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AGREEMENT dated [] between

[] of [] (the "**Utility**"); and

[] of [] (the "**Concessionaire**")

WHEREAS:

- (A) The Utility is responsible for providing wastewater treatment and disposal services to [town].
- (B) The Utility wishes to make arrangements for the implementation of the project comprising the Scheme (as defined below and as more fully defined in the Concession Specification) and has invited private sector companies to tender for a single contract to design, build, own, finance, operate and maintain wastewater treatment facilities and certain sewerage associated with the Scheme and, where applicable, to take over, operate and maintain certain existing facilities.
- (C) Following tenders issued and negotiated in accordance with [procurement legislation], the Utility has agreed to enter into this agreement with the Concessionaire for the carrying out of the works and the provision of the services described generally above and more particularly in this agreement.

NOW IT IS AGREED as follows:

1. INTERPRETATION

- (1) In this agreement in addition to the terms defined elsewhere in this agreement:

"**Affected Day**" means a day during a Performance Test at the Scheme on which wastewater containing a Pollutant the concentration of which exceeds the Pollution Incident Influent Concentration Levels is received at the treatment plant at the Scheme and includes each subsequent day until the day on which the plant's biological treatment process is (or, if earlier, ought, in accordance with Good Engineering and Operating Practices, to have been) reinstated but does not include any day on which the Scheme would not have been capable of meeting the Wastewater Standards even if the wastewater received at the Scheme had not contained such Pollutant;

"**Affiliate**" means, in relation to any person, any holding company or subsidiary of that person or any subsidiary of such holding company and "**holding company**" and "**subsidiary**" shall have the meaning given to them [in relevant commercial legislation/ code];

"**Agreed Form**" means in relation to any document the form of that document initialled for the purposes of identification by, or on behalf of, the parties;

the "**Annex**" means the annex to this agreement which has been signed by the parties to it;

"**Archaeological Finds**" means antiquities, fossils and other remains of archaeological interest discovered on a Site;

"**Articles of Association**" means the Articles of Association of the Concessionaire in the Agreed Form;

"**Base Date**" means [base date for setting specifications etc];

"**Catchment Area**" means the catchment area as specified in drawings [] in the Annex;

"**Change of Law**" means the introduction, amendment, modification or repeal of any Statutory Requirement or Required Consent having effect in [country] or any part of it and which is binding upon either of the parties but for the avoidance of doubt does not include the entry into force after the date of this agreement of any Statutory Requirement or Required Consent in existence but not in force at the date of this agreement;

"**Change of Law Variation**" has the meaning ascribed to it in clause 21(3);

"**Commissioning Commencement Date**" means, in relation to an Existing Facility, the date on which the flow is first diverted from that Existing Facility to the new treatment works for the Scheme;

"**Commissioning Plans**" means the detailed commissioning plans developed by the Concessionaire in accordance with the Outline Commissioning Plans and approved by the Utility in accordance with clause 15;

"**Competent Authority**" includes any court of competent jurisdiction and any local, national or supranational agency, inspectorate, minister, ministry, official or public or statutory person (whether autonomous or not) in or of, or of the government of, [country];

"**Concession**" means the rights and obligations acquired and assumed by the Concessionaire under this agreement;

"**Concessionaire Senior Debt**" means all amounts outstanding at the date of termination of the Concession Agreement including interest accrued as at that date, from the Concessionaire to the Lenders under the Financing Agreements to the extent that such amounts:

- (a) have been expended solely for the purposes of fulfilling the Concessionaire's obligations under this agreement; and
- (b) have not arisen, directly or indirectly, as a result of a breach by the Concessionaire of any provisions of the Financing Agreements (other than a breach arising as a result of a breach by the Utility of its obligations under this agreement),

together with:

- (c) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable to the Lenders by reason of prepayment under the Financing Agreements, subject to the Concessionaire and the Lenders mitigating all such costs to the extent reasonably possible;

"**Concessionaire's Representative**" means the person appointed by the Concessionaire in accordance with the provisions of clause 34;

"**Concession Award Date**" means the date of this agreement;

"**Concession Period**" means the period specified in clause 24 (as that period may be extended pursuant to clause 24(2));

"**Concession Specification**" means the specification for the construction, operation and maintenance of the Scheme, incorporating the Core Requirements, the Construction Specification, the Construction Timetable, the Outline Commissioning Plans, the Commissioning Plans, the Performance Tests, the Operation and Maintenance Specification, the Sludge Strategy and the Quality and Environmental Management Arrangements for and in relation to the Scheme;

"**Consent Determinands**" means the determinands set out in the Table in Part 9B of the Schedule;

"**Consent Influent Concentration Levels**" means the maximum concentration of the determinands set out in the Table in Part 9B of the Schedule;

"**Construction Phase**" means the period of time commencing on the Concession Award Date and ending on the Handover Date;

"**Construction Specification**" means the design and construction specification for the Scheme as set out in Part 2 of the Schedule and includes the Annex;

"**Construction Timetable**" means the construction timetable, including the Milestones, set out in Part 3 of the Schedule as the same may be amended or revised with the approval of the Utility's Representative in accordance with clause 13 or extended pursuant to clause 11;

"**Construction Works**" means all the work concerning the detailed design, specification, construction, testing and completion of the Scheme in accordance with the provisions of this agreement;

"**Contractor**" means [] or any replacement thereof appointed to carry out the Construction Works in accordance with clause 32(4);

"**Contractor's Equipment**" means all appliances or things of whatsoever nature required for the purposes of the construction of the Scheme but does not include Contract Plant, materials and other things intended to form or forming part of the Scheme;

"**Contract Payments**" means the amounts payable by the Utility to the Concessionaire in accordance with clause 23 and Part 11A of the Schedule;

"**Contract Plant**" means machinery, computer hardware and software, apparatus, materials, articles and things of all kinds to be provided under this agreement and intended to form or forming part of the Scheme and/or for the purposes of operating and maintaining the Scheme;

"**Core Requirements**" means the requirements in relation to, and minimum performance criteria for, the Scheme as set out in Part 1 of the Schedule;

"Design Documentation" means drawings, diagrams, details, documents, specifications, samples, models or information (including calculations, logic or sequence overview diagrams and functional design specifications for computer software) and all amendments and revisions thereto prepared by the Concessionaire after the date of this agreement in connection with the design of the Scheme;

"Directive" includes any present or future directive, requirement, instruction, condition of or limitation in any necessary consent, licence, authorisation, permission, approval, permit, direction, code of practice or rule of any Competent Authority having the force of law, and includes any modification, extension or replacement thereof then in force;

"Discounted Shareholder Receipts" means all amounts shown in the Financial Model as payable by the Concessionaire from the date of termination by way of dividends on the share capital of the Concessionaire, each such amount discounted at the Discount Rate from the date on which it is shown in the Financial Model to be payable to the date of termination;

"Discount Rate" means the rate of nominal shareholder return, as shown in the Financial Model;

"Dry Weather Flow" means the average daily flow over any period of 12 months at a particular location in a sewerage system excluding flow arising as a result of rainfall calculated in accordance with the methodology set out in Part 11C of the Schedule;

"Employees" means:

- (a) as at the Handover Date those employees of the Utility to whom the Utility requires the Concessionaire to offer employment, such requirement to be made by notice by the Utility to the Concessionaire; and
- (b) as at the termination of this Agreement those employees employed by the Concessionaire at the date on which this agreement terminates who are engaged by the Concessionaire in the performance of its obligations under this Agreement;

"Estimated Capital Cost" means:

- (a) in relation to an IDC Variation, the estimated capital cost of that Variation as agreed by the parties, or determined by the Expert, in accordance with clause 7(6);
- (b) in relation to a breach by the Utility falling within clause 11(5), the estimated capital costs incurred due to the breach in question as agreed by the parties, or determined by the Expert, in accordance with clause 11(5);
- (c) in relation to an Utility Variation, the estimated capital cost of that Variation as agreed between the parties, or determined by the Expert, in accordance with clause 20(3);
- (d) in relation to a Change of Law Variation, the estimated capital cost of that Variation as agreed by the parties, or determined by an Expert, in accordance with clause 21(2);

"Estimated Operating Costs" means:

- (a) in relation to an IDC Variation, the estimated increase or reduction in operating costs due to the IDC Variation, as agreed by the parties, or determined by the Expert in accordance with clause 7(6);
- (b) in relation to an Utility Variation, the estimated increase or reduction in operating costs due to the Utility Variation, as agreed by the parties or determined by the Expert in accordance with clause 20(3);
- (c) in relation to a Qualifying Change of Law, the estimated increase or reduction in operating costs due to the Qualifying Change of Law, as agreed by the parties or determined by the Expert in accordance with clause 20(2);
- (d) in relation to an alteration to the Utility's sewerage system for which the Concessionaire is entitled to an adjustment to the Tariff Rates under clause 8(2), the estimated increase or reduction in operating costs due to the alteration as agreed by the parties, or determined by the Expert in accordance with clause 8(4);
- (e) in relation to a failure by the Utility to construct, or cause to be constructed, the New Utility Sewerage for which the Concessionaire is entitled to an adjustment to the Tariff Rates under clause 8(3), the estimated increase or reduction in operating costs due to the failure, as agreed by the parties, or determined by the Expert in accordance with clause 8(4);

"Exclusive Area" means the area specified in [] in the Annex;

"Existing Facilities" means the facilities which form part of the Scheme and exist at the date hereof, as listed at Sections 1, 2, 3, 4 and 5 of Part 8 of the Schedule and **"Existing Facility"** means any of them;

"Existing Facilities Land Documents" means the leases, sub-leases and other agreements relating to the property listed in Part 15B of the Schedule in the Agreed Form to be entered into by the Utility and the Concessionaire pursuant to clause 17(1);

"Expert" means an expert appointed under clause 43;

"Financing Agreements" means:

- (i) the agreements entered into (or to be entered into in the Agreed Form) listed in Part 14 of the Schedule; and
- (ii) any agreement entered into after the date of this agreement in accordance with clause 31(6) to provide finance to the Concessionaire (including any finance lease) for the performance of its obligations under this agreement, including (without limiting the generality of the foregoing) any such agreement entered into by the Concessionaire for the provision of finance as contemplated in clauses 20 and 21 and any interest rate hedging agreements entered into in relation thereto,

as such agreements may be amended from time to time in accordance with clause 31(6), but shall not include any agreement under which finance is provided to the Concessionaire by a shareholder or any Affiliate of a shareholder of the Concessionaire;

"Financial Model" means the financial model in the Agreed Form prepared on behalf of the Sponsors, as it stands at the date of this agreement, updated by the Concessionaire subject to agreement with the Utility (or, in the absence of agreement, as determined by an Expert in accordance with clause 43) only to take account of:

- (a) the change in revenue due to, and the Estimated Operating Cost (if any) and the Estimated Capital Cost (if any) of any Tariff Adjustment Events which occurred prior to the date of termination of this agreement;
- (b) the estimated senior debt service costs (if any) of financing the Estimated Capital Cost (if any) of any Tariff Adjustment Events which occurred prior to the date of termination of this agreement and forecast balances of such senior debt outstanding (based on reasonable estimates of margin and fee costs of senior lenders and forecast term of senior debt);
- (c) any adjustments to the Tariff Rates made as a result of any Tariff Adjustment Events which occurred prior to the date of termination of this agreement; and
- (d) any change in flows and loads arising as a direct result of any Tariff Adjustment Events which occurred prior to the date of termination of this agreement and which fall within sub-paragraph (e) or (f) of Section 3.3.1 of the Schedule;

"Force Majeure Event"¹ means:

- (a) an act of war (whether war is declared or not), hostilities, invasion, act of foreign enemies, terrorism or civil disorder;
- (b) tempest, earthquake or any other natural disaster of overwhelming proportions; or
- (c) ionising radiations, or contamination by radio-activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component thereof,

which alone prevents a party from complying with its obligations under this agreement (each an **"Event"**), unless, in relation to the Concessionaire:

- (d) the Event was within the control of the Concessionaire or its contractors;
- (e) the Event could have been foreseen by the Concessionaire or its contractors had they acted in accordance with Good Engineering and Operating Practices, so as to avoid the Event preventing the party in question from complying with its obligations; or
- (f) during the Operation and Maintenance Phase, the Concessionaire has not used all reasonable endeavours at all times to comply with the Core Requirements in respect of the wastewater and sludge discharged into or delivered to the Scheme;

¹ This is a narrow definition of force majeure – may be appropriate to have a more extensive inclusive definition of force majeure, such as set out in Note 1 in the Notes at the end of the document

"First Funding Period" means the period between the Concession Award Date and the Handover Date;

"Funding Threshold" means:

- (a) in relation to the First Funding Period, [] (Indexed); and
- (b) in relation to the Second Funding Period:
 - (i) in relation to the Second Funding Period of the previous 12 months, [] (Indexed); and
 - (ii) in relation to the Second Funding Period of the previous 5 years, [] (Indexed);

"Good Engineering and Operating Practices" means the standards, practices, methods and procedures conforming to laws and that degree of skill, diligence, prudence and foresight which would reasonably be expected from a skilled and experienced contractor, engineer or operator, as the case may be, engaged in [country] in the same type of undertaking under the same or similar circumstances;

"Government" means government of [country];

"Handover Date" means the later of:

- (a) the Performance Test Certificate Date; and
- (b) [long-stop date];

"IDC Variation" has the meaning ascribed to it in clause 7(7);

"Industrial Discharge Consent" means [instrument in force in relation to discharges in a Catchment Area];

"Insolvency Event" means [events which constitute insolvency events under relevant insolvency legislation plus any other events which it is considered prudent to include here];

"Intellectual Property Rights" means all rights in inventions, patents, copyrights, design rights, trade marks and trade names, service marks, trade secrets, know-how and other intellectual property rights (whether registered or unregistered) and all applications for any of them, anywhere in the world;

"Land Documents" means the Existing Facilities Land Documents and the New Sites Land Documents;

"Latest Time for Completion" means twelve] months after the Time for Completion (subject to any extension of time permitted under clause 11);

"Lender" means any person providing finance to the Concessionaire under any Financing Agreement (but for the avoidance of doubt shall not include any shareholder or Affiliate of any shareholder of the Concessionaire);

"**Lenders' Agent**" means [];

"**Load Threshold**" means [1000kg] BOD₅ per day;

"**Milestones**" means the Milestones included in the Construction Timetable, as amended or revised with the approval of the Utility's Representative pursuant to clause 13 and as extended pursuant to clause 11;

"**Modification**" means:

- (a) an Utility Variation;
- (b) an IDC Variation; or
- (c) a Change of Law Variation;

and a Modification shall be deemed to be "**made**", for the purposes of clauses 20(7) and 21(4), on the date on which it is agreed between the parties or determined by an Expert to be required;

"**New Sites Land Documents**" means the leases, sub-leases and other agreements relating to heritable property listed in Part 15A of the Schedule in the Agreed Form to be entered into by the Utility and the Concessionaire pursuant to clause 2(1)(a);

"**O & M Warranty**" means the agreement in the Agreed Form to be entered into between the Utility and [] and relating to certain obligations of the Concessionaire;

"**Operation and Maintenance Specification**" means the operation and maintenance specification set out in Part 5 of the Schedule;

"**Operation and Maintenance Phase**" means the period of time commencing on the Handover Date and ending at the end of the Concession Period;

"**Operator**" means [] or any replacement thereof appointed in accordance with clause 19(2) for the operation and maintenance of the Scheme;

"**Outline Commissioning Plans**" means the outline commissioning plans detailed in Part 4A of the Schedule;

"**Performance Test Certificate**" means a certificate in the form of Part 16 of the Schedule signed by the Concessionaire;

"**Performance Test Certificate Date**" shall be the date upon which the Performance Tests have been successfully completed as certified in the Performance Test Certificate issued by the Concessionaire and countersigned or deemed to have been countersigned by the Utility's Representative in accordance with clause 16;

"**Performance Tests**" means the performance tests and testing procedures as set out in Part 4B of the Schedule;

"**Pollutant**" means those determinands listed in Table 4 of Part 11A of the Schedule;

"**Pollution Incident**" has the meaning given in Section 3.1 of Part 11A of the Schedule;

"**Pollution Incident Influent Concentration Levels**" means the maximum concentration of the determinands set out in Table 4 of Part 11A of the Schedule;

"**Project Agreements**" means the agreements entered into (or to be entered into in the Agreed Form) for the performance of the Concessionaire's obligations under this agreement, listed in Part 13 of the Schedule;

"**Qualifying Change of Law**"² means a Change of Law if and to the extent that it is:

- (a) a Tax imposed by reference to the specific activity carried on by the Concessionaire in its capacity as owner or operator of a wastewater treatment plant; or
- (b) a Change of Law (other than one relating to Tax) the terms of which apply expressly:
 - (i) to the Concessionaire and not to other firms;
 - (ii) to the operation of any one or all Schemes and not other wastewater treatment plant; or
 - (iii) to the collection, treatment or disposal of wastewater and not to other commercial activities,

but does not include any Change of Law relating to activities connected with sludge facilities or to the collection, treatment or disposal of sludge;

"**Quality and Environmental Management Arrangements**" means those requirements set out in Part 7 of the Schedule;

"**Required Consents**" means all consents, licences, authorisations, permissions, approvals and permits of any Competent Authority which are necessary for the construction or operation of the Scheme or for the performance of any of the Concessionaire's obligations under this agreement, including the Utility Consents;

"**RPI**" means the [retail price index]³ as published from time to time in [journal] or such index in such journal as shall replace such table, and in the event that rebasing of RPI occurs, the parties shall meet and agree the consequential changes (if any) which are required to be made to this agreement (and in default of agreement the matter shall be referred to an Expert for determination in accordance with clause 43);

"**Schedule**" means the schedule annexed to this agreement and signed by the parties to it;

"**Scheme**" means the [Scheme] as more fully described in the Concession Specification;

² This is a narrow definition of Qualifying Change of Law (which has already been very narrowly defined) applying to very specific changes of law that are expressly tailored to the concessionaire, the schemes or to collection of wastewater. This is very country specific wording and more general definition, such as set out in Note 2 of the Notes at the end of this document might be more appropriate.

³ A more tailored index may be appropriate, particularly re escalation of maintenance and construction costs, where a construction index may be more appropriate

"**Second Funding Period**" means each of:

- (i) the previous 12 months; and
- (ii) the previous 5 years;

"**Service Tax**" means service tax as provided for in [taxation legislation/code];

"**Shareholder Contribution Amount**" means the amount equal to the aggregate of all amounts paid to the Concessionaire by way of subscription for shares in the capital of the Concessionaire together with interest at [*weighted average cost of capital*]% per annum on each such amount from the date of payment to the Concessionaire to the date of termination of this agreement;

"**Sites**" means:

- (a) during the Construction Phase:
 - (i) the land described in the New Sites Land Documents; and
 - (ii) the other sites where Construction Works are being carried out; and
- (b) during the Operation and Maintenance Phase:
 - (i) the land described in the New Sites Land Documents; and
 - (ii) the land described in the Existing Facilities Land Documents;

"**sludge**" means a mixture of solids and water produced as a result of the collection or treatment of wastewater;

"**Sludge Delivery Point**" means each of the points for the delivery of sludge detailed in the Construction Specification;

"**Sludge Treatment Contract Payment**" means the amount calculated in accordance with Section 1.2 of Part 11A of the Schedule;

"**Sludge Strategy**" means the strategy for the treatment and disposal of sludge in Part 6 of the Schedule to the Concession Agreement;

"**Sponsors**" means the shareholders of the Concessionaire;

"**Statutory Requirements**" means all applicable laws, regulations and Directives;

"**Tariff Rates**" means the rates of payment shown in Table 1 and Table 2 of Part 11A of the Schedule (as amended from time to time in accordance with this agreement);

"**Tax**" means any kind of tax, duty, levy, charge, contribution, impost or any similar charge, whether or not similar to any in force at the date of this agreement and whether imposed by a local, municipal, governmental, state, federal or other body or authority in [country] [or elsewhere];

"Time for Completion" means [date], subject to any extensions of time permitted under clause 11;

"Utility Consents" means the consents listed in Part 9A of the Schedule;

"Utility's Representative" means the person from time to time appointed by the Utility to act as Utility's Representative under this agreement;

"Utility Variation" has the meaning ascribed to it in clause 20(4);

"Variation" means any change to the Concession Specification whether by addition, modification, omission or otherwise made in accordance with this agreement;

"Wastewater Treatment Contract Payment" means the amount calculated in accordance with Section 1.1 of Part 11A of the Schedule;

"Wastewater Standards" means the standards and parameters set out in Table 3 of Part 11A of the Schedule; and

"wastewater treatment plant" means any works, apparatus or plant used for the treatment or disposal of wastewater, and including septic tanks.

