



*Industrial Wastewater Treatment Facility Industry Contract*

Specific Terms

1. Date of Contract: June 24, 2020
2. Commencement Date: June 24, 2020
3. Port: Port of Sunnyside  
A Washington Municipal Corporation  
P.O. Box 329  
2640 E. Edison Avenue Suite 1  
Sunnyside WA 98944
4. Contracted Industry: Darigold  
400 Alexander Road  
Sunnyside WA 98944
5. Industry's Facility: Darigold  
400 Alexander Road  
Sunnyside, WA 98944
6. Contracted Capacity: See Schedule "A" attached to this Industrial Wastewater Treatment Facility Industry Contract (the "Industry Contract" or "Contract") and incorporated herein by reference, as amended from time to time.

General Terms

RECITALS

A. The Port owns and operates an Industrial Wastewater Treatment Facility (hereinafter referred to as the "IWWTF") for the interception, transfer, treatment and disposal of industrial wastewater. The IWWTF is located at 747 Midvale Road, Sunnyside, Washington, 98944, but any and all payments or notices given to the Port shall be mailed or delivered to the Port at the address provided in Section 7.3 of this Industry Contract, unless otherwise notified by the Port in writing.

B. The Contracted Industry desires to amend its Contracted Capacity for discharge of industrial wastewater into the IWWTF. The discharge of industrial wastewater from the Contracted Industry shall be from the location of the Industry's Facility and from no other sources.

C. The Port desires to contract with the Contracted Industry to accept the discharge of industrial wastewater for treatment and to assure that (i) such discharge to the IWWTF will be in compliance with federal and state laws and regulations and all permits issued to the Contracted Industry and the Port; (ii) such discharge is within the capacity limits of the IWWTF; (iii) such discharge will not contain constituents not compatible with the treatment process of the IWWTF; and (iv) such discharge further meets the requirements of this Industry Contract and the regulations promulgated by the Port.

D. The Port does not engage in sewerage collection activities. The Port's duties under this Contract are limited to the interception, transfer, treatment and disposal of industrial wastewater. The Contracted Industry is responsible for the installation, maintenance, repair, replacement and insuring of a pipeline running from the Contracted Industry's facility to the gravity flow pipeline transferring wastewater to the IWWTF. The connection of the Contracted Industry's pipeline to the Port's gravity flow pipeline shall be at a manhole specified by the Port. The Port has no responsibility with regards to the Contracted Industry's pipeline running from its facility to the Port's manhole. The Contracted Industry's pipeline shall conform to all requirements of the City of Sunnyside or any other agency having jurisdiction.

**NOW, THEREFORE**, in consideration of the Recitals (which are hereby incorporated into and shall be deemed a part of this Contract), and of the agreements and covenants herein contained, and of other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. **Definitions.** The definitions in the Revised Code of Washington and the regulations adopted by the State of Washington, Department of Ecology ("Ecology") relating to wastewater discharges are hereby adopted, together with the following definitions:

1.1. "CONTRACTED CAPACITY" shall mean the maximum monthly and annual hydraulic discharge and discharge of wastewater components that will be accepted by the Port from the Contracted Industry, all as set forth in Schedule "A" to this Contract, as amended from time to time.

1.2. "CONTRACTED INDUSTRY" shall mean the person, corporation, limited liability company, partnership, or other entity identified in Section 4 of this Contract's specific terms.

1.3. "CONTRACTED INDUSTRY'S PERMIT" shall mean the discharge permit issued by Ecology, which authorizes the Contracted Industry's discharge of industrial wastewater to a publicly-owned treatment works (POTW), and/or the Contracted Industry's National Pollutant Discharge Elimination System (NPDES) Permit authorizing the Contracted Industry's discharge of industrial wastewater to surface water and a POTW. The term "Contracted Industry's Permit" also shall mean any and all future permits required from the Contracted Industry by Ecology, or any other regulatory agency having jurisdiction over the IWWTF, for the discharge of industrial wastewater to the IWWTF.

1.4. "DEBT CHARGES" shall mean the Contracted Industry's charges for its share of the Indebtedness as calculated by multiplying the then-current Debt Rates with the Contracted Industry's anticipated volume of wastewater discharge and the Contracted Industry's anticipated components to be treated. The Contracted Industry's anticipated volume of wastewater discharge is determined by the Port and is generally based upon the Contracted Industry's average actual discharge for the previous five (5) years, provided that if the Contracted Industry has or intends to expand, or there are other reasons indicating that the average actual discharge for the previous five (5) years may not accurately predict the anticipated discharge, then the anticipated volume may be determined by the revised Schedule A to this Contract or other factors considered by the Port. Debt Charges may be referred to herein or in the Port's monthly invoices or other communications to the Contracted Industry as "Capital Charges".

1.5. "DEBT RATES" shall mean the rates established periodically (generally, annually) by the Port through rate hearings, and used by the Port to calculate the monthly charges of the Contracted Industry and Other Industries for the discharge of wastewater to the IWWTF, which are sufficient to pay the Indebtedness. Debt Rates may be referred to herein or in the Port's monthly invoices or other communications to the Contracted Industry as "Capital Rates".

1.6. "INDEBTEDNESS" shall mean all obligations of the Port related to the IWWTF in existence as of the date hereof, or incurred by the Port after the date hereof, including, without limitation, revenue bonds or notes, loans from federal and/or state agencies, or private organizations, and land contracts. "Indebtedness" shall not include (i) any grants or awards which the Port is not obligated to repay; and (ii) any obligations of the Port for industrial or commercial development not involving the IWWTF.

1.7. "INDUSTRIAL WASTEWATER" shall mean water or liquid-carried waste from industrial or commercial processes as distinct from domestic wastes (which includes human wastes and related kitchen, bath and laundry wastes).

1.8. "IWWTF" shall mean the Port's Industrial Wastewater Treatment Facilities.

1.9. "IWWTF Fund" shall mean a fund established by the Port to be used for the purpose of receiving income and revenue derived by the Port from the ownership, operation and maintenance of the IWWTF, and to be used for IWWTF purposes.

1.10. "OPERATING CHARGES" shall mean the Contracted Industry's charges for its share of the IWWTF Operating Expenses as calculated by multiplying the then-current Operating Rates with the Contracted Industry's anticipated volume of wastewater discharge and the Contracted Industry's anticipated components to be treated. The Contracted Industry's anticipated volume of wastewater discharge is determined by the Port and is generally based upon the Contracted Industry's average actual discharge for the previous five (5) years, provided that if the Contracted Industry has or intends to expand, or there are other reasons indicating that the average actual discharge for the previous five (5) years may not accurately predict the anticipated discharge, then the anticipated volume may be determined by the revised Schedule A to this Contract or other factors considered by the Port.

1.11. "OPERATING EXPENSES" shall mean the Port's costs of operation and maintenance of the IWWTF as identified in Section 4.1 of this Contract.

1.12. "OPERATING RATES" shall mean the rates established periodically (generally, annually) by the Port through rate hearings, and used by the Port to calculate the monthly charges of the Contracted Industry and Other Industries for the discharge of wastewater to the IWWTF, which are sufficient to pay the IWWTF Operating Expenses as identified in Section 4.1 of this Contract.

1.13. "OTHER INDUSTRIES" shall mean any industrial or commercial customers of the IWWTF, other than the Contracted Industry.

1.14. "PEAK DISCHARGE" shall mean hydraulic volumes in excess of the monthly Contracted Capacity, which, if authorized, shall be set forth on Schedule "A" to this Industry Contract. The Peak Discharge, if any, allows the Contracted Industry to spread out its annual discharge unevenly as provided in Section 4.5 herein, but it does not allow the Contracted Industry to exceed its annual Contracted Capacity.

