

AGREEMENT FOR ENGINEERING SERVICES

THIS AGREEMENT, made this _____ day of _____, 20____, by and between _____, hereinafter referred to as the OWNER, AND _____, hereinafter referred to as the ENGINEER.

The OWNER intends to construct a _____ in the _____ and surrounding area in _____ State of West Virginia which may be paid in part with financial assistance from the State, pursuant to the State Water Pollution Control Revolving Fund Program (Title 47 Legislative Rules, Series 31), and the ENGINEER agrees to perform the various professional engineering services required for the design and construction of said system, in accordance with applicable State requirements in effect on the date of execution of this agreement.

WITNESSETH:

That for and in consideration of the mutual covenants and promises between the parties hereto, it is hereby agreed:

SECTION 1 - BASIC SERVICES OF ENGINEER

General

- 1.1 ENGINEER shall provide for OWNER professional engineering services in all phases of the Project to which this agreement applies as hereinafter provided. These services will include serving as OWNER's professional engineering representative for the Project, providing professional engineering consultation and advice, and furnishing customary civil, structural, mechanical, and electrical engineering services, and customary architectural services incidental thereto.

Final Design Phase

After written authorization to proceed with the final design phase, ENGINEER shall:

- 1.2 On the basis of the accepted preliminary design documents and the revised opinion of probable total project costs prepared for incorporation to the Contract Documents, final drawings will show the general scope, extent, and character of the work to be furnished and performed by Contractor(s) thereafter called "Drawings" and Specifications (which will be prepared in conformance with the sixteen division format of the Construction Specifications Institute).
 - 1.2.1 Provide technical criteria, written descriptions and design data for OWNER's use in filing applications for permits with or obtaining approvals of such governmental authorities as having jurisdiction to approve the design of the Project and assist OWNER in consultations with appropriate authorities.

1.2.2 Advise and furnish to OWNER of any adjustments to the latest opinion of probable total project costs caused by changes in general scope, extent or character of design requirements of the project or construction costs based on the Drawings and Specifications.

1.2.3 Prepare for review and approval by OWNER, its legal counsel, and other advisor, contract agreement forms, general conditions, and supplementary conditions, and where appropriate, bid forms, invitations to bid, and instructions to bidders (all of which shall be consistent with the forms and pertinent guide sheets), and assist in the preparation of other related documents.

1.2.4 Furnish eight (8) copies of the above documents and the Drawings and Specifications to present and review it in person with OWNER.

1.2.5 Advise the OWNER as to the necessity of obtaining additional services such as, but not limited to, property, boundary, right-of-way, topographic and utility surveys and soil investigations; and if authorized by OWNER, provide or assist in procuring such services.

Bidding or Negotiating Phase

1.3 Assist OWNER in advertising for and obtaining bids or negotiating proposals for each separate prime contract for construction, materials, equipment and services and where applicable, maintain a record of prospective bidders to whom Bidding Documents have been issued, attend pre-bid conferences and receive and process deposits for Bidding Documents.

1.3.1 Issue addenda as appropriate to interpret, clarify, or expand the bidding documents.

1.3.2 Consult with and advise OWNER as to the acceptability of subcontractors, suppliers, and other persons or organizations proposed by the prime contractor(s) (herein called "contractor(s)") for the portions of the work as to which such acceptability is required by the bidding documents.

1.3.3 Consult with OWNER concerning with and determining the acceptability of substitute materials and equipment proposed by contractor(s) when substitution prior to the award of contracts is allowed by the bidding documents.

1.3.4 Attend the bid opening, prepare bid tabulation sheets, and assist OWNER in evaluating bids or proposals and in assembling and awarding contracts for construction, materials, equipment, and services.

Construction Phase

During the construction phase:

1.4 General administration of construction contract(s): ENGINEER shall consult with the OWNER and act as OWNER's representative as provided in Articles 1 through 17, inclusive of the Standard General

Conditions of the Construction Contract, No. 1910-8 (1983 Edition) of the Engineers Joint Contract Documents Committee. The extent and limitations of the duties, responsibilities, and authority of ENGINEER as assigned in said Standard General Conditions shall not be modified except to the extent provided in Exhibit A "Further Description of Basic Engineering Services and Related Matters" and except as ENGINEER may otherwise agree to in writing. All of OWNER's instructions to contractor(s) will be issued through ENGINEER who will have authority to act on behalf of OWNER to the extent provided in said Standard General Conditions except as otherwise provided in writing.

1.4.1 VISITS TO SITE AND OBSERVATION OF CONSTRUCTION. In connection with observations of the work of contractor(s) while in progress:

1.4.1.1 Engineer shall make visits to the site at intervals appropriate to the various stages of construction as ENGINEER deems necessary in order to observe as an experienced and qualified design professional, the progress and quality of the various aspects of contractor(s) work. In addition, ENGINEER shall provide the services of a Resident Project Representative (and assistants as agreed upon) at the site to assist ENGINEER and to provide more continuous observation of such work. Based on information obtained during such visits and on such observations ENGINEER shall endeavor to determine in general if such work is proceeding in accordance with the contract documents and ENGINEER shall keep OWNER informed of the progress of the work.

1.4.1.2 The resident project representative (and assistants) will be ENGINEER's agent or employee and under ENGINEER's supervision. The duties and responsibilities of the resident project representative (and assistants) are set forth in Exhibit B "Duties, Responsibilities, and Limitation of Authority of Resident Project Representative".

1.4.1.3 The purpose of ENGINEER's visit to, and representation by the resident project representative (and assistants) at the site will be to enable ENGINEER to better carry out the duties and responsibilities assigned to and undertaken by ENGINEER during the Construction Phase, and in addition, by exercise of ENGINEER's efforts as an experienced and qualified design professional to provide for OWNER a greater degree of confidence that the completed work of contractor(s) will conform generally to the contract documents and that the integrity of the design concept as reflected in the contract documents has been implemented and preserved by contractor(s). On the other hand, ENGINEER shall not, during such visits or as a result of such observations of contractor(s) work in progress, supervise, direct, or have control over contractor(s) work nor shall ENGINEER have authority over or responsibility for the means, methods, techniques, sequences or procedures of construction selected by contractor(s) to comply with laws, rules, regulations, ordinances, codes, or orders applicable to Contractor(s) furnishing and performing their work. Accordingly, ENGINEER can neither guarantee the performance of the construction contract by contractor(s) nor assume responsibility for contractor(s) failure to furnish and perform their work in accordance with the contract documents.

1.4.2 DEFECTIVE WORK. During such visits and on the basis of such observations, ENGINEER may disapprove of or reject contractor(s) work while it is in progress if ENGINEER believes that such

work will not produce a completed project that conforms generally to the contract documents or that it will prejudice the integrity of the design concept as reflected in the contract documents.

1.4.3 INTERPRETATIONS AND CLARIFICATIONS. ENGINEER shall issue necessary interpretations and clarifications of the contract documents and in connection therewith prepare work directive changes and change orders as required.

1.4.4 SHOP DRAWINGS. ENGINEER shall review and approve (or take other appropriate action with respect to) shop drawings (as that term is defined in the aforesaid Standard General Conditions), samples, and other data which contractor(s) are required to submit, but only for conformance with the design concept and compliance with the information given in the contract documents. Such reviews and approvals or other action shall not extend to means, methods, techniques, sequences, or procedures of construction or to safety precautions and programs incident thereto.

