

**WASTE HANDLING AGREEMENT**

Between

City of Portland

and

**ECO MAINE**

Dated as of July 1, 2006

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This Agreement is entered into in the State of Maine by and between the City of Portland, a body corporate pursuant to law (hereinafter referred to as the "MUNICIPALITY") and **ECO Maine** a Maine non-capital stock nonprofit corporation (hereinafter referred to as "ECO Maine").

WHEREAS, the MUNICIPALITY is required to provide facilities for the safe and efficient disposal of certain solid wastes generated within the MUNICIPALITY; and

WHEREAS, it is the policy of the State of Maine to promote and foster resource conservation and resource recovery from solid waste; and

WHEREAS, ECO Maine is willing and able to design, construct, operate and maintain (or to cause the design, construction, operation and maintenance of) a solid waste-to-energy facility; and

WHEREAS, ECO Maine is also willing and able to provide for the financing of and own the aforementioned facility.

NOW, THEREFORE, in consideration of the mutual covenants and obligations set forth herein, the parties hereby agree as follows:

## **Article I**

### **Definitions**

As used in this Agreement the following terms shall have the following meanings:

A. Acceptable Waste means ordinary household, municipal, institutional, commercial and industrial Solid Waste including, but not limited to, the following:

(1) Garbage, trash, rubbish, paper and cardboard, plastics, refuse, beds, mattresses, sofas, refrigerators, washing machines, bicycles, baby carriages and automobile or small vehicle tires, to the extent that ECO Maine determines that the air emission criteria and standards applicable to and at the Facility are not violated; and

- (2) Processible portions of commercial and industrial Solid Waste; and
- (3) Wood and lumber, tree limbs, branches, ties, logs and trees, if no more than four and one-half (4 1/2) feet long and eight (8) inches in diameter, and leaves, twigs, grass and plant cuttings, provided that the MUNICIPALITY shall not be obligated to deliver or cause to be delivered any items listed in this subpart (3) to the Facility, and further provided that such items may be delivered to the Facility by or on behalf of the MUNICIPALITY on an irregular basis only and shall represent an insignificant portion of the total Waste delivered to the Facility by or on behalf of the MUNICIPALITY within any Calendar Year.

Notwithstanding any provisions to the contrary, Unacceptable Waste, including Hazardous Waste, shall not be "Acceptable Waste" and is explicitly excluded therefrom. Furthermore, any substances which as of the date of this Agreement are included as "Acceptable Waste", but which are later determined to be harmful, toxic, dangerous or hazardous by any governmental agency or unit having appropriate jurisdiction, shall not be "Acceptable Waste" under the terms of this Agreement. However, any substances which as of the date of this Agreement are not included within the definition of "Acceptable Waste" because they are considered harmful, toxic, dangerous or hazardous and which are later determined not to be harmful, toxic, dangerous or hazardous by any governmental agency or unit having appropriate jurisdiction, shall be considered "Acceptable Waste" unless a contrary determination has been or is made by any other governmental agency or unit having appropriate jurisdiction or unless such substances are otherwise considered "Unacceptable Waste" or "Hazardous Waste."

B. Agreement means this Agreement, including any appendices incorporated herein and as it may be amended from time to time.

C. Bonds mean the bonds to be issued by ECO Maine or another entity from time to time to finance:

- (1) All or a portion of the cost of designing, constructing and installing all or any portion of the Facility; and

(2) Such additional amounts as may be required to pay any costs of issuance of the Bonds and interest on the Bonds and to fund any reserves required to be funded from Bond proceeds; provided that the Bonds include, but are not limited to, all other bonds now outstanding or hereafter issued pursuant to a Trust Indenture to be entered by ECO Maine, including, without limitation, bonds issued to refund in whole or in part any outstanding bonds of Regional Waste Systems, Inc. or to finance costs of acquisition of the Facility from Regional Waste Systems, Inc.

D. BTU means British Thermal Unit.

E. Business Day means each Monday, Tuesday, Wednesday, Thursday, Friday and Saturday which is not a Legal Holiday.

F. Calendar Year means a twelve (12) month period of Facility operations beginning on January 1 of each calendar year and ending on the following December 31.

G. Commencement Date of Operations means the date designated by ECO Maine in its sole discretion upon which Acceptable Waste shall be delivered at the Site by the MUNICIPALITY pursuant to this Agreement.

