



**Council Meeting: December 10, 2013**

**SUBJECT: Discussion and Consideration of Approval of the Second Amendment to Agreement with Waste Management of California, Inc. for Long Term Disposal of Solid Waste**

**REPORT IN BRIEF**

Sunnyvale disposes of its solid waste at the Kirby Canyon Landfill in San Jose under a long-term disposal agreement with Waste Management of California. The City's agreement is nearly identical to, and coordinated with, contracts between Waste Management and the cities of Mountain View and Palo Alto, which partner with Sunnyvale on operation of the SMaRT Station®. The agreements expire on December 31, 2021.

The cities and Waste Management have negotiated coordinated Second Amendments to their disposal agreements. The amendments will reduce future disposal costs for the cities and release Waste Management from a "Favored Nations" clause that has prevented the company from marketing Kirby Canyon disposal to other jurisdictions.

City disposal costs currently resemble a fixed cost due to the contract's minimum annual quantity requirements, which increase between now and 2021. The Second Amendment would immediately reduce the minimum annual disposal amount below current quantities and continue to reduce it through 2021. This will effectively change the disposal cost to a variable cost. Disposal costs will decline when recycling or composting programs reduce disposal quantities, thus aligning the disposal contract's provisions with the City's Zero Waste goals. Approval of the amendment would reduce three-city landfill disposal costs through December 31, 2021 by an estimated \$4.3 to \$7.3 million.

Sunnyvale's amendment also extends its disposal agreement for an additional 10 years, through 2031, in exchange for a 10% reduction in the disposal fee and elimination of minimum disposal requirements between 2022 and 2031.

Staff is recommending that Council authorize the City Manager to execute the Second Amendment to the Agreement between the City of Sunnyvale and Waste Management of California, Inc. for Long Term Disposal of Solid Waste (Attachment A).

**BACKGROUND**

Since October 1, 1993, Sunnyvale and its partner cities, Mountain View and Palo Alto, have disposed of their solid waste at the Kirby Canyon Landfill in San Jose under long-term disposal agreements with Waste Management of California, operator of Kirby Canyon. Each of the three cities has a separate, but nearly identical disposal agreement with Waste Management that became effective on October 15, 1991. The agreements and the Memorandum of Understanding (MOU) among the three cities provide for waste to be delivered to the Sunnyvale Materials Recovery and Transfer Station (SMaRT Station®). There, recyclables are removed in a materials recovery process, with the unrecycled residues transferred to Kirby Canyon for disposal, using large tractor-trailer trucks.

The 1991 agreements anticipated that disposal at Kirby Canyon would begin on July 1, 1993 and continue until October 15, 2021. Waste Management encountered construction delays and in 1993 the cities agreed to First Amendments that delayed the start of operations until October 1, 1993 and extended the agreements to December 31, 2021.

The agreements are currently set to expire in 2021. A key financial feature of the agreements and the MOU is that they include a projection by each city of its "Allocation Quantity," the amount of waste the cities, in total, anticipated disposing during each calendar year. The numbers generally climb between 1993 and 2021 in anticipation of population and economic growth in the communities. As part of the First Amendments, the unused Allocation Quantity amounts from July 1 to October 31, 1993 were added to the previous amounts for 2021. Under the terms of the agreements this total allocation quantity is reserved for the cities by Waste Management.

Because all waste disposed under the contracts comes through the SMaRT Station and is delivered in loads containing waste from all three cities, the allocation quantities of the cities are combined and managed as a single number, as viewed from Waste Management's perspective. As the landfill operator, this feature of the contract provides Waste Management with the information needed to develop the disposal site (obtain permits, install liner systems, etc.) at an appropriate pace throughout the 30 years. It also provides it with a baseline revenue commitment from the cities that is reflected in the Disposal Fee, which is currently \$39.50 per ton.

The contracts establish a band of disposal quantity surrounding each year's Allocation Quantity. If deliveries exceed 110% of the Allocation Quantity, those "Excess Quantity" amounts cost an additional 12%. A "Minimum Quantity" is established at 75% of the Allocation Quantity. The cities are obligated to pay Waste Management's disposal fee for the Minimum Quantity each calendar year, regardless of the actual amount delivered. These "put or pay" payments do not include the various local and state disposal fees and taxes, which

currently total \$20.59 per ton and are only charged on tons physically delivered. The largest of these is the City of San Jose Landfill Excise Tax, which is \$13 per ton.

When the cities pay for Minimum Quantity tons that are not actually delivered, they receive credit against future delivery of tons that are above that future year's Minimum Quantity. In this way, the "put or pay" payments go into a "bank" from which the cities may make withdrawals in future years if tons disposed exceed the Minimum Quantity. Attachment B displays disposal quantities as a percentage of the Minimum Quantity and the put or pay amounts for each year since the SMaRT Station opened.

The first "put or pay" payment was owed to Waste Management for 2002, when tons fell 0.36% below the Minimum Quantity. Payments are owed for all years below 100%. Through 2012, the cities have paid \$6,065,000 in put-or-pay payments to Waste Management. An additional amount estimated to be about \$863,000 will be owed for 2013.

The significant downturn in the local economy that began in 2008 further depressed quantities disposed, primarily in the business and construction sector. While, in theory, the unused future capacity owned by the cities could be sold to another city wishing to dispose of waste at Kirby Canyon, quantities everywhere have also declined reducing demand for landfill capacity. The \$13 per ton San Jose landfill tax is another barrier to sale of unused capacity (for both the cities and Waste Management itself).

The waste reduction or "Zero Waste" goals being pursued by the three partner cities are expected to further reduce materials sent to landfill, which will further increase the gap between minimum quantity tons and actual tons and increase payments under the current landfill agreements. The chart shown as Attachment C illustrates the widening gap between the cities' declining disposal quantities and the put-or-pay minimum requirement in the existing agreements.

## **EXISTING POLICY**

### **Council Policy Manual**

Goal 3.2E. Minimize potential future City liability for wastes generated in the City.

Goal 3.2F. Maintain sound financial strategies and practices that will enable the City to provide comprehensive solid waste management services to the community while keeping refuse rates at or below countywide averages for cities using cost of service pricing.

**CEQA REVIEW**

City use of the SMaRT Station to transfer solid waste to Kirby Canyon Landfill and the development and operation of Kirby Canyon have previously undergone environmental review in the form of two Environmental Impact Reports (EIRs), one for each facility. The proposed action is consistent with the project descriptions in those EIRs and no further CEQA review is required.