1.15. "PORT'S NPDES PERMIT" shall mean the Port's National Pollutant Discharge Elimination System (NPDES) Permit which approves the discharge of industrial wastewater from the IWWTF. The term "Port's NPDES Permit" also shall mean any and all future permits for operation of the IWWTF as required by Ecology, or any other regulatory agency having jurisdiction over the IWWTF, for the discharge of industrial wastewater from the IWWTF.

## **2. Term of Contract.**

2.1. **Term of Contract.** This Contract shall commence on the Commencement Date identified in Section 2 of this Contract's specific terms, and shall continue until terminated



by the Industry or the Port as provided herein. If a Commencement Date is not identified in Section 2 of this Contract's specific terms, then this Contract shall commence on the date on which it is signed by both the Contracted Industry and the Port.

2.2. **Termination by Industry.** The Contracted Industry may terminate its right to discharge into the IWWTF by giving the Port written notice stating an effective date of such termination, provided, however, that the effective date of termination shall be the last day of a calendar month at least six (6) months after the date such notice is given to the Port.

2.3. **Termination by Port.** The Port may terminate this Contract as one of the remedies upon the default of the Contracted Industry in its obligations under this Contract pursuant to the terms of Section 10 of this Contract. The Port also may terminate this Contract if the Port ceases to operate the IWWTF due to reasons reasonably outside the control of the Port or due to the IWWTF being shut down by Ecology or any other agency having jurisdiction.

2.4. **Effect of Termination.** Upon the effective date of the termination of this Contract, the following shall apply: (i) the Contracted Industry shall no longer have the right to discharge into the IWWTF; (ii) the Contracted Industry shall no longer be an industrial customer of the IWWTF; and (iii) the Contracted Industry shall no longer be obligated to pay the Operating Rates, Debt Rates, or any other charges under this Contract applicable for any time after the effective date of termination except for the Termination Fee which shall be a continuing obligation of the Contracted Industry as provided in Section 5 of this Contract.

2.5. **Merger.** This Contract shall supersede and replace all other contracts or agreements between the Port and the Contracted Industry relating to the IWWTF as of the Commencement Date identified in Section 2 of this Contract's specific terms, or Section 2.1 herein if no Commencement Date is specified in Section 2 of the Contract's specific term.

3. **Duties of the Port.** The Port shall:

3.1. Own, operate, manage, repair and maintain the IWWTF in accordance with accepted and customary practices for similar municipal facilities, and in accordance with applicable federal and state laws and regulations relating thereto and the Port's NPDES Permit issued to the Port.

3.2. Obtain and maintain the Port's NPDES Permit, and any all other permits necessary to the continued operation of the IWWTF. However, it shall be the Contracted Industry's duty to obtain, maintain, and comply with the Contracted Industry's Permit allowing the Contracted Industry to discharge to the IWWTF.

3.3. Establish rates and charges for the services provided to the Industry through the IWWTF, and to pay the Indebtedness including principal and interest thereon, and maintaining reserves for operation of the IWWTF and for unanticipated expenses.

3.4. Prepare and maintain in a uniform manner all financial records in connection with the IWWTF in accordance with accounting standards established from time to time by the Washington State Auditor's Office including revenues, capital construction costs, operation and maintenance expenses, amortization of bonds and loans, and depreciation/amortization of capital expenditures. All such records shall be "public records" and the Contracted Industry shall have the right to inspect all such records.

3.5. Maintain all records required to be maintained by the Port in connection with any federal or state grant, bond resolution, loan agreement, or required by any regulatory agency.

3.6. Allocate to the IWWTF Fund all income and revenue derived by the Port from time to time from the ownership, operation and maintenance of the IWWTF including, without limitation, rental income or proceeds from crop sales from acreage for which a use fee is charged to the IWWTF.

4. **Wastewater Charges.** The Port shall establish rates for the Contracted Industry and all Other Industries from time to time (generally, annually), sufficient to pay the costs of the IWWTF, including operating expenses and debt service on the Indebtedness including principal and interest thereon, and for maintaining reserves. So long as the Contracted Industry is contracted with the Port to discharge into the IWWTF, it is obligated to pay rates sufficient to allow the IWWTF to continue its operations and service its Indebtedness.

4.1. **Operating Expenses.** The "Operating Expenses" shall include the costs of operation and maintenance of the IWWTF incurred in the administration, collecting, treating, and disposal of wastewater, including, without limitation:

4.1.1. **Payroll and Benefits.** The salaries, payroll taxes and other withholdings, retirement benefits, medical insurance, and other benefits of the Port Commissioners, Port staff, and any contracted services related to the operation and/or maintenance of the IWWTF.

4.1.2. **Professional Services.** The consulting, legal, janitorial, and other fees for professional services related to the operation and/or maintenance of the IWWTF.

4.1.3. **Operating Supplies.** The costs of laboratory, shop, and other supplies and minor equipment for the IWWTF, and the costs of all fuel, lubricants, spray field supplies, and any chemicals or nutrients used in connection with the spray fields (including but not limited to fertilizers and pesticides).

4.1.4. **Maintenance, Chemicals and Capital Expenditures.** The costs of seed for the spray fields, water conditioning chemicals, equipment maintenance and rental, laboratory equipment maintenance, computer maintenance, building maintenance, grounds

maintenance, vehicle maintenance, spray field equipment maintenance, and “capital expenditures” related to the operation and/or maintenance of the IWWTF, and any other chemicals or nutrients used in connection with the treatment of wastewater. “Capital expenditures” shall include purchases of new equipment, purchases for the replacement of equipment, alterations to the IWWTF, or other capital improvements which are not covered by the Debt Rates.

4.1.5. **Testing and Irrigation.** The irrigation, drainage, and other assessments levied on the IWWTF facilities, and the costs of the IWWTF polymer, sludge disposal and management, water testing, soil and crop testing, and gas testing.

4.1.6. **Miscellaneous Operating Expenses.** The costs of training, travel, insurance, advertising, membership, dues, subscriptions, and any Port NPDES Permit charges or fees payable to regulatory agencies, related to the operation and/or maintenance of the IWWTF.

4.1.7. **Utilities and Rent.** The electricity charges, including without limitation, such charges for the lagoons, Sequencing Batch Reactors, irrigation, Covered Anaerobic Lagoon, and all other buildings, as well as all telephone and other utilities related to the operation and/or maintenance of the IWWTF, as well as all rent for buildings and land used by the IWWTF but owned by the Port’s General Fund.

4.1.8. **General and Administrative Expenses.** The allocable share of general expenses of the Port, such as Commissioner expenses, personnel, insurance and audits or elections; an operating expense contingency fund not to exceed 1% of the total budgeted Operating Expenses; any depreciation or amortization of capital assets; any taxes imposed on the operation of the IWWTF including without limitation, B&O taxes; and all direct and indirect and reasonably necessary administrative charges or other necessary actual and direct expense related to the operation and/or maintenance of the IWWTF.

4.2. **Operating Rates.** The Port shall establish rates periodically (generally, annually) for the Contracted Industry and Other Industries sufficient to pay the Operating Expenses as they become due and payable. In establishing such rates, the Port shall take into consideration factors including, but not limited to, anticipated Operating Expenses, debt payments and requirements from lending agencies relating to Indebtedness, anticipated volume of wastewater, timing of discharges, anticipated components to be treated, and expenses associated with the treatment of the Contracted Industry’s wastewater and wastewater from Other Industries. The Port may establish different rates with regard to the Operating Expenses for the Contracted Industry and Other Industries based upon differences in the volume and/or components of wastewater, including the factors set forth above. Currently, the Port allocates such rates for the Operating Expenses between (1) “Land Application” or “Operating”; (2) “BOD” or “Biochemical Oxygen Demand”; (3) “TSS” or Total Suspended Solids”; (4) “TKN” or “Total Kjeldahl Nitrogen”; (5) “SBR Chloride”; and (6) “SBR TKN”. The “Land Application” or “Operating” is calculated by the Port per 100 cubic feet for the total hydraulic monthly discharge of the Contracted Industry to

the Port. The “BOD”, “TSS”, “TKN”, “SBR Chloride” and “SBR TKN” is calculated by the Port per pound for the constituents discharged by the Contracted Industry to the Port.

