

MEMORANDUM OF UNDERSTANDING
BETWEEN THE CITY OF REDLANDS
AND NORTH AMERICA BIOMASS COMPANY, LLC

This Memorandum of Understanding (“MOU”) is made this 1st day of February, 2011 (“Effective Date”), by and between the City of Redlands, a municipal corporation and general law city organized pursuant to the laws of the State of California (the “City”), and North America Biomass Company, LLC, a limited liability company (“NABC”). The City and NABC are sometimes individually referred to herein as a “Party” and, together, as the “Parties.”

RECITALS

WHEREAS, NABC desires to produce energy from the California Landfill gas and wastewater treatment plant digester gas; and

WHEREAS, the City owns land contiguous to its Wastewater Treatment Plant suitable for the construction of a gasification facility; and

WHEREAS, a gasification facility would serve as an appropriate buffer to the City’s Wastewater Treatment Plant; and

WHEREAS, a gasification facility could provide cost effective processing and diversion of the City’s Wastewater Treatment Plant’s biosolids; and

WHEREAS, construction of a gasification facility on land contiguous to the City’s Wastewater Treatment Plant provides an opportunity for the operation and sale of electricity to the City; and

WHEREAS, the City and NABC desire to enter into negotiations relating to the execution of a lease of City-owned property and other ancillary agreements relating to the construction of a gasification facility on such property, and the construction of a biogas facility at the City’s Wastewater Treatment Plant, and the purpose of this MOU is to establish a period during which NABC shall have the right to exclusively negotiate with the City for these purposes;

NOW, THEREFORE, in consideration of the mutual promises contained herein, the City of Redlands and North America Biomass Company, LLC agree as follows:

AGREEMENT

Section 1. Exclusive Negotiations.

A. NABC shall enter into good faith, exclusive negotiations with the City for the possible lease of approximately six acres of real property (the “Lease”) owned by the City and located in the unincorporated area of the County of San Bernardino (the “Property”) upon

which NABC proposes to construct a gasification facility capable of processing approximately 4,700 tons of City-generated biosolids and 60,000 tons of municipal solid waste annually (the “Gasification Facility”), at no cost to the City. The City shall make available and deliver to NABC such City-generated biosolids provided the City determines it reasonably can do so, at no greater cost to the City than the cost it incurs for disposing of such biosolids as of the Effective Date of this MOU, plus inflation over time as measured by the annual change in the Consumer Price Index, all urban consumers (Los Angeles-Riverside-Orange County). The Property to be leased is a portion of an approximately nineteen acre parcel of real property located immediately south of, and contiguous to, the City’s Wastewater Treatment Plant, and is more particularly described in Exhibit “A” attached hereto and incorporated herein by this reference.

B. Further, the City and NABC shall enter into good faith negotiations for the construction of a biogas renewable energy facility (the “Biogas Facility”) at the City’s Wastewater Treatment Plant, in close proximity to the existing header feed-in and enclosed flare, to produce electricity from gases generated from the City’s California Street Landfill and Wastewater Treatment Plant digesters at no cost to the City, and to sell all of the electricity generated by the Biogas Facility to the City at a discount to Southern California Edison Company rates. As part of the negotiations, NABC shall be responsible for obtaining all necessary permits for the Biogas Facility.

Section 2. Negotiating Period. This MOU shall expire (unless earlier terminated pursuant to Section 4, hereof) on the date the County of San Bernardino approves a conditional use permit (“CUP”) for construction of the Gasification Facility on the Property (the “CUP Approval Date”) (the “Initial Term”). If, at the expiration of the Initial Term, NABC has not executed the Lease in a form satisfactory to City staff and submitted it to the City’s City Council, then this MOU shall remain terminated, unless extended by the mutual written agreement of the Parties. If, prior to or on the CUP Approval Date, NABC has executed the Lease and submitted it to the City’s City Council, then this MOU shall be automatically extended beyond the Initial Term for an additional sixty (60) calendar days during which time the City’s City Council shall review and consider the Lease for approval and give such public notices and hold such public meetings or hearings which the City, in its sole discretion, deems to be either necessary or prudent for compliance with law. In the event that the City’s City Council, after due consideration, decides in its sole discretion not to approve the Lease, then this MOU shall immediately expire and all rights and obligations of the Parties under this MOU shall terminate upon the date of the City’s written notice to NABC of the same.

