



PORT GARDNER BAY OUTFALL REPLACEMENT
AGREEMENT

CITY OF EVERETT

Washington

49.5%

And

*KIMBERLY-CLARK TISSUE
COMPANY*

50.5%

BUILD, OWN, OPERATE

6/2/99

MIN CAPACITY = 64 MGD

TERM = 50 YRS. + 5

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Port Gardner Bay Outfall Replacement Agreement

This Agreement is made and executed as of this 21 day of June, 1999, by and between the City of Everett ("City"), a municipal corporation of the State of Washington, and Kimberly-Clark Tissue Company ("K-C"), a corporation duly organized and existing under the laws of Pennsylvania, collectively the "Participants."

1. RECITALS AND PURPOSE

- 1.1 The K-C Mill needs to replace and upgrade its existing forty-six year old deep water effluent Outfall and desires to minimize future discharges to the inner harbor and nearshore environment of Port Gardner Bay; and
- 1.2 K-C proposes to install pollution control and water conservation facilities at its pulp and paper mill; and
- 1.3 The City's Public Works Department requires improvements to its sewage treatment system to minimize future discharges from the POTW into the Snohomish River and Estuary; and
- 1.4 Pursuant to the MOU, the City and K-C agreed to examine the feasibility of K-C constructing a deep water Outfall in Port Gardner Bay to replace K-C's existing Outfall and to convey, pump and discharge effluent from both the K-C Mill and from the City's POTW, including POTW effluent used for non-contact cooling water at the K-C Mill; and
- 1.5 The MOU contemplated that ~~K-C will construct, own and operate~~ the Joint Use Facilities, and that the City and K-C will jointly have rights to the use of these facilities through this Agreement; and
- 1.6 As contemplated by the MOU, K-C and the City considered feasibility studies, including a project engineering report; and
- 1.7 K-C desires to construct and operate the Joint Use Facilities; and

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1.8 K-C desires to sell, and the City desires to purchase, forty-nine and one-half percent (49.5%) of the Capacity of the Joint Use Facilities to serve current and projected future public needs and effluent discharge from the POTW; and

1.9 The City has experience in successful construction and operation of outfalls for wastewater effluent and stormwater and has the right under this Agreement to complete the construction of, or subsequently to assume operational control over, the Port Gardner Bay Outfall, should K-C or any successor interest be unable or unwilling to do so; and

1.10 The Agreement further minimizes risks to the City, including requiring agreement on a Construction Budget and prior agreement on any substantial cost increases and by providing for a management coordination and policy oversight committee to ensure accountability by K-C during construction and operation of the Joint Use Facilities; and

1.11 For purposes of RCW Chap. 30.04, the project consists of the construction of the Port Gardner Outfall Replacement Project (Joint Use Facilities); and

1.12 The municipal water quality, industrial, shorelands, and other sections of the State of Washington Department of Ecology have expressed support for the concept, and concurred with the City serving as lead agency under SEPA; and

1.13 K-C and the City have consulted with other governmental bodies and the public before entering into this Agreement to proceed with the further design and construction of the Joint Use Facilities; and

1.14 The development of independent facilities by the Participants would result in unnecessary additional costs to the public, wasteful duplication, and additional environmental impacts; and

1.15 The completed Joint Use Facilities will provide significant benefits to the City and to the environment, including protection of habitat used by salmon and other species, improvement of

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water quality, prevention of pollution, conservation of water, avoidance or mitigation of the impacts on environments from the discharge of treated industrial and municipal effluent and multiple construction projects in the aquatic environment, and reduction of the cost to both parties of necessary capital improvements by avoidance of duplicate engineering, construction and operating expenditures; and

1.16 The proposed project is consistent with and implements previously-approved functions and programs of the City, including the City's updated Comprehensive Plan Capital Facilities Element, Capital Improvement Program, and Comprehensive Sewer Plan, which identified the project as the preferred alternative and includes funds in the current six-year capital program as described in Ordinance No. 2379-99 for the City to utilize the replacement outfall planned for construction by Kimberly-Clark; and

1.17 The above City plans and programs have been the subject of prior SEPA compliance, including public and interagency notice and opportunity to comment, which appeal periods have expired, and the Use Agreement provides for appropriate subsequent site specific SEPA review as part of the project permitting process; and

1.18 The City and K-C are hereby committed to making expenditures necessary to fulfill the purposes of this Agreement in a timely manner through their respective appropriation procedures; and

1.19 The City has the authority to contract for, and purchase, facilities to dispose of treated wastewater and sewage pursuant to RCW 39.04.280 (1998); RCW 35.21.210 (1965); RCW 35.21.215 (1997); RCW 35.67.010 (1997) and RCW 35.67.020 (1997).

NOW, THEREFORE, IN CONSIDERATION OF THE RECITALS ABOVE AND THE COVENANTS AND PROMISES SET FORTH HEREIN, THE PARTIES AGREE AS FOLLOWS:

2. CONSTRUCTION OF JOINT USE FACILITIES

K-C agrees to construct the Joint Use Facilities in substantial conformity with the Preliminary Design, as accepted by the PRT, so that such facilities will be available for the City's use on or before the Completion Date

3. PURCHASE

The City agrees to purchase and K-C agrees to sell forty-nine and one-half percent (49.5%) of the Capacity of the Joint Use Facilities, including, but not limited to, the right and ability to operate the Joint Use Facilities in certain events as provided below, and the right to 49.5% of the Capacity of the Joint Use Facilities, which Capacity shall be not less than approximately sixty-four million gallons per day (64 mgd).

4. PRICE

The City shall pay K-C a total sum equal to forty-nine and one-half percent (49.5%) of the Joint Use Facilities Cost.

5. PAYMENT TERMS

5.1 Prior to issuance by K-C of a notice to proceed to the Construction Contractor for the Joint Use Facilities, K-C may invoice the City on a monthly basis an amount equal to 49.5% of total actual expenses incurred by K-C related to the permitting, procurement, design, and pre-construction of the Joint Use Facilities.

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5.2 After K-C issues the notice to proceed to the contractor for construction of the Joint Use Facilities, K-C shall invoice the City, and the City shall pay K-C, an amount equal to one hundred percent of the construction costs incurred until the City has paid K-C a total cumulative amount equal to 49.5% of the Construction Budget. Once the City has paid K-C such amount, K-C shall pay the balance of the construction costs; provided however, K-C may invoice the City an amount equal to 49.5% of the total for change orders approved by the PRT under Section 11.2.2.2 when K-C begins paying the balance of construction costs.

5.3 Upon final acceptance of the Joint Use Facilities or the Joint Use Facilities being placed in service for the City's effluent, K-C shall invoice the City for the difference between (a) the amount paid by the City under Sections 5.1 and 5.2 and the City's 49.5 % share of the actual and final Joint Use Facilities Cost.

