

**INTER-GOVERNMENTAL PROJECT DEVELOPMENT AGREEMENT**

**BETWEEN**

**THE CAPE & VINEYARD ELECTRIC COOPERATIVE, INC.**

**AND**

**THE TOWN OF CHATHAM**

**Standard Form / (v. 07.01.11)**

## TABLE OF CONTENTS

ARTICLE I: DEFINITIONS .....	2
ARTICLE II: LEASE OF PREMISES .....	6
2.1 Leased Premises.....	6
2.2 The Premises are demised subject to the following.....	7
2.3 As-Is Condition of the Premises. ....	8
2.4 Ownership of the PV System.....	8
2.5 Net Lease .....	8
2.6 Purposes .....	8
2.7 Subordination.....	8
ARTICLE III: TERM .....	8
3.1 Term.....	8
ARTICLE IV: RENT; MAXIMUM FINANCIAL LIABILITY OF THE PARTIES.....	9
4.1 Rent.....	9
4.2 Maximum Financial Liability of the Parties Pursuant to M.G.L. c. 40, Section 4A.....	9
ARTICLE V: INSTALLATION AND OPERATION OF PV SYSTEM.....	9
5.1 General Description .....	9
5.2 Use of Installation and/or Maintenance Subcontractors .....	9
5.3 Governmental Permits .....	9
5.4 Installation.....	9
5.5 Interconnection with Electric Distribution Grid .....	10
5.6 Access to and Use of the Premises .....	10
5.7 Plans and Specifications .....	10
5.8 Maintenance Responsibilities .....	10
5.9 Manufacturer’s Warranty.....	10
5.10 Alterations.....	10
5.11 Host Town Cooperation.....	11
5.12 Emergencies.....	11
5.13 Damage .....	11
ARTICLE VI: COOPERATIVE’S REPRESENTATIONS, WARRANTIES, AND ADDITIONAL COVENANTS .....	11
6.1 Cooperative’s Representations and Warranties .....	11
6.2 Cooperative’s Covenants .....	12
ARTICLE VII: HOST TOWN’S REPRESENTATIONS, WARRANTIES, AND ADDITIONAL COVENANTS .....	12
7.1 Host Town’s Representations and Warranties.....	12
7.2 Host Town’s Covenants.....	14
ARTICLE VIII: TERMINATION; DEFAULT; REMEDIES; PURCHASE OPTIONS.....	13

8.1	Termination.....	13
8.2	Events of Default by Host Town .....	14
8.3	Events of Default by Cooperative.....	14
8.4	<i>Force Majeure</i> .....	14
8.5	Remedies.....	15
8.6	Step-in Rights of Financier .....	16
8.7	Damage or Destruction of PV System.....	16
8.8	Site Restoration.....	17
8.9	Abandonment of PV System.....	17
8.10	Acknowledgement of Cooperative’s Purchase Option.....	17
8.11	Host Town Funded Purchase Option .....	17
ARTICLE IX: INSURANCE .....		18
ARTICLE X: QUIET ENJOYMENT.....		18
10.1	Quiet Enjoyment.....	18
10.2	Host Town’s Reserved Uses.....	18
ARTICLE XI: ASSIGNMENT AND MORTGAGE .....		19
11.1	Assignment .....	19
11.2	Financing by Leasehold Mortgage.....	19
11.3	Financing by Leasehold Mortgage Release of Cooperative .....	19
11.4	Financier Provisions.....	20
ARTICLE XII: DISPUTE RESOLUTION; GOVERNING LAW .....		21
12.1	Dispute Resolution.....	21
12.2	Governing Law .....	22
12.3	Stay of Termination .....	22
ARTICLE XIII: MISCELLANEOUS .....		22
13.1	Construction; Obligation to Modify Agreement.....	22
13.2	Notices .....	23
13.3	Entire Agreement; Amendments; Binding Effect.....	24
13.4	Expenses .....	24
13.5	No Joint Venture.....	24
13.6	Joint Workproduct .....	24
13.7	Waiver.....	24
13.8	Severability .....	25
13.9	Further Assurances.....	25
13.10	Headings and Captions .....	25
13.11	Survival.....	25
13.12	Counterparts; Scanned Copy.....	25
13.13	Reports; Compliance with M.G.L. c. 40, Section 4A .....	25
13.14	Special Terms and Conditions .....	25
13.15	No Limitation of Regulatory Authority .....	26

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BETWEEN  
THE CAPE & VINEYARD ELECTRIC COOPERATIVE, INC.  
AND  
THE TOWN OF CHATHAM**

This Inter-Governmental Project Development Agreement (the "Agreement") is entered into this 5<sup>th</sup> day of July, 2011 (the "Effective Date") and is by and between the Cape & Vineyard Electric Cooperative, Inc., a Massachusetts cooperative corporation ("Cooperative"), and the Town of Chatham, Massachusetts ("Host Town").

**RECITALS**

A. Host Town owns the land described in Exhibit A and located at 97 Sam Ryder Road, Chatham, Massachusetts 02633 (the "Premises");

B. Host Town wishes to lease the Premises to the Cooperative to allow it to design, procure, install, test, commission, own, operate and maintain a solar photovoltaic system ("PV System"), as defined in Article I (Definitions), on the Premises for beneficial public purposes;

C. Cooperative wishes to lease the Premises in order to design, procure, install, test, commission, own, operate and maintain the PV System on the Premises for beneficial public purposes, subject to the terms and restrictions set forth in this Agreement;

D. Cooperative wishes to assign certain rights and obligations under this Agreement to a Contractor (as defined herein) to design, procure, install, test, commission, own, operate and maintain the PV System, pursuant to an Energy Management Services Agreement ("EMS Agreement") between Cooperative and Contractor dated on or about July 19, 2011, a form of which is set forth in Exhibit E, hereto;

E. Host Town and Cooperative have also entered into the Inter-Governmental Cooperative Net Metered Power Sales Agreement ("Cooperative Power Sales Agreement") dated as of even date herewith, pursuant to which Cooperative will sell a certain percentage of the Net Energy generated by the PV System to the Host Town; and

F. Cooperative, to the extent permitted by law, will net meter the Net Energy generated by the PV System for the benefit of Host Town.

NOW, THEREFORE, for consideration paid, the receipt and sufficiency of which are hereby acknowledged, the Parties to this Agreement hereby agree as follows.

## ARTICLE I: DEFINITIONS

When used in this Agreement, the following terms shall have the meanings given, unless a different meaning is expressed or clearly indicated by the context. Words defined in this Article I which are capitalized shall be given their common and ordinary meanings when they appear without capitalization in the text. Words not defined herein shall be given their common and ordinary meanings.

**“Additional Exceptions”** has the meaning set forth in Section 4.2(a)(iv) of the EMS Agreement and as set forth in Exhibit A-1 hereto.

**“Affiliate”** means, with respect to any Person, such Person’s general partner or manager, or any other Person that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such Person.

**“Applicable Legal Requirements”** means any present and future law, act, rule, requirement, order, bylaw, ordinance, regulation, judgment, decree, or injunction of or by any Governmental Authority, ordinary or extraordinary, foreseen or unforeseen, and all licenses, permits, tariffs, and other governmental consents, which may at any time be applicable to a Party’s rights and obligations hereunder, including, without limitation, the design, procurement, construction, installation, operation, ownership, maintenance, repair, decommissioning and removal of the PV System on the Premises, as well as the selling and purchasing of power therefrom.

**“Bankrupt”** means that a Party or other entity (as applicable): (i) is dissolved (other than pursuant to a consolidation, amalgamation or merger); (ii) becomes insolvent or is unable to pay its debts or fails (or admits in writing its inability) generally to pay its debts as they become due; (iii) makes a general assignment, arrangement or composition with or for the benefit of its creditors; (iv) has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditor’s rights, or a petition is presented for its winding-up, reorganization or liquidation, which proceeding or petition is not dismissed, stayed or vacated within twenty (20) Business Days thereafter; (v) commences a voluntary proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors’ rights; (vi) seeks or consents to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all of its assets; (vii) has a secured party take possession of all or substantially all of its assets, or has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all of its assets; (viii) causes or is subject to any event with respect to it which, under the applicable laws of any jurisdiction, has an analogous effect to any of the events specified in clauses (i) to (vii) inclusive; or (ix) takes any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the foregoing acts.

**“Business Day”** means a day on which Federal Reserve member banks in Boston are open for business; and a Business Day shall open at 8:00 a.m. and close at 5:00 p.m. Eastern Prevailing Time.

**“Commercial Operation”** means that the PV System is ready for regular, daily operation, has undergone testing as provided in the EMS Agreement, has been accepted by Cooperative and Host Town (and to the extent required, the Distribution Company), is in compliance with Applicable Legal Requirements in all respects, and is capable of producing Energy and delivering it to the Point of Delivery.

**“Commercially Reasonable”** means any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known, or which in the exercise of due diligence, should have been known, at the time the decision was made, would have been expected in the industry to accomplish the desired result consistent with reliability, safety, expedition, project economics and regulations.

**“Contractor”** means the third party entity that will design, procure, install, test, commission, own, operate, and maintain the PV System pursuant to the EMS Agreement.

**“Cooperative Member(s)”** means any municipality, county or political subdivision thereof, or body politic, that has duly joined Cooperative as a cooperative member.

**“Cooperative Power Sales Agreement”** means the Inter-Governmental Cooperative Net Metered Power Sales Agreement dated as of even date herewith between Host Town and Cooperative.

