

MATERIAL RECOVERY AND CONVERSION FACILITY AGREEMENT

THIS MATERIAL RECOVERY AND CONVERSION FACILITY AGREEMENT (this "Agreement") is entered into this _____ day of _____, 2012 ("Effective Date"), by and between the **CITY OF LANCASTER**, a municipal corporation and charter city (the "City"), and **OEC – LANCASTER, LLC**, a California limited liability company doing business as **ECOLUTION** ("OEC"), on the terms and provisions set forth below.

RECITALS

A. The City is required pursuant to Chapter 13.16 of the Lancaster Municipal Code to provide for the collection and disposal of Refuse (the term "Refuse" is defined in Section 13.16.020 of the Lancaster Municipal Code) within the City's jurisdictional limits.

B. OEC is an advanced municipal refuse separation and renewable energy development company. OEC specializes in maximizing the recovery and diversion of recyclables from landfill bound municipal Refuse and in the conversion of lower value wet and dry organic materials into renewable fuel and energy. OEC sends only residual materials to a landfill.

C. The parties desire to enter into this Agreement for the purpose of establishing the terms and conditions upon which OEC will construct, operate and maintain a municipal recovery and conversion facility within the City's jurisdictional boundaries.

NOW THEREFORE, in consideration of the recitals set forth above, the covenants and agreements set forth herein below, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the City and OEC agree as follows:

100. OEC'S CONSTRUCTION AND OPERATION OF MATERIAL RECOVERY AND CONVERSION FACILITY.

101. OEC's Construction and Operation of Material Recovery and Conversion Facility. At its sole cost and expense, OEC shall develop, design, construct, operate and maintain within the City's jurisdictional boundaries a material recovery and conversion facility (the "Material Recovery and Conversion Facility"). The Material Recovery and Conversion Facility shall be capable of processing unsorted Refuse and shall mine all conventional recyclable commodities (paper, plastics, ferrous metals, non-ferrous metals and glass), while producing carbon neutral fuel streams from the remaining low-value wet and dry organics. OEC shall send only residual materials to a third-party disposal site (e.g., a landfill). The Material Recovery and Conversion Facility shall have the capacity and capability to sort and process a minimum of one million tons of Refuse annually and shall be fully constructed and operational (as determined by the City) within twenty-four (24) months of the effective date of this Agreement. Prior to commencing construction of the Material Recovery and Conversion Facility, OEC shall create and establish a purchasing entity approved by the City that shall be the exclusive method by which OEC purchases the equipment, supplies, materials, services and labor needed in order to construct the Material Recovery and Conversion Facility.

101.1 OEC's Corporate Headquarters. OEC will establish and locate its corporate headquarters within the City's jurisdictional boundaries and shall designate such location as the point of sale for all products and/or services it markets and/or sells.

101.2 Site Selection and Acquisition. OEC agrees to and shall search diligently and in good faith for real property (the "Site") that is suitable, sufficient and adequate to operate the Material Recovery and Conversion Facility. The parties agree that the Site shall be located within the City's jurisdictional boundaries and shall be approximately thirty-six (36) acres in size. The City agrees to and shall use reasonable efforts to assist OEC in its search for the Site as set forth herein; provided, however, that the cost and expense of OEC's search for the Site shall be borne solely by OEC.

If and to the extent OEC identifies a Site that the City, in its sole and absolute discretion, determines is suitable, sufficient and adequate to operate the Material Recovery and Conversion Facility, the City and OEC agree to diligently and in good faith negotiate the terms of either a real property purchase and sale agreement or a lease agreement (the "Purchase Agreement") whereby possession and/or ownership of the Site, if and to the extent acquired by the City, shall be conveyed to OEC and OEC shall construct and operate the Material Recovery and Conversion Facility thereon; provided, however, that neither party shall be obligated to execute such Purchase Agreement. Any Purchase Agreement resulting from the negotiations hereunder shall become effective only after and if the Purchase Agreement has been considered and approved by the City in the manner required by law. OEC acknowledges and agrees that the Purchase Agreement shall provide that upon closing, the City shall sell and convey to OEC and OEC shall accept the Site "as is, where is" with all faults and defects.