H. Credit Enhancement Provider shall have the meaning ascribed thereto in the trust indenture for the Bonds.

I. Delivery Hours means the period of hours on each Business Day set by ECO Maine during which Acceptable Waste may be delivered to the Facility. Delivery Hours may be suspended or modified by ECO Maine due to Shutdowns, hazardous conditions or lawful orders to do so.

J. ECO Maine means ECO Maine, a non-capital stock, non-profit corporation created pursuant to Title 30-A, Chapter 115; Title 13, Chapter 81; and Title 38, Section 1304-B of the Maine Revised Statutes, or any successor thereto or assignee thereof as permitted by this Agreement.

K. Facility means all buildings, equipment, installations and the like on the Site required for Handling Solid Waste and ancillary activities, including production and delivery of steam and electricity.

L. Fiscal Year means a one year period commencing on July 1 of each calendar year and ending on June 30 of the following calendar year.

M. Handle means to store, transfer, collect, separate, bale, salvage, process, reduce, recover, incinerate, treat or dispose of.

N. Hazardous Waste means Waste which by reason of its composition, characteristics or other inherent properties is dangerous to Handle by ordinary means, or which may present a substantial endangerment to health or safety, or which presents a reasonable possibility of adversely affecting the operation of the Facility. "Hazardous Waste" shall also mean Waste which is defined as harmful, toxic, dangerous or hazardous at any time during the term of this Agreement pursuant to (i) the Solid Waste Disposal Act, 42 U.S.C. §§6901 et seq., as amended; and (ii) the Maine Hazardous Waste, Septage and Solid Waste Act, 38 M.R.S.A. 591301 et seq., as amended; and (iii) any other Federal, State, county or local codes, statutes or laws; and (iv) any regulations, orders or other actions promulgated or taken with respect to the items listed in (i) through (iii) above; provided, however, that any such materials which are later determined not to be harmful, toxic, dangerous or hazardous by any governmental agency or unit having appropriate jurisdiction shall not be considered "Hazardous Waste" unless a contrary determination has been or is made by any other governmental agency or unit having appropriate jurisdiction.

O. Landfill means any landfill designated by ECO Maine from time to time.

P. Legal Holiday shall mean a day designated as a legal holiday pursuant to Section 1051, Title 4, Maine Revised Statutes, or such other day as may be so designated by ECO Maine.

Q. Member Municipality shall mean any municipality which is a member of ECO Maine.

R. Operator means the company, companies or any other entity with which ECO Maine may from time to time contract or agree to operate the Facility, or, in the absence of any such Operator, ECO Maine.

S. Pit means the storage area or areas at the Facility from which Acceptable Waste will be extracted for disposal, baling or other Handling.

T. Processed Waste means the Waste that is actually delivered to the Facility by or on behalf of the MUNICIPALITY and which is removed from the delivery vehicle or container or which is otherwise accepted for Handling at the Facility.

U. Recyclable Waste shall mean newsprint, glass, metal cans, bottles and other materials being recycled by the MUNICIPALITY as of the date of this Agreement, which is acceptable waste and from which resources other than energy may be recovered by the MUNICIPALITY.

V. Recycle means to recover resources other than energy from Recyclable Waste.

W. Residue means by-products of the Handling of Processed Waste that are not themselves Hazardous Wastes. Such by-products may include, but are not limited to, ash, process rejects, oversized and bulky Wastes and unprocessable Wastes.

X. Returned Waste means Waste that is actually delivered to the Facility by or on behalf of the MUNICIPALITY, but which is not removed from the delivery vehicle or container or is otherwise not accepted for Handling at the Facility.

Y. Shutdown means a full or partial cessation of operation of the System.

Z. Site means any property wherever located as designated from time to time by ECO Maine or its assignee by written notice to the MUNICIPALITY.

AA. Solid Waste means useless, unwanted or discarded solid material with insufficient liquid content to be free flowing. "Solid Waste" includes, but is not limited to, rubbish, garbage, scrap materials, junk, refuse, inert fill material and landscape refuse. "Solid Waste" shall in no case include sludges from air or water pollution control facilities, septic tank sludge or agricultural wastes.

BB. System means the Facility, Landfill, and any ancillary facilities, whether or not owned or operated by ECO Maine, necessary or appropriate for Handling Solid Waste on the Site or elsewhere, including Handling pursuant to contracts with other persons or entities.

CC. Tipping Fee means the payments required to be made by the MUNICIPALITY to ECO Maine for the Handling of Acceptable Waste received at the Facility.

DD. Ton means a quantity of 2,000 pounds.

