

## ENVIRO TECHNOLOGY SERVICES LTD SUPPORT AND MAINTENANCE AGREEMENT

**THIS AGREEMENT** is made on *[insert here]*.

### **BETWEEN**

- (1) ENVIRO TECHNOLOGY SERVICES LTD (Company Number 1726773) whose registered address is at Kingfisher Business Park, London Road, Stroud, Gloucestershire, GL5 2BY ("ET"); and
- (2) The entity whose name and details are set out in part 1 of schedule 1 ("Customer")

### **WHEREAS**

- (A) The Customer has obtained Products and Licensed Program (both defined below) from ET.
- (B) The Customer desires for ET to provide support and maintenance services in respect of the Products and Licensed Program and ET agrees to provide the Customer with the same on the terms and conditions hereinafter contained.

### **THE PARTIES AGREE AS FOLLOWS**

#### **1. INTERPRETATION**

1.1 In this Agreement, unless the context otherwise requires the following expressions shall have the following meanings:

"Additional Charges"	means ET's then charge out rates (as may be changed from time to time by ET) for work undertaken on a time and materials basis.
"Breakdown Services"	means the Product Support Services and Software Support Services (excluding Routine Services).
"Commencement Date"	means the commencement date set out in part 2 of schedule 1.
"Consumables"	means the consumables used by the Products or in conjunction with the Products including <i>[insert here]</i> .
"Current Release"	means the most recent New Release accepted by the Customer under this Agreement or if no New Release has been issued by ET or its licensors or accepted by the Customer, the Licensed Program.
"Expendables"	means expendables parts of the Product or expendables parts which are used in conjunction with the Products including <i>[insert here]</i> .
"Fees"	means the fees set out in part 3 of schedule 1.
"Licensed Program"	means the software set out in part 4 of schedule 1 and shall include any New Releases and New Versions.
"New Release"	means any modified or corrected version of any of the Licensed Programs or Program Documentation from time to time issued by ET and/or its licensors (as the case may be) pursuant to this Agreement for the purpose of fixings bugs or faults. For the avoidance of doubt, this will not include added features of functionality.
"New Version"	means a new version of the Licensed Program issued from time to time by ET or its licensors which incorporates enhancements, new and additional functionality and/or look and feel.

- “Optional Services” means the optional services set out in schedule 5.
- “Products” means the products specified in part 5 of schedule 1 (excluding any Consumable or Expendables) supplied by ET to the Customer.
- “Program Documentation” means the instruction manuals, user guides and other information relating to the Licensed Program made available by ET or its licensors at their discretion in either printed or machine readable form to the Customer.
- “Product Support Services” means the product support services set out in schedule 4 but shall exclude any Routine Services.
- “Response Time” means the response time set out schedule 2.
- “Routine Services” means the routine services set out in schedule 3.
- “Site” means the location where the Products and Licence Program are to be utilised by the Customer as set out in part 6 of schedule 1.
- “Software Support Services” means the software support services set out in clause 5 (excluding Routine Services).
- “Standard Support Hours” means the standard support hours for Breakdown Services as specified in schedule 2.
- “Support and Maintenance Services” means the Breakdown Services, the Routine Services and where agreed, the Optional Services.
- “Term” means subject to earlier termination of this Agreement, the term set out in part 7 of schedule 1.
- 1.2 All other defined terms used in this Agreement shall have the same meaning as the Software Licence Agreement.
- 1.3 In this Agreement, unless the context otherwise requires:
- 1.3.1 references to clauses or schedules shall be interpreted as references to clauses of, and schedules to, this Agreement, and references to this Agreement shall include its schedules;
- 1.3.2 a reference to (or to any specified provision of) this Agreement or any other document shall be construed as a reference to this Agreement, that provision or that document as in force for the time being as amended in accordance with the agreement of the relevant parties;
- 1.3.3 a reference to any gender shall include every other gender;
- 1.3.4 the singular shall include the plural and vice versa;
- 1.3.5 references to persons shall include individuals, firms, companies, unincorporated associations, partnerships and government entities (whether or not having a separate legal personality);
- 1.3.6 a reference to any party shall include its successors in title and permitted assigns; and
- 1.3.7 a reference to a statute or statutory provision shall include a reference to that statute or statutory provision as replaced, amended or re-enacted from time to time and all statutory instruments or orders made pursuant to it.
- 1.4 Clause headings are for convenience only and shall not affect the construction of this Agreement.