**DISCUSSION**

The City of Sunnyvale, its SMaRT Station partners, and Waste Management have negotiated a Second Amendment to the three city agreements for Long Term Disposal of Solid Waste. The main objective of this Second Amendment is to reduce the minimum disposal quantities required in the agreements and therefore reduce the obligation that the cities now have to pay for landfill capacity that is not being used. It is projected that the proposed Second Amendment will save the cities between \$4.3 and \$7.3 million over the current term of the Agreement, which ends on December 31, 2021. Sunnyvale's Second Amendment would also extend the term of the disposal agreement through 2031 in return for a 10% reduction in the per ton price of disposal, effective January 1, 2022.

Under the current contract terms, the cities see the landfill disposal expense largely as a fixed cost. That is, diverting an additional ton from disposal does not reduce the amount paid to Waste Management because the cities are delivering less than the minimum quantity.

The current minimum quantity amounts were estimated at the start of the Agreement in 1991 and grow each year to allow for the increased disposal that was anticipated in 1991. But disposal quantities declined sharply during the "dot com bust" in 2001 and have never again reached the peak seen in 2000. With tons remaining low and the minimum "put or pay" quantity increasing each year, the gap between the two widens each year between now and 2021 and the 20-year financial plan anticipates increasingly large put or pay payments throughout the remainder of the contract term.

The Second Amendment would reset the minimum quantity to a level below current disposal quantities. Each year from 2014 to 2021, the minimum quantity would decline by 2% instead of increasing, as it does now. This would change the disposal expense from a fixed cost to a variable cost. That is, each additional ton diverted would reduce the amount paid to Waste Management. This will provide a financial benefit from diversion and align the disposal contract's provisions with the cities' Zero Waste goals.

Key features of Sunnyvale's Second Amendment include:

- Waste Management agrees to a reduction in the minimum quantity of tons required to be delivered each year from 2014 through 2021. The amount is reset at 95% of the actual 2013 quantity, and then reduced by an additional 2% each year, starting with 2014.
- The City waives future rights to \$6-7 million of disposal credits that will have accrued through 2013 under the minimum quantity tonnage provision of the Agreement (tons not delivered but paid for).
- The City agrees to drop the "Comparable Fees/Favored Nations" clause in the Agreement. This clause currently prohibits Waste Management from offering a lower disposal cost to any other municipality for capacity amounts less than the capacity reserved for the cities. The combination of San Jose's \$13 per ton landfill tax and the Favored Nations clause has effectively prevented Waste Management from marketing the site for municipal disposal contracts.
- Waste Management agrees to drop the Excess Quantity Charge provision of the contract. This clause would require the cities to pay a premium to Waste Management if deliveries exceeded 110% of the Allocation Quantity, a level that was approached, but not reached, in 2000.
- Addition of a Disposal Fee Premium of \$7.00 per ton to the current disposal fee to be discounted (in increments of 25%, 50%, 75% and 100%) as Waste Management contracts for additional tonnage to be delivered to Kirby Canyon from other municipalities, either hauled directly to the landfill or delivered to the SMaRT Station for materials recovery, then transfer to the landfill.
- The Agreement with Sunnyvale is extended for ten additional years, through 2031. At the start of the ten-year extension, the Disposal Fee drops by 10%. The \$7.00 Disposal Fee Premium is no longer charged and there is no minimum quantity requirement after 2021.

By replacing the existing Put or Pay obligation with the Disposal Fee Premium, the Second Amendment changes disposal from a fixed cost to a variable cost. As shown in Table 2, at the amounts currently anticipated to be disposed, the amendment would save the City and its ratepayers an estimated \$2.4 to \$4.1 million in contract disposal fees through calendar 2021. Sensitivity to the effects of the percent diverted is displayed in both Table 1 and Table 2, which compare the landfill cost reduction at SMaRT Station diversion rates of 20% (similar to current results) and 25% (the current long-term plan assumption). During the 2022-2031 contract extension proposed for Sunnyvale, the amendment requires neither Put or Pay nor Disposal Fee Premium payments and the City would save at least 10% per year compared to current financial plan assumptions.

If Waste Management succeeds in attracting new municipal disposal customers to Kirby Canyon, the amendment provides for the \$7 per ton Disposal Fee Premium to decrease in 25% increments tied to the annual amounts disposed by those new customers. The amounts of reduction are:

- 25,000 or less annual new tons – No reduction (premium is \$7.00 per ton)
- Between 25,000 and 50,000 annual new tons – 25% reduction (premium is reduced by \$1.75, to \$5.25 per ton)
- Between 50,000 and 75,000 annual new tons – 50% reduction (premium is reduced by \$3.50, to \$3.50 per ton)
- Between 75,000 and 100,000 annual new tons – 75% reduction (premium is reduced by \$5.25, to \$1.75 per ton)
- 100,000 or more annual new tons – 100% reduction (no premium paid by cities)

Table 1 conservatively assumes that Waste Management will attract less than 25,000 tons per year from new municipal customers. Any cost savings from a reduction in the Disposal Fee Premium will be in addition to the savings amounts displayed in Table 1.

Table 1. Components of Anticipated 2014-2021 Reduction in Landfill Disposal Costs

<u>Under Current Agreement 2014-2021, with 25% MSW Diversion at SMaRT</u>		
Tons Disposed	1,097,268	
Disposal Fees @ \$39.50 ton + CPI		\$ 69,066,526
Put or Pay Payments @ \$39.50 ton + CPI		\$ 16,172,431
Total Paid to Waste Management		\$ 85,238,958
<u>After Second Amendment 2014-2021, with 25% MSW Diversion at SMaRT</u>		
Tons Disposed	1,097,268	
Disposal Fees @ \$39.50 ton + CPI		\$ 69,066,526
Disposal Fee Premium @\$7.00 ton + CPI		\$ 8,239,748
Put or Pay Payments @ \$39.50 + \$7.00 ton + CPI		\$ 582,825
Total Paid to Waste Management		\$ 77,889,100
Savings with Amendment		\$ 7,349,858
<u>Under Current Agreement 2014-2021, with 20% MSW Diversion at SMaRT</u>		
Tons Disposed	1,170,419	
Disposal Fees @ \$39.50 ton + CPI		\$ 73,670,961
Put or Pay Payments @ \$39.50 ton + CPI		\$ 13,072,717
Total Paid to Waste Management		\$ 86,743,678
<u>After Second Amendment 2014-2021, with 20% MSW Diversion at SMaRT</u>		
Tons Disposed	1,170,419	
Disposal Fees @ \$39.50 ton + CPI		\$ 73,670,961
Disposal Fee Premium @\$7.00 ton + CPI		\$ 8,789,065
Put or Pay Payments @ \$39.50 + \$7.00 ton + CPI		\$ -
Total Paid to Waste Management		\$ 82,460,026
Savings with Amendment		\$ 4,283,652