Section 3. Cooperation and Good Faith. At all times during the Initial Term of this MOU, and any extended term of this MOU, the Parties shall negotiate diligently and in good faith to carry out the obligations of this MOU and shall cooperate with each other and supply such information and documents as may be within each Party’s possession and reasonably requested by the other Party.

Section 4. Early Termination. This MOU shall expire, and all rights and obligations of the Parties under this MOU shall be immediately terminated, upon the occurrence of any of the following circumstances:

- A. The mutual agreement of the Parties;
- B. A determination by the City's City Council, after at least thirty (30) calendar days prior written notice to NABC of the City Council's intent to consider such issue, that the negotiations between the Parties, despite the good faith of each Party, will not lead to approval of the Lease; or
- C. The expiration of thirty (30) calendar days after one Party sends the other Party written notice of the noticed Party's failure to timely and diligently perform any of its obligations under this MOU, and the noticed Party's failure to cure or correct the failure to perform within the same thirty (30) calendar day period, or if such failure cannot be cured or corrected within thirty (30) calendar days, the noticed Party's failure to begin in good faith and diligently pursue such cure or correction within the thirty (30) calendar day period; or
- D. On the date of the City's approval of the Lease with NABC; or
- E. Upon a final denial by the County of San Bernardino of NABC's CUP application for construction of the Gasification Facility.

Section 5. Lease Provisions. The Lease and other ancillary agreement provisions will include, but not be limited to, the following:

- A. An anticipated Lease term of approximately thirty (30) years;
- B. The payment of an annual rent by NABC to the City;
- C. The requirement that NABC obtain comprehensive liability insurance, in amounts and with carriers reasonably acceptable to the City and NABC, and containing endorsements naming the City as additional insured and providing that such insurance is primary with respect to the City and non-contributing to any insurance or self insurance maintained by the City.
- D. That NABC and its contractors comply with applicable federal and state prevailing wage laws in connection with the construction of the Gasification and the Biogas Facility.
- E. NABC will take possession of the Property under the Lease only after the Gasification Facility is permitted for construction by all appropriate regulatory agencies;
- F. NABC will sell electricity to the City at a price less than the price of electricity purchased by the City from the Southern California Edison Company provided such price it does not fall below the price existing as of rate at the Effective Ddate of thise MOU.
- G. The City will use its reasonable efforts to maximize the quality and quantity of gas from the City's California Street Landfill and Wastewater Treatment Plant digesters for delivery to NABC by upgrading, from time to time, and in its sole discretion, its facilities to meet applicable regulatory requirements, and NABC will fund any additional upgrades sought by NABC to further enhance the quantity and quality of gas;
- H. NABC will process and divert, annually, approximately 4,700 tons of biosolids from the City's Wastewater Treatment Plant and 60,000 tons of municipal solid waste from the California Street Landfill at no cost to the City. The City shall, make available and deliver to NABC such municipal solid waste provided the City determines it reasonably can do so, at no greater cost to the City than the cost it incurs for disposing of such solid waste as of the Effective Date of this MOU, plus inflation over time as measured by the annual change in the Consumer Price Index, all urban consumers (Los Angeles-Riverside-Orange County); and

I. NABC will provide security to the City, in amounts and forms determined by and acceptable to the City, to pay for all costs required for the removal of the Gasification Facility, and returning the Property to its original state as of the Effective Date of this MOU, in the event the Gasification Facility is not successfully completed, or ceases to reasonably operate for any reason.

J. NABC will provide the City with an opportunity to financially participate in NABC's subsequent gasification project undertakings that are, in part, based upon, or result from, the technology associated with the successful construction and operation of the Gasification Facility. Such participation shall be upon such terms as are mutually agreed to between NABC and the City.

Section 6. NABC Funding Agreements. As a condition of the City's entry into the Lease, NABC shall have entered into funding agreements with the City to pay any costs incurred by the City for specialized technical and financial consultants, and for special legal services (collectively the "Consulting Services"), in connection with the City's review of the proceedings for and construction of the Biogas Facility and the Gasification Facility, and negotiation of the lease and any ancillary agreements. The costs for these Consulting Services shall not, without NABC's prior written consent, exceed a total of Two Hundred Thousand Dollars (\$200,000).