**“Distribution Company”** means NStar Electric Company or any successor thereto.

**“Distribution Company System”** means the electric distribution system operated and maintained by the Distribution Company.

**“Effective Date”** means the date set forth in the introductory paragraph of this Agreement.

**“EMS Agreement”** has the meaning set forth in the Recitals, a form of which is set forth in Exhibit E, hereto.

**“Energy”** means the amount of electricity either used or generated over a period of time; expressed in terms of kilowatt hour (“kWh”) or megawatt hour (“MWh”). Energy shall not include renewable energy credits, or any investment or production tax credits under Section 45 of the Internal Revenue Code or otherwise, to the extent that the PV System receives or is entitled to receive any such credits.

**“Event of Default”** means any event of default as defined in Sections 8.2 and 8.3 of this Agreement.

**“Event of Termination”** means any event of termination as defined in Section 8.1 of this Agreement.

**“Financier”** means any individual or entity providing money or extending credit for the PV System to Cooperative for: (1) the construction, term or permanent financing of the PV System;

or (2) working capital or other ordinary business requirements for the PV System. “Financier” shall not include common trade creditors of Cooperative.

“**Force Majeure**” means any cause not within the reasonable control of the affected Party which precludes that Party from carrying out, in whole or in part, its obligations under this Agreement, including, but not limited to, Acts of God; winds; hurricanes; tornadoes; fires; epidemics; landslides; earthquakes; floods; other natural catastrophes; strikes; lock-outs or other industrial disturbances; acts of public enemies; acts, failures to act or orders of any kind of any Governmental Authority acting in its regulatory or judicial capacity; insurrections; military action; war, whether or not it is declared; sabotage; riots; civil disturbances or explosions. Nothing in this provision is intended to excuse either Party from performing due to any governmental act, failure to act, or order, where it was reasonably within such Party’s power to prevent such act, failure to act, or order. Notwithstanding anything in this Agreement to the contrary, *Force Majeure* shall not mean:

- (a) Inclement weather affecting construction, start-up, operation, or decommissioning of the PV System.
- (b) Unavailability of sun.
- (c) Unavailability of equipment, repairs or spare parts for the PV System, except to the extent due to a qualifying event of *Force Majeure*.
- (d) Inability to obtain, maintain or renew any Permit or any delay in obtaining, maintaining, or renewing any Permit, except that Cooperative shall be able to assert Host Town’s governmental actions on Permits for the PV System as an event of *Force Majeure*.
- (e) Any nonpayment under this Agreement or any third party agreement.
- (f) Economic hardship of either Party.

“**Good Engineering Practice**” means any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known, or which in the exercise of due diligence, should have been known, at the time the decision was made, would have been expected to accomplish the desired result consistent with reliability, safety, expedition, project economics and Applicable Legal Requirements for similar facilities in the Commonwealth of Massachusetts. Good Engineering Practice is not intended to be limited to consideration of any one practice, method or act, to the exclusion of all others, but rather, is intended to require the consideration of a spectrum of possible practices, methods or acts.

“**Governmental Authority**” means the United States of America, the Commonwealth of Massachusetts, and any political or municipal subdivision thereof, and any agency, department, commission, board, bureau, independent electric system operator, or instrumentality of any of them, or any court or tribunal, excluding Cooperative and any Cooperative Members, including, without limitation, Host Town.

**“Installation Period”** has the meaning set forth in Section 5.4.

**“Interest Rate”** means a fluctuating interest rate per annum equal to the sum of (1) the Prime Rate as stated in the “Bonds, Rates & Yields” section of The Wall Street Journal on the Effective Date and thereafter on the first day of every calendar month, plus (2) two percentage points. (In the event that such rate is no longer published in The Wall Street Journal or such publication is no longer published, the Interest Rate shall be set using a comparable index or interest rate selected by Host Town and reasonably acceptable to Cooperative.) The Interest Rate hereunder shall change on the first day of every calendar month. Interest shall be calculated daily on the basis of a year of 365 days and the actual number of days for which such interest is due.

**“Leasehold Mortgage”** has the meaning set forth in Section 11.4.

**“Net Energy”** means the actual and verifiable amount of Energy generated by the PV System and delivered to Host Town at the Point of Delivery or allocated to Host Town in excess of any Energy consumed by the PV System as metered in kWh at the Metering Device(s), and in conformance with Applicable Legal Requirements and the Tariffs.

**“Net Metering”** means the process of measuring the difference between electricity delivered by a local electric distribution company and electricity generated by a Net Metering facility and fed back to the local electric distribution company, as set forth under M.G.L. c. 164, §§138 – 140 and 220 C.M.R. §18.00, as may be amended from time to time by a Governmental Authority, and pursuant to the Distribution Company’s Tariffs.

**“Net Metering Credits”** has the meaning set forth in 220 C.M.R. §18.00, as may be amended from time to time by a Governmental Authority, as implemented by the Tariffs.

**“Metering Device(s)”** means any and all revenue quality meters installed by Contractor, Cooperative or the Distribution Company at, before, or after the Point of Delivery necessary or appropriate for the delivery of Energy into the Distribution Company System, the calculation of Net Metering Credits, and the registration, recording, and transmission of information regarding the amount of Net Energy generated by the PV System and delivered to the Point of Delivery for sale to Cooperative and/or Host Town.

**“Parties”** means Host Town and Cooperative collectively, and their respective successors and permitted assignees.

**“Party”** means Host Town or Cooperative individually, and their respective successors and permitted assignees.

**“Permits”** means all state, federal, county, and local authorizations, certificates, permits, licenses and approvals required by any Governmental Authority for the construction, operation and maintenance of the PV System.

**“Permitted Use”** means the use, occupation, and enjoyment of the Premises by Cooperative or its Contractor to design, procure, install, test, commission, own, operate, maintain, expand and



remove the PV System, all of which are designed and intended for the purpose of producing solar-generated electricity.

“**Person**” means an individual, partnership, corporation (including a business trust), limited liability company, joint stock company, trusts, unincorporated association, joint venture, Governmental Authority, or other entity.

“**Point of Delivery**” means the agreed location or locations on the Premises where Net Energy is to be delivered and received, as further set forth in Exhibit A attached hereto.

“**Premises**” means the site for PV System and road staging area for construction owned by Host Town which is identified in Exhibit A to this Agreement.

“**PV System**” means the solar electric generating facility, including, but not limited to, the PV System Assets, which produces the Net Energy sold and purchased under the Cooperative Power Sales Agreement as further identified in Exhibit B attached hereto.

“**PV System Assets**” means each and all of the assets of which the PV System is comprised, including the solar energy panels, mounting systems, carports, tracking devices, inverters, integrators and other related equipment and components installed on the Premises, electric lines and conduits required to connect such equipment to the Point of Delivery, protective and associated equipment, improvements, Metering Device(s), and other tangible and intangible assets, permits, property rights and contract rights reasonably necessary for the construction, operation, and maintenance of the PV System.

“**Real Property Rights**” has the meaning set forth in Section 2.1.

“**Substantial Alteration**” has the meaning set forth in Section 5.10.

“**Tariffs**” means the Distribution Company’s Interconnection Agreement, M.D.T.E. No. 162-B (Standards for Interconnecting Distributed Generation), and Net Metering Tariff, M.D.P.U. No. 163, as approved in D.P.U. Docket 09-73 and subsequent amendments thereto.

“**Term**” has the meaning set forth in Section 3.1.

“**Termination Date**” means the earlier to occur of: (1) the last day of the Term; or (2) the date of termination.

“**Solar Net Metering Facility**” has the meaning set forth in 220 C.M.R. §18.00, as may be amended from time to time by a Governmental Authority.

## ARTICLE II: LEASE OF PREMISES

2.1 Leased Premises. Host Town hereby leases to Cooperative the possession, use, enjoyment, and control of the Premises (as described in Exhibits A and A-1) for the sole and exclusive purpose of conducting the Permitted Use, as set forth below, subject to the Host

Town's reserved uses as set forth in Article X (Quiet Enjoyment). As shown in Exhibit A, Host Town also grants to Cooperative a license for reasonable pedestrian and vehicular access to and egress from the Premises plus the right to construct electric interconnection lines to connect the PV System to the local electric distribution system operated by the Distribution Company such that the PV System qualifies as a Solar Net Metering Facility. Host Town hereby further agrees and acknowledges that Cooperative shall have the right, without any notice to or consent of Host Town:

- (a) for the PV System to include a total nameplate capacity expected by Contractor to be 1,755 KW DC;
- (b) to fully assign all of its rights under this Agreement to Contractor under the EMS Agreement, including to: (i) sublease and sublicense the Premises to Contractor; and (ii) provide an easement, as necessary, to Contractor to construct, own, operate, maintain, and access the PV System (collectively, the "Real Property Rights"); and
- (c) to fully assign or otherwise delegate all of Cooperative's rights, privileges or obligations under this Agreement to Contractor, including, without limitation, the right to mortgage its interest in the Premises to finance the PV System.