- (2) Where the context requires words importing the singular shall include the plural and vice versa.
- (3) Where the context requires words importing persons shall include firms and corporations.
- (4) A reference in this agreement to any clause, sub-clause, paragraph, schedule, part, section or annex is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause, paragraph, schedule, part, section or annex of this agreement.
- (5) Headings are for convenience of reference only.
- (6) Each reference to this agreement or to any other document, contract or agreement shall include a reference to each permitted variation of, or supplement to, this agreement and such document, contract or agreement as amended, varied or supplemented from time to time.
- (7) Each reference to this agreement refers to this agreement together with the Schedule hereto and the Annex.
- (8) References to any statute or statutory provision shall include any statute or statutory provision which amends or replaces or has amended or replaced it and shall include any subordinate legislation made under any such statute.
- (9) A person includes its successors and permitted assignees or transferees.
- (10) In the event of any conflict between any provision of this agreement (other than the Schedule) and the Schedule, the provisions of this agreement (other than the Schedule) shall prevail over the Schedule. In the event of any conflict between Parts 1 to 8 of the Schedule, the following priority shall prevail:

- (a) Part 1;
 - (b) Parts 2 to 8.
- (11) For the purposes of this agreement, a month shall mean a calendar month.
- (12) Where an amount is followed by the phrase "**(Indexed)**" that amount shall be read as if it were multiplied by $\frac{RPI_A}{RPI_B}$ where:

RPI_A is the value of RPI most recently published prior to the relevant calculation date; and

RPI_B is the value of RPI on the Base Date.

2. CONCESSION AWARD DATE

- (1) On the Concession Award Date⁴:
- (a) the Utility shall deliver to the Concessionaire:
 - (i) the Utility Consents; and
 - (ii) the New Sites Land Documents validly executed by the Utility; and
 - (b) the Concessionaire shall deliver to the Utility:
 - (i) a validly executed O&M Warranty;
 - (ii) validly executed Project Agreements;
 - (iii) validly executed Financing Agreements (as listed in Part 14 of the Schedule);
 - (iv) notice that the O&M Warranty, the Project Agreements and the Financing Agreements listed in Part 14 of the Schedule have become unconditional in all respects (save for any condition relating to the occurrence of the Concession Award Date); and
 - (v) notice enclosing certified copies of insurance policies satisfying the Concessionaire's obligations under clause 38 with cover attaching in each case not later than the date on which it is required and from the date on which the relevant risk commences.

3. GENERAL OBLIGATIONS

- (1) The Concessionaire shall have the right and obligation at its cost, with due care and diligence and in accordance with Good Engineering and Operating Practices, to design, build, own, operate, finance and maintain the Scheme subject to and in accordance with the provisions of this agreement.

⁴ This is defined as the date of the agreement and so there are to be no conditions precedent to the agreement or part thereof coming into force. Where commencement of construction needs to be conditional on any events/ financial close, then the wording will need to take this into account.

- (2) The Concession Specification shall be deemed to have been accepted and verified by the Concessionaire on the Concession Award Date.
- (3) The Concessionaire warrants that the Scheme constructed in accordance with the Construction Specification and the Design Documentation and operated and maintained in accordance with the Operation and Maintenance Specification shall in accordance with the Construction Timetable and within the Time for Completion:
 - (i) meet the Core Requirements; and
 - (ii) pass the Performance Tests.
- (4) The Concessionaire shall perform its obligations under this agreement at its own risk and without recourse to Government or other public funds or guarantees now or in the future, save as expressly provided in this agreement or with the prior written consent of the Utility.
- (5) The Concessionaire shall not carry out any work which may in any way affect the fabric or operation of any part of the Utility's sewerage system without the prior written consent of the Utility, which shall be granted only on approval by the Utility of the Concessionaire's detailed method statement for the work concerned. The Concessionaire shall meet the reasonable cost of making good any damage to the Utility's sewerage system caused by any such work.
- (6) *[The Utility shall not, prior to termination of this agreement, exercise its powers under [relevant legislation] to take over any wastewater treatment plant comprised in the Scheme.]*

4. WASTEWATER OBLIGATIONS

- (1) Subject to sub-clauses (2) and (3), as from the Handover Date for the Scheme, the Concessionaire shall, in accordance with the Core Requirements, receive, treat and dispose of all wastewater arising within the Catchment Area and discharged into the Scheme.
- (2) On any day when wastewater arriving at a wastewater treatment plant included in the Scheme contains any Consent Determinand the concentration of which exceeds the applicable Consent Influent Concentration Level, the Concessionaire shall on that day receive all wastewater discharged into the Scheme and shall treat and dispose of it:
 - (a) in relation to those Consent Determinands which do not exceed the Consent Influent Concentration Levels, in accordance with the Core Requirements; and
 - (b) in relation to those Consent Determinands which exceed the Consent Influent Concentration Levels, in accordance with Good Engineering and Operating Practices endeavouring to meet the Core Requirements.
- (3) On any day when a Pollution Incident occurs at the Scheme the Concessionaire:
 - (a) shall receive, treat and dispose of all wastewater discharged into the Scheme and shall treat and dispose of it in accordance with Good Engineering and Operating Practices endeavouring to meet the Core Requirements and in a manner which will mitigate, so far as reasonably practicable, the extent to which the Pollutant prevents the treatment or disposal of wastewater in accordance with the Core Requirements

until the Concessionaire could have reasonably been expected to reinstate the Scheme at which time the obligation in sub-clause (1) will apply; and

(b) shall reinstate the biological treatment process at the Scheme as soon as reasonably practicable and in accordance with Good Engineering and Operating Practices⁵.

(4) ⁶As from the Handover Date for the Scheme, or in respect of an Existing Facility as from the Commissioning Commencement Date for that Existing Facility, all rights in and (subject to sub-clauses (2) and (3)) responsibility for wastewater discharged into the Scheme or, as the case may be, that Existing Facility, shall pursuant to [relevant legislation] vest in the Concessionaire as from the point at which it is so discharged.

5. SLUDGE OBLIGATIONS⁷

(1) As from the Handover Date for the Scheme, the Concessionaire shall in accordance with the Core Requirements:

(a) treat and dispose of all sludge arising from the treatment of wastewater at the Scheme; and

(b) subject to the volume limits set out in the Construction Specification receive, treat and dispose of all sludge delivered by or on behalf of the Utility at the Sludge Delivery Point.

(2) The Concessionaire may from time to time submit to the Utility's Representative amendments to the Concession Specification so far as it relates to the treatment and disposal of sludge. No such proposed amendment shall take effect except as approved in writing by the Utility's Representative. For the avoidance of doubt, save insofar as otherwise agreed by the parties, any such amendment to the Concession Specification shall not give rise to any adjustment to the Tariff Rates.

(3) Without prejudice to the obligations of the Concessionaire under this clause and clauses 6 and 19, the Concessionaire shall ensure, on a continuing basis, that at all times:

(a) all sludge required to be treated and disposed of by the Concessionaire in accordance with this agreement is treated and disposed of:

(i) in accordance with all Statutory Requirements and Required Consents; and

(ii) in accordance with the Sludge Strategy and the Operation and Maintenance Specification; and

⁵ There may be a substantial cost implication in reinstating biological treatment process, particularly if any of the plant has been damaged by pollutant – parties may wish to consider whether any form of compensation is appropriate in these circumstances.

⁶ The Concessionaire will be deemed under law to be the entity responsible for meeting discharge regulations – fines and other penalties will therefore be borne by the Concessionaire for discharges that do not meet the regulations even where this is due to a pollution incident in the influent – thought should be given to whether any form of indemnity should/ can by law be provided to cover these situations.

⁷ Appropriate where sludge treatment and disposal is part of specification. Here Concessionaire is also accepting obligation to take and treat Utility sludge from elsewhere.

- (b) records are kept in accordance with the Sludge Strategy, the Operation and Maintenance Specification and all Statutory Requirements and Required Consents, and that these records are available to the Utility for inspection.
- (4) All rights in and responsibility for sludge delivered by or on behalf of the Utility to the Concessionaire at a Sludge Delivery Point shall vest in the Concessionaire on delivery.

6. ARRANGEMENTS WITH THIRD PARTIES

- (1) The Concessionaire shall be entitled to enter into agreements with third parties relating to the connection to, or the discharge, disposal, importation or treatment of wastewater or sludge by means of, any part of the Scheme, provided that it is not thereby breaching any Statutory Requirements or Required Consents and provided that the performance of its obligations under this agreement is not thereby prejudiced and:
 - (a) for wastewater, subject to the prior written approval of the Utility (not to be unreasonably withheld or delayed) of the means to be used (i) for measuring the quantity and quality of the wastewater to be so discharged, treated or disposed of and (ii) for the continued proper calculation of the Contract Payments;
 - (b) for sludge, subject to the prior written approval of the Utility (not to be unreasonably withheld or delayed) of the means to be used:
 - (i) to ensure that the importation, treatment and disposal of the sludge is in accordance with all Statutory Requirements and Required Consents and does not prejudice the performance of the Concessionaire's obligations to accept sludge and to treat and dispose of sludge under this agreement;
 - (ii) for measuring the quantity and quality of the sludge; and
 - (iii) for the continued proper calculation of the Contract Payments.
- (2) The Utility shall be entitled to require the Concessionaire (subject to the provisions of this agreement) as from the Handover Date:
 - (a) to make or permit to be made connections (free of expense to the Concessionaire) to any part of the Scheme with any drain or any public or private sewer;
 - (b) in accordance with and subject to the provisions of clause 4, to take, treat and dispose of wastewater originating within the Catchment Area and discharged into the Scheme; and
 - (c) in accordance with and subject to the provisions of clause 5, to take and treat sludge delivered by any third party at the Sludge Delivery Point.

7. INDUSTRIAL DISCHARGE CONSENTS⁸

- (1) Prior to issuing or entering into an Industrial Discharge Consent the Utility shall inform the Concessionaire where in the Utility's opinion it will have a significant impact on the treatment process of the Scheme's treatment plant of the quantity, quality, location and other characteristics of the discharge which would be permitted by the Industrial Discharge Consent and the identity of the discharger and shall give the Concessionaire a reasonable opportunity to comment on the effect which the proposed discharge may have on the ability of the Concessionaire to meet its obligations under this agreement.
- (2) Without prejudice to the proper exercise of the Utility's statutory duties and functions, the Utility shall determine the level of concentrations of any Consent Determinand or Pollutant to be permitted under any such Industrial Discharge Consent as if the Utility itself was operating the Scheme as sewerage authority and, in determining the date on which the new discharge may commence, the Utility shall allow the Concessionaire a reasonable period of time in which to make the alterations (if any) to the Scheme which are required to accommodate the new discharge.
- (3) The Utility shall provide the Concessionaire with extracts of the Industrial Discharge Consents issued or entered into after the Concession Award Date showing details of the quantity, quality, location and other characteristics of the discharge permitted and the identity of the discharger.
- (4) The Utility shall take all reasonable steps within its power (having proper regard to the financial, administrative and operational constraints on the Utility and its other statutory duties and functions and taking due account of the Concessionaire's obligations under this agreement) to monitor the Industrial Discharge Consents in order, so far as reasonably practicable, to minimise the incidence of breaches of Industrial Discharge Consents which give rise to the receipt at the Scheme of Consent Determinands in excess of the Consent Influent Concentration Levels and Pollutants in excess of the Pollution Incident Influent Concentration Levels.
- (5) If any Industrial Discharge Consent referred to in sub-clause (1) above would permit:
 - (i) a new discharge to the Scheme from the Catchment Area equal to or exceeding the Load Threshold; or
 - (ii) would permit an increase in an existing lawful discharge to the Scheme from the Catchment Area where the amount of the increase exceeds the Load Threshold ,

the Concessionaire shall notify the Utility's Representative of the Concessionaire's opinion of the following matters:

- (a) the Variations, if any, that need to be made at the Scheme to accommodate the new or increased discharge;

⁸ As industrial discharges are likely to be significant and could have impact on quantity of influent, it is important in regimes where discharges from industry are licensed to ensure that every time a new license/ consent is granted this is not going to materially impact the Scheme (where there is no regulation of industrial discharges, it may be necessary to include a provision specifying that if the quantities of influent exceed those specified in the Specification, then Concessionaire can only use reasonable endeavours in accordance with Good Engineering and Operating Practices to treat it. It will also be necessary to contemplate a variation process to increase capacity or require that the influent levels are reduced by the Utility, if the excess levels of influent persist and this is causing a problem for the performance of the Scheme/ potential pollution issues (see sub-clause (5) onwards, but extend it generally to cover excess in influent levels).

- (b) the time or times at which those Variations should be made, having regard to the unused capacity of the Scheme, and likely future changes in flows and loads arising in the Catchment Area (on the assumption that such Variations are not carried out earlier than is necessary to accommodate the actual increase in flow or load resulting from the proposed discharge);
- (c) whether any adjustments to the provisions of this agreement (other than to the Tariff Rates) are necessary as a result of the new or increased discharge to enable the Concessionaire to perform its obligations under this agreement; and
- (d) the estimated increase or reduction in the annual operating costs for each year remaining in the Concession Period due to, and the estimated capital cost of, any Variations identified in paragraph (a), (but not including any cost which is or would be incurred prior to the date on which the Variation is agreed by the parties or determined by the Expert under sub-clause (2)),

and shall give full supporting details of its opinions.

- (6) As soon as practicable after the Utility receives the Concessionaire's notice under sub-clause (5) the parties shall discuss the matters referred to in sub-clause (5) and agree those matters in respect of any Variations required to be carried out prior to the commencement of the new or increased discharge. The parties shall take into account all relevant facts and circumstances, including (without limitation) the terms of the Industrial Discharge Consent permitting the new or increased discharge, the likely timetable for the phasing-in of the discharge and the likely effect of the discharge on the flow and load arriving at the Scheme. If the parties cannot agree any of the matters which this sub-clause requires them to agree, the dispute shall be determined by an Expert in accordance with clause 45.
- (7) In the event that the parties agree to make a Variation, or the Expert determines that a Variation is required, in accordance with sub-clause (6) (an "**IDC Variation**"), the provisions of clause 20 shall apply (with the exception of sub-clauses (1), (2), (3), (4), (8), (12) and (13)) to the Variation as if it were an Utility Variation.
- (8) If having used reasonable endeavours to obtain funding pursuant to clause 20(7) for an IDC Variation the Concessionaire is unable to do so within 90 days after the date of agreement or determination of the Estimated Capital Cost in accordance with sub-clause (6) then the Concessionaire may by notice to the Utility request that the Utility provide the funding in excess of the relevant Funding Threshold. In the event that the Utility does not agree within 90 days after receipt of such notice to provide the funding, the Concessionaire may terminate this agreement in accordance with clause 26.

8. UTILITY'S SEWERAGE SYSTEMS

- (1) The Utility shall keep the Concessionaire informed of proposed physical alterations to the Utility's sewerage systems which may in its opinion have a significant impact on the Scheme. Without prejudice to the proper exercise of the Utility's statutory duties and functions, the Utility shall in making such alterations act as if the Utility itself was managing and operating the Scheme in conjunction with the Utility's sewerage systems as sewerage authority and shall allow the Concessionaire a reasonable period of time in which to make any alterations to the Scheme which are required as a result of the Utility's proposed alterations to its sewerage systems.

- (2) Any alteration by the Utility of its sewerage systems (other than for the purposes of repair, replacement, maintenance or renewal of sewerage systems, for the reduction of infiltration or for disconnection from the Utility's sewerage systems) so as to divert away from the Scheme flows of wastewater originating within the Exclusive Area shall give rise to an adjustment to the Tariff Rates calculated in accordance with Section 3.3 of Part 11A of the Schedule so as to compensate the Concessionaire for the additional operating costs, and the alteration in flow, due to the alteration of the Utility's sewerage system.
- (3) *[⁹The Utility shall construct, or cause to be constructed, the New Utility Sewerage by the Time for Completion. If by reason of any of the events set out in sub-clause 11(2)(a) to (d) or sub-clause 11(2)(f) or any breach by the Concessionaire of its obligations under this agreement the Utility is delayed in such construction it shall be entitled to an extension to the time for its completion by a period equal to the length of the delay. In the event that the Utility is in breach of its obligations under this sub-clause the Concessionaire shall be entitled to an adjustment of the Tariff Rates calculated in accordance with Section 3.3 of Part 11A of the Schedule so as to compensate the Concessionaire for the additional operating costs, and the alteration in flow, due to the Utility's breach (taking into account the likely date of completion of construction of the New Utility Sewerage). The adjustment to the Tariff Rates shall be the sole remedy available to the Concessionaire for that breach.]*
- (4) Any claim for an adjustment to the Tariff Rates under sub-clause (2) or (3) must be made by notice from the Concessionaire to the Utility's Representative within 28 days after the date on which the Concessionaire became aware of its entitlement to an adjustment, or (if earlier) of the date on which it should have been aware. The notice must set out:
- (a) the Concessionaire's estimate of the alteration to the flow arriving at the Scheme due to the alteration of the Utility's sewerage system or due to the failure by the Utility to construct the New Utility Sewerage (as the case may be); and
 - (b) the Concessionaire's estimate of the increase or decrease in the annual operating costs for each year remaining in the Concession Period due to the alteration in flow,
- and must be supported by full details of the claim. As soon as practicable after the Utility receives the Concessionaire's notice, the parties shall discuss and agree the estimated alteration in flow and the estimated increase or decrease in operating costs due to the alteration in flow. If the parties cannot agree these matters, the dispute shall be determined by an Expert in accordance with clause 43.

9. ARCHAEOLOGICAL FINDS

- (1) As between the Utility and the Concessionaire, any Archaeological Finds shall be deemed to be the property of the Utility.
- (2) The Concessionaire shall inform the Utility's Representative forthwith upon the discovery of any Archaeological Finds, and comply with the directions of the Utility's Representative in relation to the removal or disposal of such Archaeological Finds, or shall allow the Utility to enter the relevant Site for the purposes of such removal or disposal.

⁹ Utility is constructing its own sewerage facilities.

- (3) The Concessionaire shall not attempt to remove any Archaeological Find without the Utility's Representative's sanction and shall procure that its employees and sub-contractors shall neither remove nor damage such Archaeological Finds.
- (4) In the event that the relevant Archaeological Find cannot be moved, or that it is inappropriate that the same be moved, then the Concessionaire shall allow the Utility or any Competent Authority to carry out any investigation which they deem is appropriate in connection with its or their statutory duties or which is otherwise required by law.
- (5) The provisions of sub-clauses (1) to (4) shall not affect the rights or obligations of either party under any Statutory Requirement or Required Consent.

10. STATUTORY REQUIREMENTS AND REQUIRED CONSENTS

- (1) Without prejudice to, and subject to the provisions of clause 19, the Concessionaire shall at its cost carry out its obligations under this agreement so as to comply at all times with all Statutory Requirements and Required Consents (including those introduced after the date of this agreement).
- (2) The Concessionaire shall be deemed to have satisfied itself, as at the Concession Award Date, as to the adequacy of the Utility Consents for the purpose of discharging its obligations under this agreement. The Utility shall not be liable for any errors or omissions made in obtaining the Utility consents, or for any costs of rectifying any such errors or omissions, but shall give the Concessionaire all reasonable assistance in rectifying any such errors or omissions. The Concessionaire shall take full responsibility as if it had applied for and obtained the Utility Consents on its own behalf.
- (3)
 - (a) The Concessionaire shall be responsible for obtaining all Required Consents (other than the Utility Consents).
 - (b) The Concessionaire shall notify the Utility's Representative forthwith in the event that any Required Consent is proposed to be amended or replaced by the relevant Competent Authority, or in the event that a new Required Consent is to be issued by a Competent Authority, and shall from time to time, at its own cost, provide to the Utility such other information in relation to the progress of such amendment, replacement or issue as the Utility's Representative may require and copy all correspondence with such Competent Authority to the Utility. The Concessionaire shall take account of the Utility's comments and follow its directions in relation to any matter concerning such amendment, replacement or issue.
 - (c) If, following an amendment or replacement of a Required Consent, or the issue of a new Required Consent, the Utility requests the Concessionaire to appeal a decision of a Competent Authority, the Concessionaire shall, subject to the Utility meeting its reasonable costs in relation thereto, follow the appropriate appeal procedures in accordance with the Utility's directions.
- (4) The Utility shall provide the Concessionaire with all information within the Utility's possession or control reasonably required by the Concessionaire in relation to, or for the purpose of obtaining, any Required Consent.
- (5) If the Concessionaire fails to pay any fee or other amount due pursuant to a Statutory Requirement or Required Consent when it is due, the Utility may (at its sole discretion) pay

such fee and the amount so paid shall be immediately due and payable by the Concessionaire to the Utility.

- (6) The Concessionaire shall comply with any decree, declarator, order, judgement, direction, stipulation or requirement given, made or issued by any Competent Authority against or in relation to the Utility as a result of a breach by the Concessionaire of any Statutory Requirement or Required Consent. The Concessionaire shall indemnify the Utility on demand against any and all penalties, claims, costs, demands, liabilities and expenses (including legal expenses on an indemnity basis) arising from any breach by the Concessionaire of any notice, licence, approval, Statutory Requirement or Required Consent arising during the Concession Period or from any failure by the Concessionaire to give a notice or obtain a Required Consent which is its responsibility under this agreement.
- (7) The Concessionaire shall provide the Utility with all information reasonably requested by it in relation to the Required Consents (including, if so requested, copies of applications and copies of Required Consents) and shall consult with the Utility in connection therewith.
- (8) The Concessionaire shall use its reasonable endeavours to obtain the Required Consents (other than the Utility Consents) on a basis which permits the Utility and successors to the Concessionaire to construct and operate the Scheme.