5.6 Notwithstanding the terms of this Section 5, legal fees shall be invoiced by Preston Gates & Ellis LLP, project counsel, directly to each Participant, and will be paid directly by each Participant.

6. TERM

The Initial Term of this Agreement shall be fifty (50) years. At the end of the Initial Term and each additional term, this Agreement shall automatically renew for an additional term of five (5) years unless terminated by either Participant in accordance with Section 13.1 (Termination) or Section 12.5 (Decommissioning).

7. PROJECT REVIEW TEAM

7.1 The PRT shall provide policy and management coordination and oversight in the design, permitting, acquisition, construction, operation, maintenance, and budget of the Joint Use

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Facilities. In addition to the formal oversight by the PRT of matters related to the Joint Use Facilities, the Participants will continue to cooperate informally in implementing this Agreement.

7.2 Each Participant shall name one or more representatives to the PRT. Irrespective of the number of representatives each Participant names to the PRT, actions by the PRT shall be by unanimous agreement between K-C and the City, not by a majority vote of Participant representatives on the PRT. In other words, each Participant has one vote. If a Participant names more than one representative, the Participant shall designate one representative as the Lead Representative, who shall cast his or her Participant's vote on the PRT and shall be the Participant's representative to whom notices are given. All representatives may attend and participate in PRT meetings, but only Lead Representatives may cast votes on behalf of their Participants.

7.3 Not later than thirty (30) days after the date of this Agreement, K-C and the City shall each give notice designating its representative to serve on the PRT and the K-C Lead Representative shall convene the PRT. The City's Public Works Director shall designate the City's Lead Representative and any other representatives. The manager of the K-C Mill shall designate K-C's Lead Representative and any other representatives. By giving notice hereunder, the Participants may change their PRT representatives from time to time, provided that at all times during the Term of this Agreement, each Participant shall have at least one representative to the PRT.

7.4 Any project manager designated by a Participant for the construction of Other Facilities need not be a Participant's representative to the PRT. However, if a Participant's project manager for its Other Facilities is not a representative to the PRT, that person shall report regularly to the PRT concerning progress on and the status of that Participant's Other Facilities.

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7.5 The PRT Representatives shall determine the method of communications that will be used in conducting the business of the PRT. The PRT Representatives may invite other persons to participate in conferences, meetings, or other communications. Unless otherwise agreed by the PRT Representatives for both Participants, K-C shall have the responsibility of preparing agendas and scheduling periodic meetings of the PRT, provided that either Participant may convene a PRT meeting or place items on the agenda. During the construction period (*i.e.*, after the contractor is given the notice to proceed and until final inspection and acceptance of the work), the PRT shall meet not less than once a month. Minutes shall be kept of significant PRT actions. The PRT may meet using such communication technology as the PRT deems appropriate, such as telephonically.

7.6 Each Participant shall promptly inform the other Participant, through its PRT Lead Representative, of any formal or informal expression of concerns, correspondence, meetings, or other communications from a regulatory agency regarding the Joint Use Facilities or the Participants' respective NPDES permit compliance.

7.7 K-C and the City shall each provide the other with: (a) access at reasonable times to their respective Joint Use Facilities files and to the Joint Use Facilities files of any contractors, including Joint Use Facilities plans and specifications and any financial records of Joint Use Facilities Budget and Annual O&M Budget; (b) inspection of and access to the Joint Use Facilities and Other Facilities at reasonable times; (c) copies of correspondence from third parties about the development or operation of the Joint Use Facilities; and (d) access to any and all records required by law be available, such as records for review by the State Auditor.

7.8 Any disagreement between the K-C and the City PRT Lead Representatives is subject to dispute resolution under Section 22.7.

8. MODIFICATION OF TRANSACTION PRIOR TO CONSTRUCTION

Because construction of the Joint Use Facilities is not expected to begin for several years, the Participants recognize, anticipate, and acknowledge that the financial, tax and regulatory environment for the project may change before commencement of construction. In the event that changes occur to the regulatory, tax or financial environment that indicate the desirability of undertaking changes to the structure, payment or other terms of the transaction in order to accommodate one or both Participants' regulatory, tax or financing needs, the Participants shall use their best efforts to negotiate in good faith appropriate modifications to this Agreement that will reasonably accommodate the needs of both Participants. This Agreement presumes that reasonable modifications requested by one Participant will be accepted by the other Participant, unless clearly articulated good cause exists to refuse a requested change to the structure, payment or other terms of the transaction. If a modification is reasonably necessary to accommodate one Participant that disadvantages the other Participant, other adjustments may be made to the Agreement such that the Participants are restored to approximate parity consistent with this Agreement. This Section 8 shall be subject to dispute resolution in accordance with Section 21.7 hereof. Notwithstanding this provision to negotiate later changes in good faith, this Agreement shall be binding and enforceable upon the Participants.

9. PROJECT SCHEDULE

The following schedule (a) identifies target periods only and does not constitute a binding term of the Agreement and (b) does not change or modify the Completion Date or the Participants' obligations as set out in Section 2.

ACTIVITY	START DATE	END DATE
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Permit Applications and ROW Acquisition	May 1999	December 2000
Review/revision of Class 10 Estimate and Pre-design of Joint Use Facilities and Other Facilities	January 2001	June 2001
Final Design of Joint Use Facilities and Other Facilities	January 2002	June 2002
Develop and release Joint Use Facilities bid package	April 2002	June 2002
Bid evaluation and award	August 2002	September 2002
Joint Use Facilities construction	September 2002	December 2003
Operational start up of Joint Use Facilities	January 2004	June 2004

10. DESIGN, ACQUISITION AND PERMITTING

10.1 General

With approvals from or consultations with the PRT, as described elsewhere in this Agreement, K-C shall design, obtain permits for, and construct the Joint Use Facilities so that the Joint Use Facilities will be in operation no later than the Completion Date.

10.2 Ownership and Acquisition

10.2.1 Joint Use Facilities

Subject to the City's security interest as set forth in Section 16.1 and the option to purchase set forth in Section 16.2, K-C shall be the owner of record of the Joint Use Facilities.

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10.2.2 Other Facilities

Other Facilities may be obtained, provided, or constructed by a Participant or other party to facilitate the construction or operation of the Joint Use Facilities. Other Facilities will be paid for by the Participant or party providing the improvement. The cost for the development or operation of Other Facilities shall not be shared, except as may be expressly agreed by the Participants in writing.

10.2.3 Meters

Each Participant shall assume the cost of installing its own meters and testing portals to measure its own flows and shall pay the operation and maintenance costs for such meters, which shall be considered Other Facilities.

10.2.4. Acquisition

10.2.4.1 All real property interests, including permanent or temporary easements and other forms of rights-of-way secured by either Participant shall be drafted and executed such that the easement or right-of-way shall run with the land for the benefit of the Participants and their successors in interest. The drawing attached hereto as Exhibit A generally and schematically depicts the route of the Joint Use Facilities and some Other Facilities.