4.3. **Operating Charges.** The Contracted Industry shall pay Operating Charges based upon the then-current Operating Rates and the Contracted Industry’s anticipated volume of wastewater and anticipated components to be treated. One-twelfth of the Contracted Industry’s annual share of the Operating Expenses shall be paid monthly.

4.4. **Indebtedness.** The Contracted Industry shall pay “Debt Charges” based upon its portion of the Indebtedness, including, without limitation:

4.4.1. The payment of all interest accrued on the Indebtedness;

4.4.2. The payment of the principal of the Indebtedness;

4.4.3. The payment of reserve requirements and debt service requirements imposed by bond resolutions and/or other loan agreements or promissory notes; and

4.4.4. The payment of any deficiencies which occur as a result of the failure of Other Industries to pay their share of the Debt Charges for any reason whatsoever, including without limitation termination of service.

4.5. **Debt Rates.** The Port shall establish rates periodically (generally, annually) for the Contracted Industry and Other Industries sufficient to pay, or recover, the Indebtedness as it becomes due and payable. In the event of any deficiencies in collections from one or more of the Industries contracted to use the IWWTF, the Port may adjust the Debt Rates accordingly so as to minimize or avoid any deficiency, even while the Port pursues collection efforts against such delinquent Industry, provided, however, that upon collection of such delinquencies the Port shall re-adjust the Debt Rates to avoid inequitable treatment among the Industries contracted to use the IWWTF. The Port may establish different Debt Rates for the Contracted Industry and Other Industries based upon factors including, without limitation, contracted capacity for hydraulic volume and for treatment of wastewater components, and differences in use of IWWTF facilities in receiving or treating wastewater of an Industry.

4.6. **Debt Charges.** The Contracted Industry shall pay Debt Charges based upon the then-current Debt Rates and the Contracted Industry’s anticipated volume of wastewater and anticipated components to be treated. One-twelfth of the Contracted Industry’s annual share of the Indebtedness shall be paid monthly. The Debt Charges are used for the repayment of IWWTF Indebtedness which includes principal and interest (including the debt service requirements of any Outstanding Parity Bonds and future Indebtedness), reserves or coverage requirements in connection with the IWWTF Indebtedness, and any other costs related to the IWWTF Indebtedness.

4.7. **Charges for Excess Discharge.** The Contracted Industry shall not have the right to discharge wastewater in excess of the Contracted Capacity, even if the Port has a history of accepting such excess discharge. However, if the Port does accept any discharge from the Contracted Industry in excess of the Contracted Capacity, then the Contracted Industry shall pay for any such discharge in excess of the Contracted Capacity as follows:

4.7.1. **Exceeding the Annual Contracted Capacity.** If the Contracted Industry exceeds the annual total hydraulic discharge Contracted Capacity, as set forth on Schedule "A", for any calendar year, then the Contracted Industry shall pay the Operating Charges and Debt Charges for all such excess discharges, and in addition to the Operating Charges and Debt Charges, a charge equal to 100% of the then-current rate for 100 cubic feet of total hydraulic discharge (also referred to in Section 4.2 herein as the rate for the "Land Application" or "Operating").

4.7.2. **Exceeding the Monthly Contracted Capacity.** If the Contracted Industry exceeds the monthly total hydraulic discharge Contracted Capacity, as set forth on Schedule "A", then the Contracted Industry shall pay, in addition to the Operating Charges and Debt Charges, a charge equal to 100% of the then-current rate for 100 cubic feet of total hydraulic discharge for all such excess discharges (also referred to in Section 4.2 herein as the rate for the "Land Application" or "Operating"). Provided, however, that if a Peak Discharge is provided on Schedule "A", then such payment for excess discharges shall be charged as provided in Section 4.7.3 below.

4.7.3. **Exceeding the Monthly "Peak" Capacity in March through October.** If there is a Peak Discharge amount listed on Schedule "A", and the Contracted Industry exceeds the monthly total hydraulic discharge "peak" capacity, then the Contracted Industry shall pay, in addition to the Operating Charges and Debt Charges, a charge equal to 100% of the then-current rate for 100 cubic feet of total hydraulic discharge for all such excess discharges (also referred to in Section 4.2 herein as the rate for the "Land Application" or "Operating").

4.7.4. **Exceeding the Total Contracted Capacity in November through February.** If the Contracted Industry exceeds the total hydraulic discharge Contracted Capacity, as set forth on Schedule "A", for the months from November through February, then the Contracted Industry shall pay, in addition to the Operating Charges and Debt Charges, a charge equal to 100% of the then-current rate for 100 cubic feet of total hydraulic discharge for all such excess discharges (also referred to in Section 4.2 herein as the rate for the "Land Application" or "Operating"). Provided, however, that this excess charge shall be assessed only if the total discharges from November through February exceed the total Contracted Capacity from November through February, and the Schedule "A" to this Contract specifically permits monthly discharges during this period to exceed the individual contracted monthly discharges.

4.8. **Minimum Rates.** The Port may establish, from time to time, minimum rates for Operating Charges and Debt Charges, to be charged to the Contracted Industry and Other Industries retaining a right to discharge wastewater to the IWWTF, regardless of whether such



Industry actually discharges wastewater to the IWWTF. Any changes to the minimum rates shall be part of the Port's rate hearing process.

4.9. **Future Improvements.** Future capital improvements, as deemed necessary and/or advisable by the Port, and/or required to maintain compliance with the requirements of regulatory agencies (including storage requirements) may be undertaken, and the costs thereof shall be allocated to the Contracted Industry and the Other Industries by the Port as is deemed equitable by the Port.

4.10. **Rate Hearings.** Before establishing the Operating Rates and Debt Rates, the Port shall hold a public hearing on any proposed charges and shall provide not less than ten (10) days written notice to the Contracted Industry, at its address(es) provided in the Specific Terms of this Contract, of the scheduled time and date for such rate hearing, together with any proposed rate changes. The Port shall further provide to the Contracted Industry historic accounting data and other pertinent accounting information or general information to explain or support the proposed rates. The Contracted Industry shall have the opportunity to comment on the proposed rates at or before the public hearing. However, the Port is authorized to establish all rates related to the IWWTF and does not need the prior approval of the Contracted Industry, any Other Industry, or any other government agency.

4.11. **Billing Procedure.** All payments due to the Port from the Contracted Industry under this Contract shall be payable at least monthly. Billings shall be mailed or delivered by the Port no later than the 10<sup>th</sup> day of each month, and the Contracted Industry shall pay such charges no later than the 25<sup>th</sup> day of the same month. Payments received after the 25<sup>th</sup> day of the month in which they were due, shall be subject to a penalty of 1.5% per month, with a minimum penalty of \$100.00 per month. Any penalties charged under this Section shall also be subject to the 1.5% penalty for any subsequent months in which the payments are not received.

4.12. **pH Surcharge.** In addition, to any other rate, charges, or fees charged pursuant to this Contract, and without limiting any remedies available to the Port under this Contract (including Section 6.6.3), the Contracted Industry shall pay a surcharge for discharges which have a pH averaging less than or equal to 2.0 for a duration of ten (10) minutes or more, equal to 50% of the Contracted Industry's charge for the total hydraulic discharge for the month in which such discharge occurs. Provided, however, that there shall not be more than one such surcharge in any sixty-minute period.