11. TIME FOR COMPLETION

- (1) The Concessionaire shall so execute the Construction Works that they shall be complete in accordance with the Concession Specification and shall pass the Performance Tests within the Time for Completion.
- (2) If by reason of:
 - (a) an Utility Variation;
 - (b) an IDC Variation;
 - (c) a Change of Law Variation;
 - (d) a Force Majeure Event;
 - (e) a breach by the Utility of its obligations under this agreement; or
 - (f) the discovery of any Archaeological Find at a Site,

(each a "**Delay Event**") the Concessionaire has been delayed in the achievement of the Construction Timetable, any Milestone, the Time for Completion or the Latest Time for Completion then, provided that the Concessionaire has complied and continues to comply with all obligations under this clause the Utility's Representative shall, on receipt of such notice and particulars, grant to the Concessionaire from time to time in writing either prospectively or retrospectively, such extension of the Construction Timetable and (if applicable) any Milestone, the Time for Completion and the Latest Time for Completion as shall be reasonable in relation to such Delay Event.

- (3) In order to obtain an extension as described above:
- (a) the Concessionaire must within 28 days after it became aware that the Delay Event has caused or is likely to cause delay (or, if earlier, within 28 days after the date on which it should have become so aware) give to the Utility's Representative notice of its claim for an extension of time and as soon as reasonably practicable but in any event within 15 days after such notice (so far as practicable) supply the Utility's Representative with full particulars of the extension to which it considers itself entitled; and
 - (b) the Concessionaire must establish to the reasonable satisfaction of the Utility that the event in question had a material effect on the critical path of the Concessionaire for the achievement of the Construction Timetable, any Milestone, the Time for Completion or the Latest Time for Completion (as the case may be) and that the lost time could not reasonably be recovered within the Construction Timetable or by the Time for Completion by the Concessionaire acting in accordance with Good Engineering and Operating Practices (but, for the avoidance of doubt, without obligation on the part of the Concessionaire to incur unreasonable additional expense by accelerating the Construction Works).
- (4) The Concessionaire shall not be entitled to any extension of the time in respect of a Delay Event to the extent that such extension is based on an application made or information provided after the dates laid down in paragraph (a) of sub-clause (3). The Concessionaire shall be deemed to have waived all rights and claims to which it might otherwise have become entitled on the basis of such application or information.
- (5) During the Construction Phase the Concessionaire shall be entitled to an adjustment to the Tariff Rates if a breach by the Utility of its obligations under this Agreement increases the costs of construction of the Scheme provided that the Concessionaire has, in accordance with Good Engineering and Operating Practices, mitigated any such increase in costs, and the adjustment to the Tariff Rates shall be the sole remedy available to the Concessionaire for that breach. The adjustment will be calculated in accordance with Section 3.3 of Part 11A of the Schedule such that it compensates the Concessionaire for the increase in construction costs incurred due to the Utility's breach. Any claim for such an adjustment must be made by notice from the Concessionaire to the Utility's Representative within 28 days after the date on which the Concessionaire became aware of the increased costs, or (if earlier) of the date on which it should have become so aware. The notice must set out the Concessionaire's estimate of the increase in capital costs due to the breach and must be supported by full details of the claim. As soon as practicable after the Utility receives the Concessionaire's notice the parties shall discuss and agree the estimated increase in capital costs due to the breach. If the parties cannot agree on the estimated capital costs due to the breach, then the dispute shall be determined by an Expert in accordance with clause 43.
- (6) Without prejudice to the other provisions of this clause the Concessionaire shall within 28 days after it became aware of the happening of a Force Majeure Event (or, if earlier, within 28 days after the date on which it should have become so aware) which may delay the Construction Timetable materially or the Time for Completion, notify the Utility's Representative of such Force Majeure Event.
- (7) If the Performance Test Certificate Date has not occurred by the Latest Time for Completion the Utility may terminate this agreement in accordance with clause 27.

- (8) The Time for Completion and the Latest Time for Completion shall be automatically extended as a result of an Affected Day.

12. DESIGN AND MANUALS

- (1) The Concessionaire shall submit to the Utility's Representative for review:
- (a) within the times given in the Concession Specification such Design Documentation as may be called for therein;
 - (b) details and, if requested by the Utility's Representative, copies of all design or engineering standards to be employed by the Concessionaire in its performance of its obligations under this agreement which are not otherwise required to be used in the Utility's Requirements; and
 - (c) during the progress of the Scheme within such reasonable times as the Utility's Representative may require such drawings of the general arrangement and details of the Scheme as may be specified in this agreement or as the Utility's Representative may reasonably require.
- (2) All Design Documentation shall be consistent with the Concession Specification. The Scheme shall be constructed, carried out and completed in accordance with the Design Documentation submitted to the Utility's Representative.
- (3) Within the time or times stated in the Construction Timetable and, in the case of operating and maintenance manuals and instructions, in any event prior to the commencement of commissioning of the Scheme, the Concessionaire shall supply for review by the Utility's Representative five copies of:
- (a) draft comprehensive operating and maintenance manuals and instructions for the Scheme; and
 - (b) drawings of the Scheme and of each material item of Contract Plant as built (or as substantially built),
- in each case in the form reasonably required by the Utility and in such detail as will enable the Utility to operate, maintain, dismantle, reassemble, replace and adjust all parts of the Scheme.
- (4) The Concessionaire shall:
- (a) revise and amend the manuals and instructions and drawings submitted under sub-clause (3) in accordance with any reasonable substantive comments made thereon by the Utility's Representative within 30 days after receipt by the Utility's Representative of such materials; and
 - (b) supply to the Utility's Representative five copies of the operating and maintenance manuals and instructions and drawings, together with the computer disks and transparencies or microfiches of such manuals and instructions and drawings, as so revised and amended all at the latest within three months after the receipt of the comments of the Utility's Representative.

- (5) The manuals and instructions and drawings submitted under sub-clause (3) shall be periodically updated during the Concession Period and shall continue to be in such detail as will enable the Utility to operate, maintain, dismantle, reassemble, replace and adjust all parts of the Scheme to which they relate.
- (6) The submission of documentation to the Utility's Representative, its review by or on behalf of the Utility and the making of any comments thereon (including any approvals) shall not relieve the Concessionaire of any of its obligations under this agreement and (without prejudice to the Concessionaire's obligation to comply with the Construction Specification) the Concessionaire shall not require the consent of the Utility or its Representative to any Design Documentation.
- (7) Any dispute under sub-clauses (3), (4) and (5) above shall be referred to an Expert for determination in accordance with clause 43.

13. CONSTRUCTION TIMETABLE

- (1) The Concessionaire shall carry out the Construction Works in accordance with the Construction Timetable.
- (2) The Utility's Representative may notify the Concessionaire if in his opinion the Concessionaire is departing from the Construction Timetable but no such notice or review by the Utility's Representative of the Construction Timetable or any comment thereon shall relieve the Concessionaire of any of its obligations under this agreement.
- (3) Subject to sub-clause (4), the Concessionaire may propose amendments or revisions to the Construction Timetable from time to time and shall promptly submit a copy of such amended or revised Construction Timetable to the Utility's Representative for his approval, such approval on behalf of the Utility not to be unreasonably withheld or delayed.
- (4) For the avoidance of doubt no amendment or revision to the Construction Timetable shall, except where the Concessionaire is entitled to an extension of time pursuant to clause 11, relieve the Concessionaire of its obligations to complete the Scheme by the Times for Completion.

14. INFORMATION ON CONSTRUCTION WORKS

- (1) At all times during the Construction Phase the Concessionaire shall provide the Utility's Representative with accurate and complete information with respect to the Construction Works and the events affecting the performance of the Construction Works to the extent such information is required, in the reasonable opinion of the Utility, to enable the Utility to monitor the performance by the Concessionaire of its obligations under this agreement or to exercise the Utility's rights thereunder.
- (2) The Concessionaire shall immediately after it becomes apparent notify the Utility's Representative of all incidents of whatsoever nature affecting or likely to affect materially the progress of the Construction Works.

15. COMMISSIONING

- (1) The Concessionaire shall submit to the Utility's Representative for approval (which shall not be unreasonably withheld) the Commissioning Plans within the times given in the Concession Specification.
- (2) The Concessionaire shall commission the Scheme in accordance with the Commissioning Plans.
- (3) [¹⁰Within the period shown in the Construction Timetable, the Utility shall (subject to sub-clause (5)) permit the Concessionaire to enter the Existing Facilities of the Scheme to carry out the installation and modification work detailed in the Construction Specification, in accordance with the Commissioning Plans.
- (4) As from the Commissioning Commencement Date for an Existing Facility:
 - (a) the Concessionaire shall accept all wastewater flows arising at that Existing Facility;
 - (b) the Concessionaire shall be responsible for the operation and maintenance of the Existing Facilities (including all health and safety requirements) in accordance with this agreement (subject to sub-clause (5)); and
 - (c) the Concessionaire shall comply with the Commissioning Plans.]
- (5) The Utility shall at all times until the Handover Date retain the right to issue such directions, to the Concessionaire or its employees as may be necessary to ensure the continued operation of the Existing Facilities in accordance with the statutory duties and functions of the Utility or to ensure compliance with all health and safety requirements. The Concessionaire and its employees shall comply with such directions notwithstanding that they may hinder, delay or otherwise prejudice the installation or commissioning of the Scheme or the conduct of the Performance Tests.
- (6) The Utility shall, in relation to the Existing Facilities:
 - (a) operate and maintain such facilities in accordance with Good Engineering and Operating Practices until the Commissioning Commencement Date for that Existing Facility and shall comply with the requirements set out in Part 8 of the Schedule; and
 - (b) provide training for the Concessionaire's staff in accordance with the Commissioning Plans.
- (7) The Utility shall provide the Concessionaire with all reasonable assistance to enable the Concessionaire to commission the Scheme in accordance with the Commissioning Plans.
- (8) Any dispute arising out of or in respect of sub-clause (6) shall be referred to an Expert for determination in accordance with clause 43.

¹⁰ Relevant where there are existing facilities that are to be combined with new facilities, where Utility is to continue to operate and maintain existing facilities until commissioning date for the existing facility when responsibility for operation and maintenance transfers to Concessionaire. Concessionaire takes risk of state of assets of Existing Facilities (this may not be appropriate where the assets are in poor condition etc).

16. PERFORMANCE TESTS

- (1) The Performance Tests shall be conducted by the Concessionaire in accordance with the Performance Tests procedures set out in Part 4B of the Schedule and subject to the monitoring of the Utility's Representative. The Concessionaire shall give 7 working days' prior notice to the Utility's Representative of commencement of the Performance Tests.
- (2) An Affected Day shall not count as either a "pass" or "fail" for the purposes of the Performance Tests. The period allowed for the completion of the Performance Tests shall be extended by one day for each Affected Day. For each Affected Day the Utility shall pay [] (Indexed) (representing a contribution to the Concessionaire's operational costs).
- (3) If the Scheme fails to pass the Performance Tests or if the Performance Tests are stopped before their completion, the Performance Tests shall be recommenced subject to 7 working days' prior notice to the Utility's Representative, unless the deemed restarting provisions set out in Part 4B of the Schedule apply, in which case the Concessionaire shall notify the Utility's Representative as soon as practicable thereafter of such restart date.
- (4) For any Performance Test the Concessionaire shall issue an interim performance test report to the Utility each week which contains full details of the results of all tests carried out during the previous week.
- (5) After the Concessionaire considers that the Scheme has passed the Performance Tests, the Concessionaire shall issue a Performance Test Certificate together with the performance test report required by Part 4B of the Schedule. The Concessionaire shall immediately supply the Utility's Representative with any further data that he may reasonably require to establish to his satisfaction that the Performance Tests have been passed.
- (6) The Utility's Representative, within 14 days after receiving the Performance Test Certificate, shall, if satisfied that the Scheme has so passed the Performance Tests, countersign it or if not so satisfied on reasonable grounds, shall state why it is not prepared to do so. If the Performance Test Certificate issued by the Concessionaire has not been countersigned by the Utility's Representative within those 14 days (or such longer period as the parties might agree), the Performance Test Certificate shall be deemed to have been refused.
- (7) If, in the event of a dispute, the Expert subsequently determines (in accordance with sub-clause (8) and clause 43) that the Scheme has passed the Performance Tests and that the Performance Test Certificate had therefore been correctly issued, the Performance Test Certificate shall be deemed to have been countersigned on the date it was issued.
- (8) Any dispute arising under this clause shall be referred to an Expert for determination in accordance with clause 43.

17. HANDOVER

- (1) *[¹¹The Utility and the Concessionaire shall, within a reasonable time prior to the Handover Date validly execute the Existing Facilities Land Documents and the Utility shall deliver them to the Concessionaire so that those Existing Facilities Land Documents take effect as from such Handover Date.]*

¹¹ Where Existing Facilities are to be handed over to Concessionaire.

- (2) As from the Handover Date, the Concessionaire shall take over responsibility for and shall operate and maintain the Scheme in accordance with this agreement.

18. TRANSFER OF EMPLOYEES FROM UTILITY TO CONCESSIONAIRE¹²

- (1) The Utility and the Concessionaire acknowledge and agree that the contracts of employment between the Utility and the Employees will have effect on the Handover Date as if originally made between the Concessionaire and the Employees. On or as soon as practicable after the Handover Date the Utility and the Concessionaire shall jointly issue to each Employee a notice substantially in the form set out in Part 19 of the Schedule.
- (2) The Utility shall discharge all its obligations in respect of the Employees up to the Handover Date and shall indemnify the Concessionaire on demand against all claims, costs, demands, liabilities and expenses (including legal expenses on an indemnity basis) arising from the Utility's failure to do so.
- (3) The Concessionaire shall on and from the Handover Date discharge of all the obligations of the employer in relation to the Employees and shall indemnify the Utility on demand against all claims, costs, demands, liabilities and expenses (including legal expenses on an indemnity basis) arising from the Concessionaire's failure to do so.
- (4) The Utility shall on demand indemnify and hold the Concessionaire harmless against any claims, costs, demands, liabilities and expenses (including legal expenses on an indemnity basis) relating to an Employee which arises out of any act or omission by the Utility, or any other event, matter or circumstance occurring, before the Handover Date excluding:
- (a) any obligation in respect of the Employee's period of continuous employment (including, without limitation, an obligation to make any payment as a result of termination of employment which is calculated by reference of a period of employment with the Utility or any of its statutory predecessors as well as the period of employment with the Concessionaire);
 - (b) any liability referred to in (5) below.
- (5) The Concessionaire shall on demand indemnify and hold the Utility harmless against any claims, costs, demands, liabilities and expenses (including legal expenses on an indemnity basis) relating to an Employee which arises out of or in connection with:
- (a) any provision of this agreement including (without limitation) the change of employer occurring by virtue of this agreement;
 - (b) the termination of his employment, a change to a term of his employment or working conditions (including, without limitation, any term relating to an occupational pension scheme), any act or omission by the Concessionaire or any other event, matter or circumstance occurring at or after the Handover Date;
 - (c) an Employee continuing to be employed by the Utility after the Handover Date and/or the termination of that employment by the Utility or the Employee.

¹² Usual to see obligations requiring Concessionaire to provide employment conditions to transferred employees similar to those provided by transferring utility – this may be required by law. Important to check that employees may be transferred from employer under local laws (may have to be seconded if this is not possible) and what happens under local law on termination of agreement.

- (6) If the [taxation authority] brings into any charge to taxation any sum payable under any of the indemnities contained in this clause, the amount so payable shall be grossed up by such amount (such amount being referred to as the "**gross-up amount**") as will ensure that after deduction of the tax so chargeable there shall remain a sum equal to the amount that would otherwise have been payable under such indemnity. To the extent that the Beneficiary subsequently obtains any tax credit, allowance, repayment or relief as a result of the undertaker paying to it the gross-up amount, it shall pay to the Undertaker so much of the economic benefit from that tax credit, allowance, repayment or relief which it has received as does not exceed the gross-up amount (any question as to the accrual or amount of any such economic benefit, the order and manner of making any claim for any tax credit, allowance, repayment or relief, and the timing of any payment, being determined by the Beneficiary's auditors).
- (7) *[The Concessionaire shall on or before the Handover Date offer Employees membership of a [pension scheme] which provides benefits in respect of employment with the Concessionaire which are taken as a whole comparable to those provided by the [existing pension arrangements] and, if any pension entitlement is transferred to the Concessionaire's scheme from [] by an Employee, which provides benefits which are actuarially equivalent to the amount transferred.]*

19. OPERATION AND MAINTENANCE

- (1) The Concessionaire shall be obliged at its own expense to operate the Scheme in accordance with the Operation and Maintenance Specification.
- (2) The Concessionaire agrees that it shall not remove or replace the Operator¹³ without the consent of the Utility which shall not be withheld unless, in the Utility's opinion, the proposed replacement operator does not have the relevant experience or will not be a competent or responsible operator or will not have adequate financial resources to discharge the obligations of the Concessionaire under this agreement for the operation and maintenance of the Scheme. The Concessionaire shall following any such removal or replacement procure that an agreement in terms substantially the same as the terms of the O&M Warranty is entered into in respect of the new operator with a person acceptable to the Utility.
- (3) Without prejudice to the obligations of the Concessionaire under the preceding sub-clauses and under clauses 3, 4, 5 and 6, the Concessionaire shall ensure on a continuing basis that, at all times during the Concession Period its maintenance and operating procedures are sufficient to ensure that, save as expressly provided otherwise by this agreement:
- (a) the Core Requirements are continuously met; and
 - (b) the Scheme operates in accordance with all Statutory Requirements and Required Consents.

20. UTILITY VARIATIONS

- (1) The Utility shall, subject to and in accordance with this clause, have the power by notice to the Concessionaire from time to time during the Concession Period to propose Variations.

¹³ This assumes that Concessionaire is a consortium and recognizes importance of identity of operator, that is to operate plant for more than 20 years. Utility will be anxious to ensure that a limitation of this sort is included.

The Utility shall not propose a Variation which does not relate to and is not ancillary or incidental to the reception, treatment or disposal of wastewater arising in the Catchment Area or of sludge to be treated at the Scheme.

- (2) As soon as practicable and in any event within [28] days receipt of a notice under sub-clause (1), the Concessionaire shall notify the Utility's Representative:
- (a) whether, in the Concessionaire's opinion, any adjustments to the provisions of this agreement (other than to the Tariff Rates) would be necessary as a result of the proposed Variation to enable the Concessionaire to perform its obligations under this Agreement; and
 - (b) the estimated increase or reduction in the annual operating costs for each year remaining in the Concession Period which would result if the proposed Variation were carried out and the estimated capital cost of carrying out the proposed Variation (but not including any cost which is or would be incurred prior to the date on which the Variation is confirmed under sub-clause (4)),
- and shall give full supporting details.
- (3) As soon as practicable after the Utility receives the Concessionaire's notice under sub-clause (2), the parties shall discuss and agree the matters referred to in sub-clause (2). During the course of these discussions the Utility may propose modifications of the proposed Variation, in which event the Concessionaire shall, as soon as practicable and in any event within 14 days after receipt of the proposed modifications, notify the Utility of any modifications to its notice under sub-clause (2). If the parties cannot agree on the matters referred to in sub-clause (2) the dispute will be determined by an Expert in accordance with clause 43.
- (4) As soon as practicable after the matters referred to in sub-clause (2) are agreed, or have been determined by the Expert pursuant to sub-clause (3), the Utility's Representative shall either confirm the Variation (as modified under sub-clause (3), if applicable) (an "**Utility Variation**") or withdraw it. If the Utility does not confirm the Variation within 30 days after agreement or determination it shall be deemed to have been withdrawn.
- (5) The Concessionaire shall, subject to the provisions of this clause, carry out with all diligence and complete within a reasonable period all work necessary to comply with an Utility Variation and, as from completion of such work or (if earlier) expiry of such reasonable period, be bound by this agreement as though that Variation were provided for in the Concession Specification.
- (6) The Concessionaire shall be under no obligation to carry out work for an Utility Variation until the adjustment to the Tariff Rates has been determined under sub-clause (1) if:
- (a) the Estimated Capital Cost of the Utility Variation, taken together with the Estimated Capital Cost of other Modifications made in the preceding three month period but disregarding any Estimated Capital Cost met or to be met by the Utility, is in excess of []¹⁴ (Indexed); or
 - (b) sub-clause (7) applies.

¹⁴ Concessionaire needs to be sure that it is going to be able to raise funds to pay for the construction of the new works.

- (7) If the Estimated Capital Cost of the Utility Variation, taken together with:
- (a) if the Utility Variation is made prior to the Handover Date, the Estimated Capital Cost of other Modifications made during the First Funding Period; or
 - (b) if the Utility Variation is made on or after the Handover Date, the Estimated Capital Cost of other Modifications made during either of the Second Funding Periods,

but disregarding any Estimated Capital Cost met or to be met by the Utility, exceeds the relevant Funding Threshold the Concessionaire shall use its reasonable endeavours to obtain funding for the whole of the Estimated Capital Cost on terms reasonably satisfactory to it and the Lenders.

