

**REQUEST FOR BOARD ACTION**  
**HENDERSON COUNTY**  
**BOARD OF COMMISSIONERS**

**MEETING DATE:** 16 March 2011

**SUBJECT:** Contract with American Recycling for materials recycling

**PRESENTER:** Charles Russell Burrell

**ATTACHMENT(S):** Draft contract signed by American Recycling

**SUMMARY OF REQUEST:**

You are requested to approve the draft contract with American Recycling for materials recycling. It has been reviewed for legal matters by your County Attorney, and for compliance with the bid specifications by your County Engineer. It has been executed by American Recycling.

County staff will be present and prepared if requested to give further information on this matter.

**BOARD ACTION REQUESTED:**

Approval of the draft contract.

If the Board is so inclined, the following motion is suggested:

***I move that the Board approve the draft contract with American Recycling.***

STATE OF NORTH CAROLINA            )       **SERVICES AGREEMENT**  
  )       **Recyclable Materials**  
COUNTY OF HENDERSON            )       **Processing and Marketing**

**THIS AGREEMENT** (“Agreement” or “Contract”) is made and entered into this \_\_\_\_ day of March, 2011, by and between Henderson County, North Carolina, a duly organized political subdivision of the State of North Carolina (the “County”) and American Recycling of South Carolina, LLC, a Georgia limited liability company that is authorized to transact business in the State of North Carolina (the or “Contractor”) (collectively the “Parties”).

**WITNESSETH**

**WHEREAS**, the County has a comprehensive recycling program and desires to substantially expand its recycling program volumes; and

**WHEREAS**, the County desires a recycling materials processor to operate a materials recycling facility in Henderson County and to process and market all of the County’s recyclable materials; and

**WHEREAS**, the Contractor has reviewed the services required pursuant to this Agreement and is qualified, willing and able to provide recyclables processing services to County and perform all such services in accordance with its terms and conditions as well as process and market recyclable materials for other customers at such recycling facility; and

**WHEREAS**, the County desires to contract with the Contractor on such terms and conditions as are set forth herein.

**NOW, THEREFORE**, in consideration of these premises and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto, each intending to be legally bound, agree as follows:

**ARTICLE 1.     DEFINITIONS**

As used herein, the following terms shall have the meanings set forth below:

- 1.1 “Agreement”** – This Agreement between the County and the Contractor, including the Schedules and any written amendments to either as modified, supplemented or restated from time to time.
- 1.2 “Blue Bags”** – Program Recyclables that are collected in plastic bags.
- 1.3 “Commencement Date”** – Except as otherwise provided for herein, the Commencement Date is the date on which the Contractor commences to accept, process, and market Recyclable Materials in accordance with this Agreement, but in no event is later than \_\_\_\_\_, 2011.

- 1.4 **“Commercial Program Recyclables”** – Recyclable Materials from commercial, institutional, and industrial establishments in Henderson County that the County delivers, or causes to be delivered, to the MRF or the Transfer Station.
- 1.5 **“Commercial Fiber”** – Recyclable paper and board products designated by the County for recycling collection programs, including but not limited to office paper, cardboard, newspaper, magazines, junk mail and paperboard packaging from commercial, institutional, and industrial establishments in Henderson County that the County delivers, or causes to be delivered, to the MRF or the Transfer Station.
- 1.6 **“Commingled Containers”** – Plastic, metal, and glass containers that are mixed together for collection and delivery to the MRF or the Transfer Station.
- 1.7 **“Commission”** – The County Board of Commissioners of Henderson County, North Carolina which is the governing body of the County.
- 1.8 **“Contract Officer”** – The individual designated in writing by the County to represent it in all matters relating to the interpretation, implementation or enforcement of the Contract.
- 1.9 **“Contract Year”** – Beginning on the Commencement Date and ending June 30, 2011 and every twelve (12) months thereafter (July 1-June 30) for the term of the Agreement.
- 1.10 **“Contractor”** – American Recycling of South Carolina, LLC, with whom the County has entered into this Agreement.
- 1.11 **“County”** – Henderson County, a body corporate and politic of the State of North Carolina.
- 1.12 **“Department”** – The Henderson County Department of Engineering Services.
- 1.13 **“Director”** – The Director of the Henderson County Engineering Services Department or any other agency, as may be designated by the County to administer this Agreement.
- 1.14 **“Dual Stream”** – A method of collecting and processing Recyclable Materials in two streams in which Commingled Containers (one stream) are collected separately from commingled paper and/or fiber products (the other stream).
- 1.15 **“Effective Date”** – The date upon which this Agreement is fully executed by both Parties. The later signature date shall be the Effective Date.
- 1.16 **“Environmental Laws”** – All applicable federal, state, county or local laws, directives, rules, ordinances, codes, guidelines, regulations, governmental, administrative or judicial orders or decrees or other legal requirements of any kind, including, without limitation, common law, whether currently in existence or hereafter promulgated, enacted, adopted

or amended, relating to safety, preservation or protection of human health and the environment (including, without limitation, ambient air, surface water, groundwater, land, or subsurface strata) and/or relating to the handling, treatment, transportation or disposal of waste, substances or materials, including, without limitation, any matters related to Releases and threatened Releases of materials and substances.