4.13. **"Slug" Discharge Surcharge.** In addition, to any other rate, charges, or fees charged pursuant to this Contract, and without limiting any remedies available to the Port under this Contract (including Section 6.6.8), the Contracted Industry shall pay a surcharge for certain "spike load" discharges. The daily maximum loading surcharge trigger shall be 51,750 pounds of COD during any calendar day. Any introduction to the IWWTF of more than 51,750 pounds of COD during any calendar day shall be considered a "spike load" and shall subject the Contracted Industry to the following surcharge:

A surcharge equal to fifty percent (50%) of the hydraulic contract capacity charge for the month in which the discharge occurs, but in any event not more than one such surcharge per calendar day. The formula for this surcharge is expressed as follows:

$$\frac{\text{Monthly Hydraulic Contract Capacity X Operating Rate}}{100 \text{ cubic feet}}$$

= Monthly Hydraulic Contract Capacity Charge

÷ 2 = SURCHARGE

An example of this surcharge based upon the Contracted User's hydraulic contracted capacity and the Port's operating rate as of September 2019 is provided as follows:

$$\frac{4,010,695 \times \$1.4364}{100} = \$57,609.63 \div 2 = \$28,804.82$$

This surcharge is not the exclusive remedy of the Port for any "spike loads" introduced by the Contracted User to the Port's ATS, and, in addition to this surcharge, the Port may also exercise any other charge or remedy available to the Port.

The Port may waive all or any portion of any surcharges provided for in this Contract, in the sole and absolute discretion of the Port, and such waiver, if any, shall not limit or restrict the right of the Port to impose surcharges for any subsequent "spike loads". The Port may take into consideration the Contracted User's attempts to resolve its introduction of "spike loads" to the Port's IWWTF, including but not limited to the Contracted User's efforts towards controlling spike loads through sound engineering, acquisition of applicable regulatory approvals, and subsequent deployment of appropriate control equipment. The Port also may take into consideration the Contracted User's advance notification of any spike load and the actual elimination or reduction of the effect of such spike load on the Port's IWWTF attributable to the Contracted User's advance notification. There is no commitment, obligation, or duty by the Port to waive all or any portion of the surcharges provided for in this Contract, as any waiver shall be in the sole and absolute discretion of the Port.

Except as otherwise provided in this paragraph, on or before November 30, 2021, the Port shall propose to end the surcharge provided for in this Contract by offering to the Contracted User an amendment to this Contract which replaces the surcharge set forth herein with another charge or rate increase which approximates the additional operational costs and revenue loss at the IWWTF created by spike loads (the "Amendment"). The surcharge set forth in this Contract shall continue until the Amendment is fully executed by both the Port and the Contracted User. If the completion

of the construction of the Port's membrane bioreactor ("MBR") system is delayed beyond July 31, 2021, due to any work stoppages or delays in receiving supplies or materials arising from the COVID-19 pandemic, then the date by which the Amendment must be proposed by the Port shall be four (4) months after the new MBR system becomes operational.

5. **Termination Fee.**

5.1. **Purpose.** The Termination Fee set forth herein is to provide assurance to the Port's bond purchasers, or other lenders providing financing for the IWWTF, and to the Other Industries, that the Contracted Industry will pay its share of the Indebtedness without regard to any other events which may occur including, without limitation, the termination of the Contracted Industry's right to discharge wastewater to the IWWTF whether such termination is initiated by the Port or the Contracted Industry, or a failure of all or a portion of the IWWTF. This Termination Fee also establishes limits to the obligations of the Contracted Industry upon the termination of the Contracted Industry's right to discharge wastewater to the IWWTF. The Termination Fee shall be a continuing, independent, and separate obligation of the Contracted Industry notwithstanding the termination of this Contract, or the lack of enforceability of any other provision of this Contract including any amendments thereto.

5.2. **Application.** It is the intent of the parties that the Termination Fee supplement the Debt Charges of the Contracted Industry. It is not the intent of the parties that the Contracted Industry pay both the Debt Charges and the Termination Fee at the same time. It also is not the intent of the parties that the Contracted Industry pay neither the Debt Charges nor the Termination Fee at any time. Therefore, the Termination Fee set forth herein shall apply at any time the Contracted Industry is no longer obligated to pay the Debt Charges (as defined in this Contract) including, without limitation, upon such time as this Contract is terminated and/or the Contracted Industry is otherwise no longer an industrial customer of the IWWTF and/or upon such time as the Contracted Industry's right to discharge wastewater to the IWWTF is otherwise terminated for any reason, voluntarily or involuntarily.

5.3. **Definitions.** For the purpose of the termination fee provisions of this Contract, the following definitions shall apply:

5.3.1. "Share of Indebtedness" shall mean the Contracted Industry's percentage of the Indebtedness, rounded up to the nearest 1/10<sup>th</sup> of 1%, as determined by the Debt Rates in effect as of the Date of Termination, which includes without limitation, Debt Charges based upon contracted hydraulic capacity, and the share of long term debt for the sequencing batch reactors (SBRs), the dewatering system, the anaerobic digester, and the MBR system which are currently based upon historical discharges. The Contracted Industry's Share of Indebtedness shall include the principal of, together with interest on its percentage of Indebtedness that will accrue to maturity of that Indebtedness and the redemption premium, if any, that will be due at the redemption (i.e., call) date, if earlier. The Contracted Industry's Share of Indebtedness shall be adjusted accordingly at the Date of Termination. Any Indebtedness incurred after the Date of Termination shall not be added to the Termination Fee.

5.3.2. "Date of Termination" shall mean the date which is the earlier of (i) the date on which the Contracted Industry no longer has the right to discharge into the IWWTF; (ii) the date on which the Contracted Industry is no longer an industrial customer of the IWWTF; or (iii) the date on which the Contracted Industry is no longer obligated to pay Debt Charges for any reason.

5.3.3. "Interest Rates" shall mean the actual interest rates on the unpaid portion of the Indebtedness as of the Date of Termination. Therefore, for purposes of calculating accrued interest and applying payments towards interest and principal, the Termination Fee shall be split into separate accounts for each separate Indebtedness. Each separate account shall be 110% of the Contracted Industry's Share of that specific Indebtedness, and shall accrue interest at the actual interest rate of that specific Indebtedness.

5.3.4. "Termination Fee" shall mean 110% of the Contracted Industry's Share of the Indebtedness.

5.4. **Payments; No Prepayment.** The Contracted Industry shall pay the Termination Fee in equal monthly installments, including principal and interest, amortized over ten (10) years from the Date of Termination. The first such installment shall be due not later than one (1) month after the due date of the last Debt Charges payable by the Contracted Industry, and on the 25<sup>th</sup> day of each month thereafter. Interest shall accrue on unpaid balances of the Termination Fee from the Date of Termination. The Interest Rates shall be fixed as of the Date of Termination and shall remain constant, except for the default interest rate described below, until the Termination Fee and all accrued interest thereon is paid in full. The unpaid portion of the Contracted Industry's Share of Indebtedness may not be prepaid.

5.5. **Default Interest.** Upon any failure of the Contracted Industry to pay any installment or portion thereof as the same becomes due and payable, or any other amount due in connection with the Termination Fee as the same becomes due and payable, then such amount in default shall bear interest at a per annum rate equal to 18%.

5.6. **Acceleration.** If the Contracted Industry defaults in the payment of any installment or any other obligation due hereunder in connection with the Termination Fee, the Port may elect to declare the remaining balance of the Termination Fee immediately due and payable and may institute any action or proceeding at law or in equity against the Contracted Industry, or exercise any other remedy available pursuant to this Contract or otherwise allowed by law, which remedies shall be cumulative.