1.4.5 SUBSTITUTES. ENGINEER shall evaluate and determine the acceptability of substitute materials and equipment proposed by contractor(s), but subject to the provision of paragraph 2.2.2.

1.4.6 INSPECTIONS AND TESTS. ENGINEER shall have authority, as OWNER's representative, to require special inspections or testing of the work, and shall receive and review all certificates of inspections, testiness, and approvals required by laws, rules, regulations, ordinances, codes, orders of the contract documents (but only to determine generally that their content complies with the requirements of, and the results certified indicate compliance with, the contract documents).

1.4.7 DISPUTES BETWEEN OWNER AND CONTRACTOR. ENGINEER shall act as initial interpreter of the requirements of the contract documents and judge of the acceptability of the work thereunder and make decisions on all claims of OWNER and contractor(s) relating to the acceptability of the work or the interpretation of the requirements of the contract documents pertaining to the execution and progress of the work. ENGINEER shall not be liable for the results of any such interpretations or decisions rendered in good faith.

1.4.8 APPLICATIONS FOR PAYMENT. Based on ENGINEER's on-site observations as an experienced and qualified design professional, on information provided by the resident project representative, and on review of applications for payment and the accompanying data and schedules:

1.4.8.1 ENGINEER shall determine the amounts owing to contractor(s) and recommend in writing payments to contractor(s) in such amounts. Such recommendations of payment will constitute a representation to OWNER, that the work has progressed to the point indicated, and that, to the best of ENGINEER's knowledge, information and belief, the quality of such work is generally in accordance with the contract documents (subject to an evaluation of such work as a functioning whole prior to or upon substantial completion, to the results of any subsequent test called for in the contract documents, and to any other qualifications stated in the recommendation).

1.4.8.2 In the case of unit price work, ENGINEER's recommendations of payment will include

final determinations of quantities and classifications of such work (subject to any subsequent adjustments allowed by the contract documents).

The preparations and assembly of the contractor(s) payment shall be the responsibility of the contractor(s) and shall not be performed by the ENGINEER. The service will be only a review of the contractor's application for payment as described in the above paragraph.

1.4.8.3 By recommending any payment, ENGINEER will not thereby be deemed to have represented that exhaustive, continuous or detailed reviews or examinations have been made by Engineer to check the quality or quantity of contractor(s) work as it is furnished and performed beyond the responsibilities specifically assigned to ENGINEER in this agreement and the contract documents. ENGINEER's review of contractor's work for the purposes of recommending payments will not impose on ENGINEER responsibility to supervise, direct, or control such work or for the means, methods, techniques, sequences, or procedures of construction or safety precautions or programs incident thereto or contractor's compliance with laws, rules, regulations, ordinances, codes, or orders applicable to their furnishing and performing the work. It will also not impose responsibility on ENGINEER to make any examination to ascertain how or for what purposes any contractor has used the moneys paid on account of the contract price, or to determine that title to any of the work, materials, or equipment has passed to OWNER free and clear of any lien, claims, security interests, or encumbrances, or that there may not be other matters at issue between OWNER and CONTRACTOR that might affect the amount that should be paid.

1.4.9 CONTRACTOR (S) COMPLETION DOCUMENTS. ENGINEER shall receive and review maintenance and operating instructions, schedules, guarantees, bonds and certificates of inspection, tests, and approvals which are to be assembled by contractors in accordance with the contract documents (but such review will only be to determine that their content complies with the requirements of, and in the case of certificates, inspection; tests and approvals, the results certified indicate compliance with the contract documents) and shall transmit them to OWNER with written comments.

1.4.10 INSPECTIONS. ENGINEER shall conduct an inspection to determine if the work is substantially complete and a final inspection to determine if the completed work is acceptable so that ENGINEER may recommend, in writing, final payment to contractor(s) and may give written notice to OWNER and the contractor(s) that the work is acceptable (subject to any conditions therein expressed), but any such recommendations and notice will be subject to the limitations expressed in paragraph 1.4.9.3.

1.4.11 LIMITATION OF RESPONSIBILITIES. ENGINEER shall not be responsible for the acts or omissions of any contractor or of any subcontractor or supplier, or any of the contractor(s), subcontractor's or supplier's agents or employees, or any other persons (except ENGINEER's own employees and agents) at the site or otherwise furnishing or performing any of the contractor's work; however, nothing contained in paragraph 1.4.1 through 1.4.11 inclusive, shall be construed to release ENGINEER from liability for failure to properly perform duties and responsibilities assumed by ENGINEER in contract documents.

SECTION 2 - ADDITIONAL SERVICES OF ENGINEER

Services Requiring Authorization in Advance.

2.1 If authorized in writing by OWNER, ENGINEER shall furnish or obtain from others, additional services listed in paragraphs 2.1.1 through 2.1.14, inclusive. These services are not included as part of Basic Services except to the extent provided otherwise in Exhibit A " Further Description of Basic Engineering Services and Related Matters". These will be paid for by OWNER as indicated in Section 5.

2.1.1 Preparation of applications and supporting documents (in addition to those furnished under Basic Services) for private or governmental grants, loans, or advances in connection with the project; preparation or review of environmental assessments and impact statements; review and evaluation of the effect on the design requirements of the project of any such statements and documents prepared by others; and assistance in obtaining approvals of authorities having jurisdiction over the anticipated environmental impact of the project.

2.1.2 Services to make measured drawings of or to investigate existing conditions or facilities, or to verify the accuracy of drawings or other information furnished by OWNER.

2.1.3 Services resulting from significant changes in the general scope, extent or character of the project or its design including, but not limited to, changes in size, complexity, OWNER's schedule, character of construction or method of financing; and revising previously accepted studies, reports, design documents or contract documents when such revisions are required by changes in law, rules, regulations, ordinances, codes or orders enacted subsequent to the preparation of such studies, reports, or documents, or are due to any other causes beyond ENGINEER's control.

2.1.4 Providing renderings or models for OWNER's use.

2.1.5 Preparing documents for alternate bids requested by OWNER for contractor(s) work which is not executed or documents for out-of-sequence work.

2.1.6 Investigations and studies involving, but not limited to, detailed consideration of operations; maintenance and overhead expenses; providing value engineering during the course of design; preparation of feasibility studies; cashflow and economic evaluations; rate schedules and appraisals; assistance in obtaining financing for the project; evaluating processes available for licensing and assisting OWNER in obtaining process licensing; detailed quantity surveys of material, equipment, and labor; and audits or inventories required in connection with construction performed by OWNER.

2.1.7 Furnishing services of independent professional associates and consultants for other than Basic Services; and providing data or services of the types described in paragraph 3.4 when OWNER employs ENGINEER to provide such data or services in lieu of furnishing the same in accordance with paragraph 3.4.

2.1.8 Services during out-of-town travel required of ENGINEER other than visits to site or OWNER's

office as required by Section 1.

2.1.9 Assistance in connection with bid protests, rebidding or renegotiating contracts for construction, materials, equipment or services, except when such assistance is required to complete services called for in paragraph 6.2.2.5

2.1.10 Preparing to serve or serving as a consultant or witness for OWNER in any litigation, public hearing or other legal or administrative proceeding involving the project.

2.1.11 Providing special analysis, staffing and training, special operation drawings or charts, and any other similar analyses.