- (8) If, having used reasonable endeavours to obtain the funding pursuant to sub-clause (7) above, the Concessionaire is unable to do so within 90 days after the date that the Utility confirms that the Variation is to be made under sub-clause (4), then the Concessionaire shall have no obligation to carry out the Utility Variation unless the Utility meets that portion of the Estimated Capital Cost of the Utility Variation equal to the excess over the relevant Funding Threshold.
- (9) The Utility may (at its sole option) meet the whole or any part of the Estimated Capital Cost of any Utility Variation.
- (10) Any Utility Variation shall give rise to an adjustment to the Tariff Rates so as to put the Concessionaire in the same financial position (in accordance with Section 3.3 of Part 11A of the Schedule) as it would have been in had the Utility Variation not been made (taking into account any Estimated Capital Cost met or to be met by the Utility).
- (11) In any case where the Concessionaire is required to carry out an Utility Variation prior to the determination of the adjustment to the Tariff Rates under sub-clause (10) the Concessionaire shall keep contemporaneous records of the cost of and time expended on making the Utility Variation. Such records shall be open to inspection by the Utility's Representative at all reasonable times.
- (12) Nothing in this clause shall prevent the Concessionaire from making proposals to the Utility's Representative for Variations to the Scheme by notice to the Utility's Representative, but no Variation so proposed shall be carried out by the Concessionaire except as agreed in writing by the Utility's Representative. The Concessionaire shall not be entitled to make more than one proposal for Variations under this sub-clause in any one month. Each proposal may include any number of Variations. For the avoidance of doubt save in so far as otherwise agreed by the parties, any such Variation shall be carried out entirely at the Concessionaire's cost and shall not give rise to any adjustment to the Tariff Rates nor shall it be counted towards the calculation of the aggregate of the Estimated Capital Costs under sub-clause (7) or clause 21(4).

21. CHANGE OF LAW

- (1) Where a Qualifying Change of Law occurs or is due to occur, either party may by notice to the other advise that party's opinion of the following matters:

- (a) the Variations, if any, that need to be made at the Schemes to comply with the Qualifying Change of Law;
- (b) whether any adjustments to the provisions of this agreement (other than to the Tariff Rates) are necessary to enable the Concessionaire or the Utility to comply, in the performance of each party's obligations under this agreement, with the Qualifying Change of Law; and
- (c) the estimated increase or reduction in the annual operating costs for each year remaining in the Concession Period which would result directly from the Qualifying Change of Law and the estimated capital cost of any Variation required to comply with the Qualifying Change of Law (but not including any cost which is or would be incurred prior to the date on which the Variation is agreed by the parties or determined by the Expert under sub-clause (2)),

and shall give full supporting details of its opinion.

- (2) As soon as practicable after receipt of any notice from either party under sub-clause (1), the parties shall discuss and agree the matters referred to in sub-clause (1) and any ways in which the effects of the Qualifying Change of Law may be mitigated or avoided having regard to the rights and obligations of the Concessionaire under the Project Agreements and Financing Agreements. No account shall be taken for the purposes of this clause of any increase in operating costs or capital costs of any required Variation which would not have been suffered or incurred had the Scheme been designed, constructed, operated and maintained in accordance with Good Engineering and Operating Practices. If the parties cannot agree on the matters referred to in this sub-clause or in sub-clause (1), the dispute shall be determined by an Expert in accordance with clause 43.
- (3) In the event that the parties agree to a Variation, or the Expert determines that a Variation is necessary, in consequence of a Qualifying Change of Law (a "**Change of Law Variation**"), the Concessionaire shall be under no obligation to carry out work for that Variation until the adjustment to the Tariff Rates has been determined under sub-clause (7) if:
 - (a) the Estimated Capital Cost of the Change of Law Variation, taken together with the Estimated Capital Costs of other Modifications made in the preceding three month period but disregarding any Estimated Capital Cost met or to be met by the Utility, is in excess of [] (Indexed); or
 - (b) sub-clause (4) applies.
- (4) If the Estimated Capital Cost of the Change of Law Variation, taken together with:
 - (a) if the Change of Law Variation is made prior to the Handover Date, the Estimated Capital Costs of other Modifications made during the First Funding Period; or
 - (b) if the Change of Law Variation is made on or after the Handover Date, the Estimated Capital Costs of other Modifications made during either of the Second Funding Periods,

but disregarding the Estimated Capital Cost to be met by the Utility, exceeds the relevant Funding Threshold, the Concessionaire shall use its reasonable endeavours to obtain funding

for the whole of the Estimated Capital Cost on terms reasonably satisfactory to it and the Lenders.

- (5) If having used reasonable endeavours to obtain funding pursuant to sub-clause (4) above the Concessionaire cannot obtain funding within 90 days after agreement or determination of the Estimated Capital Cost in accordance with sub-clause (2), the Concessionaire may by notice to the Utility request that the Utility provide the funding in excess of the relevant Funding Threshold. In the event that the Utility does not agree within 90 days after receipt of such notice to provide the funding, the Concessionaire may terminate this agreement in accordance with clause 26.
- (6) The Utility may (at its sole option) meet the whole or any part of the capital expenditure required for the Change of Law Variation.
- (7) A Qualifying Change of Law shall give rise to an adjustment to the Tariff Rates only where the aggregate of:
 - (a) the Estimated Capital Costs (disregarding any Estimated Capital Costs to be met by the Utility) of the Change of Law Variation(s) (if any) due to; and
 - (b) the Operating Cost Effect of,

the Qualifying Change of Law in question and due to any Qualifying Changes of Law which occurred during the previous 12 month period exceeds [] (Indexed). In that event, the Tariff Rates will be adjusted so as to put the Concessionaire in the same financial position (in accordance with Section 3.3 of Part 11A of the Schedule) as it would have been in had the Qualifying Change of Law not been made (taking into account any Estimated Capital Cost met by the Utility and the terms of the definition of Estimated Operating Cost in clause 1(1)).
- (8) In any case where the Concessionaire is required to proceed with a Change of Law Variation prior to the determination of the adjustment to the Tariff Rates under sub-clause (7) the Concessionaire shall keep contemporaneous records of the cost of, and time expended on, making the Change of Law Variation. Such records shall be open to inspection by the Utility's Representative at all reasonable times.
- (9) For the purposes of sub-clause (7):
 - (a) the "**Operating Cost Effect**" of a Qualifying Change of Law is the amount determined by the Utility (acting reasonably) to be the net present value of the estimated increase and/or decrease in Estimated Operating Costs attributable to the Qualifying Change of Law, determined by discounting the relevant estimated increase or decrease back to the date the Qualifying Change of Law first affected the performance of the obligations of the Concessionaire under this agreement at the discount rate used in the relevant financial models used for the purposes of Section 3.3 of Part 11A; and
 - (b) the Estimated Operating Cost for any period, and the Operating Cost Effect, of a Qualifying Change of Law may be negative, and a negative Operating Cost Effect shall be deducted for the purposes of the aggregation contemplated by sub-clause (7).

22. STEP-IN RIGHTS

- (1) If the Utility or the Utility's Representative becomes aware that the Scheme does, or the Concessionaire has failed or is failing to, comply in some respect with the requirements of this agreement, the Utility may issue a notice to the Concessionaire giving details of the failure to comply (a "**Notified Default**") and requiring the Concessionaire to remedy the Notified Default within a reasonable period fixed by the Utility by reference to the nature and consequences of the default and the remedial action required.
- (2) If the Concessionaire fails to remedy a Notified Default within the period fixed by the Utility then, without prejudice to the Utility's rights under clause 27, the Utility may arrange for the Notified Default to be remedied and shall be entitled to recover the costs of such work from the Concessionaire.
- (3) Notwithstanding any other provision of this agreement but without prejudice to clause 3(6), the Utility may take such action as it considers necessary in order to prevent, mitigate or eliminate an immediate and serious risk to health, safety or the environment to ensure the proper discharge of its statutory functions where such functions are not being properly discharged through the Concessionaire under this agreement (including, without prejudice to the generality of this provision, the suspension of the Concessionaire's rights under this agreement, the removal, repair or replacement of any part of the Scheme and the carrying out of any other work, but not including the taking of action which amounts to the performance by the Utility of substantially all of the Concessionaire's obligations under this agreement to construct the Scheme). The Utility may for this purpose enter upon the Sites and, for such period as is necessary for the purposes referred to above, take over all or part of the operation of the Scheme.
- (4) The Concessionaire shall co-operate fully with whatever action the Utility deems it appropriate to take for the purposes of sub-clause (3) and shall provide all reasonable assistance to the Utility for that purpose and for the avoidance of doubt the Concessionaire shall not be obliged to perform and discharge obligations under this agreement for so long as those obligations are being performed and discharged by the Utility pursuant to sub-clause (3).
- (5) For each day on which the Utility takes over the operation of or continues to operate the Scheme for reasons which do not arise from any breach by the Concessionaire of its obligations under this agreement, the Concessionaire shall, as from the Handover Date, be entitled to receive:
 - (a) Wastewater Treatment Contract Payments calculated on the assumption that the Wastewater Standards are met on that day; and
 - (b) Sludge Treatment Contract Payments provided that all sludge is being treated and disposed of in accordance with clause 5.
- (6) For each day on which the Utility takes over or continues to operate the Scheme for reasons which do arise from a breach by the Concessionaire, the Concessionaire shall:
 - (a) pay the Utility all the Utility's reasonable costs of such operation;
 - (b) from the Handover Date, be entitled to receive:

- (i) the Wastewater Treatment Contract Payments only if the Wastewater Standards are met on that day; and
- (ii) the Sludge Treatment Contract Payments provided that all sludge is being treated and disposed of in accordance with clause 5,

and otherwise shall receive no payment.

- (7) Any dispute about the amounts due to the Concessionaire under sub-clauses (5) and (6) shall be subject to determination by an Expert upon the application of either party pursuant to clause 43, if only the amount of compensation is in dispute, or otherwise in accordance with clause 44.

23. PAYMENTS

- (1) Subject to clause 22, the Utility shall, in respect of each day from the Handover Date, pay to the Concessionaire the Contract Payments calculated in accordance with Part 11A of the Schedule. For the avoidance of doubt, no payment shall be due to the Concessionaire under this agreement in respect of any wastewater or sludge which is the subject of an agreement between the Concessionaire and a third party.
- (2) The Concessionaire shall not be entitled to retention or set off of any amount due to it by the Utility against any amounts due to the Utility by it [¹⁵*but the Utility may retain or set off amounts due to it from the Concessionaire against amounts due by it to the Concessionaire under this agreement*].
- (3) The Concessionaire shall issue an invoice to the Utility each month for the treatment services provided in the previous month. Each invoice shall be accompanied by a properly completed certificate for the relevant month in the form at Part 11B of the Schedule, to evidence the calculation of the invoiced amount. Subject to sub-clause (5), the Utility shall pay the Concessionaire the invoiced amount within 30 days after receipt of the invoice and the properly completed certificate.
- (4) The Tariff Rates shall not be increased or reduced save in accordance with the express provisions of this agreement.
- (5) Where the amount of any payment is disputed, the undisputed amount shall be paid. Either party shall refer to an Expert any dispute about the calculation of any Contract Payment due under Part 11A of the Schedule (including a dispute about whether the Wastewater Treatment Contract Payment Standards are met or about whether any adjustment should be made to a Contract Payment under Section 3 of Part 11A) for determination in accordance with clause 43. Where a disputed amount is determined by the Expert to be due, it shall be paid within 7 days after the date of determination, with interest at the base rate of [bank in country] from the date the amount would have become due under sub-clause (3) above to the date of payment.
- (6) The parties will pay interest on any principal sums payable under this agreement not paid on the date provided for payment under this agreement, over the period from that date until the date of actual payment at a rate per annum equal to [two per cent. (2%)] above the base rate of [BANK].

¹⁵ Lenders are likely to resist a right for Utility to retain or set off amounts due under the agreement.

- (7) If any supply made under or contemplated by this agreement is or becomes chargeable to service tax ("**Service Tax**") then the person receiving that supply (the "**Recipient**") shall in addition pay the amount of that Service Tax to the person making the supply (the "**Supplier**") against receipt by the Recipient from the Supplier of a proper Service Tax invoice in respect of the supply.
- (8) In the circumstances described in Section 3.2 of Part 11A of the Schedule (Revenue-Sharing Arrangements) the Concessionaire shall pay to the Utility any amount due in accordance with the provisions of that Section in accordance with its terms.

24. CONCESSION PERIOD

- (1) The Concession Period shall commence on the Concession Award Date and shall, subject to sub-clause (2), end on the last day of the period of twenty-five years from the Concession Award Date unless terminated earlier by mutual agreement or in accordance with the express terms of any other provision of this agreement.
- (2) The period of twenty-five years referred to in sub-clause (1) shall be automatically extended by:
- (a) any period of extension granted to the Concessionaire under clause 11(2);
 - (b) the duration of any Force Majeure Event during the Operation and Maintenance Phase; and
 - (c) any period during which the Concessionaire was unable to carry out its obligations during the Operation and Maintenance Phase due to a default by the Utility,

provided that no day may be counted more than once.

25. FORCE MAJEURE¹⁶

- (1) No party shall be in breach of its obligations under this agreement or incur any liability to the other party for any losses or damages of any nature whatsoever incurred or suffered by that other if and to the extent that it is prevented from carrying out those obligations by, or such losses or damages are caused by, a Force Majeure Event.
- (2) Immediately following the date of commencement of a of Force Majeure Event, and within a reasonable time following the date of termination of a Force Majeure Event, any party which invoked it shall submit to the other party reasonable proof of the nature of the Force Majeure Event and of its effect upon the performance of the party's obligations under this agreement.
- (3) The parties shall use all reasonable endeavours to prevent and mitigate the effects of any delay, and the Concessionaire shall take all steps in accordance with Good Engineering and Operating Practices required to overcome or minimise the actual or anticipated delay occasioned by, or other consequence of, a Force Majeure Event.

¹⁶ This force majeure provision is unusual and country specific as the events of force majeure are very limited and the consequences are limited: parties are relieved of obligations under agreement, but there is no provision for extra cost, or any indication as to whether Concessionaire continues to be paid a minimum fee (which would cover fixed costs, for example), although there is and extension to time for completion of construction works (11(2)(d) and extension of the Operation and Maintenance Period (24(b)). For example of a more extensive force majeure provision, go to Note 1 at the end of this document.

- (4) This clause is without prejudice to the requirement for the Concessionaire to comply with clause 11 in order to obtain extensions of time for any Force Majeure Event.
- (5) Should sub-clause (1) apply, as a result of a single Force Majeure Event for a continuous period of more than 12 months then the parties shall endeavour to agree any modifications to this agreement which may be equitable having regard to the nature of the Force Majeure Event.
- (6) Notwithstanding that the Concessionaire may have been granted under clause 11 an extension of time in respect of a Force Majeure Event, if the parties have failed to reach agreement as described in sub-clause (5) within 24 months of the commencement of the Force Majeure Event, either party may at any time thereafter, and provided that the Force Majeure Event still subsists at the time such notice is served, by notice to the other terminate this agreement. Upon such termination the Utility shall pay the Concessionaire a capital sum by way of compensation in respect of the Schemes calculated in accordance with Part 12B of the Schedule. Such amount shall be payable 30 days after the date of termination.

26. TERMINATION BY CONCESSIONAIRE

- (1) If the Concessionaire is entitled to terminate this agreement under clause 7(8) or 21(5), the Concessionaire may give not less than 90 days' notice (a "**Concessionaire Termination Notice**") to the Utility to terminate this agreement. In that notice the Concessionaire shall specify the ground or grounds of termination and details of the breach or breaches concerned
- (2) Upon expiry of the Concessionaire Termination Notice, the Concessionaire may, unless the ground or grounds for termination specified in the notice has or have been remedied, without prejudice to any other right under this Agreement, by notice to the Utility forthwith terminate this agreement.
- (3) If a Competent Authority takes action which, notwithstanding any Variation which could be made, makes it illegal or impossible (but not merely more expensive) for the Concessionaire to perform substantially all its material obligations under this agreement, the Concessionaire may give 30 days' notice to the Utility to terminate this agreement and unless the illegality or impossibility has been removed prior to the expiry of that notice this agreement shall terminate on such expiry.
- (4) If the Concessionaire terminates this agreement under sub-clause (2) or (3) the Utility shall pay by way of compensation:
 - (a) where the Concessionaire terminates under clause 26(3) a capital sum calculated in accordance with Part 12A of the Schedule; or
 - (b) where the Concessionaire terminates under clause 7(8) or 21(5), a capital sum calculated in accordance with Part 12B of the Schedule.

Any such compensation shall be payable 30 days after the date of termination.

- (5) Where the Utility fails to pay an amount of money exceeding [] (Indexed) due under this agreement, and that amount remains outstanding for more than 30 days, the Concessionaire may give the Utility a notice specifying the non-payment of the amount and requiring payment of the amount within 60 days or such further period as may be allowed by the

Concessionaire. If payment has not been made within those 60 days the Concessionaire may terminate this agreement with immediate effect by notice to the Utility, and the Utility shall pay, by way of compensation, an amount calculated in accordance with Part 12A of the Schedule, such amount being payable 30 days after the date of termination. This clause shall not apply to amounts which are disputed by the Utility to be due and which have been referred to the Expert for determination in accordance with clauses 23(5) and 43 and in respect of which the Expert has not yet made a determination.

- (6) Where the Utility is obliged to pay to the Concessionaire an amount which is, or an element of which is, expressed to be equal to Concessionaire Senior Debt, that amount shall be paid by the Utility to the Lenders' Agent. The Utility shall be entitled for this purpose to rely upon the certificate of the Lenders' Agent as conclusive as to the amount of Concessionaire Senior Debt at the relevant time. The receipt of the Lenders' Agent shall discharge the Utility's obligation to pay that element of the compensation due to the Concessionaire which is equal to Concessionaire Senior Debt.

27. TERMINATION BY UTILITY

- (1) If:
- (a) the Concessionaire shall in whole or in part assign this agreement, remove or replace the Contractor or sub-let the whole or a part of the Construction Works otherwise than in accordance with clause 32(4) or remove or replace the Operator otherwise than in accordance with clause 19(2); or
 - (b) the Utility is entitled to terminate this agreement under clause 11(7); or
 - (c) a Milestone has not been achieved within 12 months of its due date; or
 - (d) there is a breach or deemed breach of this agreement under clause 31; or
 - (e) the Utility is entitled to terminate this agreement under clause 39(7); or
 - (f) the Concessionaire is in material breach of its obligations under this agreement,
- then the Utility may give not less than 30 days' notice,
- (each an "**Utility Termination Notice**") to the Concessionaire to terminate this agreement. In the Utility Termination Notice the Utility shall specify the ground or grounds of termination and details of the breach or breaches concerned.
- (2) Upon the expiry of an Utility Termination Notice the Utility may, unless the ground or grounds for termination specified in the notice has or have been remedied or, in respect of the grounds mentioned under sub-clause (1)(f), unless remedial action has commenced and is being pursued with all diligence and is completed to the reasonable satisfaction of the Utility within a reasonable period, without prejudice to any other remedy under this agreement, by notice to the Concessionaire forthwith terminate this agreement and the Land Documents and enter the Sites and expel the Concessionaire therefrom but without thereby releasing the Concessionaire from any of its obligations or liabilities which have accrued under this agreement and without affecting the rights and powers conferred by this agreement on the Utility or the Utility's Representative.

- (3) Upon termination of this agreement by the Utility under this clause or clause 30 during the Construction Phase the Utility may itself complete the Scheme in accordance with this agreement (save only for any modifications which amount to variations of the Design Documentation but which are reasonably necessary in order to remedy any material design defect or to replace Contract Plant which is not readily available with alternative Contract Plant of, so far as practicable, the same quality and value) or may employ any other contractor so to do, and the Utility shall have free use of any Contractor's Equipment for the time being on site.
- (4) If so required by the Utility, as soon as practicable after such termination during the Construction Phase, the Concessionaire shall assign or procure the assignment to the Utility or to any contractor nominated by it the benefit of any or all of the contracts and sub-contracts relating to the Construction Works which have been let by the Concessionaire or the Contractor, provided however that any such assignment shall be on terms which shall not prejudice the Concessionaire's or Contractor's rights or claims against the sub-contractor accrued prior to such assignment or the Concessionaire's ability to recover from the sub-contractor in respect thereof.
- (5) No amount shall be payable by the Utility by way of compensation for termination pursuant to this clause.

28. BANKRUPTCY AND INSOLVENCY

If an Insolvency Event occurs in relation to the Concessionaire, the Utility shall be entitled to terminate this agreement forthwith (and without payment of any amount by way of compensation) by notice to the Concessionaire or to the administrator, receiver, manager or liquidator or to any person in whom this agreement may become vested, in any of which events the provisions of clause 27 shall apply.

