

6-19-2013

INDUSTRIAL PRETREATMENT  
INCENTIVE PROGRAM  
AGREEMENT  
("IPIP")  
BETWEEN

METROPOLITAN COUNCIL  
AND

\_\_\_\_\_  
("Discharger")

**Industrial Pretreatment  
Incentive Program Agreement  
between  
Metropolitan Council  
and**

\_\_\_\_\_ ("**Discharger**")

THIS AGREEMENT shall be effective as of \_\_\_\_\_, and is entered into between the Metropolitan Council, a public corporation and political subdivision of the State of Minnesota ("Met Council") and \_\_\_\_\_ ("**Discharger**").

**RECITALS**

A. Pursuant to Minnesota Statutes § 473.511, subd. 1, Met Council shall acquire, construct, equip, operate and maintain interceptors and treatment works necessary to implement Met Council's comprehensive plan for the collection, treatment and disposal of sewage in the Minneapolis-St. Paul metropolitan area ("**Metropolitan Area**").

B. Pursuant to Minnesota Statutes § 473.515, subd. 3, Met Council may require any person or local government in the Metropolitan Area to provide for the discharge of its sewage, directly or indirectly, into the metropolitan disposal system or to connect to such system and may require any person or local government unit discharging sewage into the metropolitan disposal system to provide preliminary treatment therefore.

C. Pursuant to its powers Minnesota Statutes § 473.504, subd. 4, Met Council may require industrial dischargers to have a Met Council Industrial Discharge Permit ("**Met Council Permit**") in order to discharge sewage into the metropolitan disposal system and may directly impose upon the industrial discharger all or a portion of the costs of treatment of such industrial discharge.

D. Met Council has approved in Business Item 2013-\_\_\_\_\_ an Industrial Pretreatment Incentive Program ("**IPIP**") which will act as an incentive to help high-strength industrial dischargers to design, construct and install pretreatment equipment on their industrial sites. This referenced Business Item further authorizes the Council's Regional Administrator to execute this Agreement.

E. Pursuant to Minnesota Statutes § 473.541, subd. 3, Met Council may issue general obligation bonds for the acquisition or betterment of any interceptors or treatment works determined to be necessary or desirable for the metropolitan disposal systems.

F. Met Council has issued or may issue general obligation bonds for the IPIP, use internal reserve fund, or other funds lawfully available to it.

G. Pursuant to Minnesota Statutes 473.523, subd. 1(a), Metropolitan Council has issued proposals for Pretreatment Facility incentive funds and is awarding this Agreement to Discharger as offering a best value in response to Met Council's proposals as provided in Minnesota Statutes chapter 16.

H. Discharger has submitted a proposal for and has received an award from Met Council to receive an incentive ("Incentive Funds") to finance a certain pretreatment facility and equipment on its industrial site as described in Discharger's application ("Pretreatment Facility"), subject to the terms and conditions as set forth in this Agreement.

I. Discharger is authorized to enter into this Agreement pursuant to the authority listed in its Application..

NOW THEREFORE, for valuable consideration, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

**I.  
Purpose of Agreement.**

The purpose of this Agreement is to set forth the terms and conditions under which Met Council will award to Discharger Incentive Funds to assist Discharger to design, construct, and start up, maintain, manage and operate the Pretreatment Facility on Discharger's industrial site as more fully described in this Agreement. The terms Pretreatment Facility and the location of Discharger's industrial site are more fully described in Section II of this Agreement.

**II.  
Definitions.**

For purposes of this Agreement, the following terms are defined as follows:

1. "Met Council" means the Metropolitan Council.
2. "Discharger" means the Discharger who is party to this agreement, listed in the title to the agreement.
3. "Application" means the proposal submitted by the Discharger to and accepted by Met Council for award of Incentive Funds for design, construction, start-up, maintenance, management and operation of a pretreatment facility. The Application is attached to this Agreement as Exhibit A and is hereby fully incorporated into and made a part of this Agreement.
4. "Pretreatment Facility" means the pretreatment facility described in the Application.

5. "Industrial Site" means the real property described in the Application as the site of the Pretreatment Facility. The term Pretreatment Facility includes all buildings, equipment, supplies and materials described in the Application as included in the Pretreatment Facility.

**III.  
Certification, Representations and Warranties.**

Discharger hereby represents, certifies and warrants to the Met Council that, as of the date of this Agreement, the following conditions are true and correct:

1. Discharger is an industry described as \_\_\_\_\_, whose mailing address is \_\_\_\_\_.

2. Discharger owns in fee title the Industrial Site on which the Pretreatment Facility is located. The address and legal description of the Industrial Site is unchanged from the address and legal description provided in the Application and in Exhibit B to this Agreement.

3. Discharger currently holds Met Council Industrial Waste Permit No. \_\_\_\_\_, ("Met Council Permit") which is in full force and effect. The billing address and all other information for the Waste Discharge Permit is correct as stated on the Permit and in the Application.

4. The Industrial Site is currently connected to the regional wastewater system for the Metropolitan Area at the location stated on the Permit and in the Application.

5. Discharger has paid certain charges referred to as "strength charges" to Met Council for discharge from the Industrial Site for each of the three calendar years preceding the year in which this Agreement is executed.

6. Discharger has equity in the Industrial Site real property equal to or in excess of the amount of the Incentive Funds stated in Section VI of this Agreement to be received by Discharger pursuant to the terms of this Agreement.

7. Discharger agrees that the information, commitments, representations, certifications and warranties which Discharger has made and submitted to Met Council in the Application for Incentive Funds through IPIP and any subsequent written communications between Met Council and Discharger (all collectively referred to as "Application") remains true and correct, which Application, its information, commitments, representations, certifications and warranties are fully incorporated herein and made a part hereof. A copy of the Application is attached as Exhibit A. Discharger agrees that if there is any conflict between the Application and this Agreement, the terms of this Agreement shall prevail.

8. Discharger will design, build, start-up, maintain, manage and operate the Pretreatment Facility.

9. Discharger has the legal authority to enter into, execute and deliver this Agreement and all documents referred to herein, and it has taken all actions necessary to its execution and delivery of such documents.

10. Discharger has the legal authority to use the Incentive Funds for the purpose described in the Application and this Agreement.

11. Discharger has the legal authority to design, construct, maintain, start-up, operate and manage the Pretreatment Facility.

12. Discharger will comply with all of the terms, conditions, provisions, covenants, requirements, and warranties in this Agreement and all other documents referred to herein, including but not limited to: 1) agreement by Discharger to use the Incentive Funds for no other purpose than the purpose stated in the Application and this Agreement and 2) agreement by Discharger that no Incentive Funds can be used for reimbursement of expenses incurred prior to the effective date of this Agreement without written consent of Met Council.

13. Discharger has made no material false statement or misstatement of fact in connection with its receipt of the Incentive Funds received pursuant to this Agreement and all of the information it has submitted or will submit to the Met Council relating to the Incentive Funds or the disbursement of any of the Incentive Funds is and will be true and correct.

14. Discharger is not in violation of any provisions of its charter, Articles of Incorporation or laws of the State of Minnesota, and there are no actions, suits or proceedings pending, or to its knowledge threatened, before any judicial body or governmental authority against or affecting it relating to the Pretreatment Facility and the Industrial Site, or its ownership interest therein, and it is not in default with respect to any order, writ, injunction, decree, or demand of any court or any governmental authority which would impair its ability to enter into this Agreement or get local permits needed, or any document referred to herein, or to perform any of the acts required of it in such documents.

15. Neither the execution and delivery of this Agreement, or any document referred to herein nor compliance with any of the terms, conditions, requirements, or provisions contained in any of such documents is prevented by, or is a breach of, or will result in a breach of, any term, conditions, or provision of any permit, agreement or document to which it is now a party or by which it is bound.