Should Waste Management also contract for additional municipal tonnage of more than 100,000 tons, thereby removing the \$7.00 Disposal Fee Premium in its entirety, the cities would save a total of \$15.6 million through 2021, with Sunnyvale's share at \$8.6 million. In this scenario, the final year, 2021, would present the highest annual savings, \$2.6 million for the cities combined, and \$1.4 million in savings to Sunnyvale at 20% diversion (\$1.7 million savings if the SMaRT Station diverts 25%).

By approving the Second Amendment, the City and its partner cities will reduce their total disposal charges going forward and make landfill disposal a variable, rather than fixed, cost. In doing so, the cities will give up the rights to the disposal tons "in the bank" i.e., tons paid for but not delivered in previous years. With the minimum quantity commitment already higher than current disposal quantities and climbing even higher in future years, there is little prospect for the cities to recover any value from the "bank" tons.

Similarly, the “Favored Nations” clause in the current agreement has prevented Waste Management from marketing the disposal site to other jurisdictions while providing no value to the cities over the past 20 years.

### **FISCAL IMPACT**

Approval of the amendment would reduce three-city landfill disposal costs through December 31, 2021 by an amount estimated to be between \$4.3 and \$7.3 million. The actual amount saved will depend on four factors:

1. The amount of garbage delivered to the SMaRT Station, a factor driven largely by local economic conditions
2. The amount of the delivered garbage that is diverted from disposal by the SMaRT Station’s materials recovery operations
3. The extent to which Waste Management is able to market additional tons to Kirby Canyon Landfill, thereby reducing the \$7 per ton premium. The savings estimates in this RTC conservatively assume no reduction in the \$7 premium, i.e. that Waste Management will not find new municipal customers.
4. Consumer Price Index changes between now and 2021

As shown in Table 2, the amount of the total cost reduction captured by Sunnyvale reflects allocation of the savings among the three cities consistent with the provisions of the MOU among the cities.

Table 2. Summary of Anticipated 2014-2021 Reduction in Landfill Disposal Costs

	<b>20% Diversion</b>	<b>25% Diversion</b>
Sunnyvale	\$2,368,003	\$4,063,001
Mountain View	\$1,004,516	\$1,723,542
Palo Alto	<u>\$ 911,133</u>	<u>\$1,563,315</u>
<b>Total</b>	<b>\$4,283,652</b>	<b>\$7,349,858</b>

Assumptions: Garbage deliveries consistent with amounts received in 2012/2013  
 Annual inflation of 2%;  
 No savings from reduction in the \$7 per ton Disposal Fee Premium

During the subsequent ten-year extension of the Sunnyvale contract with Waste Management (calendar years 2022-2031), the disposal fees paid by the City to Waste Management would be reduced by 10%. The \$7 per ton Disposal Fee Premium would also end on January 1, 2022 and the City would no longer be subject to a minimum disposal quantity. The long-range financial plan currently assumes that Sunnyvale will pay about \$3,332,000 in landfill disposal fees for FY 2022/23. The reduced disposal fee would save the City approximately \$333,000 during that year and similar amounts (plus inflation) each calendar year through 2031.

If all four parties approve the amendments, staff will reflect the appropriate fiscal impacts in the upcoming budget and refuse rate setting processes used to recommend refuse collection rates for FY 2014/15 and beyond. The amount anticipated to be saved by Sunnyvale through 2021 at 20% and 25% diversion is equal to 0.7% to 1.2%, respectively, of the amount to be collected from ratepayers in the next eight years (through 2021). The City will see additional savings prior to 2022 if the changes introduced by the Second Amendment allow Waste Management to sell capacity to new municipal customers. For example, if 100,000 "new" tons arrive at Kirby Canyon in 2021, elimination of the Disposal Fee Premium would save the City an additional \$609,000 that year. The total saved in 2021 would be \$1,388,000 to \$1,700,000, or 3.0% to 3.4% of the currently anticipated rate revenue for 2021.

### **PUBLIC CONTACT**

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, at the Sunnyvale Senior Center, Community Center and Department of Public Safety; and by making the agenda and report available at the Sunnyvale Public Library, the Office of the City Clerk and on the City's Web site.

### **ALTERNATIVES**

Alternative 1 - Authorize the City Manager to execute the Second Amendment to the Agreement between the City of Sunnyvale and Waste Management of California, Inc. for Long Term Disposal of Solid Waste (Attachment A).

Alternative 2 - Take no action.

**RECOMMENDATION**

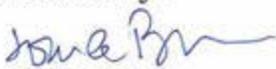
Based on the anticipated cost savings and the strategic considerations discussed above, staff recommends Alternative 1 - Authorize the City Manager to execute the Second Amendment to the Agreement between the City of Sunnyvale and Waste Management of California, Inc. for Long Term Disposal of Solid Waste (Attachment A).

Reviewed by:



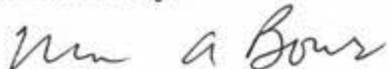
Grace Leung, Director, Finance Department

Reviewed by:



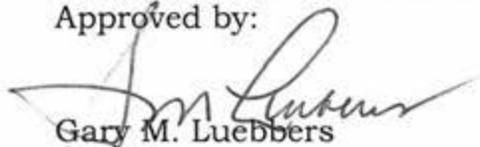
Joan Borger, City Attorney

Reviewed by:



for John Stufflebean, Director, Environmental Services Department  
Prepared by: Mark Bowers, Solid Waste Programs Division Manager

Approved by:



Gary M. Luebbers  
City Manager

**Attachments**

Attachment A - Second Amendment to Agreement between City of Sunnyvale and Waste Management of California, Inc. for Long Term Disposal of Solid Waste

Attachment B - Disposal quantities delivered as a percentage of the Minimum Quantity, 1993-2012.

