

AGREEMENT FOR HARVESTING BIOMEDIA FROM SDWRF BETWEEN  
I. KRUGER, INC. AND THE CITY OF DURHAM

This right of entry and access agreement is dated, made, and entered into as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by the City of Durham (“City”) and I. Kruger, Inc. (“Company”), a corporation organized and existing under the laws of the State of North Carolina. The City and Company agree to the following:

Sec. 1. Definitions.

(a) “Biomedia” refers to the Company’s proprietary media designed to move loosely within a side stream reactor (or “MBBR”) of a wastewater treatment facility. A thin biofilm of bacteria forms on the surface of the Biomedia (“colonized Biomedia”) helping to effectively remove nitrogen from ammonia laden wastewater effluent.

(b) “SDWRF” means the South Durham Wastewater Reclamation Facility SDWRF located off of Farrington Road just south of Highway NC 54 in southwest Durham, and also referred to as the “Property.”

(c) “Harvesting Event” – refers to the activities required by Company to extract a limited quantity of colonized Biomedia from the MBBR and replace the extracted Biomedia with un-colonized Biomedia without diminishing the ammonia nitrogen and total nitrogen removal efficiencies of the System specified in the System specifications. The precise protocol and procedures that define a “Harvesting Event” shall be developed by the Company and approved by the City.

(d) “MBBR” stands for the “Moving Bed Biofilm Reactor” that is the vessel where the Biomedia is housed and where the process of nitrogen removal from wastewater effluent occurs.

(e) “System” – refers to the entire ANITA™ Mox process devised by the Company, including the Biomedia, MBBR, apparatus, equipment and materials required to effectively reduce nitrogen from ammonia laden wastewater effluent.

(f) “Discounted Amount” refers to the monetary savings the City realized as a result of the discounted price for the purchase of the System as specified in the equipment purchase agreement negotiated and executed by the City and Company. The Company agreed to this Discounted Amount in exchange for this right of entry and this agreement.

Sec. 2. Background and Purpose. The Company is the owner of a certain proprietary process and associated equipment and materials used for the removal of ammonia and total nitrogen from wastewater referred to as the ANITA™ Mox process. The Company has agreed to sell to the City the System for use at the city’s South Durham Wastewater Reclamation Facility. The System comprises, among other things, a side-stream reactor containing moving media upon which certain bacteria colonize forming a thin biofilm upon the media that effectively removes nitrogen from ammonia laden wastewater effluent streams. The City has determined there are no competitive systems that can equal the performance of the System and the Company is the sole source of the System. The City and Company have negotiated a discounted price for the purchase of the System based upon the Company’s ability to periodically harvest Biomedia from the System to be constructed at the SDWRF.

Sec. 3. Effective Date of Agreement. Term of Agreement. This agreement shall only become effective if the City constructs and completes certain improvements to the SDWRF that include the aforementioned System within 2 years of the date of this agreement. The Effective Date of this agreement shall be the date of issuance of the final payment to the construction contractor responsible for final completion of the improvements and System to the SDWRF. The term of this agreement shall be for a period of 10 years from the Effective Date, unless otherwise terminated pursuant to Section 8 below.

*Agreement for Harvesting Biomedica from SDWRF between  
I. Kruger, Inc. and the City of Durham*

Sec. 4. Grant of Right of Entry and Access.

The City hereby grants a right of entry and access to select areas of the SDWRF (hereinafter, "Property") to the Company, its contractors, agents, employees and assigns, subject to the terms herein. The select areas of the SDWRF that may be accessed by the Company shall be delineated by the City, in consultation with the Company, and limited to those areas of the Property necessary for the Company to conduct a Harvesting Event pursuant to the conditions set forth below:

- (a) The Company must provide written notice to the City at least 15 days before it intends to conduct a Harvesting Event at the Property;
- (b) The Harvesting Event may only occur during the following times, excluding weekends and city designated holidays: 8:00 a.m. and 5:00 p.m. The Harvesting Event may not be continued beyond these specified times without express authorization from the City;
- (c) Without express authorization from the City, the frequency of Harvesting Events shall not exceed 1 Harvesting Event every two (2) months;
- (d) The Company must be accompanied at all times by a representative of the City during the Harvesting Event;
- (e) As long as the City is agreeable to reschedule a proposed Harvesting Event, the City shall have the right to deny access to the Property for a requested Harvesting Event based upon unavailability of certain SDWRF personnel or due to other scheduled events or activities that, in the opinion of the City, will interfere with the Harvesting Event;
- (f) The Harvesting Event shall not require any expenditure or compensation from the City to the Company;
- (g) Prior to or during the Harvesting Event, the Company shall replace (at no cost to City) all colonized Biomedica with an equal or greater quantity of new, uncolonized Biomedica. The total surface area of replacement Biomedica shall be equal to or greater than the surface area removed;
- (h) Any single Harvesting Event may not cause a negative impact on System Performance, defined as diminishing the ammonia nitrogen and total nitrogen removal efficiencies of the System to the point that the Total Inorganic Nitrogen load being discharged by the System exceeds the guaranteed load specified in the System specifications. In that event, the Company agrees to pay the City as liquidated damages \$1.37 per pound of Total Inorganic Nitrogen being discharged by the System that exceeds 257 pounds/day as a result of the Harvesting Event. The Liquidated Damages specified in this section are the City's sole and exclusive remedy in the case that the said guaranteed load specifications are exceeded, and any and all payments pursuant to this Section 4(h) shall be subject to Seller's aggregate liability cap described in Section 5;
- (i) This grant of right of entry and access is limited to the Company, its contractors, agents, employees and assigns required to participate in the Harvesting Event. Such grant of entry and access does not extend to any 3<sup>rd</sup> party, including prospective clients of the Company. The Company is required to make a separate request to the City to allow any such 3<sup>rd</sup> parties access to the Property;
- (j) All equipment, tools and materials brought onto the Property by the Company or its agents, assigns, or contractors (excluding necessary replacement Biomedica) shall be the sole property of the Company or its agents. The City assumes no liability or responsibility for the safe use, protection against theft, or disposal of equipment, material or property brought onto the Property or removed from the Property by the Company, its agents or contractors. The Company shall have all non-essential material, equipment and tools brought onto the Property for the Harvesting Event removed from the Property as soon as reasonably possible;
- (k) The Company agrees to comply with all local, state and federal laws, rules and ordinances applicable to the Harvesting Event, and further agrees to exercise due care in the performance of all work on the Property. It is understood and acknowledged that the Company is responsible for repairing any damage to the premises caused by the Harvesting Event and any related work;
- (l) At the termination of this Agreement, the Company will bear the cost of removing any of its materials remaining on the Property that are unnecessary for the continued operations (if any) of the Property.

Sec. 5. Seller's Limitation of Liability Notwithstanding anything else to the contrary, Seller shall not be liable for any consequential, incidental, special, exemplary, punitive or other indirect damages arising at any time related to this Agreement; and Seller's aggregate liability arising at any time from the performance of or related to this Agreement shall not exceed the Discounted Amount specified in Section

*Agreement for Harvesting Biomedica from SDWRF between  
I. Kruger, Inc. and the City of Durham*

1(f) this Agreement. These limitations apply whether the liability is based on contract (including any and all agreed-upon liquidated damages herein), tort, warranty, strict liability or any other legal theory.

Sec. 6. Indemnification.

(a) To the maximum extent allowed by law, Company shall defend, indemnify, and save harmless Indemnitees from and against all third party Charges that arise in any manner from, in connection with, or out of this contract as a result of the acts or omissions of the Company or the Company's subcontractors or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable to the extent such acts or omissions are the cause of the third party Charges. In performing its duties under this subsection "a", Company shall at its sole expense defend Indemnitees with legal counsel reasonably acceptable to City.

(b) Indemnification Definitions. As used in subsections "a" and "c" of this section--"Charges" means claims, judgments, costs, damages, losses, demands, liabilities, duties, obligations, fines, penalties, royalties, settlements (as long as Company has the sole authority to direct the defense of and settle the indemnified claim/s), and expenses (included without limitation within "Charges" are (1) interest and reasonable attorneys' fees assessed as part of any such item, and (2) amounts for alleged violations by Company or the Company's subcontractors or anyone directly or indirectly employed by any of them of pollution, or other environmental laws, regulations, ordinances, rules, or orders that arise out of the handling, transportation, deposit, or delivery by Company or the Company's subcontractors or anyone directly or indirectly employed by any of them of the items that are the subject of this contract). "Indemnitees" means City and its officers, officials, independent contractors, agents, and employees, and does not include Company.

(c) Other Provisions Separate. Nothing in this section shall affect any warranties in favor of the City that are otherwise provided in or arise out of this contract. This section is in addition to and shall be construed separately from any other indemnification provisions that may be in this contract.

(d) Survival. This section shall remain in force despite termination of this contract (whether by expiration of the term or otherwise) and termination of the services of the Company under this contract.

Sec. 7. Consideration. The City grants this right of entry and access in consideration of the discounted purchase price negotiated between the City and the Company for the System. If the City and the Company are unable to negotiate a reasonable discounted price for the System, this right of entry and access agreement shall be void.

