for cause under this Section during the Initial Term would be difficult or impossible to ascertain, that the termination liquidated damages provided for in this Section are intended to place the Company in the same economic position it would have been in had the Event of Default permitting termination for cause during the Initial Term not occurred, and that such termination liquidated damages shall constitute the only damages payable by the City upon any such termination for cause, regardless of legal theory. The obligation to pay such termination liquidated damages shall not impair or limit the obligation of the City to the Company under any other provision of this Agreement which expressly survives termination hereunder.

#### **Section 8.4 City Discretionary Termination.**

##### **Section 8.4.1 Discretionary Termination Right.**

The City shall have the right to terminate this Agreement in its sole discretion, for its convenience and without cause at any time upon ninety (90) days' written notice to the Company (a "Termination for Convenience"). In addition to any other reason for termination for convenience, a Termination for Convenience will also be considered to have occurred if the City terminates the Agreement for either of the following reasons: (1) funds for the Capital Improvements or for the operations, maintenance and management of the Facility are not appropriated or otherwise made available; and (2) if an Uncontrollable Circumstance, regardless of the cause, shall have occurred relative to a material obligation of the Company hereunder, and said material obligation of the Company is not performed for a period of thirty (30) days following the Uncontrollable Circumstance; provided, however, that in the event of a Termination for Convenience for the reasons specified in (1) and (2) above, the City may terminate the Agreement upon fifteen (15) days' written notice.

##### **Section 8.4.2 Discretionary Termination Amount.**

If the City exercises its right to terminate the Agreement, the City shall pay the Company a termination fee equal to an amount as proposed on . Schedule 15 of this Agreement. The fees indicated on Schedule 15 shall include costs for demobilization and related costs, and any unamortized portions of Capital Improvement costs. The fees shall be reduced by any outstanding encumbrances incurred by the City on behalf of the Company.

##### **Section 8.4.3 Payment of Amounts Owing Through the Termination Date.**

Notwithstanding any other terms of this contract to the contrary, upon any termination of this Agreement pursuant to this Section or any other section of this Agreement, the Company shall also be paid all amounts due for goods or services hereunder to be paid as part of the Construction Price or the Service Fee or any other provision of this Agreement but not yet paid as of the date of termination.

#### **Section 8.4.4 Adequacy of Termination Payment.**

The Company agrees that the applicable termination payments provided in this Section shall fully and adequately compensate the Company and all Subcontractors for all profits, costs, expenses, losses, liabilities, damages, taxes, and charges of any kind whatsoever (whether foreseen or unforeseen) attributable to such termination of the Company's right to perform this Agreement.

#### **Section 8.4.5 Completion or Continuance by City.**

After the date of any termination under this Section, the City may at any time (but without any obligation to do so) take any and all actions necessary or desirable to continue and complete the Construction Work or continue the Operations Services so terminated, including, without limitation, entering into contracts with other contractors.

#### **Section 8.5 Certain Obligations of the Company Upon Termination or Expiration**

##### **Section 8.5.1 Company Obligations Upon Termination.**

Upon a termination of the Company's right to perform this Agreement under Sections 8.2, 8.3 or 8.4 hereof or upon the expiration of this Agreement under Section 10.1 hereof, the Company shall, as applicable: (1) stop the Construction Work and/or the Operation Services, as applicable, on the date and to the extent specified by the City; (2) promptly take all action as necessary to protect and preserve all materials, equipment, tools, facilities and other City property; (3) promptly remove from the Site all construction equipment, implements, machinery, tools, temporary facilities of any kind and other property owned or leased by the Company, and repair any damage caused by such removal; (4) clean the Site and Facility, and leave the same in a neat and orderly condition; (5) promptly remove all employees of the Company and any Subcontractors and vacate the Site; (6) promptly deliver to the City copies of any and all Subcontracts, together with a statement of: (a) the items ordered and not yet delivered pursuant to each agreement; (b) the expected delivery date of all such items; (c) the total cost of each agreement and the terms of payment; and (d) the estimated cost of canceling each agreement; (7) deliver to the City promptly a list of: (a) all special order items previously delivered or fabricated by the Company or any Subcontractor but not yet incorporated in the Construction Work or the Operation Services; and (b) all other supplies, materials, machinery, equipment, and other property previously delivered or fabricated by the Company or any Subcontractor but not yet incorporated in the Construction Work or the Operation Services; (8) advise the City promptly of any special circumstances which might limit or prohibit cancellation of any Subcontract; (9) unless the City directs otherwise, terminate all Subcontracts and make no additional agreements with Subcontractors; (10) as directed by the City, transfer to the City by appropriate instruments or title, and deliver to the Site (or such other place as the City may specify) , all special order items pursuant to this Agreement; (11) promptly transfer to the City all warranties given by any manufacturer or Subcontractor with respect to particular components of the Construction Work or the Operation Services; (12) notify the City promptly in writing of any Legal Proceedings against the Company by any Subcontractor relating to the termination of the Construction Work or the Operation Service (or any Subcontracts) ; (13) give written notice of termination, effective as of date of termination of this Agreement, promptly under each policy of Insurance (with a

copy of each such notice to the City) , but permit the City to continue such policies thereafter at its own expense, if possible; and (14) take such other actions, and execute such other documents as may be necessary to effectuate and confirm the foregoing matters, or as may be otherwise necessary or desirable to minimize the City's costs, and take no action which shall increase any amount payable to the City under this Agreement.

#### **Section 8.5.2. Additional Obligations.**

Upon termination of the Company's right to perform this Agreement under Sections 8.2, 8.3 or 8.4 hereof or upon the expiration of this Agreement under Section 10.1 hereof, the Company at its cost and expense shall provide, and shall use its best reasonable efforts to cause its Subcontractors to provide operational systems, technological and design advice and support to the City or any replacement operator designated by the City. Such advice and support shall be for a period of twelve (12) months and shall include providing any plans, drawings, renderings, blueprints, operating manuals, maintenance and operating records, or other information useful or necessary for the City or any replacement operation designated by the City or any such replacement operator to complete and carry out the Construction Work and to perform the Operation Services. If terminated pursuant to the above sections, the Company shall exercise its best efforts to maintain the performance of the Facility during the transfer to the City.

#### **Section 8.5.3. Company Payment of Certain Costs.**

If termination is pursuant to Section 8.2 hereof, the Company shall be obligated to pay the costs and expenses of undertaking its post-termination responsibilities under this Section. If the Company fails to comply with any obligations under this Section, the City may perform such obligations and the Company shall pay on demand all reasonable costs thereof subject to receipt of invoices or other substantiation.

#### **Section 8.5.4. City Payment of Certain Costs.**

If termination is for the convenience of the City under Section 8.4 hereof or due to a City Event of Default pursuant to Section 8.3 hereof, the City shall pay to the Company within sixty (60) days of the date of the Company's invoice supported by Cost Substantiation all reasonable costs and expenses incurred by the Company in satisfying the requirements of this Section.

#### **Section 8.6 No Waivers.**

No action of the City or Company pursuant to this Agreement (including, but not limited to, any investigation or payment), and no failure to act, shall constitute a waiver by either party of the other party's compliance with any term or provision of his Agreement. No course of dealing or delay by the City or Company in exercising any right, power or remedy under this Agreement shall operate as a waiver thereof or otherwise prejudice such party's rights, powers and remedies. No single or partial exercise of (or failure to exercise) any right, power or remedy of the City or Company under this Agreement shall preclude any other or further exercise thereof or the exercise of any other right, power or remedy.

#### **Section 8.7 No Consequential or Punitive Damages.**

In no event shall either party hereto be liable to the other or obligated in any manner to pay to the other any special, incidental, consequential, punitive or similar damages based upon claims arising out of or in connection with the performance or non-performance of its obligations or otherwise under this Agreement, or the material inaccuracy of any representation made in this Agreement, whether such claims are based upon contract, tort, negligence, warranty or other legal theory.

### **Section 8.8 Dispute Resolution.**

All disputes arising out of or relating to this Agreement shall be subject first to non-binding negotiation, and, if unsuccessful, non-binding mediation, as conditions precedent to the submission of the dispute to mandatory, binding arbitration, as provided below.

#### **Section 8.8.1 Negotiation.**

The City and the Company agree, prior to invoking any other method of dispute resolution as provided in this Agreement, first to engage in good faith negotiations regarding any dispute. Either party may invoke good faith negotiations by written notice to the other, and, upon receipt of such written notice, said negotiations shall commence forthwith. If the dispute has not been resolved by mutual agreement within seven (7) calendar days of the commencement of negotiations, either party may refer the dispute to non-binding mediation as provided below.

#### **Section 8.8.2 Independent Panel Establishment.**

The parties agree to establish, within one hundred twenty (120) days after executing this Agreement, an Independent Panel (the "Independent Panel") to conduct non-binding mediation of any disputes referred for mediation which the parties have been unable to resolve through good faith negotiation. The Independent Panel shall consist of three (3) members chosen by agreement of the City and the Company. The Independent Panel shall consist of engineers or other persons with expertise and experience in the design, construction and operation of private, public or municipal wastewater treatment plants, or other similar type facilities, similar in size and complexity to the Facility.

#### **Section 8.8.3 Independent Panel Mediation.**

In the event that any dispute cannot be resolved through negotiation, either party may invoke the services of the Independent Panel to conduct non-binding mediation of the dispute by (a) giving written notice to the other of its intent to invoke non-binding mediation before the Independent Panel, which notice shall include a brief but detailed description of the dispute, including the relief requested, and (b) providing a copy of such notice to the Independent Panel. Within seven (7) days of its receipt of the written notice, the Independent Panel shall designate one member to serve as a mediator in the dispute, and so notify the parties. The member so designated shall fix a time and place for the non-binding mediation, which date shall not be later than fourteen (14) days from the date of the receipt of such notice, and shall give the parties at least five (5) business days written notice of the initial mediation session. The mediator shall meet with the parties until either (a) the dispute is resolved or (b) the mediator decides that further meetings will not likely result in a resolution by agreement. All costs and expenses incurred by the Independent Panel in the performance of its duties and responsibilities shall be

shared equally between the City and the Company. If the dispute has not been resolved by non-binding mediation within forty-five (45) days of the written notice convening such non-binding mediation, either party may refer the dispute to binding arbitration as provided below.

**Section 8.8.4 Binding Arbitration.**

All disputes arising out of or relating to this Agreement, which have not been resolved by negotiation or mediation as provided above, shall be decided by binding arbitration conducted in accordance with the Construction Industry Arbitration Rules currently in effect by the American Arbitration Association. The demand for arbitration shall be filed in writing with the other party to the Agreement and with the American Arbitration Association. A demand for arbitration shall be made within reasonable time after the dispute has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings would be barred by the applicable statute of limitations. The party filing a notice of demand for arbitration must assert in the demand all disputes then known to that party on which arbitration is permitted to be demanded. The arbitration hearing shall be held as soon as possible but in no event later than 30 days after the demand for arbitration is filed. The award rendered by the arbitrators shall be final and binding, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

**ARTICLE IX**

**REPRESENTATIONS AND WARRANTIES**

**Section 9.1. Representations of the City.**

The City represents and warrants to the Company as follows:

**Section 9.1.1 Existence and Powers.**

The City is a body corporate and politic constituting a municipal corporation, validly existing under the Constitution and the laws of the State, with full legal right, power and authority to enter into and to perform its obligations under this Agreement.

**Section 9.1.2 Due Authorization and Binding Obligation.**

This Agreement has been duly authorized, executed and delivered by all necessary corporate action of the City and constitutes a legal, valid and binding obligation of the City, enforceable against the City in accordance with its terms, except as the same may be limited by bankruptcy, insolvency or other similar laws affecting creditors' rights from time to time in effect.

**Section 9.1.3 No Conflict.**

Neither the execution nor delivery by the City of this Agreement, nor the performance by the City of its obligations in connection with the transactions contemplated hereby or the fulfillment by the City of the terms or conditions hereof (1) conflicts with, violates or results in the breach of any constitution, law or governmental regulation applicable to the City, or (2)

conflicts with, violates or results in the breach of any term or condition of any order, judgment or decree, or any contract, agreement or instrument, to which the City is a party or by which the City or any of its properties or assets are bound, or constitutes a default under any of the foregoing.

**Section 9.1.4 No Approvals Required.**

No approval, authorization, order or consent of, or declaration, registration or filing with, any Governmental Body or referendum of voters is required for the valid execution and delivery by the City of this Agreement or the performance by the City of its payment or other obligations hereunder except as the same have been disclosed to the Company and have been duly obtained or made.

**Section 9.1.5 No Litigation.**

There is no action, lawsuit or proceeding, at law or in equity, before or by any court or Governmental Body, or proceeding for referendum or other voter initiative, pending or, to the best of the City's knowledge, threatened against the City, which is likely to result in an unfavorable decision, ruling or finding which would materially and adversely affect the execution and delivery of this Agreement or the validity, legality or enforceability of this Agreement, or any other agreement or instrument entered into by the City in connection with the transactions contemplated hereby, or which would materially and adversely affect the ability of the City to perform its obligations hereunder or under any such other agreement or instrument.

**Section 9.1.6 No Implied Representations or Warranties.**

Except as expressly set forth in this Agreement, the City shall not be deemed to have made and has not made (1) any representations or warranties, either express or implied, irrespective of any reviews or other action by the City, or its representatives, with respect to the Site, (2) any representations or warranties as to compliance with, design, operation, fitness for use, condition or capacity, actual or design, of the Facility or any component thereof, or (3) any representations or warranties as to the suitability of the Facility for the purpose specified in this Agreement or for any other purpose specified in this Agreement or otherwise.

**Section 9.2 Representations and Warranties of the Company.**

The Company represents and warrants to the City as follows:

**Section 9.2.1 Existence and Powers.**

The Company is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and has the authority to do business in this State, with the full legal right, power and authority to enter into and perform its obligations under this Agreement.

**Section 9.2.2 Due Authorization and Binding Obligation.**

This Agreement has been duly authorized, executed and delivered by all necessary corporate action of the Company and constitutes a legal, valid and binding obligation of the Company, enforceable against the Company in accordance with its terms, except to the extent that its enforceability may be limited by bankruptcy, insolvency or other similar laws affecting creditors' rights from time to time in effect.

**Section 9.2.3 No Conflict.**

Neither the execution nor delivery by the Company of this Agreement nor the performance by the Company of its obligations in connection with the transactions contemplated hereby or the fulfillment by the Company of the terms or conditions hereof (1) conflicts with, violates or results in a breach of any constitution, law or governmental regulation applicable to the Company or (2) conflicts with, violates or results in a breach of any order, judgment or decree, or any contract, agreement or instrument to which the Company is a party or by which the Company or any of its properties or assets are bound, or constitutes a default under any of the foregoing.

**Section 9.2.4 No Approvals Required.**

No approval, authorization, order or consent, or declaration, registration or filing with any Governmental Body is required for the valid execution and delivery of this Agreement by the company or the performance of its payment or other obligations hereunder except as the same have been disclosed to the City and have been duly obtained or made.

**Section 9.2.5 No Litigation.**

There is no action, lawsuit or proceeding, a law or in equity, before or by any court or Governmental Body pending or, to the best of the Company's knowledge, threatened against the Company, which is likely to result in an unfavorable decision, ruling or finding which would materially and adversely affect the execution and delivery of this Agreement or the validity, legality or enforceability of this Agreement, or any other agreement or instrument entered into by the Company in connection with the transactions contemplated hereby, or which would materially and adversely affect the ability of the City to perform its obligations hereunder or under any such other agreement or instrument.

**Section 9.2.6 Practicability of Performance.**

The Company assumes and shall have exclusive responsibility for the design and the technology to be employed in the Capital Improvements and maintenance and operation of the Facility, and for their efficacy. The Company (1) assumes the risk of the practicability and possibility of performance of the Facility on the scale required hereunder, (2) assumes the risk of treating wastewater through the operation of the Facility which meets all of the requirements hereof even though such performance and supply may involve technological or market breakthroughs or overcoming facts, events or circumstances which may be different from those assumed by the Company in entering into this Agreement, and (3) agrees that sufficient consideration for the assumption of such risks and duties is included in the Fixed Construction Price and the Service Fee. The Company's warranties in this paragraph shall apply

notwithstanding the occurrence of any Uncontrollable Circumstance other than those specifically enumerated in item (a) (1) of the definition thereof.

**Section 9.2.7 Adequacy of Price and Schedule.**

The Company has reviewed carefully the Capital Improvements described in Schedule 12 hereto and all other documents forming part of this Agreement, as existing on the Agreement Date. Subject to the terms of this Agreement, the Company agrees that it can perform the Capital Improvements for the Fixed Construction Price, can achieve Acceptance on or before the Acceptance Date, and can perform the operations maintenance and management of the Facility for the Service Fee set forth in Schedule 11 hereto.

**Section 9.2.8 Information Supplied by the Company.**

The information in this Agreement supplied by the Company is correct and complete in all material respects.

**Section 9.3 Representations and Warranties Against Patent Infringement.**

**Section 9.3.1 Patents and Licenses.**

The Company warrants that it owns, or is authorized to use under patent rights, licenses, franchises, trademarks, copyrights, or otherwise, the technology necessary for the performance by the Company of this Agreement and the transactions contemplated hereby, without any known material conflict with the rights of others.

**Section 9.3.2 Warrant Against Infringement.**

The Company warrants that it shall pay all applicable royalties and license fees and shall at its own cost and expense defend, indemnify, save and hold harmless, and pay any and all awards of damages assessed against the City from and against any and all damages, costs, claims, expenses, and liabilities including, without limitation, all fees and costs, on account of infringements of patents, copyrighted or non-copyrighted works, secret processes, trade secrets, patented or non-patented inventions, articles or appliances, or claims thereof pertaining to the Facility, or any part or operation thereof, combinations thereof, processes therein or the use of any tools or implements used by the Company, or its Subcontractors; provided, however that the City (1) promptly upon receipt forwards to the Company any communication charging infringement; (2) promptly forwards to the Company all process, pleadings, and other papers served in any action charging infringement; and (3) gives the Company the opportunity to defend any such action which defense shall be at the Company's sole cost and expense. Company shall not have any obligations under this Section or elsewhere under this Agreement except to the extent that the intellectual property infringement pertains to actions by the Company, or its Subcontractors, that occur after the Contract Date and/or pertain to the operational practices and actions of the Company, or its Subcontractors after the Contract Date.

**Section 9.3.3 Preliminary Injunction.**

If in any suit or proceeding, a temporary restraining order or preliminary injunction is requested, the Company shall immediately retain counsel and shall use its best efforts, by giving a satisfactory bond or otherwise, to avoid the issuance of or alternatively to secure the release of the order or injunction.

**Section 9.3.4 Permanent Injunction.**

If in any suit or proceeding the Facility, or any part or combination thereof or process therein, is held to constitute an infringement and its use is permanently enjoined, the Company shall at once use its best efforts to secure for the City and the Company a license, at the Company's expense, including payment of any fee or royalty related thereto, authorizing the continued use of the Facility, part thereof, combination therein.

**Section 9.3.5 Replacement.**

If the Company is unable to secure such license within a reasonable time as determined by the City, the Company shall, at its own expense, and without impairing any Performance Requirements for the construction or operation of the Facility, cause the infringing portion of the Facility to be replaced with non-infringing components or parts or modify the same so that they become non-infringing.

**Section 9.4 Non-Discrimination, Business Opportunity and Local Employment Programs**

**Section 9.4.1 Nondiscrimination – Company**

The Company agrees to observe the provisions of Section 2.28.030 of the Municipal Code of the City of Richmond, obligating every contractor under a contract with the City of Richmond for public work or for goods or for services to refrain from discriminatory employment or subcontracting practices on the basis of race, color, sex, sexual orientation, religious creed, national origin or ancestry of any employees, any applicant for employment or any potential subcontractor. Said Section 2.28.030 is, by this reference, made a part of this Agreement.