- 1.17 “Fees and Taxes”** – Any federal, state, local or other taxes, assessments, fees, surcharges or similar charges directly or indirectly related to the services provided by the Contractor pursuant to this Agreement which are imposed on either the County or Contractor, and are with respect to the operations of the MRF by law, ordinance, rule, order or regulation and/or agreement with a governmental authority, whether existing as of the Effective Date or as implemented or modified thereafter and whether imposed retroactively or prospectively.
- 1.18 “Force Majeure”** – Any event relied upon by the Contractor or the County, as applicable, as justification for delay in or excuse from complying with any obligation required of the Contractor or the County, as applicable, under this Agreement, including, without limitation: (i) an act of God, landslide, lightning, earthquake, hurricane, fire, explosion, storm, flood or similar occurrence; (ii) any act of any federal, state, county, or local court, administrative agency or governmental office or body that stays, invalidates, or otherwise affects this Agreement or any permits or licenses of the MRF or the Transfer Station with respect to the acceptance and/or processing and/or general availability to consumers of Recyclable Materials; (iii) the denial, loss, suspension, expiration, termination, or failure of renewal of any permit, license or other governmental approval required to accept and/or process Recyclable Materials at the MRF or the Transfer Station; (iv) the adoption or change (including a change in interpretation or enforcement) of any federal, state, county, or local law, rule, permit, regulation or ordinance after the date of this Agreement, applicable to the obligations of the Contractor or the County, as applicable, under this Agreement; or (v) the institution of a legal or administrative action, or similar proceeding, by any person or entity which delays or prevents any aspect of the acceptance and/or processing of Recyclable Materials at the MRF or the Transfer Station.
- 1.19 “Hazardous/Biohazardous Waste”** – Medical sharps and all materials or substances defined or characterized as hazardous or biohazardous waste by the United States Environmental Protection Agency, the North Carolina Department of Environmental and Natural Resources (“NC DENR”), the Occupational Safety and Health Administration (OSHA) or any other agency pursuant to any Environmental Law and all current and future amendments thereto and all regulations promulgated thereunder.
- 1.20 “Materials Recovery Facility” or “MRF”** – The Recyclable Materials processing facility located on the Site.
- 1.21 “Non-Recyclable Materials”** – All materials that do not constitute Recyclable Materials.

- 1.22 “Program”** – The Henderson County Recycling Program as it may, from time to time, be defined by the County, which initially shall include residential recycling activities and potentially may include commercial recycling activities.
- 1.23 “Program Materials”** - All materials, both Recyclable Materials and Non-Recyclable Materials that the County delivers, or causes to be delivered, to the MRF or the Transfer Station.
- 1.24 “Program Recyclables”** – Recyclable Materials from the Program that the County delivers, or causes to be delivered, to the MRF or the Transfer Station.
- 1.25 “Recovered Materials”** – Recyclable Materials that have been processed to market specifications.
- 1.26 “Recyclable Materials”** – Various recyclable products and packaging originating in the County, including various types of paper (including but not limited to newspaper, junk mail, magazines, office paper, cardboard and paperboard packaging) and containers (including but not limited to glass bottles and jars, aluminum and steel cans, and #1 - #7 plastics). Recyclable Materials includes incidental amounts of Rejects and non-designated materials as can be normally expected as part of municipal recycling collection. The list of Recyclable Materials may be expanded or contracted from time to time as determined jointly by the County and the Contractor.
- 1.27 “Rejects”** – Materials other than Residue that cannot be processed into Recovered Materials.
- 1.28 “Residential Program Recyclables”** – Recyclable Materials from single-family and multi-family dwelling units in Henderson County that the County delivers, or causes to be delivered, to the MRF or the Transfer Station.
- 1.29 “Residue”** – That portion of the Recyclable Materials other than Rejects accepted by the Contractor that are not converted to Recovered Materials.
- 1.30 “Shutdown”** – Failure of the Contractor to accept all Recyclable Materials after the Commencement Date for any reason except Force Majeure.
- 1.31 “Site”** – The parcel of land *[To Be Selected Prior To Commencement Date]*.
- 1.32 “Single Stream”** – A method of collecting and processing Recyclable Materials whereby all Recyclable Materials are collected and delivered to the MRF or the Transfer Station mixed together.
- 1.33 “Third Party Hauler”** – A waste management and/or recycling transporter operating in the County under permit from the County which allows such transporter to deliver Recyclable Materials directly to the MRF.

**1.34 “Ton”** – A unit of weight equal to 2,000 pounds, also referred to as a “short ton.”

**1.35 “Transfer Station”** – The County owned waste management station facility located at 802 Stoney Mountain Rd., Hendersonville, North Carolina 28791.

