

Project Green Fleet Operating Agreement

This Operating Agreement (this “**Agreement**”) among Environmental Initiative, Inc., a Minnesota nonprofit corporation operating **Project Green Fleet**, and the City of Saint Paul, Minnesota (the “**Fleet Operator**”) takes effect on 3/26/18 (the “**Effective Date**”). The parties hereto are each referred to individually as a “**Party**” and collectively as the “**Parties**.”

RECITALS

- A. Environmental Initiative is operating Project Green Fleet to reduce diesel emissions from diesel engines in Minnesota that expose populations to diesel exhaust, particularly populations susceptible to the effects of diesel exhaust, by replacing or repowering older equipment with equipment operating EPA-certified engine configurations (“**Repower/Replacement**”) to reduce harmful emissions from diesel-powered engines (the “**Project**”).
- B. Fleet Operator owns and operates heavy-duty diesel equipment and desires to participate in the Project to improve the environmental factors affecting its employees and community, and supports its participation in the Project, by allowing its engines to be repowered/replaced as set forth in this Agreement.
- C. Contractor(s) (“**Contractor(s)**”) is/are a business corporation that distributes the Repower/Replacement equipment for engine(s) selected by Fleet Operator for this Project.

AGREEMENT

NOW, THEREFORE, in consideration of the above recitals, the mutual promises and covenants set forth herein and other good and valuable consideration, which the parties acknowledge is reasonable, the parties do hereby agree as follows:

1. **Responsibilities of Environmental Initiative:** Under this Agreement, Environmental Initiative will:
 - (a) Select equipment of Fleet Operator’s fleet for Repower/Replacement from the fleet data provided by Fleet Operator pursuant to Section 2(a) below, in consultation with Fleet Operator and Contractor as Environmental Initiative determines appropriate.
 - (b) Order and pay for the agreed upon costs of the Repower/Replacement equipment, including any additional parts necessary for the successful operation of the Equipment.
 - i. Environmental Initiative will pay **\$210,750.00** of the total cost of the Repower/Replacement equipment, which includes equipment, applicable tax and other necessary costs. Fleet Operator is responsible for the remaining balance due of the total Repower/Replacement equipment cost, which

includes labor, equipment, applicable tax, all costs and work related to installation of the repower equipment, and other necessary costs.

- a. Repower/Replacement equipment eligible under this Project and Operating Agreement are restricted to the following:

<u>Year</u>	<u>Make</u>	<u>Model</u>	<u>VIN</u>	<u>Engine ID</u>	<u>Grant Amount</u>
1995	Ford	C8000	1FDYH70C8SVA34154	45076915	\$25,250
1999	GMC	T8500	1GDP7C1CXXJ516533	1GDP7C1CXXJ516533	\$54,500
1998	Ford	L8513	1FDYS80E9WVA40978	45621903	\$45,000
1999	GMC	Topkick	1GDK6H1C4XJ505635	7AS41852	\$35,000
2002	Elgin	Pelican	S8549D	PE4045T193723	\$51,000

- ii. Per EPA Diesel Emission Reductions Act language, a replacement is defined as “the removal of an existing engine or piece of equipment and its replacement with a newer or cleaner engine or piece of equipment that is certified to a more stringent set of engine emission standards”
- iii. The replacement vehicle, engine or equipment must continue to perform the same function as before the replacement.
- (c) Arrange with Fleet Operator for the purchase and installation of Repower/Replacement equipment and accompanying parts to selected site(s). Fleet Operator and Contractor are wholly responsible for completion of the purchase and installation of the repowered/replaced equipment.
- (d) Fleet Operator is wholly responsible for the successful purchase and installation of the repowered/replaced Equipment, including arranging for assistance from the Contractor as deemed appropriate.
- (e) Provide technical support and monitoring, and address any technical problems which may arise, including arranging for assistance from Contractor as deemed appropriate.
- (f) With the Fleet Operator, collect required information about operations of the participating vehicles to quantify emission and exposure reductions associated with implementation of the repowered/replaced equipment.

2. Responsibilities of Fleet Operator: Under this Agreement, Fleet Operator agrees to:

- (a) Provide to Environmental Initiative the following data for each vehicle/engine engaged in the Program: vehicle identification number, make and model of the engine, engine horsepower, approximate annual hours of use in most recent full year, fuel consumption (annual gallons consumed) for most recent full year, expected retirement date and such other information as may be reasonably requested by Environmental Initiative to select vehicles for Repower/Replacement under the Project, and to quantify emission and exposure reductions associated with implementation of Repower/Replacement equipment.