**Section 9.4.2 Richmond's Business Opportunity and Local Employment Programs.**

The Company agrees to make every effort to ensure the maximum feasible utilization of Richmond businesses and veterans businesses and the employment of Richmond residents during the term of this Agreement. The Company shall work with the City's Employment and Training Department and Contract Compliance Department in furtherance of this objective.

**Section 9.5 Survival of Representations and Warranties.**

Notwithstanding any other provision of this Agreement, the representations, warranties and covenants in this Article IX are intended to and shall survive termination of this Agreement.

**ARTICLE X**

**TERM**

**Section 10.1 Term of Agreement.**

**Section 10.1.1 Effective Date and Termination Rights.**

This Agreement shall become effective on the Agreement Date, and shall continue in effect for twenty (20) years following the Commencement Date (the "Initial Term") unless (1) if renewed at the option of the City as provided in Section 10.2 hereof, this Agreement shall remain effective until the last day of any applicable renewal term (the "Renewal Term"; the Initial Term and any Renewal Term being referred to herein collectively as the "Term" or the "Contract Term"), or (2) if earlier terminated pursuant to the termination provisions of Article IV or Article VIII hereof, in which event the Term shall be deemed to have ended as of the date of such termination.

**Section 10.1.2 Survival of Certain Provisions.**

All representations and warranties of the parties contained in Article IX and such other provisions of this Agreement that expressly so provide, are intended to and shall survive the termination of this Agreement, and no such termination of this Agreement shall limit or otherwise affect the respective rights and obligations of the parties hereto accrued prior to the date of such termination.

**Section 10.2 Renewal.**

The City shall have the unilateral option to renew this Agreement for additional periods of five (5) years up to a maximum of two such renewals (the "Renewal Period"). If the City determines that it wishes to renew this Agreement pursuant to this Section, the City shall give the Company written notice of the City's irrevocable election to renew the Agreement on or before one hundred eighty (180) days preceding the last day of the Initial Term hereof or the then effective Renewal Term hereof. If the City so elects to renew this Agreement, such renewal shall be on the same terms and conditions as are applicable during the Initial Term hereof so that the only changes to this Agreement shall be an adjustment in the Service Fee per the annual adjustment methodology of the Service Agreement, and the requirement that the City perform the Renewal Period Capital Improvements identified in Section 10.3 within a reasonable time after the start of the Renewal Period.

**Section 10.3 Review at Expiration of Agreement.**

The Company and the City shall mutually select an independent, technically qualified firm or firms (the "Auditor") to perform an audit of the Facility to determine the condition of the Facility in the first three (3) months of the final Contract Year. The cost of the services provided by the Auditor shall be divided equally between the Company and the City.

The Auditor will conduct a detailed and comprehensive survey and inspection of the Facility, including but not limited to, all Equipment, buildings, structures, pavements, grounds, utility lines, spare parts inventories, operation and maintenance records, to identify the physical and operational conditions and general status of repair of the Facility. The Auditor will prepare a detailed report documenting the findings of the survey and inspection during the first six (6) months of the final Contract Year (the "Auditor's Report"). The Auditor's Report will include, but not be limited to, the following: 1) An assessment of the current condition of each item or component, its estimated remaining service life, and whether its current condition is consistent with the maintenance and general upkeep requirements of this Agreement and expected normal wear and tear; 2) An estimated cost, including a reasonable contingency allowance which will vary depending on the nature of the work required, for repair, renewal or replacement, as appropriate, will be included in the Auditor's Report for each item or component that is judged to be deficient by the Auditor; and 3) Identification and a budgetary estimate of Capital Improvements necessary for the operation of the Facility for an additional ten years per Industry Practices, that could reasonably be expected to be required for the proper, on-going operation and regulatory compliance of the Facility assuming the Company complies with the requirements of this Agreement and has provided the City with a properly maintained Facility at the end of the Initial Term (the "Renewal Period Capital Improvements").

The Auditor will provide a draft of the Auditor's Report to the City and the Company for their respective review and comments. In the case of any disagreement between the City and the Company as to the appraised condition of items or portions of the Facility, or the estimated cost for repair, renewal or replacement, the Auditor's determination will be final and binding upon both parties.

## **ARTICLE XI**

### **MISCELLANEOUS**

#### **Section 11.1 Limited Recourse to City.**

##### **Section 11.1.1. Liability Limited to Revenues; Subordination to Revenue Bonds.**

Notwithstanding any other provision hereof, no recourse shall be had to the general fund or the general credit of the City for the payment of any amount due the Company hereunder, whether on account of the Construction Price, the Service Fee, any Indemnity payment, or for any Loss-and-Expense or payment or claim of any nature arising from the performance or non-performance of the City's obligations hereunder. The City expects to pay all or a portion of the Construction Price from the proceeds of the Revenue Bonds. The City's obligations hereunder shall be payable solely from the proceeds of the Revenue Bonds (as to the Construction Price) amounts in the Enterprise Fund and the Revenues; provided, that, except for amounts payable hereunder which constitute Maintenance and Operation Costs, all payments to the Company or

any other payee or claimant hereunder shall be subordinate to the pledge and obligation of the City to pay debt service on the Revenue Bonds from Net Revenues under the Indenture. All amounts held in the Enterprise Fund shall be held for the uses permitted thereby, and no such amounts shall constitute property of the Company. In addition to the provisions of the Indenture, the City may further pledge, hypothecate, transfer, or assign any of the funds in the Enterprise Fund, including Revenues, in any lawful manner the City determines so long as the City certifies that the remaining Revenues available to make payments hereunder will be sufficient to pay all amounts expected to be payable to the Company hereunder.

#### **Section 11.1.2 Rate Covenant.**

Throughout the Contract Term, the City shall fix, establish, revise from time to time as necessary, maintain and collect thereunder, fees, rates and charges that, together with other amounts available in the City's Enterprise Fund, , will always provide System sufficient to pay the amounts payable by the City hereunder.

#### **Section 11.1.3 Enforcement of Collections.**

The City will diligently enforce its right to receive the Revenues and will diligently enforce and collect the fees, rates and charges as contemplated in this Section. The City shall, so long as this Agreement is in full force and effect, take all lawful action necessary or required to continue to entitle the City to receive the Revenues in an amount sufficient to satisfy its payment obligations hereunder.

### **Section 11.2 Company Business Activities and Guarantor Credit Standing**

#### **Section 11.2.1 Company Business.**

The Company agrees that its business regarding this Agreement will be limited to that contemplated by this Agreement and it will not engage in activities or incur liabilities in connection with this Agreement other than in connection with the Company's performance of this Agreement and the transactions contemplated hereby.

#### **Section 11.2.2 Guarantee Agreement.**

During the Contract Term, the Company shall cause to be provided and maintained the Guarantee Agreement, substantially in the form attached hereto as Exhibit B.

#### **Section 11.2.3 Material Decline in Guarantor's Credit Standing.**

For purposes of this Section, a "Material Decline in Guarantor's Credit Standing" shall be deemed to have occurred if (1) in the event that the Guarantor has long-term senior debt outstanding which has a credit rating by either Rating Service, such rating by either Rating Service is established at or is reduced below investment grade level, or (2) in the event that the Guarantor does not have long-term senior debt outstanding or such debt is not rated by either Rating Service, the credit standing of the Guarantor declines to a level which is insufficient to support an investment grade credit rating by either Rating Service on long-term senior debt of

the Guarantor, whether or not any such debt is outstanding. The Company immediately shall notify the City of any Material Decline in the Guarantor's Credit Standing.

**Section 11.2.4 Credit Enhancement Prior to Commencement Date.**

If at any time, a Material Decline in Guarantor's Credit Standing occurs, the Company shall cause to be provided credit enhancement of its obligations hereunder within thirty (30) days after such occurrence. Such credit enhancement shall be in the form either of (1) an unconditional guarantee of all of the Company's obligations hereunder provided by a corporation or financial institution whose long-term senior debt is or would be rated investment grade by either Rating Service (the "Unconditional Guaranty"), or (2) a letter of credit securing the Company's obligations hereunder in the face amount of \$50,000,000 during the first five (5) years of this Service Agreement and in the face amount of \$ 30,000,000 for the sixth (6) or subsequent years of this Service Agreement provided by a financial institution whose long-term senior debt is or would be rated investment grade by either Rating Service (the "Letter of Credit") .**Section 11.2.5 Annual Financial Reports.**

The Company shall furnish the City, as soon as reasonably possible after the end of each Contract Year, the most recent audited financial statements of the Guarantor. The Company shall also provide the City, if requested by the City, with unaudited financial statements of the Company provided the City first agrees to maintain and can actually maintain such statements in strictest confidence under Applicable Law (and not subject to third party review under the Freedom of Information Act or similar statutes or law) in accordance with a confidentiality agreement to be mutually agreed upon by the parties. If applicable, the Company shall also furnish the City with copies of the quarterly and annual reports and other filings of the Guarantor filed with the Securities and Exchange Commission.

**Section 11.3. Financial Security for the Performance of the Company's Obligations**

**Section 11.3.1 Construction Performance and Labor and Materials Bonds.**

On or before the Construction Date the Company shall provide financial security for the performance of its Construction Period obligations hereunder through Construction Performance and Labor and Materials Bonds issued by a surety acceptable to the City.

The Construction Performance and Labor and Materials Bonds shall be issued in the form as approved by the City no later than ninety (90) days prior to the Construction Date and in the amount of the Fixed Construction Price.

**Section 11.3.2 Operations Bond.**

The Company shall provide an Operations Bond issued by a surety reasonably acceptable to the City as security for performance of its obligations hereunder during the Operation Period (the "Operations Bond"). The Operations Bond shall be in amount equal to the Total Company Operations Obligations and shall be for a term of one (1) year, shall be continuously renewed, extended or replaced for as long as required by the City, and shall be issued in the form as reasonably approved by the City.

#### **Section 11.4 Relationship of the Parties.**

The Company is an independent contractor of the City and the relationship between the parties shall be limited to the performance of this Agreement in accordance with its terms. Neither party shall have any responsibility with respects to the services to be provided or contractual benefits assumed by the other party. Nothing in this Agreement shall be deemed to constitute either party a partner, agent or legal representative of the other party. Except as otherwise provided herein, no liability or benefits, such as workers' compensation, pension rights or liabilities, or other provisions or liabilities arising out of or related to a contract for hire or employer/employee relationship shall arise or accrue to any party's agent or employee as a result of this Agreement or the performance.

#### **Section 11.5 Property Rights.**

The Company shall pay all royalties and license fees relating to the design, construction, start-up, and testing of the Capital Improvements, and to the operation and maintenance of the Facility. The Company shall indemnify and hold harmless the City, and any of the City Indemnities from and against all Loss and Expense, and shall defend the City Indemnities in any suit, including appeals, arising out of or related to infringement of such patent, trademark or copyright relating to, or for the unauthorized use of trade secrets by reason of the design, construction, start-up, and testing of the Capital Improvements, and to the operation and maintenance of the Facility, or at its option, shall acquire the rights of use under infringed patents, or modify or replace infringing equipment with equipment equivalent in quality, performance, useful life and technical characteristics and development so that such equipment does not so infringe. The Company shall not, however, be required to reimburse or indemnify any person for any losses and expenses due to the negligent or willful conduct of such person. The provisions of the Section shall survive termination of this Agreement.

#### **Section 11.6 Interest on Overdue Obligations.**

Except as otherwise provided herein, all amounts due hereunder, whether as damages, credits, revenue, charges or reimbursements, that are not paid when due shall bear interest at the rate of interest which is the lower of (1) the maximum rate permitted by the law of the State or (2) 18%, on the amount outstanding from time to time, on the basis of a 365-day year, counting the actual number of days elapsed, and such interest accrued at any time, to the extent permitted by law, shall be deemed added to the amount due as accrued.

#### **Section 11.7 Subcontractors.**

##### **Section 11.7.1 Limited Review and Approval.**

The City shall have the right to review and approve any Company agreements prior to the Company entering into such agreements wherein the following are deemed to exist: (a) any record of felony criminal convictions or pending felony criminal investigations, (b) any final judicial or administrative finding or adjudication of illegal employment discrimination, (c) any unpaid State, City or local taxes, and (d) any final judicial or administrative findings or

adjudication of non-performance in contracts with the City. In the event the City fails to respond to any such notice of intention within ten (10) days of receipt thereof, the City shall be deemed to have approved the proposed Subcontractor. The approval or withholding thereof by the City of any proposed Subcontractor shall not create any liability of the City to the Company, to third parties or otherwise. In no event shall any Subcontract be awarded to any person debarred, suspended or disqualified from State, or City contracting for any services within the scope of the Construction Work. In the event of an emergency, the City may waive the requirements of this Subsection 11.8.1.

**Section 11.7.2 Indemnity for Subcontractor Claims.**

No Subcontractor shall have any right against the City for labor, services, materials or equipment furnished for the Construction Work or the Operation Services. The Company acknowledges that its indemnity obligations under Section 7.4 hereof shall extend to all claims for payment or damages by any Subcontractor who furnishes or claims to have furnished any labor, services, materials or equipment in connection with the Construction Work or the Operation Services.

**Section 11.8 Actions of the City in Governmental Capacity.**

**Section 11.8.1 Rights as Government Not Limited.**

Nothing in this Agreement shall be interpreted as limiting the rights and obligations of the City in its respective governmental or regulatory capacity.

**Section 11.8.2 No City Obligation to Issue Legal Entitlements.**

The City shall not be obligated in any manner notwithstanding any other provision of this Agreement, to issue or approve any Legal Entitlement required with respect to the Facility, and shall not be deemed to be in breach or default hereunder as a result of any delay or failure in the issuance or approval of any such Legal Entitlement. The City retains all issuance and approval rights it has under Applicable Law with respect to such Legal Entitlements, none of such rights shall be deemed to be waived, modified or amended as a consequence of the execution of this Agreement.

**Section 11.9 Assignment.**

**Section 11.9.1 By the Company.**

The Company shall not assign, transfer, convey, lease, encumber or otherwise dispose of this Agreement, its right to execute the same, or its right, title or interest in all or any part of this Agreement whatsoever whether legally or equitably, by power of attorney or otherwise without the prior written consent of the City. The following shall constitute an assignment for purposes hereof: (i) the sale, lease, or other disposal of all or substantially all of the Company's assets to any other person, firm, corporation, or association, (ii) the entry by the Company into any agreement to any such effect, and (iii) the transfer of greater than fifty one (51%) of the ownership or control of the Company. Any such approval given in one instance shall not relieve the Company of its obligation to obtain the prior written approval of the City to any further

assignment. Any such assignment shall require the assignee of the Company to assume the performance of and observe all obligations, representations and warranties of the Company under this Agreement, and no such assignment shall relieve the Guarantor of any of its obligations under the Guaranty, which shall remain in full force and effect during the Contract Term. The approval of any assignment, transfer or conveyance shall not operate to release the Company in any way from any of its obligations under this Agreement prior to the date of assignment unless such approval specifically provides otherwise. Any assignment in violation of this Section shall be void.

#### **Section 11.9.2 By the City.**

The City may not assign its rights or obligations under this Agreement without the prior written consent of the Company. The City may however, assign its rights and obligations under this Agreement, without the consent of the Company, to another public or quasi-public entity if such entity is legally capable of discharging the duties and obligations of the City hereunder. Any such assignment shall require the assignee of the City to assume the performance of and observe all obligations, representations and warranties of the City under this Agreement. The approval of any assignment, transfer or conveyance shall not operate to release the City in any way from any of its obligations under this Agreement prior to the date of the assignment unless such approval specifically provides otherwise. Any assignment in violation of this Section shall be void.

#### **Section 11.10 Amendment.**

This Agreement may not be amended except by a written agreement signed by the parties. This Agreement shall not be amended in such a way as to make any tax-exempt financing of this Agreement taxable.

#### **Section 11.11 No Other Agreements.**

All negotiations, proposals and agreements prior to the date of this Agreement are merged herein and superseded hereby, there being no agreements or understandings other than those written or specified herein, unless otherwise provided. This Agreement, including all Schedules attached hereto, constitutes the entire Agreement between the City and the Company with respect to the design, construction, start-up, and Acceptance Testing of the Capital Improvements, and the management, operation and maintenance of the Facility. No obligation or covenant of good faith or fair dealing shall be implied or interpreted as conferring upon either party any right, duty, obligation or benefit other than as expressly set forth herein, notwithstanding the fact that certain terms and conditions hereof may give either party discretion in the manner of performance under this Agreement.

#### **Section 11.12 Notices.**

All notices, demands, requests and other communications hereunder shall be deemed sufficient and properly given if in writing and delivered in person to the following addresses or sent by first class mail and facsimile, to such addresses:

(a) If to the City of Richmond: Rich McCoy  
Public Services Director  
City of Richmond  
2600 Barrett Avenue  
Richmond, CA 94804  
Phone: 510-620-6828  
Fax: 510-412-9703

with a copy of all written correspondence to:

Paul Eisenhardt, President  
Eisenhardt Group, Inc.  
1085 Greenwich Street, Suite 3  
San Francisco, CA 94133  
Phone: 415-776-9555  
Fax: 415-776-1520

(b) If to the Company:

Chibby Alloway  
US Filter Operating Services  
2300 Contra Costa Blvd.  
Suite 470  
Pleasant Hill, CA 94523

Telephone: 925-681-2305  
Facsimile: 925-681-0236

With a copy of all written correspondence to:

USFilter Operating Services, Inc.  
14950 Heathrow Forest Parkway, Suite 200  
Houston, TX 77032

Attention: Legal Department

Either party may, by like notice, designate further or different addresses to which subsequent notices shall be sent. Any notice hereunder signed on behalf of the notifying party by a duly authorized attorney at law shall be valid and effective to the same extent as if signed on behalf of such party by a duly authorized officer or employee. Notices and communications given by mail hereunder shall be deemed to have been given five (5) days after the date of dispatch; all other notices shall be deemed to have been given upon receipt.

**Section 11.13 Binding Effect.**

This Agreement shall bind and inure to the benefit of and shall be binding upon the City and the Company and any assignee acquiring an interest hereunder consistent with Section 11.10.

**Section 11.14 Consent to Jurisdiction.**

The Company and the City irrevocably (1) agree that any Legal Proceeding arising out of this Agreement shall be brought in the state and federal courts in Contra Costa County, California, (2) consents to the jurisdiction of such courts in any such suit, (3) waives any objection which they may have to the laying of the jurisdiction of any Legal Proceeding, and (4) waives their right to a trial by jury in any Legal Proceeding in any of such courts.

**Section 11.15 Further Assurances.**

The City and Company each agree to execute and deliver such further instruments and to perform any acts that may be necessary or reasonably requested in order to give full effect to this Agreement. The City and the Company, in order to carry out this Agreement, each shall use all reasonable efforts to provide such information, execute such further instruments and documents and take such actions as may be reasonably requested by the other and not consistent with the provisions of this Agreement and not involving the assumption of obligations or liabilities different from or in excess of or in addition to those expressly provided for herein.

**Section 11.16 Counterparts.**

This Agreement may be executed in any number of original counterparts. All such counterparts shall constitute one and the same document.

**Section 11.17 Governing Law.**

This Agreement shall be governed by and construed in accordance with the laws of the State of California.

**Section 11.18 Headings.**

The Table of Contents and any heading preceding the text of Articles, Sections and Subsections of this Agreement shall be solely for convenience of reference and shall not constitute a part of this Agreement, nor shall they affect its meaning, construction or effect.

**Section 11.19 Days.**

All references to days herein are references to calendar days, unless otherwise specified in this Agreement.

## **ARTICLE XII**

### **ADDITIONAL SERVICES**

#### **Section 12.1 Description of Additional Services.**

The following items shall be considered to be Additional Services under this Agreement:

- (1) any change in Facility operations, personnel qualifications or staffing or other cost which is a result of an Uncontrollable Circumstance or from the treatment of wastewater that exceeds the design capacity and capability of the wastewater treatment plant as specified in Schedule 1 of this Agreement;
- (2) changes in raw wastewater influent that are subject to the adjustment methodology of Schedule 5 and/or changes in the City's Industrial Pretreatment Program that result in increased or decreased costs for the Company;
- (3) City's request of Company to provide additional or reduced services upon terms mutually agreed to by the parties.