2.2 The Premises are demised subject to the following:

- (a) any encumbrances shown on the survey of the Premises;
- (b) covenants, restrictions, easements, agreements, and reservations, as set forth in Exhibit A;
- (c) present and future zoning laws, ordinances, resolutions, and regulations of the municipality in which the land lies, and all present and future ordinances, laws, regulations, and orders of all boards, bureaus, commissions, and bodies of any municipal, county, state, or federal authority, now or hereafter having jurisdiction, so long as they permit or otherwise regulate the use of the Premises for the Permitted Use;
- (d) the condition and state of repair of the Premises as the same may be on the Effective Date;
- (e) all water charges, electric charges, and sewer rents, accrued or unaccrued, fixed or not fixed, from and after the Effective Date arising as a result of the construction and operation of the PV System or any appurtenant facilities or improvements associated with the Permitted Use;
- (f) full compliance by the Cooperative of all Applicable Legal Requirements; and
- (g) Host Town's reserved uses, as provided in Article X (Quiet Enjoyment) and set forth in the Additional Exceptions, attached hereto as Exhibit A-1.

2.3 As-Is Condition of the Premises. Cooperative accepts the Premises in the condition or state in which the Premises now are without any representation or warranty, express or implied in fact or by law, by Host Town and without recourse to Host Town, as to the title thereto, the nature, condition or usability thereof or the use or uses to which the Premises or any part thereof may be put.

2.4 Ownership of the PV System. Except as otherwise provided herein, prior to and during the Term, Host Town shall have no ownership interest in the PV System, except for any ownership interest Host Town may have by virtue of being a Cooperative Member in the event that Cooperative exercises its purchase option under the EMS Agreement in accordance with Section 8.10 or Section 8.11.

2.5 Net Lease. Except as expressly set forth herein, the Parties acknowledge and agree that Host Town shall not be required prior to or during the Term to make any expenditure, incur any obligation, or incur any liability of any kind whatsoever in connection with this Agreement or the ownership, installation, operation, maintenance, repair or reconstruction of the PV System, subject to the Additional Exceptions set forth in Exhibit A-1.

2.6 Purposes. The Premises shall be used for the sole and exclusive purpose of conducting the Permitted Use. Except with the prior express written consent of Host Town, Cooperative shall not use the Premises for any use other than the Permitted Use.

2.7 Subordination. Cooperative acknowledges and understands that this Agreement and all rights of Cooperative are subject and subordinate to all existing leases, easements, rights of way, declarations, restrictions, permits, or other matters of record and all existing agreements of the Host Town with respect to the Premises. Cooperative acknowledges and understands that the Host Town reserves the right to grant additional leases, easements, or rights of way, whether recorded or unrecorded, as may be necessary, which do not unreasonably interfere with Host Town's use of the Premises and the operation of the PV System. Host Town shall provide or provide Cooperative with reasonable notice in the event that Host Town grants such additional rights on the Premises to a third party.

### **ARTICLE III: TERM**

3.1 Term. The term of this Agreement (the "Term") commences on the Effective Date of this Agreement and ends at the earlier of 11:59 PM on the day preceding the twentieth (20th) anniversary of the Effective Date (the "Termination Date") or such date as of which this Agreement may be earlier terminated pursuant to the provisions of this Agreement. If Cooperative is the owner of the PV System upon the Termination Date, the Term may be extended upon mutual agreement of the Parties and in conformance with all Applicable Legal Requirements, for one five (5) year period, with such modifications to the provisions hereto which may be appropriate to such extension and which are mutually agreed upon in writing. A Party seeking to extend the Term of this Agreement shall send written notice of such intent to the other Party no later than two (2) months prior to the Termination Date.

## ARTICLE IV: RENT; MAXIMUM FINANCIAL LIABILITY OF THE PARTIES

4.1 Rent. Commencing on Commercial Operation until the end of the Term, Cooperative shall pay to Host Town an annual rental payment in the amount of \$1.00 on or before the fifteenth (15th) day of each January during the Term. If Cooperative shall fail to pay Host Town any sum required to be paid by Cooperative to Host Town within ten (10) Business Days after such payment is due, interest on the unpaid amount shall accrue at the Interest Rate from and including the date such payment is due but excluding the date the payment is received.

4.2 Maximum Financial Liability of the Parties Pursuant to M.G.L. c. 40, Section 4A. This Agreement is not intended to impose any financial liabilities on the Parties other than as expressly set forth herein, including, but not limited to, Section 3.2 of the Cooperative Power Sales Agreement.

## ARTICLE V: INSTALLATION AND OPERATION OF PV SYSTEM

5.1 General Description. Except as otherwise specified herein, the PV System shall consist solely of the equipment and property described in Exhibit B.

5.2 Use of Installation and/or Maintenance Subcontractors. Cooperative may use qualified subcontractors to install and/or maintain the PV System, provided that Cooperative shall at all times remain fully responsible for the acts and omissions of such subcontractors. Cooperative shall require all installation subcontractors to reasonably provide performance and payment bonds from a surety company in amounts, form and substance acceptable to Host Town in its reasonable discretion, naming Host Town as a direct beneficiary of the surety's obligations under such bonds. Such bonds shall fully protect Host Town against any and all breaches by Cooperative, including, but not limited to, payments of salaries, withholdings, union welfare funds and any other union or employee benefits. Performance and payment bonds shall cover Cooperative's obligations during the Installation Period. Host Town agrees and understands that all or some of the rights and obligations provided for in this Article may be delegated or assigned by Cooperative to Contractor. In the event such duties are delegated, Cooperative shall remain fully responsible to Host Town under this Agreement.

5.3 Governmental Permits. Cooperative shall obtain at its sole cost all Permits required for Cooperative's use of the Premises, the Permitted Use, and the PV System from any and all Governmental Authorities having jurisdiction in the matter. Cooperative shall promptly inform Host Town of all significant developments relating to the issuance of such Permits. Host Town shall reasonably cooperate with Cooperative in procuring such Permits. If any changes in such plans and/or specifications are required by any Governmental Authority, then Cooperative shall submit such changes, if any, to Host Town for its approval, which shall not be unreasonably withheld.

5.4 Installation. Cooperative shall commence development of the PV System within three-hundred thirty (330) days of the Effective Date for a capped landfill property and four-hundred fifty (450) days of the Effective Date for a greenfield property and will proceed diligently and continuously thereafter until completion, but in no event shall the installation be completed later

than February 28, 2013 (the “Installation Period”). Cooperative will install the PV System in accordance with Good Engineering Practice and all Applicable Legal Requirements.

5.5 Interconnection with Electric Distribution Grid. Cooperative shall obtain at its sole cost all Permits and agreements required for Cooperative’s interconnection of the PV System to the electric distribution grid maintained by the Distribution Company. Cooperative shall promptly inform Host Town of all significant developments relating to such interconnection matters. Host Town shall provide Cooperative with such information as Cooperative may reasonably request in connection with Cooperative’s procurement of such Permits and agreements. If any material changes in plans and/or specifications to the PV System are required by the applicable electric distribution company, then Cooperative shall submit such changes, if any, to Host Town for its approval, which shall not be unreasonably withheld.

5.6 Access to and Use of the Premises. During the Installation Period and operation of the PV System, including, but not limited to, all pre-construction activities, Cooperative and its contractors or agents shall have access to the Premises on a 24-hour basis, seven days per week.

5.7 Plans and Specifications. Installation of the PV System shall be done according to plans approved by Host Town, which approval shall not be unreasonably withheld. Cooperative shall provide Host Town with as-built plans and specifications of the PV System installed on the Premises which show the actual location of the PV System.

5.8 Maintenance Responsibilities. Cooperative shall properly maintain the PV System, conduct all required maintenance, and make all repairs thereto in accordance with Good Engineering Practice. Cooperative shall take all measures necessary to maximize production of the PV System throughout the Term. Such obligations shall include, but not be limited to, maintaining the PV System in a condition of Commercial Operation, and taking all actions necessary to comply with the Applicable Legal Requirements. Cooperative shall be responsible for all costs related to the PV System, including, but not limited to, those costs necessary to construct, operate, maintain, repair, and remove the PV System.

5.9 Manufacturer’s Warranty. Cooperative shall ensure that each manufacturer of equipment and parts comprising the PV System provides a warranty as further described in the Special Terms attached hereto as Exhibit D.

5.10 Alterations. Cooperative shall have the right from time to time both before and after the completion of the PV System and at Cooperative’s sole cost and expense to make additions, alterations and changes, structural or otherwise in or to the Premises as is reasonably required to conduct the Permitted Use in compliance with the provisions of this Agreement, subject, however, in all cases to the following:

- (a) No alteration shall be made which would tend to (i) materially change the general design, use, character or structure of the PV System, or (ii) increase, reduce or impair, to any material extent, the use of the PV System for the generation of electricity, subject to Applicable Legal Requirements (any such alteration, a “Substantial Alteration”);
- (b) No Substantial Alteration shall be commenced except after prior written notice to and consent from Host Town, which consent shall not be unreasonably withheld;

(c) Any alteration or Substantial Alteration shall be made with reasonable dispatch, in accordance with Good Engineering Practice, and in compliance with all Applicable Legal Requirements; and

(d) No later than completion of any alteration or Substantial Alteration, Cooperative will provide Host Town with complete copies of all final plans and specifications therefor not previously provided.

5.11 Host Town Cooperation. Host Town shall have the following duties under this Agreement:

(a) to act expeditiously, cooperatively and in good faith in facilitating any Permits necessary for the construction and operation of the PV System (i.e. a landfill post-closure use permit from the Massachusetts Department of Environmental Protection);

(b) to cooperate with Cooperative and/or Contractor to the extent reasonable and appropriate on issues regarding access, construction, on-site electrical metering and consumption, and interconnection.