16. The contemplated use of the Industrial Site and the Pretreatment Facility will not violate any applicable zoning or use statute, ordinance, building code, rule or regulation, or any covenant or agreement of record relating thereto. Discharger has submitted a letter of support from the local government for the Industrial Site signed by an official of that host local government as part of Application, and has received no contrary subsequent written communication from the host local government.

17. The Pretreatment Facility will be completed in full compliance with all applicable laws, statutes, rules, ordinances, and regulations issued by any federal, state, or local political subdivisions having jurisdiction over the Pretreatment Facility.

18. All applicable licenses, permits, surety bonds and insurance required for the performance and completion of the Pretreatment Facility have been, or will be obtained by Discharger and will remain in effect as required by the terms of this Agreement;

19. Discharger will start-up, operate, maintain, and manage the Industrial Site and Pretreatment Facility in compliance with all applicable laws, statutes, rules, ordinances, and regulations issued by any federal, state, or local political subdivisions having jurisdiction over the Industrial Site and the Pretreatment Facility.

20. Discharger will not, without the prior written consent of the Met Council, allow any voluntary lien or encumbrance or involuntary lien or encumbrance that can be satisfied by the payment of monies and which is not being actively contested to be created or exist against the Discharger's ownership interest in the Industrial Site or the Pretreatment Facility if such lien or encumbrance, whether voluntary or involuntary, would cause or result in Discharger's real property equity in the Industrial Site to fall below the amount of the then outstanding Incentive Funds stated in Section VI of this Agreement.

21. Discharger will supply, or cause to be supplied, whatever funds are needed above and beyond the amount of the funds provided by Met Council pursuant to the terms of this Agreement to complete and fully pay for the design, construction, start-up, operation, management and maintenance of the Pretreatment Facility.

22. Discharger will require its contractor[s] and agents to comply with all the permits, rules, regulations, ordinances, and laws and the terms of this Agreement bearing on its performance under any and all contracts between Discharger and its contractors and agents for the design, construction, management, maintenance, and operation of the Pretreatment Facility.

23. Discharger shall comply and cause its contractors to comply with all Met Council requirements in the procurement of goods and services related to the design, construction, start-up, operation, management and maintenance of the Pretreatment Facility.

24. Discharger shall furnish such satisfactory evidence regarding the representations and warranties described herein in this Section III as may be required and requested by the Met Council.

25. Every three years Discharger will resubmit to Met Council, no later than December 31 of every third year in which this Agreement is in effect, a recertification, that each of the above certifications, representations and warranties remains true and in effect. The certifications, representations and warranties required by this Section III are in addition to and not in lieu of the Annual Report required in Section X of this Agreement.

#### IV.

### **Design, Construction, and Operation of Pretreatment Facility**

1. Discharger will design and construct (for purposes of this Agreement the term "construct" shall include construction start-up, or installation, or both) or have designed and constructed on its Industrial Site the Pretreatment Facility described in the Application in accordance with the terms of this Agreement.

2. Discharger will procure services, materials, supplies and equipment for the design and construction of the Pretreatment Facility in accordance with Section XI of this Agreement and shall secure payment and performance bonds and insurance as required by the Application and the terms of this Agreement.

3. The Pretreatment Facility will be designed and constructed by Discharger wholly within the boundaries of the Industrial Site owned by the Discharger and shall remain in place on the Industrial Site for the duration of this Agreement.

Discharger shall be responsible to obtain, maintain and pay for all federal, state and local permits and licenses necessary or required for construction, operation and maintenance of the Pretreatment Facility.

4. Discharger shall have the full and complete responsibility to operate, maintain, replace, repair and reconstruct if necessary, the Pretreatment Facility on the Industrial Site for the duration of this Agreement and shall keep the Pretreatment Facility in good working order and repair at all times and in compliance with all applicable federal, state and local applicable laws, rules and regulations. Discharger's procurement of services, materials and equipment for the operation, management, maintenance, repair, replacement and reconstruction of the Pretreatment Facility shall be in accordance with Section XI of this Agreement.

5. Discharger shall complete construction of the Pretreatment Facility no later than the date of substantial completion stated in the Application and upon such completion, shall submit to Met Council a written certification of substantial completion as provided in Section XII of this Agreement including certification that the Pretreatment Facility is fully operational and in operation.

6. As provided in Section IV of this Agreement, the Pretreatment Facility shall be owned by Met Council. During the construction period, the supplies, equipment and materials procured by Discharger, which will constitute the Pretreatment Facility, shall be owned by Met Council. However, risk of loss of the materials and equipment during the construction and installation period and upon completion of construction and installation of the Pretreatment Facility shall be borne by Discharger. And further such risk of loss shall be covered by insurance obtained by Discharger as provided in Section VIII of this Agreement.

In order to comply with Section IV, Discharger shall transfer ownership of the Pretreatment Facility and prior to construction, all materials, supplies, and equipment to Met

Council by providing to Met Council a fully executed Bill of Sale with the initial request by Discharger for disbursement of Incentive Funds..

7. Discharger hereby grants to Met Council a no cost temporary easement ("Met Council Easement") for the duration of this Agreement to use and occupy Discharger's Industrial Site for purposes of and related to Met Council's ownership of the Pretreatment Facility. Pursuant to such Met Council Easement, Met Council, including its contractors, employees, agents and invitees, may access the Discharger's Industrial Site and the Pretreatment Facility and any data reasonably necessary for Met Council to verify Discharger's compliance with this Agreement. Met Council will provide Discharger reasonable advance notice of such access by Met Council.

8. Discharger shall provide to Met Council on an annual basis such data and reports as is requested by Met Council to verify Discharger's compliance with this Agreement and other information as needed to comply with state, federal and local laws, regulations and ordinances, including but not limited to the Minnesota Statutes 116J.994 under which this Agreement is deemed a business subsidy. Such data and reports shall include, at a minimum, the concentration of Total Suspended Solids ("TSS") and/or Chemical Oxygen Demand ("COD") and volume of wastewater before and after the pretreatment provided by the Pretreatment Facility and shall provide sufficient evidence of the actual reduction in strength loading due to the Pretreatment Facility. The annual data and report shall include updated information on any energy recovery or conservation performance of the Pretreatment Facility which is included in the Application. Discharger shall also provide to Met Council all other data proposed to be provided by Discharger in the Application. Discharger agrees that none of the reporting of this Agreement revises, diminishes, or substitutes for any reporting under any Met Council permit, rule or regulation.

9. At the end of the term of this Agreement, Discharger shall accept an executed Bill of Sale from Met Council transferring title to the Pretreatment Facility to Discharger and shall thereupon take ownership of the Pretreatment Facility. Discharger shall pay to Met Council a fee in the amount of One Dollar (\$1.00) at such time as Met Council provides the Bill of Sale to Discharger. Discharger shall accept such Bill of Sale and ownership of the Pretreatment Facility regardless of the condition or usefulness of the Pretreatment Facility.

## **V.**

### **Met Council Obligations - Design and Construction of Pretreatment Facility.**

1. Met Council will accept the Bill of Sale and License described in Section III of this Agreement from Discharger for the Pretreatment Facility and will own the Pretreatment Facility for the duration of this Agreement, provided, however, that risk of loss of or damage to the Pretreatment Facility shall be borne by Discharger and shall be covered by the insurance required to be provided by Discharger in accordance with Section VIII of this Agreement.

2. Upon termination of the term of this Agreement as provided in Section XVII of this Agreement, Met Council will provide to Discharger a fully executed Bill of Sale transferring



ownership of the Pretreatment Facility to Discharger in exchange for a fee in the amount of One Dollar (\$1.00) to be paid by Discharger.

