

## SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is made as of the 1st day of March, 1994, by and among the Township of Clark ("Clark"), a municipality of the State of New Jersey, with offices located at Westfield Avenue, Clark, New Jersey 07076-1791, Rahway Valley Sewerage Authority, a governmental entity organized under the laws of the State of New Jersey, with offices located at 1050 Hazelwood Avenue, Rahway, New Jersey 07065 ("RVSA" or the "Authority"), the City of Rahway ("Rahway") with offices at 1 City Hall Plaza, Rahway, New Jersey 07065 and the Borough of Garwood ("Garwood"), with offices located at 403 Sough Avenue, Garwood, New Jersey, 07027, as well as the Town of Westfield ("Westfield"), the Boroughs of Kenilworth ("Kenilworth"), and Roselle Park ("Roselle Park"), and the Townships Cranford ("Cranford"), Springfield ("Springfield") and Woodbridge ("Woodbridge"), municipal corporations duly organized under the laws of the State of New Jersey (hereinafter Westfield, Kenilworth, Roselle Park, Cranford, Springfield and Woodbridge are collectively referred to as the "Consenting Municipalities").

### **W I T N E S S E T H**

WHEREAS, a certain action entitled "Borough of Mountainside v. Rahway Valley Sewerage Authority, the Boroughs of Garwood, Kenilworth and Roselle Park, the City of Rahway, the Town of

Westfield, and the Townships of Clark, Cranford, Springfield and Woodbridge," Docket No. L-016401-87, Superior Court of New Jersey, Union County ("Litigation"), was commenced by Mountainside in or about January 1987 (the above named defendants other than RVSA, all members of the Authority, are sometimes collectively referred to as the "Member Municipalities");

WHEREAS, the Member Municipalities entered into a certain agreement dated August 8, 1951 by which the Authority was established pursuant to the New Jersey Sewerage Authority Law, N.J.S.A. 40:14A-1 et seq. ("1951 RVSA Agreement");

WHEREAS, pursuant to Article 9.1 of the 1951 RVSA Agreement and prior to any Member Municipality selling flow rights to any other Member Municipality or any non-member municipality, such selling municipality is required to offer the same amount of flow rights for sale to each of the other Member Municipalities ("Right of First Refusal");

WHEREAS, RVSA and Clark entered into a certain agreement dated November 18, 1991 ("1991 Settlement Agreement") whereby Clark agreed to expend \$1.675 million toward purchase of flow rights and sewer improvements designed to reduce inflow and infiltration ("I/I Work") in the RVSA Sewerage System, and RVSA agreed to accept such expenditure in lieu of rental payments based on alleged excess peak flows during the 1988-89 and 1989-90 measuring years;

WHEREAS, by Resolution adopted by RVSA in March of 1993 ("1993 Resolution"), RVSA assessed rental fees of \$1.3959 million against Clark based on alleged excess peak flows during the 1990-91 and 1991-92 measuring years;

WHEREAS, Clark has heretofore expended \_\_\_\_\_ for I/I Work in the RVSA Sewerage Systems ("Paid I/I Expense");

WHEREAS, Clark has expressed its willingness to expend an additional sum of [\$800,000] for additional I/I Work in the RVSA Sewerage System ("Unpaid I/I Expense");

WHEREAS, RVSA deems the I/I work heretofore performed and the proposed additional I/I Work to be beneficial to the interests of RVSA and an acceptable alternative to rental payment for the 1990-1991 and 1991-1992 measuring years, to the assessment of additional rental for the 1992-1993 measuring years, and to certain potential assessments of additional rental in future measuring years;

WHEREAS, Garwood has agreed to sell .85 mgd peak flow ("Supplemental Garwood Flow") to Clark at a purchase price of \$850,000, and Clark has agreed to purchase the Supplemental Garwood Flow from Garwood at that price in partial satisfaction of Clark's obligations under the 1991 Settlement Agreement;