Attachment C - Chart comparing future minimum quantity requirements (with and without Second Amendment) with currently anticipated tonnages.

**SECOND AMENDMENT TO  
AGREEMENT BETWEEN  
THE CITY OF SUNNYVALE  
AND  
WASTE MANAGEMENT OF CALIFORNIA, INC.  
FOR LONG TERM DISPOSAL OF SOLID WASTE**

This SECOND AMENDMENT TO AGREEMENT (the "**Amendment**") is by and between the CITY OF SUNNYVALE, a municipal corporation (the "**City**") and WASTE MANAGEMENT OF CALIFORNIA, INC., a California corporation ("**Contractor**"). The City and Contractor are sometimes referred to individually as a "**Party**," and collectively referred to as the "**Parties**." Capitalized terms used in this Amendment without definition have the meanings specified in Appendix 1 to the 1991 Agreement (defined below).

**RECITALS**

WHEREAS, the City and Contractor entered into an agreement dated September 10, 1991 (the "**1991 Agreement**") under which Contractor has provided disposal of Municipal Solid Waste generated in the City and other Municipal Solid Waste delivered to Sunnyvale Materials Recovery and Transfer Station (the "**Transfer Station**");

WHEREAS, in 1991, Contractor also entered into long-term disposal agreements with the City of Mountain View and the City of Palo Alto (together with the City, the "**Participating Agencies**") that are substantially similar to the 1991 Agreement;

WHEREAS, on or about September 1, 1993, the Participating Agencies each entered into First Amendments with Contractor amending their 1991 disposal agreements; and

WHEREAS, on or about August 2013, the Participating Agencies and Contractor executed a Memorandum of Understanding regarding amendments to the 1991 disposal agreements, including the 1991 Agreement.

**AGREEMENT**

NOW, THEREFORE, in consideration of the recitals and mutual promises contained herein, the Parties agree to the below-referenced amendments to said 1991 Agreement, and all amendments thereto, as follows:

1. For purposes of this Second Amendment, the "**Commencement Date**" shall be December \_\_, 2013.

2. Section 1.02 Term shall be amended to read as follows:

“1.02 Term. The Term of this Agreement shall be (a) thirty (30) years from the Effective Date or (b) upon full utilization of City's Allocation Quantity, whichever occurs first (the "Term").

As of the Commencement Date, the Term of this Agreement is extended until 12:00 a.m. on January 1, 2032.”

3. Section 1.03 Extension of Term shall be amended to read as follows:

“1.03 Extension of Term. In the event Contractor is able to negotiate an extension of the term of the lease for the land on which the Disposal Facility is located (as more particularly described in Section 3.09), City shall have the option to extend the Term for an additional period of up to ten (10) years, upon the same terms and conditions as contained in this Agreement. City may exercise this option by delivering to Contractor a written notice stating that it elects to extend the Term and specifying the length of the extension. Such notice shall be delivered one year before the expiration of the initial 30-year Term or upon consumption of ninety-six (96) percent of City's Allocation Quantity, whichever occurs first. Contractor will notify City when City has consumed 95% of its Allocation Quantity. In the event City fails to deliver the notice required by this Section, the Term shall automatically expire as provided for in Section 1.02.

As of the Commencement Date, Section 1.03 shall no longer apply.”

4. Section 3.03 Disposal Capacity shall be amended to read as follows:

“3.03 Disposal Capacity. Contractor shall reserve for and provide to City the amount of disposal capacity at the Disposal Facility necessary to accommodate City's annual Allocation Quantity. City may deliver more than the annual Allocation Quantity shown on Exhibit A in any year, subject only to limitations imposed by permits for Kirby Canyon and payment of the Excess Quantity Disposal Fee, if such fee is applicable under Section 4.02.A.

As of the Commencement Date, the Allocation Quantity will no longer be in use. Instead, each year during the Term, Contractor shall reserve for the Participating Agencies an amount of disposal capacity at the Disposal Facility equal to a “**Reserve Disposal Capacity**.” For calendar year 2014, the Reserve Disposal Capacity will equal:

(Participating Agencies' actual 2013 Municipal Solid Waste disposal total at the Disposal Facility) x 95% x 98%

For each subsequent year, the Reserve Disposal Capacity will equal 98% of the previous year's Reserve Disposal Capacity. City shall be responsible for allocating Reserve Disposal Capacity among the Participating Agencies.”

5. Section 3.04 Transferability of Disposal Capacity shall be amended to read as follows:

“3.04 Transferability of Disposal Capacity. City may at any time and from time to time during the Term transfer all or any portion of its Allocation Quantity to any municipal corporation which is also contracting with City for use of the Transfer Station, including, but not limited to, one or more of the Participating Agencies. Such transfers are not subject to the approval of Contractor. City shall, however, give notice to Contractor of all such transfers, indicating the name of the transferee municipality, the amount of the Allocation Quantity transferred to it, and the date on which such transfer becomes effective.

As of the Commencement Date, the provisions immediately above are no longer applicable and City may at any time and from time to time during the Term deliver to and dispose of MSW generated in and collected from any municipal corporation and processed at the Transfer Station, providing Kirby Canyon has sufficient disposal capacity, based on Contractor’s sole determination, which may not be unreasonable, and providing that City provides Contractor at least 24 hours’ notice.”

6. Section 4.02(A) Disposal Fee shall be amended to read as follows:

“4.02(A) Disposal Fee. Commencing upon October 1, 1993, City shall pay to Contractor a Disposal Fee of \$21.99 per Ton, adjusted as provided in Section 4.02.C (plus taxes and fees, as provided in Section 4.02.B), for all Municipal Solid Waste disposed of at the Disposal Facility which was generated within City and transported to the Disposal Facility by the Transfer Station Operator. Notwithstanding the foregoing, in the event City and the Participating Agencies deliver to the Disposal Facility less than seventy-five percent (75%) of their aggregate annual Allocation Quantity (the "Minimum Quantity"), City shall pay the Disposal Fee (but not the taxes and fees described in Section 4.02.B) calculated as though City and the Participating Agencies had delivered the Minimum Quantity to the Disposal Facility. Also notwithstanding the foregoing, in the event City and the other Participating Agencies deliver to the Disposal Facility more than one hundred ten percent (110%) of their aggregate annual Allocation Quantity and City or the Participating Agencies have transferred more than ten percent (10%) of their aggregate annual Allocation Quantity to any municipal corporation other than one of the Participating Agencies, then the Disposal Fee for that amount of Municipal Solid Waste delivered which is in excess of one hundred and ten percent (110%) of the aggregate annual Allocation Quantity (the "Excess Quantity") shall be \$24.63 per Ton, adjusted as provided in Section 4.02.C (plus taxes and fees, as provided in Section 4.02.B). All references to "Disposal Fee" in this Agreement shall include both the basic Disposal Fee and the Excess Quantity Disposal Fee.