Sec. 8. (a) Termination for Convenience. (i) Procedure. Without limiting any party's right to terminate for breach, the parties agree that the City may, without cause, and in its discretion, terminate this contract for convenience by giving the Company written notice that refers to this section. TFC shall be effective at the time indicated in the notice. (ii) Obligations. Upon TFC, all obligations that are still executory on both sides are discharged except that any right based on prior breach or performance survives, and the indemnification provisions and the section of this contract shall remain in force. (iii) Payment. The City shall pay the Company an equitable amount for the value of the remaining term of the agreement by multiplying Discounted Amount times a factor equal to the portion of the term of the agreement still remaining over the full term of the agreement (i.e., 10 years) (hereinafter, referred to as the "Equitable Amount"). Within 20 days after TFC, the City shall pay the Company one hundred dollars as a TFC fee and shall pay the Company the Equitable Amount. The Company shall not be entitled to any payment because of TFC except as stated in this section, whether on the basis of overhead, profit, damages, other economic loss, or otherwise.

(b) Termination for Breach. Repeated failure of Company to comply with any of the terms of Section 4, (Grant of Right of Entry and Access) may be deemed a material breach of the Agreement and constitute grounds for termination by the City with no compensation to the Company. Company's repeated failure to comply with the terms of Section 4 shall be deemed a material breach if Company has been notified in writing on at least three (3) different occasions of its failure to comply with one or more of the terms of Section 4 and Company fails to cure or correct such violation(s) within 10 days of written notice.

*Agreement for Harvesting Biomedica from SDWRF between  
I. Kruger, Inc. and the City of Durham*

Sec. 9. Insurance

The Contractor shall maintain insurance not less than the following:

**Commercial General Liability**, covering

- premises/operations
- products/completed operations
- broad form property damage
- explosion, collapse, and underground hazards if the hazards exist in the performance of this contract
- contractual liability
- independent contractors, if any are used in the performance of this contract
- City of Durham must be named additional insured, but only with respect to liability caused, in whole or in part, by Contractor, only to the extent of liabilities assumed by this Contract, and only to the extent permitted by law. An original of the endorsement to effect the coverage must be attached to the certificate (if by blanket endorsement, then agent may so indicate in the GL section of the certificate, in lieu of an original endorsement)
- limit not less than \$1,000,000 per occurrence; aggregate limit not less than \$2,000,000 per year

**Automobile Liability Insurance**, covering

- owned, hired, or borrowed vehicles
- employee vehicles, if used in performance of this contract
- combined single limit not less than \$1,000,000 per occurrence

**Workers' Compensation Insurance**, covering

- statutory benefits;
- covering employees; covering owners partners, officers, and relatives (who work on this contract)
- employers' liability, any limit.

**Insurance shall be provided by:**

- companies authorized to do business in the State of North Carolina
- companies with Best rating of A-/VII or better.

**Insurance shall be evidenced by a certificate or endorsement:**

- providing notice of not less than 30 days prior to cancellation or non-renewal of coverage
- certificates shall be addressed to:

City of Durham, North Carolina  
Attention: Finance Director  
101 City Hall Plaza  
Durham, NC 27701

- both the insurance certificate and the additional insured endorsement must be originals and must be approved by the City's Finance Director before Contractor can begin any work under this contract.

Sec. 10. Notice. (a) All notices and other communications required or permitted by this contract shall be in writing and shall be given either by personal delivery, fax, UPS, Federal Express, or certified United States mail, return receipt requested, addressed as follows. The parties are requested to send a copy by email.

To the City:

Department of Water Management  
City of Durham  
101 City Hall Plaza  
Durham, NC 27701-3329  
The fax number is (919)560-4479  
Email:

*Agreement for Harvesting Biomedica from SDWRF between  
I. Kruger, Inc. and the City of Durham*

To the Company:

I. Kruger Inc.  
Attn: Brian Frewerd  
4001 Weston Parkway  
Cary, NC 27513  
The fax number is 919-677-0082.  
Email: brian.frewerd@veoliawater.com

(b) Change of Address. Date Notice Deemed Given. A change of address, fax number, or person to receive notice may be made by either party by notice given to the other party. Any notice or other communication under this contract shall be deemed given and sent at the time of actual delivery, if it is personally delivered or sent by fax. If the notice or other communication is sent by United States mail, it shall be deemed given upon the third calendar day following the day on which such notice or other communication is deposited with the United States Postal Service or upon actual delivery, whichever first occurs.