WHEREAS, Rahway has agreed to sell .\*\*\* mgd peak flow ("Supplemental Rahway Flow") to Clark at that price, and Clark has agreed to purchase the Supplemental Rahway Flow from Rahway at a

purchase price of \$400,000, in partial satisfaction of Clark's obligations under the 1991 Settlement Agreement;

WHEREAS, sewage flows from Clark into the RVSA Sewerage System through the \_\_\_\_\_ Spur, which Spur is also used for the transmission of sewage from \_\_\_\_\_;

WHEREAS, sewage also flows from Clark into the RVSA Sewerage System through the Winfield Spur, which Spur is also used for the transmission of sewage from Rahway;

WHEREAS, because the transmission capacities of these spurs are limited, peak flow transmission through these spurs, has been restricted so as not to exceed the Transmission Limitations established by the RVSA for each spur;

WHEREAS, Clark, the Authority, Garwood and Rahway (hereinafter collectively referred to as the "Participants") have undertaken settlement negotiations to resolve the disputes among the Participants directly;

WHEREAS, this Agreement, together with those documents incorporated herein by reference, are intended to embody all of the terms and conditions of the settlement among the Participants, and with the approval of the Consenting Municipalities; and

WHEREAS, the Participants and the Consenting Municipalities are entering into this Agreement to avoid further expense, inconvenience and delay, dispose of potentially burdensome and protracted litigation, permit, where applicable, the continued

fulfillment of their respective duties and responsibilities unhindered by the demands of the Litigation and the distraction and diversion of their personnel, and thereby put to rest the controversy regarding the Participants, except as may be otherwise expressly provided in this Agreement;

NOW, THEREFORE, in consideration of the terms, covenants, conditions and agreements contained herein, it is hereby agreed by and among the Participants, and with the approval of the Consenting Municipalities, as follows:

## **Article I**

### **DEFINITIONS**

Section 1.01. Definitions in Agreement. Throughout this Agreement, each of the following terms shall have the meaning set forth opposite said term unless the context clearly otherwise requires:

- (a) "Agreement" - This Agreement dated as of the date hereinabove first written, together with all attachments, and as it may be amended from time to time.
- (b) "Average Daily Flow" - The average number of gallons per day contributed to the Authority's sewer system by a municipality for the preceding measuring year, to be determined by continuous flow measurements.
- (c) "Consulting Engineer" - The Engineer of the Rahway Valley Sewerage Authority or his agent or representative.
- (d) "MGD" - Million gallons per day, a measure of sewage flow.

- (e) "NJDEPE" - The State of New Jersey, Department of Environmental Protection and Energy
- (f) "Peak Flow" - The maximum rate of flow in terms of million gallons per day contributed to the sewer and transmitted to the RVSA Sewerage System by a municipality for any period of time however brief.
- (g) "Peak Flow Rights" - The peak flow to which each Member Municipality is entitled in the Sewer, or parts thereof, in accordance with the terms of Article 8 of the 1951 RVSA Agreement.
- (g) "RVSA Sewerage System" - Any devices, facilities, structures, equipment or works owned or operated by the RVSA for the purpose of transmission, storage, treatment, recycling and reclamation of industrial and domestic wastes, including sewers, conduits, pipelines and other conveyances, outfall sewers, sewage collection systems, cooling towers and ponds, pumping, power and other equipment and their appurtenances; extensions, improvements; and any other works including sites for the treatment process or for ultimate disposal of residues resulting from such treatment.
- (h) "Sewer" - A pipe or conduit constituting a part of the RVSA Sewerage System, used or usable to collect and convey sewerage and to which ground, surface, storm and other non-sewerage waters or liquids are not admitted intentionally.
- (i) "Sewerage" - A combination of the water-borne wastes from residences, businesses, institutions and industrial establishments, together with such ground, surface and stormwaters as may be present in the RVSA Sewerage System.
- (j) "Transmission Limitation" - The maximum rate of flow in terms of million gallons per day contributed to the sewer and transmitted to a specified spur of the RVSA Sewerage System by a municipality for any period of time however brief.