EE. Unacceptable Waste means that portion of Solid Waste which is not Acceptable Waste and includes, but is not limited to, sewage and its derivatives, construction and demolition debris, special nuclear or by-product materials within the meaning of the Atomic Energy Act of 1954, as amended, and Hazardous Waste.

FF. Waste means items, materials or substances delivered to the Facility by the MUNICIPALITY, its employees, agents or contractors.

## **Article II**

### Representations, Warranties and Covenants

A. ECO Maine warrants and represents to the MUNICIPALITY the following:

(1) It is a non-capital stock, non-profit corporation duly organized and validly existing under the laws of the State of Maine in good standing, and authorized to do business under the laws of the State of Maine and that it has full power and authority to execute and to enter into this Agreement and is qualified to perform this Agreement in accordance with its terms.

(2) The execution and delivery of this Agreement has been duly authorized by all appropriate actions of ECO Maine and its Board of Directors, and this Agreement constitutes the legal, valid and binding obligation of ECO Maine enforceable in accordance with its terms (except as enforceability may be limited by applicable bankruptcy or similar laws affecting creditors' rights, and by application of equitable principles if equitable remedies are sought).

(3) The execution, delivery and performance of this Agreement will not violate any provision of law, any order of any court or other agency of government, ECO Maine's by-laws or recording certificate, or any indenture,



material agreement or other instrument to which ECO Maine is now a party or by which it or any of its properties or assets is bound, or be in conflict with, result in a breach of or constitute a default (with due notice or the passage of time or both) under any such indenture, agreement or other instrument, or result in the creation or imposition of any lien, charge or encumbrance of any nature whatsoever upon any of the properties or assets of ECO Maine.

B. The MUNICIPALITY warrants and represents to ECO Maine each of the following:

(1) The execution and delivery of this Agreement has been duly authorized by all appropriate actions of its governing body, this Agreement has been executed and delivered by an authorized officer of the MUNICIPALITY, and this Agreement constitutes the legal, valid and binding obligation of the MUNICIPALITY enforceable upon it in accordance with its terms (except as enforceability may be limited by applicable bankruptcy or similar laws affecting creditors' rights, and by application of equitable principles if equitable remedies are sought).

**Article III**  
**RESERVED**

**Article IV**  
Operation of the System

A. ECO Maine shall, on and after Commencement Date of Operations, except as otherwise expressly provided for herein, operate, maintain and administer the System, or shall cause the System to be so operated, maintained, and administered, as to be capable of Handling Acceptable Waste from the MUNICIPALITY.

B. ECO Maine shall be solely responsible for and exclusively entitled to the benefits of any Acceptable Waste deposited at the Facility.

C. ECO Maine shall be responsible for Handling of all Residue generated by the Facility and for Handling Acceptable Waste delivered to the Facility during any period of Shutdown.

## Article V

### Delivery of Waste to the Facility

A. On or after the Commencement Date of Operations the MUNICIPALITY will cause to be delivered to the Facility all Acceptable Waste collected by it and all other Acceptable Waste generated within the MUNICIPALITY except for Acceptable Waste generated in areas listed in any applicable Appendix hereto. The MUNICIPALITY will adopt reasonable measures to prevent the delivery of Unacceptable Waste to the Facility.

B. Notwithstanding any other provisions of this Agreement to the contrary, the MUNICIPALITY shall have no obligation to deliver Recyclable Waste generated within the MUNICIPALITY to the Facility and of such types which as of the date of this Agreement is actually being recycled. The MUNICIPALITY shall be obliged to deliver all other Recyclable Waste generated within the MUNICIPALITY to the Facility unless ECO Maine consents to allow the MUNICIPALITY to retain additional types of Waste for Recycling.

C. ECO Maine shall give the MUNICIPALITY seven (7) days advance notice of the Commencement Date of Operations. However, ECO Maine's failure to give such advance notice shall not constitute a breach or default under the terms of this Agreement, but shall merely delay the MUNICIPALITY's obligation to deliver Acceptable Waste to the Facility until seven (7) days after the earlier of the date on which ECO Maine gives notice to the MUNICIPALITY of the Commencement Date of Operations or the MUNICIPALITY receives actual knowledge of the Commencement Date of Operations.

D. **RESERVED.**

E. Upon Commencement Date of Operations (or upon such later date as provided in Section C above), the MUNICIPALITY is unconditionally required and obligated hereunder, whether or not the Facility is operational and whether or not there

is any breach or default by ECO Maine of its obligations hereunder, to deliver Acceptable Waste to the Site and, upon acceptance by ECO Maine, to pay a Tipping Fee therefore in accordance with this Agreement without any offset, deduction or setoff whatsoever in an amount which, together with other revenues received by ECO Maine from operation of the System, are sufficient to pay the "total cost of the System" as defined in Article VII hereof, and thereafter ECO Maine shall be obligated to handle such waste as provided herein.