3. Except as provided in Agreement, Met Council shall have no responsibility, financial or otherwise, for the design, construction, start-up, operation, management, maintenance, repair, reconstruction, or replacement of the Pretreatment Facility.

4. Met Council may, in its discretion, inspect the Pretreatment Facility and request and review associated data for purposes of verification of Discharger's compliance with the terms of this Agreement.

**VI.  
Met Council - Financial Obligations.**

1. Subject to Discharger's compliance with the terms of this Agreement including Section XIII, Disbursement of Incentive Funds, Met Council shall provide to Discharger Incentive Funds for the design and construction of the Pretreatment Facility in accordance with the following terms:

Maximum Amount	_____
Term	Ten (10) years
Interest Rate	Greater of: 3% or the Met Council bond financing rate obtained by Met Council for the IPIP.

The Amounts and Schedule of Disbursement by Met Council to Discharger shall be in accordance with the terms of this Agreement:

\_\_\_\_\_

Debt Service Payment Schedule: **[Exhibit C]**

Anticipated Disbursements will be in accordance with the procedure set forth in Section XIII of this Agreement and will commence no earlier than the written notification by Met Council to Discharger that Discharger may proceed with procurement of materials, supplies, equipment and services for the construction Pretreatment Facility. Discharger will have the right to cancel this Agreement as provided in Section VII of this Agreement.

2. Discharger will pay to Met Council the principal plus interest in accordance with the Debt Service Payment Schedule attached as Exhibit C to this Agreement. The Parties agree that the Met Council may update this schedule once the actual bond true interest cost and final construction costs of the Pretreatment Facility are known and the updated schedule will be the basis of the payments for the remainder of the term. The updated schedule shall be substituted for the schedule attached hereto as Exhibit C and shall serve as Exhibit C to this Agreement.

3. Met Council shall provide to Discharger on an annual basis an annual discount ("Annual Discount") of up to 30% of the annual debt service payments owed by Discharger to Met Council. The maximum Annual Discount ("Maximum Annual Discount") will be as

determined by Met Council in the notification of award to Discharger of award of the Incentive Funds. The actual Annual Discount ("Actual Annual Discount") shall be based on a financial analysis of benefits to Discharger and Met Council. This analysis will include the capital cost of preprocessing equipment and assumptions for projected future reductions in strength concentrations, operating and maintenance costs, energy savings, and the capital cost of avoiding future wastewater treatment plant expansion. The analysis will allow a 30% Actual Annual Discount unless the net present value of future benefits to Discharger exceed the benefits to Met Council (the Actual Annual Discount will be reduced to the point where these benefits are equal.) The computation shall be in the sole discretion of the Met Council.

4. The Annual Discount shall be made by Met Council in the following form:
- 

5. Discharger agrees that the Annual Discount constitutes a business subsidy payment to Discharger as that term is defined in Minnesota Statutes 116J.994, Discharger agrees to comply with the requirements of Minnesota Statutes 116J.994 and shall cooperate with the Met Council with respect to Met Council's compliance with 116J.994.

6. For a period of 30 calendar days after written notification by Met Council to Discharger of the actual debt service interest rate based upon Met Council's bond interest rate, Discharger may cancel this Agreement by written notice to Met Council. Met Council has no obligation to make any payment or reimbursement to Discharger for any services, materials, supplies, or equipment which may have been contracted for or expended by Discharger in anticipation of performance of this Agreement. Moreover, if Discharger cancels the Agreement the Proposal Bond is forfeited to the Met Council.

## **VII.**

### **Discharger - Financial Obligations.**

1. Discharger will use the Incentive Funds in accordance with the Application and the terms of this Agreement solely for the purposes of design and construction of the Pretreatment Facility on the Industrial Site and for no other purpose.

2. Until the full operation of the Pretreatment Facility, Discharger shall provide, for the benefit of the Met Council, payment and performance bonds in no less than the amount of the Incentive Funds in accordance with the terms of this Agreement.

3. Discharger shall be responsible for making in a timely manner all payments to its employees, contractors, suppliers and agents for charges and costs for or associated with the design, construction, operation, start-up, maintenance, repair, replacement or reconstruction of the Pretreatment Facility including payment of all utilities and other services provided to or in connection with the Pretreatment Facility.

4. Discharger shall make to Met Council in a timely manner (at least 5 business days prior to Met Council payment dates on associated bonds) all debt service payments in accordance with the dates and schedule set forth in Exhibit C of this Agreement. In the event any debt

service payment is late, Met Council reserves the right to discontinue the Annual Discount provided in Section VI of this Agreement and to further take any or all collection actions permitted by law and this Agreement until such debt service payments are made in a timely manner in accordance with schedule set forth in this Agreement.

5. In the event that Discharger discontinues the operation of the Pretreatment Facility on the Industrial Site for thirty (30) days or more, Met Council shall discontinue the Annual Discount as provided in Section V of this Agreement. In addition, in such event Met Council reserves the right to require that Discharger agrees and hereby commits to defease all remaining debts service payments immediately.

6. Discharger hereby agrees that in the event that Discharger is in default of the terms and conditions of this Agreement, including but not limited to, that the Application and Agreement are incorporated into and become part of the Discharger's permit with MCES for the Industrial Site has not paid in full to Met Council one or more of the debt service payments for the Incentive Funds in accordance with the terms of this Agreement, Met Council may, in accordance with Minnesota Statutes § 473.517, certify such unpaid amounts, whether due yet or not, of the scheduled Incentive Funds debt service payments to the county auditor as a tax for collection as other taxes are collected on the Industrial Site and Discharger agrees that the Industrial Site is "properly served" pursuant to the aforementioned statutes, § 473.517. Such certification does not preclude Met Council from recovery of delinquent amounts and interest under any other remedy available to the Council by its Waste Discharge Rules, by law, in equity or by the terms of this Agreement.

7. Discharger agrees that all discharge to the regional sewer system from the Industrial Site will continue to be subject to all applicable federal, state and local laws and regulations.

8. Discharger shall provide to Met Council a mortgage and security interest on Discharger's equity for the Industrial Site which secures, at a minimum, the amount of the Incentive Funds. The mortgage shall be in a form acceptable to Met Council, shall be in recordable form and shall create a recorded lien on the Industrial Site secured by Discharger's assets on or equity in the Industrial Site as provided in the Application. The mortgage will be recorded by Met Council and shall remain a recorded lien on the Industrial Site for the duration of this Agreement.

## **VIII.**

### **Liability and Insurance, Met Council and Discharger.**

#### **During Construction:**

The following requirements shall be included in any contract that Discharger may enter into with another party for construction, maintenance, or other services related to the Industrial Site and Pretreatment Facility:

**Indemnification.** The Contractor (for purposes of this Section III, "Contractor") agrees that it will save and protect, hold harmless, indemnify, and defend the Met Council and its members,

agents, and employees against any and all claims, expenses (including attorneys' fees), losses, damages, or lawsuits for damage or injury arising out of or resulting from the Contractor's performance of the contract, including acts or omissions of its employees, subcontractors, representatives, agents, or any other party for whom Contractor may be liable, except to the extent such claim, expense, loss, or damage is related to the sole negligence of the Met Council.