As of the Commencement Date, the provisions immediately above are no longer applicable (except that City shall pay for the Minimum Quantity shortfall for 2013 pursuant to the second sentence above, with the Minimum Quantity being reduced based on excluding the number of days in 2013 on and after the Commencement Date) and City shall pay to Contractor (i) a “**Disposal Fee**” of \$39.50 per Ton, (ii) a “**Disposal Fee Premium**” of \$7.00

per Ton, and (iii) taxes and fees, as provided in Section 4.02(B), for all Municipal Solid Waste transported to the Disposal Facility from the Transfer Station. Each of these amounts is subject to adjustment as provided in this Agreement. On January 1, 2022, the then-current Disposal Fee shall be reduced by ten percent (10%) and the Disposal Fee Premium will be discontinued. The Disposal Fee Premium shall be subject to reduction pursuant to Section 4.02(A)(i) below.

(i) If Contractor and/or City enters into any written disposal agreement (in the case of the City, a transfer and disposal agreement is included), either directly with one or more incorporated city or county (a "**New Municipal Customer**") for disposal of Municipal Solid Waste at the Disposal Facility or with one or more transporter who is collecting and transporting Municipal Solid Waste under contract with a New Municipal Customer for disposal at the Disposal Facility, and said disposal agreement calls for a disposal fee which is less than the City's Disposal Fee, the City's Disposal Fee Premium shall be discounted, as follows, based on Contractor's projections of the annual disposed-of amounts from all New Municipal Customers:

- 25,000 or less annual tons: No reduction in Disposal Fee Premium
- More than 25,000 but less than 50,000 annual tons: 25% Reduction in Disposal Fee Premium
- Between 50,000 and 74,999 annual tons: 50% Reduction in Disposal Fee Premium
- Between 75,000 and 99,999 annual tons: 75% Reduction in Disposal Fee Premium
- 100,000 or more annual tons: 100% Reduction of Disposal Fee Premium

If a New Municipal Customer agreement commences at a time other than January 1, the annual ton threshold amounts immediately above will be adjusted based on the partial calendar year. For example, with regard to the second category, if a New Municipal Customer agreement commences on April 1, 25,000 will be changed to 18,750 and 50,000 changed to 37,500 for such partial year.

The Disposal Fee Premium discount will be applied when Contractor's services under the New Municipal Customer disposal agreement commence, and continue until the New Municipal Customer agreement terminates. Following each calendar year, there will be a true-up calculation where Contractor will determine the actual annual disposed-of amounts from all New Municipal Customers. If actual annual disposed-of amounts vary from the previous Contractor estimate, and would have resulted in a different Disposal Fee Premium discount if known when the estimate was made, then, within 30 days of the true-up calculation, Contractor will issue a rebate to City (if actual tons are higher) or City will issue payment to Contractor (if actual tons are lower) based on the actual annual disposed-of amounts. For purposes of illustration, if a New Municipal Customer agreement commences on January 1 and the estimated annual tons are 60,000, Contractor will reduce the City's Disposal Fee Premium by 50% when such agreement commences. If the New Municipal Customer's actual annual tons for such year are 40,000 tons, then City will reimburse Contractor as follows:

Tons of Municipal Solid Waste to which the 50% Disposal Fee Premium was applied x \$1.75

Contractor's projections of the annual disposed-of amounts from a New Municipal Customer will be adjusted annually based on the previous year's disposal tons.

This Section 4.02(A)(i) applies only to disposed of Municipal Solid Waste and does not include any materials that are recycled or otherwise brought in for beneficial reuse or cover.

(ii) If during any calendar year of the Term the Disposal Facility receives for disposal an amount of Participating Agencies Municipal Solid Waste from the Transfer Station which is less than that year's Reserve Disposal Capacity, as referenced in Section 3.03 above, City shall pay the Disposal Fee and Disposal Fee Premium (but not the taxes and fees described in Section 4.02(B)) calculated as though Participating Agencies, through the Transfer Station, had delivered the Reserve Disposal Capacity tonnage to the Disposal Facility. Contractor shall provide the City an invoice for any such amounts owed on or before January 31 of the following year, which shall be paid within 30 days. For purposes of illustration, if the Transfer Station delivers 120,000 Tons of Participating Agencies Municipal Solid Waste to the Disposal Facility in a calendar year, and such calendar year's Reserve Disposal Capacity amount is 140,000, then City shall pay Contractor an amount equal to 20,000 multiplied by the sum of the then-existing Disposal Fee and Disposal Fee Premium. Reserve Disposal Capacity shortages and overages shall not carry over to the next year. The put-or-pay obligation set forth in this Section shall terminate in its entirety on January 1, 2022."

7. Section 4.02(C) Annual Adjustment shall be amended to read as follows:

"4.02(C) Annual Adjustment. The Disposal Fee set forth above shall be adjusted as of July 1, 1992 and annually thereafter to reflect changes in the San Francisco-Oakland-San Jose Metropolitan Area Consumer Price Index (All Urban Consumers; 1982-84 = 100) compiled and published by the United States Department of Labor, Bureau of Labor Statistics. The Index level as of May, 1991 (136.2) shall be the Base Index. The Disposal Fee shall be adjusted on July 1, 1992, for example, by multiplying \$21.99 by one plus the percentage change from the Base Index to the Index level as of May, 1992.

As of the Commencement Date, the Disposal Fee and Disposal Fee Premium shall be adjusted as of July 1, 2014, and annually thereafter throughout the Term, to reflect changes in the San Francisco-Oakland-San Jose Metropolitan Area Consumer Price Index (All Urban Consumers; 1982-84 = 100) compiled and published by the United States Department of Labor, Bureau of Labor Statistics. The July 1, 2013 Disposal Fee adjustment reflected the Index change through April 2013. The adjustments on July 1, 2014 will then reflect the change in Index level between April 2013 (244.675) and December 2013. The Index level as of December 2013 shall then become the Base Index for adjustments on July 1, 2015 and following years. The Disposal Fee and Disposal Fee Premium shall be adjusted on July 1,

2015, for example, by multiplying the then-applicable fees by one plus the percentage change from the Base Index (December 2013) to the Index level as of December 2014.”