- (k) "Treatment Works Approval" - An approval issued by the NJDEPE pursuant to N.J.S.A. 58:10A-6 and N.J.A.C. 7:14A-12.3, or pursuant to former N.J.S.A. 58:12-3.
- (l) "Treatment Works Sewer Connection Endorsement" - An application to be filed with the RVSA by any User not subject to NJDEPE Treatment Works Approval, prior to building, installing, modifying or operating any facility for the collection, treatment, or discharge of wastewater, including any connection as defined herein.

Section 1.02. Additional Terms. The following additional terms are defined elsewhere in this Agreement: "1991 Settlement Agreement", "1993 Resolution", "Actual Peak Flow", "Assignment Judge", "Balance", "Bond Ordinance", "I/I Work", "Mediator", "Paid I/I Expense", "Right of First Refusal", "Supplemental Garwood Flow", "Supplemental Rahway Flow", "Surcharge", "Unpaid I/I Expense", and .]]]]]

Section 1.03. Other Terms. If a term is not defined in this Agreement, the term shall be defined as found in the following documents or sources in the following order of priority:  
(a) 1951 RVSA Agreement; (b) N.J.S.A. 40:14A-1; (c) any other New Jersey statute which is applicable to sewerage authorities; and  
(d) any New Jersey regulations which are applicable to sewerage authorities.

## **Article II**

### **Purchase/Sale of Flow**

Section 2.01. Garwood has offered to sell and Clark has agreed to purchase the Supplemental Garwood Flow at a purchase price of \$850,000, subject to the terms contained herein. The Consenting Municipalities agree to waive their respective Rights of First Refusal as regards the Supplemental Garwood Flow, pursuant to the terms of the 1951 RVSA Agreement.

Section 2.02. Rahway has offered to sell and Clark has agreed to purchase the Supplemental Rahway Flow at a purchase price of \$400,000, subject to the terms contained herein. The Consenting Municipalities agree to waive their respective Rights of First Refusal as regards the Supplemental Rahway Flow, pursuant to the terms of the 1951 RVSA Agreement.

Section 2.03. RVSA approves the sale of the Supplemental Garwood Flow and the Supplemental Rahway Flow from Garwood to Clark and from Rahway to Clark, respectively, pursuant to the 1951 RVSA Agreement, subject to the terms contained herein.

## **Article III**

### **Performance Under the 1991 Settlement Agreement**

Section 3.01. The combined purchase price for the Supplemental Garwood Flow and the Supplemental Rahway Flow shall be applied toward satisfaction of Clark's obligations under the



1991 Settlement Agreement, leaving a balance of \$425,000 ("Balance").

Section 3.02. A portion of the Paid I/I Expense equalling the Balance shall be applied toward satisfaction of Clark's Obligations under the 1991 Settlement Agreement.

Section 3.03. Clark shall produce to RVSA such documentation as will verify the Paid I/I Expense. RVSA reserves the right to challenge the Paid I/I Expense based upon the documentation produced, insofar as the documentation evidences expenditures unrelated to I/I Work.

Section 3.04. Upon purchase of the Supplemental Garwood Flow and the Supplemental Rahway, and upon RVSA's determination that the Paid I/I Expense exceeds the Balance, Clark's obligations under the 1991 Settlement Agreement shall be deemed satisfied.

#### **Article IV**

##### **Performance Under the 1993 Resolution**

Section 4.01. That portion of the Paid I/I Expense not applied toward satisfaction of Clark's obligations under the 1991 Settlement Agreement shall be applied toward payment of the rental fees assessed pursuant to the 1993 Resolution.

Section 4.02. On or before June 1, 1994, Clark shall adopt a bond ordinance in the amount of the Unpaid I/I Expense ("Bond Ordinance"). The full amount of the bond issued pursuant

to this ordinance shall be expended for I/I Work in the RVSA Sewerage System before December 31, 1997, which expenditure shall be applied toward payment of the rental fees assessed pursuant to the 1993 Resolution.