## **2. SERVICES TO BE PERFORMED**

- 2.1 The Customer hereby appoints ET to provide the Customer with Support and Maintenance Services to the Customer and ET hereby agrees to provide the Customer with the same upon the terms and conditions hereinafter contained.
- 2.2 ET undertakes to carry out the Support and Maintenance Services for the Customer using reasonable skill and care.
- 2.3 The Support and Maintenance Services provided shall be without prejudice to or affect any warranties or guarantees given by ET to the Customer under its Standard Terms and Conditions for the Provision of Goods and Services.

## **3. CHARGES AND PAYMENT**

- 3.1 The Customer shall pay to ET the Fees and such other payments as specified under this Agreement where such other payments are due under the provisions of this Agreement.
- 3.2 The Fees (together with value added tax (or such other similar tax) thereon where applicable) shall be levied by ET in the amounts and at the times specified in part 3 of schedule 1 or otherwise as specified in this Agreement.
- 3.3 Where set out in part 3 of schedule 1, ET shall be entitled to vary the Fees in the amounts and at the times specified in part 3 of schedule 1.
- 3.4 The Fees and any expenses payable under this Agreement shall be payable by the Customer without set off, deduction or counterclaim. The time of payment shall be of the essence.
- 3.5 Unless otherwise agreed by the parties, all Fees payable shall be paid in Sterling Pound.
- 3.6 If payment is not made on the due date, ET shall (at its sole discretion) be entitled:
  - 3.6.1 to cancel or suspend the Support and Maintenance Services (in whole or in part) to the Customer; and/or
  - 3.6.2 without limiting any other rights set out in this clause or of which it may have, to charge interest on the outstanding amount (both before and after any judgment) in accordance with the Late Payment of Commercial Debts (Interest) Act 1998 with such interest to accrue on a daily basis from the due date until the outstanding amount is paid in full.

## **4. SUPPORTED SOFTWARE AND PRODUCTS**

- 4.1 The Support and Maintenance Services shall be provided in respect of:
  - 4.1.1 the Licensed Program (including any New Versions of the same); and
  - 4.1.2 the Productsbut not any other software, products and/or hardware unless otherwise agreed by ET in writing and subject to payment of additional fees at the Additional Charges rate.
- 4.2 Notwithstanding clause 4.1, ET shall have no obligation to provide the Support and Maintenance Services (including the diagnosis and rectification of any fault) arising from:
  - 4.2.1 the modification of the Licensed Program or their merger (in whole or in part) with any other software;
  - 4.2.2 the modification of the Products or their merger (in whole or in part) with other products not supplied by ET unless otherwise agreed by ET;

- 4.2.3 the failure by the Customer to implement recommendations in respect of, or solutions to, faults previously advised by ET;
  - 4.2.4 any repair, adjustment, alteration or modification of the Licensed Program and/or Products by any person other than ET (or its representatives) without ET's prior written consent; and/or
  - 4.2.5 the use of the Licensed Program other than in accordance with the Program Documentation or training provided by ET or its representatives, or as otherwise instructed by ET or its representatives.
- 4.3 ET may upon request by the Customer provide Support and Maintenance Services notwithstanding that the fault results from any of the circumstances described in clause 4.2 provided that ET shall in such circumstances be entitled to levy Additional Charges.
- 4.4 In addition, ET shall be entitled to levy reasonable Additional Charges, where the Customer request for Support and Maintenance Services in circumstances where any reasonably skilled and competent user of the Licensed Program and/or Products would have judged the Customer's request for Support and Maintenance Services to have been unnecessary.
- 4.5 If the Customer discovers that the Program Documentation or product user manual in respect of the Product do not provide adequate or correct instruction for the proper use of any facility or function in relation to the Licensed Program or such Product (as the case may be) for an adequately trained and experienced user, then the Customer shall notify ET in writing of the fault in question as soon as it is reasonably practicable. ET shall thereupon promptly correct the fault and provide the Customer with appropriate amendments to the Program Documentation and/or such product manual.