**Insurance Requirements.** The Contractor shall procure and maintain the following insurance:

1. *Commercial General Liability* occurrence form, ISO CG 00 01 or equivalent, and if necessary an Umbrella Liability policy on a following-form basis, providing coverage for, but not limited to, liability arising from premises, operations, independent contractors, products-completed operations, personal injury and advertising injury, and contractual liability assumed under this Agreement. Policy must be maintained for a period of two years after Discharger's final acceptance of the Work. Limits of insurance shall not be less than \$5,000,000 per occurrence. If the policy contains an annual aggregate, then it shall apply separately to this project. Council shall be listed as an Additional Insured, on a primary and non-contributory basis, utilizing ISO CG 20 26 07 04 and ISO CG 20 37 07 04, or their equivalent;
2. *Business automobile coverage*, ISO CA 00 01, 1997 or later edition, and if necessary an Umbrella Liability policy on a following-form basis, for liability arising out of the operation, maintenance or use of any automobile, whether owned, non-owned, rented or leased. Limits shall not be less than \$5,000,000 each Accident;
3. *Workers' Compensation* to be statutory. Employer's Liability with a limit not less than \$500,000 each person per accident, \$500,000 each employee by disease, and \$500,000 all employees by disease.
4. *Contractor Pollution Liability (CPL)* policy with a limit no less than \$2,000,000 per claim. Coverage shall include bodily injury, property damage, including loss of use of property, clean-up costs, defense (including costs and expenses incurred in the investigation, defense, or settlement of claims), products and/or completed operations, and contractual liability. Coverage shall also be provided for transport of waste and non-owned disposal sites, if Contractor is disposing of waste.
  - 4.1 The Met Council shall also be listed as an additional insured on such policy.
  - 4.2 If policy is written on a claims-made basis, then retroactive date must precede the earlier of either i.) the effective date of this contract, or ii.) the date work begins and shall provide an extended reporting period.

**Builder's Risk Property Insurance.** During the construction of the Pretreatment Facility, either Discharger or its Contractor(s), at Discharger's discretion, shall procure and maintain a Builder's Risk "all-risk" property insurance policy containing the following provisions:

1. Written on a replacement cost basis with a limit no less than the total value of project, including all change orders and contract modifications.
2. It shall provide coverage for, but not be limited to, loss or damage to the Work, temporary buildings, falsework, Work materials and equipment stored off or on site and in transit.
3. Include the interests of the Met Council, whom is deemed to have an insurable interest.
4. Policy shall be maintained in effect until Final payment and acceptance by the Discharger.
5. Include an endorsement permitting partial utilization of the Work if Metropolitan Council or Discharger find it necessary to occupy or use a portion or portions of the Work completed prior to Final Payment and Acceptance of the Work.

Any deductible on the policy will be the responsibility of either Discharger or Contractor, at Discharger's discretion.

**Waiver of Subrogation.** Each policy of Contractor shall be endorsed to state that the insurer agrees to waive all rights of subrogation against the Met Council, its members, agents and employees, for losses arising out of the performance of this contract.

### **Post Construction Insurance and Indemnification.**

**Indemnification.** Discharger agrees that it will save and protect, hold harmless, indemnify, and defend the Met Council and its members, agents, and employees against any and all claims, expenses (including, but not limited to, legal expense paid or incurred to enforce the provisions of this Section), losses, damages, or lawsuits for damage or injury that are alleged to arise out of, result from, or attributable to, whether in whole or in part, this Agreement.

**Insurance.** Discharger shall purchase from and maintain during the term of this agreement, or longer if required elsewhere in this contract, insurance set forth below providing protection from claims which may in any way be related to this Agreement:

#### **1. General Liability and Umbrella Insurance.**

- 1.1. Commercial general liability (CGL) on an occurrence form and, if necessary, commercial umbrella insurance with a limit of not less than \$5,000,000 each occurrence.
  - 1.1.1. CGL insurance shall be written on ISO occurrence form CG 00 01 12 04(or a substitute form providing equivalent coverage) and shall cover liability arising from premises, operations, independent contractors, products-completed

operations, personal injury, advertising injury, contractual liability, including the contractual liability assumed in this Agreement.

- 1.1.2. The Metropolitan Council, its officers, agents and employees shall be included as an additional insured under the CGL utilizing ISO CG 20 26 07 04 and ISO CG 20 37 07 04, or their equivalent. This insurance shall be primary and non-contributory with respect to any other insurance or self-insurance programs afforded to Met Council. There shall be no endorsement or modification of the CGL to make it excess over other available insurance.

## **2. Automobile and Umbrella Liability Insurance.**

- 2.1. Contractor shall maintain Business automobile coverage, ISO CA 00 01, 1997 or later edition, and if necessary an Umbrella Liability policy on a following-form basis, for liability arising out of the operation, maintenance or use of any automobile, whether owned, non-owned, rented or leased, with a limit of not less than \$5,000,000 each accident.

- 2.1.1. Pollution liability coverage equivalent to that provided under the ISO pollution liability-broadened coverage for covered autos endorsement (CA 99 48) shall be provided, and the Motor Carrier Act endorsement (MCS 90) shall be attached.

- 2.1.2. The Met Council, its officers, agents and employees shall be included as an additional insured by endorsement, ISO Form CA 20 48 02 99 or equivalent.

## **3. Workers' Compensation and Employers Liability.**

- 3.1. Workers' Compensation pursuant to Statute.

- 3.2. Employers Liability with limits not less than \$500,000 each accident for bodily injury by accident, \$1,000,000 each employee for bodily injury by disease, \$500,000 policy limit for bodily injury by disease.

## **4. Property Insurance.**

- 4.1. Discharger shall purchase and maintain property insurance written on an "all-risk" or equivalent policy form, on a replacement cost basis, and with a limit no less than the replacement cost of the Pretreatment Facility and its business contents.

- 4.2. Include the interests of the Met Council, whom is deemed to have an insurable interest and also be listed as a loss payee.

- 4.3. Policy shall be maintained during the term of this Agreement.

5. **Other Insurance Provisions.** The insurance policies shall contain the following provisions:

- 5.1 Each insurance policy shall be endorsed to state that coverage shall not be suspended, voided, canceled or non-renewed, except after thirty days' prior written notice (ten day notice for cancellation due to non-payment of premium), has been given to the Council at the following address:

**Metropolitan Council  
Attn: Risk Management  
390 N. Robert St.  
Saint Paul, MN 55101**

- 5.2 Each policy shall be endorsed to state that the insurer agrees to waive all rights of subrogation against the Council, its members, agents and employees, for losses arising out of the performance of this contract.
- 5.3 Insurance is to be placed with insurers with Best's rating of no less than A-VII.
- 5.4 Discharger shall furnish the Council with certificates of insurance and with copies of endorsements evidencing coverage required by this article. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The Met Council is not obligated to review certificates or other evidence of insurance, or to advise the Discharger of any deficiencies in such documents, and receipt thereof will not relieve the Discharger from, nor be deemed a waiver of the Met Council's right to enforce, the terms of the Discharger's obligations hereunder. The Met Council will have the right to examine any policy required by this contract.
6. **Non-Waiver of Municipal Immunity and Limits.** Nothing in this contract shall be construed to waive the municipal immunities or liability limits provided in the Minnesota Municipal Tort Claims Act or other applicable state or federal law.

## **IX.**

### **Compliance with Met Council Bond Financing.**

1. Discharger and Met Council acknowledge and agree that the funds provided by Met Council to Discharger may be the proceeds of general obligation bonds issued by Metropolitan Council pursuant to Minnesota Statutes § 473.541, subd. 3 and therefore the provisions of such statute apply or will apply to Met Council's ownership of the Pretreatment Facility and Discharger's design, construction, start-up, maintenance, management and operation of the Pretreatment Facility.

2. **Specific Bond Financing Required Provisions.** The Discharger agrees to fulfill all conditions of Section 142 (a) (5) of the Internal Revenue Code as of 1986, as amended ("the Code") to qualify Met Council's Wastewater Revenue Bonds, Series 20\_\_ (the "Bonds") as "qualified exempt facility" bonds for a local district heating or cooling system. Accordingly:

(a) The Discharger will use all of the funds provided to Discharger pursuant to the terms of this Agreement for the acquisition and betterment of the Pretreatment Facility that will pre-process the Discharger's high strength industrial biomass currently treated through the metropolitan disposal system and the Discharger will not use the Pretreatment Facility for any other purpose.

