

WASTEWATER DISPOSAL AND WATER SERVICE AGREEMENT

between

CITY OF PORTSMOUTH

and

PEASE DEVELOPMENT AUTHORITY

Dated as of January 1, 1993

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WASTEWATER DISPOSAL AND WATER SERVICE AGREEMENT

THIS AGREEMENT is made and entered into as of January 1, 1993 by and between the City of Portsmouth, a municipal corporation located in Rockingham County, New Hampshire ("COP") and the Pease Development Authority, a body politic and corporate of the state, located in Rockingham County, New Hampshire ("PDA").

WHEREAS, PDA desires to transfer to COP, and COP desires to acquire from PDA, certain water distribution, wastewater disposal and related facilities that PDA is now leasing from the United States of America pursuant to the Master Lease;

WHEREAS, COP desires to provide, and PDA desires COP to provide, certain water distribution and wastewater disposal services in the Airport District and certain other water distribution and wastewater disposal services in the Extended Area; and

WHEREAS, COP desires to be compensated fairly, and PDA desires to allow COP to be compensated fairly, for providing such water distribution services and wastewater disposal services;

NOW THEREFORE, in consideration of the premises and mutual promises contained herein, it is hereby agreed as follows:

SECTION 1
DEFINITIONS

1.1 Definitions of Certain Terms. As used in this Agreement, the following terms have the following meanings:

Administrators: as defined in Section 4.1 hereof.

Airport District: as it is defined in Chapter 12-G:2(I) NHRSA, as of January 1, 1993.

Airport District Service Fees: as defined in Section 5.1 hereof.

Airport District Services: as defined in Section 3.2 hereof.

Application: as defined in the Sublease.

COP: the City of Portsmouth.

Extended Area: the area of the Pease Base not included within the Airport District.

Extended Area Service Fees: as defined in Section 5.2 hereof.

Extended Area Services: as defined in Section 3.3 hereof.

Master Lease: as defined in the Sublease.

Municipal Services Agreement: an Agreement of even date herewith by and between PDA and COP concerning the provision of certain municipal services.

NPDES Permit: as defined in Section 3.2 hereof.

Pease Base: the area constituting the former Pease Air Force Base.

PDA: the Pease Development Authority.

Stormwater: stormwater runoff, snow melt runoff and drainage.

Sublease: as defined in Section 2.1 hereof.

Systems: as defined in the Sublease.

Transfer Agreement: as defined in Section 2.2 hereof.

Wastewater Disposal Facilities: as defined in the Sublease.

Wastewater Disposal Service: Airport District Wastewater Disposal Service and Extended Area Wastewater Disposal Service.

Wastewater Treatment Facility or WWTF: the wastewater treatment facility that is part of the System.

Water Distribution Facilities: as defined in the Sublease.

Water Distribution Service: Airport District Water Service and Extended Area Water Service.

Water Tower: all buildings and fixtures comprising the Water Tower located in the New Hampshire Air National Guard Cantonment Area described in more detail and shown on Appendix I attached hereto.

SECTION 2

SUBLEASE AND TRANSFER OF WASTEWATER DISPOSAL AND WATER DISTRIBUTION FACILITIES

2.1 Sublease and License Agreement. Concurrently with the execution and delivery of this Agreement, COP and PDA shall execute and deliver a Sublease and License Agreement attached hereto as Exhibit A (the "Sublease"), which provides for the sublease to COP of certain wastewater disposal and water distribution facilities and related facilities and equipment, on the terms and conditions described therein, and for the grant to COP of a license to repair, rebuild, relocate, operate, maintain, patrol, remove and upgrade such facilities and to construct, install, repair, relocate, maintain, patrol and upgrade new wastewater disposal and water distribution facilities and related facilities and equipment, also on the terms and conditions described therein.

2.2 Transfer Agreement. Concurrently with the execution and delivery of this Agreement, COP and PDA shall execute and deliver a Wastewater Disposal and Water Distribution Facilities Transfer Agreement attached hereto as Exhibit B (the "Transfer Agreement"), which provides for the transfer in fee to COP of certain wastewater disposal and water distribution facilities and related facilities and equipment, on the terms and conditions described therein.

2.3 Easement. It will be the obligation of COP to use its best efforts to secure a written agreement with the United States of America, through the Secretary of the Air Force, reasonably satisfactory in form and substance to PDA, as evidenced by PDA's written consent thereto, providing for the grant by the United States of America, of a perpetual easement or other suitable right of access within the Extended Area to construct, install, repair, rebuild, relocate, maintain, patrol, upgrade and operate the Systems and any new aboveground and underground wastewater disposal and water distribution facilities and equipment and related facilities that may become part of the Systems, all as COP may deem reasonably necessary or desirable to provide the Services. The easement shall be attached hereto as Appendix 2.