5.7. **Other Remedies.** The obligations of the Contracted Industry hereunder are separate and independent of the obligations of Other Industries. The Contracted Industry hereby waives any and all rights or legal requirements that the Port shall institute any action or proceeding at law or in equity against Other Industries, or exhaust its remedies against Other Industries or anyone else as a condition precedent to bringing an action or other proceeding against the

Contracted Industry for the Termination Fee. All remedies available to the Port hereunder are separate and cumulative, and it is agreed that no remedy, whether exercised by the Port or not, shall be deemed to be an exclusion of any of the other remedies available to the Port and shall not limit or prejudice any other legal or equitable remedy which the Port may have. The obligations of the Contracted Industry hereunder shall survive and continue in full force and effect until payment in full of the Termination Fee and all accrued interest thereto, notwithstanding any release or termination of any Other Industry's liability by express or implied agreement with the Port or by operation of law, and notwithstanding the Indebtedness or any part thereof having been deemed to have been performed or discharged by operation of law or by some act or agreement of the Port.

5.8. **Waivers.** With respect to the Termination Fee, the Contracted Industry hereby waives (i) any defense that may arise by reason of the incapacity, lack of authority, death or disability or any other person or persons, or the failure of the Port to file or enforce a claim against the estate (in administration, bankruptcy, or any other proceeding) of any other person or persons; (ii) any defense based upon the Port's partial or total failure to exercise diligence in the collection of the Indebtedness, or the Port's failure to exercise diligence in making any demand, protest or notice of any kind, including without limitation notice of the existence, creation, or incurring of any new or additional indebtedness or obligation after the date hereof but before the Date of Termination, or of any action or non-action on the part of the Port, any endorser or creditor of the Contracted Industry or any Other Industry under this or any other instrument in connection with any obligation or evidence of indebtedness held by the Port as collateral or in connection with the Indebtedness; and (iii) any defense based upon an election of remedies by the Port.

5.9. **Modification or Consent.** This Contract sets forth the entire agreement between the Port and the Contracted Industry with respect to the Termination Fee and supersedes all prior oral and written agreements and representations between the parties to this Contract. No modification, consent, or waiver of any provision relating to the Termination Fee, and no consent to any departure from the provisions of the Termination Fee, shall be effective unless they are in writing and signed by an officer of the Port, and then shall be effective only in the specific instance and for the purposes for which given. No notice to, or demand on, the Contracted Industry shall, by itself, entitle the Contracted Industry to any other or further notice or demand in similar or other circumstances. No delay or omission by the Port in exercising any power or right hereunder shall impair any such right or power or be construed as a waiver thereof or any acquiescence therein, nor shall any single or partial exercise or any such power preclude other or further exercise thereof or the exercise of any other right or power under this Contract. All rights and remedies of the Port are cumulative of each other and of every other right or remedy which the Port may otherwise have at law or in equity or under any other contract or document, and the exercise of one or more rights or remedies shall not prejudice or impair the concurrent or subsequent exercise of other rights and remedies.

5.10. **Financial Statements.** The Contracted Industry agrees to provide operating and financial information about itself to the extent required to be provided by the Contracted Industry as an "obligated person" under 17 CFR 240.15c2-12 – relating to municipal



securities disclosure with respect to Indebtedness. The Contracted Industry acknowledges that, although the Port shall reasonably attempt to keep the financial statements confidential, such financial statements provided to the Port shall be considered to be "public records" subject to review by any third party pursuant to the provisions of RCW Chapter 42.56, as amended. For any financial information provided, the Contracted Industry shall represent and warrant that:

5.10.1. The financial statements or information provided by the Contracted Industry in connection with this Contract shall be fair and accurate representations of the financial condition of the Contracted Industry, and that the Contracted Industry has not omitted any information from the financial statements that would be necessary to fully and properly assess the financial condition of the Contracted Industry.

5.10.2. The financial information shall disclose if the Contracted Industry is a party to any indenture, loan or credit agreement or any lease or other agreement or instrument or subject to any charter or other restriction which would have a material adverse effect on the ability of the Contracted Industry in the aggregate to carry out its obligations under this Contract.

5.10.3. No information, exhibit, or report furnished by the Contracted Industry to the Port, as of the date thereof, or, if there be no such date, the date of furnishing thereof, shall contain any material misstatement of fact or omitted to state a material fact or any fact necessary to make the statements contained therein not misleading.

6. **Discharges by Industry.**

6.1. **IWWTF Industry Regulations.** Currently, the Port has the following adopted policies that regulate the Contracted Industry's, and the Other Industries', discharges to the IWWTF:

6.1.1. Industry Discharge Policy, adopted February 16, 2015;

6.1.2. Policy Regarding Discharge of Stormwater to the Port of Sunnyside Industrial Wastewater Treatment Facility, adopted February 16, 2015; and

6.1.3. Policy for Receiving Tanker-Hauled Wastewater into the Port of Sunnyside Industrial Wastewater Treatment Facility, adopted February 16, 2015.

The Port may adopt further policies regulating discharges from the Contracted Industry, and the Other Industries, to the IWWTF at any time if the Port deems such policies reasonable and beneficial for the use and operation of the IWWTF. Such policies may add to or otherwise amend the provisions of this Industry Contract which relate to discharges by industries (Section 6) and reporting requirements (Section 7). The Contracted Industry shall comply with all such policies.

6.2. **Contracted Capacity.** The Port hereby agrees to accept the total hydraulic discharge as the “contracted” capacity set forth on Schedule “A” attached hereto and incorporated herein by reference, and further agrees to accept the discharge of the constituents (such as BOD, TSS and TKN) also set forth on Schedule “A”. In addition, the Port hereby agrees to accept the condensate of whey (“COW”) water which may be released or disposed directly to the IWWTF’s Lagoon 4 through an underground pipeline in accordance with the limits set forth on Schedule “A – COW Water Discharge to IWWTF Lagoon No. 4.” The Port reserves the right to restrict and limit discharges to the Contracted Capacity, both as to total hydraulic volume and as to constituents, or, in the sole discretion of the Port, the Port may accept excess discharges; provided that excess discharges do not exceed the total hydraulic volume or constituent limits established under the Port’s NPDES Permit. If the Port accepts discharges which include constituents in excess of the annual or monthly constituent limits set forth on Schedule “A”, then the Port may establish surcharges for the extra discharges or extra constituents, which surcharge may be charged in addition to any charges authorized by Section 4 of this Contract. Such surcharge shall be established by regulations adopted by the Port, and shall apply only to discharges made after the date such regulations were adopted by the Port.

6.3. **Peak Discharge.** The Port may establish Peak Discharge levels from time to time, at the sole and absolute discretion of the Port, which shall be set forth on Schedule “A”; provided that Peak Discharge levels do not exceed discharge limits established under the Port’s NPDES Permit. The purpose of Peak Discharge levels, if any exist, are to allow the Contracted Industry to discharge volumes in excess of the monthly Contracted Capacity, so long as the Port determines that sufficient capacity is available within the IWWTF, without subjecting the Contracted Industry to the surcharge or other penalties for discharges in excess of its monthly discharge volume identified on Schedule A as “contracted”. The Port reserves the right to reduce the Peak Discharge levels, or to eliminate the Peak Discharge levels at any time, upon thirty (30) days written notice from the Port to the Contracted Industry, so that no excess beyond the monthly Contracted Capacity is allowed. Peak Discharge shall never be used to allow the Contracted Industry to exceed its annual Contracted Capacity.

6.4. **Contracted Industry’s Permits.** The Contracted Industry shall be solely responsible for obtaining any and all permits authorizing the Contracted Industry to discharge wastewater into the IWWTF, including but not limited to the Contracted Industry’s Permit. The Contracted Industry shall provide a copy of its Contracted Industry’s Permit to the Port. The Contracted Industry also shall provide the Port with any amendments or other revisions to its Contracted Industry’s Permit.