- (b) Consult with Environmental Initiative on the selection of equipment for Repower/Replacement and installation as may be reasonably requested by Environmental Initiative.
- (c) Follow all applicable procurement rules consistent with the State of Minnesota's Cooperative Purchasing Venture (CPV) related to obtaining the agreed upon replacement/repowered equipment/engines.
- (d) Pay its portion of the cost of the Repower/Replacement as set forth in Section 1(b)(i) above.
- (e) Accept delivery of Repower/Replacement equipment and accompanying parts to selected site(s) for operation on selected vehicles.
- (f) With Contractor, assist as required with the operation and training on the repowered/replaced equipment in accordance with the repowered/replaced equipment's manufacturer recommendations.
- (g) Work with Environmental Initiative and the Contractor(s) to complete all work no later than December 31, 2018, unless otherwise agreed to by the parties.
- (h) Fleet Operator will not order replacement equipment/engines until this signed Operating Agreement is sent from Environmental Initiative. Upon completion of the Project work, Fleet Operator will provide proof of Project expenditure and issue an invoice to Environmental Initiative for **\$210,750.00** of the total Project cost and include itemized equipment expenses listed under Section 1.(b)i.a. as described in this Operating Agreement.
- (i) The equipment being repowered/replaced will be scrapped or rendered permanently disabled or returned to the original manufacturer for remanufacturing to a certified cleaner emission standard. Drilling a hole in the engine block and manifold while retaining possession of the equipment is an acceptable scrapping method. Evidence of appropriate disposal, including engine serial number and vehicle identification number (VIN), is required.
- (j) After installation, operate the repowered/replaced equipment in Minnesota for at least five (5) years, unless physically impossible to do so.
- (k) Contact Environmental Initiative with any questions or problems relative to the repowered/replaced equipment.

3. Terms and Conditions: This Agreement is subject to the terms of the Fleet Operator contract to be entered into between Environmental Initiative and the applicable Fleet Operator, additional terms and conditions of any funding agreements between Environmental Initiative and its funders, the requirements of 40 CFR § 30.48, Circular A-110, and other applicable legal requirements. Purchase orders are recognized by both parties to be legally binding contracts.

4. Federal Contracting Compliance Provisions:

- (a) Suspension and Debarment: Fleet Operator represents and warrants that it has not been debarred from participating in federal procurement and non-procurement programs. If during the term of this Agreement, Fleet Operator receives notice that it is or will be debarred from such programs, it will immediately notify Environmental Initiative.
- (b) Work Hours and Safety Standards Act: If Fleet Operator is paid in excess of \$100,000 under this Agreement, its employment of mechanics or laborers must comply with 40 U.S.C. §§ 3702 and 3704, as supplemented by Department of Labor regulations at 29 C.F.R. Part 5. See 2 C.F.R. Part 200, Appendix II, ¶ E.
- (i) Overtime requirements: In performing this Agreement, Fleet Operator shall not require or permit any laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.
- (ii) Violation; liability for unpaid wages; liquidated damages: In the event of any violation of the provisions of paragraph (i) of this subsection (b), Fleet Operator and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, Fleet Operator and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic employed in violation of the clause set forth in paragraph (i) of this subsection (b), in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (i) of this subsection.
- (iii) Withholding for unpaid wages and liquidated damages: Environmental Initiative shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by Fleet Operator or a subcontractor under this Agreement such sums as may be determined to be necessary to satisfy any liabilities of such Fleet Operator or subcontractor for unpaid wages and liquidated damages as provided in paragraph (ii) of this subsection.
- (iv) Subcontracts: Fleet Operator shall insert in any subcontracts the clauses set forth in paragraphs (i) through (iii) of this Section and shall require any such subcontractors to include these clauses in any lower tier subcontracts.
- (c) Clean Air Act and the Federal Water Pollution Control Act: Fleet Operator agrees to comply with all applicable standards, orders or regulations issued

pursuant to the Clean Air Act, as amended, 42 U.S.C. § 7401 et seq., and the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 et seq.

- (d) **Byrd Anti-Lobbying Amendment:** By signing this Agreement, Fleet Operator certifies that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract or grant, the making of any Federal loan, the entering into of any cooperative agreement, or the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement. Fleet Operator agrees to include the language of this certification in any agreement with a subcontractor, and all subcontractors shall certify accordingly.