If and to the extent OEC identifies a Site that is suitable, sufficient and adequate to operate the Material Recovery and Conversion Facility, the City agrees to and shall diligently and in good faith seek to acquire the Site from the record owner(s) on a voluntary basis. The City shall seek to acquire the Site only if the City agrees that the Site is suitable, sufficient and adequate to operate the Material Recovery and Conversion Facility. The City shall have no obligation to acquire the Site unless the record owner(s) of the Site agree(s) to sell the Site to the City on a voluntary basis, the terms of such sale are acceptable to the City (in its sole and absolute discretion) and a Purchase Agreement has been executed by and between the City and OEC.

101.3 Cost of Construction and Operation. OEC shall be solely responsible for all costs directly and/or indirectly related to the design, development, construction, operation and maintenance of the Material Recovery and Conversion Facility, including, without limitation, costs related to the following: plan reviews, special studies and environmental compliance; site development; the design, construction and operation of the Material Recovery and Conversion Facility; any and all regulatory fines and/or penalties imposed or assessed with respect to the design, construction and/or operation of the Material Recovery and Conversion Facility.

101.4 OEC's Acquisition of Refuse. Subject to the terms and conditions of this Agreement, beginning upon the date the Material Recovery and Conversion Facility is fully constructed and operational, OEC agrees to and shall accept from the City (i) all Refuse collected

by the City pursuant to Chapter 13.16 of the Lancaster Municipal Code, (ii) all Refuse collected by a third-party contractor engaged by the City for the purpose collecting Refuse within the City's jurisdictional boundaries pursuant to Chapter 13.16 of the Lancaster Municipal Code, and (iii) all other Refuse transported by the City, by a third-party contractor engaged by the City or by OEC that is to be disposed of within the City's jurisdictional boundaries; provided, however, that (i) the City shall be obligated to supply to OEC Refuse only if and to the extent the City owns or is legally entitled to ownership or possession of the same, and (ii) OEC acknowledges and agrees that the City has not and does not make any representation, warranty or guarantee concerning a specific and/or minimum amount of Refuse that will be supplied pursuant to this Agreement. The provisions of this Section 101.4 do not impose any obligation upon the City to purchase Refuse from any third-party. The City and/or OEC shall either deliver or arrange for the delivery of all Refuse supplied to OEC pursuant to this Agreement to the Material Recovery and Conversion Facility.

(a) **Host Fee.** For the term of this Agreement, OEC shall pay to the City an amount equal to the greater of the following (the "Host Fee"): (i) Five Dollars (\$5.00) per ton of Refuse actually delivered to the Material Recovery and Conversion Facility (whether such refuse is delivered by the City pursuant to this Agreement, by a third-party pursuant to some other agreement, or otherwise); or (ii) the product of the amount of Refuse (in tons) actually delivered to the Material Recovery and Conversion Facility (whether such refuse is delivered by the City pursuant to this Agreement, by a third-party pursuant to some other agreement, or otherwise) multiplied by the average tipping fee charged by OEC during the previous twelve (12) month period. The "tipping fee charged by OEC" means the fee that OEC charges in order to accept delivery of Refuse at the Material Recovery and Conversion Facility. The Host Fee shall be paid by OEC to the City on a monthly basis. OEC shall permit the City to audit and inspect any books and records related to the operation of the Material Recovery and Conversion Facility upon the City's request.

101.5 Disposal of Residual Materials. Materials reasonably determined by OEC to be "residual materials" shall be disposed of by OEC in the ordinary course of business and by arranging for the delivery of such materials to an approved landfill site; provided, however, that the City shall have the right, but not the obligation, to select and/or approve such landfill site.

102. Agreement Does Not Constitute Development Approval. This Agreement shall not be construed as a grant of development rights or land use entitlements to construct or operate the Material Recovery and Conversion Facility or any other project. All design, architectural, and building plans for the Material Recovery and Conversion Facility shall be subject to the review and approval of the City. By its execution of this Agreement, the City is not committing itself to or agreeing to undertake any acts or activities requiring the subsequent independent exercise of discretion by the City or any agency or department thereof. OEC agrees and acknowledges that nothing in this Agreement in any respect does or shall be construed to affect or prejudice the exercise of the City's discretion concerning consideration of any submittal by OEC.