29. OTHER CONSEQUENCES OF TERMINATION

- (1) On termination of this agreement for any reason:
 - (a) the Land Documents shall terminate in accordance with their terms and both the Utility and the Concessionaire will execute any deeds reasonably required to record the termination of the Land Documents;
 - (b) all interests in the Scheme shall vest in the Utility or any person nominated by it;
 - (c) up-to-date versions of all operating and maintenance manuals, project specific health and safety manuals, instructions and drawings referred to in clause 12(3) shall be delivered to the Utility;
 - (d) all other books and records reasonably required to enable the Utility or a successor concessionaire to own, operate and maintain the Scheme shall be delivered to the Utility; and
 - (e) the Utility shall be entitled (and the Concessionaire shall ensure that this right is obtained) to purchase all spare parts, tools and moveable property used in the Schemes (to the extent owned or leased (to the extent possible, the Concessionaire having used all reasonable endeavours to enable such leased property to be transferred) by the Concessionaire) free from all liens charges and encumbrances at

fair market value as agreed by the parties or in default of agreement within 30 days of termination as determined by the Expert,

provided that in the event of termination by the Concessionaire pursuant to clause 26(2), (3) or (5), if the Concessionaire incurs costs or expenses arising from the obligations set out in this sub-clause, the Utility shall reimburse the Concessionaire for such costs reasonably and properly incurred. The Utility may request such documentary evidence as it shall require to determine whether the costs of the Concessionaire have been reasonably and properly incurred.

- (2) The Concessionaire shall indemnify and keep indemnified the Utility against any and all claims, costs, demands, liabilities and expenses (including legal expenses on an indemnity basis) which relate to any claim in respect of an Employee:
 - (a) arising from any act or omission by, or obligation or liability of, the Concessionaire whether under contract, statute, or otherwise or any other event occurring prior to termination of the Concession; and
 - (b) on or after termination of this agreement, except where it is terminated in accordance with clause 26(2), (3) or (5), arising out of the termination by the Utility of an Employee's contract of employment and against the sum payable to or in respect of that employee in respect of his employment following the termination of this agreement.
- (3) The Concessionaire agrees that:
 - (a) the Utility (or its nominee) may make to each such Employee an offer in writing to employ him under a new contract of employment to take effect upon the termination referred to below; and
 - (b) upon that offer being made by the Utility (or its nominee) and accepted by the Employee, the Concessionaire shall terminate the employment of the Employee concerned and the Utility shall be responsible for all the costs and expenses of employing such Employee from the termination of this agreement until such termination, and the indemnity in clause (2)(b) shall not apply.
- (4) The Concessionaire shall:
 - (a) twelve months prior to the end of the Concession Period;
 - (b) at any time directed by the Utility; or
 - (c) after the Utility or the Concessionaire has given notice to terminate the Agreement,

fully and accurately disclose to the Utility, the information listed in Part 20 of the Schedule relating to the Employees, as the Utility may request. The Utility shall be authorised to use the information for informing any tenderer for the services provided pursuant to this agreement and shall enable and assist the Utility and such other persons as the Utility may nominate to communicate with and meet the Employees as, when and where the Utility decides (in its absolute discretion).

- (5) The Concessionaire shall not:

- (a) during the twelve month period prior to the end of the Concession Period; or
- (b) after the Utility or Concessionaire has given notice to terminate this agreement,

without the prior written agreement of the Utility:

- (i) vary, or purport or promise to vary, any term or condition of employment (including any benefit or payment on retirement or termination of employment) of any Employee (including any promise to make any additional or increased payment or provide any additional or increased benefit);
- (ii) create or grant, or promise to create or grant, terms or conditions of employment for any Employee engaged during that period or after that notice is given, which are substantially overall more favourable than those for then existing Employees in the same category or grade;
- (iii) increase or decrease the number of Employees; and/or
- (iv) transfer any Employee who is engaged by the Concessionaire in the performance of its obligations under this Agreement to the performance of any other work.

30. RIGHTS OF ACCESS

- (1) The Utility or the Utility's Representative may at all times enter upon the Sites and inspect the construction, operation and maintenance of the Scheme to ensure the Concessionaire's obligations under this agreement are being performed.
- (2) The Utility and the Utility's Representative shall at all times have access to the Construction Works and the Sites and to all workshops and places where work is being prepared or where Contract Plant or materials are being obtained for the Scheme and the Concessionaire shall afford, and shall procure that the Contractor shall afford, every facility for and assurance in obtaining such access.
- (3) The Utility and the Utility's Representative shall at all times have access to the Scheme during the Operation and Maintenance Phase and shall be entitled to conduct tests and take samples and shall be entitled to have access to test results and samples taken by or on behalf of the Concessionaire.
- (4) The Utility and the Utility's Representative shall, without prejudice to sub-clause (1), in exercising their rights of access to the Sites, comply at all times with any relevant health and safety requirements at the Sites.
- (5) Where the Utility or the Utility's Representative causes material damage to the fabric of the Scheme in the exercise of its rights under this clause, the Utility shall be liable to the Concessionaire for the reasonable cost of repairing the damage so caused.

31. TRANSFERS AND AMENDMENTS

- (1) *[During the period from the Concession Award Date to the [seventh]¹⁷ anniversary of the Handover Date, it shall be deemed to be a breach of this agreement if the legal, beneficial or equitable interest in the equity share capital of the Concessionaire ceases to be held by the persons listed in Part 18 of the Schedule (or any Affiliate for the time being of those persons) in the proportions set out against their respective names in that Part of the Schedule or if any amendment is made to the Articles of Association of the Concessionaire except in accordance with sub-clauses (2), (4) and (5), without in either case the prior written consent of the Utility, which may be withheld for any reason.*
- (2) *Between the second anniversary and the seventh anniversary of the Handover Date, any holder of any legal, beneficial or equitable interest in the equity share capital of the Concessionaire may subject to the prior written consent of the Utility (which may not be unreasonably withheld or delayed):*
- (a) *dispose of all or part of that interest; or*
- (b) *subscribe for further shares in the Concessionaire,*
- provided that following any such disposal or subscription each of the persons in Part 18 of the Schedule (together with any of its Affiliates) holds at least 51% of the interest (together with the voting rights attaching thereto) which is set out against its name in Part 18 of the Schedule.*
- (3) *If the Utility consents under clause 32(4) to a replacement Contractor or under clause 19(2) to a replacement Operator, sub-clause (1) and (2) of this clause shall not apply to a transfer, contemporaneously with the taking effect of the appointment of the replacement Contractor or Operator (as the case may be), to such replacement Contractor or Operator (or to one of its Affiliates) of the entire interest in the equity share capital of the Concessionaire held by the Contractor or Operator which is being replaced together with any such interest held by any Affiliate of such Contractor or Operator, provided that the acceptability to the Utility of the replacement Contractor or Operator or its Affiliates as shareholders in the Concessionaire is a ground on which the Utility may reasonably withhold its consent to the replacement (or impose conditions thereon) under clause 32(4) or clause 19(2), as applicable.*
- (4) *Any amendment to the Concessionaire's Articles of Association may be made without the consent of the Utility unless it relates to or affects in any way any legal, beneficial or equitable interest in the equity share capital of the Concessionaire, or any voting rights attaching to any such interest, or the powers of the directors of either company to deal with third parties.]*
- (5) *Nothing in this clause shall restrict the ability of Lenders to take security over any interest in the share capital of the Concessionaire or to enforce that security.*
- (6) *The Concessionaire shall not, without the Utility's prior written consent (not to be unreasonably withheld or delayed):*

¹⁷ It is assumed that the Concessionaire is a consortium and that the identity of each member of the consortium is important for the financial and operating stability of the Concessionaire. The parties will need to agree a period during which the original members of the consortium are required to be engaged in the project that balances the desire of the Utility to preserve the strengths of the consortium, with the desire of most construction companies taking part in such projects to exit as soon after the construction period ends as possible.

- (a) terminate or make any amendments to any Project Agreement which could affect its ability to perform its obligations under this agreement to any material extent;
- (b) amend any Financing Agreement or enter into any new agreement for the financing or re-financing, in any form, of the Scheme which (in any such case):
 - (i) would increase the aggregate amount of principal, fees or other charges capable of being borrowed or payable by the Concessionaire;
 - (ii) would reschedule the dates on which payments are due under any such agreement; or
 - (iii) would (on the assumption that it were performed in accordance with its terms) result in an increase in the amount of Concessionaire Senior Debt outstanding at any time.

32. ASSIGNMENT SECURITY

- (1) Without prejudice to any assignment or other transfer of the rights or obligations of either party under this agreement required or effected by or under statute or by operation of law, and save as permitted by this clause or with the prior written consent of the other party, neither party may assign this agreement or the rights arising under this agreement nor create any security over this agreement or such rights or over any property or rights forming part of the Scheme.
- (2) For the purpose of financing the construction or operation of the Scheme, the Concessionaire may in security assign its rights under this agreement to the Lenders (or the Lenders' Agent) and create any other forms of security over it or over any property or rights (heritable or moveable, corporeal or incorporeal) forming part of the Scheme to the Lenders (or the Lenders' Agent) provided that all such rights and forms of security (but for the avoidance of doubt not including security over the Project Agreements) shall cease in relation to the Scheme upon termination of this agreement.
- (3) Subject to sub-clause (4) the Concessionaire may subcontract any of its rights or obligations under this agreement but without relieving the Concessionaire of its obligations under the terms of this agreement.
- (4) The Concessionaire may not replace the Contractor without the Utility's prior written consent (such consent not to be unreasonably withheld or delayed).

33. UTILITY'S REPRESENTATIVE

- (1) The Utility's Representative has authority to act on behalf of the Utility under this agreement only where, and to the extent that, this agreement so provides expressly. In the absence of such express provision, the Utility's Representative shall have no authority to give instructions to the Concessionaire, derogate from or amend this agreement, relieve the Concessionaire of any duty or obligation under this agreement or otherwise to act on behalf of the Utility under this agreement.

- (2) The Utility may from time to time in writing delegate to the Utility's Representative any of the powers and authorities vested in the Utility pursuant to this agreement and shall furnish the Concessionaire with a copy of all such written delegations of powers and authorities.
- (3) Any notice or consent given by the Utility's Representative to the Concessionaire under this agreement or within the terms of such delegation, but not otherwise, shall bind the Concessionaire and the Utility (for whom the Utility's Representative shall be deemed to act as agent) as though it had been given by the Utility.
- (4) In the discharge of his functions under this agreement the Utility's Representative shall not owe any duty to the Concessionaire and shall incur no liability to it.
- (5) The Utility may remove and replace the Utility's Representative at any time without the consent of the Concessionaire but shall give the Concessionaire immediate notice of any removal or replacement and provided always that no such removal or replacement of any person as the Utility's Representative shall invalidate or otherwise affect any actions or decisions of such person in his capacity as the Utility's Representative prior to such removal or replacement. In the event that the Utility removes the Utility's Representative, then, until it appoints a replacement, any notification to be made by the Concessionaire to the Utility's Representative shall be made to the Utility.

34. CONCESSIONAIRE'S REPRESENTATIVE

- (1) The Concessionaire shall appoint a competent representative, who shall have been approved previously by the Utility to superintend the carrying out of the Scheme and to act as the Concessionaire's agent in connection with this agreement.
- (2) The Concessionaire's Representative shall, together with such of the Concessionaire's staff as may be appropriate, attend all meetings with the Utility's Representative at times and at frequencies reasonably required by the Utility's Representative.
- (3) The Concessionaire's Representative shall be deemed to have full power and authority to act on behalf of the Concessionaire.
- (4) The Concessionaire subject to the approval of the Utility may, and if so required by the Utility shall, remove or replace the Concessionaire's Representative at any time provided always that no such removal or replacement of any person as the Concessionaire's Representative shall invalidate or otherwise affect any actions or decisions of such person in his capacity as the Concessionaire's Representative prior to such removal or replacement.
- (5) The Concessionaire shall remove, or procure the removal, from the Sites of any person whose behaviour or activities are likely, in the opinion of the Utility, to bring the Utility into disrepute.

35. INFORMATION AND REPORTING

- (1) The Concessionaire shall maintain its books and records in the manner and for the period described in the Concession Specification and shall permit the Utility to have access to all such books and records and all other information in its possession as may be required in the reasonable opinion of the Utility to enable the Utility to monitor the performance by the Concessionaire of its obligations under this agreement, or to exercise the Utility's rights

thereunder, or to verify amounts due from one party to the other under this agreement, to audit the same and to take copies of all or part thereof.

- (2) In the event that a matter has been referred to an Expert for determination, the Concessionaire shall also permit the Expert to have access to its books and records and all other information in its possession as the Expert may require in order to determine the matter in question, and to take copies of all or part thereof for such purpose, and the Concessionaire agrees and acknowledges that the Utility is entitled to disclose copies of the same in its possession to the Expert.
- (3) The provisions of sub-clauses (1) and (2) are subject to the provisions of clause 40 (Confidentiality).
- (4) During the Concession Period the Concessionaire shall supply the Utility's Representative with such information as is required to be provided by the Concessionaire pursuant to the Concession Specification or as may be reasonably required by the Utility's Representative having regard to the Utility's statutory duties or the obligations to be performed by the Concessionaire under this agreement.

36. INDEMNITY

- (1) The Concessionaire shall, subject to sub-clause (2), be responsible for, and shall release and indemnify the Utility, its employees, agents and contractors on demand from and against, all liability for death or personal injury, loss of or damage to property (including property belonging to the Utility or for which it is responsible), actions, claims, demands, costs, charges and expenses (including legal expenses on an indemnity basis) which may arise out of, or in consequence of, the design, construction, operation or maintenance of the Scheme or the performance or non-performance by the Concessionaire of its obligations under this agreement or the presence on the Utility's property of the Concessionaire, its employees, agents or contractors.
- (2) The Concessionaire shall not be responsible or be obliged to indemnify the Utility pursuant to sub-clause (1) for any injury, loss, damage, cost and expense caused by the negligence of the Utility, its employees, agents or contractors or by the breach by the Utility of its obligations under this agreement and provided further that the Concessionaire's liability to indemnify the Utility as provided in sub-clause (1) shall be reduced proportionately to the extent that the negligence of the Utility, its employees, agents or contractors or the Utility's breach is determined to have contributed to the said injury, loss, damage, costs and expenses.
- (3) The Concessionaire's liability to the Utility arising under any indemnity in this agreement shall be without prejudice to any other right or remedy available to the Utility.
- (4) An indemnity by either party under any provision of this agreement shall be without limitation to any indemnity by that party under any other provision of this agreement.
- (5) Without prejudice to clause 37(2), the Utility shall be responsible for, and shall release and indemnify the Concessionaire, its employees, agents and contractors on demand from and against all liability for death or personal injury and loss of or damage to property claims, costs, demands and expenses (including legal expenses on an indemnity basis) to the extent resulting from any negligent act or omission of the Utility, its employees, agents or representatives or from any breach by the Utility of its obligations under this agreement, except to the extent that any such liability arises from the exercise by the Utility of its step-in

rights under clause 22 as a result of a breach by the Concessionaire of its obligations under this agreement, in which case the Utility shall only be responsible for loss of or damage to property to the extent resulting from any wilful act or omission of the Utility, its employees, agents or contractors.

- (6) If one party to this agreement (the "**Beneficiary**") becomes aware of any matter which might give rise to a claim for an indemnity under this agreement from the other party to this agreement (the "**Undertaker**"), the following provisions shall apply:
- (a) the Beneficiary shall immediately give written notice to the Undertaker of the matter in respect of which the indemnity is being claimed (stating in reasonable detail the nature of the matter and, so far as practicable, the amount claimed) and shall consult with the Undertaker with respect to the matter (and if the matter has become the subject of any proceedings the Beneficiary shall give the notice within sufficient time to enable the Undertaker time to contest the proceedings before any first instance judgement in respect of such proceedings is given);
 - (b) the Beneficiary shall take such action and institute such proceedings, and give such information and assistance, as the Undertaker or its insurers may reasonably request to dispute, resist, appeal, compromise, defend, remedy or mitigate the matter or enforce against any person (other than the Undertaker) the rights of the Beneficiary or its insurers in relation to the matter;
 - (c) in connection with any proceedings related to the matter (other than against the Undertaker) the Beneficiary shall use professional advisers nominated by the Undertaker or its insurers and approved by the Beneficiary (such approval not to be unreasonably withheld or delayed) and if the Undertaker or its insurers so requests and the Beneficiary consents (such consent not to be unreasonably withheld or delayed), allow the Undertaker or its insurers the exclusive conduct of the proceedings in each case;
 - (d) the Undertaker shall fully indemnify the Beneficiary for all costs incurred as a result of any request or nomination by the Undertaker or its insurers pursuant to sub-clause (b) or sub-clause (c);
 - (e) the Beneficiary shall not admit liability in respect of or settle the matter without the prior written consent of the Undertaker (such consent not to be unreasonably withheld or delayed);
 - (f) if the Undertaker has conduct of any litigation and negotiations in connection with a claim, the Undertaker shall promptly take all proper action to deal with the claim so as not, by any act or omission in connection with the claim, to cause the Beneficiary to be in breach of its obligations to its current or past employees or to cause the Beneficiary's business interests to be materially prejudiced.
- (7) The indemnities contained in this clause shall, for the avoidance of doubt, extend to include all costs and expenses suffered or reasonably incurred by the Beneficiary in connection with enforcing its rights under this clause.
- (8) Neither party shall have any liability to the other for loss of revenue or profit or other indirect or consequential loss arising from or in connection with the performance or non-performance

of its obligations under this agreement, whether or not as a result of negligence or default, and whether such liability would arise in contract, delict or otherwise.

- (9) Subject to the obligation under any provision of this agreement to make Contract Payments (or a proportion thereof), the Utility shall bear no liability, under this agreement or otherwise, in connection with any loss or damage that the Concessionaire may suffer as a result of any breach of any of the Consent Influent Concentration Levels or of the Pollution Incident Influent Concentration Levels or of any Pollution Incident.
- (10) The provisions and obligations set out in this clause shall survive and remain in force upon and following the termination of this agreement.

37. OWN ENQUIRIES

- (1) ¹⁸Notwithstanding any reports, data or opinions made available to it, or used to obtain Required Consents, the Concessionaire shall be deemed to have satisfied itself as to the suitability of the heritable property and facilities to which it will acquire rights and the nature and extent of the risk assumed by it in relation to the Concession and shall be deemed to have gathered all information necessary to perform its obligations under this agreement including information as to the nature, location and condition of the heritable property (including hydrological, geological, geotechnical and sub-surface conditions), archaeological finds (without prejudice to clause 11(2)(f)), areas of archaeological scientific or natural interest, local conditions and facilities, flow and load estimates and characteristics, the quality of existing structures and obligations assumed as a result of Required Consents and Statutory Requirements.
- (2) The Concessionaire shall not in any way be relieved from any obligation under this agreement, nor shall it be entitled to claim against the Utility under clause 36(6) or otherwise, on grounds that any information whether obtained from the Utility or otherwise (including information made available by the Utility) be incorrect or insufficient (whether or not contained in the Core Requirements or any other part of the Concession Specification) and shall make its own enquiries as to the accuracy and adequacy of such information.

38. INSURANCE

- (1) ¹⁹The Concessionaire shall, throughout the Construction Phase take out and maintain or cause the Contractor to take out and maintain the insurances described in Part 17A of the Schedule and any other insurances as may be required by law (provided that cover thereunder requires to be effective in each case not later than the date on which it is required and from the date on which the relevant risk commences).
- (2) The Concessionaire shall as from the Commissioning Commencement Date (or such earlier date as may be agreed between the parties) for each Existing Facility and, throughout the Operation and Maintenance Phase take out and maintain or cause the Operator to take out and maintain the insurances described in Part 17B of the Schedule and any other insurances as may be required by law.

¹⁸ It may be appropriate for the Concessionaire to accept risk of the data and the site conditions where it has had appropriate access to the site and to be able to make its own assessment of circumstances prior to contract. Where there are existing assets, a concessionaire may be reluctant to accept full risk for the condition of the assets, especially where these are underground and so difficult to inspect, and the provision may need to be amended accordingly.

¹⁹ Advice should be sought from local insurance specialist as to availability of insurances, ability to include endorsements on policy, to make co-insureds etc.

- (3) No party to this agreement shall take or fail to take any reasonable action, or (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any insurance policy in which such party is a co-insured or additional insured person.
- (4) The insurances referred to in sub-clause (1) and (2) shall:
- (a) name the Concessionaire as co-insured with any other party maintaining the insurance;
 - (b) contain a clause waiving the insurers' subrogation rights against the Utility, its employees and agents;
 - (c) provide for 30 days' prior written notice of their cancellation, non-renewal or amendment to be given to the Utility; and
 - (d) provide for payment of any proceeds to be made by insurers in accordance with sub-clauses (12) to (15).

The Utility shall be named on each policy as a co-insured for its separate interest.