Section 7. Application for Conditional Use Permit. The City consents to NABC's filing of an application for a CUP with the County of San Bernardino for construction of the Gasification Facility on the Property. The Mayor of the City is hereby authorized to execute the application for the CUP, and any other documents reasonably required by NABC for constructing the Gasification Facility on the Property, on behalf of the City. NABC, and its successors and assigns, shall defend, indemnify and hold harmless the City of Redlands and its elected officials, officers, agents and employees from and against any and all claims, actions, and proceedings to attach, annul, void or set aside approval of the CUP. This indemnification shall include, but not be limited to, damages, fees, costs, liabilities and expenses incurred in such actions or proceedings, including any award of attorneys' fees. In the event of any legal challenge in connection with respect to the approval of the CUP, within thirty (30) calendar days of the same, NABC shall file with the City a performance bond or irrevocable letter of credit (together, the "Security") in a form and amount reasonably satisfactory to the City to ensure NABC's performance or its defense and indemnity obligations under this MOU. The failure of NABC to provide the Security shall be deemed an express acknowledgement and agreement of NABC, that the City shall have the right to abandon the approval of the CUP and/or request the County of San Bernardino to revoke the CUP. The provision of this Section 7 shall survive any termination of this MOU.

Section 8. Indemnification Against Costs. NABC acknowledges and agrees that the provisions of the funding agreements and the Lease shall insure that the City incurs no costs in connection with NABC's processing of the CUP, or any other regulatory entitlement or permits associated with any approvals for the construction of the Gasification Facility, or NABC's construction of the facility. The funding agreements and the lease shall contain provisions providing for NABC's defense and indemnity of the City against the City. The provisions of this Section 8 shall survive any termination of this MOU.

Section 9. Entire Agreement. This MOU represents the entire agreement of the Parties, and supersedes all prior negotiations and agreements between the Parties, with respect to the subject matter hereof.

Section 10. Governing Law. The MOU shall be governed by and construed in accordance with the laws of the State of California.

Section 11. Authority. The representatives of the City and NABC who have executed this MOU represent that they are an official or officer of their respective employers, and are vested with the authority to execute this MOU on behalf of their employers, the City and NABC, respectively.

Section 12. Discretionary Approval. By its execution of this MOU, the City is not committing itself to, or agreeing to undertake: (i) any leasing or other disposition of property to NABC; or (ii) any other acts or activities requiring the subsequent independent exercise of discretion by the City. Execution of this MOU by the City is merely an agreement to enter into a period of exclusive negotiations according to the terms hereof, reserving final discretion and approval by the City as to any Lease. Nothing herein shall be deemed a covenant, promise or commitment by the City to issue any entitlement with regard to the entitlement construction of the Facility, or to approve any Lease with NABC. This MOU does not vest NABC with any entitlement. NABC acknowledges and agrees that nothing herein restricts nor shall be deemed to restrict the City in the free exercise of its discretion, or in the free exercise of its executive, quasi-judicative or quasi-legislative powers, except as may be expressly provided for herein.

Section 13. No Third Party Beneficiaries. This MOU is for the sole and exclusive benefit of the City and NABC. No other persons or entities are intended to be, or shall be considered, a beneficiary of the performance of any of the Parties' obligations under this MOU.

Section 14. Interpretation. This MOU is the product of mutual arms-length negotiation and drafting, and each Party represents and warrants to the other that it has been represented by legal counsel in the negotiation and drafting of this MOU. Accordingly, the rule of construction which provides that ambiguities in a document shall be construed against the drafter of that document shall have no application to the interpretation and enforcement of this MOU. In any action or proceeding to interpret or enforce this MOU, the finder of fact may refer to such extrinsic evidence not in direct conflict with any specific provision of this MOU to determine and give effect to the intention of the Parties.

Section 15. Notices, Demands and Communications Between the Parties. Formal notices, demands and communications between the Parties shall be given in writing and personally served or dispatched by registered or certified mail, postage prepaid, return receipt requested, to the principal offices of the Parties, as designated in this Section, or faxed to the facsimile number listed below followed by dispatch as above described. Such written notices, demands and communications may be sent in the same manner to such other addresses as either Party may from time to time designate by mail as provided in this Section. Any such notice shall be deemed to have been received upon the date personal service is affected, if given by personal

service, or upon the expiration of three (3) business days after mailing, if given by certified mail, return receipt requested, postage prepaid.