Section 4.03. Clark shall produce to RVSA such documentation as will verify that the work performed pursuant to Section 4.02 shall have constituted I/I Work. RVSA reserves the right to challenge the work performed based upon the documentation produced, insofar as the documentation evidences expenditures unrelated to I/I Work.

Section 4.04. Upon i) completion of the work performed pursuant to Section 4.02, ii) purchase of the Supplemental Garwood Flow and the Supplemental Rahway, and iii) RVSA's determination that the work performed pursuant to Section 4.02 shall have constituted I/I Work, the rental fees assessed against Clark under the 1993 Resolution shall be deemed paid.

## **Article V**

### **Future Assessment for Excess Flow**

Section 5.01. Commencing in the measuring year 1993 - 1994, Clark shall be assessed a rental fee on an annual basis for excess flows ("Surcharge") as follows:

Section 5.01.01. In any measuring year in which recorded peak flows exceed 5.0 mgd more than ten times, a

\$10,000 Surcharge shall be assessed.

Section 5.01.02. In any measuring year in which recorded peak flows exceed 6.0 mgd more than ten times, a \$60,000 Surcharge shall be assessed, in addition to the Surcharge assessed pursuant to Section 5.01.01.

Section 5.01.03. In any measuring year in which recorded peak flows exceed 7.0 mgd more than ten times, an \$85,000 Surcharge shall be assessed, in addition to the Surcharges assessed pursuant to Section 5.01.01 and Section 5.01.02.

Section 5.01.04. In any measuring year in which recorded peak flows exceed 8.0 mgd more than ten times, a \$115,000 Surcharge shall be assessed, in addition to the Surcharges assessed pursuant to Section 5.01.01, Section 5.01.02 and Section 5.01.03.

Section 5.01.05. In any measuring year in which recorded peak flows exceed 10.0 mgd more than ten times, a \$250,000 Surcharge shall be assessed, in addition to the Surcharges assessed pursuant to Section 5.01.01, Section 5.01.02, Section 5.01.03 and Section 5.01.04.

Section 5.02. On or before June 1, 1995, 1996 and 1997 Clark shall amend the Bond Ordinance to add any Surcharge assessed for the previous measuring year. To the extent that the bond issued pursuant to the Bond Ordinance as amended by this Section

shall exceed the Unpaid I/I Expense, it shall be expended for I/I Work in the RVSA Sewerage System before December 31, 1998.

## **Article VI**

### **Restrictions on New Development**

Section 6.01. Upon execution of the Agreement, RVSA will process all applications for local endorsements that for development that will not result in the generation of any additional flow discharged into the RVSA Sewerage System.

Section 6.02. New development that will result in the generation of additional flow discharged into the RVSA system will be permitted if, and only if, additional peak flow rights are first purchased from Garwood, or, in a case of development upon properties located along the Winfield Spur and connected to the Winfield Spur, purchased from Rahway, in amounts equivalent to that which are required by the new development, and in accordance with New Jersey Department of Environmental Protection Formulae. No development in Clark will be purchase of peak flow rights from Rahway for development other than that not connected to the Winfield Spur.

Section 6.02.01. Except as provided in Section 6.03, purchase of additional peak flow rights pursuant to this Section shall be in increments of .01 mgd, at a purchase price to be agreed upon with Garwood or Rahway.

Section 6.02.02. If at any time Garwood or Rahway is determined to have no peak flow rights to sell to Clark, RVSA reserves the right prohibit a sale of peak flow rights to Clark and to prohibit new and/or additional hookups in Clark, notwithstanding any contradictory provision contained herein.

Section 6.03. Clark may submit such evidence as demonstrates a reduction in flow, in terms of the number of days that Clark exceeds its peak flow rights as compared to said number of days in the measuring year of 1992 - 1993, which reduction is occasioned by demolition of properties within Clark and replacement of the demolished properties with new facilities generating less flow. Upon demonstrating to the satisfaction of RVSA such reduction in flow, RVSA may approve such new development in Clark as will generate flow not to exceed such reduction, notwithstanding any contradictory provisions contained with this section.