10.2.4.2 Upon the execution of this Agreement, the Participants shall begin the negotiation and acquisition of the rights of way, easements, and other property interests for the Joint Use Facilities.

10.2.4.3 The property rights presently believed necessary for the Joint Use Facilities shall be acquired as follows:

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10.2.4.3.1 K-C shall obtain the necessary right-of-way from Burlington Northern Santa Fe Railroad and Standard Oil. Any acquisition costs shall be treated as a Joint Use Facility Cost.

10.2.4.3.2 K-C shall obtain an easement, license, lease, or other form of use agreement (e.g., annual or long-term lease) for use of state-owned aquatic lands managed by the Washington State Department of Natural Resources ("DNR"). If the cost is a one-time payment, the cost shall be treated as a Joint Use Facility Cost. If the cost consists of multi-year payments, the cost shall be included in the Annual O&M Budget. If any such multi-year costs are paid prior to the Completion Date, such costs shall be included in the Joint Use Facilities Cost.

10.2.4.3.3 K-C shall grant the City an easement over K-C property for the Joint Use Facilities and Other Facilities reasonably necessary for the City's use of the Joint Use Facilities.

10.2.4.3.4 The City shall obtain the necessary right-of-way from the Port of Everett in such form so as to benefit the City and K-C and allow K-C to operate the Joint Use Facilities in the event the City terminates its participation in the Joint Use Facilities. A proportionate share of any costs, including any costs for financial contribution to the Port's shoreline public access improvements, shall be credited against the City's obligations hereunder.

10.2.4.4 Each party shall obtain separately and pay for any property or rights-of-way for Other Facilities.

10.3 Permitting

10.3.1 K-C shall apply for governmental permits and approvals for construction and operation of the Joint Use Facilities. The City shall provide technical support and information required to complete applications and submittals; provided, however, the City's support shall not be construed to limit the City's exercise of its legislative, police and regulatory powers. The PRT shall review draft permit applications and technical submittals for the Joint Use Facilities prior to filing with governmental agencies. K-C shall prepare and submit the required SEPA documents, and the City shall serve as the lead agency for the SEPA process required for the Joint Use Facilities and for any subsequent replacement or repairs undertaken pursuant to this Agreement.

10.3.2 Applications for permits and other required approvals shall be filed in sufficient time so that the Joint Use Facilities shall be operational when required by this Agreement. Sufficient time includes, but is not limited to, allowing for reasonable delays that may be encountered in the regulatory process.

10.4 Design

10.4.1 K-C shall employ one or more qualified engineering firms to prepare a Final Design.

10.4.1.1 The Final Design will include, but not be limited to: (a) biddable and constructable drawings and specifications; (b) an updated Class 10 Estimate; (c) adequate subsurface investigation that will reasonably depict subsurface conditions that may be encountered by the

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Construction Contractor and (d) at least two sets of as-built drawings upon completion of the Project.

- 10.4.1.2 K-C shall submit the Class 10 Estimate to the PRT for review and approval which approval shall be a condition for K-C to advertise for bids to select a Construction Contractor.
- 10.4.2 At its option, the PRT or one or more Participant's representative may interview engineering, design, construction management, and construction firms, and may advise K-C as to recommendations concerning the qualifications of such firms.
- 10.4.3 The PRT may inspect, review and comment on any design or construction documents and attend meetings with the firm preparing the Final Design. K-C shall be solely responsible for providing direction to the design firm and neither the City nor the PRT shall directly instruct the design firm. The City's review or attendance at meetings shall not create any privity between the design firm and the City, nor shall it relieve K-C of any of its responsibilities under this Agreement.
- 10.4.4 The Final Design must be submitted to the PRT for review and comment. For each comment on the Final Design made by a Participant through the PRT, K-C and/or the firm preparing the Final Design shall either modify the design in accordance with such comment, or explain in reasonable detail the reasons why the design will not be modified.
- 10.4.5 K-C shall furnish the blank forms of third party agreements it intends to use to the PRT for review and comment; provided that K-C may designate such

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forms of agreement as confidential and proprietary business information. K-C acknowledges that records given to the City may be subject to public disclosure, absent an exemption from disclosure under RCW Chap. 42.17.250 et seq.

10.5 Design and Permitting Budget

The Final Design costs, including a revised and updated Class 10 Estimate, shall be included in the Joint Use Facilities Cost. Any expenses associated with obtaining permits for the Joint Use Facilities shall also be a Joint Use Facilities Cost.

11. CONSTRUCTION

11.1 Procurement, Selection and Award

11.1.1 K-C shall employ one or more qualified Construction Contractors to construct the Joint Use Facilities through an open, competitive, fair and neutral process. Payment and performance bonds shall be required of the Construction Contractor, and the Construction Contractor and K-C shall comply with RCW Chap. 60.28 regarding retainage. K-C shall inform the PRT of its intent to commence advertising for bids at least fourteen (14) days before advertising for bids or proposals.

11.1.2 After selecting the Construction Contractor, but before awarding contracts for construction, K-C shall report the results of the contractor selection process to the PRT. If the Construction Contractor is selected by competitive bidding, K-C shall award the contract to the lowest responsive, responsible bidder. If the contractor is selected by competitive negotiation,

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K-C shall award the contract to the bidder tendering the proposal that, taken as a whole, is deemed the most advantageous to both the City and K-C.

After review and comment by the PRT, K-C shall prepare and execute one or more construction contracts that are based on the Final Design. K-C shall issue a notice to proceed in sufficient time to allow the Joint Use Facilities to be constructed, tested and in operation no later than Completion Date.

11.1.3 If K-C believes it more economical to do so, K-C may acquire directly some or all of the supplies and material to be incorporated into the Joint Use Facilities, or it may at its discretion provide that the Construction Contractor furnish some or all of such supplies and material. The cost of supplies and materials acquired directly by K-C will be included in the Construction Budget and the Joint Use Facilities Cost.

11.1.4 As part of K-C's contract with the Construction Contractor, K-C shall require the Construction Contractor to prepare and submit two (2) sets hard copy and one (1) electronic copy of complete and accurate as-built drawings of the constructed Joint Use Facilities as a condition of final acceptance.

11.2 Construction

11.2.1 Prosecution of the Work

11.2.1.1 K-C shall direct the Construction Contractors and any construction management contractors on the Joint Use Facilities. Neither the City nor the PRT shall directly instruct the Construction Contractors or construction management contractors.