2.1.12 Providing planning surveys, land surveys, site evaluations, and comparative studies of prospective sites.

2.1.13 Providing any type of field surveys for design purposes; "stake-out" of the location of the work for construction; and any other special field surveys such as for easements, right-of-ways, photogrammetry, and all related office activities.

2.1.14 Providing subsurface investigations, soils investigations, including test borings, and appropriate professional analysis and interpretations.

2.1.15 Furnishing additional copies of reports and contract documents.

2.1.16 Making a review of the project prior to expiration of the guarantees provided to ENGINEER made by the contractor during the construction phase.

2.1.17 Record drawings based on actual field measurements made by ENGINEER's personnel. This will include one (1) copy of reproducible record drawings and three (3) copies of as-built drawings to be submitted to OWNER no later than sixty (60) days after project completion.

2.1.18 Additional or extended services during construction made necessary by (1) work damaged by fire or other causes during construction, (2) defective or incomplete work of the contractor, (3) prolongation of the initial construction contract time, (4) acceleration of the work schedule involving services beyond established office working hours, (5) contractor's default under the contract documents due to delinquency or insolvency, and (6) equipment inspection at manufacturer's premises.

2.1.19 Providing assistance in the initial start-up testing, adjusting or balancing, operation of equipment or systems, or training personnel for operation or maintenance of equipment or system.

2.1.20 Detailed mill, shop, and/or laboratory inspection of material and equipment.

2.1.21 Operation and Maintenance Manual. One draft manual will be submitted to the West Virginia Department of Environmental Protection prior to 90% construction completion for review and approval. Three (3) final sets will be submitted after approval.

2.1.22 Extra travel and subsistence for the ENGINEER or staff beyond that normally incurred under basic services, when authorized by OWNER.

2.1.23 Preparation of engineering data and testimony before the West Virginia Public Service Commission as required establishing sewer service charges.

2.1.24 Negotiations and discussions with other municipalities relative to sewerage services, tie-ins, metering requirement, rates, or any other technical assistance as may be required.

2.1.25 Furnishing engineering and administrative services for sewer system rehabilitation.

2.1.26 Providing design services relating to future facilities, systems, and equipment that are not intended to be constructed or operated as a part of the project.

2.1.27 During the first year following the initiation of operation:

- (1) Direct the operation of the project and revise the Operation and Maintenance Manual as necessary to accommodate actual operations,
- (2) Train or provide for training of operating personnel and prepare curricula and training materials for operating personnel, and
- (3) Advise and submit to OWNER, within sixty (60) days of the end of the first year of overview with a report, whether the project is capable of meeting the project performance standards (design specifications and effluent limitations).

2.1.28 Prior to construction, provide video taping of all sewer line construction.

2.1.29 Providing other services not otherwise provided for in this agreement, including services normally furnished by OWNER as described in the agreement, as amended.

Required Additional Services

2.2 When required by the contract documents in circumstances beyond ENGINEER's control, ENGINEER shall furnish or obtain from others, as circumstances require during construction and without waiting for specific authorization from OWNER, additional services of the type listed in paragraph 2.2.1 through 2.2.6, inclusive (except to the extent otherwise provided for in Exhibit A). These services are not included as part of Basic services. ENGINEER shall advise OWNER promptly after starting any such additional services that will be paid for by OWNER as indicated in Section 5.

2.2.1 Services in connection with work directive changes and change orders to reflect changes requested by OWNER if the resulting change in compensation for Basic services is not commensurate with the additional services rendered.

2.2.2 Services in making revisions to Drawings and Specifications occasioned by the acceptance of substitutions proposed by contractor(s); and services after the award of each contract in evaluating and

determining the acceptability of an unreasonable or excessive number of substitutions proposed by contractor.

2.2.3 Services resulting from significant delays, changes or price increases occurring as a direct or indirect result of material, equipment, or energy shortages.

2.2.4 Additional or extended services during construction made necessary by (1) work damaged by fire or other cause during construction, (2) a significant amount of defective or neglected work of any contractor, (3) acceleration of the progress schedule involving services beyond normal working hours, and (4) default by any contractor.

2.2.5 Services (other than Basic services during the operational phase) in connection with any partial utilization of any part of the project by OWNER prior to substantial completion.

2.2.6 Evaluating an unreasonable or extensive number of claims submitted by contractor(s) or others in connection with work.

SECTION 3 - OWNER'S RESPONSIBILITIES

OWNER shall do the following in a timely manner so as not to delay the services of ENGINEER:

- 3.1 Designate in writing a person to act as OWNER's representative with respect to the services to be rendered under this agreement. Such person shall have complete authority to transmit instructions, receive information, interpret and define OWNER's policies and decisions with respect to ENGINEER's services for the project.
- 3.2 Provide all criteria and full information as to OWNER's requirements for the project, including design objectives and constraints, space, capacity, and performance requirements, flexibility and expandability, and any budgetary limitations; and furnish copies of all design and construction standards which OWNER will require to be included in the Drawings and Specifications.
- 3.3 Assist ENGINEER by placing at ENGINEER's disposal all available information pertinent to the project including previous reports and any other data relative to design or construction of the project.
- 3.4 Furnish to ENGINEER, as required for performance of ENGINEER's basic services (except to the extent provided otherwise in Exhibit A) the following:
 - 3.4.1 Data prepared by or services of others including, without limitations, borings, probings and subsurface explorations, hydrographic surveys, laboratory tests and inspections of samples, materials, and equipment
 - 3.4.2 Appropriate professional interpretations of all of the foregoing
 - 3.4.3 Environmental assessment and impact statements

- 3.4.4 Property, boundary, easement, right-of-way, topographic and utility surveys
- 3.4.5 Property descriptions
- 3.4.6 Zoning, deed and other land use restrictions, and
- 3.4.7 Other special data or consultations not covered in Section 2 all of which ENGINEER may use and rely upon in performing services under this agreement.
- 3.5 Provide engineering surveys to establish reference points for construction to enable contractor(s) to proceed with the layout of the work (except to the extent provided in Exhibit A).
- 3.6 Arrange for access to and make all provisions for ENGINEER to enter upon public and private property as required for ENGINEER to perform services under this agreement.
- 3.7 Examine all studies, reports, sketches, drawings, specifications, proposals and other documents presented by ENGINEER, obtain advice of an attorney, insurance counselor and other consultants as OWNER deems appropriate for such examination and render in writing, decisions pertaining thereto within a reasonable time so as not to delay the services of ENGINEER.
- 3.8 Furnish approvals and permits from all governmental authorities having jurisdiction over the project and such approvals and consents from others as may be necessary for completion of the project.
- 3.9 Provide such accounting, independent cost estimating and insurance counseling services as may be required for the project, (1) legal services as OWNER may require or ENGINEER may reasonably request with regard to legal issues pertaining to the project including any that may be raised by contractors, (2) auditing services as OWNER may require to ascertain how and for what purpose any contractor has used the moneys paid under the construction contract, and (3) inspections services as OWNER may require to ascertain that contractors are complying with all laws, rules, regulations, ordinances, codes, or order applicable to their furnishing and performing the work.
- 3.10 If OWNER designates a person to represent OWNER at the site who is not ENGINEER or ENGINEER's agent or employee; the duties, responsibilities and limitations of authority of such other person and the effect thereof on the duties and responsibilities of the ENGINEER and the staff will be set forth in an exhibit that is to be identified, attached to, and made part of this agreement before such services begin.
- 3.11 If more than one prime contract is to be awarded for construction, materials, equipment and services for the entire project, designate a person or organization to have authority and responsibility for coordinating the activities among the various prime contractors.
- 3.12 Furnish to ENGINEER data or estimated figures as to OWNER's anticipated costs for services to be provided by others for OWNER so that ENGINEER may make the necessary findings to support opinions of probable total project cost.