#### **Section 12.2 Payment for Additional Services.**

For Additional Services described in Sections 12.1(1) and 12.1(2), the City shall compensate Company for all costs and expenses reasonably incurred by Company in dealing with such event. For Additional Services described in Sections 12.1(3), the City and Company shall negotiate a mutually acceptable fee for such Additional Services. Company shall provide the City with Cost Substantiation with respect to the Additional Services described in Section 12.1 above.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly authorized representatives as of the day and year first above.

CITY OF RICHMOND, CALIFORNIA

By: Irma L. Anderson  
Name: Irma L. Anderson  
Title: Mayor  
Date: May 24, 2002

US FILTER  
OPERATING SERVICES, INC.

By: Michael M. Stark VAC  
Name: Michael M. Stark  
Title: President  
Date: May 22, 2002

**FINAL**

**SCHEDULES and EXHIBITS TO THE SERVICE AGREEMENT**

<b>Schedule #</b>	<b>Title</b>
1	Performance Standards
2	Operation and Maintenance Standards
3	Facility Plans
4	Insurance
5	Escalation Indices and Flow and Loadings Adjustment
6	Permits
7	Wastewater Influent Requirements
8	Maximum Utilities Utilization
9	Equipment and Chemicals Inventory
10	Pass Through Costs
11	Service Fee
12	Capital Improvements
13	Acceptance Testing
14	Key Company Personnel and Affiliation
15	Termination Payments for Early Termination
16	Sludge Disposal Facility, Operations, and Costs

**EXHIBITS:**

<b>A</b>	Wastewater Treatment Facility
<b>B</b>	Guarantee

SCHEDULE 1  
PERFORMANCE STANDARDS

1.1 TREATMENT REQUIREMENTS

The Company shall operate and maintain the Facility in accordance with all applicable federal, State, and local regulations pertaining to wastewater treatment standards, including the effluent quality requirements described in the current NPDES Permit. In addition, the Company shall operate the Facility to be in compliance with the specific performance standards described herein. All analytical methods used to demonstrate compliance shall be according to methods approved by the City, and the San Francisco Bay Regional Water Quality Control Board, per 40CFR136 or other approved regulatory references. Storm Water monitoring and management will be provided by the Company for the Facility only. The effluent limitations and performance requirements are presented in Table S 1-1 below.

<b>Table S1-1 Existing Effluent Limits<sup>1</sup></b>					
Parameter	Units	Monthly Average	Weekly Average	Daily Maximum	Instantaneous Maximum
Biochemical Oxygen Demand	mg/L	30	45		
Total Suspended Solids	mg/L	30	45		
Oil & Grease	mg/L	10		20	
Settleable Matter	Mg/L-hr	0.1		0.2	
PH	su				6.0-9.0
Fecal Coliform	MPN / 100 ml's				10,000
Fecal Coliform	MPN / 100 ml's				240 (for 5 consecutive samples)
Total Chlorine Residual	mg/L				0.0

The effluent quality limits above are based on a monthly average flow of 8.5 MGD. These parameters represent only a partial listing of the facility effluent limitations.

### 1.2 STUDIES FOR FUTURE TREATMENT STANDARDS

The NPDES Permit issued to the Joint Powers Authority (City of Richmond and West County) dated November 28, 2001 contains requirements for studies relating to specified contaminants that may be present in the City's NPDES permitted wastewater discharged to the San Francisco Bay via the deep water outfall. The Company has agreed to participate with the City in the conduct of the required studies; the Company will be reimbursed up to \$500,000 for the conduct of the studies, based upon documented costs as authorized by the City of Richmond.

It is currently envisioned that the studies will be performed by the Joint Powers Authority (JPA) consisting of the City of Richmond and West County Wastewater Authority. This JPA organization has responsibility for the deep water outfall and the NPDES permit utilized by the City.

### 1.3 FACILITY DESIGN CRITERIA FOR WASTEWATER FLOWS AND LOADINGS

Flow (MGD)	BOD Loadings (lbs.)	TSS Loadings (lbs.)
<b>16.0</b>	<b>26,680</b>	<b>26,680</b>

## SCHEDULE 2 OPERATION AND MAINTENANCE STANDARDS

### 2.1 GENERAL

The Company shall operate, maintain and manage the Facility in accordance with the terms and provisions set forth herein. Operational decision making shall always be based on the following overall objectives:

- Protection of health and welfare of the public
- Protection of the health and safety of the Facility operating staff
- Preservation of the long-term capability to supply wastewater treatment services
- Protection of the environment / meeting of regulatory requirements
- Protection and preservation of the Facility equipment and facilities
- Maximization of Facility operational efficiency and minimization of operational costs

### 2.2 OPERATIONS AND MAINTENANCE

The Company shall maintain the Facility in good working order and repair and in a neat and orderly condition. The Company shall maintain the aesthetic quality of the Facility as conveyed to the Company at the time of contract signing, with due allowance for reasonable wear and tear and depreciation. The Company shall maintain on behalf of the City all manufacturers' warranties on new Equipment purchased, and shall fully cooperate and assist the City, at the Company's sole cost and expense, in enforcing existing Equipment warranties and guaranties relative to the Facility.

The Company's Service Fee shall be based on treating all wastewater within  $\pm 10\%$  of the historical average presented in Schedule 5 for flow and loadings. Should the average ranges, as measured by a 12-month moving average, fall outside the  $\pm 10\%$  range, the Company and the City shall negotiate in good faith to adjust upward or downward the Service Fee per the adjustment methodology specified in Schedule 5.

<b>Table S2-1 Wastewater Influent Average<sup>1</sup></b>	
<b>Parameter</b>	<b>12-Month Average</b>
Flow, mgd	<b>8.5</b>
BOD <sub>5</sub> , lbs/day	<b>17,203</b>
TSS, lbs/day	<b>19,548</b>

<sup>1</sup>As measured at the Facility influent (raw), not including recycle flows.

The Company shall continue to meet the performance standards specified in Schedule 1 if the influent flows and/or loadings fail to fall within the  $\pm 10\%$  range on a daily, monthly, or other short-term basis. The  $\pm 10\%$  influent flow and loading range is intended to protect the City and the Company from extraordinary changes, on an annual average basis, over the Term of the Agreement.

The subsequent sections set forth requirements for the operation and maintenance (O&M) of Facility components, and are intended to address the major activities required. The following sections, however, are not intended to include all specific activities that are necessary for meeting the performance requirements set forth in the Agreement.

In addition to the general requirements of the Agreement, the Company is responsible for the specific performance requirements below. The Company shall refer to the Operations Manual, as updated by the Company, and associated operation and maintenance manuals to understand additional operations and maintenance requirements.

The Facility shall at all times be operated, controlled, and supervised by a qualified manager and with supervisory controls capable of responding immediately and effectively to any and all anticipated and unanticipated circumstances. The combination of automated and human oversight shall assure compliance with the Agreement.

#### 2.2.1 SCADA System

A supervisory control and data acquisition (SCADA) system at the Facility shall be utilized for the purpose of managing and improving operational monitoring and efficiency. The Company shall be responsible for ongoing integration of such system with Facility operations, including the associated staff training required. The Company shall modify and/or reconfigure the SCADA system, as deemed necessary by the Company, subsequent to implementation of the proposed Capital Improvements. Such updates are anticipated to occur consistent with the Company's major maintenance schedule for the twenty (20) year contract term.

The Facility SCADA system (hardware and software) will utilize only tested and proven technology that results in a complete system that remains capable of ensuring efficient and effective monitoring and control of the facility throughout the period of the Agreement. The Company will use only technology that has been proven to provide reliable and accurate data and control. The use of unproven, "cutting edge," technology will only be implemented with the concurrence of the City; the City shall not unreasonably withhold approval of improved technology as requested by the Company.

To maintain the SCADA system as described above, the Company will use the following table as a guide to making annual improvements to it. It should be noted that the actual type and timing of improvements may vary significantly from those described below, but that in any case, the Company will make any and all improvements to the SCADA system necessary to comply with the requirements of this section:

Category	Description	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10
SCADA Software Support	Automation Software Annual Support Fees	x	x	x	x	x	x	x	x	x	x
PC support	Workstation Service Contract				x			x			x
Non-SCADA PC Software	Allowance for system software purchases		x		x		x		x		x
PC Hardware	Replacement/Upgrades for PC System			x			x			x	
PLC/SCADA Support	Travel and costs for SCADA support	x	x	x	x	x	x	x	x	x	x
PLC/SCADA Upgrades	Major System Upgrades/New Technology				x				x		
Media/Systems Upgrades	Conversions in communication technology		x			x			x		
ISP/DSL/Access	High Speed ISP/System Access	x	x	x	x	x	x	x	x	x	x

Category	Description	Year 11	Year 12	Year 13	Year 14	Year 15	Year 16	Year 17	Year 18	Year 19	Year 20
SCADA Software Support	Automation Software Annual Support Fees	x	x	x	x	x	x	x	x	x	
PC support	Workstation Service Contract			x			x			x	
Non-SCADA PC Software	Allowance for system software purchases		x		x		x		x		
PC Hardware	Replacement/Upgrades for PC System		x			x			x		
PLC/SCADA Support	Travel and costs for SCADA support	x	x	x	x	x	x	x	x	x	x
PLC/SCADA Upgrades	Major System Upgrades/New Technology		x				x				
Media/Systems Upgrades	Conversions in communication technology			x			x				
ISP/DSL/Access	High Speed ISP/System Access	x	x	x	x	x	x	x	x	x	x

### 2.2.2 Maintenance Management System

The Company shall develop and implement a comprehensive computer-based maintenance management program that develops readily available historical data, including an inventory of spare parts and provisions for enforcing existing Equipment warranties and guarantees and maintaining all warranties on new Equipment purchased after the Commencement Date. The Company shall implement such a maintenance management program to include preventative, predictive, and corrective maintenance for all components of the Facility, including but not limited to:

- Buildings, grounds, and structures
- Electrical systems and instrumentation
- Mechanical equipment
- Odor control systems
- Vehicles and other related Rolling Stock
- Laboratory, monitoring and sampling equipment
- Heating, ventilation, and air conditioning
- Communication equipment (i.e. telephones, facsimiles, etc.)
- Computer equipment (software and hardware)
- Chemical feed systems
- Pumping systems
- Auxiliary power facilities
- Air pollution control devices (to the extent such devices are present at the Facility)
- SCADA facilities
- Other facilities, equipment, and systems contained within the Facility
- Other specialized tools and equipment

### 2.2.3 Solids Handling and Sludge Disposal

Currently, sludge and solids produced by the operation of the wastewater facility are disposed of by the City using the sludge lagoons located in West County. It is envisioned that sludge disposal for wastewater treated at the Richmond facility shall remain the responsibility of the City until such time as the sludge lagoons are no longer available for usage. At that time, Us

Filter, consistent with their proposal, shall provide alternative sludge disposal facilities and services. Such Company provided sludge disposal facilities and services shall be as summarized in Schedule 16 and will include, as a minimum, usage of centrifuge dewatering equipment located within a building structure to be provided by Company. The building structure shall be designed and operated to minimize odor and noise impacts and shall include state of the art air handling and odor control equipment. The building shall utilize a "negative pressure" atmosphere and restricted entry system. Company's responsibilities, consistent with the Company proposal shall also include provision of sludge disposal containers and provide for the hauling and disposal of the sludge at a properly certified landfill. The costs for and operations of these sludge disposal facilities and services are further specified in Schedule 16.

#### 2.2.4 Odor Control Facilities

The Company shall use reasonable efforts consistent with best industry practices and the Agreement to control odors from the Facility so that the odors at the site boundary do not prompt public complaints. The Company's commitment shall be to achieve zero odor incidents, and the Company, in conjunction with the City, shall develop a program that identifies procedures for certifying and documenting odor complaints, and shall establish procedures to address recurrent failures of the odor control program. Additional provisions with respect to odor control facilities and their operations are contained in Exhibit A and attached hereto.

The Company shall be responsible for optimizing the operation of existing and future odor control equipment so that it performs to its designed capacity and capability.

##### 2.2.4.1 Odor Hotline

The City and Company currently share responsibility for responding to odor complaints. Both parties will respond to calls about odor complaints received through an "odor hotline." The Company shall coordinate with the City to maintain the odor hotline and respond to customer complaints, as appropriate, by adjusting odor control equipment, and/or process operations to address such complaints and to reduce odors from the Facility. The Company shall also maintain a record of the number of calls received and shall document the odor complaints using a log form similar to that used by the City. Such record shall be tabulated and charted in the Monthly Reports, as defined in Schedule 2.4.1.

##### 2.2.4.2 Response Plan

The Company shall establish a response plan based on the Facility's current response procedures. The complainant should be contacted as soon as possible, at a reasonable time of day, and the site of the odor source visited to obtain more information on the location and characteristic of the odor complaint. The Company shall obtain hydrogen sulfide (H<sub>2</sub>S) measurements at the Facility and at the location of the complaint using a hand held meter to establish the presence of odorous compounds at different locations in the Facility, including the wet stream and sludge handling processes and the odor control system exhausts. The odor complaint log form should be completed, including wind speed and direction at time of the call, the status of process units, and action taken by the Company to rectify the odor complaint. A written report on the odor complaint investigation shall be sent out to the complainant.

If the results of the H<sub>2</sub>S monitoring and other investigations establish the continued presence of odorous compounds, then the Company shall (1) review and, as appropriate, adjust current operations and maintenance practices concerning odor control, and at its direction, subject to the provisions of the Agreement, consider installing capital Equipment to address odors, in lieu of or in addition to proposed adjustments to current operations and maintenance practices, and (2) in connection therewith, make reasonable efforts to determine and implement, at the sole cost and expense of the Company, a corrective action plan within a reasonable time period. If the initial H<sub>2</sub>S levels are below detection threshold levels, and the odor complaints persist, the City may request the Company to perform odor evaluations. Should the evaluation results indicate the presence of odors above the detection threshold levels, then the Company shall conduct and pay for such odor evaluations and shall use all reasonable efforts to determine and implement a corrective action plan in a timely manner, subject to the City's review and comment. The first phase of such corrective action plan shall include a reasonable time period for the Company to determine the cause of the odors.

#### 2.2.5 Analytical Services and Industrial Pre-Treatment Program (IPP)

The Company shall perform sampling, testing, and any other analytical procedures of Facility influent and effluent to demonstrate compliance with the Agreement, applicable regulatory requirements, and permit provisions applicable to the Facility operations. The Company shall perform all applicable testing related to process control at its own expense. All testing and analytical procedures, with the exception of process control testing, shall be performed by a laboratory certified by the State of California subject to approval by the City within ten business (10) days of receipt of written notification by the Company, provided that such City approval will not be unreasonably withheld. The Company shall prepare laboratory data for all applicable regulations, permits monitoring, and operating reports and shall forward the results from the laboratory to the appropriate State and regulatory agencies, including the City. The City at its sole expense may also perform testing, sampling and analytical procedures as it deems necessary. To the extent additional testing, sampling and analytical procedures are required by a Change in Law applicable to the Facility, including any revisions to the NPDES permit, the Company shall be responsible for such activities and the expense for such changes will be negotiated between the City and Company using the Change of Law provision of the Agreement.

The Company shall operate, manage and maintain the laboratory and all analytical equipment to ensure that testing, analysis and reporting performed at the Facility meet all regulatory standards. The laboratory QA/QC program shall be maintained and revised, as necessary, to ensure that all required analyses and reports are completed fully and accurately to exacting specifications, following standard methods and procedures, in a timely manner for appropriate agencies. As mutually agreed to by the parties the following represents the annual analytical inventory given by the City for the Company to accomplish in support of the City of Richmond IPP Program:

## City of Richmond Analysis

<i>TEST NAME</i>	<i>Annual Frequency Richmond IPP</i>
Alkalinity - Total	
Ammonia	
BIOMONITORING-Acute 96 hour LC50 flow through	
BOD	300
Coliform Total MPN	
Color	
Cyanide, Total	9
Metals - Graphite AA	813
Metals - Hg Cold Vapor	75
Metals Preparation	287
Metals, Land Application	
Metals, Surface Disposal Unlined	
Oil & Grease	
Oxygen Dissolved	
PAH's (polynuclear aromatic hydrocarbons)	
pH	300
Phenolic Compounds	
Priority Poll Inorganics,EPA TableIII CN,Metals, Phenol	
Priority Poll Organics,TTO or TableII VOC,SV,PCB/Pest	
Sulfide Total	
Sulfides Dissolved	
Total Petroleum Hydrocarbon (TPH)	57
Total Settleable	
Total Solids & Volatile Solids	
Total Suspended	300
Volatile Acids/Alkalinity - Digester (Arm & Hammer Method)	
Volatile Organic Compounds	4
Volatile Suspended Solids	

In the event that the IPP Program requires new, additional, or modified tests be conducted on IPP samples, the City and the Company shall adjust the Service Fee to reflect these new conditions. The Service fee shall be adjusted based upon Substantiated Costs for the analytical tests required.

In the event that actual analysis related to the IPP Program are less than 90% of the volume of tests outlined in the inventory above, or greater than 110% of the volume of tests outlined in the inventory above, the parties agree to negotiate a commensurate adjustment in costs based upon Substantiated Costs for the analytical tests.

If needed to substantiate industry user charges for implementation of the IPP program and if requested by the City the Company shall provide a written quotation reflecting the fair market price for analytical services (sampling, testing, reporting and other laboratory services) required for the Industrial Pretreatment Program, including, where necessary, appropriate chain of custody controls to assure us of analytical results for evidentiary purposes. At the City's request, the Company shall provide Cost Substantiation for such services.

#### 2.2.6 Equipment and Chemicals

The Company shall keep all Equipment in good operating condition and maintain adequate Equipment in inventory to facilitate the repair and replacement of used or useful Equipment, as necessary, in a timely fashion so as not to disrupt the operation of the Facility. Such Equipment shall be of a quality and durability equal to or greater than the Equipment being used, in inventory, or required herein to be secured as of the Commencement Date; and shall meet the specification provided for in the Operations Manual or future operations manuals issued with new equipment.

The Company shall operate all used or useful Equipment, including Equipment placed in service, and perform all tests and testing as may be required or recommended pursuant to applicable warranties, commercial or industrial standards and federal, State, and local laws, regulations and permits. The Company shall promptly notify the City in the event of any major Equipment failure.

All Equipment and chemicals provided by the City on and after the Contract Date, including any permanent Equipment or chemical ordered by the Company or the City for the Facility, shall be deemed to be owned by the City and shall remain a part of the Facility upon termination or expiration of the Agreement. All such Equipment, including Rolling Stock, shall be in good operating condition, as adjusted for normal wear and tear. All property and equipment, including Rolling Stock and chemicals, designated for disposal or replacement shall be replaced or disposed of as defined in the Agreement.

#### 2.2.7 Vehicle Maintenance

The Company shall operate and maintain the vehicles and/or any additional equipment provided by the Company as part of the services. All maintenance of the vehicles shall be performed in accordance with the O&M Plan, manufacturer warranties, and standard industry

practice. If the Company wishes to reduce the existing inventory of vehicles, the Company shall request the same from the City for review and approval. The procedures for disposition of such vehicles shall be at the discretion of the City and the City shall retain all proceeds from the sale of such equipment. Schedule 9 shall be updated accordingly, as a result of changes in the vehicle inventory.