2.4 Water Tower Agreement. It will be the obligation of COP to use its best efforts to secure a written agreement with the United States of America, through the Secretary of the Air Force, reasonably satisfactory in form and substance to PDA, as evidenced by PDA's written consent thereto, to require the NH Air National Guard to maintain and operate in perpetuity the Water Tower situated in the New Hampshire Air National Guard Cantonment Area as part of the Water Distribution System. Such agreement shall prohibit any disconnection, separation or other removal of the Water Tower from the Water Distribution System unless a facility of equivalent volume and function is provided to the Water Distribution System. The Agreement shall be attached hereto as Appendix 3.

SECTION 3

WASTEWATER DISPOSAL AND WATER DISTRIBUTION SERVICES

3.1 Provision of Wastewater Disposal and Water Distribution Services. From and after the date hereof, COP shall provide Wastewater Disposal and Water Distribution Services (the "Services") to all of those portions of the Pease Base for which the PDA is obligated by law or agreement, now or in the future, to provide such services and shall assume all obligations of the PDA to provide such services to the geographical areas covered by this Agreement, including specifically all construction and regulatory obligations. The Services shall not include and COP shall not be required to provide Services related to management, permitting or approvals of the stormwater disposal system.

3.2 Airport District Services. COP shall provide Services to all portions of the Airport District. Such services shall, as COP deems necessary, include the following component services:

(i) Operating, repairing, constructing, installing, relocating, maintaining, rebuilding, and upgrading the Wastewater Disposal System, to include without limitation, all existing and future pipes, mains, lift stations, wastewater treatment facility, manholes, outfalls and all facilities, appurtenances and equipment associated therewith;

(ii) Operating, repairing, constructing, installing, relocating, maintaining, rebuilding and upgrading the Water

Distribution System, to include without limitation, all existing and future pipes, mains, meters, valves, pumps, water treatment plant, wells and all facilities, appurtenances and equipment associated therewith.

(iii) Compliance with all requirements of the Authorization to Discharge Under the National Pollutant Discharge Elimination System (NPDES Permit) for the Pease Wastewater Treatment Facility or other applicable NPDES permits for the wastewater treatment facility or facilities servicing the Pease Base, including without limitation, effluent limitations, monitoring and reporting requirements and applicable State permit conditions.

(iv) Preparing and distributing statements to users of the Systems as provided in Section 5 hereof.

Notwithstanding any provision of this Agreement to the contrary, COP shall not be required to install or construct new service locations to the PDA or its tenants. COP shall provide Services as are provided to all system users to such new service locations upon installation or completion of construction.

3.3 Extended Area Services. From and after the date hereof, COP shall provide the Services in the Extended Area at Pease to the United States of America or its successor or successors in interest as required pursuant to Condition 18.2 of the Master Lease and Condition 5e(7) of the Application.

3.4 Regulatory Approvals and Compliance. COP shall, at its sole cost and expense, promptly obtain and maintain, or cause to be obtained and maintained, all federal, state and local regulatory approvals or permits necessary to provide the Services, in the manner and to the extent described herein, including, without limitation, any NPDES Permit, drinking water permit, approval of the New Hampshire Public Utilities Commission to commence business as a public utility, pursuant to Chapters 362:4 III(a) and 374:22, NHRSA, and any other applicable approvals or permits as may be required from time to time and shall comply with all applicable federal, state and local regulatory requirements in the provision of the Services. PDA shall assist COP in satisfying its obligations as are necessary to accomplish the stated objectives of this Agreement.

3.5 Restrictions on Services. The PDA, on behalf of itself and its successors and assigns of every kind, agrees to comply with all municipal policies, ordinances and regulations of COP with respect to Wastewater Disposal and Water Distribution Services, including, but not limited to all standards for pre-treatment or other regulation of effluent which may be discharged to the wastewater disposal system.

SECTION 4

ADMINISTRATION, ARBITRATION

4.1 Administration. The implementation of this Agreement, including, without limitation, the provision of Services, in the manner and to the extent described herein, shall be administered by the City Manager of COP and the Executive Director of PDA (the "Administrators"), who shall meet at least once every calendar quarter to discuss the implementation of this Agreement and such other matters related thereto as they deem appropriate.

4.2 Arbitration. If a dispute between the Administrators concerning the Systems or Services hereunder cannot be resolved within 10 days of one Administrator giving the other Administrator written notice thereof, either Administrator may request arbitration of such dispute.