F. ECO Maine and the MUNICIPALITY acknowledge that the MUNICIPALITY has been and may continue to be party to a Waste Handling Agreement with Regional Waste Systems, Inc. dated as of July 1, 1986 (the "RWS Waste Handling Agreement"). As long as the RWS Waste Handling Agreement is in effect, any Acceptable Waste delivered by the MUNICIPALITY pursuant to the provisions of the RWS Waste Handling Agreement shall be deemed to have been delivered to the Facility for purposes of this Agreement.

## **Article VI**

### Delivery Procedures and Weighing

A. All deliveries of Acceptable Waste to the Facility by or on behalf of the MUNICIPALITY shall be made during Delivery Hours and ECO Maine or the Operator may reject any Acceptable Waste delivered at hours other than Delivery Hours. ECO Maine or the Operator may also reject delivery of Unacceptable Waste. Except as otherwise provided herein, ECO Maine shall keep the Facility open for receipt of Acceptable Waste during Delivery Hours.

B. ECO Maine shall provide the MUNICIPALITY with a description of the type of vehicles which will or will not be accepted for use in delivering Waste to the Facility. The MUNICIPALITY shall cause all equipment and vehicles delivering Waste to the Facility to bear an ECO Maine identification conspicuously displayed on the exterior of the vehicle in a location designated by ECO Maine and reasonably visible to

personnel at the scale house at the Facility. Said identification shall be in such form as ECO Maine may from time to time reasonably designate.

C. ECO Maine shall maintain or shall cause the Operator to maintain weighing facilities at the Facility for the purpose of determining the total Tonnage of Acceptable Waste delivered to the Facility by or on behalf of the MUNICIPALITY. Each vehicle delivering Waste to the Facility shall be weighed in and weighed out. ECO Maine shall maintain or cause the Operator to maintain a weight record containing the weight, date, time and vehicle identification of each vehicle entering and exiting the Facility. ECO Maine shall maintain or cause the Operator to maintain copies of all weight records for a period of at least two years. The MUNICIPALITY shall have the right to inspect the weight records upon reasonable advance notice.

D. ECO Maine or the Operator shall estimate the quantity of Waste and Acceptable Waste delivered to the Facility during any time that all weighing facilities are incapacitated, being tested or are otherwise not available for use, on the basis of vehicle volumes and estimated data obtained from historical information pertinent to the MUNICIPALITY. These estimates shall take the place of actual weighing records during such times.

E. Waste which is delivered to the Facility and which is not rejected by ECO Maine or the Operator shall be deposited at the Pit. No Waste may be stored outside the Facility buildings except during an emergency and then only if applicable environmental, safety and aesthetic requirements are satisfied. Title to all Waste shall pass to the Operator when such Waste is deposited at the Pit.

F. Neither ECO Maine, the Operator or the MUNICIPALITY shall knowingly permit deliveries of Hazardous Waste to the Facility.

G. The MUNICIPALITY shall pay all costs related to Handling of Unacceptable Waste delivered to the Facility by the MUNICIPALITY, its employees, agents, or contractors, provided that the MUNICIPALITY shall not be obligated to pay costs related to Handling of Unacceptable Waste generated within the MUNICIPALITY

but not delivered to the Facility by the MUNICIPALITY, its employees, agents or contractors.

## **Article VII**

### Calculation and Payment of Tipping Fee

A. The MUNICIPALITY agrees to pay ECO Maine a Tipping Fee as calculated herein for each Ton of Waste deposited at the Pit by the MUNICIPALITY, its employees, agents or contractors. The Tipping Fee for each Fiscal Year shall be calculated by:

(1) Calculating the "total cost of the System" of the previous Fiscal Year; and

(2) Subtracting from the aforesaid "total cost of the System" all revenues received by ECO Maine from the operation of the System during the previous Fiscal Year, from any source other than Tipping Fees received from Member Municipalities or any agency, instrumentality or subdivision thereof; and

(3) Dividing the resulting amount by the number of Tons of Waste deposited at the Pit during the previous Fiscal Year, by Member Municipalities, or any agency, instrumentality or subdivision thereof for which a Tipping Fee may be charged.