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- 11.2.1.2 K-C shall monitor construction progress and costs and shall prepare and submit to the PRT monthly reports describing the progress of the physical work and the financial status of the Joint Use Facilities. K-C may retain consultants or hire additional staff with expertise in construction management. Such consultants or staff shall track and report the total costs to date against the contract price on a monthly basis and shall track and report to the PRT the financial, construction and physical progress of the construction of the Joint Use Facilities.
- 11.2.1.3 To manage the construction and avoid disruptions, delays or claims, K-C and the Construction Contractor will use critical path method schedules which will be frequently and periodically updated.
- 11.2.1.4 The PRT may inspect, review and comment on the progress of construction, and attend construction, design, planning or permitting meetings during the course of the work. Such inspection, review, comment, attendance or participation shall not relieve K-C of any of its responsibilities under this Agreement.

11.2.2 Change Orders

- 11.2.2.1 Proposed change orders must be reviewed and approved by the PRT prior to execution and performance of the additional or changed work, if the value of the proposed change order is either (a) greater than one-half of one percent (0.5%) of the initial Construction Budget or (b) the cumulative total net cost of approved and proposed change orders has exceeded two percent (2%) of the Construction Budget.

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11.2.2.2 The additional cost of any change orders reviewed and approved by the PRT for the benefit of the overall Joint Use Facilities and the Participants shall become part of the Construction Budget and shall be paid for as provided in §5.4. Unless otherwise agreed by the PRT, a deductive change order shall not decrease the Construction Budget, but shall reduce the Joint Use Facilities Cost. A Participant shall pay for the additional cost of any change orders that are requested by and primarily benefits that Participant or is for the purpose of constructing Other Facilities.

11.2.3 Completion and Acceptance

Upon declaration by K-C of substantial completion of the construction work, K-C shall provide the PRT with reasonable opportunities to participate in final inspection and commissioning of the Joint Use Facilities. Final acceptance shall be determined by K-C with the review and comment of the PRT. For each comment on final acceptance made by the PRT Representative, K-C or the Construction Contractor shall either address the condition identified by the PRT or explain the reasons why the Joint Use Facilities are suitable for final acceptance.

11.3 *Construction Budget*

11.3.1 Construction Budget

The PRT shall establish an initial Construction Budget contemporaneously with the execution of the construction contract. The initial Construction Budget shall be an amount equal to the sum of the construction contract, supply and material costs to the

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extent not furnished by the Construction Contractor, construction management costs, capitalized interest and a contingency set by the PRT. A change order for additional cost approved by the PRT shall constitute an adjustment to the Construction Budget. Any proposed increase to the Construction Budget that causes the Joint Use Facilities Cost to exceed Twenty Million Dollars (\$20,000,000.00) will require a written amendment to this Agreement approved by City Council, and K-C management.

11.3.2 Contractor Claims

11.3.2.1 In the event of a claim by any contractor or consultant for an equitable adjustment of price or time, additional cost, or other claim, each Participant agrees to delay asserting any allegation against the other regarding allocation of fault, contribution, or cost that could affect the defense or settlement of the claim and hereby agrees to toll any applicable statute of limitations during the pendency of the claim. The statute of limitations for any cause of action between the Participants arising from allocation of fault, contribution or cost shall begin to run when, as and if liability on the claim becomes final. A claim becomes final upon the later of: (a) the expiration time for filing a notice of appeal from a trial court's judgment, or trial court decision after remand, without the filing of an appeal therefrom; (b) the expiration of time for seeking review of an appellate court decision and the appellate court issues its mandate without remanding any part of the action for further proceedings by the trial court; or (c) the Supreme Court issues its

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mandate without remanding any part of the action for further proceedings by an inferior court.

- 11.3.2.2 During the pendency of the claim, the parties agree to defend against the claim to the extent that the Participant defending the claim reasonably believes that the claimant is not entitled to such claim, in whole or in part. The PRT shall be consulted and may provide policy oversight with respect to defense of the claim. Prior to appointment of counsel to prosecute or defend any claim hereunder, K-C shall: (a) consult with the City Attorney concerning the list of candidates; (b) to the extent time allows, interview prospective counsel jointly with the City Attorney; and (c) give substantial weight to the recommendation of the City Attorney in selection of outside counsel. The expenses of defense, settlement, and any net judgment in favor of any Construction Contractor shall become part of the Construction Budget; provided, however, such expenses shall be subject to indemnification or recoupment if one Participant is later determined to be at fault or have caused the extra expense (in whole or in part).
- 11.3.2.3 In the event K-C successfully asserts a claim against any Construction Contractor or its surety, any amount recovered, net of attorney fees and reasonable litigation and collection costs and expenses, shall be applied to reduce the total of the Joint Use Facilities Cost.
- 11.3.2.4 The PRT shall be consulted and may provide policy oversight with respect to the prosecution of any claims by the Participants against any

third parties, such as engineering firms, designers, suppliers, Construction Contractors, etc., including, but not limited to, architectural or engineering malpractice, defects or failure of material or equipment, defective workmanship, nonconformity with plans and specifications or untimely completion by a Construction Contractor.

12. OPERATION AND MAINTENANCE

12.1 *Operation and Maintenance Expenses*

- 12.1.1 Each year K-C shall propose an Annual O&M Budget to the PRT. The Annual O&M Budget shall be on a calendar year basis, and shall be approved and established by the Participants (acting through the PRT) not later than December 1 preceding the year of the proposed budget. If an Annual O&M Budget is not approved by that time, the amounts of previous year's Annual O&M Budget shall be deemed to be the amounts of the next year's Annual O&M Budget until a new Annual O&M Budget is adopted. The Participants shall coordinate the Annual O&M Budget with their respective budget processes.
- 12.1.2 The City shall reimburse K-C for operations and maintenance costs by paying to K-C its proportionate share of the Annual O&M Budget which share shall correspond to the City's percent interest in the Capacity of the Joint Use Facilities (initially 49.5%). Such payments will be made quarterly in accordance with invoices tendered by K-C.

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- 12.1.3 The Participants, acting through the PRT, may (a) establish a different payment schedule (e.g., annual basis, except for major repairs) or (b) approve expenses not anticipated in the Annual O&M Budget.
- 12.1.4 Except for Emergency repairs, any repair or replacement to the Joint Use Facilities not anticipated by the Annual O&M Budget that exceed a cumulative total of \$50,000 within any budget year shall require the prior approval of the Participants, acting through the PRT.
- 12.1.5 If the Participants have a dispute regarding the proposed Annual O&M Budget that cannot be resolved ninety (90) days prior to the start of a new budget year, the PRT may retain an independent consulting engineer to provide recommendations to the Participants within 30 days (or such other time as the PRT sets) of such engineer's engagement. The cost of engaging the independent engineer shall be included in the Annual O&M Budget for the year in which the engineer's work is performed.