## **Article VII**

### **Mediation of Disputes**

Section 7.01. In the event that any dispute arises out of this Agreement, then and in that event, the Participants shall be permitted to make application to the Assignment Judge of Union County ("Assignment Judge") for appointment of a neutral mediator ("Mediator"), to be named within thirty (30) days of submission of such application, for the purpose of resolving such dispute. Hearings may be conducted before the Mediator at the request of any of the Participants, however, a final determination by the mediator shall be rendered within thirty (30) days after the Mediator's appointment. Any party shall have the right to appeal the determination of the Mediator to the Assignment Judge within thirty (30) days of the determination being rendered, solely based upon the record established before the Mediator. Only in the event of a finding by the Court that the decision of the Mediator was arbitrary, capricious, contrary to New Jersey law and/or contrary to the Agreement may the Mediator's determination be reversed or modified.

## **Article VIII**

### **REPRESENTATIONS, WARRANTIES AND COVENANTS**

Section 8.01. Representations, Warranties and Covenants of the Authority. The Authority hereby makes the following representations, warranties and covenants.

Section 8.01.1. Corporate Existence of Authority.

The Authority is a body politic and corporate and a public instrumentality of the State of New Jersey, duly organized and validly existing under the laws of the State of New Jersey, with full legal right, power and authority to enter into and perform its obligations under this Agreement.

Section 8.01.2. Binding Obligation of Authority.

The Authority has duly authorized the execution and delivery of this Agreement and this Agreement has been duly executed and delivered by the Authority and constitutes the legal, valid and binding obligation of the Authority, enforceable against the Authority in accordance with its terms.

Section 8.02. Representations, Warranties and Covenants of Clark. Clark hereby makes the following representations, warranties and covenants.

Section 8.02.1. Corporate Existence of Clark.

Clark is a municipal corporation, duly organized and validly existing under the laws of the State of New Jersey, with full legal right, power and authority to enter into and perform its obligations under this Agreement.

Section 8.02.2. Binding Obligation of Clark.

Clark has duly authorized the execution and delivery of this Agreement and this Agreement has been duly executed and delivered by Clark and constitutes a legal, valid and binding obligation of

Clark, enforceable against Clark in accordance with its terms.

Section 8.03. Representations, Warranties and Covenants of Rahway. Rahway hereby makes the following representations, warranties and covenants.

Section 8.03.1. Corporate Existence of Rahway. Rahway is a municipal corporation, duly organized and validly existing under the laws of the State of New Jersey, with full legal right, power and authority to enter into and perform its obligations under this Agreement.

Section 8.03.2. Binding Obligation of Rahway. Rahway has duly authorized the execution and delivery of this Agreement and this Agreement has been duly executed and delivered by Rahway and constitutes a legal, valid and binding obligation of Rahway, enforceable against Rahway in accordance with its terms.

Section 8.04. Representations, Warranties and Covenants of Garwood. Garwood hereby makes the following representations, warranties and covenants.

Section 8.04.1. Corporate Existence of Garwood. Garwood is a municipal corporation, duly organized and validly existing under the laws of the State of New Jersey, with full legal right, power and authority to enter into and perform its obligations under this Agreement.

Section 8.04.2. Binding Obligation of Garwood. Garwood has duly authorized the execution and delivery of this



Agreement and this Agreement has been duly executed and delivered by Garwood and constitutes a legal, valid and binding obligation of Garwood, enforceable against Garwood in accordance with its terms.

## **Article IX**

### **Remedies**

Section 9.01. Remedies for Default. Any remedy provided in this Agreement shall be taken and construed as cumulative; i.e., in addition to each and every other remedy herein provided; and in addition to all other suits, actions or legal proceedings, the Authority shall be entitled as of right to an injunction or other equitable relief against any breach of any of the provisions of this Agreement.