103. [Intentionally omitted]

200. DEFAULT AND REMEDIES.

201. Events of Default. An "Event of Default" or "Default" shall occur under this Agreement when there shall be a breach of any condition, covenant, warranty, promise or representation contained in this Agreement and the breach shall continue for a period of thirty (30) days after written notice thereof to the defaulting party without the defaulting party curing such breach, or if the breach cannot reasonably be cured within a thirty (30) day period, commencing the cure of the breach within the thirty (30) day period and thereafter diligently proceeding to cure the breach; provided, however, that if a different period or notice requirement is specified for any particular breach under any other paragraph of this Agreement, the specific provision shall control.

202. Remedies. The occurrence of any Event of Default shall give the non-defaulting party the right to proceed with any and all remedies set forth in this Agreement, including an action for damages, an action or proceeding at law or in equity to require the defaulting party to perform its obligations and covenants under the documents executed pursuant hereto or to enjoin acts or things which may be unlawful or in violation of the provisions of such documents, and the right to terminate this Agreement.

203. Force Majeure. Subject to compliance with the notice requirements as set forth below, performance by a party hereunder shall not be deemed to be in default, and all performance and other dates specified in this Agreement shall be extended, where delays or defaults are due to causes beyond the control and without the fault of the party claiming an extension of time to perform, which may include, without limitation, the following: war, insurrection, strikes, lockouts, riots, floods, earthquakes, fires, assaults, acts of God, acts of the public enemy, epidemics, quarantine restrictions, freight embargoes, lack of transportation, governmental restrictions or priority, litigation, unusually severe weather, inability to secure necessary labor, materials or tools, acts or omissions of the other party, or acts or failures to act of any public or governmental entity (except that the City's acts or failure to act shall not excuse performance of the City hereunder). Subject to the timing and provisions of Section 201, in no event shall OEC's difficulty or inability to obtain and secure financing become an event of force majeure. An extension of the time for any such cause shall be for the period of the enforced delay and shall commence to run from the time of the commencement of the cause, if notice by the party claiming such extension is sent to the other party within thirty (30) days of the commencement of the cause.

204. Effective Date. This Agreement shall become effective on the Effective Date and shall expire by its own terms on the twentieth (20th) anniversary thereof; provided, however, that (i) prior to such expiration the parties may mutually agree to extend the effectiveness of this Agreement for one (1) or more additional five (5) year period(s), and (ii) upon the tenth (10th) anniversary of the Effective Date the City may elect to either renegotiate the terms of this Agreement or terminate this Agreement by giving written notice to OEC.

205. Termination by City. Subject to the timing and provisions of Section 201, the City may elect to terminate this Agreement upon giving written notice to OEC of the City's intent to terminate based on one or more of the following reasons:

(a) OEC fails to comply with the terms and conditions of this Agreement and upon notice by the City, fails to take all corrective actions specified within the timeframe set forth in such notice;

(b) A change in any local, state or federal law, statute or regulation, any of which materially alters or otherwise materially affects the City's ability or obligation to perform the City's duties;

(c) OEC fails to take all corrective actions specified in any notice or demand received from any public or private utility, or local, state or federal government or regulatory agency;

(d) OEC fails to fully construct and bring to an operational state the Material Recovery and Conversion Facility, pursuant to the terms and conditions of this Agreement and all other applicable federal, state and local laws, statutes and regulations, within twenty-four (24) months of the Effective Date.

206. Termination by OEC. Subject to the timing and provisions of Section 201, OEC may elect to terminate this Agreement upon giving written notice to the City of OEC's intent to terminate based on one or more of the following reasons:

(a) The City fails to comply with the terms and conditions of this Agreement and upon notice by OEC, fails to take all corrective actions specified within the timeframe set forth in such notice; or

(b) A change in any local, state or federal law, statute or regulation, any of which materially alters or otherwise materially affects OEC's ability or obligation to perform OEC's duties.

207. Attorneys' Fees. In addition to any other remedies provided hereunder or available pursuant to law, if any party brings an action or proceeding to enforce, protect or establish any right or remedy hereunder or under any of the documents executed pursuant hereto, the prevailing party shall be entitled to recover from the other party its costs of suit, including without limitation expert witness fees, and reasonable attorneys' fees.

208. Remedies Cumulative. No right, power, or remedy given by the terms of this Agreement is intended to be exclusive of any other right, power, or remedy; and each and every such right, power, or remedy shall be cumulative.