Sec. 11. Miscellaneous

(a) Choice of Law and Forum; Service of Process. (i) This contract shall be deemed made in Durham County, North Carolina. This contract shall be governed by and construed in accordance with the law of North Carolina. The exclusive forum and venue for all actions arising out of this contract shall be the North Carolina General Court of Justice, in Durham County. Such actions shall neither be commenced in nor removed to federal court. This subsection (a) shall not apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this subsection. (ii) If the Company is not a natural person (for instance, the Company is a corporation or limited liability company), this subsection (ii) applies. "Agent for Service of Process" means every person now or hereafter appointed by the Company to be served or to accept service of process in any State of the United States. Without excluding any other method of service authorized by law, the Company agrees that every Agent for Service of Process is designated as its non-exclusive agent for service of process, summons, and complaint. The Company will instruct each Agent for Service of Process that after such agent receives the process, summons, or complaint, such agent shall promptly send it to the Company. This subsection (ii) does not apply while the Company maintains a registered agent in North Carolina with the office of the N. C. Secretary of State and such registered agent can be found with due diligence at the registered office.

(b) Waiver. No action or failure to act by the City shall constitute a waiver of any of its rights or remedies that arise out of this contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

(c) Performance of Government Functions. Nothing contained in this contract shall be deemed or construed so as to in any way estop, limit, or impair the City from exercising or performing any regulatory, policing, legislative, governmental, or other powers or functions.

(d) Severability. If any provision of this contract shall be unenforceable, the remainder of this contract shall be enforceable to the extent permitted by law.

(e) Assignment. Successors and Assigns. Without the City's written consent, the Company shall not assign (which includes to delegate) any of its rights (including the right to payment) or duties that arise out of this contract. The City Manager may consent to an assignment without action by the City Council. Unless the City otherwise agrees in writing, the Company and all assignees shall be subject to all of the City's defenses and shall be liable for all of the Company's duties that arise out of this contract and all of the City's claims that arise out of this contract. Without granting the Company the right to assign, it is agreed that the duties of the Company that arise out of this contract shall be binding upon it and its heirs, personal representatives, successors, and assigns.

(f) Compliance with Law. In performing all of the Work, the Company shall comply with all applicable law.

(j) No Third Party Rights Created. This contract is intended for the benefit of the City and the Company and not any other person.

(k) Principles of Interpretation and Definitions. (1) The singular includes the plural and the plural the singular. The pronouns "it" and "its" include the masculine and feminine. References to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute

*Agreement for Harvesting Biomedica from SDWRF between  
I. Kruger, Inc. and the City of Durham*

or regulation. References to contracts and agreements shall be deemed to include all amendments to them. The words "include," "including," etc. mean include, including, etc. without limitation. (2) References to a "Section" or "section" shall mean a section of this contract. (3) "Contract" and "Agreement," whether or not capitalized, refer to this instrument. (4) "Duties" includes obligations. (5) The word "person" includes natural persons, firms, companies, associations, partnerships, trusts, corporations, governmental agencies and units, and other legal entities. (6) The word "shall" is mandatory. (7) The word "day" means calendar day. (8) The word "Work" is defined in Section 2. (9) A definition in this contract will not apply to the extent the context requires otherwise.

(l) Modifications. Entire Agreement. A modification of this contract is not valid unless signed by both parties and otherwise in accordance with requirements of law. Further, a modification is not enforceable against the City unless it is signed by the City Manager, a deputy or assistant City Manager, or, in limited circumstances, a City department director. This contract contains the entire agreement between the parties pertaining to the subject matter of this contract. With respect to that subject matter, there are no promises, agreements, conditions, inducements, warranties, or understandings, written or oral, expressed or implied, between the parties, other than as set forth or referenced in this contract.

(m) City's Manager's Authority. To the extent, if any, the City has the power to suspend or terminate this contract or the Company's services under this contract, that power may be exercised by City Manager or a deputy or assistant City Manager without City Council action.

IN WITNESS WHEREOF, the City and the Company have caused this contract to be executed under seal themselves or by their respective duly authorized agents or officers.

ATTEST:

CITY OF DURHAM

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

Preaudit Certification, if necessary:

I. Krüger Inc.

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

Mike Gutshall

Title of officer: \_\_\_\_\_

President

(Affix corporate seal.)

State of \_\_\_\_\_

ACKNOWLEDGMENT BY CORPORATION

County of \_\_\_\_\_

I, a notary public in and for the aforesaid county and state, certify that

\_\_\_\_\_ personally appeared before me this day and stated that he or she is (~~strike through the inapplicable:~~) chairperson/ president/ chief executive officer/ vice-president/ assistant vice-president/ treasurer/ chief financial officer of I. Kruger Inc a corporation, and that by authority duly given and as the act of the corporation, he or she signed the foregoing contract or agreement with the City of Durham and the

corporate seal was affixed thereto. This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

My commission expires:

\_\_\_\_\_

Notary Public