Until the Facility has been operational for at least a full year period following the Commencement Date of Operations, any Tipping Fee shall be calculated based upon estimated costs, revenues and waste deposits.

B. As used herein, the "total cost of the System" for any Fiscal Year shall mean all expenses associated with the System during that year and shall include, but not be limited to:

(1) The current expenses of operating, maintaining and managing the System, including transportation and other ancillary costs;

(2) Payments of principal, premium, interest penalties and other charges on all bonds, notes and other obligations issued by ECO Maine including any

amount owing to the issuer of a credit or liquidity facility provided in connection with said bonds, notes and other obligations as such bonds, notes and other obligations become due or upon an accelerated basis;

(3) The creation and maintenance of such reserves sufficient to provide funds available for debt service equal to 125% of expected debt service, or as may be required by any trust agreement or resolution securing bonds, notes and other obligations of ECO Maine, or as may be deemed necessary by ECO Maine for any reasonable contingency;

(4) The provision of funds for paying the cost of all necessary repairs, replacements and renewals of the System;

(5) Payment or provisions for any and all amounts which ECO Maine may be obligated to pay or provide for by law or contract, including any resolution or contract with or for the benefit of the holders of its bonds, notes and other obligations and for the benefit of the issues of a credit or liquidity facility provided in connection with said bonds, notes and other obligations;

(6) Any deficit or anticipated deficit for the current year's operation, including any deficit resulting from the failure of a Member Municipality or any other person or entity to pay Tipping Fees when due and owed; and

(7) Payments in lieu of taxes to Member Municipalities where all or a portion of the System is located.

C. On or before July 15 of each year following the Commencement Date of Operations, ECO Maine shall adopt a final budget for operation and maintenance of the System for the ensuing Fiscal Year which shall include an estimate of the total Tipping Fee to be paid by the MUNICIPALITY during the ensuing Fiscal Year based on the actual Tonnage of Waste deposited at the Facility by the MUNICIPALITY during the previous Fiscal Year and upon the Tipping Fee for the Fiscal Year as calculated in Section A of this Article. The MUNICIPALITY shall pay not later than the 15th day of each following month an amount of money which shall equal 1/12th of the estimated total Tipping Fee to be paid by the MUNICIPALITY during the Fiscal Year.

D. At least 90 days prior to the Commencement Date of Operations ECO Maine shall submit to the MUNICIPALITY an itemized estimate of the expenditures, anticipated revenues and anticipated waste deposits of the Facility during the period beginning on the Commencement Date of Operations and ending on the following June 30<sup>th</sup>. On or before the Commencement Date of Operations ECO Maine shall adopt a final budget for the operation, maintenance and administration of the System for this period and submit such budget forthwith to the MUNICIPALITY. On or before the 15<sup>th</sup> day of each month following Commencement Date of Operations, the MUNICIPALITY shall pay ECO Maine an amount of money equal to the pro rata portion of the estimated total Tipping Fee to be paid by the MUNICIPALITY through the beginning of the next Fiscal Year.

E. The Tipping Fee shall be adjusted during any Fiscal Year to reflect substantial and unanticipated increases in costs, decreases in revenues or changes in waste deposited at the Facility, provided that the MUNICIPALITY shall receive 30 days prior notice of any adjustment of the Tipping Fee. Any such adjustments shall be made using the calculation method set forth in Section A of this Article, including such increases in costs, decreases in revenues, and changes in Waste deposited at the Facility. If (a) ECO Maine gives written notice to the MUNICIPALITY either (i) that in the judgment of ECO Maine that any liabilities or expenses (including but not limited to any amounts due on or in connection with any Bonds of ECO Maine or under any agreement with any Credit Enhancement Provider and any amounts necessary to provide adequate reserves) cannot be paid when due, or (ii) that any such liabilities and expenses have not been paid when due; and (b) ECO Maine has not obtained other sources of funds or revenues to pay such liabilities and expenses, then the Tipping Fee shall be increased by such amount as determined in accordance with Section A of this Article, including such increases in costs, decreases in revenues and changes in waste deposited at the site.

The Tipping Fee shall also be adjusted (in accordance with the calculation method set forth in Article VII (A)) at least once every 6 months of each year during that portion of the term of this agreement that any policy of bond insurance is in effect or any

agreement between and any bond insurer is in effect with respect to any of the Bonds, provided, however, that in lieu of adjusting the Tipping Fee with respect to any increased operating expenses during any Fiscal Year, ECO Maine may obtain short-term (less than one year) interim financing.