Arbitration shall be conducted by a panel of three arbitrators in accordance with the rules of the American Arbitration Association sitting at Boston, Massachusetts. The decision of the three arbitrators, by majority vote, shall be final and binding on the parties hereto and not subject to any appeal. All arbitration proceedings shall be held in a public forum and costs of arbitration shall be shared equally by the parties.

SECTION 5

PAYMENT

5.1 Airport District Service Fees. COP shall charge each service location in the Airport District for Services at the same rate or rates as are applicable in COP with respect to such service. The Airport District Service Fees shall be calculated applying the same basis as is applied to service locations throughout COP; provided that COP shall not differentiate between Pease and other areas of the City in the calculation of such fees. Notwithstanding any other provision herein to the contrary, PDA shall not pay any such fees for Services used at the Pease Golf Course, up to an annual maximum usage of 9 million gallons, for as long as the PDA shall be the owner or lessee thereof or at any location owned or leased and occupied by PDA as "occupied by PDA" is defined in the Municipal Services Agreement.

5.2 Extended Area Service Fees. COP shall, as it deems appropriate, charge the United States of America or its successor or successors in interest for Services in the Extended Area, but only to the extent and in the manner permitted under Condition 18.2 of the Master Lease and Condition 5e(7) of the Application. Notwithstanding any other provision herein to the contrary, PDA shall not pay any such fee for Services used at any locations in the Extended Area occupied by PDA as "occupied by PDA" is defined in the Municipal Services Agreement.

5.3 Costs for System Repairs and Improvements. In the event that repairs or improvements to either the Wastewater Disposal System or Water Distribution System become necessary to supply the Services, as defined in Section 3.2 herein, to any present or future service location within the Airport District, COP agrees to undertake such repairs or improvements to the Systems. Costs incurred by COP for such repairs or improvements shall be apportioned among all users of COP water or wastewater services in the same manner as such costs are normally apportioned among all system users.

5.4 Costs for Wasteload Allocation Study. PDA shall undertake, and COP shall reimburse PDA for one half the actual costs incurred in the completion of the engineering study to determine the maximum allowable headworks loading for all pollutants which are anticipated to be introduced into the wastestream to be treated by the Pease Wastewater Treatment Facility and which is required to be completed prior to any transfer of the NPDES permit currently pending renewal by the Air Force for said Facility.

SECTION 6
REPRESENTATIONS AND WARRANTIES

COP and PDA each represent and warrant to the other as follows:

6.1 Organization and Authority. It is a municipal corporation in the case of COP and a body politic and corporate of the state in the case of PDA, duly organized and validly existing under the laws of the State of New Hampshire and has all requisite power and authority to execute, deliver and perform this Agreement.

6.2 Authorization. This Agreement has been duly authorized, executed and delivered by it, constitutes the legal, valid and binding obligation of it and is enforceable against it in accordance with its terms.

6.3 No Conflict. Neither the execution and delivery of this Agreement by it nor the consummation by it of any of the transactions herein referred to or contemplated hereby has constituted or resulted in or will constitute or result in a breach of or a default under the provisions of any agreement, lease or other instrument to which it is a party, or by which it is bound, or the violation of any law, judgment, decree, injunction or governmental or administrative order, rule or regulation applicable to it.

SECTION 7

ADDITIONAL AGREEMENTS

7.1 Expenses. Each party hereto shall pay its own expenses incident to preparing for and entering into this Agreement.

7.2 Further Assurances. Each party hereto shall use its best efforts to execute such further documents, and perform such further acts, as may be necessary or reasonably desirable to consummate the transactions contemplated hereby.

7.3 COP Employees. To the extent such services are provided by COP, all personnel who provide Services, in the manner described herein, shall be and remain employees or agents of COP, as the case may be, and COP shall be solely responsible for (i) training and equipping such personnel, (ii) all wages, worker's compensation, and other employee compensation and benefits and (ii) any other applicable duty of an employer to an employee.

7.4 Duration. The term of this Agreement shall be co-existent with the Sublease and of any termination, extension or renewal thereof; provided, however, that if the Sublease terminates and the Systems are upon such termination transferred in fee to COP pursuant to the Transfer Agreement, this Agreement shall remain in full force and effect, without interruption and shall have perpetual duration thereafter.

7.5 Compliance. In the performance of its obligations hereunder, COP shall, at its sole cost and expense, promptly observe

and comply with all applicable federal, state and local laws, rules and regulations.

7.6 Submission to Attorney General. This Agreement shall be submitted to the New Hampshire Attorney General's Office for a determination of whether the Agreement is in proper form and compatible with the Laws of the State of New Hampshire, if, and only if, the New Hampshire Attorney General's Office determines that such submission is required by the provisions of Chapter 53-A:3 V, NHRSA. If such submission is determined to be necessary, the parties hereto shall cause this Agreement to be filed as provided in Chapter 53-A:4 NHRSA.