- 3.13 Attend the pre-bid conference, bid opening, pre-construction conference, construction progress and other job related meetings, substantial completion inspection, and final payment inspections.
- 3.14 Give prompt written notice to ENGINEER whenever OWNER observes or otherwise becomes aware of any development that affects the scope or timing of ENGINEER's services, or any defect or non-conformance in the work of any contractor.
- 3.15 Furnish or direct ENGINEER to provide additional services as stipulated in paragraph 2.1 of this agreement or other services as required.
- 3.16 Bare all costs incident to compliance with the requirements of this Section 3.

SECTION 4 - PERIODS OF SERVICE

- 4.1 The provisions of this Section 4 and the various rates of compensation for ENGINEER's services provided for elsewhere in this agreement have been agreed to in anticipation of the orderly and continuous progress of the project through completion of the construction phase. ENGINEER's obligation to render services hereunder will extend for a period which may reasonably be required for the design, award of contracts, construction, and initial operation of the project including extra work and required extensions thereto. If in Exhibit A, specific periods of time for rendering services are set forth or specific dates by which services are to be completed are provided and if such dates are exceeded through no fault of ENGINEER, all future rates, measures, and amounts of compensation provided herein shall be subject to equitable adjustment.
- 4.2 ENGINEER's services under final design phase shall be considered complete at the earlier of (1) the date when the submissions for that phase have been accepted by OWNER, or (2) Ninety (90) days after submittal of the approvable plans and specifications to the Department of Environmental Protection, Construction Assistance Programs, which is considered a reasonable time of obtaining final approval of the design of the project.
- 4.3 After acceptance by OWNER of the ENGINEER's drawings, specifications, and other final design phase documents including the most recent opinion of probable total project costs and upon written notice to proceed, ENGINEER shall proceed with performance of the services called for in bidding or negotiating phase. This phase shall terminate and the services to be rendered thereunder shall be considered complete upon commencement of the construction phase or upon cessation or negotiations with prospective contractors (except as may otherwise be required to complete the services call for in paragraph 6.2.2.5).
- 4.4 The construction phase will commence with the execution of the first prime contract for the work of the project or any part thereof, and will terminate upon written recommendation by ENGINEER of final payment on the last prime contract to be completed. Construction phase services may be rendered at different times in respect of separate prime contracts if the project involves more than one prime contract.

- 4.5 If OWNER has requested significant modifications or changes in the general scope, extent or character of the project, the time of performance of ENGINEER's services shall be adjusted in an equitable manner.
- 4.6 If OWNER fails to give prompt written authorization to proceed with any phase of service after completion of the immediately preceding phase, or if the construction phase has not commenced within ____ calendar days (plus such additional time as may be required to complete the services called for under paragraph 6.2.2.5) after completion of the final design phase, ENGINEER may, after giving seven days' written notice to OWNER, suspend services under this agreement.
- 4.7 If ENGINEER's services for design or during construction of the project are delayed or suspended in whole or in part by OWNER for more than three months for reasons beyond ENGINEER's control, ENGINEER shall, on written demand to OWNER (but without termination of this agreement) be paid as provided in paragraph 5.3.2. If such delay or suspension extends for more than one year for reasons beyond ENGINEER's control, or if ENGINEER for any reason is required to render construction phase services in respect of any prime contract for construction, materials, or equipment more than one year after substantial completion is achieved under that contract, the various rates of compensation provided for elsewhere in this agreement shall be subject to equitable adjustment.
- 4.8 In the event that the work designed or specified by ENGINEER is to be furnished or performed under more than one prime contract, or if ENGINEER's services are to be separately sequenced with the work of one or more prime contractors (such as in the case of fast tracking), OWNER and ENGINEER shall, prior to commencement of the final design phase, develop a schedule for performance of ENGINEER's services during the final design, bidding, or negotiating, and construction phases in order to sequence and coordinate properly such services as are applicable to the work under such separate contracts. This schedule is to be prepared whether or not the work under such contracts is to proceed concurrently and is to be included in Exhibit A.

SECTION 5 - PAYMENTS TO ENGINEER

Methods of Payment for services of ENGINEER:

- 5.1 BASIC SERVICES. OWNER shall pay ENGINEER for Basic services rendered under Section 1 (and as amended and supplemented by Exhibit A) as follows:
 - 5.1.1 A lump sum fee of \$ _____ for the services under Section 1.2 "Final Design Phase".
 - 5.1.2 An estimated cost of \$ _____ plus a fixed fee of \$ _____ for a total cost of \$ _____ for the services under Section 1.3 "Bidding and Negotiating Phase" and Section 1.4 " Construction Phase", except for the Resident Project Representative services furnished under paragraph 1.4.2.1.

5.1.3 An estimated cost of \$ _____ plus a fixed fee of \$ _____ for a total cost of \$ _____ for the services under Section 1.4.2.1 "Resident Project Representative Services".

5.2 Basis of Payment. The OWNER shall pay ENGINEER in accordance with the provisions of this Section 5.2.

5.2.1 For all services rendered under each lump sum agreement, subagreement, amendment, or supplemental agreement for work as defined by the project documents and the West Virginia Department of Environmental Protection, the OWNER will pay the ENGINEER as follows:

5.2.1.1 ENGINEER shall submit monthly statements for all services rendered.

5.2.1.2 Compensation for "Basic Services" will be based upon ENGINEER's estimate of the proportion of the total services actually completed at the time of billing. OWNER shall make prompt payments in response to ENGINEER's statements.

5.2.1.3 Compensation for additional services, including resident services during construction, will be based upon ENGINEER's estimate of the proportion of the total services actually completed at the time of billing. OWNER shall make prompt payments in response to ENGINEER's statements.

5.2.1.4 If this agreement is terminated upon the completion of any phase of the Basic services, progress payments due ENGINEER for services rendered through such phase shall constitute total payment for such services. If this agreement is terminated during any phase of the Basic services, ENGINEER will be paid for the services rendered to the time of termination based upon a reasonable estimate of the status of the work completed and negotiated with OWNER. In the event of any termination, ENGINEER will be paid for all unpaid additional services that have been actually performed.

5.2.2 For all services rendered under each cost plus fixed fee agreement, subagreement, amendment, or supplemental agreement for work as defined by the project documents and the West Virginia Department of Environmental Protection, the OWNER will pay the ENGINEER as follows:

5.2.2.1 Actual direct labor of employees for time directly chargeable to the project;

5.2.2.2 Reimbursable expenses incurred in fulfilling the terms of the agreement;

5.2.2.3 the ENGINEER's overhead of indirect costs to the extent they are properly allocated to the project; and

5.2.2.4 a fixed dollar profit.