F. The MUNICIPALITY pledges its full faith and credit for the payment of fees, assessments and other payments required of it under this Agreement, including, but not limited to, payments required under this Article, and to levy upon and raise from taxable estates within the MUNICIPALITY by general or special tax the amounts required to make such payments, or to raise such amounts by means of a fee, user charge or other cost sharing or assessment mechanism.

**Article VIII**  
**RESERVED**

**Article IX**  
**Damage Or Destruction**

If the System or any substantial portion thereof is damaged or destroyed to an extent that it cannot function-as contemplated by the parties, by fire, the elements or other casualty, then ECO Maine shall restore, repair and reconstruct the System to the best of its ability. If restoration, repair or reconstruction is impractical, then ECO Maine may terminate this Agreement by written notice to the MUNICIPALITY within one-hundred twenty (120) days after the date of damage or destruction, provided that whether restoration, repair or reconstruction is impractical shall be determined by ECO Maine and further provided that this Agreement may be terminated pursuant to the terms of this Article only after the Bonds have been paid or defeased in full and any amounts owing to any Credit Enhancement Provider for the Bonds has been paid. This Agreement will terminate thirty (30) days after the date of such notice and the parties shall have no further obligations hereunder, except for payment of all amounts then due and owing.



## Article X

### Term of Agreement

A. This Agreement shall remain in effect as long as the ECO Maine Interlocal Solid Waste Agreement remains in full force and effect and the MUNICIPALITY has not withdrawn from said Agreement in accordance with the provisions thereof, except that, notwithstanding any provision to the contrary, this Agreement shall remain in effect until the Bonds have been paid or defeased in full and any amounts owing to any Credit Enhancement Provider have been paid.

B. **RESERVED**

C. If ECO Maine shall propose to continue to operate the Facility beyond the term hereof, ECO Maine shall so advise the MUNICIPALITY, and if the MUNICIPALITY so agrees, the MUNICIPALITY shall then have the right to continue delivering Acceptable Waste to the Facility on terms no less favorable than those then accorded other Member Municipalities. The MUNICIPALITY may elect to exercise such right by providing ECO Maine with written notice of this election on the later of the date sixty (60) days after the date on which ECO Maine informs the MUNICIPALITY of its intent to continue to operate the Facility or one hundred eighty (180) days before the end of the term of this Agreement. However, the MUNICIPALITY shall have no right to make such election unless it is a Member Municipality as of the date the election is made. The MUNICIPALITY agrees that it shall execute all documents and take whatever other actions are necessary to effectuate such election and the failure of the MUNICIPALITY to do so by at least 10 days after the election is made shall void that election.

D. Neither ECO Maine nor the MUNICIPALITY has the right to terminate this Agreement prior to the time provided in this Article for any reason whatsoever, including without limitation, by reason of the default, continuing or persistent default or non-performance of either party hereunder, the withdrawal of any Member Municipality

from the Interlocal Agreement or the termination or dissolution of the Interlocal Agreement.

## **Article XI**

### Remedies for Nonperformance

A. If at any time subsequent to Commencement Date of Operations, the MUNICIPALITY delivers Acceptable Waste to the Facility which is required to be accepted by ECO Maine pursuant to this Agreement, and ECO Maine fails to accept such Acceptable Waste, then ECO Maine shall be liable to pay to the MUNICIPALITY the reasonable cost which the MUNICIPALITY had to pay for disposing of the Acceptable Waste which ECO Maine did not accept. ECO Maine shall pay such costs within forty five (45) days of receipt of an itemized bill from the MUNICIPALITY.

B. The parties agree and acknowledge that because of the unique nature of the Facility it is difficult or impossible to determine with precision the amount of damages that would or might be incurred as a result of a failure of the MUNICIPALITY to deliver or cause to be delivered all Acceptable Waste generated in the MUNICIPALITY to the Facility, except as otherwise provided in Article V of this Agreement. Accordingly, the parties agree and acknowledge that where ECO Maine has an adequate remedy at law for such a breach, then the damages to be awarded shall be liquidated damages in an amount equal to one hundred twenty-five percent (125%) of the Tipping Fee which is in effect for the period of breach times the estimated number of Tons of Acceptable Waste which was not delivered to the Facility as a result of such breach. Such number of tons will be estimated on a monthly basis by:

(1) Calculating the number of tons of Acceptable Waste generated in the MUNICIPALITY and delivered to the Facility in the calendar month prior to the commencement of the breach; and

(2) Adjusting the above number of tons for any monthly or seasonal variation in delivery which has occurred in the previous two calendar years; and

(3) Subtracting from the resulting figure the number of tons of Acceptable Waste generated in the MUNICIPALITY and actually delivered to the Facility during each month in which the breach occurs.