(c) to perform any maintenance and/or monitoring obligations imposed by a Permit on the Town (i.e. a landfill post-closure use permit from the Massachusetts Department of Environmental Protection), subject to the Additional Exceptions set forth in Exhibit A-1.

5.12 Emergencies. The Parties agree that Host Town shall have the right, but not the obligation, to respond to any emergency or equipment failure involving the PV System if necessary to protect the Premises or to protect public health or safety, and to effectuate any necessary repairs or take corrective action.

5.13 Damage. Any damage done to the Premises or other property not belonging to Cooperative during installation or during operations shall be repaired at Cooperative's expense as soon as practicable, but no later than forty-five (45) Business Days after notification of damage, or sooner if immediate repair is required to prevent further damage to such property.

## **ARTICLE VI: COOPERATIVE'S REPRESENTATIONS, WARRANTIES, AND ADDITIONAL COVENANTS**

6.1 Cooperative's Representations and Warranties. As of the Effective Date of this Agreement, Cooperative represents and warrants to Host Town as follows:

(a) Cooperative has full legal capacity to enter into this Agreement;

(b) The execution of this Agreement has been duly authorized, and each person executing this Agreement on behalf of Cooperative has full authority to do so and to fully bind Cooperative;

(c) Cooperative knows of no pending or threatened action, suit, proceeding, inquiry, or investigation before or by any judicial court or administrative or law enforcement agency against or affecting Cooperative or its properties wherein any unfavorable decision, ruling, or finding would materially and adversely affect the validity or enforceability of this Agreement or Cooperative's ability to carry out its obligations under this Agreement; and

(d) None of the documents or other written or other information furnished by or on behalf of Cooperative to Host Town or its agents pursuant to this Agreement contains any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements contained herein or therein, in the light of the circumstances in which they were made, not misleading.

6.2 Cooperative's Covenants. In addition to the other covenants set forth in this Agreement, Cooperative covenants to Host Town as follows:

(a) Cooperative shall promptly inform Host Town of the occurrence of any event that may reasonably be expected to materially affect the operation of the PV System or the performance of Cooperative's obligations under this Agreement (including, but not limited to, any notices of default under any third party contract and the occurrence of any event that may result in the imposition of material liability or obligations on Cooperative or Host Town); and

(b) Cooperative shall provide Host Town such other information as Host Town may reasonably request in order to review Cooperative's compliance with the terms of this Agreement.

(c) Prior to deciding whether to waive or forbear on exercise of its discretionary rights, if any, to: (i) early termination of the EMS Agreement pursuant to Section 3.3 of the EMS Agreement; or (ii) extension of a milestone date as established therein, the Cooperative shall in good faith weigh the interests of the Host Town and consult with its duly authorized representative identified in Section 13.2 herein.

## **ARTICLE VII: HOST TOWN'S REPRESENTATIONS, WARRANTIES, AND ADDITIONAL COVENANTS**

7.1 Host Town's Representations and Warranties. As of the Effective Date of this Agreement, Host Town represents and warrants the following to Cooperative:

(a) Host Town has full legal capacity to enter into this Agreement;

(b) Host Town has the power to perform all of its obligations hereunder and the right to grant Cooperative the right to assign the Real Property Rights to Contractor;

(c) The execution of this Agreement has been duly authorized, and each person executing this Agreement on behalf of Host Town has full authority to do so and to fully bind Host Town;

(d) Host Town knows of no pending or threatened action, suit, proceeding, inquiry, or investigation before or by any judicial court or administrative or law enforcement agency against or affecting Host Town or its properties wherein any unfavorable decision, ruling, or finding would materially and adversely affect the validity or enforceability of this Agreement or Host Town's ability to carry out its obligations under this Agreement;

(e) With the exception of Contractor, on the Effective Date, pursuant to Article X (Quiet Enjoyment), no third party shall have any tenancy or license to use all or any portion of the Premises during the Term, except as provided for in Section 10.2 and the Additional Exceptions set forth in Exhibit A-1;

(f) Host Town agrees that it has read and fully understands the form of EMS Agreement (attached as Exhibit E to this Agreement), including all rights granted to Contractor thereunder; and

(g) Host Town warrants that it owns the Premises in fee simple, and the Premises are free and clear of all liens, encumbrances and restrictions except those listed in the Additional Exceptions set forth in Exhibit A-1.

7.2 Host Town's Covenants. In addition to the other covenants set forth in this Agreement, Host Town covenants to Cooperative that throughout the Term and any extensions thereof, Host Town shall not interfere or allow a third party to interfere with the sun affecting the PV System.

## **ARTICLE VIII: TERMINATION; DEFAULT; REMEDIES; PURCHASE OPTIONS**

8.1 Termination. Subject to Section 8.4 (*Force Majeure*), this Agreement shall not be subject to termination, except for the following Events of Termination:

(a) Either Party may terminate this Agreement in the event a material Event of Default pursuant to Section 8.2 (Events of Default by Host Town) or 8.3 (Events of Default by Cooperative) prevents operation of the PV System for twelve (12) months, except with respect to *Force Majeure* events.

(b) Cooperative shall terminate this Agreement in the event that Cooperative abandons the PV System prior to Commercial Operation.

(c) Cooperative may terminate this Agreement in the event of an Event of Default by Host Town pursuant to Section 8.2 (Events of Default by Host Town).



(d) Cooperative may terminate this Agreement in the event that Host Town breaches its obligations and duties pursuant to Article X (Quiet Enjoyment).

(e) Cooperative may terminate this Agreement in the event that the EMS Agreement is terminated by either Cooperative or Contractor, except to the extent the EMS Agreement is terminated due to Cooperative's exercise of its Purchase Option (as defined therein).

8.2 Events of Default by Host Town. The following shall each constitute an Event of Default by Host Town:

(a) Host Town breaches any material obligation under this Agreement, and fails to cure such breach within thirty (30) Business Days after notification by Cooperative of the breach.

(b) If any material representation or warranty made by Host Town in Article VII of this Agreement (Host Town's Representations, Warranties, and Additional Covenants) proves to have been misleading or false in any material respect when made and to have a material adverse affect on the Cooperative, and Host Town does not cure the underlying facts so as to make such representation or warranty correct and not misleading within ten (10) Business Days of written notice from Cooperative.

(c) Host Town fails to carry out its obligations and duties pursuant to Article X (Quiet Enjoyment).

(d) Any other material breach of this Agreement, which proves to have a material adverse affect on the Cooperative, not specifically enumerated above.

Events of Default in this Section 8.2 are subject to specific performance and monetary damages pursuant to Section 8.5 (Remedies).

8.3 Events of Default by Cooperative. It shall constitute an Event of Default by Cooperative if Cooperative: (a) breaches any material obligation under this Agreement that proves to have a material adverse affect on Host Town and fails to cure the breach within thirty (30) days after notification by Host Town of the breach; or (b) any material representation or warranty made by Cooperative in Article VI (Cooperative's Representations, Warranties and Additional Covenants) proves to have been misleading or false in any material respect when made and to have a material adverse affect on the Host Town, and Cooperative does not cure the underlying facts so as to make such representation or warranty correct and not misleading within ten (10) Business Days of written notice from Host Town. Events of Default in this Section 8.3 are subject to specific performance and monetary damages pursuant to Section 8.5 (Remedies).

8.4 Force Majeure. Notwithstanding Sections 8.1 (Termination), 8.2 (Events of Default by Host Town) and 8.3 (Events of Default by Cooperative), if by reason of *Force Majeure* either Party is unable to carry out, either in whole or in part, its obligations herein contained, such Party shall not be deemed to be in default during the continuation of such inability, provided that: (a)

the non-performing Party, as soon as practicable (and in any event within five (5) Business Days after the *Force Majeure* event first prevents performance, gives the other Party hereto written notice describing the particulars of the occurrence; (b) the suspension of performance be of no greater scope and of no longer duration than is required by the *Force Majeure* event; (c) no obligations of the Party which were to be performed prior to the occurrence causing the suspension of performance shall be excused as a result of the occurrence; and (d) the non-performing Party shall use Commercially Reasonable efforts to remedy with all reasonable dispatch the cause or causes preventing it from carrying out its obligations. If an event of *Force Majeure* continues for a period of one hundred eighty (180) days or longer, either Party may treat such an event as an Event of Termination and may immediately terminate this Agreement by sending the non-performing Party a written termination notice setting forth the Termination Date, provided, however, that the other Party may not terminate this Agreement if the non-performing Party is using Commercially Reasonable efforts to cure the Event of Termination and the non-performing Party provides reasonable written assurances that it will be able to cure such Event of Termination within an additional one hundred eighty (180) days. In the event of termination under this Section 8.4, Financier shall have step-in rights as provided in Section 8.6.

#### 8.5 Remedies.

(a) Subject to the limitations set forth in Section 8.5(c) below, in the event the defaulting Party fails to cure the Event of Default within the period for curative action under Sections 8.2 (Events of Default by Host Town) or 8.3 (Events of Default by Cooperative), as applicable, the non-defaulting Party may seek specific performance and/or monetary damages pursuant to this Section 8.5.

(b) In the event that Host Town defaults under Section 8.2 (Events of Default by Host Town), Cooperative may terminate the Cooperative Power Sales Agreement, as also provided for in Section 8.1(d) (Termination) of the Cooperative Power Sales Agreement, and may exercise any other remedy provided for in this Agreement or otherwise allowed by law.