## 5. BREAKDOWN SERVICES

- 5.1 The Breakdown Services shall consist of:
- 5.1.1 the Software Support Services;
  - 5.1.2 the Product Support Services; and
  - 5.1.3 the Optional Services (where agreed and specified in schedule 5)
- but for the avoidance of doubt, exclude the Routine Services.
- 5.2 The Breakdown Services shall be provided:
- 5.2.1 during the Standard Support Hours;
  - 5.2.2 and shall comprise:
    - 5.2.2.1 a telephone help desk to provide first-line technical support;
    - 5.2.2.2 remote diagnosis and, where possible, carry out correction of faults, defects and errors remotely; and
    - 5.2.2.3 sending a technician to the Site.
- 5.3 Where the Breakdown Services are provided outside of the Standard Support Hours, ET shall be entitled to charge additional fees based on the ET's Additional Charges rate.
- 5.4 ET shall ensure that any of its authorised representative e.g. engineers or technicians who are on the Site for the purpose of, or in connection with, this Agreement adheres to the Customer's security procedures and health and safety regulations, as from time to time notified to ET or otherwise brought to the notice of ET or such persons. The Customer shall be entitled to remove or to refuse admission to any person who is, or has been, in material breach of such procedures and regulations. However, ET shall incur no liability for any delay in performing or failure to perform its obligations under this agreement as a result of compliance with the terms of this clause 5.4.

- 5.5 In the course of the performing the Breakdown Services, where Consumables and/or Expendables require replacing, the cost of such Consumables and/or Expendables (as the case may be) shall be charged at ET's then current price list.

## **6 New Versions**

- 6.1 ET shall promptly notify the Customer of any New Version of the Licensed Programs which ET shall from time to time make generally available to its licensees. ET shall provide with such notification an explanatory memorandum specifying not only the nature of the improvements but also any adverse effects which the New Version may be expected to have, including in particular any expected degradation in the performance of the Licensed Programs or any removal of current functionality. While it is acknowledged by the Customer that the explanatory memorandum may not be equivalent to a detailed specification of the New Version it shall contain sufficient information to enable the Customer to judge whether the New Version will be appropriate to the Customer's requirements.
- 6.2 The Customer will have the option of whether to obtain such New Version. Where the Customer desires to upgrade the Licensed Program to the New Version, the Customer shall pay the ET such fees based on ET standard price list in relation to such new Version. ET will thereafter deliver to the Customer as soon as reasonably practicable (having regard to the number of other users requiring the New Version) the object code of the New Version in machine-readable form together with any amendments to the Specification and the Program Documentation which shall be necessary to describe and enable proper use of the improved facilities and functions of the New Version. The Customer's use of such New Version of the Licensed Program shall be governed by the provisions of the relevant software licence agreement to which such New Version relates to.
- 6.3 If requested by the Customer, ET shall provide training for the Customer's staff in the use of the New Version at ET's standard scale of charges from time to time in force, such training to commence as soon as reasonably practicable after the delivery of the New Version.

## **7 ROUTINE SERVICES AND OPTIONAL SERVICES**

- 7.1 ET shall perform the Routine Services pursuant to schedule 3 and the Optional Services in schedule 5 using reasonable skill and care.
- 7.2 For the avoidance of doubt, Consumables and Expendables (which ET has included as part of its Routine Services offering) which require replacement whilst the Routine Services is performed shall be replaced at no additional cost to the Customer.

## **8 THE CUSTOMER'S RESPONSIBILITIES**

- 8.1 The Customer shall provide ET, and all other persons duly authorised by ET with full, safe and uninterrupted access to the Site, and remote access to designated equipment on which the Licensed Program has been installed upon and the Products as may reasonably be required for the purpose of performing the Support and Maintenance Services, such access, except in the case of emergency or agreed out-of-hours downtime, to be within the Standard Support Hours.
- 8.2 Where the Support and Maintenance Services are to be performed at the Site or any of the Customer's premises, the Customer shall provide adequate working space and office (including telephone) facilities for use by ET's personnel and take reasonable care to ensure their safety.
- 8.3 The Customer shall ensure that appropriate environmental conditions are maintained for the Licensed Program and Products and shall take all reasonable steps to ensure that the Licensed Program and Products are operated in a proper manner by the Customer's employees.
- 8.4 The Customer shall nominate 3 representatives who shall act as its contact points and channels of communication for the purpose of this Agreement. The Customer shall forthwith inform ET in writing of any change in the identity of any such person(s) or department.
- 8.5 The Customer shall:
- 8.5.1 provide ET with such assistances as may be reasonably required by ET in order for ET to provide the Customer such the Support and Maintenance Services.