- (5) The Concessionaire shall furnish copies of all insurance policies relating to the above to the Utility on request and the Utility shall be entitled to inspect during ordinary business hours such original policies of insurance taken out and maintained pursuant to sub-clauses (1) and (2) which are or should be in the custody of the Concessionaire, together with evidence that the premiums payable thereunder have been paid and that the insurances are in full force and effect.
- (6) Renewal certificates in relation to such insurances shall be obtained as and when necessary and copies thereof (certified in a manner acceptable to the Utility) shall be forwarded to the Utility as soon as possible but in any event at least 10 days before the renewal date.
- (7) If the Concessionaire fails to maintain or procure the maintenance of such insurances, the Utility may pay any premiums required to keep such insurance in force or itself procure such insurance and may in either case recover the amounts thereof on written demand from the Concessionaire.
- (8) The Concessionaire shall give the Utility notification within 30 days after any claim with respect to any of the insurance policies referred to in this clause accompanied by full details of the incident giving rise to such claim.
- (9) Neither failure to comply nor full compliance with the insurance provisions of this agreement shall limit or relieve the Concessionaire of its liabilities and obligations under this agreement.
- (10) The premiums in respect of insurance referred to in this clause shall be the responsibility of the Concessionaire.
- (11) The insurances referred to in this clause shall be effected with insurers approved by the Utility such approval not to be unreasonably withheld or delayed.

- (12) All insurance proceeds received under any policy referred to in Section [] of Part 17A or Section [] of Part 17B of the Schedule (the "**Physical Damage Policies**") shall be applied, subject to and in accordance with this agreement, to repair, reinstate and replace each part or parts of the Scheme in respect of which the proceeds were received except to the extent that the Financing Agreements otherwise requires [*Tenderers to note: the Utility will require that in such circumstances the insurance proceeds will be applied to reinstate the works unless an economic test to be agreed demonstrates that to do so would mean the project would be uneconomic*].
- (13) All insurance proceeds paid under any Physical Damage Policy in respect of a single event (or a series of related events) in an amount in excess of [] (Indexed) shall be paid to the Utility (and the Utility shall be named on those policies as sole loss payee). The Utility shall be obliged to invest all insurance proceeds paid to it under this clause in accordance with the Utility's normal policies and practices for investing money on a short term basis and the Concessionaire shall be entitled to be paid the interest accruing in and credited to the account in which such proceeds are invested as and when the principal sum in respect of which the interest has accrued is payable to the Concessionaire pursuant to this clause.
- (14) Where a claim is made or proceeds of insurance are received or are receivable under any Physical Damage Policy in respect of a single event (or a series of related events) (the "**Relevant Incident**") in an amount in excess of [] (Indexed):
- (a) the Concessionaire shall deliver as soon as practicable and in any event within 28 days after the making of the claim a plan prepared by the Concessionaire for the carrying out of the works necessary (the "**Reinstatement Works**") to repair, reinstate or replace (the "**Replacement Plan**") the property the subject of the relevant claim or claims in accordance with sub-clause (15) below. The Reinstatement Plan shall set out:
 - (i) if not the Contractor, the identity of the person proposed to effect the Reinstatement Works, which shall be subject to the prior written approval of the Utility; and
 - (ii) the proposed terms and timetable upon which the Reinstatement Works are to be effected (including the date that the affected Scheme will become fully operational), the final terms of which shall be subject to the prior written approval of the Utility;
 - (b) provided that the Utility is satisfied that the Reinstatement Plan will enable the Concessionaire to comply with sub-clause (15) below within a reasonable timescale:
 - (i) the Reinstatement Plan will be adopted;
 - (ii) the Concessionaire shall enter into contractual arrangements to effect the Reinstatement Works with the person identified in the approved Reinstatement Plan on the terms approved by the Utility;
 - (iii) the proceeds received by the Utility under any Physical Damage Policy in respect of the Relevant Incident (the "**Relevant Proceeds**") (together with any interest accrued thereon) will be paid by the Utility to the Concessionaire as required by the Concessionaire to enable it to make payments in accordance with the terms of the contractual arrangements, referred to in (ii)

of this paragraph (b), and to meet any other costs and expenses of the Concessionaire for the sole purposes of financing the Reinstatement Works;

- (iv) (for the avoidance of doubt) the Utility agrees and undertakes that, subject to compliance by the Concessionaire with its obligations under this clause, and provided that the Concessionaire procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in (ii) of this paragraph (b), it shall not exercise any right which it might otherwise have to terminate this agreement or any Land Document by virtue of the event which gave rise to the claim for the Relevant Proceeds;
 - (v) the Utility undertakes to use all reasonable endeavours to assist the Concessionaire in the carrying out of the Reinstatement Plan; and
 - (vi) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Utility and in accordance with sub-clause (15) below, the Utility shall pay to the Concessionaire any Relevant Proceeds then held by the Utility in respect of the Relevant Incident, together with any interest earned thereon to the Concessionaire;
- (c) if the Utility is not satisfied, on reasonable ground(s), that the Reinstatement Plan will enable the Concessionaire to comply with sub-clause (15) below within a reasonable timescale, the Concessionaire shall amend the Reinstatement Plan so that the Utility is so satisfied and, until the Utility is so satisfied, no amount of the Relevant Proceeds shall be payable to the Concessionaire and the Reinstatement Plan will not be adopted.
- (15) Where insurance proceeds are to be used, in accordance with this agreement to repair, reinstate or replace any part of the Scheme, the Concessionaire shall carry out the work in accordance with the Construction Specification (subject to clause 20(12)) so that on completion of the work, the Scheme meets the Core Requirements. The provisions of this clause shall not (subject to sub-clause (14)(b)(iv)) prejudice the Concessionaire's obligations under the other provisions of this agreement (including, without limitation, clauses 3, 4, 5 and 6).
- (16) Nothing in this clause shall oblige the Concessionaire to take out insurance which is not available or is available only at a cost or on terms other than in accordance with good commercial practice and on normal commercial rates taking into account the nature of the Scheme (provided that the reason for the non-availability of the cost or terms is not connected with the claims record or acts or omissions of the Concessionaire, Contractor or Operator or any of their respective contractors or sub-contractors).

39. INTELLECTUAL PROPERTY RIGHTS

- (1) All Intellectual Property Rights which may subsist in those parts of the Concession Specification or in the Design Documentation or other design material of whatever nature prepared by the Concessionaire specifically for the Scheme, shall (as between the Utility and the Concessionaire) vest in the Concessionaire and the Concessionaire hereby grants to the Utility (or, in the event that any such right is vested in a third party, agrees to procure the grant to the Utility, at no cost to the Utility, of) a perpetual royalty free non-exclusive licence to use (or to license others to use) the same to the extent required to enable the Utility to exercise its rights and perform its obligations under this agreement and to enable it to relet

the Concession or to own, operate, maintain and, if applicable, sell the Scheme with the benefit of such licence after the termination of this agreement.

- (2) Except as provided in clause 40 or pursuant to an assignment under clause 32, drawings or information supplied by the Concessionaire shall not without the Concessionaire's consent be used, copied or communicated to a third party by the Utility's Representative or the Utility otherwise than as strictly necessary for the purposes of, or otherwise permitted by, this agreement.
- (3) Drawings and information supplied by the Utility and the Utility's Representative to the Concessionaire for the purposes of this agreement shall remain the property of the Utility. They shall not without the consent of the Utility be used, copied or communicated to a third party by the Concessionaire otherwise than as strictly necessary for the purposes of, or otherwise permitted by, this agreement.
- (4) Each party agrees to do whatever may be necessary to give effect to or confirm the terms of the licences provided for by this clause.
- (5) The Concessionaire shall indemnify the Utility on demand against all actions, claims, demands, liabilities, costs, charges and expenses (including legal expenses on an indemnity basis) arising from, or incurred by reason of, any infringement or alleged infringement of letters patent, registered design, copyright, trade mark or trade name protected in [country] by the use or possession of any Contract Plant supplied by the Concessionaire, but such indemnity shall not cover any use by the Utility of the Scheme otherwise than for the purpose indicated by, or reasonably inferred from, the Concession Specification or any infringement which is due to the use of any Contract Plant in association or combination with any other Contract Plant not supplied by the Concessionaire.
- (6) In the event of any claim being made or action brought against the Utility arising out of the matters referred to in this clause, the Concessionaire shall be promptly notified thereof and may at his own expense conduct all negotiations for the settlement of the same, and any litigation that may arise therefrom. The Utility shall not, unless and until the Concessionaire has failed to take over the conduct of the negotiations or litigation, make any admission which might be prejudicial thereto. The conduct by the Concessionaire of such negotiations or litigation shall be conditional upon the Concessionaire having first given to the Utility such reasonable security as shall from time to time be required by the Utility to cover the amount ascertained or agreed or estimated, as the case may be, of any compensation, damages, expenses and costs for which the Utility may become liable. The Utility shall, at the request of the Concessionaire, afford all available assistance for the purpose of contesting any such claim or action, and shall be repaid all reasonable expenses incurred in so doing.
- (7) If the Utility is prevented from using the Scheme in consequence of any infringement of letters patent, registered design, copyright, trade mark or trade name and the Concessionaire is unable within 30 days after notice thereof from the other party to procure the removal at its own expense of the cause of prevention then the parties shall meet and use their best endeavours to agree an alternative method (including if necessary amendments to this agreement) for avoiding the infringement, failing which (subject to the Utility's rights under clause 20 to make an Utility Variation which would avoid the infringement), the Utility may treat such prevention as a material breach of its obligations by the Concessionaire and exercise the powers and remedies available to it under clause 27.

- (8) The provisions and obligations set out in this clause shall survive and remain in force upon and following the termination of this agreement.

40. CONFIDENTIALITY

- (1) Subject to sub-clause (2), the parties to this agreement shall keep confidential all matters relating to this agreement and shall not make any disclosure, and shall use their best endeavours to prevent their employees, agents and servants from making any disclosure, to any person of any information, data, documents, secrets, dealings, transactions or affairs of or relating to this agreement.
- (2) The confidentiality obligation of the parties shall not apply to the following:
- (a) any matter which a party can demonstrate is already generally available and in the public domain otherwise than as a result of a breach of this clause;
 - (b) any disclosure which may reasonably be required for the performance of that party's obligations under this agreement or to enable the Expert to make a determination where a matter has been referred to him;
 - (c) disclosure of information which is required by any law (including any order of a court of competent jurisdiction) or the rules of any stock exchange or governmental or regulatory authority whether or not having the force of law (but, if not having the force of law compliance with which is in accordance with the general practice of persons subject thereto);
 - (d) disclosure of any information which is already lawfully in the possession of the receiving party prior to its disclosure by the disclosing party;
 - (e) the provision of information to shareholders, suppliers or subcontractors of the Concessionaire for purposes connected with the Concession;
 - (f) provision of information to the Lenders or the Lenders' professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Concessionaire to enable it to carry out its obligations under this agreement, to that person but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
 - (g) disclosure of information to enable the Concessionaire to comply with its obligations under clause 38;
 - (h) disclosure of information by the Utility or the Concessionaire to the any person or body who has statutory responsibilities in relation to the treatment or disposal of wastewater or sludge;
 - (i) disclosure by the Utility of information relating to the design, construction, operation and maintenance of the Scheme and such other information as may be reasonably required for the purpose of conducting a due diligence exercise to (i) any proposed new concessionaire, its advisers and lenders should the Utility decide to re-let a concession or (ii) any proposed purchaser of any or all of the Schemes; and

- (j) registration or recording of the Utility Consents and the Land Documents (or any of them) in the Land Register].
- (3) Where disclosure is permitted under sub-clause (2), other than paragraphs (c), (h) and (j), the recipient of the information shall be subject to a similar obligation of confidentiality as that contained in this agreement.
- (4) The provisions and obligations set out in this clause shall survive and remain in force upon and following the termination of this agreement.

41. MISCELLANEOUS

- (1) Save as required by law or regulation the parties to this agreement shall not make any announcements in connection with this agreement without the prior written consent of the other party such consent not to be unreasonably withheld.
- (2) None of the terms, provisions or conditions of this agreement shall be considered waived by any party to this agreement unless a waiver is given in writing by that party.
- (3) No waiver under sub-clause (2) above shall be a waiver of any past or future default or breach nor shall it create any amendment or addition to or deletion from any of the terms, provisions or conditions of this agreement unless (and then only to the extent) expressly stipulated in the waiver.
- (4) In entering into this agreement no party may rely on any representation, warranty, collateral contract or other assurance (except those set out in this agreement and the documents referred to in it) made by or on behalf of any other party before the signature of this agreement and each of the parties waives all rights and remedies which, but for this sub-clause, might otherwise be available to him in respect of any such representation, warranty, collateral contract or other assurance; provided that nothing in this sub-clause shall limit or exclude any liability for fraud.
- (5) This agreement and the relevant documents referred to in it contains the whole agreement between the parties relating to the subject matter of this agreement and supersede all previous agreements between the parties relating to that subject matter.
- (6) The various agreements, exhibits and schedules which together make up this agreement are to be taken as mutually explanatory of one another and, in the event that the Concessionaire or the Utility discovers any ambiguities or discrepancies between any of such documents, the same shall be explained and adjusted by mutual agreement between the Utility and the Concessionaire.
- (7) Each party agrees, upon the request of the other, to execute any documents and take any further steps as may be reasonably necessary in order to implement and give full effect to this agreement.
- (8) The invalidity, illegality or unenforceability in whole or in part of any of the provisions of this agreement shall not affect the validity, legality and enforceability of the remaining part or provisions of this agreement.
- (9) It is expressly declared that there shall in no circumstances be created by this agreement an ius quaesitum tertio in favour of any other party whatsoever.

- (10) Notwithstanding any rule of law to the contrary, and save as otherwise provided in this agreement, this agreement shall not be terminated or suspended on account of destruction of, or damage to, the Scheme for whatever reason but shall continue in full force and effect in every respect.
- (11) Save as specifically provided in this agreement, nothing herein shall prejudice the exercise of the rights of or the fulfilment of any obligation of the Utility acting as a sewerage authority pursuant to any Statutory Requirement.

42. NOTICES

- (1) All notices or other communications under this agreement to any party to this agreement shall be deemed to be duly given or made when given in writing and:
- (a) when delivered in the case of personal delivery or post; or
 - (b) when despatched in the case of telex (provided the relevant answer back is received); or
 - (c) when received in the case of facsimile,

in each case to such party addressed to it at the address given below or at such address as such party may after the date of this agreement specify in writing for such purpose to the other parties to this agreement by notice in writing.

Utility: []

For the attention of: []

Fax Number: []

Utility's Representative: []

Concessionaire: []

- (2) A written notice includes a notice by facsimile provided that a copy by way of confirmation is also delivered by personal delivery or post.
- (3) A notice or other communication received on a non-working day or after business hours in the place of receipt shall be deemed to be served on the next following working day in such place.

43. EXPERT DETERMINATION

- (1) Any dispute arising out of or in connection with this agreement during, or after the termination of, the Concession Period shall be determined by an Expert in accordance with this clause if:
- (a) this agreement expressly so provides;
 - (b) the dispute is primarily or solely about technical matters; or

- (c) the parties so agree.
- (2) Either party may initiate the reference of a dispute described in sub-clause (1) above to an Expert by proposing by notice to the other party the appointment of an Expert.
- (3) The Expert shall be a chartered engineer, except for disputes in relation to the definition of RPI in clause 1 or about the amounts payable under clause 29(1) or Part 11 of the Schedule where the Expert shall be a chartered accountant, and shall be appointed by agreement between the parties, or, if they have not agreed within 14 days after receipt of the notice under sub-clause (2), (for an engineer) by the President for the time being of the [relevant engineering institute] or (for an accountant) by the President for the time being of the relevant accountant institute], on the application of either party. If the Expert has been appointed but is unable to complete the reference another Expert shall be appointed by the parties, or if they have not agreed on the appointment within those 14 days, by the appropriate President on the application of either party.
- (4) The Expert shall act as an expert and not as an arbiter. The parties shall each have the right to make representations to the Expert. There will be no formal hearing. The Expert shall regulate procedure as he sees fit. The Expert shall have the power to open up, review, and revise any certificate, opinion, requisition or notice including any decision of the Utility's Representative and to determine all matters in dispute. The decision of the Expert shall be final and binding on the parties and can include orders that one or both of the parties are to pay his costs, stating the proportion, and that one party is to pay the other party's costs. The Expert may take such advice and assistance from professional advisers or other third parties as he reasonably considers appropriate to enable him to reach a determination of the dispute.
- (5) Sub-clause (6) shall apply if any dispute referred to an Expert under this clause raises issues which, in the reasonable opinion of either party, are substantially the same as or connected with issues raised in a related dispute between any of the following entities (and their successor in title and permitted assignees):
- (a) the Utility;
 - (b) the Concessionaire;
 - (c) the Contractor; or
 - (d) the Operator,

and that related dispute has already been referred for determination to an expert in accordance with provisions identical (with the necessary changes) to sub-clauses (3) and (4).

- (6) In the circumstances described in sub-clause (5) the Utility and the Concessionaire hereby agree that:
- (a) the dispute under this agreement shall be referred to the Expert appointed to determine the related dispute; and
 - (b) the Expert shall have power to make such directions and awards in the same way as if the rules applicable in the [courts] as to joining one or more defenders or third parties or conjoining actions were applicable to the parties and to him.

- (7) In the event that either party believes that the dispute in question does not fall within sub-clause (1) or involves other issues it shall notify the other party within 7 days after receipt of the notice under sub-clause (2) with evidence supporting this belief and the dispute shall instead be determined pursuant to clause 44. Where any provision of this agreement does not specify the use of expert determination any dispute in relation to that provision, or if for any reason it is not possible to refer a dispute in relation to the rights and obligations of the parties to this agreement to expert determination for resolution that dispute shall, shall be resolved in accordance with clause 44.

44. DISPUTES

- (1) The parties shall, prior to initiating a reference under clause 43 or referring a dispute to conciliation or arbitration under this clause, attempt in good faith to resolve any dispute or claim arising out of or relating to this agreement promptly through negotiations between the respective senior executives of the parties who have authority to settle the same.
- (2) If the parties agree, any dispute may be referred to conciliation in accordance with [] or any modification being in force at the date of such referral. The conciliator shall make his recommendation in writing and give notice of the same within one month of the referral. Where either:
- (a) one of the parties is dissatisfied with any recommendation of a conciliator appointed under this sub-clause; or
 - (b) the conciliator fails to give such recommendation for a period of one month after the date of referral,
- then either party may within three months after receiving notice of the conciliator's recommendation or within three months after the expiry of the one month period referred to in paragraph (b) (as the case may be) refer the dispute to arbitration in accordance with sub-clause (3).
- (3) All disputes arising out of or in connection with this agreement (including any question regarding its existence, validity or termination) during, or after the termination of, the Concession Period which have not been resolved pursuant to sub-clause (1) or (2) or through expert determination pursuant to clause 43 shall be referred to and finally resolved by arbitration in accordance with the UNCITRAL Arbitration Rules (the "**UNCITRAL Rules**"), in [location] by one arbiter appointed by agreement between the parties or, in default of that agreement, by [] on the application of either party.
- (4) Sub-clause (5) shall apply if any dispute to be referred to arbitration under sub-clause (3) raises issues which, in the reasonable opinion of either party, are substantially the same as or connected with issues raised in a related dispute between any of the following entities (and their successor in title and permitted assignees):
- (a) the Utility;
 - (b) the Concessionaire;
 - (c) the Contractor; or

(d) the Operator,

and that related dispute has already been referred for determination to an arbiter in accordance with arbitration provisions identical (with the necessary changes) to sub-clause (3).

- (5) In the circumstances described in sub-clause (4) the Utility and the Concessionaire hereby agree that:
- (a) the dispute under this agreement shall be referred to the arbiter appointed to determine the related dispute; and
 - (b) the arbiter shall have power to make such directions and awards in the same way as if the rules applicable in the [courts] as to joining one or more defenders or third parties or conjoining actions were applicable to the parties and to him.
- (6) The arbiter while determining any dispute shall, without prejudice to the generality of his powers, have power to open up, review and revise any certificate, opinion or notice and any decision of the Utility's Representative; issue proposed findings at the request of either party; award compensation, assess and award damages and award expenses to or against any parties in the arbitration; award interim or part decrees; and award interest at such rate as he thinks fit on any sum awarded by him (whether interim or final) for any period, whether before or after the date of his award. The award of the arbiter shall be binding on the parties and the parties hereby agree that notwithstanding the provisions of the UNCITRAL Rules that the award of the arbiter shall be subject to the provisions of [arbitration legislation].
- (7) Performance of this agreement shall continue during expert determination, conciliation or arbitration unless the parties agree to a suspension or if such continuation is impossible on account of the nature of the dispute.

47. COSTS AND EXPENSES

The Concessionaire shall bear its own costs and expenses (including advisers' fees and expenses) in connection with the preparation, negotiation and completion of this agreement.

48. GOVERNING LAW AND SUBMISSION TO JURISDICTION

This agreement shall be governed by, and construed in accordance with, the laws of [country].

IN WITNESS WHEREOF these presents consisting of this and the preceding [] pages are, together with the Schedule and the Annex executed as follows:

They are subscribed for and on behalf of the said
UTILITY at
On [date]

.....Authorised Signatory

.....Full name

.....Authorised Signatory

.....Full name

They are subscribed for and on behalf of the said
[CONCESSIONAIRE]
at
On [date]

.....Director

.....Full name

.....Director/Secretary

.....Full Name

SAMPLE

7 Standards of Works

All works provided by the Concessionaire shall be designed, specified, constructed, tested, operated and maintained in accordance with Good Engineering and Operating Practices and shall comply with all Statutory Requirements and Required Consents. The Scheme shall comprise only materials, equipment, plant, machinery and other goods which are of sound and merchantable quality and fit for the purpose for which they are to be used and all workmanship, manufacture or fabrication will meet or surpass all relevant [country] or equivalent [international] standards. The selected processes, methods of production and technology incorporated into the Scheme are to be of internationally accepted standards including, but not limited to, standards of efficiency, reliability and health and safety.