(c) Host Town may not enforce any remedies against Contractor under the EMS Agreement. Cooperative agrees to enforce any and all remedies against the Contractor under the EMS Agreement. Host Town's sole remedy against Contractor under the EMS Agreement shall be to seek specific performance of this Agreement by the Cooperative.

For breach of any provision for which an express remedy or measure of damages is provided, such express remedy or measure of damages will be the sole and exclusive remedy, the obligor's liability will be limited as set forth in such provision and all other remedies or damages at law or in equity are waived. If no remedy or measure of damages is expressly provided herein, the obligor's liability will be limited to direct actual damages only, such direct actual damages will be the sole and exclusive remedy and all other remedies or damages at law or in equity are waived.

**NO PARTY HERETO SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT.**

8.6 Step-in Rights of Financier.

(a) Host Town agrees to give written notice to any Financier of which Host Town has written notice upon the occurrence of any Event of Default hereunder, and Financier shall have a period of sixty (60) days after receipt of said notice to cure such default, provided however, that Financier shall have an additional reasonable period of time thereafter, not to exceed one hundred eighty (180) days, to cure the Event of Default if Financier uses Commercially Reasonable efforts to cure such Event of Termination during the initial sixty (60) days after notice aforesaid, and Financier provides reasonable written assurances that it will be able to cure such Event of Default within such a reasonable period of time thereafter.

(b) Host Town agrees that, prior to termination pursuant to Section 8.1 (Termination), Host Town shall give written notice to any Financier of which Host Town has written notice upon the occurrence of any Event of Termination hereunder, and Financier shall have a period of one hundred eighty (180) days after receipt of said notice to cure such Event of Termination, provided however, that Financier shall have an additional one hundred eighty (180) days to cure the Event of Termination if Financier uses Commercially Reasonable efforts to cure such Event of Termination during the initial one hundred eighty (180) days after notice aforesaid, and Financier provides reasonable written assurances that it will be able to cure such Event of Termination within the additional one hundred eighty (180) days.

(c) Host Town also agrees that, in the event that Host Town terminates this Agreement pursuant to Section 8.1 (Termination), then a new agreement shall be executed by Host Town with Financier to assume the Cooperative's place, upon the same terms and conditions as are contained in this Agreement; provided, however, that any such new agreement will be for the unexpired term of this Agreement and provided further, nothing herein shall be construed to alter any substantive terms which would expand the rights of Financier or extend or expand Host Town's obligations hereunder.

8.7 Damage or Destruction of PV System.

(a) Cooperative shall bear the risk of loss to the PV System (including casualty, condemnation or *Force Majeure*), except to the extent such loss results from the gross negligence of the Host Town or Host Town's agents, representative, customers, vendors, visitors, employees, contractors, or invitees.

(b) In the event of any PV System loss, Cooperative shall, at its sole cost and expense either (i) repair or replace the PV System, or (ii) elect to terminate this Agreement in which case Cooperative shall remove the PV System and promptly restore the Premises

to substantially the same condition as existed prior to the Effective Date in accordance with Section 8.8 (Site Restoration).

8.8 Site Restoration. On the Termination Date, Cooperative shall peaceably and quietly leave, surrender and yield up unto Host Town the Leased Premises. Following the Termination Date of this Agreement, Cooperative shall have one hundred twenty (120) days to remove the PV System from the Leased Premises, and to restore the Leased Premises to the condition that existed as of the Effective Date.

8.9 Abandonment of PV System. Notwithstanding anything to the contrary contained in this Agreement, any waiver in whole or in part of the requirement to remove the PV System shall require the written approval of Host Town. Any of the PV System left on the Leased Premises after the passage of one hundred twenty (120) days after the Termination Date shall be deemed abandoned. Host Town shall provide written notice to the Cooperative within thirty (30) days of the expiration of such one hundred twenty (120) day period, of its election to retain all or any of the PV System as its property, or dispose of all or any of the PV System in such reasonable manner as Host Town may see fit and at Cooperative's sole cost; provided, however, that Host Town's election to retain all or any portion of the PV System as its property shall relieve Cooperative from any liability for its failure to remove such PV System; and provided further, however, that the foregoing shall not apply to any of the PV System that is not timely removed if the failure to remove is caused by an event of Force Majeure or the negligent acts or omissions of Host Town (in which in either case the time period for removal shall be extended on a day for day basis).

8.10 Acknowledgement of Cooperative's Purchase Option. Host Town agrees and understands that Cooperative shall have a Purchase Option to purchase the PV System under the EMS Agreement (as defined therein). In the event that Cooperative exercises its Purchase Option under the EMS Agreement, this Agreement shall continue in full force and effect.

8.11 Host Town Funded Purchase Option. Host Town agrees and understands that the Cooperative's Purchase Option under the EMS Agreement includes the right to purchase the PV System from Contractor upon the expiration of the term of the EMS Agreement. Cooperative and Host Town acknowledge that pursuant to Section 13.4, Cooperative has a period of sixty (60) Business Days from the expiration of the term in which to request a price determination from an Independent Appraiser for the purchase of the PV System. Cooperative shall provide Host Town with notice no more than thirty (30) Business Days after the expiration of the term of the EMS Agreement stating whether it intends to request a price determination from an Independent Appraiser for the purchase of the PV System. In the event that the Cooperative determines not to request such price determination, Host Town may obligate the Cooperative to exercise Cooperative's Purchase Option as follows:

- (a) Host Town must notify the Cooperative within thirty (30) Business Days of receipt of said notice by the Cooperative that it is ready, willing and able to fund a purchase of the PV System and that it will cooperate with the Cooperative to pursue the independent appraisal process for determination of an Alternative Purchase Price as defined and set forth in Article XIII of the EMS Agreement. The Parties acknowledge and agree that the Host Town must provide Cooperative notice within twenty (20)

Business Days of its receipt of the Preliminary Determination (as set forth in Article XIII of the EMS Agreement) of any objection to the Preliminary Determination and that the Host Town must provide Cooperative notice within twenty (20) Business Days of its receipt of the Final Determination (as set forth in Article XIII of the EMS Agreement) of its final decision to obligate the Cooperative to exercise the purchase of the PV System at the Alternative Purchase Price (as set forth in Article XIII of the EMS Agreement).

(b) the Cooperative and Host Town shall negotiate in good faith the terms and conditions of such Host Town funded purchase option and agree to fully document the result of such negotiations in an agreement binding upon Cooperative and Host Town.

#### **ARTICLE IX: INSURANCE**

The Parties agree to comply with the insurance obligations allocated to them in Exhibit C hereto.

#### **ARTICLE X: QUIET ENJOYMENT**

10.1 Quiet Enjoyment. Host Town covenants that Cooperative shall quietly have and enjoy the Premises throughout the Term and any extensions thereof. Host Town warrants and agrees that, throughout the Term and any extensions thereof:

(a) the Premises shall be dedicated to Cooperative's use for conducting the Permitted Use and designing, constructing, operating, maintaining, repairing, and expanding the PV System, except as provided for in Section 10.2 and subject to the Additional Exceptions set forth in Exhibit A-1;

(b) any other uses of the Premises by Host Town or any third party (other than Contractor) pursuant to Section 10.2 and the Additional Exceptions set forth in Exhibit A-1 shall not unreasonably interfere with the Permitted Use and the operational and solar requirements of the PV System;

(c) Host Town shall maintain or obtain any agreements, contracts, consents, Permits, approvals, or other instruments or permissions necessary for Cooperative to have the quiet enjoyment of its rights under this Agreement; and

(d) Host Town shall, in good faith, use its best efforts to protect Cooperative's quiet enjoyment of its rights hereunder, including, without limitation, defending against a third party claim that would materially interfere with Cooperative's rights under this Article X.

Subject to the specific provisions of this Agreement permitting the same, Host Town shall have the right to enter upon the Premises at any time for any purpose and no such entry which complies with the provisions of this Agreement permitting the same shall be considered a breach of the covenant of quiet enjoyment.

10.2 Host Town's Reserved Uses. Except as specifically set forth in the Additional Exceptions contained in Exhibit A-1, Host Town shall not itself conduct any other use, nor shall Host Town allow any third party to conduct any other use, on the Premises.

## ARTICLE XI: ASSIGNMENT AND MORTGAGE

### 11.1 Assignment.

(a) Cooperative Assignment. Except as otherwise provided by this Agreement, Cooperative shall not assign, subcontract, sublet or delegate its rights, privileges or obligations under this Agreement without the prior written approval of Host Town, provided that prior notice to or consent of Host Town shall not be required: (i) for an assignment or transfer by Cooperative to any of its other individual Cooperative Members; (ii) for any assignment or transfer by Cooperative to Contractor; and (iii) for a collateral assignment by Cooperative to any Financier, subject to the terms and conditions of this Article XI. For assignments requiring Host Town's approval, approval may be denied in the reasonable discretion of Host Town if it determines that the proposed assignee does not have at least the same financial and technical ability as the assigning Cooperative. Notwithstanding the foregoing, Host Town may not unreasonably withhold its consent to an assignment to an affiliated entity under common control or management with Cooperative. Cooperative's assignee shall agree in writing to be bound by the terms and conditions of this Agreement.

(b) Host Town Assignment. Host Town shall not assign this Agreement without the prior consent of Cooperative, such consent not to be unreasonably withheld, provided, however, that any such assignment shall be made subject to the terms and provisions of this Agreement. Host Town shall promptly provide Cooperative a copy of the assignment document following any assignment.