12.2 Operation Generally

Upon completion and final acceptance of the construction, K-C shall operate and maintain the Joint Use Facilities in compliance with applicable laws, regulations, and this Agreement. To enable coordination among operating personnel, foster communication between the Participants and provide oversight, the PRT may draft and approve an Operations Manual. Changes or modifications to the Operations Manual must be approved by the PRT prior to becoming effective. K-C shall operate and maintain the Joint Use Facilities for the benefit of the Participants, and in compliance with any Operations Manual.

12.3 Maintenance

The PRT may retain an independent consulting engineer to provide advice on the need and frequency for Outfall testing and monitoring and to resolve any differences between the Participants concerning the need, extent or methods for repair or replacement of the Joint Use Facilities. The cost of the independent engineer shall be included in the Annual O&M Budget for the year in which the independent engineer's work is performed.

12.4 Environmental Compliance during Operations

12.4.1 K-C and the City will each hold separate NPDES permits with specific requirements pertaining to their respective effluent. K-C and the City will monitor their respective effluent streams separately prior to their respective effluent streams being combined and discharged through the Joint Use Facilities. Each Participant will be responsible for compliance of their respective effluents with applicable laws, regulations and permits. If the combined discharge approaches or exceeds permit conditions or if the Outfall fails or is in danger of failing to perform as permitted, the Participants will cooperate through the PRT to identify the cause of the problem.

12.4.2 If the cost of unbudgeted studies or regulatory costs (including any appeals) must be incurred before the proportionate responsibility of the Participants of the environmental problem can be determined, each Participant shall be responsible for its proportionate share of those costs, subject to a Participant's right to recoup or be indemnified by the other Participant after

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the proportionate responsibilities of the Participants for the environmental problem are determined.

12.4.3 If responsibility for an environmental problem is ambiguous, cannot be reasonably allocated or is apparently and substantially caused by both Participants' effluents, each Participant will pay its proportionate share of the cost of corrective or remedial action, including any modifications to the Joint Use Facilities, which share shall correspond to K-C's and the City's percentage interest in the Capacity of the Joint Use Facilities (initially 50.5% and 49.5% respectively). Any corrective actions needed upstream in either of the Participant's Other Facilities will be borne by that Participant (unless one Participant is correcting the other Participant's problem). In the event a Participant must pay any fine or judgment or take corrective action that is caused in whole or in part by the other Participant, then that Participant may make a claim against the other Participant under Article 19 (Indemnity).

12.4.4. Characterization costs required by Ecology for assurance that the Outfall is performing properly will be included in the Annual O&M Budget.

12.5 Decommissioning

Beginning in year 40, and every five years thereafter (or upon other interval set by the PRT Representatives), the PRT shall conduct a study of the remaining useful life of the Joint Use Facilities. In the event that the findings of such study indicates that the Joint Use Facilities have less than five (5) years of remaining useful life, the PRT shall, at that time, recommend to the Participants one of the following options: (a) institute measures to extend the useful life of the existing Joint Use Facilities; (b) plan a replacement project

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jointly or otherwise; or (c) undertake a decommissioning program. The costs of these studies and plans shall be included in the O & M Budget. The Participants, acting through the PRT, may approve expenditures necessary to implement the option selected by the PRT.

13 TERMINATION

13.1 *Absent Default*

Either party may terminate this Agreement without cause, or default by the other party, under the following circumstances and in the described manner:

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When	Written Notice	Other Requirements
PRE-CONSTRUCTION		
<p>Prior to the award of construction contract if the expected Joint Use Facilities Cost exceeds Twenty Million Dollars (\$20,000,000.00).</p>	<p>At least thirty (30) days prior to award of construction contract</p>	<p>Terminating Participant conveys to non-terminating Participant all rights of way, easements, engineering drawings, and information, materials and interests acquired so that the non-terminating Participant may proceed to construct the Joint Use Facilities for its own use.</p>
<p>If, after Participants use their best efforts to obtain acceptable project permits, construction permits for the Joint Use Facilities are not issued or environmental permit conditions on project permits cause the Joint Use Facilities to become impractical, infeasible or not cost-effective in the reasonable discretion of a Participant.</p>	<p>Termination may be affected within thirty (30) days after the final, non-appealable rejection of a necessary permit or imposition of one or more unacceptable permit conditions .</p>	<p>Terminating Participant shall convey to non-terminating Participant all rights of way, easements, engineering drawings, and information, and materials and interests acquired so that the non-terminating Participant may proceed to construct the Joint Use Facilities for its own use.</p>
<p>If, in the reasonable discretion of a Participant, any condition of that Participant's NPDES or other environmental permit related to the K-C Mill or POTW causes investment by that Participant in the Joint Use Facilities to not be advantageous or cost-effective.</p>	<p>Termination may be effected within thirty (30) days after the final, non-appealable imposition of one or more unacceptable permit condition.</p>	<p>Participants will use their best efforts to obtain an acceptable permit prior to termination. Terminating Participant shall convey to non-terminating Participant all rights of way, easements, engineering drawings, and information, and materials and interests acquired so that the non-terminating Participant may proceed to construct the Joint Use Facilities for its own use.</p>

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DURING CONSTRUCTION		
After the award of construction contract, and before Joint Use Facilities are operational, neither Participant may terminate in the absence of material breach by the other Participant.		
AFTER CONSTRUCTION		
After facilities are constructed and operational.	Ninety (90) days	Conveyance of such interests as are reasonably necessary for the non-terminating party to operate the Joint Use Facilities.
The end of a term (Initial or Additional)	Twelve (12) months written notice	Conveyance of such interests as are reasonably necessary for the non-terminating party to operate the Joint Use Facilities.
After a finding by the PRT that the end of useful life for the Joint Use Facilities will occur within five (5) years and that a decommissioning program will be required by then applicable laws or regulations.	Twelve (12) months after written notice.	The terminating Participant shall pay a one time fee to the non-terminating Participant equal to its proportionate share of reasonable and necessary decommissioning costs, as estimated by the PRT, which share shall correspond to the terminating Participant's percent interest in the Capacity of the Joint Use Facilities.

13.2 Default

In the event of a default by a Participant, the non-defaulting Participant shall give written notice to the defaulting Participant, providing the non-performing Participant an opportunity to cure the default. The defaulting Participant must cure within ninety (90) days. If the default cannot be cured within ninety (90) days through no fault of the defaulting Participant, then the defaulting Participant must commence promptly and diligently prosecute such cure and take such steps as are necessary to effect a cure as soon as a possible. The period of time in which the default must be cured shall be that time reasonably necessary to effect the cure. If the default is material and the defaulting

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Participant does not or cannot cure the default in a timely manner (or if attempts to cure would be futile), then the non-defaulting Participant may elect either to continue or to terminate this Agreement. If the non-defaulting Participant elects to continue: (a) the defaulting Participant shall convey such interests and perform such acts as are reasonably necessary to allow the non-defaulting Participant to complete and operate the Joint Use Facilities; (b) the Participants agree that this Agreement may be specifically enforced; and (c) the non-defaulting Participant shall be entitled to such other remedies at law or in equity as may be appropriate. If the non-defaulting Participant elects to terminate, then the non-defaulting Participant shall be entitled such legal and equitable remedies as are appropriate and just.