## **Article X**

### **Successors and Assigns**

Section 10.01. Assignment. Clark, Rahway or Garwood shall not, in whole or in part, assign its rights and responsibilities under this Agreement, or convey, assign, transfer or otherwise dispose of any right, title or interest under this Agreement, without first obtaining the written approval of the Authority.

## **Article XI**

### **Miscellaneous Provisions**

Section 11.01. Severability. If any provision of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall not be deemed affected thereby.

Section 11.02. Governing Law. This Agreement shall be governed by and construed and enforced pursuant to the substantive and procedural laws of the State of New Jersey.

Section 11.03. Headings. All headings in this Agreement are for ease of reference only and do not constitute a part of this Agreement.

Section 11.04. Waiver. Neither inspection by the Authority nor any of its agents, nor any orders, measurements or certificate by the Authority or any of its agents, nor any order by the Authority for the payment of money nor payment for, nor acceptance of, the whole nor any part of the work, nor any extension of time, shall operate as a waiver of any provisions of this Agreement, or of any power herein reserved to the Authority, or any right to damages herein provided, nor shall any waiver of any breach of this Agreement be held to be a waiver of any other or subsequent breach.

Section 11.05. This Agreement is the result of extensive negotiations between the Participants. It is hereby agreed that this Agreement shall not be considered the exclusive product of any one of the Participants and no provision of this Agreement shall be construed as a matter of law for or against any

of the Participants.

Section 11.06. This Agreement contains the entire agreement among the Participants as it relates to the disputes involving Garwood. There are no other terms, understandings, obligations, covenants, representations, statements, conditions or inducements, oral or otherwise, of any kind whatsoever. No change or addition shall be made to this Agreement except by written memorandum executed by the Participants. The requirement for such a writing shall apply to any waiver of the requirement of a written modification pursuant to this Article, and this requirement shall be deemed an essential term of this Agreement. This Agreement may be executed in several counterparts, each of which shall be an original, but all of which shall constitute one and the same instrument.

Section 11.07. This Agreement has been executed on behalf of the Participants by their proper corporate officers who, by their execution and delivery, individually represent that the execution and delivery of this Agreement has been duly authorized by the appropriate authority and that they have the requisite capacity to bind their respective governmental agency.

Section 11.08. The Participants acknowledge that this Agreement is intended to supplement and amend any and all existing agreements among the Participants, whether written or oral and, upon execution and delivery hereof, all such previous agreements, if any, or representations shall become merged in this Agreement, including but not limited to the 1951 RVSA Agreement.

Section 11.09. The Participants agree to execute any and all further documents and to do such further and other things that may be reasonably necessary to effectuate fully the provisions of this Agreement including a Settlement Order in the form attached as Exhibit 3, which shall be held in escrow by counsel to the Authority until this Agreement has been executed on behalf of all of the Participants.

Section 11.10. Clark, Garwood and Rahway shall adopt such ordinances as are necessary, pursuant to N.J.S.A. 40:8A-1, et seq., to enter an Interlocal Services Contract with the Participants to this Agreement, and RVSA shall adopt such resolutions as are necessary, pursuant to N.J.S.A. 40:8A-1, et seq., to enter an Interlocal Services Contract with Clark, Garwood and Rahway.

Section 11.11. The Participants acknowledge that this is a fair agreement and that it is not the result of any fraud, duress or undue influence exercised by any of the Participants or any third persons upon any of the Participants or upon some third party. This Agreement contains the entire understanding of the

Participants as it relates to the disputes involving the Participants, and there are no representations, promises, warranties, covenants or undertakings other than those expressly set forth herein. Legal counsel have been independently selected, and the Participants represent, each to the other, that their respective legal counsel have fully reviewed and fully explained to them the legal and practical effect of this Agreement.

IN WITNESS WHEREOF, this Agreement is executed as of the day and year first above written.

ATTEST:

RAHWAY VALLEY SEWERAGE AUTHORITY

\_\_\_\_\_  
Richard M. Gonder, Secretary

By: \_\_\_\_\_  
Allen Chin, Chairman