The rights and obligations created by this Agreement shall inure to the benefit of, and be binding upon, the successors and permitted assigns of the respective Parties hereto. Notice of any permitted assignment shall be provided to the other Party as soon as practicable.

11.2 Financing by Leasehold Mortgage. Host Town is cognizant of the need of Cooperative to finance its interest in the Premises and the PV System thereon, and therefore specifically agrees, subject to Section 8.6, without any further request for prior consent to permit Cooperative to mortgage, assign or transfer its interest in the Premises for the purpose of obtaining financing, which shall include equity and/or debt, provided:

- (a) The term of such mortgage, assignment or transfer shall not exceed the Term; and
- (b) Cooperative shall give Host Town notice of the existence of any mortgage, assignment or transfer, together with the name and address of the mortgagee, assignee or transferee, and a copy of the mortgage, assignment or transfer document within thirty (30) days of the execution of such mortgage, assignment or transfer.

11.3 Financing by Leasehold Mortgage Release of Cooperative. Cooperative shall be relieved from its obligations under this Agreement in whole or in part, as the case may be:

- (a) by any whole or partial disposition of Cooperative's interest in this Agreement in compliance with Section 11.1, when coupled with a written instrument signed by the assignee or transferee of such interest in which said assignee or transferee accepts and agrees to be bound by the terms of this Agreement, unless the Parties agree otherwise, and except as otherwise provided by the terms of any assignment or transfer; and
- (b) in the event of any foreclosure by a Financier, in which case the Financier shall substitute for the Cooperative for purposes of this Agreement.

Absent express written consent of Host Town, the execution of a mortgage or any assignment from a Financier to another Financier shall not relieve Cooperative from its obligations under this Agreement.

11.4 Financier Provisions. Any Person or entity that holds or is the beneficiary of a first position mortgage, deed of trust or other security interest in this Agreement or in any PV System located on the Premises (any such first position mortgage, deed of trust or other security interest is referred to herein as a "Leasehold Mortgage") shall, for so long as its Leasehold Mortgage is in existence and until the lien thereof has been extinguished, be entitled to the protections set forth herein. No Leasehold Mortgage shall encumber or affect in any way the interest of Host Town or Host Town's fee interest in and to the Premises, or Host Town's rights under this Agreement. Host Town shall act expeditiously, cooperatively and in good faith in facilitating any amendments to this Agreement requested by Financier in connection with the financing of the PV System.

- (a) Financier's Right to Possession, Right to Acquire and Right to Assign. Pursuant to the provisions of this Section 11.4 and subject to Section 8.6, a Financier shall have the right: (i) to assign its security interest; (ii) to enforce its lien and acquire title to the leasehold estate by any lawful means; (iii) to take possession of and operate the PV System or any portion thereof and to perform all obligations to be performed by Cooperative hereunder, or to cause a receiver to be appointed to do so, subject to the terms and conditions of this Agreement; (iv) to acquire the leasehold estate by foreclosure or by an assignment in lieu of foreclosure; and (v) to sell the PV System and rights under the Cooperative Power Sales Agreement and any other contracts dealing with the sale of Net Energy or renewable energy certificates from the PV System to a third party. Host Town's consent shall not be required for the Financier's acquisition of the encumbered leasehold estate created by this Agreement, whether by foreclosure or assignment in lieu of foreclosure.
- (b) Upon the Financier's acquisition of the leasehold estate, whether by foreclosure or assignment in lieu of foreclosure, Financier shall have the right to sell or assign said acquired leasehold estate, provided Financier and proposed assignee (as applicable) shall first satisfy each of the following conditions: (i) any such assignee shall be approved in advance by Host Town, such approval not to be unreasonably conditioned, withheld or delayed; (ii) any such assignee shall assume all of Cooperative's obligations under this Agreement; (iii) Financier and/or any proposed assignee shall have satisfied every obligation of Cooperative existing under this Agreement but which remains unsatisfied at

the time of the proposed assignment; and (iv) Financier and any such assignee shall satisfy all Applicable Legal Requirements.

(c) Notice of Default; Opportunity to Cure. The Financier shall be entitled to receive notice of any default by Cooperative, provided that such Financier shall have first delivered to Host Town a notice of its interest in the Leasehold Mortgage in the form and manner, if any, provided by state laws, rules, regulations, Cooperative's procedures, and the provisions of this Agreement. If any notice shall be given of the default of Cooperative and Cooperative has failed to cure or commence to cure such default within the cure period provided in this Agreement, then any such Financier, which has given notice as above provided, shall be entitled to receive an additional notice that Cooperative has failed to cure such default and such Financier shall have sixty (60) days after such additional notice to cure any such default or, if such default cannot be cured within sixty (60) days, to diligently commence curing within such time and diligently pursue such cure to completion within such time as Cooperative would have been allowed pursuant to Article VIII (Termination; Default; Remedies; Purchase Options) but as measured from the date of such additional notice. The Financier may take possession of the Premises and the PV System, and operate the PV System if necessary, pursuant to Section 8.6.

(d) Cross-Default/Cross-Collateralization. The Leasehold Mortgage shall not contain any cross-collateralization or cross-default provisions relating to other loans of Cooperative (or any subsidiary or Affiliate of Cooperative) that are not incurred for the ownership, construction, maintenance, operation, repair or financing of the PV System.

(e) Priority in Payment. The Financier shall have priority over Host Town with respect to payments owed by Cooperative.

## **ARTICLE XII: DISPUTE RESOLUTION; GOVERNING LAW**

12.1 Dispute Resolution. Unless otherwise expressly provided for in this Agreement, the dispute resolution procedures of this Section 12.1 shall be the exclusive mechanism to resolve disputes arising under this Agreement. The Parties agree to use their respective best efforts to resolve any dispute(s) that may arise regarding this Agreement. Any dispute that arises under or with respect to this Agreement that cannot be resolved shall in the first instance be the subject of informal negotiations between the Parties. The dispute shall be considered to have arisen when one Party sends the other Party a written notice of dispute. The period for informal negotiations shall be fourteen (14) days from receipt of the written notice of dispute unless such time period is modified by written agreement of the Parties. In the event that the Parties cannot resolve a dispute by informal negotiations, the Parties agree to submit the dispute to mediation. Within fourteen (14) days following the expiration of the time period for informal negotiations, the Parties shall propose and agree upon a neutral and otherwise qualified mediator. In the event that the Parties fail to agree upon a mediator, the Parties shall request that the American Arbitration Association, Boston, Massachusetts, appoint a mediator. The period for mediation shall commence upon the appointment of the mediator and shall not exceed sixty (60) days, unless such time period is modified by written agreement of the Parties. The decision to continue mediation shall be in the sole discretion of each Party. The Parties will bear their own



costs of the mediation. The mediator's fees shall be shared equally by the Parties. In the event that the Parties cannot resolve a dispute by informal negotiations or mediation, the sole venue for judicial enforcement shall be Barnstable County Superior Court, Massachusetts. Notwithstanding the foregoing, injunctive relief from such court may be sought without resorting to alternative dispute resolution to prevent irreparable harm that would be caused by a breach of this Agreement.

12.2 Governing Law. This Agreement and the rights and duties of the Parties hereunder shall be governed by and shall be construed, enforced and performed in accordance with the laws of the Commonwealth of Massachusetts without regard to principles of conflicts of law.

12.3 Stay of Termination.

(a) During informal negotiations and mediation pursuant to Section 12.1, the Parties shall not exercise any termination rights pursuant to this Agreement. During such informal negotiations and/or mediation, the Parties shall continue to fully perform their respective obligations pursuant to this Agreement. All applicable statutes of limitation and defense based upon the passage of time and similar contractual limitations shall be tolled while discussions in Section 12.1 are pending, the Parties shall take such action, if any, required to effectuate such tolling. Without prejudice to the procedure set forth in Section 12.1, a Party may file a complaint for statute of limitations purposes, if in its sole judgment such action may be necessary to preserve its claims or defenses.

(b) During the Term of the EMS Agreement (as defined therein), if there is any lawsuit pending between Cooperative and Contractor, Host Town shall not exercise any termination rights pursuant to this Agreement and shall continue to fully perform its obligations under this Agreement. As to any claims that arise between the Parties under this Agreement, all applicable statutes of limitation and defenses based upon the passage of time and similar contractual limitations shall be tolled while such lawsuit is pending and the Parties shall take such action, if any, required to effectuate such tolling. Notwithstanding the foregoing, Host Town may file a complaint for statute of limitations purposes, if in its sole judgment such action may be necessary to preserve its claims or defenses. This provision may be waived by the Cooperative at any time by any reason.

### **ARTICLE XIII: MISCELLANEOUS**

13.1 Construction; Obligation to Modify Agreement.

(a) As set forth in Section 5.2 (Use of Installation and/or Maintenance Subcontractors) herein, Cooperative may perform or have Contractor perform all or some of its obligations hereunder. To the extent Contractor is performing Cooperative's obligations hereunder it will do so pursuant to the EMS Agreement, which is substantially similar in form and substance to the model energy management services agreement recommended for use by the Massachusetts Department of Energy Resources in accordance with M.G.L. c. 25A, §11C and 225 C.M.R. § 10.00 et seq. The Parties acknowledge that inconsistencies may exist between this Agreement and the EMS Agreement and that the Parties will use their best efforts to construe the two agreements

harmoniously. If a conflict arises between the Contractor's performance of Cooperative's obligations hereunder pursuant to the EMS Agreement and the terms of this Agreement, the Parties will use their best efforts to reach a Commercially Reasonable resolution of the conflict. To the extent the Parties are unable to resolve such conflict, the Parties acknowledge and agree that their sole remedy shall be to utilize the Dispute Resolution procedures set forth in Section 12.1 of this Agreement.