8 Performance Tests

The Performance Tests shall demonstrate whether the Scheme is able to receive, treat and dispose of wastewater and sludge in accordance with the requirements of the Concession Agreement.

9 Nutrient Removal and Disinfection

The design of the wastewater treatment plant shall allow for the possible addition of nutrient removal and /or disinfection processes for the wastewater treatment stream.

10 Facilities for the Utility

The Concessionaire shall provide service and maintain at each Site, suitable facilities for the sole use of the Utility's Representative throughout the duration of the Construction Phase as defined in the Construction Specification.

The Concessionaire shall provide and maintain for the Scheme permanent facilities for the sole use of the Utility's Representative throughout the duration of the Operation and Maintenance Phase as defined in the Construction Specification.

The Concessionaire shall provide and maintain for the Scheme permanent facilities for the sole use of the Utility's sludge tanker operatives throughout the duration of the Operation and Maintenance Phase as defined in the Construction Specification.

11 Interfaces

The physical and operational interfaces between existing or future wastewater systems operated by the Utility and the Scheme provided by the Concessionaire shall be as detailed on drawings [] contained within the Annex.

12 Quality and Environmental Management

The Concessionaire shall implement a quality management system complying with the requirements [...] or equivalent. In addition, the Concessionaire shall implement an environmental management system complying with the requirements of [...] or equivalent. The quality management system and environmental management system shall cover all aspects of the design, construction, operation and maintenance of the Scheme sufficient to demonstrate that the Concessionaire will meet all its obligations under the terms of the Concession Agreement. The Concessionaire's quality management system and environmental management system shall be audited by an independent third party assessment body, approved by the Utility, to ensure compliance. The auditing body shall be

accredited by [] for auditing facilities and services similar to those required under this Concession Agreement and shall operate in accordance with [].

13 Design Life

The design life of all new sewers and outfalls within the Scheme shall be not less than [60] years. All sewers and outfalls shall be sized to accommodate flow increases which may arise over the design life.

14 Construction Records

The Concessionaire shall maintain records of all aspects of the construction of the Scheme as defined in Part 2 of the Schedule to the Concession Agreement.

15 Operational and Maintenance Records

The Concessionaire shall maintain records associated with the operation and maintenance of the Scheme as defined in Parts 5 and 6 of the Schedule to the Concession Agreement.

16 Performance Records

The Concessionaire shall monitor the performance of the Scheme and maintain records, in accordance with its quality assurance procedures.

17 Training of Utility Staff

The Concessionaire shall train sufficient numbers of the Utility's staff at regular intervals in sufficient detail of the operation of the Scheme such that should it be necessary for the Utility to take over the Scheme at short notice this may be achieved with the minimum of inconvenience to the Utility.

18 Scheme Criteria

The Scheme will include the facilities detailed on drawing [] contained within the Annex and listed below :-

[]

THE SCHEDULE

Part 2

Construction Specification

[To be provided by Tenderers]

SAMPLE

THE SCHEDULE

Part 3

Construction Timetable and Milestones

[To be provided by Tenderers]

SAMPLE

THE SCHEDULE
Part 4

Outline Commissioning Plans and Performance Tests

Part 4A - Outline Commissioning Plan

[To be provided by Tenderers]

Part 4B - Performance Tests

1. INTRODUCTION

1.1 Definitions

"BOD _e "	means BOD ₅ (mg/l) of the sample collected on the particular day from the treated wastewater effluent;
"BOD ₅ "	means the 5-day BOD, ATU suppressed; and
"SS _e "	means suspended solids concentration (mg/l) of the sample collected on the particular day from the treated wastewater effluent.

1.2 General

The purpose of the Performance Tests is to demonstrate whether the Scheme is able to receive, treat and dispose of wastewater and sludge in accordance with the requirements of the Concession Agreement.

The Concessionaire will provide labour, power, consumables, associated with the Scheme and collect all samples, during the Performance Tests. The Concessionaire will be responsible for, and bear all costs of, the analytical testing of the samples collected during a Performance Test. All flow measurement, sampling and analysis shall be undertaken in accordance with the requirements included in Part 11 of the Schedule to the Concession Agreement.

The Performance Tests will start after the Concessionaire has commissioned the Scheme in accordance with the Commissioning Plans.

The duration of a Performance Test will be 28 days, subject to clause 16(3) of the Concession Agreement. The wastewater Performance Tests and the sludge Performance Tests shall be performed concurrently.

2. PERFORMANCE TEST STANDARDS

2.1 Wastewater Effluent Criteria

For the purpose of the wastewater Performance Tests, the effluent quality will conform to the standards and compliance criteria in Table 1.

Table 1 - Wastewater Effluent Criteria

Criterion	Standard		Compliance Criteria
BOD _e	25 mg/l		No more than two samples with values for each criterion greater than the standard
SS _e	35 mg/l		

2.2 Sludge Criteria

For the purpose of the sludge Performance Tests the treated sludge product will conform to the standards and compliance criteria in Table 2.

Table 2 - Treated Sludge Criteria

Criterion	Standard	Compliance Criteria
Faecal Coliform	1000/gram dry solids	No more than two samples with values for each criterion greater than the standard
Salmonellae	3/gram dry solids	

[The Tenderer must develop a Performance Test to demonstrate that the sludge dryer can maintain the design temperature, that the required retention time is consistently achieved and that an appropriate dry solids content is consistently achieved.]

2.3 Performance Test Failure

The Scheme will fail the Performance Test in the event of any of the following:

- (a) compliance is not obtained with one or more of the compliance criteria listed in Tables 1 and 2;
- (b) the error in measuring the gauge head to the measurement flume at any point within the normal operating range is found to be greater than 4mm;
- (c) any wastewater when flowing at rates of less than first year value of 3 DWF (as defined in Part 11C of the Schedule) does not pass forward to the treatment process;
- (d) any wastewater, when flowing at rates between first year value of 3 DWF (as defined in Part 11C of the Schedule) and the flow to storm tanks first year value does not pass into the storm tanks;
- (e) any storm water is not screened; and
- (f) any of the sludge imported to the Scheme by or on behalf of the Utility does not pass through the sludge treatment processes.

2.4 Restart of Performance Test

In the event that the Scheme fails the Performance Test, the Performance Test will be deemed to have restarted the day after the most recent failure except in the case of (a) above where the Performance Tests will be deemed to have restarted the day after the third most recent failure.

3. PERFORMANCE TEST REPORT

During the course of a Performance Test, the Concessionaire will issue an interim performance test report to the Utility each week containing full details of all tests carried out during the previous week. In addition, the Utility will have the option of reviewing the performance test results as soon as they become available.

- (a) a list of all the values of all the parameters given in Tables 1 and 2, with supporting data as necessary;
- (b) confirmation that all tests tested in Section 2.3 have been passed;
- (c) a recommendation on whether the Scheme has either passed or failed the test; and
- (d) the basis of the recommendation.

THE SCHEDULE**Part 5****Operation and Maintenance Specification**

[To be provided by Tenderers]

SAMPLE

THE SCHEDULE**Part 6****Sludge Strategy**

[To be provided by Tenderers]

SAMPLE

THE SCHEDULE**Part 7****Quality and Environmental Management Arrangements**

[To be provided by Tenderers]

SAMPLE

THE SCHEDULE**Part 8****Existing Facilities, Spares and Maintenance****Part 8A - List of Existing Facilities****Part 8B - List of Spares****Part 8C - Operation and Maintenance of Existing Facilities**

SAMPLE

Part 8A

List of Existing Facilities

The following is a list of the principal items of equipment within the Existing Facilities as at the date of this agreement.

Part 8B

List of Spares

Part 8C

Operation and Maintenance of Existing Facilities

The Utility undertake the maintenance of the Existing Facilities (in all material respects and so far as it is not inconsistent with Good Engineering and Operating Practices) in accordance with [] (which is included in the Annex) and at the times specified in the programmes entitled [] (which are included in the Annex).

SAMPLE

THE SCHEDULE**Part 9****Utility Consents****Part 9A - List of Utility Consents**

[List to be developed by the Tenderer]

Part 9B - Consent Influent Concentration Levels

*[These levels will be determined by the conditions included in the consents to discharge as issued by
[].]*

SAMPLE

THE SCHEDULE

Part 10

Undertakings

SAMPLE

THE SCHEDULE**Part 11****Contract Payments****Part 11A - Contract Payments****Part 11B - Certificate for Contract Payments****Part 11C - Calculation of Dry Weather Flow**

SAMPLE

Part 11A

Contract Payments

Contract Payments shall be calculated on a daily basis. The Contract Payments for the Scheme on any particular day when the Concessionaire is able to demonstrate that the provisions of this Part 11A have been met, shall consist of a Wastewater Treatment Contract Payment and a Sludge Treatment Contract Payment. Each Contract Payment shall be calculated in accordance with Section 1, subject to the provisions of Sections 2, 3 and 4 of this Part 11A.

In this Part 11A:

"a ₀ "	means the tariff (pence per m ³) for the relevant tariff band as set out in Table 1;
"b ₀ "	means the tariff (pence per m ³) as set out in Table 2;
"c ₀ "	means the tariff (pence per m ³) as set out in Table 2;
"d ₀ "	means the tariff (pence per tonne) as set out in Table 2;
"BOD _e "	means BOD ₅ (mg/l) of the sample collected on the particular day from the treated wastewater effluent;
"BOD ₅ "	means the 5-day BOD, ATU suppressed;
"BOD _i "	means BOD ₅ (mg/l) of the sample collected on the particular day from the treated influent wastewater;
"BOD _s "	means 350 mg/l;
"DS _i "	means dry solids concentration (w/w%) of the sample collected on the particular day from the imported sludge;
"I ₀ "	means the value of the [<i>relevant index</i>] at the Base Date;
"I _z "	means the value of the [<i>relevant index</i>] in the year in which payment is due;
"M _i "	means mass (tonnes) of imported sludge on the particular day;
"Q _{wi} "	means the volume (m ³) of wastewater received at the Scheme in the relevant tariff band set out in Table 1 on the particular day;
"Q _{si} "	means the volume (m ³) of wastewater received at the Scheme in the 0 to 1.5 DWF and 1.5 to 3 DWF tariff bands on the particular day;
"SS _e "	means the suspended solids concentration (mg/l) of the sample collected on the particular day from the treated wastewater effluent;
"SS _i "	means suspended solids concentration (mg/l) of the sample collected on the particular day from the influent wastewater; and
"SS _s "	means 250 mg/l.

1. CONTRACT PAYMENT CALCULATION

1.1 Wastewater Treatment Contract Payments

The Wastewater Treatment Contract Payment in respect of the Scheme for each day shall be the aggregate of $WTCP_b$ for each tariff band set out in Table 1, where:

$$WTCP_b = Q_{wi}(a_o(I_z / I_o))$$

Table 1
Wastewater Treatment Tariff Rates

	Rate			
Tariff Band	a_o			
0-1.5 DWF				
1.5-3DWF				
Over 3DWF	0			

1.2 Sludge Treatment Contract Payment

The Sludge Treatment Contract Payment in respect of the Scheme for each day shall be STCP, where:

$$STCP = \left(Q_{si} (b_o (BOD_i/BOD_s) + c_o (SS_i/SS_s)) + d_o (M_i .DS_i) \right) (I_z / I_o)$$

Table 2
Sludge Treatment Tariff Rates

Index	Rate			
b ₀				
c ₀				
d ₀				

2. WASTEWATER STANDARDS

2.1 Wastewater Treatment

The Wastewater Treatment Contract Payment shall be due for the Scheme only on days when the value of each of BOD_e and SS_e, as shown in the sample taken from the treated wastewater effluent, comply with the relevant standards specified in Table 3, Wastewater Standards). The Wastewater Treatment Contract Payment for the Scheme shall be nil on each day when the value of either BOD_e or SS_e, or both, shown in the sample taken from the treated wastewater effluent, does not comply with the relevant standards in Table 3.

Table 3
Wastewater Standards

Parameter	Standard
BOD _e	<25mg/l
SS _e	<35mg/l

2.2 Non Payment Days

For the avoidance of doubt, the Contract Payments for the Scheme will not be due in respect of a day unless the Concessionaire is able to demonstrate to the Utility that the provisions of Section 4 which are relevant to that Contract Payment have been performed and followed in respect of that day.

3. WASTEWATER TREATMENT CONTRACT PAYMENT ADJUSTMENTS

3.1 Pollution Incident

[MBJV/NoSWA to review]

On any day when the influent sample at the wastewater treatment plant of the Scheme exceeds any Pollution Incident Influent Concentration Level, as set out in Table 4, and, as a result of the influent from which the sample was taken, the average biological reaction rate of the wastewater treatment plant (calculated by reference to the biological reaction rate of the wastewater treatment plant at the same or similar loadings on days where the Wastewater

Treatment Contract Payments Standards are met) is reduced by at least 10% and consequently is unable on that day or the immediately following day, and on the subsequent day or days, to treat wastewater to the Wastewater Standards (a "**Pollution Incident**"), then provided that:

- (a) the Concessionaire has used its reasonable endeavours to treat the wastewater to the Wastewater Standards; and
- (b) the Concessionaire demonstrates to the Utility's satisfaction that the reduction is not due to the effect of either:
 - (i) sodium, sulphate or chloride due to sea water intrusion into, or road salt entering, the Scheme; or
 - (ii) sulphide due to septicity in the Scheme,

the Concessionaire shall be entitled in respect of the treatment of wastewater at the Scheme only to the following payments from the Utility, from the date on which, as a result of the Pollution Incident, the Scheme is unable to meet the Wastewater Standards until the date when the Scheme is again able to meet the Wastewater Standards:

- (c) for the day on which the Scheme is unable, as a result of the Pollution Incident, to meet the Wastewater Standards and for each of the next 29 days, a sum equal to 75% of the Wastewater Treatment Contract Payment that would have been due had the Concessionaire met the Wastewater Standards in respect of the quantity of wastewater actually discharged into the Scheme on each such day;
- (d) for each of the next 30 days, a sum equal to 50% of the amount of the Wastewater Treatment Contract Payment that would have been due had the Concessionaire met the Wastewater Standards in respect of the quantity of wastewater actually discharged into the Scheme on each such day; and
- (e) no amount shall be paid from the end of the period referred to in paragraph (b).

Table 4
Pollution Incident Influent Concentration Levels

Parameter	Sample or definition	Unit	Value or concentration
pH	Daily composite		6.0 to 9.0
Temperature	Daily average	°C	28
Unassociated soluble (CN ⁻¹)	Daily composite Spot	mg/l	0.5 0.5
Phenols	Daily composite	mg/l	5.0
As (soluble)	Daily composite Spot	mg/l	0.1 0.2
Cd (soluble)	Daily composite Spot	mg/l	0.5 0.1
Cr ³⁺ (soluble)	Daily composite Spot	mg/l	2.0 4.0
Cr ⁶⁺ (soluble)	Daily composite Spot	mg/l	1.0 2.0
Cu (soluble)	Daily composite Spot	mg/l	1.0 2.0
Hg (soluble)	Daily composite Spot	mg/l	0.1 0.1
Ni (soluble)	Daily composite Spot	mg/l	0.5 1.0
Pb (soluble)	Daily composite Spot	mg/l	0.5 1.0
Zn (soluble)	Daily composite Spot	mg/l	2.0 4.0
Cr ⁶⁺ + Cu + Ni + Pb + Zn (all soluble)	Daily composite Spot	mg/l	4.0 5.0
The presence in a sample of any substance or combination of substances which are known to cause inhibition of the biological reaction rate	Daily composite Spot	-	Concentration of a substance or combination of substances is greater than a level which is capable, as clearly demonstrated by reference to scientific literature, of causing a reduction of at least 10% of the average biological reaction rate (calculated by reference to the biological reaction rate of the relevant wastewater treatment plant on the same or similar loadings on days where the Wastewater Standards are met)

3.2 Revenue Share Arrangements

3.2.1 Within 45 days after the end of each calendar year the Concessionaire will notify the Utility of the Cumulative Shareholder Return for that year.

3.2.2 If the Cumulative Shareholder Return for a year (the "**Reference Year**") is a positive figure and exceeds the Forecast Shareholder Return for that year but does not exceed the Initial Additional Shareholder Return Threshold for that year, the Concessionaire shall, within 90 days after the end of the Reference Year, pay the Utility a sum equal to 25% of the Excess Distributable Cash.

3.2.3 If the Cumulative Shareholder Return for a year (the "**Reference Year**") equals or exceeds the Initial Additional Shareholder Return Threshold for that year but does not exceed the Further Additional Shareholder Return Threshold, the Concessionaire shall, within 90 days after the end of the Reference Year, pay the Utility a sum equal to the aggregate of:

(a) $(A-B) \times 0.25$; and

(b) 50% of the amount which, when subtracted from the Distributable Cash for the year, gives a Cumulative Shareholder Return for that year equal to the Initial Additional Shareholder Return Threshold.

3.2.4 If the Cumulative Shareholder Return for a year (the "**Reference Year**") equals or exceeds the Further Additional Shareholder Return Threshold for that year the Concessionaire shall, within 90 days after the end of the Reference Year, pay the Utility a sum equal to the aggregate of:

(a) $(A - B) \times 0.25$;

(b) 50% of the amount which, when subtracted from the Distributable Cash for the year, gives a Cumulative Shareholder Return for that year equal to the Initial Additional Shareholder Return Threshold; and

(c) 75% of the amount which, when subtracted from the Distributable Cash for the year, gives a Cumulative Shareholder Return for that year equal to the Further Additional Shareholder Return Threshold.

3.2.5 In calculating the Utility's entitlement to sums under this clause in any year no account will be taken of any Excess Distributable Cash generated in any previous year as a result of the Concessionaire having exceeded the Forecast Shareholder Return.

3.2.6 For the purpose of this Section 3.2:

"**A**" equals the amount which, if it were the Distributable Cash for the year, would give a Cumulative Shareholder Return equal to the Initial Additional Shareholder Return Threshold;

"**B**" equals the amount which, if it were the Distributable Cash for the year, would give a Cumulative Shareholder Return equal to the Forecast Shareholder Return;

"**Credit Agreement**" means the credit agreement dated on or about today's date between [];

"**Cumulative Shareholder Return**" for any year means the rate (expressed as a percentage) which, when used as the annual discount rate to discount back to the Base Date the Real Net Shareholder Cashflow for each calendar year (or part thereof) during the period from the Base Date to (and including) the year in question, would result in the aggregate of all such Real Shareholder Cashflows so discounted being equal to zero (and for these purposes the Real Net Shareholder Cashflow for a year (or other period) shall be discounted back from the mid-point of that year (or period); and

"**Distributable Cash**" for a year means all amounts available, in accordance with the Credit Agreement, for distribution to shareholders of the Concessionaire during that year;

"**Excess Distributable Cash**" means the amount which, when subtracted from the Distributable Cash for the year, gives the Forecast Shareholder Return for that year;

"**Forecast Shareholder Return**" for a year means the Cumulative Shareholder Return up to and including that year as shown in the Original Financial Model;

"**Further Additional Shareholder Return Threshold**" for a year means the Forecast Shareholder Return for that year plus 4% (real);

"**Initial Additional Shareholder Return Threshold**" for a year means the Forecast Shareholder Return for that year plus 2% (real);

"**Net Shareholder Cashflow**" in any calendar year means all amounts paid by the Concessionaire by way of dividends on the share capital of the Concessionaire or of, or in respect of, any subordinated debt of the Concessionaire [*and any other type of shareholder finance*], as demonstrated by the Concessionaire to the reasonable satisfaction of the Utility, less all amounts paid during that year to the Concessionaire by way of subscription for shares in the capital of the Concessionaire;

"**Original Financial Model**" means the financial model in the Agreed Form prepared on behalf of the Sponsors of the Concessionaire, as it stands at the date of the Concession Agreement;

"**Real Net Shareholder Cashflow**" in any calendar year means Net Shareholder Cashflow for that year divided by $\frac{RPI_A}{RPI_B}$, where **RPI_A** is the average of the value of RPI last published prior to the beginning of that year and the value of RPI last published prior to the end of that year and **RPI_B** is the value of RPI as at the Base Date.

3.3 Adjustment of Tariff

3.3.1 In this Section, "**Tariff Adjustment Event**" means any of the following events giving rise to an adjustment of the Tariff Rates under this Agreement:

- (a) an Utility Variation;
- (b) an IDC Variation;

- (c) a Qualifying Change of Law;
- (d) a breach by the Utility falling within clause 13(5);
- (e) an alteration of the Utility's sewerage systems falling within clause 8(2);
- (f) a failure by the Utility to construct the New Utility Sewerage in accordance with clause 8(3); or
- (g) an alteration of the route of the pipes by the CEC pursuant to clause [] of the CEC Head Grant.