#### 2.2.8 Buildings Services

The Company shall perform buildings services to maintain the current condition of the Facility, for those buildings and facilities located at the wastewater treatment plant site at 601 Canal Blvd., and used by the Company for the operation and maintenance of the Facility throughout the term of the Agreement. The Facility structures shall be maintained at a level adequate for the efficient, long-term reliability and preservation of the capital investment. The Company, shall at a minimum, perform the following activities relevant to the buildings and grounds:

- a. Maintain the buildings, grounds and landscaping in an aesthetically attractive and clean condition.
- b. Wash windows twice per year or more frequently on an as-needed basis.
- c. Repair all roof leaks within 10 days of discovery; provided that at Contract Date, roofs do not leak.
- d. Develop and implement regularly scheduled mosquito and other pest control abatement measures as needed and immediately upon discovery of potential pest infestations.
- e. Repair all plumbing leaks and failures immediately.
- f. Damp mop all floors twice per week or more frequently as needed. Immediately clean all spills.
- g. Strip all floors and apply new floor finish on a periodic basis and to the extent necessary to maintain appearance and safety standards.
- h. Wash down wall tiles and clean other walls a minimum of every sixth months commencing with the first Billing Month of the Agreement as needed.
- i. Apply paint as necessary and appropriate but at a minimum every five (5) years all paint surfaces shall be repainted.
- j. Clean offices and restrooms on a Monday through Friday schedule and as needed.

#### 2.2.9 Utilities

As of the Commencement Date, the Company shall be responsible for supplying and paying for all utilities, including but not limited to heating, fuel oil, telephone and water. The cost for electricity and natural gas shall be a Pass Through Cost including such maximum limits specified in Schedule 10. The billing accounts for electricity and natural gas costs shall remain

under the City's name and shall be treated as Pass Through costs per the requirements of the Agreement.

#### 2.2.10 Sewers and Collection System

The City will retain responsibility for maintenance, cleaning, repair, and construction of the City sewers, pump stations and Collection System. The City will provide new sewer connections and/or laterals to properties along the existing Collection System. The Company shall coordinate its activities at the Facility with the City, as directed by the City, to minimize disruption of the Facility operation and maintenance and to prevent any interference with sewer cleaning and maintenance activities.

### 2.3 OPERATIONS AND MAINTENANCE COSTS

The Company shall provide, at its sole cost and expense, all labor, materials, machinery, vehicles, except Equipment and Chemicals initially provided by the City for the Company's use and identified in Schedule 9, including, but not limited to office equipment, copiers, computers, fuel, chemicals, supplies, materials, spare parts, expendables, consumables, testing and laboratory analysis, and any items required for the operation, maintenance and management (including all repair and replacement) of the Facility in accordance with the terms and provisions of the Agreement.

### 2.4 OPERATIONS MONITORING AND REVIEW

The City will actively participate in review of Facility management, operation and maintenance throughout the term of the Agreement.

#### 2.4.1 Monthly Operating Reports

The Company shall prepare the monthly operating reports (Monthly Reports) summarizing the operations of the Facility for submission to the San Francisco Bay Regional Water Quality Control Board ("RWQCB"). The Monthly Reports shall be prepared by the 15th or other date, as applicable, of every month for the previous month of Facility operation. The Monthly Reports shall be submitted to the City for review prior to submission to the RWQCB. The Company shall prepare the Monthly Reports in a format subject to approval by the City and RWQCB. The Monthly Reports shall include data pertaining to the Facility performance, analyses required by the NPDES Permit, wastewater flows, and other pertinent information. At a minimum, the Company shall include the following data in the Monthly Reports and any other information in compliance with RWQCB requirements:

- Monthly Discharge Monitoring Reports (DMRs) requirements (flow, influent and effluent BOD, COD and suspended solids, effluent pH, metals and toxicity testing results, etc.)

- Facility operations report to show daily process operations information including all process flows (i. e. wastewater, primary sludge, aeration tank influent, return sludge, waste sludge), primary and return sludge concentrations, secondary treatment process parameters (i.e. aeration tank dissolved oxygen levels, sludge settling tests, sludge production, sludge age, oxygen uptake rates), process unit hydraulic and solids loading rates, process unit detention times and process performance calculations.
- Summary of maintenance work performed, backlog, and anticipated major maintenance work for the next month.
- Summary of utility and chemical usage for the prior month.
- Summary of odor complaints and action taken.

#### 2.4.2 Annual Operation and Maintenance Report

The Company shall prepare an annual operation and maintenance report (Annual Report). This report shall include detailed information about the completed Billing Year's operation and maintenance of the Facility and current Facility conditions. The report shall include, at a minimum:

- An assessment of the condition of the Facility, details of any modifications made (design details and as-built drawings) and an analysis of the effectiveness of any repairs, replacements, or upgrades.
- A summary of the information provided in the monthly reports.
- A summary of environmental, safety, and regulatory compliance.
- An assessment of outstanding issues, including any recommendations for changes to plant operations.
- Operating budget summary
- The Annual Report shall be finalized by the Company and issued approximately two weeks prior to the annual Facility inspection.

#### 2.4.3 Facility Inspections

The City or its authorized agents and representatives from the governing regulatory agency (e.g. RWCQB) reserves the right to visit or inspect the Facility at any reasonable time, including "blind" inspections without prior notice to the Company. The City or its authorized agents and representatives may call upon the Company at any time for an oral review of any matter pertaining to the Facility. The Company shall provide the City and/or authorized agents and representatives adequate office working space during inspections and reviews as necessary.

The City or its authorized agents and representatives anticipate performing an annual inspection of the Facility that shall be scheduled at a time of mutual consent between the Company and the City or its authorized agents or representatives. The purpose of this annual inspection is to verify that Facility operations and maintenance is properly performed in accordance with this Agreement Term Sheet. At least two weeks prior to the annual inspection, the Company shall submit to the City three (3) copies of the Company's Annual Report.

In the event that any such inspections reveal work not in accordance with the Agreement or a lack of repairs or necessary maintenance to the Facility or Facility facilities or equipment, the City or its authorized agent shall bring to the attention of the Company such items and the Company shall perform the repairs and maintenance activities identified by the City in accordance with the terms and provisions set forth in the Agreement. Failure of the City to identify and notify the Company of any such deficiencies shall not relieve the Company of its obligations as established by the provisions of this Agreement.”

The Company shall maintain all records of operating data and information relevant to the capital costs, operation and maintenance, and related matters of the Facility, including accounting and financial records. The Company shall provide the City access to all such records upon reasonable request.

#### 2.4.4 Operations Records

The Company shall maintain a computerized record keeping system for all operation and maintenance functions performed on the Facility. Records shall include, but not be limited to, records of Facility operation, operation and maintenance costs, maintenance procedures, emergency incidents, personnel, and inventory (equipment and chemicals).

#### 2.4.5 Monthly Meetings

The City and the Company shall meet on a monthly basis at the Facility or other mutually agreed upon location to discuss the prior Monthly Report and Facility performance, including maintenance issues, Facility conditions, environmental and permit compliance, invoicing issues, public relations, and other relevant issues. Copies of documentation of these meetings shall be the responsibility of the Company and shall be distributed to all attendees. The Company shall provide Monthly Reports to the City of the previous month's operation and maintenance of the Facility by the 15th or other date, as applicable, of the current month. These status reports present the operating and maintenance and financial information for the previous month.

#### 2.4.6 Review at Expiration of Agreement

Prior to the final Billing Year, the City and Company shall select an independent, technically qualified firm (Auditor) to conduct a complete Facility audit to determine the condition of the Facility. The cost of services provided by the Auditor shall be divided equally between the City and Company.

The Auditor will conduct a detailed, comprehensive survey and inspection of the Facility to identify the physical and operational conditions and general status of repair of all equipment

buildings, structures, pavements, grounds, utility lines, spare parts inventories, operation and maintenance records, etc. The Auditor will prepare a detailed report documenting the findings of the survey/inspection during the first six months of the final Billing Year.

A draft version of the Auditor's report will be provided to the City and Company for review and comment. In the case of disagreement between the City and Company as to the appraised condition of items or portions of the Facility, or estimated cost for repair, renewal, or replacement, the Auditor will make the final decision, which shall be binding to both parties.

#### 2.4.7 City Offices and Operations

The Company shall provide a working office within the administration building of the Facility for utilization by the City's designated contract administrator and/or other individuals designated by the City in writing during such time periods as the individual is at the wastewater treatment Facility. Such office shall at a minimum contain a desk, chair, filing cabinet, and telephone.

## SCHEDULE 3 FACILITY PLANS

As part of this procurement, the Company shall be required to prepare several comprehensive plans which document the Company's and City's objectives of improving Facility performance. This Schedule outlines the various plans that shall be required. It is recognized that information may not be available to provide all of the details necessary to develop a complete plan. Therefore, the Company shall develop comprehensive draft plans that outline the Company's approach for the items specified. The customer service and emergency response plan shall be completed prior to the Commencement Date. All other plans shall be completed either 30 or 60 days after the Commencement Date, as applicable. The following plans shall be developed:

- Customer Service and Emergency Response Plan
- Staffing and Training Plan
- Operations and Maintenance Plan
- Safety and Security Plan
- Transition Plan

### 3.1 CUSTOMER SERVICE AND EMERGENCY RESPONSE PLAN

The Company shall respond promptly and in a reasonable manner to all customer odor complaints. Odor complaints, emergencies and emergencies at the Facility shall be responded to within 2 hours in accordance with this Agreement. The Company shall maintain a toll-free 24 hour telephone number throughout the term of the Agreement so that customers of the Facility can report odor complaints and emergencies. The Company shall notify the City of any activity, problem, or circumstance of which it becomes aware that threatens the safety, health or welfare of the customers of the Facility. The Company shall maintain a complete log with the start and end date and time of all problems and emergencies identified and measures and response time taken by the Company to remedy such problems and emergencies.

The Company shall develop emergency operations procedures, including on-call backup capability to be utilized during an emergency event. As part of the emergency plan, emergency operations procedures shall be developed to address at a minimum:

- Chemical Spills
- Personnel Emergencies
- Fire and Explosions
- Pipe, Valve, or Pump Failure
- Equipment and Process Failure

- Power Failure
- Acts of God (i. e., Hurricanes, Wind Storms, and Floods)
- Wastewater bypass discharges
- Emergency Telephone Numbers
- Emergency Equipment Inventory
- Records Preservation including Industrial Waste Sampling and Monitoring
- Physical Security
- Coordinating Instructions with Public Safety Agencies

### 3.2 STAFFING AND TRAINING PLAN

The Company shall provide staff qualified and experienced in the operation, maintenance, and management of wastewater treatment systems similar in nature and character to the Facility in accordance with the terms and conditions defined in the Agreement. The Company shall also provide additional third party support, on an as needed basis, to perform its duties and obligations of this Agreement. Such third parties shall be qualified for the specific services to be performed. The Company is responsible for maintaining the required number of staff and third party contractors as deemed appropriate to operate, maintain and manage the Facility in accordance with the provisions and terms of this Agreement. The Company shall provide:

- Qualified management, supervisory, technical, laboratory, operations and maintenance personnel.
- Duly licensed and certified personnel as required by the State of California hired or contracted by the Company to perform the services required.
- Office and clerical support staff.
- Technical support to provide on-call backup and process expertise for process control, instrumentation, troubleshooting, management, maintenance and Facility repair, emergency management, as necessary, to support operations and maintenance staff in performing the services of this Agreement.

Within thirty days after the Commencement Date, the Company shall submit to the City a staffing plan for the personnel requirements during both the interim operations phase and future operations. The Company shall include, at a minimum, the following information, in accordance with the provisions of this Agreement:

- Organization chart
- List of all personnel assigned to the Facility, with contact telephone numbers
- Job classifications
- Number of staff required for the transition phase and long-term operations
- Resumes of personnel employed within the Facility to demonstrate qualifications to perform assignment

Within ten business days of written notification by the Company to the City of any change in the Facility staffing complement (numbers and qualifications of personnel) the City shall review and approve said request, with such approval not unreasonably withheld. At all times, Company shall staff the Facility in conformance with Applicable Law.

### 3.2.1 Staffing Responsibilities

The Company shall provide adequate staff to meet the requirements of the NPDES Permit, maintain facility equipment in proper and safe working order, meet laboratory and reporting requirements, provide a safe workplace, implement and administer the Industrial Pre-Treatment Program, maintain appropriate records of equipment and process effectiveness and provide training as necessary for the effective and efficient operation and maintenance of the facility. At the Company's sole option any or all of these services may be contracted with a private firm specializing in the needed service, subject to reasonable review and approval by the City, with such written approval provided within ten (10) business days and not unreasonably withheld. All other aspects of the Agreement shall remain in effect and the cost of such outside contracted services shall be the sole responsibility of the Company.

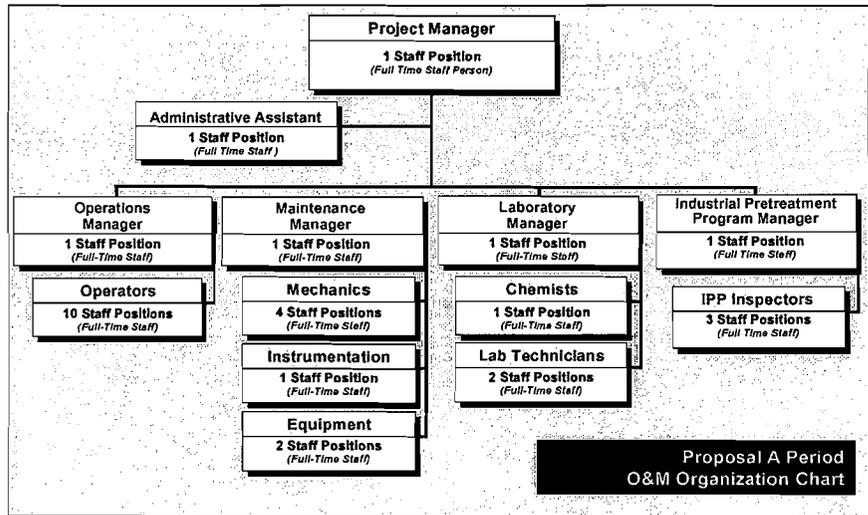
For example, if the cost of having laboratory service performed by a private outside lab is advantageous to the Company, the Company may, at its sole discretion, choose to contract that work out. The Company will continue to be required to maintain all aspects of the contract agreement with the City in regards to personnel and performance of contract requirements and pay all cost associated with the work performed by the outside contractor.

Once appropriate automation has been developed and implemented at the facility, the Company will begin the transition to staffing the plant eight-hours daily with electronic monitoring, alarm systems and "on-call" personnel to respond to alarms. The Company shall provide, for City review and comment, the staffing plan and job descriptions that will constitute the revised shift coverage plan to be implemented. The Company shall make all reasonable efforts to incorporate and/or address comments received from the City.

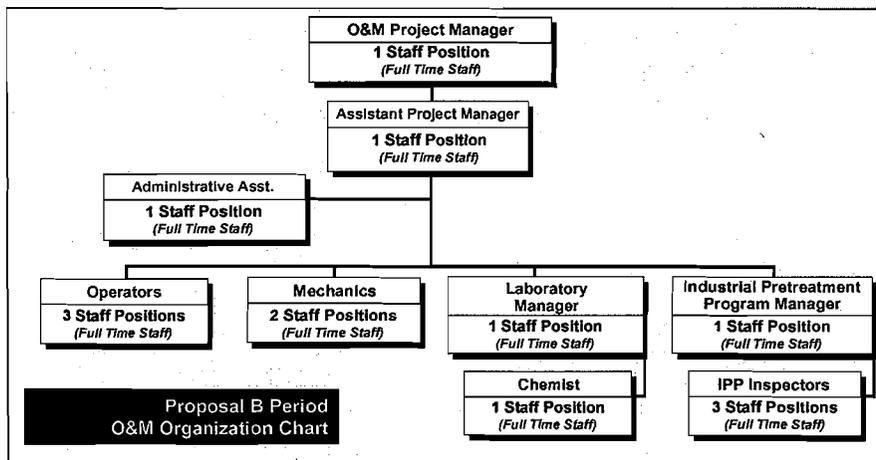
### 3.2.2 Staffing Plan

Initial staffing of the facility will be highly dependent on the number of current City of Richmond employees that choose to join the Company. An organization chart assuming all eligible employees transfer to the Company is found below and labeled "Proposal A Period". The "Proposal B Period" chart demonstrates the

anticipated staff organization at the end of the three-year guaranteed employment period for those that



choose to join the Company.



It is the Company's goal to ultimately staff the plant eight hours per day utilizing electronic monitoring technology and alarms to notify an "on-call" operator to respond to occasional plant calls. Implementation

of this phase of the project will also be highly dependent on the number of available employees that choose to accept employment with the Company.

The Company shall submit a staffing plan to the City within ninety (90) days of the commencement of operation of the facility by the Company. The staffing plan shall address what the Company believes will be the progression of staff requirements through the three-year guaranteed employment period and from year four through completion of the contract.

### 3.2.3 Training

The Company shall provide training programs for all personnel employed. Such training shall include, but not be limited to, wastewater process control, equipment operation, repair, and maintenance, sampling and analytical procedures, regulatory requirements, supervisory skills, and safety and occupational health procedures. It is the City's and the Company's desire to maximize employment opportunities for existing personnel and build the employee skill base to fill future opportunities through skill and safety training. Initial operations shall include training and development of employees to meet the needs of the facility at the completion of the upgrade project and have a qualified and motivated staff to meet future facility requirements. The Company shall maintain records of all training programs.

It is the Company's desire to provide appropriate and adequate training to all employees of the facility as it relates specifically to the respective position. All new employees will receive training regarding the Company's personnel policies and regulations, as well as a copy of the Company's Employee Handbook that contains specific information regarding how the Company addresses many employment items.

General and site specific safety Training will be provided at the outset of operation of the facility by the Company. Safety of the people who perform the work in the facility is the first priority of the Company. Regional safety and industrial hygiene personnel will be brought to the facility to evaluate safety issues and recommend repair or procedures to mitigate the hazard. All personnel will receive training in relation to hazards identified as specific to this facility and in general wastewater treatment safety as required.

Team building training will also be implemented at an early phase of the project in order to build a stronger relationship with co-workers and management at the facility. The Company provides training and instruction to facilitate a cohesive workforce that improves moral and safety in the facility through cooperative work teams.

No later than 90 days after the Commencement Date, the Service Provider shall submit five copies of a draft Operator Training Plan (Training Plan) as an attachment to the staffing plan for review and comment by the City. The Training Plan shall clearly define the classroom and hands-on training curriculum for each operator position and classification. Calendar dates and milestones shall be assigned to each portion of the training and a training schedule shall be submitted in the Training Plan. The date and duration of on-site training by each of the equipment manufacturer's technical representatives will be shown in the schedule.

The City will review the draft Training Plan and return one copy with comments and reasonable and acceptable corrections within 30 days of the initial submittal. The Service Provider shall submit five copies of a final version of the Training Plan incorporating requested changes and comments 30 days following the return of the draft version.

### 3.3 OPERATIONS AND MAINTENANCE PLAN

The Company shall prepare and submit to the City for approval a comprehensive Operation and Maintenance Plan (O&M Plan) within 180 days after the Commencement Date. The O&M Plan shall specify all procedures and tests to be conducted for the operation and maintenance of the Facility, inclusive of all facilities and Equipment. The O&M Plan shall be a comprehensive manual organized into separate sections addressing each of the unit processes involved, the overall Facility operation and control auxiliary Facility equipment, and grounds and building maintenance.. At a minimum, this O&M Plan shall include the following:

- a. Routine maintenance schedule for all major systems and schedule of expected shutdowns.
- b. Copies of all permits, licenses, and other regulatory documents obtained for the Company's services, if not previously submitted.
- c. Operation procedures for all major equipment within the Facility during start-up, normal, alternate, and emergency operation modes.
- d. Equipment and Facility manufacturers/suppliers O&M manuals to be supplied, to the extent available, by the City for all existing equipment. .
- e. Forms and checklists to be used to monitor equipment and process Facility operation and preventative maintenance.
- f. Monitoring and reporting requirements.
- g. Updates to the O&M Plan.