6.5. **Environmentally Significant Impact of Wastewater.** The Contracted Industry represents and warrants to the Port that, to the Contracted Industry’s knowledge, the Contracted Industry’s wastewater contains no components and shall not contain any components which have or may have an adverse environmentally significant impact.

6.6. **Prohibited Discharges.**

6.6.1. **National and State Standards: Prohibited Discharges.** The Contracted Industry shall not cause or permit the discharge of any pollutant to the IWWTF in violation of the National Pretreatment Standards as defined in 40 C.F.R. § 403.5(a) and (b) or Washington State standards as defined in WAC 173-216-060.

6.6.2. **No Toxic or Hazardous Substances.** The Contracted Industry shall not cause or permit the release or disposal of any toxic or hazardous substances into the IWWTF, except for such discharges specifically allowed by the Contracted Industry's Permit and which are specifically within the maximum limits set forth on Schedule "A" and any excess as defined in Section 6.2 or 6.3 of this Contract. Toxic and hazardous substances shall be interpreted broadly to include, but not limited to, any material or substance that is defined or classified under federal, state or local laws as: (a) a "hazardous substance" pursuant to Section 311 of the Federal Water Pollution Control Act, 33 U.S.C. Section 1321, as now or hereafter amended; (b) a "hazardous waste" pursuant to Section 1004 or Section 3001 of the Resource Conservation and Recovery Act, 42 U.S.C. Section 6903, 42 U.S.C. Section 6921, as now or hereafter amended; (c) a toxic pollutant under Section 307(1)(a) of the Federal Water Pollution Control Act, 33 U.S.C. Section 1317 (a) as now or hereafter amended; (d) a "hazardous air pollutant" under Section 112 of the Clean Air Act, 42 U.S.C. Section 7412, as now or hereafter amended; (e) a "hazardous material" under the Hazardous Material Transportation Act, 49 U.S.C. Section 1802(2), as now or hereafter amended; (f) a "hazardous substance" as defined under Washington State's Model Toxic Control Act, RCW 70.105D.020(5), as now or hereafter amended; (g) toxic or hazardous pursuant to resolutions promulgated now or hereafter under the aforementioned laws; (h) presenting a risk to human health or the environment under other applicable federal, state, or local laws, ordinances, or regulations, as now or as may be passed or promulgated in the future; and (i) substances that are toxic in combination as revealed in Whole Effluent Toxicity ("WET") testing. Toxic or hazardous substances shall also mean any substance that after release into the environment and upon exposure, ingestion, inhalation, or assimilation, either directly from the environment or indirectly by ingestions through food chains, will or may reasonably be anticipated to cause death, disease, behavior abnormalities, cancer or genetic abnormalities. Toxic or hazardous substances specifically includes, but is not limited to, asbestos, polychlorinated biphenyls (PCBs), petroleum and petroleum based derivatives, flammable explosives, radioactive material and urea formaldehyde.

6.6.3. **No discharges with low pH.** Any discharge by the Contracted Industry with a sustained pH of less than 5 ("low pH discharge") shall be prohibited unless the IWWTF may accommodate the discharge. At its sole discretion, and based on its current capacity, the IWWTF may accommodate a low pH discharge from the Contracted Industry *provided that* the duration of low pH discharge to the IWWTF is less than ten minutes. Any low pH discharge with a duration that is ten minutes or longer (as measured by the IWWTF) is prohibited unless the Contracted Industry obtains prior written approvals from both the Port and Ecology for such discharge to the IWWTF. Any low pH discharge that cannot be accommodated or that results in

interference (as defined in Section 6.6.4 of this Contract) shall be subject to the indemnification provision in Section 9 of this Contract.

6.6.4. **No Interference with the IWWTF.** The Contracted Industry shall not cause or permit the release or disposal of any pollutant, including but not limited to oxygen-demanding pollutants (BOD<sub>5</sub>, etc.), pH, or wastewater temperature at a flow rate and/or with pollutant concentration(s) that will cause interference with (as defined under 40 C.F.R. § 403.3 and WAC 173-216-030) the IWWTF. In addition, the Contracted Industry shall not cause or permit the release or disposal of Industrial Wastewater which significantly affects IWWTF hydraulic loading, and which does not require treatment or would not be afforded a significant degree of treatment by the IWWTF, *except that* for condensate of whey ("COW") water which may be released or disposed directly to the IWWTF's Lagoon 4 through an underground pipeline which complies with the Contracted Industry's Permit and in accordance with the limits set forth in set forth on Schedule "A - COW Water Discharge to IWWTF Lagoon No. 4."

6.6.5. **No Storm Water.** The Contracted Industry shall not cause or permit the release of storm water, *except* to the extent allowed by the current Policy Regarding Discharge of Storm Water to the Port of Sunnyside Industrial Wastewater Treatment Facility.

6.6.6. **No Permit or Legal Violations.** The Contracted Industry shall not cause or permit the release of Industrial Wastewater which are prohibited by the Contracted Industry's Permit or the Port's NPDES Permit, or which would otherwise cause either the Contracted Industry to be non-compliant with the Contracted Industry's Permit or the Port to be non-compliant with the Port's NPDES Permit. In addition, the Contracted Industry shall not cause or permit the release of Industrial Wastewater which would violate any federal, state, or local laws, regulations and ordinances.

6.6.7. **No Violations of Port Policies.** The Contracted Industry shall not cause or permit the release of Industrial Wastewater which are prohibited by any policy then currently adopted by the Port regulating discharges to the IWWTF.

6.6.8. **No "Slug" Discharges.** Any slug discharge (as defined by 40 C.F.R. § 403.8(f)(2)(v)) by the Contracted Industry shall be prohibited unless the IWWTF may accommodate the discharge. At its sole discretion, and based on its current capacity, the IWWTF may accommodate a slug discharge from the Contracted Industry *provided that* the Contracted Industry's quantity of flow is less than one hundred twenty percent (120%) of the Contracted Industry's quantity of flow in a 24 hour period as averaged over the prior three months; or *provided that* the Contracted Industry's mass of wastewater constitute is less than three hundred percent (300%) of the Contracted Industry's mass of wastewater constituent in a 24 hour period as averaged over the prior three months. Any slug discharge that cannot be accommodated or that results in interference (as defined in Section 6.6.4 of this Contract) shall be subject to the indemnification provision in Section 9 of this Contract.

6.7. **Meters, Sampling Devices.** A discharge meter and sampling device, acceptable to the Port, shall be installed at the Contracted Industry's expense, at a location and in a manner approved by the Port, provided, however, that the Port may purchase and/or install the meter and sampling device and charge the Contracted Industry on such terms and conditions as the Contracted Industry and the Port may agree. The Port shall own and maintain the meter and sampling device. The Contracted Industry shall allow access of Port personnel or agents to replace, read, maintain, and/or repair meters and sampling devices together with such other maintenance as may be required to collect wastewater from the Contracted Industry. The Contracted Industry is further referred to the Port's Industrial Discharge Policy, adopted February 16, 2015, which may be amended from time to time by the Port.

6.8. **Screening.** All Industrial Wastewater discharged to the IWWTF shall pass through a screen not larger than 30 mesh prior to passing through the effluent sampling device.

6.9. **Right of Entry.** The Contracted Industry shall allow the Port personnel and its agents to enter upon the Industry's Facility at any time in connection with concerns for the health and safety with regard to the IWWTF, and at all reasonable hours for the purposes of inspecting, sampling, or records inspection or copying, provided that the Port's activities shall not unreasonable interfere with the Contracted Industry's operations. Reasonable hours in the context of inspection and sampling include any time that the Contracted Industry is operating any process which discharges into the IWWTF.