If notice is to be made to the City:

Attention: City Manager
City of Redlands
35 Cajon Street, Suite 200
P.O. Box 3005 (mailing)
Redlands CA 92373
Telephone No. (909) 798-7510

If notice is to be made to NABC:

Attention: Graeme Bethell, President
North America Biomass Company, LLC
#133 – 1335 Bear Mountain Parkway
Victoria, BC
Canada, V9B 6T9
Telephone No. (250) 478-8820

Section 16. Counterpart Originals. This MOU may be executed in duplicate originals, each of which is deemed to be an original.

Section 17. Attorneys' Fees/Venue. In the event any action is commenced to enforce or interpret the terms or conditions of this MOU the prevailing party in such action, whether resolved by mediation, arbitration or judgment, shall, in addition to any costs and other relief, be entitled to the recovery of its reasonable attorneys' fees, including, in the case of the City, attorneys' fees incurred for any use of its in-house counsel at prevailing rates for private counsel performing similar work in San Bernardino County. In the event that suit is brought by either Party relating to this MOU, the Parties agree that venue shall be vested exclusively in the state courts of the County of San Bernardino, California, or where appropriate, in the United States District Court, Southern District of California, Riverside, California. The provisions of this Section 17 shall survive any termination of this MOU.

Section 18. Defense and Indemnity. NABC shall defend, indemnify and hold harmless the City, its elected officials, officers, employees and agents from and against (i) any and all third party claims, losses, proceedings, damages, causes of action, liability, costs and expenses (including reasonable attorneys' fees) arising from or in connection with or caused by any negligent or intentionally wrongful act or omission of NABC and its contractors, agents and employees in connection with NABC carrying out its obligations under this MOU; and (ii) any action or proceeding brought by any third party challenging the validity of any provision of, or the entirety of, this MOU, the Lease, any ancillary agreement contemplated hereby, or the approval of the CUP or any other entitlement of permit associated with the construction of the Gasification Facility or the Biogas Facility. The City shall fully cooperate in the defense of any such actions and shall provide to NABC such documents and records as are relevant to such actions. The provisions of this Section 18 shall survive any termination of this MOU.

Section 19. No Damages Relief Against City. The Parties acknowledge and agree that the City would not have entered into this MOU had it been exposed to damage claims from NABC for any breach of this Agreement. As such, the Parties agree that in no event shall NABC be entitled to recover damages of any kind against the City for breach of this Agreement. NABC's sole remedy for the City's breach of this Agreement shall be specific performance. The provisions of this Section 19 shall survive any termination of this MOU.

Section 20. Assignment. There shall be no assignment or other transfer ("Assignment") of the rights and/or obligations of the NABC under this MOU unless the City has given its prior written approval to the Assignment. The City shall not unreasonably withhold its approval of an Assignment that meets the following requirements: (i) the Assignment is to a validly organized and existing business entity which is an affiliate or subsidiary of the NABC, or which NABC is the majority owner (meaning owning at least 51% of the outstanding stock, partnership interest, or limited liability interest entitled to voting rights in the business entity); (ii) the Assignment is to an entity that expressly assumes the obligations of NABC under this MOU up to the date of the Assignment; and (iii) NABC remains fully responsible for the performance of, and the liable for the obligations of, NABC under the MOU up to the date of the Assignment; (iv) the assignee is financially capable of performing the duties and discharging the obligations it is assuming. NABC shall promptly notify the City in writing of any and all changes whatsoever in the identity of the persons in control of NABC and the degree thereof.

Section 21. Relationship of Parties. It is specifically understood and agreed by and between the Parties that the construction of the Gasification Facility on the Property, construction of the Biogas Facility, and NABC's performance of its obligations under this Agreement are private undertakings, and that neither Party is acting as the agent of the other Party in any respect hereunder. The City and NABC also hereby renounce the existence of any form of joint venture or partnership between them, and agree that nothing contained herein or in any document executed in connection herewith shall be construed as making the City and NABC joint ventures or partners.

North American Biomass Company, LLC

City of Redlands

Graeme Bethell, President
North America Biomass Company, LLC

Pete Aguilar, Mayor
City of Redlands

ATTEST:

Sam Irwin, City Clerk