5.2.3 Where applicable, the total estimated fee as set forth in the agreement and as amended,

including the fixed dollar profit, will be the maximum payable without contractual amendment(s). It is understood that the project budget will be reviewed at seventy-five percent (75%) completion of planning, design, or construction to determine if project will be completed on schedule and within projected costs. If through no fault of the ENGINEER the schedule is extended beyond the contract time, or if it cannot be completed within projected costs, the ENGINEER will be entitled to an amendment to the agreement providing for reasonable payment of additional costs due to these extensions.

5.2.4 Actual direct labor used as a basis for payment mean salaries and wages paid to all personnel engaged directly on the project, including, but not limited to engineers, architects, surveyors, designers, draftsmen, specification writers, estimators, other technical personnel, stenographers, typists and clerks, exclusive of the cost of customary and statutory benefits.

5.2.5 Reimbursable expenses mean the actual expenses incurred directly in connection with the project for: transportation and subsistence incidental thereto; obtaining bids of proposals from contractor(s); furnishing and maintaining field office facilities; toll charges, telephone calls and telegrams; reproduction of reports, drawings and specifications, and similar project-related items in addition to those required under any subagreement.

5.2.6 Payment will be made monthly, based on progress reports and invoices submitted to OWNER. Upon receipt, review and approval of properly documented invoices, the OWNER will make partial payment of the fixed fee specified in the agreement. Payment will be made on the work element basis for the agreement and other requirements as may be imposed by the Department of Environmental Protection.

5.2.7 It is understood that the final payment is subject to audit in accordance with applicable State regulations and other such requirements as may be imposed by the Department of Environmental Protection, Construction Assistance Programs, of the ENGINEER's records pertaining to the agreement with estimates used for interim payments, payroll burdens and overhead or indirect costs to be applied to base salaries. Indirect costs not defined in the proposal and incurred during the life of the agreement shall be allowed for reimbursement if found allowable in the final audit. Guidance for allowable direct and indirect costs as applied to cost plus fixed fee payments, is published in Section 15 of the Federal Procurement Regulations and may be supplemented by the State of West Virginia. A supplemental agreement will be required to make any upward adjustment of the total estimated costs.

Other Provisions Concerning Payments:

5.3 If OWNER fails to make any payment due to ENGINEER for services within forty-five (45) days after receipt of ENGINEER's statement, the amounts due ENGINEER will be increased at the rate of one percent per month from said thirtieth day, and in addition, ENGINEER may, after giving seven days' written notice to OWNER, suspend services under this agreement until ENGINEER has been paid in full all amounts due for services.

5.3.1 In the event of termination by OWNER under paragraph 7.1, ENGINEER will be reimbursed for

all unpaid services rendered to the date of termination, plus all termination expenses. Termination expenses include expenses incurred directly attributable to termination of this agreement.

SECTION 6 -- CONSTRUCTION COST AND OPINIONS OF COST

6.1 Construction Cost

The construction cost of the entire Project (herein referred to as "Construction Cost") means the total cost to OWNER of those portions of the entire Project designed and specified by ENGINEER, but it will not include ENGINEER's compensation and expenses, the cost of land, rights-of-way, or compensation for or damages to, properties unless this Agreement so specifies, nor will it include OWNER's legal, accounting, insurance counseling or auditing services, or interest and financing charges incurred in connection with the Project or the cost of other services to be provided by others to OWNER pursuant to paragraphs 3.7 through 3.11, inclusive.

6.2 Opinions of Cost

6.2.1 Since ENGINEER has no control over the cost of labor, materials, equipment or services furnished by others, or over the Contractor(s) methods of determining prices, or over competitive bidding or market conditions, ENGINEER's opinions of probable Total Project Costs and Construction Costs provided for herein are to be made on the basis of ENGINEER'S best judgement as an experienced and qualified professional engineer, familiar with the construction industry; but ENGINEER cannot and does not guarantee that proposals, bids or actual Total Project or Construction Costs will not vary from opinions of probable cost prepared by ENGINEER. If prior to the Bidding or Negotiating Phase OWNER wishes greater assurance as to Total Project or Construction Costs, OWNER shall employ an independent cost estimator as provided in paragraph 3.9.

6.2.2 If a Construction Cost limit is established by written agreement between OWNER and ENGINEER and specifically set forth in this Agreement as a condition thereto, the following will apply:

6.2.2.1 The acceptance by OWNER at any time during the Basic Services of a revised opinion of probable Total Project or Construction Costs in excess of the then established cost limit will constitute a corresponding revision in the Construction Cost limit to the extent indicated in such revised opinion.

6.2.2.2 Any Construction Cost limit so established will include a contingency of ten percent unless another amount is agreed upon in writing.

6.2.2.3 ENGINEER will be permitted to determine what types of materials, equipment and component systems are to be included in the Drawings and specifications and to make reasonable adjustments in the general scope, extent and character of the Project to bring it within the cost limit.

6.2.2.4 If the Bidding or Negotiating Phase has not commenced within six months after completion of the Final Design Phase, the established Construction Cost limit will not be binding on ENGINEER, and OWNER shall consent to an adjustment in such cost limit commensurate with any application change in the general level of prices in the construction industry between the date of completion of the Final Design Phase and the date on which proposals or bids are sought.

6.2.2.5 If the lowest bonafide proposal or bid exceeds the established Construction Cost limit, OWNER shall (1) give written approval to increase such cost limit, (2) authorize negotiating or rebidding the Project within a reasonable time, or (3) cooperate in revising the Project's general scope, extent or character to the extent consistent with the Project's requirements and with sound engineering practices. In the case of (3), ENGINEER shall modify the Contract Documents as necessary to bring the Construction Cost within the cost limit. In lieu of other compensation for services in making such modifications, OWNER shall pay ENGINEER, ENGINEER's cost of such services, all overhead expenses reasonable related thereto and Reimbursable Expenses, but with profit to Engineer on account of such services. The providing of such service will be the limit of Engineer's responsibility in this regard and, having done so, ENGINEER shall be entitled to payment for services in accordance with this Agreement and will not otherwise be liable for damages attributable to the lowest bonafide proposal or bid exceeding the established Construction Cost.

SECTION 7 -- GENERAL CONSIDERATION

7.1 Termination

The obligation to provide further services under this Agreement may be terminated by either party upon thirty (30) days' written notice in the event of substantial failure by the other party to perform in accordance with the terms hereof through no fault of the terminating party.

7.2 Reuse of Documents

All documents including Drawings and Specifications prepared or furnished by ENGINEER (and ENGINEER'S independent professional associates and consultants) pursuant to this Agreement are instruments of service in respect of the Project and ENGINEER shall retain an ownership and property interest therein whether or not the Project is completed. OWNER may make and retain copies for information and reference in connection with the use construction and occupancy of the Project by OWNER and others; however, such documents are not intended or represented to be suitable for reuse by OWNER or others on extensions or the Project or on any other project. Any reuse without written verification or adaptation by ENGINEER for the specific purpose intended will be at OWNER's sole risk and without liability or legal exposure to ENGINEER, or to ENGINEER's independent professional associates or consultants, and OWNER shall indemnify and hold harmless ENGINEER and ENGINEER's independent professional associates and consultants from all claims, damages, losses and expenses including attorney's fees arising out of or resulting therefrom. Any such verification or

adaptation will entitle ENGINEER to further compensation at rates to be agreed upon by OWNER and ENGINEER.