8.5.2 report any faults, malfunction, failure, errors in respect of the Licensed Program and Hardware promptly to ET; and

8.5.3 keep full and up to date back-up copies of all of its data.

8.6 The Customer shall indemnify ET against any losses, damages, costs (including legal fees) and expenses incurred by or awarded against ET as a result of the Customer's breach of this agreement or any negligent or wrongful act of the Customer, its officers, employees, contractors or agents.

## **9 TERM**

9.1 This Agreement shall commence or be deemed to have commenced on the Commencement Date and subject to earlier termination in accordance with the provisions of this Agreement, shall continue during the Term.

## **10 TERMINATION**

10.1 Without prejudice to any other termination provisions set out in this Agreement, this Agreement may be terminated:

10.1.1 by either party forthwith on giving notice in writing to the other if the other commits any material breach of any term of this Agreement and (in the case of a breach capable of being remedied) shall have failed, within thirty (30) days after the receipt of a request in writing from the other party so to do, to remedy the breach; or

10.1.2 by either party forthwith on giving notice in writing to the other if the other party shall (if an individual) have a bankruptcy order made against him or her or (if another business entity) shall have a receiver or administrative receiver appointed of it or over any part of its undertaking or assets or shall pass a resolution for winding-up (otherwise than for the purpose of a bona fide scheme of solvent amalgamation or reconstruction of ET) or a court of competent jurisdiction shall make an order to that effect or if the other party shall become subject to an administration order or shall enter into any voluntary arrangement with its creditors or shall cease or threaten to cease to carry on business.

10.2 Any termination of this Agreement pursuant to this clause shall be without prejudice to any other rights or remedies a party may be entitled to hereunder or at law and shall not affect any accrued rights or liabilities of either party, nor the coming into, or continuance in force, of any provision hereof which is expressly or by implication intended to come into, or continue in force, on or after such termination.

10.3 If this Agreement is terminated under any provision of this Agreement, the Customer shall pay to ET all costs and expenses, including legal and other fees incurred, together with all invoiced amounts which remain unpaid and a reasonable amount, based on ET's current rates, for any work carried out but not yet invoiced.

10.4 Unless otherwise agreed, no part of the Fees shall be refunded on any termination of this Agreement.

10.5 Upon termination, the Support and Maintenance Services shall cease to be provided.

## **11 LIMITATION OF LIABILITY**

11.1 Notwithstanding any other provisions in this Agreement, ET shall not exclude or limit liability for death or personal injury to the extent that the same results from the negligence or wilful default of ET or for fraudulent misrepresentation.

11.2 Subject only to clause 11.1 and 11.3, in no event shall ET be liable to the Customer for any indirect or consequential loss including without limitation to loss of audit savings, cost of employing staff, wasted time of managers and staff and third party cost e.g. disaster recovery, replacement of supplier, loss of profits, loss of good will, loss of reputation or loss or corruption of data.

11.3 Subject only to clause 11.1, ET shall not be liable for any loss, damages, costs, claims or expenses whatsoever arising from:

- 11.3.1 operator error on the part of the Customer or any fault in the hardware, software or programs supplied by the Customer or used by the Customer (other than the Licensed Program and/or the Hardware); or
- 11.3.2 the wilful or negligent act or omission of any person not being an employee or agent of ET.
- 11.4 Subject to clauses 11.1, 11.2 and 11.3, ET's total liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with this Agreement shall be limited to:
  - 11.4.1 in respect of matters for which ET does not carry insurance, the Fees paid by the Customer to ET over the past 12 months; and
  - 11.4.2 in respect of matters for which ET carries insurance, the insured value.
- 11.5 The Customer agrees that it is in a better position to foresee and evaluate any loss which it may suffer in connection with this Agreement and that the terms of this Agreement have been calculated on the basis of the limitations and exclusions as set out in this clause 11 and the Customer agrees to effect such insurance as is suitable having regard to its particular circumstances and the terms of this Agreement.
- 11.6 The provisions of this clause 11 shall survive the termination of this Agreement howsoever arising.
- 11.7 The exclusions and limitations of liability set out in this clause 11 shall be considered severally. The invalidity or unenforceability of any one of these sub-clauses shall not affect the validity or enforceability of any other part of this clause 11.