(b) The Discharger certifies that the Pretreatment Facility is and, so long as this Agreement is outstanding, will remain connected to the metropolitan disposal system.

(c) No portion of the proceeds of the Incentive Funds will be used to acquire or otherwise provide any airplane, skybox or other private luxury box, health club facility, facility primarily used for gambling, or store the principal business of which is the sale of alcoholic beverages for consumption off premises, within the meaning of Section 147(e) of the Code.

(d) The expected economic life of the Pretreatment Facility will be at least twenty years within the meaning of Section 147(b) of the Code.

The Discharger acknowledges that Met Council owns the Pretreatment Facility and the Discharger has provided or hereby provides the Council the necessary easements and licenses to inspect the Pretreatment Facility and remove the Pretreatment Facility in the event the Discharger fails to utilize and maintain the Pretreatment Facility or repay the debt service as provided herein.

Upon payment of the debt service as provided herein, the Discharger shall acquire the Pretreatment Facility for \$1.00 as provided in Section V of this Agreement.

If applicable, the Discharger shall not otherwise use the funds or the Pretreatment Facility, or take or fail to take any action, the effect of which would be to impair the exemption of interest on the Bonds from federal income taxation [not necessary if tax exempt bonds are not used].

## **X.**

### **Compliance with Minnesota Statutes 116J.993 through 116J.997.**

In order to comply with Minnesota Statutes 116J.993 through 116J.997, the Parties agree as follows:

1. The definitions set forth in Minnesota Statutes 116J.993 are hereby incorporated into and fully become a part of this Agreement.

2. The Incentive Funds provided by Met Council to Discharger pursuant to the terms of this Agreement constitute a business subsidy ("Subsidy") as that term is defined in Minnesota Statutes 116J.993, subd. 3.

3. The Subsidy is described as follows: 1) Incentive payment to Discharger to design, construct, maintain and operate Met Council owned wastewater treatment equipment on



Discharger's Industrial Site, and 2) the Annual Discount(s) of up to 30% of the debt service schedule shown in Exhibit C and described further in Section V of this Agreement.

4. The public purpose of the Subsidy is to reduce the strength of industrial discharge into the metropolitan wastewater treatment system, thus reducing the operating cost for the Met Council's wastewater treatment plant into which the Discharger's wastewater is received and to potentially delay future capital costs to expand that treatment plant.

5. The measurable, specific and tangible goals for the Subsidy are to reduce the industrial waste discharge strength in pounds of TSS and COD from the Industrial Site into the regional wastewater treatment system. The reduction in pounds will be based on a comparison of the two year weighted average concentration of TSS and COD before the operation of the Pretreatment Facility and the actual measured weighted average concentration of TSS and COD thereafter (with TSS given twice the weight of COD). The time frame for achievement of the goal of the Subsidy is annually for a period of ten years from the date of this Agreement. The Actual Annual Discount will be adjusted each year for the actual achievement of the goal (*e.g.*, if the weighted average concentration is reduced 50%, the Annual Discount will be 15% instead of 30%).

6. If the goal of the Subsidy with respect to Discharger's design and construction of the Pretreatment Facility or any other term of this Agreement are not met, the Discharger is obligated by the terms of this Agreement to immediately pay, upon demand by Met Council, the remaining debt service as listed in Exhibit C of this Agreement. If the goal of the Subsidy with respect to the decrease of industrial discharge from the Discharger's Industrial Site into the regional wastewater treatment system are not met, pursuant to Section V of this Agreement, the Discharger will not receive an Annual Discount pursuant to Section V of this Agreement.

7. The Subsidy is needed by Discharger for the following reasons: to make pretreatment economical for Discharger as further described or qualified for the reasons specified in the Application.

8. Discharger will continue operation, maintenance and management of the Pretreatment Facility at the Industrial Site as provided by the terms of this Agreement, and at least ten (10) years after the benefit date ("Benefit Date"). For the purposes of this Agreement, the term "Benefit Date" is the date the Discharger puts the Pretreatment Facility into service,.

9. The name and address of the parent corporation of the Discharger is:

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10. In addition to the Incentive Funds, Discharger is receiving the following financing assistance for the design, construction, operation and management of the Pretreatment Facility:

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11. The present value of the expected fair market value of the Subsidy, if the Pretreatment Facility performs as expected, is: \_\_\_\_\_.

12. There is no public goal of the Subsidy with respect to creation or retention of jobs or wages, although some jobs related public benefit will occur.

13. In addition to any and all other remedies provided to Met Council by the terms of this Agreement, if the Discharger does not fulfill the terms of this Agreement. Met Council may require Discharger to immediately pay to Met Council the amount of the Subsidy plus interest, which is the interest rate set forth in Minnesota Statutes 116J.994, subd. 6. Further, if Discharger fails to fulfill the terms of this Agreement, Discharger will be ineligible to receive a Subsidy for a period of five (5) years from the date of failure or until Discharger satisfies its payment obligation as stated in this Agreement, whichever occurs first.

14. Discharger will file with the Met Council no later than March 1st of each year in which this Agreement is in effect a report ("Annual Report") containing the following information with respect to the previous year:

- a. The type, public purpose, and amount of Subsidies (both the Incentive Funds and the Annual Discount);
- b. The hourly wage of each job created with separate bands of wages;
- c. The sum of the hourly wages and cost of health insurance provided by the employer with separate bands of wages;
- d. The date the job and wage goals will be reached;
- e. A statement of goals identified in the subsidy agreement and an update on achievement of those goals, (that is, the TSS and COD of discharge from the Industrial Site before and after pre-treatment);
- f. The location of the Discharger prior to receiving the business subsidy;
- g. Why the Discharger did not complete the project outlined in the subsidy agreement at their previous location, if the Discharger was previously located at another site in Minnesota;
- h. The name and address of the parent corporation of the Discharger, if any;
- i. A list of all financial assistance by all grantors for the project; and
- j. Other pertinent information Met Council may request.

The Annual Report required in this Section X is in addition to and not in lieu of the certifications, representations and warranties required in Section III of this Agreement.

## **XI. Procurement Requirements.**

Discharger will procure the materials, equipment, goods and services required for and used for the design, construction, start-up, maintenance, operation and management of the Pretreatment Facility in accordance with applicable federal, state and local laws, regulations, rules and ordinances and further, in compliance with Met Council's procurement requirements, which are attached hereto and made a part hereof as Exhibit D.

## **XII. Construction of Pretreatment Facility and Disbursement of Funds.**

1. In accordance with the schedule provided in the Application, Discharger will prepare, or have prepared, the design and final construction plans for the Pretreatment Facility, which will include plans, specifications, bidding documents and a construction schedule, all in accordance with the Application ("Final Construction Documents") and will submit these Final Construction Documents to Met Council for review and acceptance. Evidence of the Council's written acceptance pursuant to this Section XII (i) will be a letter to Discharger from Met Council's General Manager of Environmental Services. The Final Construction Documents are made a part hereof with the same force and effect as though fully set forth herein.

2. On the date indicated in the Application, Discharger will submit to Met Council a copy of the fully executed contract between Discharger and its contractor(s) for the design and construction of the Pretreatment Facility ("Construction Contract"). The Construction Contract will contain all of the terms and conditions required by this Agreement, to be included in the Construction Contract.