SECTION 8
GENERAL PROVISIONS

8.1 Remedies. Each party hereunder acknowledges and agrees that, because the other party's legal remedies may be inadequate in the event of a breach of, or other failure to perform, any of the party's obligations set forth herein, the other party may, at its option, in addition to obtaining any other remedy or relief available to it (including without limitation damages at law), enforce the provisions hereof by injunction and other equitable relief. Notwithstanding the preceding sentence, neither party shall institute a suit for monetary damages against the other party unless a suit or claim has been instituted by a third party seeking monetary damages from either COP or PDA.

8.2 Termination and Amendment. This Agreement may be amended or modified by, and only by, an instrument in writing signed on behalf of each party hereto. In the event that the PDA is unable to transfer in fee to COP certain wastewater, water distribution and related facilities on the terms and conditions set forth in the Transfer Agreement then upon termination of the Sublease or at the election of COP if PDA or its successors retain an interest in the Airport District, this Agreement shall terminate and COP shall have no further obligation to provide services as set forth herein.

8.3 No Third Party Rights. It is specifically agreed between the parties executing this Agreement that it is not intended by any of the provisions of the Agreement to make the public or any member

thereof a third-party beneficiary of the Agreement, or to authorize anyone not a party to this Agreement to maintain a suit for personal injuries or property damage pursuant to the terms or provisions of this Agreement. The duties, obligations and responsibilities of the parties to this Agreement with respect to third parties shall remain as imposed by law. No portion of this Agreement shall be understood to be a waiver of the State's sovereign immunity.

8.4 Notices. Any notice or other communication in connection with this Agreement shall be in writing or in the form of a telex or telecopy and shall be deemed to be delivered if addressed as provided below and if either (a) actually delivered at said address (evidenced in the case of a telex, by receipt of the correct answerback) or (b) in the case of a letter, five business days shall have elapsed after the same shall have been deposited in the United States mails, postage prepaid:

if to COP:

City of Portsmouth
Municipal Complex
P.O. Box 628
Portsmouth, NH 03802-0628
Attention: City Manager

if to PDA:

Pease Development Authority
601 Spaulding Turnpike
Suite 1
Portsmouth, NH 03801-2833
Attention: Executive Director

8.5 Waivers. No action taken pursuant to this Agreement, including an investigation by or on behalf of any party hereto, shall

be deemed to constitute a waiver, by the party taking such action, of compliance with any representation, warranty, covenant or agreement contained herein or in any ancillary document contemplated hereby. Except as expressly provided in this Agreement, no delay or failure to exercise any right, power or remedy accruing to any party hereunder, upon any breach or default of any party under this Agreement, shall impair any such right, or remedy, nor shall it be construed to be a waiver of any such breach or default, or any acquiescence therein, or in any similar breach or default thereafter occurring; nor shall any waiver of any single breach or default be deemed a waiver of any other breach or default theretofore or thereafter occurring.

8.6 Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of, the parties hereto and their respective transferees, successors and assigns. Neither this Agreement nor any of the rights, interests or obligations hereunder shall be assigned by any party hereto without the prior written consent of the other party.

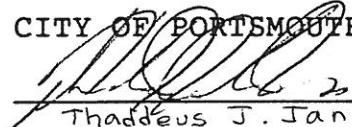
8.7 Miscellaneous. The invalidity or enforceability of any term or provision hereof shall not affect the validity or enforceability of any other term or provision hereof. This Agreement, the Sublease and the Transfer Agreement (a) constitute the entire agreement and supersede all other prior agreements and understandings, both written and oral, between the parties, or any of them, with respect to the subject matter hereof and (b) are not intended to confer upon any person not a party hereto any rights or

remedies hereunder. The headings in this Agreement are for convenience of reference only and shall not alter or otherwise affect the meaning hereof. This Agreement may be executed in any number of counterparts which together shall constitute a single instrument and shall be governed by and construed in accordance with the laws (other than the conflict of law rules) of the State of New Hampshire.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed by their respective officers thereunto duly authorized as of the date first above written.

CITY OF PORTSMOUTH

By:

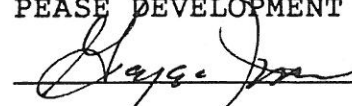

Thaddeus J. Jankowski, JR.

Title:

CITY MANAGER

PEASE DEVELOPMENT AUTHORITY

By:



Title:

Stephen P. Brown

EXHIBITS

Exhibit A - Form of Sublease and License Agreement

Exhibit B - Form of Transfer Agreement

APPENDICES

Appendix 1 - Description of Water Tower

Appendix 2 - Air Force Easement

Appendix 3 - Water Tower Agreement