## **12 INTELLECTUAL PROPERTY RIGHTS INDEMNITY**

- 12.1 Subject to the financial limits set out in clause 11 and ET's standard terms and conditions (and in the event of conflict, the terms most favourable to ET shall apply), ET will indemnify and hold harmless the Customer against any damages (including costs) that may be awarded or agreed to be paid to any third party in respect of any claim or action that the normal operation, possession or use of the Licensed Program which are wholly owned by ET (but not those which are licensed by third parties to ET to sub-licence to the Customer; or by third parties directly to the Customer) by the Customer infringes the patent, copyright, registered design or trade mark rights of said third party (an "Intellectual Property Infringement") provided that the Customer:
  - 12.1.1 gives notice to ET of any Intellectual Property Infringement forthwith upon becoming aware of the same;
  - 12.1.2 gives ET the sole conduct of the defence to any claim or action in respect of an Intellectual Property Infringement and does not at any time admit liability or otherwise attempt to settle or compromise the said claim or action except upon the express instructions of ET; and
  - 12.1.3 acts in accordance with the reasonable instructions of ET and gives to ET such assistance as it shall reasonably require in respect of the conduct of the said defence including, without prejudice to the generality of the foregoing, the filing of all pleadings and other Court process and the provision of all relevant documents.
- 12.2 For the avoidance of doubt, ET shall not be liable for any Intellectual Property Infringement which relate to Licensed Programs which are not wholly owned by ET including those which are licensed by third parties to ET to sub-licence to the Customer; or by third parties directly to the Customer.
- 12.3 ET shall reimburse the Customer its reasonable costs incurred in complying with the provisions of clause 12.1.
- 12.4 ET shall have no liability to the Customer in respect of an Intellectual Property Infringement if the same results from any breach of the Customer's obligations under this Agreement.
- 12.5 In the event of an Intellectual Property Infringement of the Licensed Program Materials, ET shall be entitled at its own expense and option either to:
  - 12.5.1 procure the right for the Customer to continue using the Licensed Program Materials; or

12.5.2 make such alterations, modifications or adjustments to the Licensed Program Materials so that they become non-infringing, without incurring a material diminution in performance or function; or

12.5.3 replace the Licensed Program Materials with non-infringing substitutes, provided that such substitutes do not entail a material diminution in performance or function.

12.6 Subject always to clause 11, if ET, in its reasonable judgement, is not able to exercise any of the options set out at clauses 12.5.1, 12.5.2 or 12.5.3 within 30 days of the date it received notice of the Intellectual Property Infringement then the Customer, without prejudice to any other rights or remedies it may have hereunder or at law, shall be entitled to terminate this Agreement by 7 days' notice upon ET and ET shall return to the Customer the licence fees by the Customer in respect of such Licensed Program and the Customer agrees that this will be the Customer's sole remedy.

12.7 For the avoidance of doubt, the copyright and all other intellectual property rights of whatever nature in any corrected or modified versions of the Licensed Program including any New Version and/or New Release made pursuant to this Agreement or the Software Licence Agreement shall be and shall remain vested in ET.

### **13 CONFIDENTIALITY**

13.1 Each of the parties hereto undertakes to the other to keep confidential all information (written or oral) concerning the business and affairs of the other that it shall have obtained or received as a result of the discussions leading up to or the entering into of this Agreement save that which is trivial or obvious; already in its possession other than as a result of a breach of this clause; or in the public domain other than as a result of a breach of this clause.

13.2 Each of the parties undertakes to the other to take all steps as shall from time to time be necessary to ensure compliance with the provisions of clause 13.1 by its employees, agents and sub-contractors.

### **14 FORCE MAJEURE**

14.1 Neither party hereto shall be liable for any breach of its obligations hereunder resulting from causes beyond its reasonable control including but not limited to fires, strikes (of its own or other employees), insurrection or riots, embargoes, container shortages, wrecks or delays in transportation, inability to obtain supplies and raw materials, requirements or regulations of any civil or military authority (an "Event of Force Majeure"). Notwithstanding the foregoing, the parties agree that the non-payment of the Fees or monies due to ET shall be excluded from this clause 14.1.

14.2 Each of the parties hereto agrees to give notice forthwith to the other upon becoming aware of an Event of Force Majeure such notice to contain details of the circumstances giving rise to the Event of Majeure.