Each separate unit process, auxiliary Facility processes, grounds /buildings section of the O&M Plan shall include a detailed written explanation of the following:

- The process or Facility including its key components.
- The Facility function including its purpose and normal operating parameters.
- Equipment summary including nameplate data, supplier/local representative, and manufacturer.
- Description of instrumentation and control Facility, including an alarm summary.
- Description of normal Facility operations including startup and shutdown, adjustment of variable speed drives and settings, interface with other plant systems, routine monitoring checklists and record keeping forms.
- Maintenance, including predictive and preventative maintenance for process functions, such as cleaning and hose down, flushing and inspection; mechanical functions, such as changing lubricating fluids and filters, checking rotating equipment balance, and changing valve seals and packing; electrical functions, such as checking tightness of wiring terminal connections,

exercising breakers, and recalibrating meters; instrument and control functions, such as sensor calibration; and structural maintenance, such as crack repairs and restoration of surface corrosion protection Systems.

- Troubleshooting Facility malfunctions.

The City will review the draft O&M Plan and return one marked-up copy with comments and conditions for approval within 30 days of the initial submittal. The Company shall submit five copies of a final version of the O&M Plan incorporating the City's reasonable and acceptable changes and comments 30 days following the return of the draft manual.

### 3.3A Initial Improvements during the Proposal A Period

A section of the O&M Plan shall be dedicated to the Company's maintenance, capital repairs and replacements during the Proposal A Period, specifically required for operation during the Interim Operation Period. This plan shall augment the information contained in the O&M Plan, and shall support the procedures for interim operation and maintenance, as set forth in the transition plan. During the Interim Operation Period, the Company shall provide all capital repairs and replacements. Items identified to the City as comprising expenditures for the Repair & Replacement Capital (Schedule 12.2) up to the maximum City reimbursement of \$270,000 total shall be submitted to the City for review and expenditure approval. Any additional items will be submitted for review to the City; however the funding for these additional items shall be provided by the Company without reimbursement from the City. The Company shall be responsible for meeting regulatory requirements as specified within this Agreement.

Upon expiration of the Agreement, the Company shall return the Facility to the City in good repair and in a sound, proper, and well-maintained condition without the necessity for the City to undertake major repairs or a major overhaul when assuming Facility management responsibilities. Any unspent dollars in the Repair & Replacement fund shall be transferred to the City at the end of the Agreement.

### 3.4 SAFETY AND SECURITY PLAN

The Company shall provide for and maintain security and safety of all facilities and structures contained within the Facility. The Company shall develop and submit to the City a safety plan within 30 days after the Commencement Date. The Company shall be responsible and obligated to enforce all safety, security and health laws, rules, regulations, and/or procedures. Any and all persons entering the Facility shall be identified and provide appropriate documentation of authorization to have access to the Facility in conformance with Company's standard policies. The Company is responsible for providing the appropriate procedures to maintain a log of any and all persons accessing the Facility.

The structural integrity of the fences shall be maintained and kept in neat order. Gates, access points, and doors to the facilities and structures in the Facility shall be kept locked during non-business hours. Entrance to such facilities and structures shall be protected against unauthorized entry. The Company is responsible for maintaining all security alarms in working order. To the extent necessary, and as mutually

determined by the City and the Company, the Company shall also upgrade the plant security and alarm systems during the Contract term as part of the Company's annual Service Fee charged to the City.

### 3.5 TRANSITION PLAN

The Company shall develop a transition plan describing the operational procedures and the approach to initiating the Capital Improvements, including preparations for new construction while securing the operations of existing systems. At least 180 days prior to the anticipated Acceptance Date, the Company shall submit to the City a detailed transition plan defining the activities required to conduct final inspections, commence start-up, perform preliminary tests, and undertake any other activities necessary to prepare the Facility for the Acceptance Test.

The transition plan shall address the interrelationship between the existing treatment Facility and the new Facility constructed under this Agreement. The transition plan shall describe, at a minimum, the Company's approach with respect to:

- Procedures for continuing operation of the Facility during construction
- Appropriate safety and security measures implemented at the Facility during the transition period
- The timing and duration of scheduled testing and interim operations procedures
- The procedures to be employed during start-up of new Equipment and systems.
- Procedures for shutting-down and starting-up new and existing Equipment and systems.

During the interim operating period, the Company shall be responsible for coordination and transitioning between construction and operation and maintenance activities. It is the City's desire to minimize Facility interruptions during this period.

#### 3.5.1 Construction Inspection Activities

Throughout the construction period, the Company shall monitor the quality of all installations to insure work proceeds in accordance with the design drawings and specifications, manufacturer's recommendations and current installation standards. As installations are completed, documentation will be maintained noting satisfactory installation in accordance with the quality control standards. The transition plan shall address how successful completion of all installation activities and supporting documentation will be provided prior to proceeding with the Acceptance Test.

#### 3.5.2 Start-up and Preliminary Testing

Start-up and preliminary testing shall be conducted prior to conducting the Acceptance Test. The transition plan shall address how such activities will be conducted to demonstrate that the Facility is acceptable to begin treating wastewater. The transition plan shall specify the start-up and commissioning of major equipment and systems, including, but not limited to, the following:

- Major Valves
- Electrical Equipment (e. g., switchgear, starter panels, protection and control circuits, transformers, etc.)
- Instrumentation and Metering
- Generator Sets
- Automation Equipment
- Pipelines (e. g., pressure testing)
- Structures to Retain Water
- Pumps
- Filter Systems
- Backwash Systems
- Chemical Design Systems
- Storage Tanks and Basins
- All Other Water Treatment Systems

The transition plan shall also address how the transition activities will eventually lead into the Acceptance Test, and if any down time will exist between the transition period and the commencement of the Acceptance Test. All transition activities shall be included in the Company's Fixed Construction Price. The Company may choose to combine the transition plan with the Acceptance Test Plan.

## SCHEDULE 4 INSURANCE

### 4.1 COMPANY'S WORKERS' COMPENSATION

Statutory benefits as defined by California State Statutes encompassing all operations contemplated by this contract or Agreement to apply to all owners, officers, and employees regardless of number of employees. Individual employees may be exempted per State Law. Employers Liability will have minimum limits for bodily injury by accident of \$2,000,000 per accident and for bodily injury by disease with a \$2,000,000 policy limit and \$2,000,000 per employee.

### 4.2 COMPANY'S COMMERCIAL GENERAL LIABILITY

Coverage shall apply to premises and/or operations, products and/or completed operations, independent contractors, contractual liability, and broad form property damage exposures with minimum limits of \$5,000,000 per occurrence, and \$10,000,000 aggregate.

### 4.3 COMPANY'S COMMERCIAL AUTOMOBILE LIABILITY

Coverage shall apply to owned vehicles and/or hired and non-owned vehicles and employee non-ownership use with minimum limits of \$2,000,000 CSL (combined single limit).

### 4.4 COMPANY'S ENVIRONMENTAL IMPAIRMENT INSURANCE

Coverage shall be \$10,000,000 per occurrence and \$20,000,000 aggregate.

### 4.5 COMPANY'S CERTIFICATE OF INSURANCE

The City shall be listed as a certificate holder and additional insured with respect to Commercial General Liability, Commercial Automobile Liability, and Environmental Impairment Insurance. An original hand signed certificate shall be on file with and approved by the City risk manager by the Commencement Date. Said certificate shall evidence the required coverages and amounts as contained herein and provide a sixty (60) day notice of cancellation for non-renewal or material change in coverage.

### 4.6 CITY'S PROPERTY INSURANCE

The City shall maintain property damage insurance on the Facility and equipment owned by the City and operated by the Company under this Agreement. Any property of the City not properly or fully insured shall be the financial responsibility of the City. Such policy shall include a waiver of any subrogation rights to pursue claims against the Company and name the Company an additional insured.

SCHEDULE 5  
ESCALATION INDICES AND FLOW AND LOADINGS ADJUSTMENT

5.1 FIXED CONSTRUCTION PRICE INDEX

One hundred percent (100%) of the Fixed Construction Price Index shall be used to adjust the Fixed Construction Price from December 31, 2002 to the payment. The Fixed Construction Price Index shall be an amount equal to the sum of:

1. Sixty percent (60%) of a fraction, the numerator of which is the CPI as published by the U. S. Bureau of Labor Statistics for the month in which the payment date is established and the denominator of which is the CPI for the month ending on December 31, 2002.
2. Twenty percent (20%) of a fraction, the numerator of which is the CE plant cost index (CE-PCI) equipment, machinery, supports as published in Chemical Engineering for the month in which the payment date is established and the denominator of which is the CE-PC1 for the month ending on December 31, 2002.
3. Twenty percent (20%) of a fraction, the numerator of which is the Engineering News Record (ENR) "Skilled Labor" Index of (San Francisco Bay Area) as published in ENR for the month of which the payment date is established and the denominator of which is the same index for the month ending on December 31, 2002.

Provided, however, that if any of such indices or price is not available at any time that the Fixed Construction Price Index is to be calculated, the calculation shall be made using a mutually agreeable, comparable index or price, and if the base used in any such index or price is altered, the Fixed Construction Price Index shall be calculated to reflect the actual percentage change in such index or price from December 31, 2002 to the date that the payment date is established.

5.2 ANNUAL SERVICE FEE ADJUSTMENT FOR INFLATION INDICES

One hundred percent (100%) of the Annual Service Fee Adjustment for Inflation Index shall be used to annually adjust the Annual Service Fee from December 31, 2002 forward. The adjustment to the Service Fee shall be made annually using the prior twelve (12) month change in the Indices to determine the percentage adjustment to the then effective Service Fee. The adjusted Service Fee shall commence on January 1 of each year and continue at the established rate for the twelve-month calendar period. At that time, the adjustment process shall be repeated using the then current twelve (12) month Adjustment Index. The Annual Service Fee Adjustment for Inflation Index shall be equal to:

1. One hundred percent (100%) of a fraction, the numerator of which is the for the San Francisco Bay Area for the 12 months ending prior to the current contract year and the denominator of which is the arithmetic sum of the monthly CPI for the current twelve-month, contract year.

2. An example is provided below:

CPI Index for 2003 Service fee		
	Numerator 12 months ending Nov. 2002	Denominator 12 months ending Nov. 2001
Dec	185.9 (2001)	180.0 (2000)
Jan	186.2 (2002)	180.4 (2001)
Feb	187.0	180.7
Mar	187.2	181.1
Apr	187.5	181.5
May	187.9	182.3
June	188.2	182.7
July	188.5	183.0
Aug	188.9	183.4
Sept	189.3	183.7
Oct	189.8	184.8
Nov	190.1	185.3

$$\text{Adjustment Fraction} = \frac{\text{Arithmetic Sum of Numerator Entries}}{\text{Arithmetic Sum of Denominator Entries}}$$

Provided, however, that if any of such indices or prices is not available at any time that the Annual Service Fee Adjustment for Inflation Index is to be calculated, the calculation shall be made using the Producer Price Index (PPI) as the mutually agreed upon comparable index.

### 5.3 FLOW & LOADINGS ADJUSTMENT

The Service Fee provided by Company (Schedule 11) and the maximum utilities usage quantities cap provided by the City shall be adjusted whenever the twelve-month moving average for wastewater flows and/or loadings falls outside the +/- 10 percent range established for this Agreement. The initial Service Fee established by the Company and the maximum utilities usage quantities cap specified for provision by the City is for the flows and loadings as specified below. The methodology for adjusting the Service Fee and for establishing the adjusted maximum utilities quantities usage cap shall be as specified in Schedule 5.3.2 below.

#### 5.3.1 Initial Contract Basis:

Flow (MGD)		8.5
Loadings (lbs)	BOD	17,203
	TSS	19,548



treatment of wastewater at the facility will be provided by the Company and will be divided by 1,000 lbs of BOD treated for the prior 12-month moving average. This figure will then be multiplied by the change from the Initial Contract Basis Loadings (BOD) identified in 5.3.1 above.

**Service Fee adjustment:** For example, if the 12-month moving average loading drops to 15,000 lbs/day and the documented treatment costs were \$34.84/1,000 lbs BOD the following Service Fee cost adjustment would be made:

$$\underline{(17,203-15,000) * 365 \text{ days} / 1,000) * \$34.84) * 1.10 = \$ 30,816 \text{ annual reduction}}$$

Thus a Service Fee reduction in this amount would be extended to the City.

**Utilities Maximum Usage Cap adjustment:** For the same 12 month moving average decline in BOD to 15,000 lbs / day, the maximum utility usage quantity caps specified in Schedule 8 would be updated as follows:

- a) **Electrical Power:** The Annual Maximum Electrical Usage would also be reduced by 638 kwh/1,000 lbs BOD as shown below:

$$\underline{(17,203-15,000) * 365 \text{ days} / 1,000) * 638 = 513,013 \text{ kWh's cap reduction}}$$

- b) **Natural Gas:** The Annual Maximum Natural Gas Usage would also be reduced by 4.2734 Therms/1,000 lbs BOD as shown below:

$$\underline{(17,203-15,000) * 365 \text{ days} / 1,000) * 4.2734 = 3,436 \text{ Therm's cap reduction}}$$

**Total Suspended Solids:** For 12 month moving average TSS loading greater than 10 percent above or below 19,548 lbs/day, pass-through adjustments of 561 kwh/1,000 lbs TSS for electricity and 3.7607 Therms/1,000 lbs TSS for natural gas will be made. Documented annual costs for the treatment of wastewater at the facility will be provided by the Company and will be divided by 1,000 lbs of TSS treated for the prior 12-month moving average. This figure will then be multiplied by the change from the Initial Contract Basis Loadings (TSS) identified in 5.3.1 above.

**Service Fee adjustment:** For example, if the 12-month moving average loading drops to 17,000 lbs/day TSS and the documented treatment costs were \$30.66 /1,000 lbs TSS the following Service Fee cost adjustment would be made:

$$\underline{(19,548-17,000) * 365 \text{ days} / 1,000) * \$30.66) * 1.10 = \$ 31,366 \text{ annual reduction}}$$

Thus a Service Fee reduction in this amount would be extended to the City

**Utilities Maximum Usage Cap adjustment:** For the same 12 month moving average decline in TSS to 17,000 lbs / day, the maximum utility usage quantity caps specified in Schedule 8 would be updated as follows:

a) **Electrical Power:** The Annual Maximum Electrical Usage would also be reduced by 561 kwh/MG as shown below:

$$\underline{(19,548-17,000) * 365 \text{ days} / 1,000) * 561 = 521,741 \text{ kWh's cap reduction}}$$

b) **Natural Gas:** The Annual Maximum Natural Gas Usage would also be reduced by 3.7607/MG as shown below:

$$\underline{(19,548-17,000) * 365 \text{ days} / 1,000) * 3.7607 = 3,498 \text{ Therm's cap reduction}}$$

### **TOTAL EFFECT**

In the event that two or more of the parameters above change, each parameter which has changed will be given equal but proportionate weight in determining the cost adjustment calculation and utility usage adjustments. For example, if both flow and BOD declined as described above, both would be given equal weight and averaged. Thus for this example:

### **Service Fee adjustment:**

$$\underline{(\text{Flow credit of } \$28,310 + \text{BOD credit of } \$30,816) / 2 = \$29,563 \text{ Service Fee reduction}}$$

### **Maximum Utility Usage Cap adjustment:**

Utility usage adjustments would be averaged using the same averaging methodology as illustrated for the Service fee adjustment.

The same averaging procedures would be followed if all three parameters were triggered.

## SCHEDULE 6 PERMITS

### 6.1 RESPONSIBILITIES

The Company shall be responsible for renewing, obtaining and maintaining all applicable federal, State and local approvals, licenses, permits, and certifications required for performing the Services in accordance with the terms and provisions of this Agreement. Notwithstanding the previous sentence, the Company shall be responsible for assisting the City in the future renewal of the NPDES Permit and will be reimbursed \$500,000 for studies to be conducted for the next permit renewal. Additional costs for NPDES permit renewal and subsequent NPDES permit renewals shall be the responsibility of the City.

The Company shall be responsible for preparing all applicable reports in compliance with federal, State and local requirements for submission by the City to the appropriate agencies.

The Company shall comply with, satisfy, and pay all costs and/or fees associated with all regulatory requirements pertaining to the permits, but not limited to, public notification in the event of non-compliance with wastewater treatment standards.

The Company shall comply with all applicable federal, State, and local laws and regulations pertaining to the Facility and shall comply with all permits governing the performance of its Services hereunder issued for or with respect to the Facility. In the event that during the Term of the Agreement, an existing permit must be renewed, or additional permits required, the Company shall be responsible for obtaining, including the completion of the required application forms, supplying required data, and payment of required fees for such permits and permit renewals; provided, however, all costs and expenses incurred by the Company in performing the above obligation, including as necessary attorneys fees, consulting fees and other out of pocket costs and expenses incurred by the Company in fulfilling the above obligation, shall be paid to the Company by the City as a Pass-Through cost under this Agreement.

All permit renewals shall be in the name of the City as the permittee. This provision shall not be construed to require the Company to make repairs beyond those required by the terms and provisions of this Agreement.

The Company shall operate the Facility to meet the requirements of NPDES Permit No. CA0038539.

The Company will be responsible for maintaining ongoing adherence to the requirements of the National Pollutant Discharge Elimination System (NPDES) permit under which the Facility operates. These duties will include, but will not be limited to the maintaining of all permit requirements related to effluent quality. Additionally, the Company will maintain and provide all reports required by the Regional Water Quality Control Board (RWQCB) of the NPDES permit. Company will be added to the NPDES permit CA0038539 effective 12/1/01-10/31/06 as the manager of the Facility. The San Francisco Bay Regional Water Quality Board (RWQCB) will require Company to provide to the RWQCB a copy of the transfer of management statement. Company legal staff will assist in this process.

Other Permits the Company will require include:

*Hazardous Material Business Plan*

The Hazardous Material Business Plan will need to be revised to reflect Company as the manager of the Facility. Company will review the existing Plan, make any necessary amendments and file the final documents with the City Fire Department.

*Business License*

A business license will be required with the City. Company will file the necessary documents with the City to secure this document.

*Building Permits*

General, mechanical and electrical building permits will be required to support the capital improvements that are to be performed. Company will obtain these permits with assistance from team members Olivia Chen Consultants (engineering) and Kaweah Constructors (general contractor).

**SCHEDULE 7  
INFLUENT REQUIREMENTS**

The Company's Service Fee shall be based on treating all wastewater within  $\pm 10\%$  of the historical average presented in Schedule 5 for flow and loadings. Should the average ranges, as measured by a 12-month moving average, fall outside the  $\pm 10\%$  range, the Company and the City shall negotiate in good faith to adjust upward or downward the Service Fee per the adjustment methodology specified in Schedule 5.

<b>Table S2-1 Wastewater Influent Average<sup>1</sup></b>	
<b>Parameter</b>	<b>12-Month Average</b>
Flow, mgd	<b>8.5</b>
BOD <sub>5</sub> , lbs/day	<b>17,203</b>
TSS, lbs/day	<b>19,548</b>

<sup>1</sup>As measured at the Facility influent (raw), not including recycle flows.

1. The Company shall continue to meet the performance standards specified in Schedule 1 if the influent flows and/or loadings fail to fall within the  $\pm 10\%$  range on a daily, monthly, or other short-term basis. The  $\pm 10\%$  influent flow and loading range is intended to protect the City and the Company from extraordinary changes, on an annual average basis, over the Term of the Agreement.
  
2. The Company will operate the Facility so that effluent will meet the Effluent Limits specified in the NPDES permit. The Company shall be responsible for meeting the effluent quality requirements of the City's NPDES Permit unless one or more of the following occurs: (a) the wastewater influent contains Biologically Toxic Substances which violate the requirements of the City's Industrial Pre-treatment Program and Ordinances and which are present in concentrations in excess of the Facility's Maximum Allowable Headwork Concentrations; (b) the flow or influent BOD<sub>5</sub> and/or suspended solids exceeds the Facility design parameters which are 16 million gallons of flow per day, 26,688 pounds of BOD<sub>5</sub> per day on a monthly average, 26,688 pounds of suspended solids per day on a monthly average, and a daily peaking factor of 2.5 times flow; or (c) if the Facility and/or associated appurtenances is inoperable or can operate only at a reduced capacity on account of Uncontrollable Circumstances.
  