13.3 Limitation of Liability

The Participants shall not be liable to each other for any loss, liability or damage arising out of or related to this Agreement (whether arising under contract, tort, strict liability or other legal theories) where such loss, liability or damage exceeds one million dollars (\$1,000,000); provided, however, that this limitation of liability does not apply to (a) a breach by the City in failing to pay amounts due and owing hereunder, (b) K-C's abandonment or express repudiation during construction or wrongful termination, or (c) third party claims against either Participant for bodily injury or property damage. IN NO EVENT SHALL EITHER PARTICIPANT BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES RELATED TO THIS AGREEMENT OR THE TRANSACTIONS HEREUNDER FOR ANY CAUSE, INCLUDING, WITHOUT LIMITATION, BREACH OF CONTRACT, TORT OR OTHER LEGAL THEORIES.

14. WATER REUSE

14.1 The City hereby grants K-C the right, but not the obligation, to withdraw City effluent from the Joint Use Facilities or City conveyance line to the Joint Use Facilities and to use, at K-C's risk and expense, City effluent as non-contact cooling water, but only to the extent such withdrawal does not compromise proper functioning of the Joint Use Facilities or the City's conveyance line; provided, however, that the City has the right, after fifteen (15) years from the commencement of Joint Use Facility operations, to divert and sell any or all of its treated effluent to one or more third parties. The City's right to divert and sell treated effluent is subject to a right of first refusal by K-C to meet the terms offered to the City by a third party purchaser of the City's treated effluent.

14.2 Once K-C begins using the City's treated effluent for non-contact cooling water, K-C will not terminate use of City effluent (a) unless such treated effluent use adversely affects the site manufacturing or operations or (b) until K-C gives the City ninety (90) days advance written notice of intent to suspend or terminate such use.

15. ASSIGNMENT OF CAPACITY

15.1 Excess Capacity

15.1.1 Right of First Offer

Before a Participant may rent, lease or temporarily assign its Excess Capacity to a third party, it must first offer the Excess Capacity to the other Participant for the expected time period of its availability on terms substantially similar to the terms and conditions the Participant can reasonably expect to obtain from a third party.

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15.1.2 Third Party Use

15.1.2.1 If the other Participant does not exercise the first offer provided for in Section 15.1.1, the Participant with Excess Capacity may assign, lease, or otherwise allow the Excess Capacity to be used by third parties on the following terms and conditions:

15.1.2.1.1 The Participants will consult with each other's PRT Representative prior to assigning capacity to a third party;

15.1.2.1.2 Such assignment will comply with applicable laws, regulations, and permit requirements and must not adversely affect the Participants' permits or operations;

15.1.2.1.3 The assignment is subject to any security interest granted under this Agreement;

15.1.2.1.4 The term of assignment or lease must be limited and may not be greater than the remaining years in the Initial Term or such additional renewal term as may then be in effect;

15.1.2.1.5 Assignee may not cause or allow harm to the Joint Use Facilities or operation of Joint Use Facilities; and

15.1.2.1.6 The other Participant consents to the assignment which consent shall not be unreasonably withheld nor delayed. Without limitation, consent may be reasonably withheld if a Participant reasonably believes that such assignment could (a) jeopardize environmental compliance or (b) impair the efficient operation of the Joint Use Facilities.

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15.1.2.2 If both Participants want to assign their Excess Capacity: (a) the quantity of Excess Capacity assigned shall be shared pro rata by the Participants or as otherwise mutually agreed; and (b) proceeds from the sale of Excess Capacity will be shared pro rata or as otherwise mutually agreed.

15.1.2.3 Third party responsibility for share of the Annual O&M Budget will be negotiated, but shall not be less than pro rata by flow. The third party will be responsible for any study and testing costs to demonstrate acceptability of effluent to the system, unless a Participant elects to share in such costs.

15.2 Assignment or Transfer to a Successor in Interest

Notwithstanding any other provisions in this Agreement, and subject to the other Participant's consent as set forth below (which consent will neither be unreasonably withheld nor delayed), a Participant may assign or otherwise transfer its rights and obligations under this Agreement to a successor in interest, *i.e.*, a subsequent owner or operator of the K-C Mill or the City's POTW, by providing written notice to the other Participant. The non-assigning Participant shall have thirty (30) days from receipt of such notice to review the proposed assignment or other transfer and, as a condition for such consent, may require the successor in interest to execute a written undertaking that the successor fully assumes and is bound by the obligations, terms and conditions of this Agreement, any Operations Manual, and any other permits, licenses, or agreements that govern the Joint Use Facilities. As a further condition for consent, the non-assigning Participant may (a) require reasonable documentation showing that the proposed assignee

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has adequate financial capability to assume responsibility for construction or operation and maintenance, as applicable, or (b) require financial assurance (e.g., bond or letter of credit) to remain in effect, as applicable, for three (3) years in an amount equal to one-half of the Construction Budget or the total Annual O&M Budgets for the prior three (3) years.

16. PROTECTION OF INVESTMENT

16.1 Security Interests

To secure performance of its obligations hereunder, K-C hereby grants and conveys to the City a security interest in the real and personal property of the Joint Use Facilities. The parties agree to execute such other documents as may be reasonably necessary to perfect the security interests granted herein, (e.g., deeds of trust or financing statement). The security interests granted by this Agreement may be exercised in the event of default by the non-defaulting Participant and shall be subordinated to security interests subsequently granted by a Participant in the ordinary course of financing a Participant's ordinary business.

16.2 Option

16.2.1 To further secure its obligations hereunder, each Participant grants to the other Participant an option to purchase their respective interest in the Joint Use Facilities. Except as provided in Section 15.2 (Assignment), the option may be exercised in the event a Participant offers to sell, or a Participant accepts an offer to purchase, a Participant's interest, in whole or in part, in

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the flow carrying capacity of the Joint Use Facilities or if this Agreement is terminated.

- 16.2.2 The exercise price of the option shall be equal to the disposing Participant's proportionate share of the remaining balance of the amortized Joint Use Facilities Cost, which share shall correspond to that Participant's percentage interest in the Capacity of the Joint Use Facilities where the amortization is calculated on a straight line basis over fifty (50) years. At the election of the Participant exercising the option, the price shall be paid either (a) in a lump sum, or (b) in up to twelve (12) equal quarterly installments over three years from the exercise of the option with interest at a rate equal to one hundred fifty percent (150%) of the interest rate for 90 day Treasury bills, or (c) on such other commercially reasonable terms as the Parties may agree. The option may only be exercised by written notice to the other Participant.