Where historical data does not exist sufficient to allow calculation of the estimated number of tons of Acceptable Waste which was not delivered to the Facility as the result of such breach, then that number of tons shall be estimated by ECO Maine in any reasonable manner available.

C. Either party may take whatever reasonable action may be necessary or desirable to collect the payments and other amounts due as provided in this Agreement, or to enforce performance and observance of any obligation, agreement or covenant under this Agreement provided that neither party may terminate this Agreement for nonperformance.

D. Each party agrees that if either party incurs attorneys' fees or other expenses in the enforcement of its rights under this Agreement, then the prevailing party shall be reimbursed by the other party for all such fees and expenses incurred, including court costs, if any.

E. In the event any agreement or covenant contained in this Agreement should be breached by one party and thereafter waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder.

## **Article XII**

### Assignment/Delegation

A. This Agreement shall not be assigned or delegated by any party without the prior written consent of the other party except that without such consent ECO Maine may assign its interest and obligation hereunder to a person, firm or corporation acquiring all or substantially all of the business and assets of ECO Maine by transfer of assets or otherwise.

B. Notwithstanding any other provisions of this Agreement, ECO Maine may enter into contracts or agreements with an Operator or Operators concerning the maintenance and/or operation of the System.

C. Anything to the contrary notwithstanding, the MUNICIPALITY consents to ECO Maine entering into an indenture of trust or mortgage of the Facility with a third party trustee for the purposes of obtaining bond financing and into other loan agreements for the purposes of obtaining conventional or bond financing (which may include agreements with Credit Enhancement Provider in connection with such financing), with the acknowledgement that under such financing agreements ECO Maine may be required to pledge and assign its rights in and to the Facility, and its contractual rights in and to the Facility, and its contractual rights under this Agreement to the trustee or other lender or Credit Enhancement Provider as security for its debt obligations in event of default.

D. Anything to the contrary notwithstanding, the MUNICIPALITY consents to the assignment of this Agreement or the revenues thereof by ECO Maine to the Trustee and/or any Credit Enhancement Provider and/or to any other third-party trustee in connection with bond financing and other loan agreements for the purposes of obtaining financing (which may include agreements with Credit Enhancement Providers in connection with such financing) as security for its obligations in event of default.

The MUNICIPALITY consents to the assignment of this Agreement to such parties including the Trustee and any Credit Enhancement Provider(s) (hereinafter collectively called the "Assignee") providing financing or Credit Enhancement, as defined in the trust indenture for the Bonds, for or with respect to the Facility, Site, or System or any portions thereof. In the event of any such assignment, the following provisions shall apply to the extent, if any, now or hereafter required under any agreement(s) between ECO Maine and the Trustee and/or any Credit Enhancement Provider:

(1) There shall be no cancellation, surrender, termination, amendment or modification of this Agreement or the Interlocal Agreement by joint action of

ECO Maine and the MUNICIPALITY without the prior written consent of the Assignee.

(2) The MUNICIPALITY will mail to each Assignee by certified mail, return receipt requested, at such address as specified by the Assignee, copies of all notices which the MUNICIPALITY may from time to time serve ECO Maine or any successors, simultaneously therewith.

(3) In the event that the Assignee gives written notice to the MUNICIPALITY that ECO Maine is in default under any of the Bonds, or under any agreement with any Credit Enhancement Provider, then the MUNICIPALITY shall make all payments due hereunder and under the Interlocal Agreement directly to the Assignee, and shall deliver Acceptable Waste to the Site as designated thereafter from time to time by the Assignee. Following any such notice of default and unless and until the MUNICIPALITY receives notice from the Assignee to the contrary, the Assignee shall have the right to determine the amounts due under Article VII and Article VIII hereof, to designate the location(s) of the Site, to exercise all other rights of ECO Maine hereunder, and to take such other actions as provided in any agreement between any Assignee and ECO Maine.

(4) No waiver by ECO Maine of any of the obligations of the MUNICIPALITY hereunder or under the Interlocal Agreement, and no consent or election made by ECO Maine or the MUNICIPALITY hereunder or under the Interlocal Agreement and no purported termination of this Agreement by ECO Maine or the MUNICIPALITY shall be effective against the Assignee without the prior written consent of the Assignee.