7.3 Insurance

7.3.1 ENGINEER shall procure and maintain insurance for protection from claims under worker's compensation acts, claims for damages because of bodily injury including personal injury, sickness or disease or death of any and all employees or of any person other than such employees and from claims or damages because of injury to or destruction of property including loss of use resulting therefrom.

7.4 Controlling Law

This Agreement is to be governed by the law of the principal place of business of ENGINEER.

7.5 Successors and Assigns

7.5.1 OWNER and ENGINEER each is hereby bound and the partners, successors, executors, administrators and legal representatives of OWNER and ENGINEER (and to the extent permitted by paragraph 7.5.2 the assign of OWNER and ENGINEER) are hereby bound to the other party to this Agreement and to the partners, successors, executors, administrators and legal representatives (and said assigns) of such other party in respect of all covenants, agreements and obligations of this Agreement.

7.5.2 Neither OWNER nor ENGINEER shall assign, sublet or transfer and rights under or interest in (including but without limitation, moneys that may become due or moneys that are due) this Agreement without the written assignment, subletting or transfer is mandated by law of the effect or this limitation may be restricted by law. Unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under this Agreement. Nothing contained in this paragraph shall prevent ENGINEER from employing such independent professional associates and consultants as ENGINEER may deem appropriate to assist in the performance of services hereunder.

7.5.3 Nothing under this Agreement shall be construed to give any rights or benefits in this Agreement to anyone other than OWNER and ENGINEER and all duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of OWNER and ENGINEER and not for the benefit of any other party.

SECTION 8--SPECIAL PROVISIONS, EXHIBITS and SCHEDULES

8.1 This Agreement is subject to the following special provisions:

- a) Executive Order 11248 - "Equal Employment Opportunity"
- b) Section 306 of the Clean Air Act
- c) Section 308 of the Clean Water Act
- d) Executive Order 11738
- e) EPA regulations regarding award of contracts to those included on the EPA list of violating facilities.
- f) Title 47, Series 31 of the State Revolving Fund Program

8.2 The following Exhibits are attached to and made a part of this Agreement:

- a) Exhibit A "Further Description of Basic Engineering Services and Related Matters" consisting of 2 pages.
- b) Exhibit B "Duties, Responsibilities and Limitations of Authority of Resident Project

Representative" consisting of 4 pages.

c) Exhibit C - State Subagreement Clauses, consisting of 5 pages.

d) Exhibit D - Summary of Fees and Forms 5700-41 - "Cost Price Summaries"

8.3 This Agreement (consisting of pages 1 to ____, inclusive) together with the Exhibits and schedules identified above constitutes the entire agreement between OWNER and ENGINEER and supersedes all prior written or oral understandings. This Agreement and said Exhibits and schedules may only be amended, supplemented, modified or canceled by a duly executed written instrument.

IN WITNESS WHEREOF, the parties hereto have made and executed this agreement as of the day and year written below:

OWNER:

ENGINEER:

Title _____

Title _____

Date _____

Date _____

Address for giving notices:

Address for giving notices:

EXHIBIT A
TO AGREEMENT BETWEEN
OWNER AND ENGINEER FOR
PROFESSIONAL SERVICES
Dated _____

FURTHER DESCRIPTION OF BASIC ENGINEERING SERVICES
AND RELATED MATTERS

1. This is an exhibit attached to, made a part of and incorporated by reference into the Agreement made on _____ between _____ (OWNER) and _____ (ENGINEER) providing for professional engineering services. The Basic Services of Engineer as described in Section 1 of the Agreement are amended or supplemented as indicated below and the time periods for the performance of certain services as indicated in Section 4 of the Agreement are stipulated below.
2. The services under Section 1.2 "Final Design Phase" will be completed and Contract Documents and Engineer's opinion of costs submitted within _____ calendar days following written authorization from OWNER to ENGINEER to proceed with that phase of services.
3. It is anticipated that the construction period shall be _____ () months, at which time the services as described in Section 1.4 (Construction Phase) shall be performed.
4. This agreement for services for design through construction will be for a minimum of _____ () months after design authorization to proceed. Within this timeframe, the project allows for _____ () days review time for the State clearances. Therefore, the ending date for the completion of this contract shall be _____.
5. For additional services in accordance with Section 2 - Additional Services of Engineering with Payment in accordance with Payment Provisions Section 5.2 and 5.3:
 - A) Engineer will provide service in accordance with Section _____ of Section 2. Compensation is based on a cost of \$_____, plus a fixed fee of \$_____ for a total \$_____, and/or
 - B) Engineer will provide service in accordance with Section _____ of Section 2. Compensation is based on a cost of \$_____, plus a fixed fee of \$_____ for a total \$_____, and/or
 - C) Engineer will provide service in accordance with Section _____ of Section 2. Compensation is based on a cost of \$_____, plus a fixed fee of \$_____ for a total

\$_____, and/or

D) Engineer will provide service in accordance with Section _____ of Section 2. Compensation is based on a cost of \$_____, plus a fixed fee of \$_____ for a total \$_____, and/or

E) Engineer will provide service in accordance with Section _____ of Section 2. Compensation is based on a cost of \$_____, plus a fixed fee of \$_____ for a total \$_____, and/or

6. With each payment request as outlined in Section 5, the Engineer will be required to submit to the Owner a certified payroll with a detailed breakout of hours worked per work element or services.

EXHIBIT B

A LISTING OF THE DUTIES, RESPONSIBILITIES AND LIMITATIONS OF AUTHORITY OF THE RESIDENT PROJECT REPRESENTATIVE

ENGINEER shall furnish a Resident Project Representative (RPR), assistants and other field staff to assist ENGINEER in observing performance of the work of the Contractor.

Through more extensive on-site observations of the work in progress and field checks of materials and equipment by the RPR and assistants, ENGINEER shall endeavor to provide further protection for OWNER against defects and deficiencies in the Work; but, the furnishing of such services will not make ENGINEER methods, techniques, sequences or procedures or for safety precautions or programs, or responsibility for Contractor(s) failure to perform the work in accordance with the Contract Documents.

The duties and responsibilities of the RPR are limited to those of ENGINEER in ENGINEER's agreement with the OWNER and in the construction Contract Documents, and are further limited and described as follows:

A. GENERAL

RPR is ENGINEER's agent at the site, will act as directed by and under the supervision of ENGINEER, and will confer with ENGINEER regarding RPR's actions. RPR's dealings in matters pertaining to the on-site work shall in general be with ENGINEER and CONTRACTOR keeping OWNER advised as necessary. RPR's dealings with sub-contractors shall only be through or with the full knowledge and approval of Contractor. RPR shall generally communicate with OWNER with the knowledge of and under the direction of ENGINEER.

B. DUTIES AND RESPONSIBILITIES OF RPR

1. Schedules: Review the progress schedule and schedule of values prepared by Contractor and consult with ENGINEER concerning acceptability.
2. Conferences and Meetings: Attend meetings with CONTRACTOR, such as pre-construction conferences, progress meetings, job conferences and other project-related meetings.
3. Liaison:
 - A. Serve as ENGINEER's liaison with Contractor(s), working principally through Contractor(s) superintendent and assist in understanding the intent of the Contract Documents; and assist ENGINEER in serving as OWNER's liaison with Contractor(s) when Contractor(s) operations affect OWNER's on-site operations.