3. Discharger will administer the Construction Contract and inspect the construction of the contract work for the Pretreatment Facility. Discharger will provide to Met Council's authorized representative monthly construction reports indicating construction progress and inspection results. The Pretreatment Facility work may be inspected by the Met Council's authorized representative, but the Council's authorized representative will not have responsibility for the supervision or quality of the work. If the Met Council reasonably determines that the work has not been properly constructed in accordance with the Final Construction Documents, the Council, through its authorized representative, shall inform the Discharger in writing of such defects. The term "authorized representative", for Met Council's purposes, means the person designated in writing by the General Manager of the Council's Environmental Services Division. Discharger shall require its contractor to make the corrections and/or meet the requirements of the Final Construction Documents requested by the Council through its authorized representative. All work shall be performed in substantial accordance with the Construction Documents accepted by the Council in accordance with Section XIII (1) of this Agreement. The Discharger will inform the Met Council in writing of completion of construction of the Pretreatment Facility. Within a reasonable time thereafter, the Council will inform the Discharger in writing either that the Pretreatment Facility as constructed conforms to the Final Construction Documents accepted by Met Council or that the Pretreatment Facility does not conform to the accepted Final Construction Documents. The Met Council will further inform the Discharger of the specific reasons for non-conformance to the Final Construction Documents and what steps, in the opinion of Met Council, must be taken by the Discharger to make the Pretreatment Facility conform to the Final Construction Documents. As between the Met Council and the Discharger, the final decision on conformance of the Pretreatment Facility as to the Final Construction Documents will be made by Met Council. Evidence of acceptance of the Pretreatment Facility will be in writing by letter from the General Manager of the Met Council's Environmental Services Division. The Met Council will not unreasonably withhold the determination that the construction of the Pretreatment Facility conforms to the Final Construction Documents.

**Alternate Section XII, Paragraph 3:**

3. The Discharger shall be responsible for making its own inspections and observations of the Pretreatment Facility design and construction and shall determine to its own satisfaction that the work done or materials supplied by the contractors to whom payment is to be made out of each request for disbursement funds has been properly done or supplied in accordance with the Final Construction Documents. If any work done or materials supplied by a contractor is not in material compliance with the Final Construction Documents in any respect, then the Discharger shall immediately notify the Met Council in writing. The Met Council may conduct such inspections of the design and construction items as it deems necessary for the protection of the Met Council's interest, and any inspections made of the Pretreatment Facility by the Met Council, if any, are made solely for the benefit and protection of Met Council and the Discharger will not rely thereon.. The Met Council may withhold Incentive Fund distribution if it deems that the construction will not material meet the design agreed to, until such time as the deficiencies are corrected.

4. Not less than seven (7) business days prior to commencement of the construction, the start-up, and the full operations of the Pretreatment Facility by the Discharger, the Discharger will give written notices to Met Council of its intention to commence each activity, said notices to be directed as follows:

Metropolitan Council Environmental Services  
Attn: Director, MCES Finance  
390 Robert Street North  
St. Paul, MN 55101

5. Discharger will submit any amendments to or material changes in the Construction Contract or accepted Final Construction Documents for the Pretreatment Facility, including the construction schedule, to the Met Council for review and acceptance, which acceptance will not be unreasonably withheld. Discharger agrees that it will not proceed with amendment to or changes in accepted Final Construction Documents or construction schedule of the Pretreatment Facility until the Met Council has consented to such change in writing as evidenced by letter from the Met Council. The Met Council agrees to consent to or reject amendments or changes in the accepted Final Construction Documents within five (5) business days of receipt of such amendment or change.

6. Prior to and during construction of and upon completion of the construction and acceptance of the Pretreatment Facility by the Discharger pursuant to this Agreement, the Pretreatment Facility, and prior to and during the construction, the materials, supplies and equipment which are procured for the construction of the Pretreatment Facility, all associated warranties and guarantees provided by the construction contractors and subcontractors associated with the Pretreatment Facility, become the property of Met Council provided, however, that Met Council hereby grants to Discharger the right and obligation to utilize and enforce such warranties and guarantees with respect to the Pretreatment Facility. All operation, maintenance, restoration, repair or replacement required for the Council Project thereafter shall be performed by the Discharger. Discharger shall provide to Met Council a complete set of reproducible record drawings of the Pretreatment Facility, in a form acceptable to the Met Council.

**XIII.**  
**Disbursement of Incentive Funds.**

1. Met Council and Discharger will enter into a written escrow account agreement with a title company ("Title Company") designated by Met Council which establishes a non-interest bearing escrow account ("Escrow Account") into which Met Council will deposit the funds to be disbursed to Discharger pursuant to the terms of this Agreement for design and construction of the Pretreatment Facility ("Escrow Agreement"). The Escrow Agreement shall provide for disbursement of funds by the Title Company in the manner provided in this Section XIII.

2. No funds will be disbursed from the Escrow Account without written approval of Met Council. Funds will be disbursed to reimburse Discharger for costs of design and construction of the Pretreatment Facility. Met Council will not approve any disbursement of Incentive Funds from the Escrow Account unless and until Discharger has submitted to and Met Council has reviewed and approved all of the following:

- a. This Agreement executed by Met Council and Discharger;
- b. Executed Construction Contract for the Pretreatment Facility;
- c. Certification of Insurance in amounts and coverage required by this Agreement;
- d. Executed Payment and Performance Bonds in amounts and coverage as required by this Agreement;
- e. Executed Bill of Sale for Pretreatment Facility, supplies and equipment;
- f. Executed recordable mortgage on Industrial Site, as required by this Agreement;
- g. Executed Escrow Agreement;
- h. Such other submissions as may be reasonably required by Met Council with respect to disbursement of the Incentive Funds as provided in this Agreement.

3. Discharger will submit to Title Company and Met Council requests for disbursement of funds for design and construction of the Pretreatment Facility on an as requested basis (but no more frequently than monthly) based upon signed invoices from the Discharger's contractor(s), (copies of which shall be submitted with the request for disbursement, evidence of payment to contractor by Discharger and submission of lien waivers and other evidence of payment as required by the Title Company. Discharger shall provide documentation, satisfactory to Met Council that the partial costs requested are actual, reasonable and verifiable costs of the design and construction of the Pretreatment Facility. If Met Council disagrees and provides timely notice of contest, Met Council will approve all uncontested amounts and may withhold approval of the contested amount pending resolution as provided this Agreement of the amount actually due.

4. At the completion of design and construction of the Pretreatment Facility in accordance with this Agreement, Discharger shall submit to Met Council and Title Company a final cost statement and final request for disbursement of funds, together with:

i) certification by Discharger that the work is completed, including all landscape requirements, utility and access requirements for the Pretreatment Facility and corrections of defects in workmanship or materials as provided in the Final Construction Documents, and that all contractors and subcontractors have been paid;

ii) satisfactory evidence, including but not limited to lien waivers that all contractors, subcontractors and suppliers who have provided equipment, supplies, materials and work for or related to the construction and design of the Pretreatment Facility have been paid;

iii) satisfactory evidence that all work requiring inspection by municipal and other governmental authorities having jurisdiction has been duly inspected and approved by such authorities and that all requisites of certificates of occupancy and other approvals have been issued.

iv) satisfactory evidence that all applicable and required permits, bonds and licenses necessary for the operation and maintenance of the Pretreatment Facility have been issued, obtained and paid for other than those which in the ordinary course of business would not be obtained until a later date;

v) all other items which the Met Council and Title Company may reasonably require.

5. Met Council and Title Company shall have 45 calendar days from receipt of said final request for disbursement to review the certification and final invoice and approve payment of the final invoice unless Met Council contests the invoice by written notice. The amount due stated in the final invoice shall be final, binding and conclusive, and the amount shall be immediately payable, upon expiration of the aforesaid 45 calendar day examination period unless the Met Council or Title Company provides timely notice of contest. If the Met Council or Title Company provides timely notice of contest of the final invoice, the Met Council or Title Company shall approve payment of all uncontested amounts and may withhold the approval of the contested amount pending resolution of the amount actually due.