**1.36 ‘Unwanted Waste’** – Non-Recyclable Materials that Contractor deems in its sole discretion to be undesirable to sort as part of the processing of Program Recyclables, including but not limited to Non-Recyclable Materials that are likely to cause contamination to potentially Recyclable Materials.

## **ARTICLE 2. TERM OF AGREEMENT**

**2.1 Effective Date.** Except as otherwise provided for herein, the obligations of the Parties shall take effect on approval by the Board of Commissioners of the County.

**2.2 Term.** Unless terminated earlier as set forth herein this Agreement, the initial term of this Agreement shall remain in effect for ten (10) years from July 1, 2011 (the “**Initial Term**”). Thereafter, the Agreement will automatically renew for two additional and successive five (5) year terms (each a “**Renewal Term**”) unless (i) either party gives written notice to the other party ninety (90) days prior to the expiration of the Initial Term that the Agreement will terminate on the expiration of the Initial Term; or (ii) either party gives written notice to the other party ninety (90) days prior to the expiration of the first Renewal Term that the Agreement will terminate on the expiration of the first Renewal Term.

## **ARTICLE 3. CONTRACTOR’S RESPONSIBILITIES**

**Services of the Contractor.** Subject to the terms of this Agreement, the Contractor shall be responsible for receiving and processing all of the Recyclable Material that the County delivers or causes to be delivered to the MRF or the Transfer Station, as well as the County Office Program Recyclables to be picked up by the Contractor (**the “Work”**).

### **3.1 Material Acceptance – Transfer Station.**

**3.1.1 Acceptance of Program Recyclables – Transfer Station.** Beginning with the Commencement Date, the Contractor shall accept Program Recyclables at the Transfer Station and be responsible for delivery to the MRF. Notwithstanding the foregoing, Contractor’s obligation to accept Program Recyclables at the Transfers Stations shall only occur if and when (i) containers/trailers are loaded to visual capacity (each a “**Visual Capacity Load**”); (ii) each Visual Capacity Load is stowed in either open top roll off containers or walking floor trailers; and (iii) the County notifies the Contractor of a Visual Capacity Load (each load meeting the requirement of (i) – (iii) referred to as a “**Ready Load**”).

**3.1.2 Transportation to MRF; Transportation Costs.** The Contractor shall be solely responsible for transporting Ready Loads to the MRF and all costs associated with such transfers shall be absorbed by the Contractor.

### **3.2 Acceptance of Program Recyclables - MRF.**

**3.2.1 Acceptance of Program Recyclables – MRF.** Beginning with the Commencement Date, the Contractor shall accept all Program Recyclables accumulated at the Transfer Station. Program Recyclable picked up by the Contractor may be Dual Stream, Single Stream or Single Stream with Blue Bags.

**3.2.2 Method of Delivery.** The Contractor shall accept County or Third Party Hauler delivered Program Recyclables from a variety of different trucks including, but not limited to, packer trucks, roll-off trucks, self-unloading road trailers, and rear-discharging and side-discharging tilt-bed collection vehicles.

**3.2.3 Scale House Operations.** The Contractor shall operate the truck scale and electronic weigh system to weigh and record all inbound loads. In the event the truck scale or electronic weigh system is found to be inaccurate or is otherwise in need of repair, the Contractor shall be responsible for weighing all County Program Material loads at HCSW’s transfer station until Contractor’s scale is repaired and certified for use.

**3.2.4 Weigh Tickets.** For each load of County Program Materials picked up at the Transfer Station, the Contractor shall provide the County with a ticket showing vehicle weight before and after unloading, or gross weight and tare weight and the total net weight of the material. (each a “**Load Weigh Ticket**”).

**3.2.5 Scheduled Receiving Hours.** The MRF shall be open and available to receive Program Recyclables from at least 7:30 a.m. to 4:30 p.m. Monday through Friday to accommodate any third party haulers hauling Program Recyclables generated within the county.. The MRF may be closed on six holidays (New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving, and Christmas), but will be required to be open from 7:30 a.m. to 4:30 p.m. on the Saturday following the holiday (collectively the “**Scheduled Receiving Hours**”). No changes shall be made to these hours without the prior written approval of the Director.

The Contractor agrees to temporarily increase the Scheduled Receiving Hours to accommodate unusual quantities of County delivered Recyclable Materials resulting from unusual circumstances if both (a) the MRF is able, in the reasonable sole judgment of the Contractor to receive such additional quantities without adversely affecting the Contractor's operation or maintenance of the MRF; and (b) the County provides the Contractor with advance written notice to such delivery sufficient to enable the Contractor to respond to any such request.