- B. Assist in obtaining from OWNER additional details or information when required for proper execution of the work
4. Shop Drawings and Samples
- A. Receive and file copies of shop drawings and samples, after review by ENGINEER.
 - B. Advise ENGINEER and Contractor(s) of the commencement of any work requiring a Shop Drawing or sample if ENGINEER has not approved the submittal.
5. Review of Work, Rejection of Defective Work, Inspections and Tests:
- A. Conduct on-site observations of the Work in progress to assist ENGINEER in determining if the Work is in general proceeding in accordance with the Contract Documents.
 - B. Report to ENGINEER whenever RPR believes that any Work is unsatisfactory, faulty or defective or does not conform to the Contract Documents, or has been damaged, or does not meet the requirements of any inspection, tests or approval required to be made and advise ENGINEER of Work that RPR believes should be corrected or rejected or should be uncovered for observation, or requires special testing, inspection or approval.
 - C. Verify that tests, equipment and systems start-ups and operating and maintenance training are conducted in the presence of appropriate personnel, and that Contractor(s) maintains adequate records thereof; and details relative to the test procedures and start-ups.
 - D. Accompany visiting inspectors representing public or other agencies having jurisdiction over the Project, record the results of these inspections and report to Engineer.
6. Interpretation of Contract Documents: Report to ENGINEER when clarifications and interpretations of the Contract Documents are needed and transmit to Contractor(s) clarifications and interpretations as issued by ENGINEER.
7. Modifications: Consider and evaluate Contractor(s) suggestions for modifications in Drawings or Specifications and report with RPR's recommendations to ENGINEER. Transmit to Contractor decisions as issued by ENGINEER.
8. Records:
- A. Maintain at the job site orderly files for correspondence, reports of job conferences,

Shop Drawings and samples, reproductions of original Contract Documents including all Work Directive Changes, Addenda, Change Orders, Field Orders, additional Drawings issued subsequent to the execution of the Contract Documents, progress reports, and other Project related documents.

- B. Keep a diary or log book, recording Contractor(s) hours on the job site, weather conditions, data relative to questions of Work Directive Changes, Change Orders or changed conditions, list of job site visitors, daily activities, decisions, observations in general, and specific observations in more detail as in the case of observing test procedures; and send copies to ENGINEER.
- C. Record names addresses and telephone numbers of all Contractor(s), subcontractors and major suppliers of materials and equipment.

9. Reports:

- A. Furnish ENGINEER periodic reports as required of progress of the Work and of Contractor(s) compliance with the progress schedule and schedule of Shop Drawing and sample submittals.
- B. Consult with ENGINEER in advance of scheduled major tests, inspections or start of important phases of the Work.
- C. Draft proposed Change Orders and Work Directive Changes, obtaining backup material from Contractor and recommend to ENGINEER Change Orders, Work Directive changes, and Field Orders.
- D. Report immediately to ENGINEER and OWNER upon the occurrence of any accident.

10. Payment Requests: Review applications for payment with Contractor(s) for compliance with the established procedure for their submission and forward with recommendations to ENGINEER, noting particularly the relationship of the payment requested to the schedule of values, Work completed and materials and equipment delivered at the site but not incorporated in the Work.

11. Certificates, Maintenance and Operation Manuals: During the course of the Work, verify that certificates, maintenance and operation manuals and other data required to be assembled and furnished by Contractor(s) are applicable to the items actually installed and in accordance with the Contract Documents, and have this material delivered to ENGINEER for review and forwarding to OWNER prior to final payment for the Work.

12. Completion:

- A. Before ENGINEER issues a Certificate of Substantial Completion, submit to

Contractor(s) a list of observed items requiring completion or correction.

- B. Conduct final inspection in the company of ENGINEER, OWNER and Contractor(s) and prepare a final list of items to be completed or corrected.
- C. Observe that all items on final list have been completed or corrected and make recommendations to ENGINEER concerning acceptance.

C. LIMITATIONS OF AUTHORITY

Resident Project Representative:

1. Shall not authorize any deviation from the Contract Documents or substitution of materials or equipment, unless authorized by ENGINEER.
2. Shall not exceed limitations of ENGINEER's authority as set forth in the Contract Documents.
3. Shall not undertake any of the responsibilities of Contractor(s), subcontractors or Contractor(s) superintendent.
4. Shall not advise on, issue directions relative to or assume control over any aspect of the means, methods, techniques, sequences or procedures of construction unless such advice or directions are specifically required by the Contract's Documents.
5. Shall not advise on, issue directions regarding or assume control over safety precautions and programs in connection with the Work.
6. Shall not authorize OWNER to occupy the Project in whole or in part.
7. Shall not participate in specialized field or laboratory tests or inspections conducted by others except as specifically authorized by ENGINEER.

EXHIBIT C

STATE SUBAGREEMENT CLAUSES

5.2.6

1. Applicability and scope of this subpart.

(a) This subpart applies to all State recipients and describes the minimum content of each subagreement (contract and subcontract).

(b) Nothing in this subpart prohibits a recipient from requiring more assurances, guarantees, or indemnity or other contractual requirements from any party to a subagreement.

2. Requirements for subagreement clauses.

Recipients shall include clauses that meet the requirements of §5.2.6 and the appropriate clauses in §5.2.6.1, in each procurement subagreement.

3. Subagreement

Provisions clause.

Each subagreement must include provisions defining a sound and complete agreement, including the:

(a) Nature, scope and extent of work to be performed;

(b) Timeframe for performance;

(c) Total cost of the subagreement;

and

(d) Payment provisions.

4. Labor standards provisions.

Recipients shall maintain a copy of EPA Form 5720-4 "Labor Standards Provisions for Federally Assisted Construction Contracts" in each subagreement for construction (as defined by the Secretary of Labor). The form contains the Davis-Bacon Act requirements (40 U.S.C. 276a-276a-7); the Copeland Regulations (29 CFR Part 3); the Contract Work Hours and Safety Standards Act-

Overtime

Compensation (940 U.S.C.327-333) and the nondiscrimination provisions in Executive Order 11246, as amended.

5. Patents data and copyrights clause.

Except for construction grant subagreements, all subagreements shall include notice of Federal requirements and regulations pertaining to reporting and patent rights under any subagreement involving research, developmental, experimental or demonstration work with respect to any discovery or invention that arises or is developed in the conduct of work under a subagreement. This notice shall also include Federal requirements and regulations pertaining to copyrights and rights in data contained in 40 CFR Part 30.

6. Violating facilities clause.

Subagreements in excess of \$100,000 shall contain a provision that requires engineer compliance with all applicable standards, orders or requirements issued under Section 06 of the Clean Air Act (42 U.S.C. 1857 (h) Section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and EPA regulations (40 CFR Part 15) which prohibit the use under nonexempt Federal contracts, grants or loans of facilities included on the EPA List of Violating Facilities.

7. Energy efficiency clause.

Subagreements shall comply with mandatory standards and policies on energy efficiency contained in the State's energy conservation plan issued in compliance with the Energy Policy and Conservation Act (P.L. 94-163).

§5.2.6.1 Model subagreement clauses.

1. Supersession

The recipient and the engineer agree that this and other appropriate clauses in Title 47 Series 31 §5.2.6 apply to that work eligible for STATE assistance to be performed under this subagreement and that these clauses supersede any conflicting provisions of this subagreement.