3. In the event the Project influent characteristics for suspended solids, BOD<sub>5</sub> or peak flow in excess of 2.5 times the average exceeds the design parameters stated above, the Company shall use its best efforts to re-establish effluent quality as soon as reasonably possible, per the recovery plan submitted by the Company to the City. Any substantiated costs to

implement the recovery plan incurred by the Company shall be promptly reimbursed by the City.

Notwithstanding the above schedule, if the failure to meet effluent quality limitations is caused by the presence of Biologically Toxic Substances in violation of the City's Industrial Pretreatment Program and Ordinances, then the Company will present a recovery plan and have the time identified in the recovery plan for the restoration of effluent quality, consistent with good sanitary engineering practice and treatment plant operations. In no case shall the Company have more than a twenty (20) day recovery period after the influent is free from said substances. The City shall reimburse Company for all additional costs and expenses incurred by Company in dealing with Biologically Toxic Substances in violation of the City's Industrial Pretreatment Program and Ordinances.

4. The Company shall not be responsible for fines or legal action as a result of discharge violations within the period that influent exceeds design parameters, contains Biologically Toxic Substances in violation of the City's Industrial Pretreatment Program and Ordinances and which are present in concentrations in excess of the Facility's Maximum Allowable Headworks Concentrations. The Company will fully cooperate with the City in all efforts to identify and commence appropriate action against any entity in violation of the City's Industrial Pretreatment Program and Ordinances.

SCHEDULE 8  
 MAXIMUM UTILITIES UTILIZATION

8.1 Tables Summarizing Electric Power and Natural Gas Maximum Usage Caps with flows and loadings as specified in Schedule 2, Table S2-1:

**Table S8-1A**  
**Maximum Utilities Utilization – Electric Power**

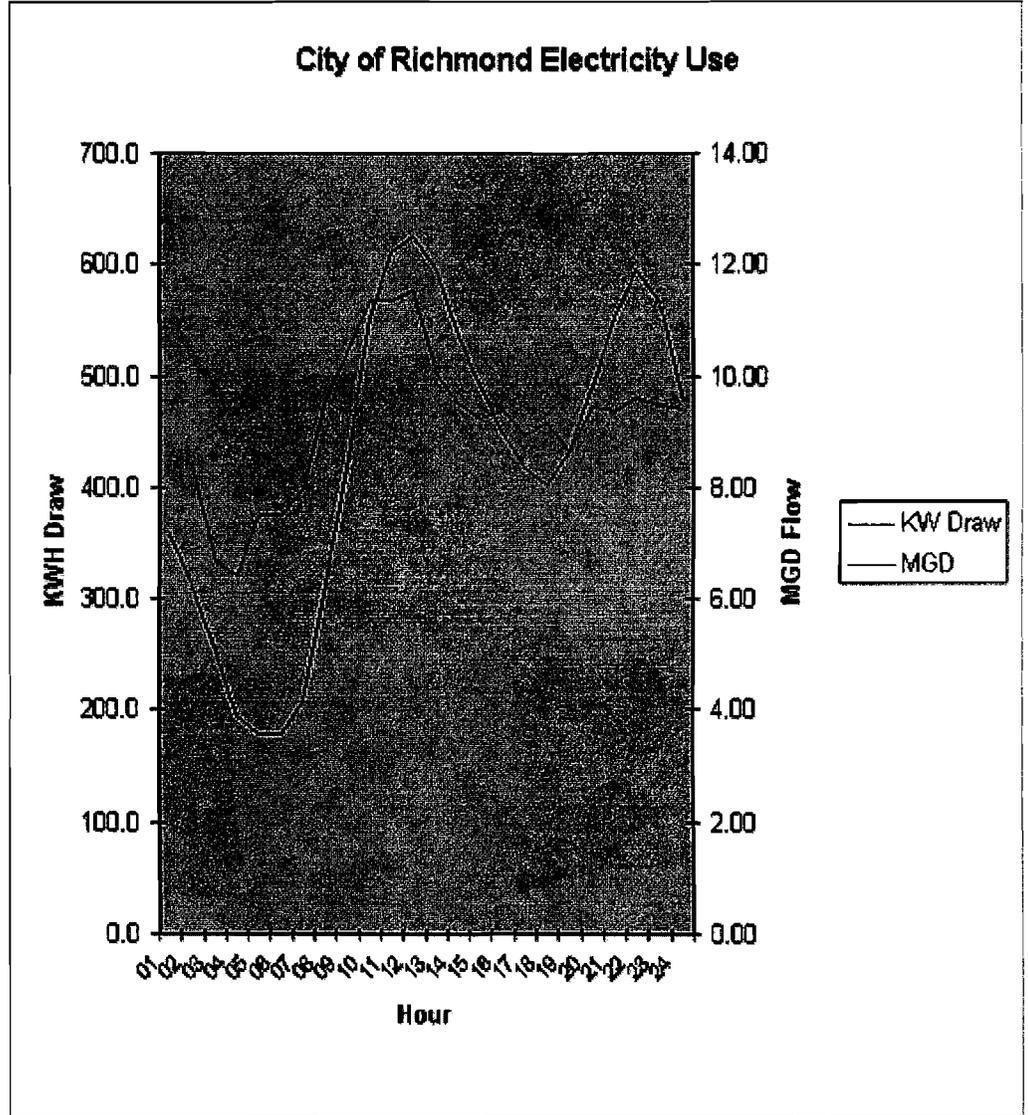
<b>Item</b>	<b>Maximum Annual Usage (kWh/year)</b>	<b>Maximum Unit Usage (kWh/MGD)</b>
City Electricity Consumption Prior to Contract Date	4,645,092	1,497
Company Electricity Consumption at Acceptance Date	4,005,328	1,291

**Table S8-1B**  
**Maximum Utilities Utilization –Natural Gas**

<b>Item</b>	<b>Maximum Annual Usage (Therms/year)</b>	<b>Maximum Unit Usage (Therms/MGD)</b>
City Natural Gas Consumption Prior to Contract Date	109,035	35.14
Company Natural Gas Consumption at Acceptance Date	26,833	8.6489

8.2 Load Profile

Hour Ending	MGD	KW Draw
01	7.15	428.8
02	6.25	421.4
03	5.06	333.9
04	3.87	320.8
05	3.57	374.5
06	3.57	374.5
07	4.17	399.5
08	6.25	479.0
09	8.34	520.2
10	11.02	568.1
11	12.21	566.8
12	12.51	575.8
13	11.91	500.6
14	10.72	475.5
15	9.83	461.3
16	8.93	467.9
17	8.34	445.0
18	8.04	458.1
19	8.64	432.0
20	9.83	472.0
21	11.02	468.7
22	11.91	479.8
23	11.32	473.3
24	9.53	470.0
Minimum	3.57	
Maximum	12.51	
Average	8.50	



The parties acknowledge that the electricity load profile herein has been provided at the request of the City for informational purposes. The Company and the City recognize that due to the design of the Facility and the need to treat flows as they are received, as well as cost effective staffing plans, all but minor electrical use cannot be deferred to off peak hours leaving little flexibility in the scheduling of electricity use. As such any deferred use of electricity to off peak hours will be determined by the Company in concert with the operational needs of the Facility.

Failure of the Company to demonstrate load profiles as patterned within a reasonable range of that in the Schedule 8-2 Load Profile graph shall be the basis for the Company reimbursing the

City for additional demand charges or other charges imposed by the electric utility for variation in the load profile – provided the altered profile is not the direct result of documented changes in the influent flow and/ or loadings received at the Facility where such changes in the flows and loadings received are acknowledged to be beyond the control and / or responsibility of Company as these changed flows and loadings relate to the changes in the electric utility load profile. The electrical load profile was assembled on a best efforts basis with information provided by the City of Richmond and that reasonable variation from this profile will occur on a seasonal or other basis beyond the control of the Company.

## SCHEDULE 9 EQUIPMENT AND CHEMICALS INVENTORY

Within 60 days after the Commencement Date, the Company shall conduct a physical inventory and prepare an up-to-date report of Equipment and chemicals located throughout the System. The inventory report shall be attached to this Schedule 9 and contain, but is not limited to, the following information relative to the Equipment and chemicals of the System:

- Detailed description of items
- Date of purchase as furnished by the City or provided on the item being inventoried
- Identification number (i.e., serial number), if available
- Manufacturer's name
- Quantity (i.e., gallons of chemicals)

**SCHEDULE 10  
PASS-THROUGH COSTS**

Pass Through Costs shall be paid to the Company based on the Company's documentation demonstrating that such costs have been incurred and are applicable pursuant to the provisions of this Agreement. Pass Through Costs shall be identified on the Company's monthly invoices as separate line items and shall include the following costs as Pass Through:

Costs pursuant to the Agreement:

1. Performance Bond costs (as found in table S10-1)
2. Insurance costs (as found in table S10-1)
3. Electricity costs and natural gas costs to the extent the maximum utilization in Schedule 8 is not exceeded.
4. Proposal A Period Repair and Replacement costs not to exceed the amounts found in Schedule 12.2

Note: These Pass Through Costs are separate and distinct from the Service Fee and are not included as part of the Service Fee of Schedule 11. The maximum quantities to be provided by the City for the electrical power and natural gas categories shall be as specified below and are based on the flows and loadings of Schedule 2, Table S2-1.

**Table S10-1**

<b>Pass Through Costs</b>					
<b>Component</b>	<b>Bonds</b>	<b>Insurance</b>	<b>Electricity</b>	<b>Natural Gas</b>	<b>Proposal A Period Repair and Replacement</b>
Proposal A	\$8,450	\$6,660	See Table S8-1A for max usage	See Table S8-1B for max usage	See Schedule 12.2
Proposal B (subsequent to Capital Improvements)	\$7,914	\$6,660	See Table S8-1A for max usage	See Table S8-1B for max usage	Not Applicable
Proposal B, Year 4 (subsequent to Capital Improvements)	\$7,242	\$6,660	See Table S8-1A for max usage	See Table S8-1B for max usage	Not Applicable

SCHEDULE 11  
SERVICE FEE

The Company shall be paid Proposal A and Proposal B Service Fees as indicated below, pursuant to the terms and provisions of this Agreement, for Facility operations, maintenance, and management. The Company shall be paid such Service Fees effective on the Initial Operation Period throughout the term of the Agreement.

**Table S11-1  
Annual Fees**

Component	Fees		
	Base Service Fee	IPP Laboratory Analysis	Total
Proposal A	\$1,921,538	\$ 78,183	\$ 1,999,721
Proposal B (immediately subsequent to Capital Improvements and before Year 4)	\$1,981,802	\$ 78,183	\$ 2,059,985
Proposal B, Year 4 (subsequent to Capital Improvements)	\$1,774,936	\$ 78,183	\$ 1,853,119
<i>Service Fee Escalation Date:</i>			
Base Service Fee, Proposal B	January 1, 2005		
IPP Service Fee	December 31, 2002		

Major Repair and Maintenance Fund During Proposal B Period:

The Company and the City have discussed the importance of the long-term maintenance of the Facility and its condition at the end of the twenty (20) year Contract Term. Commencing with the third year of the Agreement, the Company has budgeted, within its Service Fee, an annual expenditure for the long-term repair and maintenance of Facility capital in the amount specified below. Expenditures of these Company provided funds for major repair and maintenance will be submitted to the City for review and written approval. A preliminary plan is contained in Schedule 12.4. Any cumulative funds unused at the end of the Contract Term shall be made available to the City by the Company.

The Company shall annually update the status of the Major Repair and Maintenance Fund and provide the city the anticipated / recommended expenditures for the following (next) year.

The Major Repair and Maintenance Fund is established at \$60,000 for years 3 through 20 of the Contract Term and shall be increased or decreased by the CPI Index adjustment each year of the Service Agreement beginning at the end of year 3.

SCHEDULE 12  
 PROPOSAL B CAPITAL IMPROVEMENTS

**SCHEDULE 12.1 PROPOSAL B CONSTRUCTION DRAWDOWN SCHEDULE**

Description	Price	Acceptance Price	Comments
<b>Primary Sedimentation Basins</b>			
Primary Sedimentation Basin Engineering complete	\$244,000		
Primary Sedimentation Basin No. 2 chain and flight procurement complete	\$45,000		
Primary Sedimentation Basin No. 1 Concrete demolition 50% complete	\$182,000		demolition of half of the concrete deck
Primary Sedimentation Basin No. 1 Concrete demolition complete	\$182,000		
Primary Sedimentation Basin No. 1 concrete repair 50% complete	\$182,000		repair of half of the concrete deck
Primary Sedimentation Basin No. 1 concrete repair complete	\$182,000		
Primary Sedimentation Basin No. 1 Subsystem Acceptance test		\$144,000	
Primary Sedimentation Basin No. 2 remove and replace chains and flights complete	\$85,000		
Primary Sedimentation Basin No. 2 Concrete demolition 50% complete	\$182,000		demolition of half of the concrete deck
Primary Sedimentation Basin No. 2 Concrete demolition complete	\$182,000		
Primary Sedimentation Basin No. 2 concrete repair 50% complete	\$182,000		repair of half of the concrete deck
Primary Sedimentation Basin No. 2 concrete repair complete	\$182,000		
Primary Sedimentation Basin No.2 Subsystem Acceptance test		\$144,000	
<b>Digester Upgrade</b>			
Digester engineering complete	\$780,000		
Digester cover procurement complete	\$140,000		
Digester transfer and mixing pump procurement complete	\$65,000		
Contractor mobilize for digester demolition	\$95,000		move hoisting equipment on site
Digester No.1 remove existing cover	\$310,000		remove cover from digester and place on site
Digester No.1 dispose of existing cover	\$95,000		remove cover from site
Digester No.1 deliver new cover	\$160,000		

Digester No.1 install cover	\$388,000	
Digester No.2 remove existing cover	\$310,000	remove cover from digester and place on site
Digester No.2 dispose of existing cover	\$95,000	remove cover from site
Digester No.2 deliver new cover	\$160,000	
Digester No.2 install cover	\$388,000	
Deliver sludge transfer pumps	\$85,000	
Deliver sludge mixing pumps	\$130,000	
Digester transfer and mixing pump installation complete, digester No. 2	\$105,000	
Digester transfer and mixing pump installation complete, digester No. 1	\$105,000	
Digester No.1 Cover Acceptance Test		\$83,000
Digester No.2 Cover Acceptance Test		\$83,000
Digester transfer and mixing Acceptance Test complete		\$65,000
<b>Additional Capital Items</b>		
Preliminary headworks engineering	\$71,000	
Influent pump evaluation complete	\$25,000	
Influent pump repair complete	\$70,000	
Influent pump Acceptance Test complete		\$5,000
Aerator evaluation and rehabilitation complete (install 3 new aerators)	\$115,000	
Aerator Acceptance Test complete		\$35,000
Secondary Clarifier No. 3 rehabilitation complete	\$145,000	
Engineering & Procurement influent gates complete	\$45,000	
Influent Gates delivered	\$230,000	
Subsystem Acceptance Test of Influent gates complete		\$15,000
Bar Screen Acceptance Test complete		\$120,000
Chemical Unloading installation complete	\$86,000	
Chemical Unloading Acceptance Test complete		\$5,000
Final Acceptance		\$250,000
<b>Subtotals</b>	<b>\$6,028,000</b>	<b>\$949,000</b>
<b>Total</b>	<b>\$6,977,000</b>	

This page intentionally left blank

This page intentionally left blank

This page intentionally left blank



**SCHEDULE 12.2 PROPOSAL A REPAIR AND REPLACEMENT BUDGET**

<u>CIP</u>	<u>R &amp; R Budget – Proposal A</u>
Digester Upgrade	\$ -
Sedimentation basins	\$ -
Grit Chamber	\$ 15,000
Pumps	\$ 25,000
Valves	\$ 10,000
Gates	\$ 50,000
Canyon Estates PS	\$ -
Bar screen	\$ -
Shredder	\$ -
Ferry Point PS	\$ -
Comminutors	\$ -
Aerators	\$ 50,000
Shop	\$ -
Telemetry	\$ -
SCADA	\$ -
Bioassay lab	\$ -
Clarifier renovation	\$ 50,000
Other headworks impvmts	\$ -
Chem. unloading area	\$ -
Sludge	\$ -
Other (including, but not limited to replacing obsolete motor control centers, rehabilitating chemical feed pumps and addressing other untimely failures)	\$ 70,000
 <u>Total</u>	 <u>\$ 270,000</u>

**SCHEDULE 12. 3 PROPOSAL B CAPITAL IMPROVEMENTS**

	<u>CIP</u>		<u>Cost</u>	
1	Digester Upgrade	\$	3,815,000	
2	Sedimentation basins	\$	2,266,000	
2	Grit Chamber	\$	-	
3	Pumps	\$	100,000	See Note 1
3	Valves	\$	-	
3	Gates	\$	290,000	
3	Canyon Estates PS	\$	-	
4	Bar screen	\$	120,000	See Note 1
4	Shredder	\$	-	
4	Ferry Point PS	\$	-	
5	Comminutors	\$	-	
5	Aerators	\$	150,000	See Note 1
5	Shop	\$	-	
6	Telemetry	\$	-	
6	SCADA	\$	-	
6	Bioassay lab	\$	-	
7	Clarifier renovation	\$	145,000	See Note 1
8	Other headworks impvmts	\$	-	
8	Chem. unloading area	\$	91,000	
8	Sludge	\$	-	
9	Other			
	<u>Total</u>	\$	<u>6,977,000</u>	

Notes

1, Any cost savings in this amount will be shared between USFOS and the City, with City receiving 70% and Company receiving 30% with proper Cost Substantiation.

## SCHEDULE 12.3 (Cont'd)

### PROPOSAL B PERIOD CAPITAL IMPROVEMENTS

#### Scope of Work

##### Project Description:

The Capital Improvements consists of improvements in six areas of the existing plant: Headworks, Primary Sedimentation Basins, Digesters No. 1 and 2, Chemical Unloading Area, Aeration Basins, and Secondary Clarifier No. 3. Descriptions of the plant improvements are described below. The Company will design, supply, and construct the Capital Improvement items as listed below.

##### 1. Headworks Rehabilitation

- a) Remove four existing slide gates from influent wet well.
  - 1) Remove the gates two at a time, isolating each side of the wet well at the influent screen with the existing gates.
- b) Supply and install four new electrically operated slide gates for influent control at the Influent Wet Well.
  - 1) Modify existing motor control center (MCC) as necessary to power new slide gates.
  - 2) Replace the gates two at a time, isolating each side of the wet well at the influent screen with the existing gates.
- c) Remove existing bar screen.
- d) Supply and install new bar screen.
- e) Evaluate existing influent pumps and repair / replace as necessary.
- f) Inspect existing influent pump suction pipes and evaluate suitability for continued use. Repair as necessary.

##### 2. Primary Sedimentation Basin Rehabilitation

- a) Renovate the existing Primary Clarifiers, one at a time.
  - 1) Start with Clarifier No. 1 and complete the work already begun per the discussion below.
- b) Rehabilitate the concrete walls and walkways that have deteriorated in Basin No. 1.
  - 1) Operations personnel will isolate Basin No.1 upstream and downstream.
  - 2) Operations personnel will clean and de-water Basin No.1 sufficiently to allow rehabilitation.
  - 3) Operations personnel will identify any additional work necessary while the basin is out of service.
  - 4) Rehabilitate the concrete while the basin is out of service.
- 2) Evaluate the entire concrete deck on Basin No. 1 and rehabilitate as necessary.
- 3) Use a suitable quick-drying, fast-bonding concrete grout compound for the rehab work.
- 4) New concrete shall be mixed to achieve a 28 day compressive strength per the specifications.