8. Section 4.02(D) Comparable Fees shall be amended to read as follows:

“4.02(D) Comparable Fees. If Contractor enters into any agreement or arrangement with any other Person with an Allocation Quantity equal to or less than City’s, under with such Person is allowed to deposit Municipal Solid Waste at the Disposal Facility for a fee or charge which is less than the Disposal Fee then charged to City pursuant to Section 4.02.A (as adjusted pursuant to Sections 4.02.B and 4.02.C), then City shall not be required to pay a Disposal Fee in excess of the amount of such lesser fees or charges, for so long as such lesser fee or charge is in effect. This paragraph is not intended to apply to charges imposed by Contractor on solid waste delivered to the Disposal Facility by Contractor, or by companies wholly owned and controlled by Contractor or Waste Management of North America, Inc., or Waste Management, Inc. so long as the solid waste so delivered is not collected, transported or otherwise handled pursuant to a contractual relationship which, either directly or indirectly, secures disposal capacity at the Disposal Facility and which is between the company delivering the waste to the Disposal Facility and a city, county, district or other political subdivision.

As of the Commencement Date, Section 4.02(D) shall no longer apply.”

9. Section 4.02(E) Credit for Tonnage Paid for Under Minimum Quantity Provisions shall be amended to read as follows:

“4.02(E) Credit for Tonnage Paid for Under Minimum Quantity Provisions. If City pays for any Tons which are not physically delivered to the Disposal Facility, pursuant to the Minimum Quantity provisions of Section 4.02.A, upon subsequent delivery of such paid-for but unused portion of its Allocation Quantity, City shall receive full credit against the then-current Disposal Fee for the amount previously paid, provided that City may not receive such credit in any year unless and until it has delivered at least 75 percent of the annual Allocation Quantity specified for that year.

As of the Commencement Date, all credits accumulated to date shall be waived by the Participating Agencies and no remuneration for payment of disposal fees prior to the Commencement Date with regard to waste material not delivered to the Disposal Facility shall be received by the Participating Agencies. Beginning on the Commencement Date, the Participating Agencies shall not receive any credit for any Tons which are not physically delivered to the Disposal Facility but which are paid for as specified in Section 4.02(A)(ii).”

10. Section 4.03(D) Proportionate Share shall be amended as follows:

“4.03(D) Proportionate Share. As of the Commencement Date, to the extent the costs of complying with newly enacted governmental regulations (or changes to regulations which can be charged to City) are attributable to Municipal Solid Waste already in place at the Disposal Facility at the time such new regulations are issued, the City's proportionate share

of such costs shall be determined by multiplying such costs by a fraction, the numerator of which is the amount of Municipal Solid Waste then deposited in the Disposal Facility which originated in the City and the denominator of which is the total amount of Municipal Solid Waste then deposited in the Disposal Facility from all sources, unless otherwise provided for by the enacted legislation. Contractor shall be reimbursed for such costs (including its actual and reasonable financing costs) through monthly installment payments which will amortize the costs incurred over the remaining Term of the Agreement, as specified in Section 1.02. The parties agree that the prime rate, as published on a monthly basis by the Wall Street Journal, is a reasonable financing cost.

To the extent the costs of complying with such regulations are attributable to Municipal Solid Waste not yet in place at the Disposal Facility at the time such new regulations are issued, then City's proportionate share of such costs shall be determined by multiplying such costs by a fraction, the numerator of which is the Reserve Disposal Capacity sum for the remaining Term and the denominator of which is the total remaining permitted capacity of the Disposal Facility. The cost of compliance shall be calculated on a "per Ton" basis amortized over the remaining life of the Disposal Facility. In all cases in which the costs of compliance with new or changed governmental regulations attributable to Municipal Solid Waste not yet in place are sought to be charged to the City, Contractor shall provide City, on an annual basis, with evidence showing (1) that the work required by the regulations has been performed, and (2) the amount of costs actually incurred. If the actual costs are less than the costs as estimated on which an increase in Disposal Fee was based, the Disposal Fee will be reduced accordingly, so as to offset any overpayments made on the basis of the estimated cost. If the actual costs are more than the costs as estimated, on which an increase in Disposal Fee was based, the Disposal Fee may be increased accordingly, so as to cover any underpayment made on the basis of the estimated cost."

11. Section 4.04(A) Monthly Billing shall be amended to read as follows:

"4.04(A) Monthly Billing. As of the Commencement Date, on or before the fifteenth (15th) day of each month, Contractor shall submit to the Transfer Station Operator an invoice for Disposal Fees and Disposal Fee Premiums (and taxes and governmental fees, if applicable) covering Municipal Solid Waste delivered to the Disposal Facility during the prior month by the Transfer Station Operator on behalf of City and the Participating Agencies. The invoice shall be accompanied by a report showing the following information: date of each delivery; vehicle identification number; quantities in Tons (gross weight, tare weight, and all Tons) or cubic yards; rate per Ton; and cost per load. Contractor shall concurrently send a copy of the invoice and report to the City. Contractor shall not be responsible for the allocation of the Disposal Fees or Disposal Fee Premiums (or taxes and fees) or the determination of proportionate disposal of Municipal Solid Waste by and between City and the Participating Agencies. City shall pay or cause the Transfer Station Operator to pay Contractor within fifteen (15) days after its receipt of the invoice and report. If City disputes a portion of an invoice, it shall pay the undisputed portion within fifteen (15) days and notify Contractor in writing of the reason(s) for nonpayment of the disputed portion. City may request additional information from Contractor regarding an invoice and report within fifteen (15) days from receipt. Such request shall be in writing and shall describe the information requested with

reasonable specificity. Contractor shall furnish the requested information to City within thirty (30) days from the date of the request. All disputes arising under this Section 4.04 shall be referred to binding arbitration pursuant to this Subsection. The arbitrator shall be selected and the arbitration conducted in accordance with the procedures set forth in Exhibit F. Notwithstanding the foregoing, in the event of a dispute between City and the Transfer Station Operator and/or the Participating Agencies regarding City's proportionate share of the invoice rather than the total amount due according to the invoice, City shall not withhold any portion of its payment, and Contractor shall have no obligation to refund any portion of said payment upon resolution of the dispute between City, the Transfer Station Operator and/or the Participating Agencies."