2. Privity of subagreement

This subagreement is expected to be funded in part with funds from the State Revolving Fund. Neither the United States, West Virginia, nor any of its departments, agencies or employees is, will be, a party to this subagreement or any lower tier subagreement. This subagreement is subject to State regulations contained in Title 47 Series 31 in effect on the date of the loan agreement for this project.

3. Remedies

Unless otherwise provided in this subagreement, all claims, counterclaims, disputes and other matters in question between the recipient and the engineer arising out of, or relating to, this subagreement or the breach of it will be decided by arbitration if the parties mutually agree, or in a court of competent jurisdiction within the State in which the recipient is located.

4. Audit; Access to Records

(a) The engineer shall maintain books; records, documents and other evidence directly pertinent to performance on State funded work under this subagreement in accordance with generally accepted accounting principles and practices consistently applied. The engineer shall also maintain the financial information and data used in the preparation of support of the cost submission required under for any

negotiated subagreement or change order and a copy of the cost summary submitted to the recipient. The United States Environmental Protection Agency, the Comptroller General of the United States, the United States Department of Labor, the recipient, and the State or any of their authorized representatives shall have access to all such books, records, documents and other evidence for the purpose of inspection, audit and copying during normal business hours. The engineer will provide proper facilities for such access and inspection.

(b) The engineer agrees to make paragraphs (a) through (g) of this clause applicable to all negotiated subagreement amendments affecting the subagreement price.

© Audits conducted under this provision shall be in accordance with generally accepted auditing standards and with established procedures and guidelines of the reviewing or auditing agency (ies). (d) The engineer agrees to disclose all information and reports resulting from access to records under paragraphs (a) and (b) of this clause to any of the agencies referred to in paragraph (a).

(e) Records under paragraphs (a) and (b) above shall be maintained by the engineer during performance on State assisted work under this subagreement and for three (3) years beyond performance certification. In addition, those records that relates to any controversy arising under a State loan agreement, litigation, the settlement of claims arising out of such performance or to costs or items to which an audit exception has been taken shall be maintained by the engineer for such time until settlement has occurred.

(f) Access to records is not limited to the required retention periods. The authorized representative designated in paragraph (a) of this clause shall have access to records at any

reasonable time for as long as the records are maintained.

(g) This right of access clause applies to financial records pertaining to all subagreements regardless of the type of subagreement, and all subagreement amendments. In addition this right of access applies to all records pertaining to all subagreements, subagreement change orders and subagreement amendments;

(1) To the extent the records pertain directly to subagreement performance;

(2) If there is any indication that fraud, gross abuse or corrupt practices may be involved; or

(3) If the subagreement is terminated for default or for convenience.

5. Covenant Against Contingent Fees

The engineer assures that no person or selling agency has been employed or retained to solicit or secure this subagreement upon an agreement or understanding for a commission, percentage, brokerage or contingent fee excepting bona fide employees or bona fide established commercial or selling agencies maintained by the engineer for the purpose of securing business. For breach or violation of this assurance, the recipient shall have the right to annul this agreement with liability or, at its discretion, to deduct from the contract price or consideration, or otherwise recover the full amount of such commission, percentage, brokerage or contingent fee.

6. Gratuities

(a) If the recipient finds after a notice hearing that the engineer or any of the engineer's agents or representatives offered or gave gratuities (in the form of entertainment, gifts or otherwise) to any official, employee or agent of the recipient, or the State in an attempt to secure a subagreement or favorable

treatment in awarding, amendment or making any determinations related to the performance of this subagreement, the recipient may, be written notice to the engineer, terminate this subagreement. The recipient may also pursue other rights and remedies that the law or this subagreement provides.

However, the existence of the facts on which the recipient bases such findings shall be in issue and may be reviewed in proceedings under the Remedies clause of this subagreement.

(b) In the event this subagreement is terminated as provided in paragraph (a), the recipient may pursue the same remedies against the engineer as it could pursue in the event of a breach of the subagreement by the engineer, and as a penalty, in addition to any other damages to which it may be entitled by law, be entitled to exemplary damages in an amount (as determined by the recipient) which shall be not less than three nor more than ten times the costs the engineer incurs in providing any such gratuities to any such officer or employee.

7. Responsibility of the Engineer

(a) The following clause applies only to subagreements for services. (1) The Engineer is responsible for the professional quality, technical accuracy, timely completion and coordination of all designs, drawings, specifications, reports and other services furnished by the engineer under this subagreement. If the subagreement involves environmental measurements or data generation, the engineer shall comply with State quality assurance requirements. The engineer shall, without additional compensation, correct or revise any errors, omissions or other deficiencies in his designs, drawings, specifications, reports and other services.

(2) The engineer shall perform the

professional services necessary to accomplish the work specified in this subagreement in accordance with their subagreement and applicable State requirements in effect on the date of execution of the loan agreement for this project.

(3) The owner's or State's approval of drawings, designs, specifications, reports and incidental work or materials furnished hereunder shall not in any way relieve the engineer of responsibility for the technical adequacy of his work. Neither the owner's nor State's review, approval, acceptance or payment for any of the services shall be construed as a waiver of any rights under this agreement or of any cause for action arising out of the performance of this subagreement.

(4) The engineer shall be, and shall remain, liable in accordance with applicable law for all damages to the owner or the State caused by the engineer's negligent performance

of any of the services furnished under this subagreement, except for errors, omissions or other deficiencies to the extent attributable to the owner, owner-furnished data or any third party. The engineer shall not be responsible for any time delays in the project caused by circumstances beyond the engineer's control.

(5) The engineer's obligations under this clause are in addition to the engineer's other express or implied assurances under this subagreement or State law and in no way diminish any other rights that the owner may have against the engineer for faulty materials, equipment or work.

8. Final Payment

Upon satisfactory completion of the work performed under this subagreement, as a condition before final payment under this subagreement or as a termination settlement under this subagreement the contractor shall execute and

deliver to the owner a release of all claims against the owner arising under, or by virtue of, this subagreement, except claims which are specifically exempted by the contractor to be set forth therein. Unless otherwise provided in this subagreement, by State law or otherwise expressly agreed to by the parties to this subagreement or settlement upon termination of this subagreement shall not constitute a waiver of the owner's claims against the contractor or his sureties under this subagreement or applicable performance and payment bonds.

E

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EXHIBIT D

Summary of Fees

<u>Description of Services</u>	<u>Contract Type</u>	<u>Total or Ceiling</u>
Design Engineering	Lump Sum/ Cost Plus Fixed Fee	\$
Design Special Services	Lump Sum/ Cost Plus Fixed Fee	\$
Resident Project Representative	Lump Sum/ Cost Plus Fixed Fee	\$
Basic Engineering	Lump Sum/ Cost Plus Fixed Fee	\$
PSC Rate Case & Rule 42	Lump Sum/ Cost Plus Fixed Fee	\$
Operation & Maintenance Manual	Lump Sum/ Cost Plus Fixed Fee	\$
As-Built Drawings	Lump Sum/ Cost Plus Fixed Fee	\$
Construction Stakeout	Lump Sum/ Cost Plus Fixed Fee	\$
Startup & Warranty	Lump Sum/ Cost Plus Fixed Fee	\$
One-Year Certification	Lump Sum/ Cost Plus Fixed Fee	\$
Plan of Operation	Lump Sum/ Cost Plus Fixed Fee	\$
(Any Additional Services)		