(b) Upon implementation by the Massachusetts Department of Energy Resources of any order, rule or regulation issued pursuant to M.G.L. c. 25A, §11C or 225 C.M.R. § 10.08(8) requesting a modification to this EMS Agreement, the Parties shall be obligated to amend this Agreement, if necessary, to conform to such rule(s), order(s) and/or regulation(s) to the extent that such amendments are Commercially Reasonable. The Parties shall use their best efforts to conform such amendment to the original intent of this Agreement and to do so in a timely fashion.

(c) Upon implementation by the Department of Public Utilities, Department of Energy Resources, or other Governmental Authority of any rule or regulation that may affect any provision of this Agreement, in particular any rule or regulation regarding Net Metering, the Parties shall be obligated to amend this Agreement to conform to such rule(s) and/or regulation(s) to the extent that such amendments are Commercially Reasonable. The Parties shall use their best efforts to conform such amendment to the original intent of this Agreement and to do so in a timely fashion.

13.2 Notices. All notices, demands, requests, consents or other communications required or permitted to be given or made under this Agreement shall be in writing and addressed to the following:

If to Host Town:

Town of Chatham  
Attn: Chatham Town Manager  
549 Main Street,  
Chatham, MA 02633  
Tel: 508-945-5100  
Fax: 508-945-3550

If to Cooperative:

Cape & Vineyard Electric Cooperative, Inc.  
P.O. Box 427/SCH  
Barnstable, MA 02630  
Attn: Margaret T. Downey  
Tel: (508) 375-6636  
Fax: (508) 362-4136  
Email: mdowney@barnstablecounty.org

with a copy to:

Jeffrey M. Bernstein, Esq.  
BCK Law, P.C.  
One Gateway Center, Suite 809  
Newton, MA 02458  
Tel: (617) 244-9500  
Fax: (617) 244-9550  
Email: jbernstein@bck.com

Notices hereunder shall be deemed properly served: (a) by hand delivery, on the day and at the time on which delivered to the intended recipient at the address set forth in this Agreement; (b) if sent by mail, on the third business day after the day on which deposited in the United States certified or registered mail, postage prepaid, return receipt requested, addressed to the intended recipient at its address set forth in this Agreement; or (c) if by Federal Express or other reputable express mail service, on the next business day after delivery to such express mail service, addressed to the intended recipient at its address set forth in this Agreement. Either Party may change its address and contact person for the purposes of this Section 13.2 by giving notice thereof in the manner required herein.

13.3 Entire Agreement; Amendments; Binding Effect. This Agreement and the Cooperative Power Purchase Agreement constitute the entire agreement between the Parties hereto with respect to the subject matter hereof and supersede all prior oral or written agreements and understandings between the Parties relating to the subject matter hereof. This Agreement may only be amended or modified by a written amendment to this Agreement signed by both Parties hereto. This Agreement inures to the benefit of and is binding upon the Parties and their respective successors and permitted assigns.

13.4 Expenses. Each Party hereto shall pay all expenses incurred by it in connection with its entering into this Agreement, including but not limited to, all attorneys' fees and expenses.

13.5 No Joint Venture. Nothing herein contained shall be deemed to constitute either Party a partner, agent or legal representative of the other Party or to create a joint venture, partnership, agency or any relationship between the Parties. The obligations of the Parties are individual and not collective in nature.

13.6 Joint Workproduct. This Agreement shall be considered the workproduct of both Parties hereto, and, therefore, no rule of strict construction shall be applied against either Party.

13.7 Waiver. No waiver by either Party hereto of any one or more defaults by the other Party in the performance of any provision of this Agreement shall operate or be construed as a waiver of any future default, whether of like or different character. No failure on the part of either Party hereto to complain of any action or non-action on the part of the other Party, no matter how long the same may continue, shall be deemed to be a waiver of any right hereunder by the Party so failing. A waiver of any of the provisions of this Agreement shall only be effective if made in writing and signed by the Party who is making such waiver.

13.8 Severability. If any article, section, phrase or portion of this Agreement is, for any reason, held or adjudged to be invalid, illegal or unenforceable by any court of competent jurisdiction, such article, section, phrase, or portion so adjudged shall be deemed separate, severable and independent and the remainder of this Agreement shall be and remain in full force and effect and shall not be invalidated or rendered illegal or unenforceable or otherwise affected by such adjudication, provided the basic purpose of this Agreement and the benefits to the Parties are not substantially impaired.

13.9 Further Assurances. From time to time and at any time at and after the execution of this Agreement, each Party shall execute, acknowledge and deliver such documents and assurances, reasonably requested by the other and shall take any other action consistent with the terms of this Agreement that may be reasonably requested by the other for the purpose of effecting or confirming any of the transactions contemplated by this Agreement.

13.10 Headings and Captions. The headings and captions appearing in this Agreement are intended for reference only, and are not to be considered in construing this Agreement.

13.11 Survival. Termination of this Agreement for any reason shall not relieve Host Town or Cooperative of any obligation accrued or accruing prior to such termination, including, but not limited to, the obligations set forth in Article IX (Insurance) and XII (Dispute Resolution; Governing Law), which shall survive the expiration or termination of this Agreement. Article IX (Insurance) shall expire three (3) years after the Termination Date, including any extensions thereof, of this Agreement.

13.12 Counterparts; Scanned Copy. This Agreement may be executed in counterparts, each of which shall be deemed an original and all of which shall constitute one and the same instrument. The Parties agree that a scanned or electronically reproduced copy or image of this Agreement bearing the signatures of the Parties hereto shall be deemed an original and may be introduced or submitted in any action or proceeding as competent evidence of the execution, terms and existence of this Agreement notwithstanding the failure or inability to produce or tender an original, executed counterpart of this Agreement and without the requirement that the unavailability of such original, executed counterpart of this Agreement first be proven.

13.13 Reports; Compliance with M.G.L. c. 40, Section 4A. Cooperative shall prepare an annual report which shall be provided, without charge, to each of its Cooperative Members no later than sixty (60) days after the close of its fiscal year. Cooperative shall keep accurate and comprehensive records of services performed, costs incurred, and reimbursements and contributions received. Cooperative agrees that it will perform regular audits of such records. Periodic financial statements shall be issued to all Cooperative Members. Cooperative's officers responsible for this Agreement shall give appropriate performance bonds. Cooperative shall comply with all other applicable provisions of M.G.L. c. 40, §4A.

13.14 Special Terms and Conditions. Host Town understands and agrees that this Agreement is Cooperative's standard form inter-governmental agreement for project development and that modifications to the main body of this Agreement are not permitted. To the extent there are special terms and conditions that are specific to the installation of the PV System on the Premises, such terms and conditions will be set forth in Exhibit D attached hereto (the "Special

Terms and Conditions”). To the extent there is a conflict between the Special Terms and Conditions and the main body of this Agreement, the Special Terms and Conditions will control.

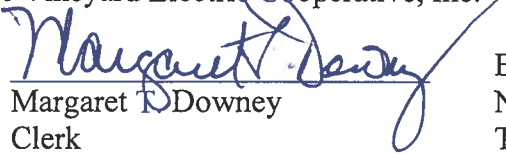
13.15 No Limitation of Regulatory Authority. Except as provided in Section 2.1(c)(Leased Premises), the Parties acknowledge that nothing in this Agreement shall be deemed to be an agreement by Host Town to issue or cause the issuance of any permit or approval, or to limit or otherwise affect the ability of the Host Town or the Commonwealth of Massachusetts to fulfill its regulatory mandate or execute its regulatory powers consistent with Applicable Legal Requirements.

*[Signature page to follow.]*

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

**COOPERATIVE**

Cape & Vineyard Electric Cooperative, Inc.


By:   
Name: Margaret Downey  
Title: Clerk  
P.O. Box 427  
Superior Court House  
Barnstable, MA 02630  
(508) 375-6636 (voice)  
(508) 362-4166 (fax)

By:   
Name: Charles S. McLaughlin, Jr.  
Title: President


**HOST TOWN**


Town of Chatham

By: \_\_\_\_\_  
Name: Florence Seldin  
Title: Chair, Board of Selectmen

By:   
Name: David Whitcomb  
Title: Board of Selectmen

By:   
Name: Sean Summers  
Title: Board of Selectmen

By:   
Name: Leonard Sussman  
Title: Board of Selectmen

By:   
Name: Timothy Roper  
Title: Board of Selectmen

549 Main Street,  
Chatham, MA 02633  
Tel: 508-945-5100  
Fax: 508-945-3550

List of Exhibits to this Agreement

- Exhibit A – Description of Premises
- Exhibit A-1 – Additional Exceptions
- Exhibit B – Description of PV System
- Exhibit C – Insurance Requirements
- Exhibit D – Special Terms and Conditions
- Exhibit E – Form of Energy Management Services Agreement

## EXHIBIT A

### DESCRIPTION OF PREMISES

Address: **97 Sam Ryder Road**, Chatham (West), Massachusetts

A certain parcel of land (capped landfill) situated in the Town of Chatham (West), Barnstable County, Massachusetts, comprised of approximately 13.025 acres as shown on the attached Sketch Plan/Photograph (the "Premises"), being a portion of a larger parcel of land of 42.279 acres as shown on a plan entitled "Notice of landfill Operation Plan", dated April 14, 1999, Prepared by Eldredge, Quigley & Clark for the Town of Chatham, recorded with the Barnstable County Registry of Deeds in Plan Book 549, Page 82.