- 5) Use an appropriate bonding agent on the existing concrete surfaces before installing the new grout compound material.
- 6) Form as required to support rehabilitation work.
- 7) New Chains, Flights and Shafts have been purchased and installed by the City. This equipment will be removed to allow concrete rehabilitation work to proceed.
- 8) Replace Chains, Flights and shafts following concrete rehabilitation.
- 9) The existing cross-collector is still in service and requires no work.
- 10) Work cannot begin on Basin No. 2 until Basin No. 1 has been started up and is providing satisfactory service.
  - a) Rehabilitate the concrete walls and walkways that have deteriorated in Basin No. 2 similar to Basin No. 1.
  - b) The City has purchased Chains, Flights and Shafts for both of the Primary Sedimentation Basins. The Fixed Construction Cost includes the equipment cost for one Basin. The Fixed Construction Cost will be reduced by the City's verifiable equipment cost by Change Order following the Construction Date.
  - c) Replace the eight (8) Effluent Troughs:
    - 1) There are 4 existing troughs in each basin.
    - 2) Replace the four troughs with weirs in Basin No. 1 first.
    - 3) Adjust weirs for even distribution of outflow from the basin into the troughs.
    - 4) Complete all work in Basin No. 1 and return it to service when all renovation work is completed..
    - 5) Complete the trough replacement on Basin No. 2 while it is down for the other repair work described herein.
    - 6) Remove the four existing troughs in Basin No. 2
    - 7) Install the four new troughs in Basin No. 2
    - 8) Adjust weirs for even distribution of outflow from the basin into the troughs.
  - d) Refill and re-start Basin No. 2 when all renovation work is completed.

### 3. Digester Upgrade

- a) Rehabilitate Digesters
  - 1) Operations personnel will isolate digester No. 2 upstream and downstream.
  - 2) Operations personnel will remove all residual sludge from digester number 2 and clean as required to work inside. Operators will drain the sludge and hose-down the walls and floor to remove as much sludge as possible.
  - 3) Operations personnel will evaluate and identify necessary repairs.
  - 4) Remove from the cover, all appurtenant gas and mixing equipment and housings.
  - 5) Remove existing flexible gas pipe arm.
  - 6) Remove existing floating cover from digester number 2.
  - 7) Supply and install new supernatant draw-off system in digester number 2
  - 8) Supply and install new DYSTOR gas holder covers on digester number 2.
  - 9) Repeat above steps for digester number 1.
  - 10) Dispose of covers and mixing equipment.

b) **Replace Sludge Mixing Systems**

- 1) Supply and install 2 recessed impeller pumps for sludge mixing.
- 2) Install in-line sludge grinders on suction side of recessed impeller pumps.
- 3) Install on open pad without canopy for placement of pumps and digester equipment..
- 4) Modify piping as necessary to install pumps.
- 5) Install necessary power conduit and wiring for new pumps.
- 6) Evaluate existing MCC and modify as necessary to provide pump power. Supply and install local control station HOA selector switch with start/stop push buttons. The selector switch will be supplied with an auxiliary contact for auto mode indication. The control scheme will have provisions for remote start/stop from a SCADA system.

c) **Remove two existing progressive cavity sludge transfer pumps.**

- 1) Supply and install new chopper pumps to replace existing sludge transfer pumps.
- 2) Modify existing piping as necessary to install new pumps.
- 3) Evaluate existing electrical wire and hardware and re-use as appropriate.
- 4) Supply and install local control station HOA selector switch with start/stop push buttons. The selector switch will be supplied with an auxiliary contact for auto mode indication. The control scheme will have provisions for remote start/stop from a SCADA system.

4. Chemical Unloading

- a) Install new concrete containment pad, berm and dike for spill containment. Install a new concrete pad and curb at the chemical unloading area, along with a 4" high concrete "speed bump" type curb over which the chemical hauling trailer will back to unload the chemicals.
- b) Install a dry sump for spill collection and pumping, 3'x 3' square by 4' deep. Install the sump in a corner of the containment area to allow for collection of a spill. Cover the sump with appropriate grating to keep out debris.
- c) Provide one portable chemical resistant submersible pump that can be dropped into the sump when necessary. The pump will be portable with a carry handle, and will be powered by a 120 volt single phase 60 Hz motor. A 20' long power cord will be provided. The pump will be constructed of materials suitable for sodium hypochlorite and sodium bisulfite service.
- d) Provide a flexible chemical resistant hose suitable for sodium hypochlorite and sodium bisulfite service. The length of hose will be approximately 50 feet so that the spilled chemicals can be discharged into the existing containment area around the tanks.
- e) Provide a permanent power connection, buried conduit and an outside receptacle for the pump, outside the containment area in the vicinity of the sump.
- f) Install GFI receptacle for chemical pump in the vicinity of the dry sump.

5. Secondary Clarifier No. 3 Renovation

- a) Operations personnel will isolate clarifier No.3 upstream and downstream.

- b) Operations personnel will dewater and clean clarifier No. 3 sufficiently to allow rehabilitation and evaluation.
- c) Operations will evaluate and identify necessary mechanical repairs.
- d) Remove clarifier No. 3 heaved concrete floor sections.
- e) Repair the existing concrete floor where it has uplifted by saw cutting the floor to remove the heaved concrete area.
- f) Saw cut sufficiently back from the heaved area to access undamaged and unstressed floor concrete.
- g) Drill holes and install chemically anchored dowel bars (epoxy bond) into the existing concrete.
- h) Provide and install new reinforcing bars in a pattern and configuration similar to that existing.
- i) Apply bonding agent to the existing concrete surfaces.
- j) Place waterstop in joints between the new concrete and the existing concrete to provide watertight seal.
- k) Place concrete to rebuild the floor.
- l) Inspect the scraper mechanisms and the drive units and make minor repairs as necessary to return the unit to full operating condition.

6. Aeration Basin Number 4

- a) Inspect and evaluate all six surface aerators in Basin Nos. 1 and 2 for condition and continued use.
- b) Remove the 3 existing surface aerators from Basin Nos. 1 and 2 that are in the worst condition.
- c) Relocate these aerators to Basin No. 4 (the high flow basin where no aerators currently exist) and connect to the existing electrical and control systems.
- d) Supply and install three new motor starters for basin No. 4 aerators.
- e) In the place of the three aerators that have been removed from Basin Nos. 1 and 2, install new high efficiency surface aerators of similar size and capacity. Utilize the existing electrical and control wiring and hardware to power the new aerator units.

**SCHEDULE 12.4 ENVISIONED MAJOR REPAIR AND REPLACEMENT SCHEDULE**

**Major Repair and Replacement Items  
Typical Demand Over Time**

Data is typical occurrences per year, actual year of occurrence and frequency for any item is approx  
Maintenance schedule will be revisited per the requirements of the Agreement

Maintenance Requirement	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Year 11	Year 12	Year 13	Year 14	Year 15	Year 16
Bar Screen overhaul														
Large influent pump major overhaul/replace		1			1							1		
Small influent pump major overhaul/replace			1			1					1			
Influent pump VFD major overhaul/replace		1				1				1				
Influent system piping / valve overhaul														1
Grit conveyor major overhaul/replace	1					1					1			
Grit chain/flight major overhaul/replace		1			1					1				
Primary scum system major overhaul							1		1					
Primary sludge pump major overhaul/replace	1			1			1					1		
Primary chain/flights major overhaul/replace								1						1
Primary chain/flights drive major overhaul/replace	1		1											
Aerator major overhaul/replacement	1	2		1				1		1		1		
Aeration VFD major overhaul/replacement			1			1		1		1		1		
RAS pump major overhaul/replacement	1			1			1		1		1			1
Clarifier major overhaul			1					1						1
Disinfection feed system overhaul					1						1			
DAF pumping system overhaul		1				1								1
DAF drive/conveyor/rake overhaul					1				1			1		
Plant air compressor major overhaul/replacement										1				1
Digester cleaning									1					
Boiler major overhaul/replacement				1				1				1		
Emergency generator major service				1										
Building roof/repair/addition	1				1				1					1
Major plant gate replacement		1				1				1				

Major conduit/cable replacement or installation			1				1				1		
Motor control center major overhaul/replace		1			1			1			1		
Monitoring instrumentation replacement or addition	1		1		1		1		1		1		1
<b>Total item count by year</b>	<b>7</b>	<b>8</b>	<b>6</b>	<b>5</b>	<b>7</b>	<b>6</b>	<b>5</b>	<b>6</b>	<b>6</b>	<b>6</b>	<b>7</b>	<b>6</b>	<b>8</b>
Average year item count	<b>6</b>												

## **SCHEDULE 12.5 INITIAL CITY IMPROVEMENTS**

Beginning on or before the Contract Date, the City shall perform at its sole cost (or shall retain the Company to perform for an additional fee to be mutually agreed upon by the parties) the following repair, maintenance and replacement activities in order to return the Facility to working order and condition that existed at the time of the Request for Proposal (RFP) inspections and as represented in the subsequent Proposal submitted by the Company. The repairs are required due to the continued and accelerated deterioration of the Facility during the time period between the RFP period and the Contract Date.

### **DESCRIPTION OF CONDITIONS IDENTIFIED AND REPAIRS TO BE COMPLETED BY THE CITY:**

1. One of the small influent pumps at the influent pump station is leaking severely from the pump casing due to a hole in the casing. This pump and associated inlet and outlet fittings need to be repaired or replaced to facilitate proper operation. This situation presents the potential for catastrophic failure, of the pump casing or failure of the sump pump in the area, resulting in flooding of the dry well and the ultimate failure of ALL influent pumps due to flooding of the drive motors. This could result in a massive spill of all incoming wastewater at the plant and potentially in the collection system as well.
2. Verify the ability of all three grit collection mechanisms, including flights, chains and screw conveyors to operate as they did at the time of the initial inspection. Repair or replace as necessary.
3. One of the comminutor motors is missing and the comminutor needs to be made operational as it was at the initial inspection. Two comminutors were present and operational at the time of the initial inspection.
4. Repair and verify operation of both primary clarifier sludge collection mechanisms, including chains, flights and drive components. While the City has recently installed new chain and flights for this purpose, it appears that reliable collector functionality has not been restored.
5. Primary Clarifier scum collection mechanism. At the time of the initial inspection, spray systems were in place and operational. One helical scum collector (Clarifier #2) was in place and the Company was told the helical collector from the other clarifier (Clarifier #1) was out for repair. At this time, neither spray system is operational and both helical collectors are missing. Also, at least one progressive cavity scum transfer pump is now missing and needs to be repaired or installed and placed in service.
6. Of the twelve (12) aerators in the aeration basins, three are completely missing and three more are either inoperable or require major repair. At the time of the initial

inspection, the Company was informed that all of the units were operable. Three of them were not in place; however, the City informed the Company that they were operable and that the others in place were operational as well. At the current time, three aerators are completely missing with the exception of a few components of incomplete and unknown condition in the storage area and three more are either inoperable or require major repairs. All aerators need to be restored to operable condition or replaced.

7. Parts from the electrical control systems for the aerators have been salvaged to keep other units in service. The control panels need to be returned to operational condition as found during the initial inspection.
8. The Dissolved Air Flotation Thickeners have both been seriously damaged, apparently by being run backwards. Both were operable at the time of the initial inspection and need to be restored to the original design configuration with all components in place and functional. The handrail around one of them was severely damaged and a section of effluent control weir is missing; both of these items must be repaired or replaced.
9. Digester #1 cover was operational and the four mixing systems were functional at the time of the initial inspection. At this time, this cover is partially submerged in sludge and is resting in a "cocked" or crooked position. Only two of the four mixers are operational. While ultimate repair of the digester requires replacement of the dome, the digester needs to operate properly to allow time to repair the #2 digester (which is and has been out of service for an extended period of time), prior to making modifications to #1 digester. The ability to properly digest sludge is severely compromised and may result in additional costs or fines and the development of hazardous conditions. Additional costs may also be incurred by the Company, due to the condition of the cover, in making the planned modifications and repairs to digester #1.

The loss of methane production from the digester may also affect the ability of the Company to meet Maximum Natural Gas Usage, as digester gas (methane) is planned to be used to supplement natural gas for heating purposes. Temporary relief from the Maximum Natural Gas Usage limit may be required as well.

10. The west chemical injection water supply pump, at the chlorine contact tank area, has a severely damaged pump shaft resulting in leakage. The shaft/pump needs to be repaired/replaced to return the unit to the condition found during the initial inspection.

The City and the Company shall perform an inspection of the Facility on the Commencement Date to identify and verify the above conditions and/or other conditions that may occur (including repairs the City may make prior to the inspection) between the time of this agreement and the commencement date that affect the ability of the Facility to meet Effluent Requirements.

The above repairs shall be completed not later than 90 days after the Contract Date (the "Required City Repairs Period"). Notwithstanding any other terms of this Agreement, it is agreed and understood that (i) the Company shall have no liability or responsibility for any failure of the Facility to meet the performance requirements established by this Agreement or Applicable Law, including, without limitation, liability for fines, penalties or liquidated damages, until the Required City Repairs have been satisfactorily completed by the City (or by the Company if directed by the City) and the Facility has been returned to working order, and (ii) the Company shall be entitled to equitable cost or schedule relief in the event that the Required City Repairs which affect the Capital Improvements or the Repair and Replacements planned by the Company are not satisfactorily completed by the end of the Required City Repairs Period through no fault of the Company.

SCHEDULE 13  
ACCEPTANCE TESTING

13.1 ACCEPTANCE TEST

There are three main components to the Acceptance Test: 1) evaluation and acceptance of the various subsystem capital improvements to be implemented under the Proposal B Capital Improvements, 2) demonstration of the ability to convey 8.5 MGD of wastewater through the Facility for a 24-hour period, and 3) determination of the ability of the completed upgrades to the Facility to reliably meet the performance standards in Schedule 1 for a continuous period of 14 days.

In conducting the Acceptance Test, Company will endeavor to demonstrate the Facility's design criteria and, to the extent practical, will do so when conducting the tests described below. However, nothing in this Schedule shall be construed to require Company to conduct tests at the design criteria, particularly if said test would have an adverse impact on the operation of the Facility or the Collection System.

13.2 ACCEPTANCE TEST PLAN

At least 90 days prior to the scheduled completion of each subsystem and of the complete Facility, the Company shall submit to the City a detailed Acceptance Test Plan defining the test program as related to each specified objective. The Acceptance Test Plan shall define the procedures to be used, the specific measurements to be made, the proposed usage of permanent and temporary instrumentation, the organization of the test team, the testing schedule, and the operating and maintenance schedule during testing. The Acceptance Test Plan shall include specific, detailed sampling protocols to be utilized in conducting the Acceptance Test. Preliminary tests shall be conducted at the Company's expense; however, the results of such tests shall not be made part of the test report. The Acceptance Test shall not be conducted until the Acceptance Test Plan is approved, and authorization is received from the City. The Acceptance Test Plan shall address the Company's approach and details for meeting the requirements of this Schedule. The City shall comment on, or approve the Acceptance Test Plan within thirty (30) days of receipt. However, the Acceptance Test Plan shall not be considered complete and approved until all the City's comments are satisfactorily addressed. City approval shall not be unreasonably withheld provided that the Company makes every effort to provide expeditious response to all comments.

The Acceptance Test shall demonstrate the ability of the Facility to treat the range of influent quantity and quality as established from historical data. It is not likely, however, that all extreme conditions will exist during the test period. Therefore, the Acceptance Test Plan shall describe how the tests will demonstrate the ability of the Facility to achieve the performance standards under the ranges of flow and loading that can reasonably be expected in the operation of the facility, and safely simulated during the Acceptance Test.

All labor, materials, equipment, and services required to perform the Acceptance Test shall be supplied by the Company. During the test, the Company will operate all systems under normal

operating conditions, including, but not limited to, routine equipment operation, maintenance services, and chemicals and electricity usage.

### 13.3 SUBSYSTEM ACCEPTANCE TESTING

When installation of each of the new equipment subsystems to be installed as proposed in Proposal B Capital Improvements nears completion, Company will give the City five (5) business days written notice that the system(s) will be ready for Acceptance Testing. The City will be asked to provide, on five (5) days notice, an authorized agent to meet at the plant site with the Contractor's installation personnel, to inspect the installed equipment, and witness the Acceptance Testing, for the purposes of accepting same for, or on behalf of, the City.

Company is responsible for providing start-up supervision for each particular piece of equipment as defined in their respective equipment Acceptance Test Plan. The test procedures will be specific to the manufacturer's requirement for each particular piece of equipment. Test conditions that best approximate the design variables of the facility will be simulated and used as much as practical. All fine-tuning of operating conditions will be performed prior to testing. Design operating conditions shall be maintained to the greatest extent practical. During this time, all pertinent operating parameters will be monitored and recorded and sufficient data shall be collected to document performance at the design conditions.

The following Subsystem Acceptance Tests will be conducted:

- Primary Sedimentation Basin No. 1
- Primary Sedimentation Basin No. 2
- Digester No. 1 Cover
- Digester No. 2 Cover
- Digester Transfer and Mixing Equipment\*
- Influent Pump – Test for flow capacity\*\*
- Aeration System\*
- Influent Gates – Test for flow capacity\*\*
- Bar Screen – Test for flow capacity\*\*
- Chemical Unloading Area

\* These items require testing procedures to insure adequate mixing, pumping and aeration capacity, as applicable, for their intended purpose.

\*\* These items are identified as the only modifications performed by the Company as part of this Agreement that have the potential to affect the flow handling capability of the facility.

## 13.4 FACILITY TESTING

During the hydraulic test, the treatment Facility shall be operated at a flow rate of 8.5 MGD. However, the City recognizes that plant influent will be limited by the contributing discharges. Therefore, the Acceptance Test Plan shall identify means for verifying the hydraulic capacity of critical components of the overall Facility. During the final week of the 14-day test, the Facility shall be operated in a manner which will allow the facility to experience the design peak flow of 40 MGD for a reasonable period of time to demonstrate the ability of the facility to hydraulically handle the peak design flow. The City and the Company shall jointly determine the manner by which this flow rate can be practically created in a safe manner without causing operational difficulties at the Facility or in the collection system. If the Company and the City determine that no practical means exists to safely create a peak flow situation, the City and the Company will agree to either a lower rate or to an alternative method of determining the impact of a peak flow incident on the facility. During the 14-day test, the Facility shall be operated at hydraulic loading rates ranging from 5 to 16 MGD to simulate as close as practical real and reasonable operating conditions as expected for the facility.

During the Acceptance Test, the following tests will be conducted:

1. Manual or automatic, as applicable, shutdown and start-up of each new or modified component or process in the Facility
2. Simulated electric power failure, generator start-up, and equipment switch over to stand-by power and switch back when power is restored, as designed.
3. Demonstrate SCADA monitoring, control and alarming systems, as designed to meet the requirements of this Agreement.

During the Acceptance Test the influent and effluent will be regularly monitored for certain key parameters in order to evaluate the performance of the Facility. These key parameters are those listed in Schedule 1, plus any additional parameter required by RWQCB or USEPA. Samples shall be analyzed by a certified laboratory agreed to by both the Company and the City, using laboratory analytical quality control standard procedures. The effluent shall be sampled at least four times per day (early morning, early afternoon, late morning, and at least once during the night) for established parameters.

The Company shall staff the Facility according to the Agreement during the Acceptance Test; since un-staffed operation is proposed, the appropriate period of operation must be un-staffed during the Acceptance Test.

During the Acceptance Test, the Facility will be discharging treated water into the deep water outfall. Should the performance of the Facility be deemed to be unsatisfactory at any time during the acceptance period, immediate action shall be taken by the Company to ensure that the effluent entering the outfall does not exceed existing or interim limits, or pose a threat to human health and the environment. If remedial action is considered unlikely to satisfy this requirement, the trial will be terminated until such time as the above requirement is satisfied.

### 13.5 ACCEPTANCE TEST REPORT

Following successful completion of each Subsystem Acceptance Test and the Facility Acceptance Test, as described above, the Company shall prepare a report that contains a description of the test procedures and results, and a certification by the Company that the acceptance standards have been met. The report will be submitted in triplicate to the City. The City shall determine within thirty (30) days whether it concurs with such certification. Once the City states in writing that it concurs with the Company's certification:

- For the Subsystem Acceptance Tests, the Company will invoice and the City shall pay the "Acceptance Test Retention" for that particular subsystem as presented in Schedule 12.1.
- For the Facility Acceptance Test, the Acceptance Date shall be deemed to have been established as presented in Section 6.7.1 of this Agreement; and the Company will invoice and the City shall pay the "Final Acceptance Test Retention" as presented in Schedule 12.1.