300. GENERAL PROVISIONS.

301. Time is of the Essence. Time is expressly made of the essence with respect to the performance of each and every obligation and condition of this Agreement.

302. Indemnification. OEC agrees to protect, defend, and hold harmless the City and its officers, employees, agents, attorneys and representatives from any and all claims, liabilities, expenses, or damages of any nature, including attorney's and expert witness fees, for injury or death of any person, or damage to property, or interference with use of property, arising out of, or in any way connected with performance of this Agreement or the design, construction operation and/or maintenance of the Material Recovery and Conversion Facility by OEC, OEC's agents, officers, employees, subcontractors, customers, invitees, or independent contractors hired

by OEC, except for claims, liabilities, expenses, or damages which are due to the sole negligence of the City, or any of its officers, employees, agents and representatives.

303. Notices. Any approval, disapproval, demand, document or other notice (“Notice”) which any party may desire to give to the other party under this Agreement must be in writing and may be given either by (i) personal service, (ii) delivery by reputable document delivery service such as Federal Express that provides a receipt showing date and time of delivery, (iii) facsimile transmission, or (vi) mailing in the United States mail, certified mail, postage prepaid, return receipt requested, addressed to the address of the party as set forth below, or at any other address as that party may later designate by Notice. Service shall be deemed conclusively made at the time of service if personally served; upon confirmation of receipt if sent by facsimile transmission; the next business day if sent by overnight courier and receipt is confirmed by the signature of an agent or employee of the party served; the next business day after deposit in the United States mail, properly addressed and postage prepaid, return receipt requested, if served by express mail; and three (3) days after deposit thereof in the United States mail, properly addressed and postage prepaid, return receipt requested, if served by certified mail.

City: City of Lancaster
44933 Fern Avenue
Lancaster, CA 93534
Attn: Mark Bozigian, City Manager
Fax No.: (661) 723-6141

OEC: OEC – Lancaster, LLC

Attn: _____
Fax No.: _____

Such addresses may be changed by Notice to the other party(ies) given in the same manner as provided above.

304. Transfers and Assignments. The qualifications and identity of OEC are of particular concern to the City. It is because of those qualifications and identity that the City has entered into this Agreement. OEC shall not make any total or partial sale, grant, transfer, conveyance or assignment of the whole or any part of this Agreement without prior written approval of the City, except as expressly set forth herein.

305. Successors and Assigns. Whenever the term “OEC” or “City” is used in this Agreement, such term shall include any approved assignee(s) or transferee(s), or any other permitted successors and assigns as herein provided.

306. Non-Liability of Officials and Employees of the City. No member, elected or appointed official, or employee of the City shall be personally liable to OEC in the Event of Default or other breach or for any amount which may become due under the terms of this Agreement.

307. Relationship Between City and OEC. It is hereby acknowledged and agreed that the relationship between the City and OEC is not that of a partnership or joint venture or other investor partner and that neither party shall be deemed or construed for any purpose to be the agent of the other party. Accordingly, except as expressly provided in this Agreement, the City shall have no rights, powers, duties or obligations with respect to the development, construction, operation, maintenance or management of the Material Recovery and Conversion Facility.

308. City Approvals and Actions. The City shall maintain authority of this Agreement and the authority to implement this Agreement through the City's City Manager (or his or her duly authorized representative). The City Manager and his or her duly authorized representative(s) shall have the authority to make approvals, issue interpretations, waive provisions, request issuance of warrants and make payments authorized hereunder, make and execute further agreements (including agreements necessary in order to fully implement this Agreement) and/or enter into amendments of this Agreement on behalf of the City so long as such actions do not materially or substantially add to the costs, responsibilities, or liabilities incurred or to be incurred by the City as specified herein, and such interpretations, waivers and/or amendments may include extensions of time to perform. All material and/or substantive interpretations, waivers, or amendments shall require the consideration, action and written consent of the City's legislative body. Further, the City Manager shall maintain the right to submit to the City's legislative body for consideration and action any non-material or non-substantive interpretation, waiver or amendment, if in his or her reasonable judgment he or she desires to do so.

309. Counterparts. This Agreement may be signed in multiple counterparts all of which together shall constitute an original binding agreement. This Agreement is executed in three (3) originals, each of which is deemed to be an original.