17. CITY ASSUMPTION OF CONTROL

The City shall have the right, but not an obligation, to assume control from K-C of the operation of the Joint Use Facilities by delivering written notice to K-C after occurrence of any of the following events:

17.1 *Emergency*

The City's *bona fide*, good faith determination that an Emergency exists which could result in significant damage to the Joint Use Facilities, the City's system connected to the Joint Use Facilities, or to the environment. The City shall notify K-C, and K-C shall reassume control as soon as reasonably practicable after cessation of the Emergency.

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17.2 *Uncured Default*

An uncured material default exists after the procedures in §13.2.

17.3 *Repeated Defaults*

Three or more undisputed notices of material default from City, with corresponding cures by K-C, within a consecutive 12-month period.

17.4 *K-C Successor*

Except as provided in Section 15.2 (Assignment), K-C sells or leases the K-C Mill or Joint Use Facilities to a new entity or completes an acquisition, merger or other change of ownership in K-C whereby K-C no longer owns the controlling interest for the K-C Mill and Joint Use Facilities. "Controlling interest" means majority owner of a corporation or the sole managing partner or member of a partnership or limited liability company

17.5 *Termination of Mill Use*

The K-C site ceases to be used as a manufacturing facility and K-C or its successors or assigns can no longer demonstrate its ability to perform its obligations hereunder.

18. INSURANCE

The PRT shall determine the types, coverages, forms and amount of insurance to be carried on the Facilities. K-C shall maintain such insurance. The City shall be endorsed as an additional named insured in any policy insuring the Joint Use Facilities. If the Joint Use Facilities are added to K-C's insurance for the K-C Mill, and there is a resulting increase in K-C's premium, K-C may include the amount of any premium increase in the Annual O&M Budget.

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19. INDEMNITY

19.1 Each Participant shall to the extent permitted by law indemnify, hold harmless and defend, at the election of the indemnitee, the other Participant from and against all costs, losses, claims for damages, liabilities and expenses, including but not limited to legal fees and court costs, arising out of its negligent acts or omissions or willful misconduct related to the Joint Use Facilities or an uncured default under this Agreement. In the event of concurrent negligence, each Participant shall be responsible to third parties for its allocable share of fault, and shall indemnify the other Participant for its share of any concurrent negligence.

19.2 If a Participant causes the combined discharge to exceed or violate any applicable water quality requirement, that Participant shall be responsible for the cost or corrective actions, including the cost of any studies to identify or analyze the excess or violation. If such excess or violation is caused by piping and cooling water flow control systems at K-C's mill, K-C shall be responsible for any fines, costs, corrective expenses, and remedies.

20. CONDITION SUBSEQUENT

The right of K-C to issue a notice to proceed to the construction contractor under Section 11.2, and the obligation of the City to pay K-C prior to the Completion Date under Section 5.2, is expressly conditioned on the issuance of water and sewer revenue bonds of the City to provide funds for such payment, together with an opinion of Preston Gates & Ellis LLP, or other bond counsel, to the effect that such bonds issued for such purpose are valid and binding obligations of the City payable from revenues of the City's water and sewer system.

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21. MISCELLANEOUS PROVISIONS

21.1 *Audit of Accounts*

All expenses submitted to the City shall be subject to inspection, audit and copying by the City or its audit representatives during normal K-C business hours. K-C shall retain all of its records of Joint Use Facilities costs and expenses for not less than three years after final acceptance of any contracts let or awarded for the Joint Use Facilities.

21.2 *Severability*

If any provision of this Agreement is held to be invalid, such invalidity shall not affect any other provision hereunder; provided, however, the Participants shall negotiate in good faith any amendments to this Agreement necessary to effect the Participants' original intent.

21.3 *Invoicing*

Unless otherwise provided herein or as decided by the PRT, charges or expenses to be paid by a Participant hereunder shall be invoiced monthly, and such invoices shall be paid within thirty days of receipt. In the event of a dispute, the receiving Participant shall pay any undisputed portion of the invoice and the disputed portion shall be handled pursuant to the §21.7 below.

21.4 *Amendments*

The parties may only amend this Agreement in writing, notwithstanding the authority given the PRT under this Agreement to take certain actions and make certain adjustments (e.g., to the schedule and adoption of the Annual O&M Budget).

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21.5 Cooperation

The parties agree to execute any documents that are reasonably required to effect the terms of this Agreement and to provide each other such reasonable assistance as may be requested and available to assure the timely and safe operation of the Joint Use Facilities.

21.6 Notice

Any notice or other communications required or permitted by this Agreement shall be in writing and shall be deemed properly given when personally delivered to the PRT Lead Representative or sent by: (a) first class mail, certified or registered postage prepaid, (b) a recognized courier service; or (c) facsimile transmission with a confirmation of receipt followed by first-class mail addressed as follows:

If to K-C:

Kimberly-Clark Corporation
2600 Federal Avenue
Everett, Washington 98201
Attention: Mill Manager

If to the City:

The City of Everett
3200 Cedar Street
Everett, Washington 98201
Attention: Director of Public Works

21.7 Dispute Resolution

21.7.1 Disputes shall be resolved by structured negotiation. If structured negotiation fails to resolve the dispute, the dispute may be resolved by a lawsuit in Snohomish County Superior Court under Washington law and

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procedure. Any time period stated herein may be modified by mutual agreement of the Participants.

- 21.7.2 Disputes that are not solved at a working level shall be referred to the PRT for review and recommendation. The PRT may engage outside experts and facilitators to assist resolution of disputes and such expenses shall be deemed part of the Construction Budget or the Annual O&M Budget.
- 21.7.3 If the PRT does not resolve a dispute within thirty days (subject to extension by the PRT), either PRT Representative may refer the dispute to senior management. Within ten (10) days after referral by the PRT, each Participant shall designate one senior manager with authority to resolve the matter in dispute. Upon request, the PRT Representatives shall provide the senior management officials with one or more brief oral or written statement identifying: (a) any material facts at issue (and agreed upon facts, if relevant); (b) any specific provisions of the Agreement at issue; (c) the basis for their positions and the consequences if their position is not accepted; and (d) any alternatives they wish to recommend for consideration. The senior management officials may jointly retain consulting engineers or other experts or facilitators to make recommendations to them, and any costs shall be treated as part of the Construction Budget or Annual O&M Budget.
- 21.7.4 If the senior management officials cannot reach agreement within twenty (20) days of receiving a referral, they may either initiate: (a) a ten (10) day cooling off period; and/or (b) voluntary non-binding mediation by a mutually agreed-upon mediator. The Participants intend that any mediation

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process or any cooling off period followed by further negotiations be completed within fifty (50) days of senior management officials receiving the referral.

21.7.5 If the Participants are still unable to resolve the dispute, they may seek judicial review in the Superior Court in Snohomish County under the laws of the state of Washington.