- 3.3 Over 35% Loads.** Each load of County Program Materials containing thirty five percent (35%) or more of the total load in Non-Recyclable Materials by weight, as determined in the sole discretion of the Contractor (each an “**Over 35% Load**”), may be refused at Contractor's sole discretion. Any Over 35% Load that is accepted by the Contractor will be paid based on the received weight of Recyclable Materials. The Non-Recyclable Materials from an Over 35% Load will be weighed and shipped to the landfill. All disposal costs incurred by Contractor in connection with the disposal of Non-Recyclable Materials remaining after processing of an Over 35% Load will be the responsibility of the County and the Contractor will deduct all such incurred costs associated with such disposal from the amount owed to County under Section 6 below.
- 3.4 Downgrade Loads.** Each load of County Program Materials containing more than five percent (5%) but less than thirty five percent (35%) of the total load in Non-Recyclable Materials, as determined in the sole discretion of the Contractor (each a “**Downgrade Load**”), may also be refused at Contractor's sole discretion in the event that the Downgrade Load is due to either Hazardous/Biohazardous Waste or Unwanted Waste, or a combination of the two. Any Downgrade Load that is accepted by the Contractor will be paid based on the received weight of Recyclable Materials. The Non-Recyclable Materials from a Downgrade Load will be weighed and shipped to the landfill. All disposal costs incurred by Contractor in connection with the disposal of Non-Recyclable Materials remaining after processing of a Downgrade Load will be the responsibility of the County and the Contractor will deduct all such incurred costs associated with such disposal from the amount owed to County under Section 6 below.
- 3.5 Hazardous/Biohazardous Waste.** If any Hazardous/Biohazardous Waste is detected in Program Materials, the Contractor will attempt to properly isolate the waste and notify the Contract Officer. Mutually, the Contractor and Contract Officer will determine who will remove, pack and disposed of such Hazardous/Biohazardous Waste, but the County shall always be responsible for all costs associated with the removing, packing, and disposing of the Hazardous/Biohazardous Waste delivered by the County and the Contractor will deduct all such incurred costs associated with such disposal from the amount owed to County under Section 6 below.
- 3.6 Certified Scale and Electronic Weighing System.** The Contractor shall maintain all mechanical and electronic components of the MRF truck scale. The Contractor will ensure that the truck scale is tested, calibrated and certified in accordance with all



applicable requirements of the state North Carolina. The Contractor will operate the scale utilizing CieTrade, or a comparable and compatible, electronic weighing system that enables detailed tracking of all inbound loads of County delivered Program Materials, Recyclable Materials, Recovered Materials, Rejects and Residue.

**3.7 Compliance with Laws and Regulations.** In fulfilling its responsibilities under this Agreement the Contractor and County shall comply at all times with all applicable local, State and Federal laws, regulations, permits and similar requirements, including all applicable requirements concerning noise, odors, effluent and emissions.

**3.8 Subcontracting.** The Contractor may subcontract any or all of its duties or obligation under this Agreement with the prior written consent of the County, which consent may not be unreasonably withheld.

**3.9 Public Relations.**

**3.9.1 MRF Tours.** Contractor may make the MRF available for tours by governmental officials during Scheduled Receiving Hours. Unless otherwise mutually agreed, the County will give at least one (1) week notice to the Contractor of a tour. MRF tours will be at no cost to the County. Designated areas for tour-group participants to safely observe the operations of the MRF will be created by the Contractor and the County will take reasonable precautions to ensure tour group participants stay within such designated areas.

**3.9.2 Promotional Events.** The Contractor will participate in up to two (2) County promotional events annually, such as award events, Henderson Recycles Day, America Recycles Day, and special events.

**3.10 County Office Services.** The Contractor will continue to pick-up and deliver to the MRF those Program Recyclables located at offices owned by the County (the “**County Office Program Recyclables**”). The Contractor will receive no fee for such transportation and the County will receive no payment for such County Office Program Recyclables. Notwithstanding the foregoing the County Office Program Recyclables will count towards the Annual Tonnage Requirement described in Section 5.1.

**ARTICLE 4. DELIVERY AND EXCLUSIVITY**

The County shall cause all Recyclable Material collected by or on behalf of the County to be delivered to the MRF or Transfer Station. The County shall use reasonable efforts, in good faith, to cause only Recyclable Material to be delivered to the MRF or Transfer Station and to minimize quantities of County delivered Non-Recyclable Materials. During the Initial Term and any Renewal Term of the Agreement, the County will not enter into any new agreements with any other entity, whether written or oral, that provides services similar to those provided by Contractor as contemplated by this Agreement without Contractor’s written consent. Nothing in

this Agreement shall restrict Contractor in any manner from providing recycling material processing services for other potential customers.

## **ARTICLE 5. RESPONSIBILITIES OF THE COUNTY**

**5.1 Minimum Tonnage Requirements Guarantee.** The County guarantees either (i) to personally deliver to the MRF or Transfer Station (which shall include County Office Program Materials under Section 3.11); or (ii) to cause a Third Party Hauler to deliver to the MRF, a minimum of 333.33 Tons of Recyclable Materials per each calendar month of each Contract Year (each month the “**Monthly Tonnage Requirement**”). Because the County has a July 1-June 30 fiscal year (the County’s “**Fiscal Year**”), the twelve calendar months between July 1-June 30 of each Fiscal Year shall be aggregated for the purpose of determining the Profit Sharing Payment set forth in Section 6.2.2 below. In the event the Commencement Date is a day other than the first day of a calendar month, the Monthly Tonnage Requirement for such stub period month will be adjusted downward on a pro-rata basis based on the percentage of days remaining in such Calendar Month.