5. Relationship of the Parties: The Parties are at all times serving as independent contractors to each other. Nothing in this Agreement or in the relationship between the Parties shall be construed to make any Party or any of their officers, agents, or employees an employee of, or joint venturer of or with the others for any purpose whatsoever, including without limitation, participation in any benefits or privileges given or extended by the parties to their employees. No right or authority is granted to any Party to assume or to create any obligation or responsibility, express or implied, on behalf of or in the name of any other Party.

6. Each Party to Bear Own Costs: Except for Environmental Initiative's payment of the agreed upon \$210,750.00 for Repower/Replacement equipment, the Fleet Operator shall be solely responsible for the remaining balance of costs and expenses of performing such Party's obligations under this Agreement, including, if any, installation costs and delivery fees of Repower/Replacement equipment, under Section 1(b) above.

7. Mutual Indemnification: Each party shall indemnify, defend and hold harmless the other party, any related entity, and each of its directors, officers, and employees from and against any and all claims, actions, causes of action, demands, liabilities, losses, damages, costs and expenses, including but not limited to, reasonable attorneys' fees and interest, which any of them at any time sustain or incur (i) by reason of any negligent act or omission to act of the party or its employees or agents arising under this Agreement, or (ii) by reason of the failure of a party to perform its obligations under the terms of this Agreement.

8. Contractor Terms: Fleet Operator shall require all Contractors involved in supplying any component equipment referenced in 1.(b)i.a. to adhere to all terms and conditions of this agreement.

9. Term. The Term this Agreement shall commence on the Effective Date and end on the earlier of 3/26/19 or two (2) years after the date on which all installation of Repower equipment on selected equipment is complete ("**Termination Date**"), unless earlier terminated or extended by the Parties pursuant to this Agreement.

10. Termination of Services. This Agreement may be terminated before the Termination Date as follows:

- (a) Either Environmental Initiative or Fleet Operator may terminate this Agreement at any time, with or without cause, effective upon 90 days advance written notice to the other Parties. In the event the Agreement is terminated under this Section 4(a), Fleet Operator's obligations under Sections 2(f) shall survive termination of this Agreement.
- (b) Either Environmental Initiative or Fleet Operator may terminate this Agreement effective upon 60 days advance written notice to the other of Environmental Initiative or Fleet Operator such Party's breach of this Agreement, unless such breach is timely cured to the satisfaction of the terminating Party within such 60 day period.
- (c) This Agreement and the Services may terminate at any time upon mutual agreement of the Parties.

11. Remedies for Breach: If this Agreement is terminated pursuant to Section 12(b) above, the non-breaching party shall retain all rights and remedies available to it in accordance with law or equity.

12. Title: Title to the repowered/replaced equipment shall transfer from Contractor to Fleet Operator upon their receipt of delivery by Fleet Operator under Section 2(d). Thereafter, Fleet Operator shall operate and be exclusively responsible for maintenance, repair and other incidents of ownership of the repowered/replaced equipment installed in its vehicles. Nothing in this Agreement shall affect the title to Fleet Operator's vehicles.

13. Disclaimer of Warranties: Environmental Initiative makes no express or implied warranty of any kind whatsoever with respect to any repowered/replaced equipment, including but not limited to, the merchantability of any repowered/replaced equipment or vehicle, or its fitness for any particular purpose, the design or condition of any repowered/replaced equipment or vehicle, the quality or capacity of any repowered/replaced equipment or vehicle, the workmanship in any repowered/replaced equipment or vehicle, or the compliance of any repowered/replaced equipment or vehicle with the requirements of any law, rule, specification or contract pertaining thereto, all such risks are borne as between Environmental Initiative and Fleet Operator by Fleet Operator and at Fleet Operator's sole risk and expense. All warranties by the manufacturer of repowered/replaced equipment will be issued in Fleet Operator's name.

14. Distribution of Liability: Environmental Initiative shall not be liable to Fleet Operator or any other person or entity for any loss or damage arising from the acts or omissions of Contractor or Fleet Operator's employees and agents with regard to the manufacture or installation of any repowered/replaced equipment in Fleet Operator's vehicles, or from the failure of any repowered/replaced equipment. Any and all such risk of liability shall be borne by Fleet Operator or Contractor, as applicable, and subject to applicable warranties as described above in Section 9. Environmental Initiative has no liability to Fleet Operator for any liability arising from the merchantability, fitness, design, condition, quality, capacity, workmanship, or compliance with legal or contractual requirements of any repowered/replaced equipment.