6. If for any reason whatsoever the funds to be provided to Discharger by Met Council pursuant to the terms of this Agreement are not sufficient to complete the design and construction of the Pretreatment Facility, Discharger shall have full responsibility and obligation to complete the design and construction of the Pretreatment Facility and to pay any and all costs to complete such design and construction. Met Council shall have no obligation to review and approve the final request for disbursement of funds until the conditions required above in this Section have been fulfilled.

#### **XIV. Maintenance.**

Discharger shall, solely at its cost, 1) keep the Discharge Site and the Pretreatment Facility in good condition and repair, subject to reasonable and ordinary wear and tear; and 2) shall promptly restore in like manner any portion of the Pretreatment Facility, which may be damaged or destroyed thereon and pay when due all claims for labor performed and materials furnished therefore, and 3) comply with all laws, ordinances, regulations, requirements, covenants, conditions and restrictions now or hereafter affecting the Discharge Site and Pretreatment Facility, or any part thereof, or requiring any alterations or improvements thereto, 4) keep and maintain abutting grounds, sidewalks, roads, parking and landscape areas in good and neat order and repair.

The Discharger shall not, without the written consent of Met Council, a) permit or suffer the use of any of the Pretreatment Facility, or any part thereof, for any purpose other than the purposes specified in this Agreement, b) remove, demolish, or substantially alter any of the Pretreatment Facility, except such alterations as may be required by laws, ordinances or regulations or such other alterations as may improve such Pretreatment Facility by increasing the value thereof or improving its ability to be used to operate the Pretreatment Facility; c) do any act or thing which would unduly impair or depreciate the value of the Pretreatment Facility; d) abandon the Discharge Site or the Pretreatment Facility; e) commit or permit any waste or deterioration of the Pretreatment Facility; f) remove any fixtures or personal property from the Pretreatment Facility that was paid for with the funds provided to Discharger under this Agreement, or g) commit, suffer, or permit any act to be done in or upon the Pretreatment Facility, in violation of any law, ordinance or regulation.

If the Discharger fails to maintain the Pretreatment Facility in accordance with the provisions contained in this Section, then the Met Council may perform whatever acts and expend whatever funds that are necessary to so maintain the Pretreatment Facility, and the Discharger irrevocably authorizes and empowers the Met Council to enter upon the Discharge Site and the Pretreatment Facility to perform such acts as may be necessary to so maintain the Pretreatment Facility. Any actions taken or funds expended by the Met Council hereunder shall be at its sole option and discretion, and nothing contained herein, including but not limited to this Section, shall require the Met Council to take any action, incur any expense, or expend any funds, and the Met Council shall not be responsible for or liable to the Discharger or any other entity for any such acts that are undertaken and performed in good faith and not in a negligent manner. Any funds expended by the Met Council to perform such acts as may be necessary to so maintain the Pretreatment Facility shall be due and payable on demand by the Met Council and bear interest from the date of advancement by the Met Council at a rate equal to the lesser of the maximum interest rate allowed by law or 18% per annum based upon a 365 day year.

#### **XV. Events of Default.**

1. The following events shall, unless waived in writing by the Met Council, constitute an event of default ("Event of Default") under this Agreement upon Met Council

giving Discharger thirty (30) days written notice of such event, and the Discharger's failure to cure such event during such 30 day time period for those Events of Default that can be cured within 30 days or within whatever time period is needed to cure those Events of Default that cannot be cured within 30 days as long as the Discharger is using its best efforts to cure and is making reasonable progress in such Events of Default, however in no event shall the time period to cure any Event of Default exceed 180 days unless otherwise consented to in writing by Met Council:

A. If any representation, covenant or warranty made by the Discharger in this Agreement, in any requisition for funds, in any other document furnished pursuant to this Agreement, or in order to induce the Met Council to award incentive under the IPIP or to disburse any of the Incentive funds for the Pretreatment Facility prove to have been untrue or incorrect in any material respect or materially misleading as of the time such representation, covenant or warranty was made;

B. If the Discharger fails to fully comply with any provision, term, condition, covenant, or warranty contained in this Agreement, or any other document referred to herein, including, but not limited to, the final obligations set forth in Section VI of this Agreement;

C. If the Discharger fails to fully comply with any provision, term, condition, covenant or warranty contained in the Met Council's bond legislation or the requirements of Minnesota Statutes, section 116J.994;

D. If the Discharger fails to complete or cause to complete the design and construction, or start-up of the Pretreatment Facility within 30 days of the completion date stated in the Application.

E. If Discharger fails to operate, manage or maintain the Pretreatment Facility in accordance with the terms of this Agreement.

F. If Discharger fails to make a payment or payments in accordance with the Debt Service Payment Schedule attached hereto as Exhibit C.

Notwithstanding the foregoing, any of the above delineated events that cannot be cured shall, unless waived in writing by the Met Council, constitute an Event of Default under this Agreement immediately upon Met Council giving the Discharger written notice of such event.

## **XVI. Remedies.**

Upon the occurrence of an Event of Default and at any time thereafter until such Event of Default is cured to the satisfaction of the Met Council, Met Council may enforce any or all of the following remedies:



A. Met Council may refrain from disbursing the Incentive funds provided, however, the Met Council may make such disbursements after the occurrence of an Event of Default without thereby waiving its rights and remedies hereunder.

B. If the Event of Default involves a failure to own or continue to own the Industrial Site or to design, construct, manage, maintain and operate the Pretreatment Facility in accordance with the terms of this Agreement and applicable federal, state, and local laws, regulations, rules and ordinances including applicable zoning and use statutes, the Met Council may demand that the Discharger immediately pay to Met Council an amount to fully defease the remaining debt service on the funds disbursed to Discharger pursuant to Exhibit C of this Agreement. Met Council shall make such demand in writing and upon such written demand, Discharger shall pay the required amount to Met Council within 30 business days of the written demand.

C. If the Event of Default involves a default by Discharger in the payment of debt service in accordance with the debt service schedule as provided in Exhibit C of this Agreement, or in the payment of any amount due and owing by Discharger pursuant to the terms of this Agreement, including full amount of debt service demanded by Met Council pursuant to Section XVI (B) above in this Agreement, Met Council may, pursuant to Minnesota Statutes 473.517, subd. 10 (c), certify such unpaid amounts to the appropriate county auditor as a tax for collection as other taxes are collected on the property served.

D. If the Event of Default involves a default by Discharger in the payment of debt service in accordance with the debt service schedule as provided in Exhibit C of this Agreement, or in the payment of any amount due and owing by Discharger pursuant to the terms of this Agreement, including full amount of debt service demanded by Met Council pursuant to Section X (B) above in this Agreement, Met Council may, but is not obligated to, enter upon the Industrial Site and remove and sell the Pretreatment Facility. Met Council will apply any proceeds of sales of the Pretreatment Facility, after deduction of Met Council's expenses for removal and sale, to the amount of debt service due and owing by Discharger pursuant to the terms of this Agreement.

E. If the Event of Default involves a default by the Discharger in the payment of debt service in accordance with the debt service schedule as provided in Exhibit C of this Agreement or in the payment of any amount due and owing by Discharger pursuant to the terms of this Agreement, including the full amount of debt service demanded by Met Council pursuant to Section XVI (B) above in this Agreement, Met Council may foreclose the mortgage on the Industrial Site in accordance with procedures set forth in Minnesota law.

F. As provided in Section VII (6) of this Agreement, the Application and Agreement are incorporated into and become part of Met Council Permit No. \_\_\_\_\_. The Discharger agrees that an Event of Default under this Agreement constitutes a violation of the terms and conditions of Met Council Permit No. \_\_\_\_\_ and Met Council may utilize with respect to this Agreement any and all remedies available to Met Council with respect to enforcement of violation of the Met Council Permit for Industrial Site including, but not limited to, termination of said permit.