310. Integration. This Agreement contains the entire understanding between the parties relating to the transaction contemplated by this Agreement. With the exception of the Exclusive Negotiating Agreement entered into by and between the City and OEC and dated as of February 14, 2012, all prior or contemporaneous agreements, understandings, representations and statements, oral or written, are merged in this Agreement and shall be of no further force or effect. The parties are entering this Agreement based solely upon the representations set forth herein and upon each party's own independent investigation of any and all facts such party deems material.

311. Titles and Captions. Titles and captions are for convenience of reference only and do not define, describe or limit the scope or the intent of this Agreement or of any of its terms. References to Section and Paragraph numbers are to sections and paragraphs in this Agreement, unless expressly stated otherwise.

312. Interpretation. As used in this Agreement, masculine, feminine or neuter gender and the singular or plural number shall each be deemed to include the others where and when the context so dictates. The word "including" shall be construed as if followed by the words "without limitation." This Agreement shall be interpreted as though prepared jointly by all parties.

313. No Waiver. A waiver by either party of a breach of any of the covenants, conditions or agreements under this Agreement to be performed by the other party shall not be construed as a waiver of any succeeding breach of the same or other covenants, agreements, restrictions or conditions of this Agreement.

314. Implementation of Agreement. The parties acknowledge that, due to the long term nature of this Agreement, it may be necessary and/or appropriate at some time in the future, or from time to time, for the parties to enter into various "Implementation Agreements" or to otherwise execute additional documentation to clarify and implement the provisions of this Agreement. The parties agree to cooperate in good faith to negotiate and enter into such various Implementation Agreements as may be determined to be reasonably necessary and/or appropriate by any party in its reasonable discretion.

315. Modifications. Any alteration, change or modification of or to this Agreement, in order to become effective, shall be made in writing and in each instance signed by a duly authorized representative on behalf of each party.

316. Severability. If any term, provision, condition or covenant of this Agreement shall be held, to any extent, invalid or unenforceable, the remainder of this Agreement shall not be affected, and shall be valid and enforceable to the fullest extent permitted by law.

317. Computation of Time. The time in which any act is to be done under this Agreement is computed by excluding the first day and including the last day, unless the last day is a holiday or Saturday or Sunday, and then that day is also excluded. The term "holiday" shall mean all holidays as specified in Section 6700 and 6701 of the California Government Code. If any act is to be done by a particular time during a day, that time shall be Pacific Time Zone time.

318. Legal Advice. Each party represents and warrants to the other the following: they have carefully read this Agreement, and in signing this Agreement, they do so with full knowledge of any right which they may have; they have received independent legal advice from their respective legal counsel as to the matters set forth in this Agreement, or have knowingly chosen not to consult legal counsel as to the matters set forth in this Agreement; and, they have freely signed this Agreement without any reliance upon any agreement, promise, statement or representation by or on behalf of the other party, or their respective agents, employees or attorneys, except as specifically set forth in this Agreement, and without duress or coercion, whether economic or otherwise.

319. Cooperation. Each Party agrees to cooperate with the other parties in this transaction and, in that regard, to sign any and all documents which may be reasonably necessary, helpful or appropriate to carry out the purposes and intent of this Agreement including, but not limited to, Implementation Agreements, releases or other agreements.

320. Conflicts of Interest. No member, elected or appointed public official or employee of the City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, elected or appointed public official or employee participate in any decision relating to this Agreement which affects his personal interests, his economic interests,

or the interests of any corporation, partnership or association in which he is directly or indirectly interested.

321. Non-Exclusive Relationship. The relationship established by this Agreement is non-exclusive. Except as and to the extent expressly prohibited herein, each party expressly reserves the right to contract for the service(s) and/or product(s) that is/are within the scope of this Agreement with as many additional clients, persons or other entities as that Party, in its sole discretion, sees fit.

[Signatures begin on next page.]

IN WITNESS WHEREOF, the City and OEC have executed this Agreement as of the date and year first set forth above.

CITY:

CITY OF LANCASTER, a California municipal corporation and charter city

By: _____

Its: _____

ATTEST:

Geri K. Bryan, CMC
City Clerk

APPROVED AS TO FORM:

David R. McEwen
City Attorney

OEC:

OEC – LANCASTER, LLC, a California limited liability company doing business as **ECOLUTION**

By: _____

Its: _____