**5.2 Site Damage Caused by County.** The County shall repair all Site damage, including any damage to buildings or structures or vehicles or other personal property of the Contractor, caused by its fault or negligence.

## **ARTICLE 6. PAYMENTS TO THE COUNTY**

**6.1 Monthly Minimum Payments.** Each month, if and only if the Contractor earns the Monthly Minimum Payment (defined below) and meets the Monthly Minimum Tonnage, the Contractor shall pay revenue to the County equal to the total monthly tons of Dual Stream, Single Stream and Single Stream with Blue Bags delivered to either the MRF or the Transfer Station by the County multiplied by the Minimum Per Ton Revenue Formula in Table 2 below (the “**Monthly Minimum Payment**”). Material which exceeds 10% Blue Bag material will be classified as Single Stream with Blue Bags. The County acknowledges that the Monthly Tonnage Requirement is a material inducement for the Contractor to enter into this Agreement. Failure by the County to meet each Monthly Tonnage Requirement each calendar month of each Contract Year will result in material damages to Contractor. Therefore, in the event that the County fails to meet the Monthly Tonnage Requirement for a given month, the Monthly Minimum Payment will be deemed unearned, the Contractor will not make the Monthly Minimum Payment for such month, and the County waives any and all rights to such unearned Monthly Minimum Payment.

### **6.2 Annual Profit Sharing Payments**

**6.2.1 Average Annual Market Value Calculation.** After each Contract Year the Contractor shall calculate the Average Annual Market Value index for the just ended Contract Year (“**AAMV**”) of Residential Program Recyclables defined as the 12-month average (shorter month

average for first stub year Contract Year) of (i) the monthly sum of commodity prices (U.S. Dollar per Ton) posted on the first day of each of the twelve months of the Contract Year in SecondaryMaterialsPricing.com and SecondaryFiberPricing.com (the “Original Pricing Sources”) multiplied by (ii) the composition of Recyclable Materials (see Table 1 below). In the event that either one or both of the Original Pricing Sources either (i) no longer exist; or (ii) no longer accurately reflect the County and Contractor’s intent for establishing pricing on the Effective Date; the County and Contractor agree to negotiate in good faith and establish a replacement pricing source(s) that is as comparable as possible to the Original Pricing Source(s).

**6.2.2 End-of-Year Payment.** After each Contract Year, upon the Contractor’s determination of the AAMV, the Contractor shall make a one-time annual profit sharing payment to County based on the AAMV equal to the total annual tons of Dual Stream, Single Stream and Single Stream with Blue Bags delivered to either the MRF or the Transfer Station by the County multiplied by the Per Ton Profit Sharing Formula in Table 3 (the “Profit Sharing Payment”). Material which exceeds 10% Blue Bag material will be classified as Single Stream with Blue Bags.

**Table 1  
Composition of County Delivered Residential Program Recyclables and Market Indexes  
for Determining Average Market Value**

<b>MATERIAL</b>	<b>Percentage<sup>1</sup></b>	<b>Waste News Pricing Type<sup>2</sup></b>
<b>Aluminum</b>	<b>1.79%</b>	<b>Aluminum Cans (sorted and baled)</b>
<b>Steel</b>	<b>2.65%</b>	<b>Steel Cans (sorted &amp; densified)</b>
<b>HDPE Colored</b>	<b>2.38%</b>	<b>Colored HDPE (baled)</b>
<b>HDPE Natural</b>	<b>1.28%</b>	<b>Natural HDPE (baled)</b>
<b>PET</b>	<b>3.88%</b>	<b>PET (baled)</b>
<b>OCC</b>	<b>10.20%</b>	<b>PS 11 Corrugated Containers</b>
<b>Office Fiber</b>	<b>2.40%</b>	<b>PS 37 Sorted Office Paper</b>
<b>ONP</b>	<b>38.68%</b>	<b>PS 8 Special De-ink Quality News</b>
<b>Mixed Paper</b>	<b>7.00%</b>	<b>PS 1 Soft Mixed Paper</b>
<b>Mixed Plastics</b>	<b>0.44%</b>	<b>All containers 1-7s</b>
<b>Mixed Glass</b>	<b>24.80%</b>	<b>3 Sort Glass</b>
<b>Residuals</b>	<b>4.50%</b>	
	<b>100.00%</b>	<b>Average Monthly Market Value</b>

**Table 2  
Minimum Per Ton Revenue Formulas for Dual  
Stream, Single Stream and Single Stream with Blue Bags Delivered By County.**

MATERIAL		GUARANTEED FLOOR PRICES
Dual Stream		\$20/ton
Single Stream		\$10/ton
Single Stream with Blue Bags		\$0/ton

**Table 3  
Per Ton Profit Sharing Formulas for Dual Stream, Single Stream and Single Stream with Blue Bags Delivered By County.**