14.3 If a default due to an Event of Force Majeure shall continue for more than 12 weeks then the party not in default shall be entitled to terminate this Agreement. Neither party shall have any liability to the other in respect of the termination of this Agreement as a result of an Event of Force Majeure.

### **15 ENTIRE AGREEMENT**

15.1 This Agreement constitutes the entire understanding between the parties with respect to the subject matter of this Agreement and supersedes all prior agreements, negotiations and discussions relating to it.

15.2 The Customer accepts that Support and Maintenance Services were not specially designed and tailored to its individual requirements and that it was responsible for their selection.

### **16 GENERAL PROVISIONS**

16.1 This Agreement may not be varied except by an instrument in writing signed by the authorised representatives of all the parties to this Agreement.

16.2 No delay or failure by ET to exercise any of its powers, rights or remedies under this Agreement will operate as a waiver of them, nor will any single or partial exercise of any such powers, rights or remedies preclude any other or further exercise of them. Any waiver, to be effective, must be in writing.



- 16.3 Every power and remedy given to ET under this Agreement shall be cumulative and not alternative and in addition to and not exclusive of any other power or remedy given to ET either by this Agreement or by law, and all such powers and remedies may be exercised whenever and as often as ET may deem expedient.
- 16.4 The provisions of this Agreement shall be binding upon and shall endure for the benefit of the successors and permitted assigns of the parties. None of the rights of the Customer under this Agreement may be assigned or transferred without the prior written consent of ET.
- 16.5 If any part of this Agreement is found by any court or competent authority to be illegal, void or unenforceable then that part shall be deemed not to be a part of this Agreement and the enforceability of the remainder of this Agreement shall not be affected.
- 16.6 Each party shall bear its own costs and expenses in relation to this Agreement and its implementation.
- 16.7 Nothing in this Agreement shall be deemed to create a partnership between the parties nor constitute any party the agent of the other party.
- 16.8 A person who is not a party to this Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement but this does not affect any right or remedy of a third party which exists or is available apart from that Act.

## **17 NOTICES**

- 17.1 All notices to be given under this Agreement shall be in writing and shall either be delivered personally or sent by first class pre-paid post or facsimile transmission and shall be deemed duly served:
- 17.1.1 in the case of a notice delivered personally, at the time the same is left at the address of, or handed to a representative of, the party to be served;
- 17.1.2 in the case of a notice sent by pre-paid post, 10 clear business days after the date of despatch; and
- 17.1.3 in the case of a facsimile transmission, if sent during normal business hours then at the time of transmission and if sent outside normal business hours then on the next following business day, provided that a confirmatory copy is sent by first class pre-paid post or by hand by the end of the next business day.
- 17.2 Each notice shall be addressed to the address of the party concerned set out at the head of this Agreement or to such other address as may be notified in writing for this purpose from time to time.

## **18 FREEDOM OF INFORMATION ACT**

- 18.1 Where the Customer is in a public authority subject to the provisions of the Freedom of Information Act 2000, and liable to reveal details of this Agreement and matters connected with this Agreement ("the Details") if requested to do so by someone under s.1(1) of the said Act, the Customer undertakes to inform ET of all such requests for Details forthwith.
- 18.2 The Customer if requested by ET shall allow ET to contest or commence proceedings to resist such disclosure of the Details at ET's cost.

## **19 LAW AND JURISDICTION**

- 19.1 The parties will attempt in good faith to resolve any dispute or claim arising out of or relating to this Agreement by negotiations between senior executives of the parties who have authority to resolve such disputes or claims.
- 19.2 Failing resolution pursuant to Clause 19.1, any dispute arising at any time between the parties in regard to any matter relating to or arising from this Agreement shall be submitted to and decided by arbitration under the UNCITRAL Rules in force as at the date of the dispute. Unless otherwise agreed by the parties, it is agreed that:

- 19.2.1 the tribunal shall consist of one arbitrator (who is to be a practising barrister or solicitor who specialises in environmental and Information Technology law) which shall be jointly appointed by the parties:
- 19.2.2 in default of the parties' agreement as to the arbitrator, the appointing authority shall be the President of the British Computer Society;
- 19.2.3 the seat of the arbitration shall be in London; and
- 19.2.4 the language of the arbitration shall be English.
- 19.3 The parties agree that the decision of the arbitrator shall, in absence of a manifest error, be binding on the parties.
- 19.4 If the matter is not resolved by the arbitration procedure in this Clause 19 within twenty one days of the initiation of such procedure (or such other period as may be agreed in writing) or if either party will not or ceases to participate in the aforesaid arbitration procedure, the dispute shall, unless otherwise agreed by the parties in writing, be referred to the English Courts.
- 19.5 This Agreement shall be governed by and construed in accordance with English law.