12. Section 4.04(B) Annual Reconciliation shall be amended to read as follows:

"4.04(B) Annual Reconciliation. At the end of each calendar year of the Term, Contractor shall submit to the Transfer Station Operator an invoice for Disposal Fees covering (1) the Minimum Quantity Disposal Fees not previously collected by Contractor and/or (2) the Excess Quantity Disposal Fees accrued during the year by the Transfer Station Operator on behalf of City and the Participating Agencies. A copy shall be sent concurrently to City. Contractor shall not be responsible for the allocation of Minimum Quantity Disposal Fees or Excess Quantity Disposal Fees between City and the Participating Agencies. City shall pay its share, if any, of such Fees to Contractor (through Sunnyvale or the Transfer Station Operator) within thirty (30) days after the City's receipt of the copy of the invoice.

As of the Commencement Date, required end of year invoicing will be as per Section 4.02(A)(ii)."

13. Section 5.02 Insurance shall be amended to read as follows:

"5.02 Insurance. As of the Commencement Date:

A. Types and Amounts of Coverage. Contractor, at Contractor's sole cost and expense, shall procure from an insurance company or companies licensed to do business in the State of California and maintain in force at all times during the Term the following types and amounts of insurance:

1. Workers' Compensation and Employer's Liability. Contractor shall maintain workers' compensation insurance covering its employees in statutory amounts and otherwise in compliance with the laws of the State of California. Contractor shall maintain employer's liability insurance in an amount not less than One Million Dollars (\$1,000,000) per accident or occurrence.
2. General Liability. Contractor shall maintain commercial general liability insurance with a combined single limit of not less than Ten Million Dollars (\$10,000,000) per occurrence and Ten Million Dollars (\$10,000,000) aggregate covering all claims and all legal liability for personal injury, bodily injury, death, and property damage, including the loss of use thereof, arising out of, or occasioned in any way by, directly

or indirectly, Contractor's performance of services under this Agreement. The insurance required by this Subsection shall include:

- a. Premises Operations;
- b. Independent Contractor's Protective;
- c. Products and Completed Operations;
- d. Personal Injury Liability coverage for insured contracts;
- e. Broad Form Property Damage, including Completed Operations.

The General Liability insurance required herein shall be written on an "occurrence" (not an "accident"), rather than a "claims made" basis, if such coverage is obtainable. If it is not obtainable, Contractor shall arrange for "tail coverage" to protect City from claims filed after the expiration or termination of this Agreement relating to incidents which occurred prior to such expiration or termination. The insurance policies required by this Section shall be issued by an insurance company or companies authorized to do business in the State of California and with a rating in the most recent edition of Best's Insurance Reports of size category XV or larger and a rating classification of A or better.

- B. Owned, Non-Owned, and Hired Motor Vehicles. Contractor shall maintain insurance with limits of \$10,000,000 per occurrence and \$10,000,000 aggregate for bodily injury, personal injury and property damage for owned, non-owned and hired motor vehicles. ISO Occurrence Form CG 0001 or equivalent is required.
- C. Pollution Liability. Contractor shall maintain Contractor's pollution liability insurance with limits in an amount of not less than One Million Dollars (\$1,000,000) per occurrence and annual aggregate covering claims for on-site, under-site, or off-site bodily injury and property damage and remediation as a result of pollution conditions arising out of its operations under this Agreement.
- D. Required Endorsements. The general liability policy shall contain endorsements or provisions in substantially the following form:

"Thirty (30) days prior written notice shall be given to the City of Sunnyvale in the event of cancellation of this policy. Such notice shall be sent to: Risk and Insurance Manager, City of Sunnyvale, P.O. Box 3707, 456 West Olive Avenue, Sunnyvale, CA 94086."

"The City of Sunnyvale, its officers, employees, and agents are additional insureds on this policy."

"This policy shall be considered primary insurance as respects any other valid and collectible insurance maintained by the City of Sunnyvale including any self-insured retention or program of self-insurance, and any other such insurance shall be considered excess insurance only."

"This policy shall contain a separation of insureds provision to provide that the policy shall protect Contractor and the City in the same manner as though a separate policy had been issued to each, but this shall not operate to increase the company's liability as set forth in the policy beyond the amount shown or to which the company would have been liable if only one party had been named as an insured."

E. Delivery of Proof of Coverage. On or before the Effective Date, Contractor shall furnish City with certificates of each policy of insurance required hereunder, in form and substance satisfactory to City. Such certificates shall show the type and amount of coverage, effective dates and dates of expiration of policies and shall have all required endorsements. Contractor shall periodically furnish renewal certificates to City to demonstrate maintenance of the required coverages throughout the Term.

F. Other Insurance Requirements.

1. In the event any services are delegated to a subcontractor, Contractor shall require such subcontractor to provide statutory workers' compensation insurance and employer's liability insurance for all of the subcontractor's employees engaged in the work. The liability insurance required by Section 5.02.A.2 shall cover all subcontractors or the subcontractor must furnish evidence of insurance provided by it meeting all of the requirements of this Section 5.02.
2. Contractor shall comply with all requirements of the insurers issuing policies. The carrying of insurance shall not relieve Contractor from any obligation under this Agreement, including those imposed by Section 5.01. If any claim is made by any third person against Contractor or any subcontractor on account of any occurrence related to this Agreement, Contractor shall promptly report the facts in writing to the insurance carrier and to City. If Contractor fails to procure and maintain any insurance required by this Agreement, City may take out and maintain, at Contractor's expense, such insurance as it may deem proper and deduct the cost thereof from any monies due Contractor."

14. Section 10.04 Status of Disposal Facility shall be amended to read as follows:

"10.04 Status of Disposal Facility. As of the Commencement Date, the Disposal Facility has been designed and constructed in accordance with 23 California Code of Regulations Section 2510 et seq. ("Subchapter 15"). The Disposal Facility has been issued all permits from federal, state, regional, county and city agencies necessary for it to operate as a Class 3 Sanitary Landfill. The Disposal Facility is authorized, under its permits, as amended, to accept all Municipal Solid Waste at the daily flow rates, and at the times of delivery contemplated in this Agreement delivered to it. The Disposal Facility has sufficient remaining capacity, not committed to others by contract, to accommodate Municipal Solid Waste in the amount equal to the total of the Participating Agencies' Reserve Disposal

Capacity. The Disposal Facility is being operated in accordance with all its permits. Contractor has contractual rights with the owner of the property on which the Disposal Facility is located to operate the Disposal Facility for a period of at least forty (40) years from the Effective Date of this Agreement.”