MATERIAL		FORMULA BASED ON THE AVE. ANNUAL MARKET VALUE
Dual Stream		AAMV - \$110.00/ton
Single Stream		AAMV - \$115.00/ton
Single Stream with Blue Bags		AAMV - \$125.00/ton

**6.3 Timing and Method of Payment.** Subject to setoff by Contractor for costs of County incurred by Contractor under Article 3 above, the Monthly Minimum Payment due under Section 6.1 shall be submitted to the County within thirty (30) calendar days from the end of the month for which the payment is being made. Additionally, within thirty (30) calendar days from the end of each Contract Year the Profit Sharing Payment shall be submitted to the County. Concurrently with the submission of the Profit Sharing Payment, the Contractor shall submit an annual report for the previous Contract Year detailing the calculation of the Profit Sharing Payment due under Section 6.2.

**6.4 Adjustments to the Composition of Residential Program Recyclables.** The Contractor or County may request a study to measure the composition of Residential Program Recyclables utilized to calculate the AAMV pursuant to Article 6 of this Agreement, such request being subject to approval by the County, and such approval not unreasonably withheld. If approved by the County, Contractor and Director shall jointly develop a methodology and cost estimate to conduct the composition study. The Parties shall share equally in paying for the cost of the study. Once approved, adjustments to the composition of Residential Program Recyclables shall become effective for the following month and remainder of the Term, or until further adjusted in accordance with this article.

**6.5 Proration.** If any payments, rights or obligations under this Agreement (whether relating to Fees and Taxes, insurance, or to any other provision of this Agreement) relate to a period in part before the Effective Date or in part after the date of expiration or termination of the Term, the Parties hereto agree that appropriate adjustments and prorations shall be made.

**ARTICLE 7. RECORD KEEPING AND REPORTING**

**7.1 Recordkeeping.** The Contractor shall create, maintain, and make available records as defined herein, and which may be required by applicable local, state, and federal laws, rules and regulations:

**7.1.1 Recyclable Materials.** The Contractor will record Recyclable Materials Tonnage by date, type and source.

**7.1.2 Reject and Residue.** The Contractor will record Reject and Residue Tonnage by date.

**7.1.3 Other.** The Contractor shall maintain other records, documents and reports as the County may reasonably require to verify compliance with the Agreement.

**7.2 Document Retention.** The Contractor shall maintain and allow access to books, records, data, documents, and reports relating to this Agreement for three (3) years following the conclusion or termination of this Agreement.

## **ARTICLE 8. TERMINATION**

**8.1 For Default.** If either Party fails to comply with any of the terms and conditions of the Agreement deemed to be material, such refusal or failure shall be deemed a default under this Agreement.

In the event of default, the non-defaulting Party may give written notice of the default to the defaulting Party. The defaulting Party shall have thirty (30) days from the receipt of the notice to cure any default. If the defaulting Party fails to cure the breach within the allotted time, the non-defaulting Party may, at its option, immediately terminate the Agreement by providing written notice of termination to the defaulting Party. In the event of a default, the Contractor shall be entitled to compensation from third party vendors for materials processed, marketed and sold under this Agreement.

**8.2 Rights Cumulative.** The rights and remedies of the County and Contractor provided in this Article are in addition to any other rights and remedies provided by law or under this Agreement.

## **ARTICLE 9. REPRESENTATIONS AND WARRANTIES.**

**9.1 Contractor.** The Contractor represents and warrants as follows:

**9.1.1** The Contractor is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Georgia and is authorized to do business in North Carolina.

**9.1.2** This Agreement has been duly executed and delivered by the Contractor and constitutes a legal, valid and binding obligation of the Contractor,

enforceable against the Contractor in accordance with its terms, except as the same may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditors' rights generally and general equitable principles regardless of whether such enforceability is considered in a proceeding at law or in equity.

**9.1.3** The Contractor has the corporate power and authority to execute and deliver this Agreement and to perform its obligations hereunder. The Contractor has taken all action necessary to authorize the execution and delivery of this Agreement, the performance of its obligations hereunder and the consummation of the transactions contemplated hereby to be consummated by it.

**9.2 County.** The County represents and warrants as follows:

**9.2.1** This Agreement has been duly executed and delivered by the County and constitutes a legal, valid and binding obligation of the County, enforceable against the County in accordance with its terms.

**9.2.2** The County has the power and authority to execute and deliver this Agreement and to perform its obligations hereunder. The County has taken all action necessary to authorize the execution and delivery of this Agreement, the performance of its obligations hereunder and the consummation of the transactions contemplated hereby to be consummated by it.