7. **Reporting Requirements, Records.**

7.1. **Accidental/Slug Discharge.** The Contracted Industry shall maintain a slug discharge control plan as required by the Contracted Industry's Permit. In addition, the Contracted Industry shall notify the Port immediately of any accidental or slug discharge to the IWWTF. Formal written notification discussing the circumstances and remedies shall be submitted to the Port within five (5) days of the occurrence. The slug discharge control plan must comply with the limitations of Section 6.6.8 of this Contract.

7.2. **Changes in Operation.** The Contracted Industry shall notify the Port before the introduction of new wastewater constituents or any substantial change in the volume or characteristics of the wastewater being discharged into the IWWTF from the Contracted Industry.

7.3. **Notice to Port.** Until notified otherwise in writing, any notices or reports required by this Contract shall be sent to:

IWWTF, Supervisor  
Port of Sunnyside  
P.O. Box 329  
2640 E. Edison Avenue, Suite 1  
Sunnyside WA 98944



Telephone: (509) 839-3187

Facsimile: (509) 839-4481

8. **Limitation of Liability of Port.** The Port shall not be liable to the Contracted Industry for any damages or losses suffered by the Contracted Industry as a result of or in connection with:

- 8.1. The acts or omissions of Other Industries of the IWWTF;
- 8.2. Actions taken by any federal or state agency with regard to the operation of the IWWTF;
- 8.3. Any event or occurrence not reasonably foreseeable by the Port; or
- 8.4. Any operation of the IWWTF in accordance with reasonable and customary practices for industrial wastewater treatment facilities.

9. **Indemnification.** The Contracted Industry shall indemnify and hold harmless the Port, its Commissioners, employees, representatives, and other agents from and against any and all claims, actions, suits, and other legal proceedings, damages (including consequential damages) and from costs or expenses whatsoever (including, without limitation, interest, penalties, and reasonable attorneys' fees and legal costs) (collectively, "Losses") which the Port, its Commissioners, employees, representatives, and other agents may incur (or which may be claimed against the Port by any other person or entity whatsoever) arising out of or in connection with (i) the Contracted Industry's discharge of any wastewater or substance into the IWWTF in breach of this Contract, in violation of any applicable law or regulation governing the Contracted Industries discharges to the IWWTF, any interference (as defined in this Contract) with the IWWTF, or the Contracted Industry's Permit, or in connection with the enforcement by the Port of its rights hereunder (except to the extent directly and actually resulting from the willful misconduct of the Port). "Losses" shall include costs incurred by the Port in connection with prohibited discharges, as defined in Section 6.6 of this Contract, which includes but is not limited to removal of debris or obstruction from pipelines, pumping stations, sequencing batch reactors, lagoons and sprayfields; costs of repairs to Port facilities and equipment; any environmental cleanup costs; and any damages, fines, penalties, costs or expenses for which the Port may be obligated, including any consequential damages. Losses includes, without limitation, any fees or other charges from Ecology, or any other agency having jurisdiction over the Port, incurred by the Port if the Port reasonably believes that it is in the best interest of the IWWTF to discharge non-conforming effluent from the IWWTF in response to the Contracted Industry's discharge to the IWWTF. The Port shall not be liable, in any way or to any extent, for any failure by the Port to operate the IWWTF as a result of any governmental acts or any other cause beyond the control of the Port. Notwithstanding the foregoing, the Contracted Industry shall not be required to indemnify the Port in connection with this subsection, for any claims, damages, losses, liabilities, costs or expenses to the direct and actual extent, caused by the willful misconduct of the Port in the operation of the

IWWTF. Nothing in this Section is intended to limit, or shall limit, any obligation of the Contracted Industry to the Port, including without limitation the payment of the Termination Fee.

Upon demand by the Port, the Contracted Industry shall reimburse the Port for any reasonable legal or other expenses (including attorneys' fees) incurred in connection with investigating or defending against any of the foregoing. If any action, suit, or proceeding arising from any of the foregoing is brought against the Port, then the Contracted Industry, to the extent determined by the Port as necessary or advisable in order to protect the Port's rights hereunder, shall resist and defend such action, suit, or proceeding, or cause the same to be resisted and defended by counsel designated by the Contracted Industry (which counsel shall be satisfactory to the Port). The Port shall have the right to employ separate counsel if the Port determines in good faith that such counsel is necessary to protect its interest and to participate in the investigation and defense and, in such event, the fees and expenses of such counsel has been authorized by the Contracted Industry. The Contracted Industry shall not be liable for any settlement of any such action without its consent, but if any such action is settled with the consent of the Contracted Industry, or if there be final judgment against the Contracted Industry and/or the Port, then the Contracted Industry shall indemnify and hold harmless the Port from and against any losses by reason of such settlement or judgment.

10. **Remedies if the Contracted Industry Fails to Perform.** If the Contracted Industry fails to make any payment, or to perform any obligations, required of the Contracted Industry under the terms of this Contract, then the Port shall be entitled to exercise all rights and remedies allowed by law or equity including, without limitation, the following remedies, which may be cumulative:

10.1. **Collection Action.** The Port may commence legal action for the collection of past due payments or other obligations.

10.2. **Termination of Service.** The Port may refuse to accept wastewater from the Contracted Industry in the following manner.

10.2.1. If the Contracted Industry fails to pay any wastewater charges, or any other payments due from the Contracted Industry under this Contract, by the date such charges are due, then the Port may refuse to accept wastewater from the Contracted Industry upon the Port giving the Contracted Industry five (5) days written notice of the Port's intent to terminate service. Provided, however, that if the Contracted Industry's failure to pay relates solely to the indemnification provisions of this Contract, then the Port shall continue to accept wastewater from the Contracted Industry provided that the Contracted Industry tenders into a court having jurisdiction, or into an escrow account or other similar account approved by the Port, the amount of money claimed due and owing by the Port to be held until the indemnification dispute is resolved.

10.2.2. In the event of any other act or omission by the Contracted Industry which the Port determines to be an emergency circumstance, the Port may terminate service immediately following notice given by the Port to the Contracted Industry of its intent to discontinue service. Such notice may be given verbally in person or by telephone, facsimile, mail, personal delivery, or such other form appropriate under the circumstances. For this purpose of this Industry Contract, "emergency circumstance" shall include, without limitation, prohibited discharges by the Contracted Industry or discharges beyond the limits set forth in Schedule "A". Service shall be resumed upon the curing and resolution of the circumstance causing the termination of service.

10.2.3. The termination of service to the Contracted Industry shall not relieve the Contracted Industry of its obligation with regard to the Termination Fee pursuant to the terms and conditions of this Industry Contract.

10.3. **Security Deposit.** In the event the Contracted Industry fails to pay any charges due under this Industry Contract by its due date, then the Port may require a security deposit as a condition to continuation of service to the Contracted Industry. If the Port chooses to require a security deposit, then the Port shall review the Contracted Industry's monthly invoices for the previous twelve (12) months, and the security deposit may be up to an amount equal to the highest monthly invoice amount.

10.4. **Diversion of Discharges.** The Port may require the Contracted Industry to divert the discharge of all or a portion of its wastewater to a source other than the IWWTF upon notice by the Port to the Contracted Industry. Such notice may be given verbally in person or by telephone, facsimile, mail, personal delivery, or such other form appropriate under the circumstances.

10.5. **No Port Responsibility.** The Port shall not be liable or otherwise responsible to the Contracted Industry for any loss, costs, damages or other consequences to the Contracted Industry as a result of the Port properly exercising any one or more of its remedies set forth herein or provided by law or equity.