G. With respect to any Event of Default, the Council may enforce any and all remedies it may have in law or in equity or pursuant to the terms of this Agreement.

H The rights and remedies herein specified are cumulative and not exclusive of any rights or remedies that Met Council would otherwise possess.

**XVII.  
Term of Agreement.**

The term of this Agreement is ten (10) years, beginning on \_\_\_\_\_ and ending \_\_\_\_\_.

**XVIII.  
General Provisions.**

1. All records kept by the Met Council and the Discharger with respect to the performance of each part of its responsibilities under the Agreement shall be subject to examination by the representatives of each party hereto. All data collected, created, received, maintained or disseminated for any purpose by the activities of the Discharger and the Council pursuant to this Agreement shall be governed by Minnesota Statutes, chapter 13, as amended and the Minnesota Rules implementing such act now in force or hereinafter adopted.

2. Nothing contained in this Agreement is intended or should be construed in any manner as creating or establishing the relationship of co-partners or a joint venture between the Met Council and Discharger, nor shall the Discharger be considered or deemed to be an agent, representative or employee of the Met Council in the performance of this Agreement, the Pretreatment Facility, or operation of the Industrial Site and the Pretreatment Facility.

3. The Discharger represents that it has already or will secure or cause to be secured all personnel required for the performance of this Agreement and the Pretreatment Facility and the operation and maintenance of the Industrial Site and the Pretreatment Facility. All personnel of the Discharger or other persons while engaging in the performance of this Agreement, the Pretreatment Facility or the operation and maintenance of the Industrial Site and the Pretreatment Facility shall not have any contractual relationship with the Met Council and shall not be considered employees of the Met Council. In addition, all claims that may arise on behalf of said personnel or other persons out of employment or alleged employment including, but not limited to, claims under the Worker's Compensation Act of the State of Minnesota, claims of discrimination against the Discharger, its officers, agents, contractors, or employees shall in no way be the responsibility of the Met Council. Such personnel or other persons shall not require nor be entitled to any compensation, rights or benefits of any kind whatsoever from the Met Council including, but not limited to, tenure rights, medical and hospital care, sick and vacation leave, disability benefits, severance pay and retirement benefits. Any and all claims made by third parties as a consequence of any act or omission on the part of said employees while so

engaged or any of the work or services provided to be rendered herein, shall in no way be the obligation or responsibility of Met Council.

4. All employees of the Met Council and all other persons engaged by the Met Council in the performance of any work or services required or provided for herein to be performed by the Met Council shall not be considered employees of the Discharger, and any and all claims that may or might arise under the Worker's Compensation Act of the State of Minnesota on behalf of said employees while so engaged, and any and all claims made by any third parties as a consequence of any act or omission on the part of said employees while so engaged, or any of the work or services provided to be rendered herein, shall in no way be the obligation or responsibility of the Discharger.

5. Met Council and the Discharger agree that any agreement or contract entered into by the Discharger for the Pretreatment Facility shall include clauses that will: 1) Require the Contractors ("Contractor") to defend, indemnify, and hold harmless Met Council, its members, officers, agents, and employees from claims, suits, demands, damages, judgments, costs, interest, expenses (including, without limitation, reasonable attorneys' fees, witness fees and disbursements incurred in the defense thereof) arising out of or by reason of the negligence of the said Contractor, its officers, employees, agents, or subcontractors; 2) require the Contractor to provide and maintain insurance as required by the Met Council and to provide to Met Council prior to commencement of construction a Certificate of Insurance evidencing the insurance coverage; and 3) require the Contractor to be an independent contractor for purposes of completing the work provided for in this Agreement.

6. Applicable provisions of Minnesota and federal law and of any applicable local ordinance relating to civil rights and discrimination and the Affirmative Action Policy statement of the Met Council shall be considered a part of this Agreement as though fully set forth herein.

7. It is understood and agreed that the entire Agreement between the parties is contained herein and that this Agreement supersedes all oral agreements and negotiations between the parties relating to the subject matter hereof. All items referred to in this Agreement are incorporated or attached and are deemed to be a part of this Agreement.

8. Any alterations, variations, modifications, or waivers of provisions of this Agreement shall only be valid when they have been reduced to writing as an amendment to this Agreement signed by the parties hereto.

9. The provisions of this Agreement shall be deemed severable. If any part of this Agreement is rendered void, invalid, or unenforceable, such rendering shall not affect the validity and enforceability of the remainder of this Agreement unless the part or parts which are void, invalid or otherwise unenforceable shall substantially impair the value of the entire Agreement with respect to the parties. One or more waivers by said party of any provision, term, condition, or covenant shall not be construed by the other party as a waiver of a subsequent breach of the same by the other party.

10. The covenants of this Agreement shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns.

11. Any notice or demand, which may or must be given or made a party hereto, under the terms of this Agreement or any statute or ordinance, shall be in writing and shall be sent certified mail or delivered in person to the other party addressed as follows:

**METROPOLITAN COUNCIL**

Attn: Regional Administrator  
390 Robert Street North  
St. Paul, MN 55101

With copy to:

Metropolitan Council Environmental Services  
Attn: Director, MCES Finance  
390 Robert Street North  
St. Paul, MN 55101

**DISCHARGER**

12. The Recitals are incorporated into and made a part of this Agreement.

13. If a dispute should arise between the Parties to this Agreement with respect to this Agreement or any of its provisions, the Parties agree to attempt to settle such dispute through the use of a mediator mutually acceptable to the Parties involved in the dispute prior to initiation of any legal action on the part of any of the Parties involved in the dispute with respect to this Agreement, any of its provisions and/or its amendment to this Agreement entered into prior to mediation which specifically addresses the responsibility of each Party for the expenses of such mediation.

14. The Parties agree that this Agreement shall be recorded with the County Recorder/Registrar of Titles in the county in which the Discharge Site is located. Discharger further agrees and consents to the recording of such other documents as may be required by law to effect and record Met Council's security interest in the Pretreatment Facility.

IN WITNESS WHEREOF, the parties have executed and delivered this Agreement as of the date first written above.

**METROPOLITAN COUNCIL**

By: \_\_\_\_\_  
Patrick P. Born  
Its: Regional Administrator

STATE OF MINNESOTA )  
 ) ss.  
COUNTY OF RAMSEY )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by Patrick P. Born, Regional Administrator of the METROPOLITAN COUNCIL, a public corporation and political subdivision of the State of Minnesota, on its behalf.

\_\_\_\_\_  
Notary Public

**DISCHARGER**

By: \_\_\_\_\_

Its:

STATE OF MINNESOTA )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_, the \_\_\_\_\_ of \_\_\_\_\_, on its behalf.

\_\_\_\_\_  
Notary Public

THIS INSTRUMENT WAS  
DRAFTED BY:  
  
Jeanne K. Matross  
Associate General Counsel  
License No. 68615  
Metropolitan Council  
390 Robert Street North  
St. Paul, MN 55101

## **LIST OF EXHIBITS**

<b>EXHIBIT A</b>	<b>THE APPLICATION</b>
<b>EXHIBIT B</b>	<b>LEGAL DESCRIPTION OF PROPERTY</b>
<b>EXHIBIT C</b>	<b>DEBT SERVICE PAYMENT SCHEDULE</b>
<b>EXHIBIT D</b>	<b>PROCUREMENT REQUIREMENTS</b>

**NOTE: There may be references to other programs in Exhibit D. At the time this Agreement is finalized, all references will refer to the incentive program that is the subject of this Agreement.**

**EXHIBIT A**  
**THE APPLICATION**

DRAFT

**EXHIBIT B**

**LEGAL DESCRIPTION OF PROPERTY**

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**EXHIBIT C**

**DEBT SERVICE PAYMENT SCHEDULE**

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**EXHIBIT D**

**PROCUREMENT REQUIREMENTS**

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