The Premises shall include all necessary electrical and other utility sources. In the event there are not sufficient electric or other necessary utility sources located on the Premises to enable Cooperative to transmit Net Energy generated by the PV System to the Point of Delivery, Host Town agrees to grant Cooperative, Cooperative's Contractor(s) or the Distribution Company the right to install such utilities on, over and/or under the Premises, as necessary to operate the PV System, provided, however, the location of such utilities shall **NOT** puncture or damage the vinyl landfill cap and provided the location of such utilities shall be as reasonably designated by Host Town.

The Premises shall further include a non-exclusive right of ingress and egress to the leased property from the south along Water Pollution Control Facility Road. Planning and care will be required to maintain access of the noted road and the adjacent bike path, as shown on the Sketch Plan/Photograph attached below. The non-exclusive right of ingress and egress to the Premises for the purpose of design, procurement, installation, testing, commissioning, operation, inspection, maintenance, repair, improvements and removal of the PV System shall be available for use seven (7) days a week, twenty-four (24) hours a day.

For title see Order of Taking, recorded with the Barnstable County Registry of Deeds in Deed Book 1276, Page 384.

**Town of Chatham, MA  
Capped Landfill**

Solar PV Project Conditions  
June 1, 2011

**Leased Premises**  
567,387 S.F. +/-  
13,025 Ac. +/-

Access Route

Bike Path

Water Pollution Control Facility Rd.

Imagery Date: May 21, 2010

41°41'12.96" N 70°00'38.86" W elev: 58 ft

Eye alt: 1915 ft



## EXHIBIT A-1

### ADDITIONAL EXCEPTIONS

A. Cooperative's use of the Premises shall be subject to the following:

1. Full compliance by the Cooperative and/or Cooperative's Contractor(s) in all respects with the terms and conditions of current closure documentation governing the landfill on the Premises as referenced in the document entitled CLOSURE PLAN FOR THE CHATHAM SANITARY LANDFILL prepared by Weston and Sampson Engineers, Inc. dated October 1998. This document can be viewed in its entirety at the Chatham Town Offices.

Cooperative and/or Cooperative's Contractor(s) agree(s) to read said document and agree(s) to ask questions regarding such document, if the Cooperative or Cooperative's Contractor(s) have questions, and further NOT to proceed with any work on the Premises until such time as the Cooperative or Cooperative's Contractor(s) have had adequate opportunity to review and understand the limitations imposed by the closure documents.

2. Full compliance by the Cooperative and/or Contractor(s) in all respects with the terms and conditions of any and all post-closure use permits or orders granted at any time throughout the Term by the Massachusetts Department of Environmental Protection regarding the landfill located on the Premises.

B. Host Town's Reserved Uses of the Premises:

1. Host Town may have continued operation or maintenance responsibilities required pursuant to the current closure documentation governing the landfill on the Premises in accordance with the document entitled CLOSURE PLAN FOR THE CHATHAM SANITARY LANDFILL prepared by Weston and Sampson Engineers, Inc. dated October 1998. This document can be viewed in its entirety at the Chatham Town Offices. The Host Town will carry out such responsibilities at the sole expense of the Host Town, and Cooperative and/or Contractor will use its best efforts to cooperate with Host Town's prosecution and completion of such work.

**EXHIBIT B**

**DESCRIPTION OF PV SYSTEM**

The Town of Chatham PV Project is a 1.755 MW solar electric generation facility to be located on at the Town's closed landfill. The facility will consist of approximately 6,400 +/- photovoltaic modules mounted on a non-penetrating ballasted ground mount system. The 1.755 MW solar array will utilize approximately three inverters to convert the energy output from direct current (DC) to alternating current (AC). A transformer will then step up the voltage of the AC output to the level of the interconnecting utility's distribution line. The system will be designed to meet all Local, State and Federal codes and regulations. At such time that Contractor can fully describe the PV System, this Exhibit B shall be replaced in its entirety with the completed chart below.

PV SYSTEM:

System Manufacturer: \_\_\_\_\_

Nameplate Capacity: \_\_\_\_\_

Approximate Annual Energy Production:

\_\_\_\_\_ kWh

Location: \_\_\_\_\_

Preliminary Specifications:

\_\_\_\_\_

PV SYSTEM ASSETS:

Mounting Systems \_\_\_\_\_

Tracking Devices: \_\_\_\_\_

Inverters: \_\_\_\_\_

Integrators: \_\_\_\_\_

Related Equipment: \_\_\_\_\_

Electric Lines: \_\_\_\_\_

Permits: \_\_\_\_\_

Contracts: \_\_\_\_\_

## EXHIBIT C

### INSURANCE REQUIREMENTS

A. Cooperative's insurance obligations. Cooperative shall secure and maintain, at its own expense, throughout the Term of this Agreement the following insurance coverage. Cooperative shall provide Host Town with evidence, reasonably satisfactory to the Host Town, of its insurance hereunder, upon request.

1. ***Comprehensive commercial general liability insurance*** of at least \$2,000,000 combined single limit. This limit requirement may be satisfied by (i) the purchase of the specified limits in an individual policy, or (ii) with the purchase of additional umbrella or excess liability insurance which, in combination with the limits of the separate policies, provides the total limit required.
2. ***Excess liability*** coverage of at least \$10,000,000.
3. ***Additional insurance requirements.*** All insurance maintained by Cooperative shall:
  - a. include as additional insured Host Town but only for obligations arising out of this Agreement. The policies shall be endorsed to require that such additional insureds receive at least thirty (30) days notice of cancellation or non-renewal.
  - b. Such insurance shall contain a standard separation of insureds clause, whereby the actions of one insured will not negate coverage for another insured.
  - c. the insurance may be provided on a claims-made basis.
  - d. in the event such insurance is cancelled or non-renewed, Cooperative agrees to provide a 36 month discovery period endorsement for obligations under this Agreement.
  - e. The insurance shall include coverage for bodily injury liability, property damage liability, advertising injury liability and personal injury liability.
  - f. The insurance shall include blanket contractual liability coverage, including coverage for this Agreement.

B. Host Town's insurance obligations. Host Town shall secure and maintain, at its own expense, throughout the Term of this Agreement the following insurance coverage. Host Town shall provide Cooperative and/or Contractor with evidence, reasonably satisfactory to the Host Town, of its insurance hereunder, upon request.

1. **Commercial general liability insurance** written on an occurrence basis and endorsed to include its independent contractors, bodily injury liability, property damage liability, personal injury liability, premises/operations liability, and broad form general liability, with limits of not less than \$3,000,000 combined single limit and annual aggregate. This limit requirement may be may be satisfied by (i) the purchase of the specified limits in an individual policy, or (ii) with the purchase of additional umbrella or excess liability insurance which, in combination with the limits of the separate policies, provides the total limit required.

2. **Property insurance** on the Premises with a waiver of subrogation rights against the Cooperative and Contractor.

## EXHIBIT D

### SPECIAL TERMS AND CONDITIONS APPLICABLE TO THIS INTER-GOVERNMENTAL PROJECT DEVELOPMENT AGREEMENT

A. Manufacturers' Warranties: All major equipment must meet the following minimum manufacturer warranties:

1. Photovoltaic Module: Minimum of one (1) year product warranty from date of sale to first consumer purchaser for product workmanship and materials, plus a minimum performance warranty of twenty (20) years within which time the module will produce, under standard test conditions, a minimum of 80% of the product's minimum rated power at time of sale.
2. Inverters: Minimum of ten (10) years product warranty from date of sale to first consumer purchaser for product workmanship and materials.
3. Revenue grade production meters: Minimum of two (2) years following the effective commercial operation date that the meter system will be free from all defects in design, materials and workmanship.
4. Mounting equipment: Mounting system manufacturer(s) warranty that the mounting system(s) will be free from all defects in design, materials and workmanship for a period of five (5) years following the effective commercial operation date.

B. Taxes. The Parties acknowledge that Cooperative is a tax-exempt entity and that, to the extent lawful, Host Town will not charge any real or personal property taxes to Contractor. If obligated to assess real or personal property taxes, Host Town shall use reasonable efforts to establish an assessment rate and/or methodology that minimizes to the greatest extent allowable, the amount of real or personal property taxes imposed on Contractor.

C. Bonding. The obligations of the Cooperative set forth in Section 5.2 of this Agreement with respect to performance and payment bonds of installation subcontractors shall be replaced in the entirety with the bonding requirements placed upon the Contractor pursuant to Sections 4.7(e), (f) and (g) of the EMS Agreement.

D. Damage or Destruction of PV System. Host Town and Cooperative acknowledge and agree that for such time as Contractor is owner and operator of the PV System, in the event of damage or destruction of the PV System not caused by the gross negligence of Cooperative or Host Town or Cooperative's or Host Town's agents, representatives, customers, vendors, visitors, employees, contractors, or invitees, Contractor's and Cooperative's obligations upon PV System Loss set forth in Section 8.1 of the EMS Agreement shall control over Section 8.7 of this Agreement.

**EXHIBIT E**

**FORM OF ENERGY MANAGEMENT SERVICES AGREEMENT**

Please see attached.