## **ARTICLE 10. NOTICES**

All notices or other communications to be given hereunder shall be in writing and shall be sent by facsimile, overnight delivery or registered or certified United States mail, return receipt requested, properly addressed as follows:

To the Contractor:  
American Recycling of South Carolina, LLC  
1240 White Horse Rd.  
Greenville, SC 29605  
Phone: 864-277-7722  
Facsimile: 864-277-7733  
Attn: Ron Moore

To the County:  
Office of the County Manager  
Henderson County  
1 Historic Courthouse Square, Ste 2  
Hendersonville, NC 28792

with copy to Office of the County Attorney  
Henderson County  
1 Historic Courthouse Square, Ste 5  
Hendersonville, NC 28792

## **ARTICLE 11. GENERAL PROVISIONS**

### **11.1 Hold Harmless/Indemnification.**

**11.1.1 As to the Contractor.** The County, to the extent of its liability insurance coverage, hereby agrees to save, protect, defend, indemnify, and hold the Contractor and its employees harmless from and against any and all claims, liabilities, demands, damages, judgments, awards, settlements, expenses, or losses, arising out of (i) the negligence or intentional misconduct of the County and its employees, (ii) the breach by the County of any of the representations, warranties, covenants, and agreements made by the County set forth in this Agreement, (iii) any damage to property and injuries (including death) to any persons, caused by the County or its employees and (iv) any damage to property and injuries (including death) to any persons, caused by the Contractor, its employees, agents, or permitted subcontractors. The County, at its option, may control the defense of any claim subject to the foregoing indemnity, and the Contractor will cooperate with the County in such defense in all reasonable respects, at no cost to the Contractor.

**11.1.2 As to the County.** The Contractor hereby agrees to save, protect, defend, indemnify, and hold the County and its employees harmless from and against any and all claims, liabilities, demands, damages, judgments, awards, settlements, expenses, or losses, arising out of (i) the negligence or intentional misconduct of the Contractor and its employees and its permitted subcontractors, (ii) the Contractor's use of subcontractors' services if permitted hereunder, (iii) the breach by the Contractor of any of its representations, warranties, covenants, and agreements made by the Contractor set forth in this Agreement, and (iv) any damage to property and injuries (including death) to any persons, caused by the Contractor, its employees, agents, or permitted subcontractors. The Contractor, at its option, may control the defense of any claim subject to the foregoing indemnity, and the County will cooperate with the Contractor in such defense in all reasonable respects, at no cost to the County.

**11.2 Insurance.** Before performing any work under this Agreement, Contractor shall procure and maintain, during the life of the Agreement, unless otherwise specified, Commercial General Liability which includes insurance for bodily injury, property damage, contractual, products and completed operations, and personal injury with limits of not less than \$1,000,000 combined single limit per occurrence for bodily injury, property damage, and personnel injury with a \$1,000,000 general aggregate limit covering all work performed under this Agreement. The Contractor shall also require any subcontractors to carry the same coverage in the same amounts.

**11.3 Controlling Law.** This Agreement sets forth the entire agreement and understanding of the Parties hereto with respect to the subject matter of this Agreement and supersedes all arrangements, communications, representations or warranties, whether oral or written, by any officer, employee or representative of either Party hereto. This Agreement may not be modified, amended, supplemented, canceled, or discharged, except by written instrument executed by all of the Parties hereto. There are no restrictions, representations, warranties, covenants or undertakings other than those expressly set forth or referred to herein. No waiver shall be effective unless it is in writing and is signed by the Party asserted to have granted the waiver. The provisions of this Agreement are independent of and severable from each other, and no provision shall be affected or rendered invalid or unenforceable by virtue of the fact that any provision may be invalid or unenforceable in whole or in part. This Agreement is not intended to confer upon any third parties, other than the Parties hereto, any rights or remedies. This Agreement shall be governed by the laws of the State of North Carolina and any and all disputes arising out of the Agreement shall, if they cannot be resolved without litigation, be litigated only in a non-jury hearing. This Agreement may be executed in any number of counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument.

**11.4 Arm's Length Negotiations.** Each Party hereto expressly represents and warrants to all other Parties hereto that: (a) before executing this Agreement, said Party has fully informed itself of the terms, contents, conditions and effects of this Agreement; (b) said Party has relied solely and completely upon its own judgment in executing this Agreement; (c) said Party has had the opportunity to seek and has obtained the advice of counsel before executing this Agreement; (d) said Party has acted voluntarily and of its own free will in executing this Agreement; (e) said Party is not acting under duress, whether economic or physical, in executing this Agreement; and (f) this Agreement is the result of arm's length negotiations conducted by and among the Parties hereto and their respective counsel.

**11.5 Construction.** The Parties hereto agree and acknowledge that they have jointly participated in the negotiation and drafting of this Agreement. In the event of an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the Parties hereto and no presumptions or burdens of proof shall arise favoring any Party hereto by virtue of the authorship of any of the provisions of this Agreement. Any reference to any federal, state, local, or foreign statute or law shall be deemed also to refer to all rules and regulations promulgated thereunder, unless the context requires otherwise. If any Party hereto has breached any representation, warranty, or covenant contained herein in any respect, the fact that there exists another representation, warranty, or covenant relating to the same subject matter (regardless of the relative levels of specificity) which the Party has not breached shall not detract from or mitigate the fact that the Party is in breach of the first representation, warranty, or covenant.