3.3.2 Where this agreement provides for the Tariff Rates to be adjusted in accordance with this section as a result of a Tariff Adjustment Event:

- (a) in relation to sub-paragraphs (a), (b) and (c), of Section 3.3.1 so as to put the Concessionaire in the same financial position as it would have been in had the Tariff Adjustment Event not occurred;
- (b) in relation to paragraph (d) of Section 3.3.1, so as to compensate the Concessionaire for the increase in construction costs incurred due to the Utility's breach;
- (c) in relation to paragraph (e) of Section 3.3.1, so as to compensate the Concessionaire for the increase in operating costs and the alteration in flow, due to the alteration of the Utility's sewerage systems;
- (d) in relation to sub-paragraph (f) of Section 3.3.1, so as to compensate the Concessionaire for the increase in operating costs, and the alteration in flow, due to the Utility's default; or
- (e) in relation to sub-paragraph (g) of Section 3.3.1, so as to compensate the Concessionaire for any increase in operating costs due to the alteration of the route of the pipes by the CEC,

the adjustment to the Tariff Rates shall be calculated as follows.

3.3.3 Except where Section 3.3.6 below applies, the adjustment to the Tariff Rates shall be such as, when applied to the Adjusted Financial Model (as defined below), gives a real shareholder return and senior debt loan life cover ratio, each as shown in, and calculated in accordance with the Adjusted Financial Model, which are the same as the real shareholder return and senior debt loan life cover ratio respectively as shown in and calculated in accordance with, the Unadjusted Financial Model (as defined below).

3.3.4 If the Tariff Adjustment Event for which the adjustment is to be made occurred prior to the first anniversary of the Handover Date:

"**Unadjusted Financial Model**" means the financial model in the Agreed Form prepared on behalf of the Sponsors, as it stands at the date of the Concession Agreement, updated by the Concessionaire, subject to agreement with the Utility, only to take account of:

- (a) the changes in revenue due to, and the Estimated Capital Cost (if any) and the Estimated Operating Cost (if any) of any Tariff Adjustment Events which have already occurred;
- (b) the estimated senior debt service costs (if any) of financing the Estimated Capital Cost (if any) of any Tariff Adjustment Events which have already occurred and forecast balances of such senior debt outstanding (based on reasonable estimates of margin and fee costs of senior lenders and forecast term of debt);
- (c) adjustments to the Tariff Rates made as a result of any Tariff Adjustment Events which have already occurred; and
- (d) any change in flows and loads arising as a direct result of any such Tariff Adjustment Events which have already occurred and which fall within sub-paragraph (e) or (f) of Section 3.3.1; and

"Adjusted Financial Model" means the Unadjusted Financial Model, as defined above in this paragraph, adjusted by the Concessionaire, subject to agreement with the Utility, to take account of:

- (a) the changes in revenue due to, and the Estimated Operating Cost (if any) and the Estimated Capital Cost (if any) of the Tariff Adjustment Event;
- (b) the estimated senior debt service costs (if any) of financing the Estimated Capital Cost (if any) of the Tariff Adjustment Event and forecast balances of such senior debt outstanding (based on reasonable estimates of margin and fee costs of senior lenders and forecast term of senior debt); and
- (c) if the Tariff Adjustment Event falls within paragraph (e) or (f) of Section 3.3.1, any change in flows and loads arising as a direct result of that Tariff Adjustment Event.

3.3.5 If the Tariff Adjustment Event for which the adjustment is to be made:

- (i) occurred on or after the first anniversary of the Handover Date; and
- (ii) falls within sub-paragraph (e), (f) or (g) of Section 3.3.1;

then:

"Unadjusted Financial Model" has the same meaning as for Section 3.3.4 above, save that the assumptions to be used for forecast flows and loads of wastewater and sludge to the Scheme shall be such as may be agreed between the Concessionaire and the Utility (but for the avoidance of doubt shall not take into account any change in flows and loads arising from the Tariff Adjustment Event in question); and

"Adjusted Financial Model" means the Unadjusted Financial Model, as defined above in this paragraph, adjusted by the Concessionaire subject to agreement with the Utility, only to take account of:

- (a) and the Estimated Operating Cost of the Tariff Adjustment Event; and

(b) in the case of a Tariff Adjustment Event falling within sub-paragraph (e) or (f) of Section 3.3.1:

(i) any change in flows and loads; and

(ii) any changes in revenue,

arising as a direct result of that Tariff Adjustment Event.

3.3.6 If the Tariff Adjustment Event for which the adjustment is to be made:

(i) occurred on or after the first anniversary of the Handover Date; and

(ii) falls within paragraph (a), (b) or (c) Section 3.3.1,

then the adjustment to the Tariff Rates shall be such as, when applied to the Hybrid Model (as defined below), gives the same real shareholder return and senior debt loan life cover ratio, as shown in and calculated in accordance with the Hybrid Model, as those shown in the financial model in the Agreed Form prepared on behalf of the Sponsors as it stands at the date of the Concession Agreement (the "**Original Financial Model**").

"**Hybrid Model**" means a financial model prepared by the Concessionaire, subject to agreement with the Utility, made up only of the following elements:

(i) updated forecasts of flows and loads of wastewater and sludge to the Scheme (including where there has been a Tariff Adjustment Event falling within sub-paragraph (e) or (f) of Section 3.3.1, any changes in flow and loads arising as a result of that Tariff Adjustment Event);

(ii) updated forecast number of days on which wastewater and/or sludge treatment revenue would be foregone at the Scheme as a result of failure to meet effluent quality criteria;

(iii) updated forecast DWF band limits at the Scheme;

(iv) the difference between the Tariff Rate applicable prior to the Tariff Adjustment Event and the adjusted Tariff Rates;

(v) inflation, assumed to be as forecast in (and as applied in) the Original Financial Model;

(vi) the Estimated Operating Cost (if any) and Estimated Capital Cost (if any) of the Tariff Adjustment Event;

(vii) real interest rates, assumed to be as forecast in the Original Financial Model;

(viii) estimated senior debt service costs of financing the Tariff Adjustment Event and forecast balances of such senior debt outstanding (based on reasonable estimates of margin and fee costs of senior lenders and forecast term of senior debt); and

(ix) forecast tax payments on incremental taxable profits associated with the Tariff Adjustment Event (based on incremental revenue less incremental operating costs

less incremental finance costs and taking into account any capital allowances available on new assets). The taxation calculation methodology, tax rate and writing down allowances applied shall be as contained in the Original Financial Model.

- 3.3.7** Any dispute about any adjustment or updating to be made to any financial model pursuant to this Section, or about any assumption to be used for the purposes of any such model, or about the preparation of a Hybrid Model pursuant to Section 3.3.6, shall be determined by an Expert in accordance with clause 43.

4. MEASUREMENT, SAMPLING AND ANALYSIS

4.1 Measurement

4.1.1 Measurement of Wastewater Volume (Q_{wi})

The wastewater flow rate in each band shall be aggregated over each day.

Flow measurement shall be carried out using flumes designed, provided and calibrated in accordance with BS 3680.

[Measurement details to be provided by Tenderers]

4.1.2 Measurement for Sludge Mass

[To be provided by Tenderers]

4.2 Sampling

4.2.1 Sampling Costs

The Concessionaire shall be responsible for and bear all costs of sampling and analytical testing for the purposes of fulfilling its obligations under the Concession Agreement except where the Utility nominates the second sample for analytical testing pursuant to Section 4.2.2, in which case the costs of sampling and analytical testing will be borne by the Utility only where the test results either:

- (a) meet the Wastewater Standards; or
- (b) exceed the relevant wastewater parameters as set out in Table 4.

4.2.2 Dual Sampling

Each sample will be divided into two sample bottles each containing an approximately equal amount. The Concessionaire will send the first sample for analysis to its nominated laboratory and store the second sample in accordance with Section 4.2.4. The Utility may have, at its discretion, the second sample analysed at its nominated laboratory. The Concessionaire may discard any second sample not required by the Utility for analysis within the time specified in Section 4.2.4. Results obtained by the Concessionaire's nominated laboratory will be assumed to be accurate unless the Concessionaire can show with reasonable confidence that the accuracy is lower than normal and will be used for determining the result of the daily operating tests. However, provided the second sample is analysed within the required timescale and in accordance with the standard procedures, the

results of such analysis shall be assumed to be correct and shall supersede any results obtained by the Concessionaire from the analysis of the first sample.

4.2.3 Sampling Locations

[To be provided by Tenderers]

4.2.4 Sampling Procedures

(a) Wastewater Composite Samples

These samples will provide the daily values of BOD_i, SS_i, BOD_e and SS_e and the daily concentrations of the parameters in Table 4. The daily composite samples for the influent and effluent will:

- (a) be taken automatically, in proportion to the flow by a sampler programmed to sample, 96 times during each day;
- (b) be stored in the dark in opaque, tamper-proof, clean containers between 1°C and 4°C and be analysed for BOD_i, SS_i, BOD_e and SS_e within 48 hours from the end of the sample period and for the parameters in Table 4, within 96 hours; and
- (c) be of at least 5 litres volume and shall be in proportion to the daily influent volume, with an allowable tolerance of ± 2 litres.

(b) Wastewater Spot Samples

[To be provided by Tenderers]

(c) Sludge Samples

[To be provided by Tenderers]

4.2.5 Handling of Samples

(a) Sample Identification

[To be provided by Tenderers]

(b) Handling Audit

[To be provided by Tenderers]

4.3 Analysis

4.3.1 Analytical Services

Analysis of all samples will be carried out at a laboratory selected by the Concessionaire, and approved by the Utility.

4.3.2 Analytical Standards

The analytical standards to be employed for the spot and composite samples will be those stated in the following Standard Committee of Analyst (SCoA) method booklets:

Table 5
SCOA Method Booklets

Determinand	Technique
BOD (ATU)	ISBN 0 11 7522120
TSS	ISBN 0 11 751957 X
DS	ISBN 0 11 7517879
pH	ISBN 0 11 7520845 or 011 7514284
Phenols	ISBN 0 11 7516171 (Analysis by reaction with 4-amino antipyrine)
NH ₄ -N	ISBN 0 11 7516139 1981
Free Cyanide (CN)	Skaler auto analysis
Temperature	ISBN 0 11 7520179
Arsenic (As) ¹	Hydride generation
Cadmium (Cd) ¹	Inductively coupled plasma (ICP)
Chromium (Cr 6+)	Hach Colourimetry
Chromium (Cr 3+) ¹	Inductively coupled plasma (ICP)
Copper (Cu)	Inductively coupled plasma (ICP)
Mercury (Hg) ¹	ISBN 0 11 7519073
Molybdenum (Mo)	Inductively coupled plasma (ICP)
Nickel (Ni) ¹	Inductively coupled plasma (ICP)
Lead (Pb) ¹	Inductively coupled plasma (ICP)
Selenium (Se) ¹	ISBN 0 11 7519332
Zinc (Zn) ¹	Inductively coupled plasma (ICP)

Changes in method detailed by a future edition of any of the booklets or alternative validated methods to those stated above may be adopted following agreement between the Utility and the Concessionaire.

For the parameters not listed above, the analytical testing will follow the "Standard Methods for the Examination of Water and Waste Water", 18th Edition 1992, Edited by Greenberg, Clescerl and Eaton, published by AWWA WEF.

¹ Soluble metals determinations on filtrate following filtration through a 0.45 micron membrane filter.

Part 11B**Certificate for Contract Payments**

[To be provided by Tenderers]

SAMPLE

Part 11C

Calculation of Dry Weather Flow

1. INTRODUCTION

This Part prescribes the method to be used for determining the values of dry-weather flow, 1.5 DWF and 3 DWF.

2. DEFINITION OF FLOWS

2.1 Dry Weather Flow

The value of dry weather flow shall be constant for any particular year and calculated from flow data collected in the previous year. The methodology to be used for the purposes of calculating dry weather flow for the Scheme shall be as follows:

The value of DWF for any particular year shall be equal to the 50 percentile of the distribution of average values of wastewater flow rate measured from 10:00 to 10:00 on days, during the previous year, when the measured rainfall from 10:00 to 10:00 was zero following days when the rainfall over the same period was equal to 0.25 mm or less.

The daily values of wastewater flow rate shall be recorded by the measurement flumes at the Scheme.

2.2 Multiples of Dry Weather Flow

DWF is composed of three components as follows:

$$\text{DWF} = \text{D} + \text{E} + \text{I} \quad 1$$

where **D** is the daily wastewater flow rate contributed by the domestic population

E is the daily trade discharge rate

and **I** is the ground water infiltration rate.

The multiples of DWF, namely xDWF where x is equal to 1.5, or 3 are given by:

$$\text{xDWF} = \text{x}(\text{D} + \text{E}) + \text{I} \quad 2$$

The values of xDWF are determined from the minimum night dry-weather flow (DWF_n) which is given by:

$$\text{DWF}_n = \text{D}_n + \text{E}_n + \text{I} \quad 3$$

where **D_n** is the rate of the domestic contribution occurring at minimum night flow

and E_n is the rate of trade flow occurring at minimum night flow.

The value of I in Equation 3 is the same as the value in Equations 1 and 2 since the value is constant over the diurnal period.

The values of DWF_n , D_n and E_n are given by:

$$DWF_n = \alpha DWF \quad 4$$

$$D_n = \beta D \quad 5$$

$$E_n = \gamma E \quad 6$$

where α , β and γ are coefficients which are defined later.

It follows from Equations 1 and 4 to 6 that:

$$D + E = [DWF(1 - \alpha) + E(\gamma - \beta)] / (1 - \beta) \quad 7$$

$$I = [DWF(\alpha - \beta) - E(\gamma - \beta)] / (1 - \beta) \quad 8$$

Equations 7 and 8 shall be substituted into Equation 2 to determine the values of xDWF for any particular year. The following describes the procedures to be used for determining the values of α , β , γ and E.

3. VALUES OF COEFFICIENTS

3.1 Alpha

The value α shall be constant for any particular year and calculated from flow data collected during the previous year. The value is determined from the DWF and the minimum night dry-weather flow (DWF_n) defined as follows:

The value of DWF_n for any particular year shall be equal to the median of the distribution of minimum hourly-average values of wastewater flow rate occurring between 10:00 and 10:00 on days, during the previous year, when the measured rainfall from 10:00 to 10:00 was zero following days when the rainfall over the same period was equal to 0.25 mm or less.

The minimum daily values of wastewater flow rate shall be recorded by the flumes at the Scheme.

3.2 Beta

The value of β shall be assumed to be 0.11.

3.3 Gamma and E

The Concessionaire shall calculate the values from the trade effluent records held by the Utility for assessing trade effluent charges in the previous year. These records will be made available to the Concessionaire. For the type of trades in the catchments, the value of γ is typically 0.7.

The calculations shall be based on actual measurements of average flow rate of the trade discharges where these measurements are available. Otherwise, the consented flow rate and a value of 0.7 for γ shall be used.

4. CALCULATIONS

The Concessionaire will be responsible for the annual calculation of the values of DWF, α , γ and E during the first two weeks of each year. A copy of the calculations shall be issued to the Utility for checking and approval. The calculations shall also show the times of the minimum flows in each qualifying dry day.

Each year shall start on the anniversary date of the commencement of the payment of treatment tariffs.

5. FIRST YEAR VALUES

For the first year of operation, no flow readings will be available for determination of the values of DWF and α . The following synthesised values shall therefore be substituted:

DWF (m ³ /day)	70,950
α	0.6

At the end of the first year, the values of DWF and α shall be determined from the actual flow measurements made using the main flumes at the Scheme. Similarly, the values of E and γ shall be recalculated. The tariff payments for the first year shall then be recalculated using the updated DWF, α , E and γ values and the payments reconciled accordingly. The same values of DWF, α , E and γ will therefore be applicable for the first two years of operation. Thereafter, the values for the current year will be derived from data collected in the previous year.

6. RAINFALL

The Concessionaire shall install, operate and maintain rainfall gauges in locations], at a suitable and secure location.

Data from Gauges [] will be taken as definitive unless there has been a logging failure, in which case the data gauges [] respectively will be used. In the event of both [] and [...] gauges failing on a particular day this will be defined as a null day and the rainfall shall be deemed to be greater than 0.25mm.

Data will be downloaded from the gauge data loggers on a weekly basis and recorded at the Wastewater Treatment Plant. This information will be made available to the Utility on Request.

7. COSTS

The Concessionaire shall be responsible for and bear all costs for obtaining data and calculating dry weather flow for the purposes of fulfilling its obligations under this agreement.

THE SCHEDULE**Part 12****Termination Payments**

Part 12A - Termination by Concessionaire

Part 12B - Termination for Prolonged Force Majeure Event and for Non-Funding

Part 12C - Tax Neutrality of Concessionaire

SAMPLE

Part 12A
Termination by Concessionaire
 Clauses 26(4)(a) and 26(5)

- (a) The capital sum payable pursuant to clause 26(4)(a) (termination under clauses 26(3)) and 26(5) (termination for non-payment) shall be the aggregate of:
- (i) a capital sum equal to Concessionaire Senior Debt;
 - (ii) redundancy and severance payments in respect of employees of the Concessionaire reasonably incurred by the Concessionaire as a result of termination of this agreement and amounts payable to counterparties to the Project Agreements as a direct result of termination of this agreement; and
 - (iii) the aggregate of Discounted Shareholder Receipts or, if the Handover Date has not occurred by the date of termination, the Shareholder Contribution Amount.
- (b) Part 12C of this Schedule shall apply to any payment under this Part 12A.
- (c) The Utility shall be entitled to rely on a certificate of the Lenders' Agent as conclusive as to the amount of Concessionaire Senior Debt at the relevant time. Any dispute as to the amount of compensation shall be determined in accordance with clause 43.

Part 12B
Termination for Prolonged Force Majeure Event and for Non-Funding
 Clauses 25(6) and 26(4)(b)

- (a) The capital sum payable pursuant to clause 25(6) (termination for prolonged Force Majeure Event) and 26(4)(b) (termination under clauses 7(8) and 21(5)) shall be an amount equal to Concessionaire Senior Debt.
- (b) Part 12C of this Schedule shall apply to any payment under this Part 12B.
- (c) The Utility shall be entitled to rely on a certificate of the Lenders' Agent as conclusive as to the amount of Concessionaire Senior Debt at the relevant time. Any dispute as to the amount of such capital sum shall be determined in accordance with clause 43.

Part 12C
Tax Neutrality of Concessionaire

If any amount of compensation payable by the Utility under Part 12A or 12B of this Schedule is subject to Tax (in whole or in part) the Utility shall pay to the Concessionaire such additional amount or amounts as will put the Concessionaire in the same after Tax position as it would have been in had the payment not been subject to Tax, taking account of any available relief, allowance, deduction, setting off or credit in respect of Tax (whether the same is available by choice or is automatic) which may be available to the Concessionaire to reduce the Tax to which the said payment is subject save that no amount shall be paid under this Part 12C to the extent that any charge to tax on the Concessionaire arises as a result of a balancing charge arising under relevant tax legislation].

THE SCHEDULE**Part 13****List of Project Agreements**

[To be provided by Tenderers]

SAMPLE

THE SCHEDULE**Part 14****List of Financing Agreements**

[To be provided by Tenderers]

SAMPLE

THE SCHEDULE**Part 15****Land Documents**

Part 15A - New Sites Land Documents

Part 15B - Existing Facilities Land Documents

SAMPLE

Part 15A
New Sites Land Documents

SAMPLE

Part 15B

Existing Facilities Land Documents

SAMPLE

THE SCHEDULE

Part 16

Performance Test Certificate

To: [The Utility]

From: [Concessionaire]

Date: []

Scheme

In accordance with clause 16 of the Concession Agreement between you and us dated [], we hereby certify that the Scheme has passed the Performance Tests. Terms defined in the Concession Agreement have the same meaning herein.

Signed:
On behalf of [Concessionaire]

Countersigned:
Utility's Representative

THE SCHEDULE**Part 17****Insurance****Part 17A - Construction Phase Insurance**

[To be provided by Tenderers]

Part 17B - O&M Phase Insurance

[To be provided by Tenderers]

SAMPLE

THE SCHEDULE

Part 19

Form of Notice to Employees

[To be provided by the Utility]

SAMPLE

THE SCHEDULE

Part 20

Concessionaire Employees Information

1. Name (surname, forename, title and initials)
2. Sex
3. Date of birth
4. Job title
5. Work location
6. Annual salary and rates of pay band/grade
7. All documents, manuals, codes, handbooks, procedure guides relating to the Employees (including collective agreements)
8. Current terms and conditions of employment and benefits (including retirement benefits), any other letters or documents or collective agreements or any other agreements affecting terms and conditions of employment
9. If registered disabled
10. Outstanding loan/advances on salary or debts for all Employees
11. Those currently on maternity leave
12. Date continuous employment commenced and (if different) the commencement date

UTILITY

.....Authorised Signatory

.....Full Name

..... Authorised Signatory

.....Full Name

CONCESSIONAIRE

.....Director

..... Full Name

..... Director/Secretary

.....Full Name

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CONCESSION AGREEMENT

DATED []

[UTILITY]

- and -

[CONCESSIONAIRE]

CONCESSION AGREEMENT
in respect of
a Wastewater Treatment Scheme at [LOCATION]

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