SCHEDULE 14  
 KEY COMPANY PERSONNEL and AFFILIATION

<b>Name of</b>		
<b>Individual</b>	<b>Position</b>	<b>Affiliation</b>
E. J. Shalaby	Richmond Project Manager	USFilter Operating Services
Dan Child	Area Manager	USFilter Operating Services
Chibby Alloway	Vice President Western Region	USFilter Operating Services
James Good	Vice President, Business Development	USFilter Operating Services
Matt Maley	Regional Environmental Health and Safety Manager	USFilter Operating Services
Karen White	Contract Account Administrator	USFilter Operating Services
Chuck Voltz	Engineering Project Director	USFilter Engineering and Construction
Kurt Maddern	Construction Manager	USFilter Engineering and Construction
Robert Watson	Engineering Project Manager	USFilter Engineering and Construction
David Ogden	Engineering Project Manager	Boyle Engineering
Dan Seidel	Engineering Project Manager	Olivia Chen Consultants
Will Lyles	Manager	Kaweah Construction

SCHEDULE 15  
 TERMINATION PAYMENTS FOR EARLY TERMINATION

<b>TERMINATION PAYMENTS (in 2002 Dollars)</b>				
<b>Termination Cost Category</b>	<b>Contract Years 1 - 5</b>	<b>Contract Years 6 -10</b>	<b>Contract Years 11 - 15</b>	<b>Contract Years 16 - 20</b>
Early Termination	<b>\$ 4,000,000</b>	<b>\$3,000,000</b>	<b>\$2,000,000</b>	<b>\$1,000,000</b>
Demobilization and Other <sup>(1)</sup>	<b>\$ 515,606</b>	<b>\$ 515,606</b>	<b>\$ 515,606</b>	<b>\$ 515,606</b>
Net Termination Payments	<b>\$4,515,606</b>	<b>\$3,515,606</b>	<b>\$2,515,606</b>	<b>\$1,515,606</b>

Notes:

(1) "Demobilization and Other" costs should be indicated to include all additional payments to the Company for termination for convenience by the City.

SCHEDULE 16  
SLUDGE DISPOSAL FACILITY, OPERATIONS AND COSTS

During the Term of the Agreement, the West County Wastewater District may close the sludge drying lagoons where Sludge from the Facility is currently sent for drying. Should this occur, Company will provide the following services:

Company will install a new sludge dewatering system consisting of sludge piping, sludge pumps, and dewatering equipment. Two (2) new centrifuge feed pumps, each at 250 gallons per minute pumping capacity will be installed. These pumps will be provided with variable frequency drives (VFDs) to control the pump speed and consequently the amount of sludge being sent to the centrifuge(s). New piping and valves to take suction from the anaerobic digesters and discharge to the new dewatering system will be installed to facilitate sludge transfer.

The sludge dewatering equipment will be located in available space in the existing Sludge Control Building. This building will be provided with a forced air ventilation system, an odor control system and chemical scrubbing to meet the stated objective of “no odors” at the property boundary and no odor complaints from Richmond residents and businesses.

The costs to build and operate these facilities (stated in 2002 dollars) are as follows:

1)	Capital Costs:	<u>\$3,000,000</u>
2)	Annual Operating Costs:	
	Staff:	\$ 85,455
	Chemicals:	\$ 28,322
	Utilities:	215,103 kwh/year
	Other (sludge disposal):	\$ 296,022
	Total:	\$ 436,560 / year

This supplemental service is provided on the same terms and conditions as all other capital and operating services of this Service Agreement. The operation and maintenance of the sludge dewatering facility and the capital costs and operating costs will be incorporated into the Service Agreement as a change in scope of services with costs (capital, operations, and maintenance) pre-determined as specified above. The specified costs shall be adjusted from year 2002 dollars using the Construction Cost Index of this Service Agreement for the capital costs and the CPI Index of this Service Agreement for the Operational Costs. Kilowatt-hour usage beyond the annual maximum specified above will be reimbursed to the City by the Company. Unless impacted by future changes in law and/or regulatory requirements, the costs specified above shall only be adjusted for inflationary cost adjustments as determined by the Construction Cost Index and the CPI Index specified in this Service Agreement. The facility costs and operational costs specified are for a facility sized to handle the loadings specified in Schedule 2, Table S2-1, the effluent quality requirements specified in Schedule 1, and the regulatory requirements and laws as of the execution date of this Agreement. Utilization of alternative landfill/disposal locations by the Company will not create a change in scope of services

condition and shall not create a compensation adjustment, unless the change of location results directly from a change in law. The anticipated and announced closure of the Potrero Hills landfill will not constitute a change in law or a change in scope of services condition.

**Guarantees:**

- |                     |                 |   |
|---------------------|-----------------|---|
| 1 - Cost Guarantee: | Capital         | As specified above.   |
|                     | Operating Costs | As specified above with electricity, Insurance and bonds treated as Pass Through costs. |

2 - Permitting: Prior to construction activities commencing, approval for construction must be obtained from the local Regional Water Quality Control Board. A Building Permit must also be obtained from the City. The specified scope of the capital improvements is designed per the applicable standards and criteria for year 2002. Documented changes to these standards, occurring after 2002, will allow the Company to recover any additional costs necessitated to meet revised standards and criteria in effect at the time the City authorizes this Schedule 16 project. The Company will provide to the City documentation of the impact of any change on the established costs specified in this Schedule 16 for review and acceptance by the City. The City shall have the right to a third-party review by a qualified firm; if the City and the Company do not reach agreement on the cost impact, the dispute resolution provisions of the Service Agreement shall be followed.

3 - Schedule: The Company will establish and honor a design/build project schedule for the completion of the work. Such schedule will be governed by all the provisions of the Service Agreement.

4 - Performance (including odor control): Company will guarantee operational dewatering and odor control consistent with the performance requirements established with this Schedule 16.

5 - Regulatory Requirements: Company will comply with current regulatory requirements at the time the West County facility closes, for residuals handling and disposal. Changes in regulatory requirements from the Agreement Date until the West County landfill closure will create a Change in Law condition for the Company and allow the City or the Company to document cost increases and/or decreases for the resulting adjustment of the Schedule 16 costs per the terms of the Service Agreement and this Schedule 16.

## EXHIBIT A WASTEWATER TREATMENT FACILITY

The Company is responsible for the services as defined in Schedules 1, 2 and 3 and set forth in the Agreement. The following description presents the various components that comprise the Facility, and a description of existing operational conditions.

### 1.1 RICHMOND WASTEWATER TREATMENT FACILITY

The Facility is located at 601 Canal Boulevard, Richmond, CA. The City owns the land, buildings and equipment at the Facility. The Facility is a secondary treatment facility with a design capacity of 16 MGD average flow. Facility currently treats approximately 8.5 MGD average annual flow. The treatment processes consist of preliminary treatment, primary treatment, activated sludge secondary treatment, and chlorination. Final effluent is discharged to the deep water outfall.

The Facility was designed for a 16 MGD average flow. The design capacity was an organic loading of 200 mg/L or 26,688 pounds/day of Biochemical Oxygen Demand (BOD) and a Total Suspended Solids (TSS) of 200 mg/L or loading of 26,688 pounds/day.

The Facility treats wastewater from various industries along with domestic wastewater. Industries that contribute to the Facility influent have variable wastewater flows and characteristics. The City has industrial pre-treatment regulations and the required sampling, inspection and enforcement programs.

#### 1.1.1 Wet Stream and Odor Control Treatment Facilities

Throughout the term of this agreement USFOS will provide the following:

##### 1. Odor Hotline and Response Plan including the following:

- 24 hour toll free hotline (manned by the operator on-call) published and posted
- Immediate response to site of issue/complaint to identify odor sources and collect information
- Analytical monitoring as necessary for identification of odor causing constituents at the site of complaint/concern such as:
  - o Hydrogen sulfide gas
  - o Amines
  - o Methyl-mercaptan's
- Incorporation of weather monitoring and correlation to odor issues (wind, temperature, humidity, etc.) into the Company's SCADA system
- Follow-up with report generation including a copy to the City

##### 2. Practices to be followed to avoid odor issues will be:

- Keeping tankage not in use dry when possible
- Applying water caps over residuals in open tanks when tanks cannot be kept dry
- Using of a number of chemicals as either preventive or corrective measures dependant upon the chemical/chemistry source of any possible odor issue

- Performing of odor generating activities under weather conditions favorable to avoiding odor issues
- Covering of the open top headwork's wet well area with a simple structure to prevent the unregulated dispersal of fugitive odors and the installation of a small wet scrubber to maintain scrubbed ventilation through this enclosed area

#### 1.1.2 Sludge Treatment, Odor Control and Disposal

In the event West County closes the existing sludge disposal system and the City approves the sludge dewatering and disposal option submitted by the Company, the Company will provide for the following:

- Installation and operation of a closed dewatering system through the use of centrifuges to provide a system which minimizes odors from the dewatering process
- Closed conveyance from centrifuges to the truck loading bay to minimize odors
- Maintenance of a negative atmosphere in all dewatering areas with airstreams scrubbed through a wet chemical scrubber
- Immediate delivery of dewatered product into roll-off containers
- Transportation of the containers to the Company provided landfill location for disposal.

### 1.2 LABORATORY, ANALYTICAL SERVICES, AND IPP PROGRAM

The laboratory performed over an estimated 7,527 individual tests during the fiscal year 1999-2000. These tests include conventional, non-conventional, and specialized analyses for both Facility NPDES permit and Facility process samples, and industrial and non-industrial pretreatment samples. This last category of the industrial and non-industrial pretreatment samples (i.e the IPP sampling work) is specified in Schedule 2, Section 2.2.5.

All conventional and non-conventional regulatory analyses conform to the appropriate EPA approved methodologies and quality control and quality assurance program procedures. The laboratory facility and Staff are an accredited laboratory via the laboratory certification process and requirements.

**EXHIBIT B  
GUARANTEE**

**GUARANTEE**

This Guarantee made as of the \_\_\_ day of \_\_\_\_\_, 2002, by Vivendi Water S.A., ("Guarantor"), having its principal place of business at 52 rue d'Anjou, 75008 Paris, Cedex 08 France, to and for the benefit of the City of Richmond, California (the "City").

**WITNESSETH:**

WHEREAS, the Company, U.S. Filter Operating Services, Inc., corporation (the "Company"), having an office at 2300 Contra Costa Blvd, Suite 470, Pleasant Hill, California 94523, has entered into an Agreement for Capital Improvements, Operations, Maintenance and Management Services (the "Agreement") with the City dated as of \_\_\_\_\_, 2002 pursuant to which the Company shall perform Capital Improvements, and shall operate, maintain and manage the City's Facility.

WHEREAS, Guarantor is willing to guarantee, as set forth below, the performance of the Company under the Agreement; and

WHEREAS, the City would not enter into the Agreement unless the Guarantor provided this Guarantee;

NOW, THEREFORE, as an inducement to the City to enter into the Agreement, Guarantor agrees as follows:

1. Guarantor hereby absolutely and unconditionally guarantees the full and prompt payment and performance by the Company of all of the Company's obligations under the Agreement, as and when due, and in accordance with the terms and conditions therein; PROVIDED, HOWEVER, the Guarantor's liability under this Guarantee shall in no event exceed \$75 million in the aggregate, regardless of whether the action in which recovery of damages is sought against the Company and/or the Guarantor is based on contract, tort (including, without limitation, active or passive negligence, gross negligence, intentional misconduct, and strict liability), statute or otherwise.
2. Guarantor covenants and agrees with the City that during such time as this Guaranty is in effect, there shall be no material adverse change (as defined below) in Guarantor's financial condition.
3. The Guarantor covenants that during the term of this Guarantee it will maintain its corporate existence, will not dissolve or otherwise dispose of all or substantially all of its assets and will not consolidate with or merge into another entity or permit one or more other entities to consolidate with or merge into it, unless the successor is the Guarantor

and the conditions contained in clause (ii) below are satisfied; provided, however, that the Guarantor may consolidate with or merge into another entity, or permit one or more other entities to consolidate with or merge into it, or sell or otherwise transfer to another entity all or substantially all of its assets as an entirety and thereafter dissolve if (i) the successor entity (if other than the Guarantor) (a) assumes in writing all the obligations of the Guarantor hereunder and, if required by law, is duly qualified to do business in the State of California, and (b) delivers to the City an opinion of counsel to the effect that its obligations under this Guaranty are legal, valid, binding and enforceable subject to applicable bankruptcy and similar insolvency or moratorium laws, and (ii) any such transaction does not result in a Material Decline in Guarantor's Credit Standing, as defined in Section 11.2.3 of the Agreement, or, if such transaction results in a Material Decline in Guarantor's Credit Standing, as defined in Section 11.2.3 of the Agreement, the successor Guarantor provides credit enhancement as required by Section 11.2.4 of the Agreement simultaneously with the effectiveness of such merger, consolidation, sale or transfer. If a consolidation, merger or sale or other transfer is made as permitted by this Section 3, the provisions of this Section 3 shall continue in full force and effect and no further consolidation, merger or sale or other transfer shall be made except in compliance with the provisions of this Section 3. No such consolidation, merger or sale or other transfer shall have the effect of releasing the initial Guarantor from its liability hereunder unless a successor entity has assumed responsibility for this Guarantee as provided in this Section 3 and if such transaction results in a Material Decline in Guarantor's Credit Standing as defined in Section 11.2.3 of the Agreement, the successor Guarantor shall provide credit enhancement as required by Section 11.2.4 of the Agreement modified so that the credit enhancement dollar amount shall be for \$ 50 million throughout the term of the Agreement. This credit enhancement shall be provided to the City simultaneously with the effectiveness of such merger, consolidation, sale or transfer. The provisions of this paragraph apply to the current Guarantor's credit standing and/or to any successor Guarantor.

4. Guarantor warrants and represents that all financial statements previously furnished by Guarantor to the City (i.e., the Guarantor's financial statements as set forth in its Annual Report for the Year 2000) fully and accurately reflect in all material respects the financial condition of Guarantor for the dates and periods indicated, and that there has been no material adverse change in the financial condition of Guarantor since the date of such statements. For purposes of this Guarantee, a "material adverse change" has the same meaning as the defined term "Material Decline in Guarantor's Credit Standing" in Section 11.2.3 of the Agreement.
5. In the event of the occurrence of any one or more of the following events (each of which is called a "Guaranty Event of Default", and more than one of which are collectively called "Guaranty Events of Default"):
  - a. Any of Guarantor's representations made herein or in any audited financial statements now or hereafter delivered to the City is untrue in any material respect or is not reaffirmed by Guarantor upon request for such reaffirmation made by the City to Guarantor;  
or

- b. Guarantor fails to pay or perform, after receiving notice from City, any of the obligations of the Company immediately upon Company's failure to pay or perform any one or more of such obligations when due, or fails to perform any other covenant of Guarantor contained herein; or
- c. any proceeding under bankruptcy or receivership or any other laws, state or federal, now or hereafter in effect for the relief of debtors, is filed by or against Guarantor (and as to any involuntary proceeding filed against Guarantor, such proceeding remains undismissed for a period of sixty (60) days) or for the appointment of a receiver for Guarantor or any of its property, or if Guarantor makes an assignment for the benefit of creditors or shall discontinue business or become insolvent; or
- d. Guarantor terminates or attempts to take any action to terminate this Guaranty, whether in whole or in part; or
- e. Dissolution, termination of existence, business failure or cessation of business operations by Guarantor;

then upon any such occurrence of an Event of Default under the Agreement or a Guaranty Event of Default, at the City's election, Guarantor shall promptly pay to and perform for the City all of the obligations of the Company; and the City may immediately or at any time thereafter take any action it deems or they deem necessary or advisable to enforce this Guaranty.

- 6. This Guarantee shall be governed by the laws of the State of California exclusive of the choice of law rules thereof, and Guarantor hereby agrees to the service of process in California for any claim or controversy arising out of this Guarantee or relating to any breach hereof, and to submit to the exclusive jurisdiction of any court of competent jurisdiction in the State of California in connection therewith.
- 7. This Guarantee shall be binding upon and enforceable against the Guarantor, its successors or assigns and legal representatives (including any successor by merger or consolidation or any transferee of all or substantially all of the assets of Guarantor), whether or not such obligations are expressly assumed by such successor, assignee or transferee, and is for the benefit of the City, and any permitted successors and assigns under the Agreement.
- 8. This Guarantee may be enforced by the City without first resorting to any action against Company or exhausting any other remedies that the City may have; provided, however, the City shall give the Company notice prior to exercising its rights and remedies hereunder against the Guarantor.
- 9. Each and every Event of Default under the Agreement shall give rise to a separate cause of action hereunder, and separate suits may be brought hereunder by the City as each cause of action arises. Guarantor waives presentment and demand for payment of the obligations, protest and notice of default, any demand for payment

under this Guarantee, and until the obligations of the Company under the Agreement are fully performed and paid in full any right of subrogation to any of the City's rights against the Company. Notwithstanding any provisions contained in this Guarantee to the contrary, the Guarantor shall be entitled to exercise or assert any and all legal and equitable rights or defenses which the Company may have under the Agreement or under applicable law (other than bankruptcy or insolvency of the Company) and the obligations of the Guarantor are subject to such counterclaims, set-offs or deductions as the Company is entitled to assert under the Agreement or applicable law.

10. No failure or delay by the City in exercising any right, power or privilege hereunder or under the Agreement shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other right, power or privilege. No waiver, amendment, release or modification of this Guarantee shall be established by conduct, custom or course of dealing, but solely by an instrument in writing duly executed by the party against whom any such waiver, amendment, release or modification is sought to be enforced.
11. Guarantor shall not assign its obligations hereunder without the prior written consent of the City, which consent may be given or withheld in the City's sole discretion.
12. The obligations of Guarantor to the City set forth in this Guarantee are absolute and unconditional, shall not be subject to any requirement that the City first enforce any remedies it may have against the Company or any other person, or any requirement to seek to recover from the Company hereunder before proceeding against Guarantor hereunder, and shall not be subject to any claim of Guarantor against any other person including the City except as provided in the last sentence of Paragraph 8 above.
13. During such times as this Guarantee shall be effective, the Guarantor agrees: (i) promptly to furnish the City, at the City's request, the most current annual audited financial statements of the Guarantor; and (ii) promptly to notify the City of any condition or event which constitutes, or would constitute with the passage of time or giving notice or both, an Event of Default of the Guarantor (as defined in the Agreement).
14. This Guarantee may be executed simultaneously in several counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument. The invalidity or unenforceability of one or more provisions of this Guarantee shall not affect the validity or enforceability of the remaining portions of this Guarantee.
15. Any term used not otherwise defined herein and defined in the Agreement shall have the meaning attributed to it in the Agreement.

16. Notices given pursuant to this Guarantee unless otherwise stated shall be in writing and shall be served personally or sent by certified mail, return receipt requested, to:

Guarantor at: Vivendi Water S.A.

If by Mail: 52 rue d'Anjou  
75008 Paris, Cedex 08 France  
Attn: Secretary

With a required copy to:

United States Filter Corporation  
40-004 Cook Street  
Palm Desert, California 92211  
Attention: General Counsel

If by Hand:

Vivendi Water S.A.  
c/o United States Filter Corporation  
40-004 Cook Street  
Palm Desert, CA 92211  
Attn: Secretary

City at: City of Richmond  
2600 Barrett Avenue  
Richmond, CA 94804  
Attn: City Attorney

or to such other address as shall be designated by such party in a written notice to the other party hereto. Any notice given pursuant to this Section if transmitted by certified mail shall be effective immediately upon receipt and if delivered by hand upon delivery.

17. If any litigation is necessary to enforce the terms of this Guarantee, the prevailing party shall be entitled to reasonable attorney's fees that are directly attributable to such litigation in addition to any other relief to which it may be entitled.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, Guarantor has executed this instrument the day and year first above written.

ATTEST:

Vivendi Water S.A.

\_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

ACCEPTED:

City of Richmond

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_