15. **No Liability for Interruption in Service:** Notwithstanding the provisions of Section 7 above, Environmental Initiative shall not be liable to Fleet Operator or any other person or entity for any loss or damage, including, but not limited to, interruption of business or loss of profits, caused by any interruption in the service or availability of any vehicle for any reason, including, but not limited to, any failure or operation of any vehicle or loss of use during the installation of repowered/replaced equipment, or during the performance of any other repairs or warranty work to any vehicle. Environmental Initiative shall not be under any obligation to furnish Fleet Operator a replacement or substitute vehicle.

16. **General:** Each of the Parties shall pay their own expenses incurred in the preparation and negotiation of this Agreement. This Agreement may not be assigned without the prior written consent of the other Parties. No amendment to this Agreement or waiver of the rights or obligations of either Party shall be effective unless in writing signed by the Parties. This Agreement is governed by the laws of the State of Minnesota, without regard to conflict of laws principles. If any provision of this Agreement is held invalid or unenforceable by any court of competent jurisdiction, the other provisions of this Agreement will remain in full force and effect. Any provision of this Agreement held invalid or unenforceable only in part or degree will remain in full force and effect to the extent not held invalid or unenforceable. Any notices, consents or other communications pursuant to this Agreement must be in writing and delivered by mail, courier or facsimile (with written confirmation of receipt) to the address of the recipient Party set forth below. This Agreement is made solely and specifically among and for the benefit of the Parties, and their respective successors and assigns, and no other Person will have any rights, interest, or claim hereunder or be entitled to any benefits under or on account of this Agreement, whether as a third party beneficiary or otherwise. This Agreement contains the entire agreement and understanding of the Parties concerning the subject matter of this Agreement. This Agreement may be signed by facsimile and in counterparts.

17. **Fleet Operator's Insurance:** Environmental Initiative recognizes that, as a large municipality, Fleet Operator is self-insured at a level meeting insurance requirements as stated by Minnesota Statutes 466.04 and 176.181, including the following stipulations as delineated in the attached Proof of Self-Insurance letter (dated April 18, 2018)

- (a) Commercial General liability with limits of \$500,000 per claim/\$1,500,000 per occurrence.
- (b) Commercial Automobile Liability insurance as covered by tort liability caps in the amount of \$500,000 per claim/\$1,500,000 per occurrence.
- (c) Statutory Workers' Compensation insurance in the amount of a \$1,000,000 retention limit for 2018 as authorized by Minnesota Statute 176.181.

18. **Certificate of Insurance:** Upon Environmental Initiative's request, Fleet Operator shall provide evidence of self-insurance.

19. **Notice Required:** Fleet Operator shall notify Environmental Initiative as soon as possible but in no event later than within ten (10) days of any actual or threatened claim, action, suit or proceeding related to activities undertaken pursuant to this Agreement and shall cooperate

in all respects with Environmental Initiative in the defense of any such claim, action, suit or proceeding.

20. Miscellaneous: This Agreement and the rights and obligations of the parties shall be governed by and construed and enforced in accordance with the laws of the State of Minnesota without reference to the choice of law doctrine of such state. Neither party may assign or otherwise transfer its rights or obligations hereunder including, without limitation, by a change in the majority ownership or control of one of the parties, without the prior written consent the other party to this Agreement, and any such transfer or assignment without said consent shall be void. This Agreement may be amended or modified only by a writing executed by both parties. This Agreement may be executed and delivered by original signature or facsimile, and in one or more counterparts. This Agreement is made solely and specifically among and for the benefit of the parties, and their successors and assigns, and no other person will have any rights, interest, or claim hereunder or be entitled to any benefits under or on account of this Agreement, whether as a third party beneficiary or otherwise, except for the engine owner as specifically set forth herein. This Agreement and any instruments referenced herein constitute the entire agreement and understanding of the parties relative to the subject matter hereof as of the date of this Agreement and replaces and supersedes any and all prior oral or written agreements, representations and discussions relating to such subject matter.

IN WITNESS WHEREOF, the parties have executed this Agreement effective as of the date first written above.

ENVIRONMENTAL INITIATIVE

“FLEET OPERATOR”

By 

By _____

Its Chief Impact Officer

Its Mayor

By _____

Its Director of OES

By _____

Its City Clerk

By _____

Its City Attorney