(5) No Assignee shall have any obligation to perform the obligations of ECO Maine hereunder or under the Interlocal Agreement unless such obligations are expressly assumed in writing by the Assignee. The Assignee may, but shall not be obligated to, cure any default of ECO Maine under this Agreement.

### **Article XIII**

#### Insurance

To the extent practicable and financially feasible as determined by ECO Maine in its sole discretion, ECO Maine shall obtain and maintain or cause to be obtained and maintained, with financially sound and reputable insurers, insurance with respect to the Facility, and against such liabilities, casualties, business interruptions and contingencies and of such types and in such amounts as shall be deemed by ECO Maine to be customary in the case of municipal organizations engaged in the same or similar activities or having similar properties similarly situated.

### **Article XIV**

#### Non-Discrimination

ECO Maine shall be an equal opportunity and affirmative action employer, and it shall not discriminate on the basis of age, race, religion, color, creed, sex, sexual preference, handicap, financial status, or national origin:

- A. In the persons served, or in the manner of service; or
- B. In the hiring, assignment, promotion, salary determination, or other conditions of employment.

### **Article XV**

#### Applicable Law

The laws of the State of Maine shall govern the validity, interpretation, construction and performance hereof.

### **Article XVI**

#### Amendment Of Agreement

No amendments to this Agreement may be made except in writing signed by both parties. Should this Agreement be assigned under financing arrangements, the written consent of such assignee shall also be required before any amendment becomes effective.

## **Article XVII**

### Severability

In the event any covenant, condition or provision of this Agreement is held to be invalid or unenforceable by a final judgment of a Court of competent jurisdiction, or by any other tribunal, board or other entity, the decision of which is binding upon the parties and which becomes final, the invalidity or unenforceability thereof shall in no way affect any of the other covenants, conditions or provisions hereof, provided that such remaining covenants, conditions and provisions can thereafter be applicable and effective without materially changing the obligations of either party.

## **Article XVIII**

### Notices

All notices herein required or permitted to be given or furnished under this Agreement by either party to the other shall be in writing, and shall be deemed sufficiently given and served upon the other party if sent by certified or registered mail, return receipt requested, postage prepaid, addressed as follows:

If to ECO Maine:	General Manager ECO Maine 64 Blueberry Road Portland, Maine 04102
With a copy to:	Nicholas S. Nadzo, Esq. Jensen Baird Gardner & Henry Ten Free Street, P.O. Box 4510 Portland, ME 04112
If to MUNICIPALITY:	Executive Legal Assistant Theresa Bourgoin Office of Corporation Council 389 Congress Street Portland, ME 04101

Each party shall have the right, from time to time, to designate a different person and/or address by notice given in conformity with this section.

Notice shall be deemed given when mailed and shall also be deemed sufficient hereunder if delivered in person or if mailed by ordinary, first class mail, postage prepaid.

#### **Article XIX**

##### Binding Effect

The Agreement shall bind upon and inure to the benefit of the parties hereto and their respective successors and assigns.

#### **Article XX**

##### Other Documents

Each party promises and agrees to execute and deliver any instruments and to perform any acts which may be necessary or reasonably required in order to give full effect hereto.

#### **Article XXI**

##### Headings

Captions and headings herein are for ease of reference and do not constitute a part of this Agreement.

#### **Article XXII**

##### Counterparts

This Agreement may be executed in more than one counterpart, each of which shall be deemed an original and all of which together shall constitute the same agreement.



**Article XXIII**

Integration

This instrument (including all appendices and attachments hereto) embodies the whole agreement of the parties, and there are no promises, terms, conditions or obligations other than those contained herein provided that if the MUNICIPALITY is a member of ECO Maine, the provisions of the ECO Maine Interlocal Solid Waste Agreement shall be binding upon the parties except that in the event any such provisions shall be found to be inconsistent with this Agreement, this Agreement shall control. Except as otherwise provided in this Article, this Agreement shall supersede all previous communications, representations or agreements, either oral or written, between the parties hereto. In the event that the requirements of any Article of this Agreement shall be found to be inconsistent with those of any Appendix, the Article shall control.

**Article XXIV**

Consents

To the extent that the consent of either party to this Agreement is required to any action of the other party pursuant to any provision of this Agreement, such consent will not be unreasonably withheld.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement to be effective as of the 1st day of July 2006.

Witness:

Sonia Brea

City of Portland:

By: Joseph E. King

Its: City Manager

[Signature]

**ECO MAINE**

By: Jeffery Jordan

Its: President