## **ARTICLE 12. ASSIGNMENT AND/OR SUBCONTRACTING**



This Agreement and any permits required for performance of the Agreement, may not be assigned, conveyed, or otherwise disposed of without the written permission of the other Party, which will not be unreasonably withheld. Unless otherwise expressly agreed by the Parties hereto, no such assignment shall relieve either Party of its liability under this Agreement. In the event Contractor elects to use any subcontractors, Contractor shall retain prime responsibility to the County of full and complete satisfactory and acceptable performance under this Agreement.

### **ARTICLE 13. TAXES**

Contractor shall pay all applicable sales, consumer, use and other similar taxes required by Federal, State and local law. Contractor is responsible for reviewing the pertinent State Statutes involving the sales tax and complying with all requirements.

### **ARTICLE 14. FORCE MAJEURE**

**14.1 Force Majeure.** Except for any payment obligation by either Party, if the County or Contractor is unable to perform, or is delayed in its performance of any of its obligations under this Agreement by reason of any event of Force Majeure, such inability or delay shall be excused at any time during which compliance therewith is prevented by such event and during such period thereafter as may be reasonably necessary for the County or Contractor to correct the adverse effect of such event of Force Majeure.

**14.2 Notification.** In order to be entitled to the benefit of this Section, a Party claiming an event of Force Majeure shall be required to give prompt written notice to the other Party specifying in detail the event of Force Majeure and shall further be required to use its best efforts to cure the event of Force Majeure. The Parties agree that, as to this Article, time is of the essence.

### **ARTICLE 15. MISCELLANEOUS**

**15.1 Succession of Agreement.** This Agreement and the rights and obligation contained herein shall inure to the benefit of and be binding upon the Parties hereto and their respective successors and assigns.

**15.2 Survival.** Any rights either Party may have in the event it terminates this Agreement pursuant to the terms hereof shall survive such termination.

**15.3 Relationship.** Nothing contained in this Agreement shall constitute or be construed to be or create a partnership, joint venture or any other relationship between Contractor and County.

**15.4 Further Assurance.** Contractor and County agree to execute, acknowledge and deliver and cause to be done, executed, acknowledged and delivered all such further documents and perform such acts as shall reasonably be requested of it in order to carry out this Agreement and give effect hereto. Accordingly, without in any manner limiting the

specific rights and obligations set forth in this Agreement, the Parties declare their intention to cooperate with each other in effecting the terms of this Agreement.

**15.5 Time of the Essence.** For purposes herein, the Parties agree that time shall be of the essence of this Agreement and the representations and warranties made are all material and of the essence of this Agreement.

**15.6 Captions and Section Headings.** Captions and Section headings contained in this Agreement are for convenience and reference only and in no way define, describe, extend, or limit the scope or intent of this Agreement, nor the intent of any provision hereof.

**15.7 No Waiver.** No waiver of any provision in this Agreement shall be effective unless it is in writing, signed by the Party against whom it is asserted, and any such written waiver shall only be applicable to the specific instance to which it relates and shall not be deemed to be a continuing or future waiver.

**15.8 Gender.** All terms and words used in this Agreement, regardless of the number and gender in which used, shall be deemed to include any other gender or number as the context or the use thereof may require.

**15.9 Severability.** In the event that any provision of this Agreement shall, for any reason, be determined to be invalid, illegal, or unenforceable in any respect, the Parties hereto shall negotiate in good faith and agree to such amendments, modifications, or supplements of or to this Agreement or such other appropriate actions as shall, to the maximum extent practicable in light of such determination, implement and give effect to the intentions of the Parties as reflected herein, and the other provisions of this Agreement shall, as so amended, modified, or supplemented, or otherwise affected by such action remain in full force and effect.

**15.10 Schedules and Exhibits.** All schedules or exhibits attached hereto contain additional terms of this Agreement. Typewritten provisions inserted in this form or attached hereto shall control all printed provisions in conflict therewith.

**15.11 Attorney Fees.** In the event of arbitration or litigation between the Parties regarding this Agreement, each Party shall be responsible for their own attorney's fees and costs.

**15.12 Third Party Rights.** The Parties hereto do not intend nor shall this Agreement be construed to grant any rights, privileges or interest to any third party.

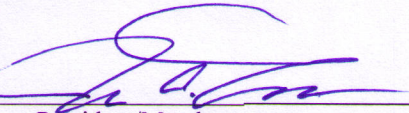
**15.13 Modification.** Any modification to this Agreement must be in writing and signed by both Parties.

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IN WITNESS WHEREOF, the Board of Commissioners of the County has approved this the 16th day of March, 2011, and the Parties have executed this Agreement the day and year first written above.

**AMERICAN RECYCLING OF SOUTH CAROLINA LLC**

By:   
\_\_\_\_\_  
President/Member-manager

**COUNTY OF HENDERSON**

By: \_\_\_\_\_  
County Manager

This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act.

\_\_\_\_\_  
HENDERSON COUNTY FINANCE OFFICER