11. **Certificates Required by EDA Grant.** As a condition to discharging Industrial Wastewater to the IWWTF, the Contracted Industry shall sign and deliver to the Port such Certificates of Non-Relocation, form of action plans, or other civil rights forms as required by the EDA Financial Assistance Award.

12. **Severability.** If any term or provision of this Industry Contract shall be determined to be invalid, illegal or unenforceable, such determination shall not, in any way, affect the remaining provisions of this Industry Contract.

13. **Industry Contract Not Assignable.** This Industry Contract is the Contracted Industry, and its existing industrial use, and is not assignable to Other Industries or any other

person or entity, in whole or in part, without the prior written consent of the Port, which consent shall not be unreasonably withheld. The parties agree that an assignment to a successor-in-interest, or other person or entity utilizing the Contracted Industry's present facility is reasonable, provided that the wastewater discharge of the successor-in-interest is not greater than the demands set forth on the Contracted Industry's current Schedule "A", and further provided that the consent by the Port to such assignment shall not constitute a release of the Contracted Industry from any of its obligations contained in this Industry Contract. The Port agrees that its obligations under the terms of this Industry Contract are not subject to delegation to any other person without the approval of the Contracted Industry, which approval shall not be unreasonably withheld.

14. **Notice.** In the event of emergency circumstances, either party may give notice as circumstances reasonably require which may include verbal notice by telephone or in person, or written notice by facsimile transmission or as hereinafter provided. Otherwise, notices under this Industry Contract shall be in writing and may be delivered personally; (2) by U.S. mail, certified or registered; (3) by a nationally recognized overnight courier service; or (4) by facsimile transmission, if a facsimile number has been provided by the party receiving notice, with a copy to be sent by U.S. first class mail. Mailed notices shall be deemed effective on the third day after deposited as registered or certified mail, postage prepaid directed to the other party at the address shown above. Couried notices shall be deemed delivered when the courier's records indicate that delivery has occurred. Facsimile notices shall be effective when actually transmitted to the facsimile number provided. Either party may change its address for notices by written notice to the other. Notice to the Contracted Industry shall be addressed as follows:

DARIGOLD INC.  
Attn: General Counsel  
5601 6<sup>th</sup> Ave S. Suite #300  
Seattle, WA. 98108

Telephone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_

Notice to the Port shall be addressed as follows:

IWWTF, Supervisor  
Port of Sunnyside  
P.O. Box 329  
2640 E. Edison Avenue, Suite 1  
Sunnyside WA 98944  
Telephone: (509) 839-3187  
Facsimile: (509) 839-4481

15. **Interpretation and Fair Construction of Contract.** This Industry Contract has been reviewed and approved by each of the parties. In the event it should be determined that any



provision of this Industry Contract is uncertain or ambiguous, the language in all parts of this Industry Contract shall be in all cases construed as a whole according to its fair meaning and not strictly construed for nor against either party.

16. **Waiver of Breach.** The failure of any party hereto to insist upon strict performance of any of the covenants and agreements herein contained, or to exercise any option or right herein contained, in any one or more instances, shall not be construed to be a waiver or relinquishment of any such option or right, or of any other covenant or agreement, but the same shall be and remain in full force and effect.

17. **Governing Law.** This Industry Contract shall be governed by, construed, and enforced in accordance with the laws of the State of Washington. Venue for any action under this Industry Contract shall lie in the Superior Court of the State of Washington, Yakima County.

18. **Scope of Review.**

18.1. **Discretionary Acts.** The exercise of discretion by the Port in the establishment of any rates and/or other charges under this Industry Contract, and in the adoption of any regulations hereunder, shall be upheld so long as such exercise is not arbitrary or capricious.

18.2. **Expenditures for IWWTF Improvements and Design.** Deference shall be given to the Port in its decisions regarding the necessity for design and construction of the any IWWTF improvements, the replacement of equipment, fixtures or other improvements, and any additions to the IWWTF.

18.3. **Employment of Experts.** The Port may, but shall not be required to, employ such engineers, rate consultants, and accountants to provide it with guidance in the establishment of rates and charges from time to time, or in the design, construction and maintenance of the IWWTF.

19. **Dispute Resolution.** In the event of any disputes arising regarding the interpretation or enforcement of this Industry Contract, either party may require that such disputes be resolved as follows:

19.1. **Negotiation and Mediation.** The parties shall first attempt to resolve any disputes by good faith negotiations. If any disputes cannot be resolved by direct negotiations within fifteen (15) days or such longer time as is mutually agreed by the parties, then the parties shall submit such disputes to mediation, which shall focus on the needs of all concerned parties and seek to solve problems cooperatively, with an emphasis on dialogue and accommodation. The goal of the mediation shall be to fairly resolve each dispute in a manner which preserves and enhances the parties' relationships. Any party desiring mediation may begin the process by giving the other party a written request to mediate which describes the issues involved and invites the other party to join in naming a mutually agreeable mediator and setting a time frame for the



mediation meeting. The parties and the mediator may adopt any procedural format that seems appropriate for the particular dispute. The contents of all discussions during the mediation shall be confidential and non-discoverable in subsequent arbitration or litigation, if any. If the parties can agree upon a mutually acceptable resolution to the dispute, then it shall be reduced to writing, signed by the parties, and the dispute shall be deemed resolved. The costs of mediation shall be divided equally among the parties to the dispute.

19.2. **Failure of Mediation.** If any dispute cannot be resolved through mediation, or if any party refuses to mediate or to name a mutually acceptable mediator or establish a time frame for mediation within a period of time that is reasonable considering the urgency of the disputed matter, but not exceeding thirty (30) days, or fails to agree to procedures for the mediation, then any party who desires dispute resolution shall seek binding arbitration as hereinafter provided.


19.3. **Arbitration.** All disputes among the parties arising out of or related to this Industry Contract which have not been settled by mediation, and which one of the parties desires to be resolved by dispute resolution, shall be resolved by binding arbitration within Yakima County, Washington. Within twenty (20) days of receiving written demand for arbitration, the parties involved in the dispute shall attempt to reach agreement upon the selection of a qualified impartial arbitrator. If the parties cannot agree upon a mutually acceptable arbitrator within said twenty (20) days, then the party demanding arbitration may commence an action for the limited purpose of obtaining appointment of an arbitrator by the Superior Court of the State of Washington for Yakima County. Any arbitration shall be conducted in accordance with the rules of the American Arbitration Association then in effect, although the arbitration need not be conducted under the auspices of the Association. The substantially prevailing party at any such arbitration shall have the right to recover from the other party its reasonable expenses and attorneys' fees incurred at the arbitration or in any effort to have the award enforced. Any arbitration award may be enforced by judgment entered in the Superior Court of the State of Washington for Yakima County.

20. **Costs and Attorneys' Fees.** In the event of any dispute arising out of or relating to this Agreement, whether suit or other proceeding is commenced or not, and whether in mediation, arbitration, at trial, on appeal, in administrative proceedings or in bankruptcy (including without limitation any adversary proceeding or contested matter in any bankruptcy case), the prevailing party shall be entitled to its costs and expenses incurred, including reasonable attorneys' fees.

21. **Computation of Time.** Unless otherwise expressly specified herein, any period of time specified in this Agreement shall expire at 9:00 p.m. of the last calendar day of the specified period of time, unless the last day is Saturday, Sunday or a legal holiday, as prescribed in RCW 1.16.050, in which event the specified period of time shall expire at 9:00 p.m. of the next business day. Any specified period of seven (7) days or less shall include business days only.

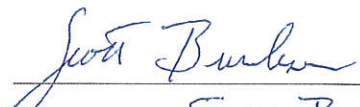
Port of Sunnyside

By:

  
Print Name: Jay Hester  
Title: Executive Director

Contracted Industry - DARIGOLD

By:

  
Print Name: Scott Burleson  
Title: Sr. VP Operations