21.8 Interpretation

Unless the context clearly requires otherwise:

- a. "Any" shall mean "if any" and does not assume a condition exists.
- b. "Days" shall be counted in calendar days and shall include weekends or holidays.
- c. "Include" means include but not limited to.
- d. "May" is optional and permissive and does not imply a requirement.
- e. "Parties" and "Participants" are synonymous.
- f. "Shall" or "will" or "must" is mandatory.
- g. Use of the singular shall include the plural and conversely.

Because the parties and their counsel negotiated this Agreement and exchanged drafts, no one party was responsible for drafting the Agreement. Therefore, the parties agree that the Agreement should not be construed for or against either party.

21.9 Eminent Domain and Police Power Not Restricted

This Agreement does not restrict or limit the City's police powers or power of eminent domain.

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21.10 No Third Party Rights

This Agreement does not create any enforceable rights in any third parties, or any causes of action by third parties against the Participants.

21.11 No Partnership

This Agreement does not create any partnership or joint venture between the Parties, nor does it create any agency relationship between them.

21.12 MOU Superseded

This Agreement supersedes the MOU.

22. DEFINITIONS

The following definitions and usage shall apply to this Agreement and any Operations Manual approved by the PRT.

Agreement	Short title of this Port Gardner Bay Outfall Replacement Agreement.
Additional Term	Any five year period for which this Agreement was automatically renewed subsequent to the Initial Term.
Annual Operations and Maintenance Budget or Annual O&M Budget	Calendar year estimate of cost of operating and maintaining the Joint Use Facilities. It may include, but is not necessarily limited to, any of the following items: inspection and maintenance, repairs and replacements, preventive maintenance, financial reserves, performance review for the facilities, taxes directly and properly chargeable to the operation and maintenance of the Joint Use Facilities, insurance premiums, and the costs of testing and monitoring that may be agreed to by the Participants or required by government agencies.
Capacity	The design flow carrying capacity for a volume of liquid through the Joint Use Facilities, measured in gallons per day and stipulated to be at least sixty-four million gallons per day (64,000,000 gallons per day).
City Effluent	Sanitary sewage waste collected and treated by the City from residential and commercial establishments, but excluding

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	industrial or other wastes not treated in accordance with City requirements, and shall include ground water and storm water flows currently present within the City's sewerage system.
Class 10 Estimate	An estimate of construction, engineering and development costs that are represented by the design firm to be within ten percent (10%) of the actual cost of the Joint Use Facilities.
Completion Date	June 1, 2004, unless extended by the Participants acting through the PRT.
Construction Budget	The total cost of constructing the Joint Use Facilities as determined by the PRT based upon the construction contract submitted by K-C to the PRT for review as may be updated during the course of construction by the Participants acting through the PRT.
Construction Contractors	One or more qualified contractors or subcontractors, construction managers, inspectors, or other consultants, vendors or contractors employed by K-C to build the Joint Use Facilities.
Ecology	The Washington State Department of Ecology or its successor agency.
Emergency	Any catastrophe, disaster, disorder, civil unrest, terrorist act, military action or attack, or unanticipated event that interrupts or threatens to interrupt the operation of the Joint Use Facilities. Emergencies include, but are not limited to, public emergencies such as a major earthquake in the Puget Sound area, and private emergencies, such as a fire or industrial accident at the K-C Mill.
Excess Capacity	The difference between a Participant's share of Capacity of the Joint Use Facilities and the maximum capacity actually used by the Participant.
Feasibility Report	The report and associated studies prepared under the MOU to enable the Participants to decide whether to proceed with the Joint Use Facilities, including, but not necessarily limited to, the third revision of the Engineering Report prepared by CH2M Hill and any subsequent revision or final report.
Final Design	Detailed plans and specifications to construct the Joint Use Facilities as an integrated system in compliance with all applicable laws and regulations including, without limitation, plans, drawings, specifications necessary to obtain competitive bids from qualified, competent construction contractors.
Initial Term	The period ending fifty (50) years after the Completion Date.
Joint Use Facilities	The facilities generally described in this Agreement, starting from where the effluent stream enters the K-C Mill to be combined with

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K-C effluent, including the conveyance line to the deep water outfall and the outfall diffuser, pipelines, associated equipment, appurtenances and fixtures constructed or purchased pursuant to this Agreement.

Joint Use Facilities Cost	All costs and expenses properly incurred for acquisition, permitting, design and construction of the Joint Use Facilities, provided such costs and expenses are fully documented to the City and reasonably necessary for the design, permitting, acquisition, or construction of the Joint Use Facilities, excluding, however, those costs and expenses paid pursuant to the MOU and for ordinary maintenance.
K-C Mill	K-C's pulp and paper mill in Everett, Washington.
MOU	The Memorandum of Understanding Port Gardner Outfall Replacement Joint Use Facilities dated August 15, 1997.
NPDES Permit	The National Pollution Discharge elimination System permit issued by the Washington Department of Ecology, or its successor agency, required for operation of any facility that discharges effluent to the waters of the United States or the State of Washington.
Operation	The use of the Joint Use Facilities by the Participants after the construction, initial testing and start-up period.
Operations Manual	A document proposed by K-C to the PRT describing methods of operation and maintenance and insurance coverages, as approved by the PRT.
Other Facilities	Any capital improvement that is not defined as a Joint Use Facility, including each Participant's respective effluent transfer facilities to the Joint Use Facilities.
Outfall	Depending on its use in context, either the existing Port Gardner Bay Outfall owned and operated by K-C or that portion of the Joint Use Facilities that extends into Port Gardner Bay, including the diffuser section.
Participant	K-C or the City or their approved successors or assigns.
POTW	Publicly Owned Treatment Works owned by the City of Everett, Washington.
Preliminary Design	The Engineering Report that is part of the Feasibility Report. The Engineering Report shall be considered a performance specification that the PRT may change or modify.
PRT Representatives	One or more persons that represent each Participant on the PRT, provided that each Participant has only one official representative

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to the PRT for the purposes of formal actions of the PRT authorized by this Agreement.

PRT

The Joint Use Facilities management and policy oversight review team appointed as initially provided in Paragraph 6 of the MOU and continued under this Use Agreement. The Participants shall act through the PRT in a manner more specifically defined throughout this Agreement.

[SIGNATURES ON FOLLOWING PAGE]

Port Gardner Bay Outfall Replacement Agreement

IN WITNESS whereof, the parties have executed this Agreement as of the day and year first above written.

CITY OF EVERETT

KIMBERLY CLARK TISSUE COMPANY

By *Edward D. Hansen*
Edward D. Hansen, Mayor

By *A. C. Sanford*

APPROVED AS TO FORM:

[Signature]
Mark Soine, City Attorney



ATTEST:

TAM McEn
~~Sharon Marks, City Clerk~~ Deputy
TAM McEn