15. Appendix 1, Definition of Contractor shall be amended as of the Commencement Date by changing “Waste Management of North America, Inc., an Illinois Corporation” to “Waste Management Holdings, Inc., a Delaware Corporation”.
16. Exhibit A-1 List of Allocation Quantities, In Tons. As of the Commencement Date, the Allocation Quantities for 2014 and later are hereby deleted.

[Signatures on following page]

CITY OF SUNNYVALE

By: \_\_\_\_\_

Name: GARY LUEBBERS

Title: CITY MANAGER

Date: \_\_\_\_\_

WASTE MANAGEMENT OF CALIFORNIA, INC.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Attachment B

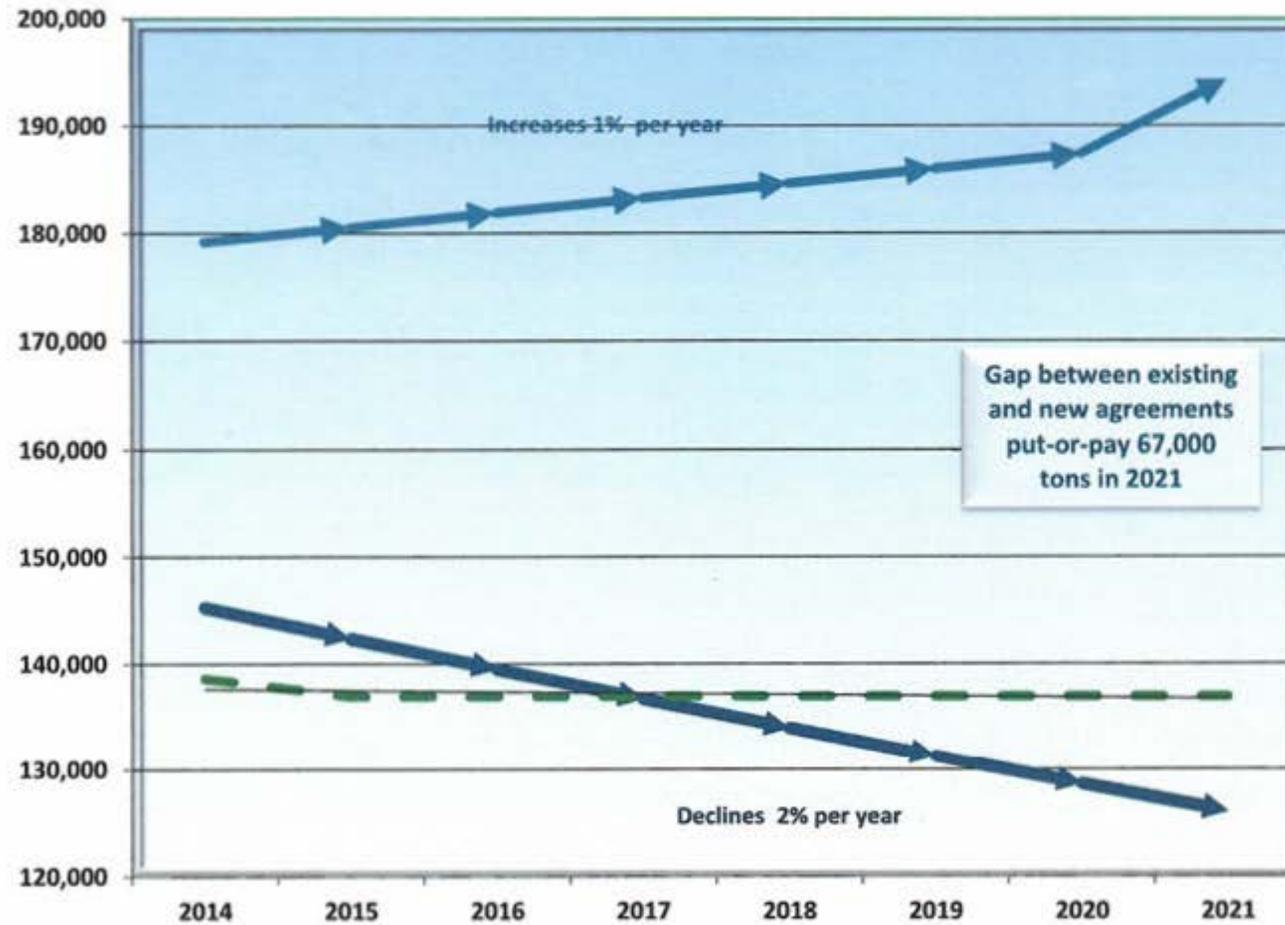
Disposal Quantities to Kirby Canyon Landfill  
as a percent of Minimum Quantity

Year	Percent of Minimum Quantity	Tons short of minimum	Put or Pay Payment
1993	103.8%	-	\$ -
1994	102.4%	-	\$ -
1995	102.4%	-	\$ -
1996	103.0%	-	\$ -
1997	103.1%	-	\$ -
1998	105.5%	-	\$ -
1999	117.5%	-	\$ -
2000	127.1%	-	\$ -
2001	117.1%	-	\$ -
2002	99.6%	(660)	\$ 20,566
2003	98.0%	(3,710)	\$ 118,163
2004	97.1%	(5,370)	\$ 171,960
2005	93.8%	(11,604)	\$ 379,326
2006	97.0%	(5,601)	\$ 188,922
2007	98.2%	(3,426)	\$ 119,362
2008	102.9%	5,476	\$ (196,329)
2009	86.7%	(25,509)	\$ 921,895
2010	78.9%	(40,799)	\$ 1,499,771
2011	71.7%	(55,172)	\$ 2,085,502
2012	88.9%	(19,604)	\$ 756,518
Total		<u>(165,979)</u>	<u>\$ 6,065,655</u>

Note: In 2012 reduced commitment by 10% maximum allowed  
on 20-year anniversary of Agreement

## Proposed Landfill Agreement Amendment

Disposal Tons



- New agreement put-or-pay
- Existing agreement put-or-pay
- Projected disposal