**IN WITNESS WHEREOF** the parties hereto have set their hands the day and year first before written.

**SIGNED** by \_\_\_\_\_ )  
duly authorised for and on \_\_\_\_\_ )  
behalf of ET \_\_\_\_\_ )

**SIGNED** by \_\_\_\_\_ )  
duly authorised for and on \_\_\_\_\_ )  
behalf of the Customer \_\_\_\_\_ )

## SCHEDULE 1

### PART 1

Name of Customer: *[insert here]*

Address: *[insert here]*

### PART 2

Commencement Date: *[insert here]*

### PART 3

Fees:

*[insert when Fees are payable especially if payment is done via stage payments – where relevant you just say that the Fees can increase as much as RPI each year]*

### PART 4

Licence Programs

*[insert names of software which ET will support here]*

### PART 5

Products

*[insert the products/hardware which ET will support here]*

### PART 6

Site: *[insert address here]*

### PART 7

**Term:** *[insert number of year here]*. Thereafter, this Agreement will automatically be renewed for additional period of 12 months unless notified by either party giving the other party no less than 90 days prior to the expiry of the Agreement which will be on such anniversary date of the Commencement Date. Where no such notice is provided, this Agreement will be renewed for further 12 month periods unless either party provides to the other party written notice of no less than 90 days of its intention to terminate this Agreement in which case the Agreement will terminate on such subsequent anniversary date of the Commencement Date.

## SCHEDULE 2

Subject to the provisions set out in the body of the Agreement, ET will use reasonable endeavours to meet the response time set out below when providing the Breakdown Services:

1. Provide standard support between the hours of *9.00 hrs to 17.00 hrs Monday to Friday excluding bank holidays in England.*
2. Where on Site support is required, ET will to send an engineer to the Site within [5 working days] [OR] [2 working days].

### **SCHEDULE 3**

#### Routine Services

ET shall provide the Customer with following:

1. The routine services shall consist of ET sending [[2] engineers to the Site for [2] days to:
  - 1.1 service the Products and where applicable the Licensed Program;
  - 1.2 replace the certain Consumables and Expendables within the Products which ET has identified as being included as part of its routine services offering; and
  - 1.3 carry out re-calibration of the Products and where applicable the Licensed Program.
2. The Customer will not incur any additional cost in respect of the cost of replacement Consumables and Expendables which ET has identified as being included as part of its routine services offering.
3. In the event more engineers are required on Site or the work required exceed [2 days], ET will be entitled to charge the Customer for the same at its Additional Charges Rate.

## SCHEDULE 4

Software Support Services and Product Support Services

### SOFTWARE SUPPORT SERVICES

ET shall provide the Customer with the following Software Support Services:

#### 1 Error correction

- 1.1 If the Customer shall discover that the Current Release fails to conform with the applicable software specifications or does not operate in accordance with the Program Documentation, then the Customer shall as soon as it is reasonable practicable upon discovery of the same, notify ET setting out the fault, defect or error in question and if reasonably practicable provide ET with a documented example of such defect or error.
- 1.2 ET will then based on the facts provided by the Customer, categorise the fault, defect or error. ET shall thereupon use reasonable endeavours to meet the Response Time and investigate the reported defect or error and thereafter use its reasonable endeavours to rectify the fault, defect or error within reasonable time. To the extent applicable, provided that ET has in its reasonable opinion been able to rectify the defect or error, it shall, forthwith upon such correction being completed, deliver and install the corrected version of the object code of the Current Release in machine readable form together with appropriate amendments to the Program Documentation specifying the nature of the correction and providing instructions for the proper use of the corrected version of the Current Release. ET shall provide the Customer with all assistance reasonably required by the Customer to enable the Customer to implement the use of the corrected version of the Current Release.
- 1.3 Without prejudice to the generality of clause 2 of this schedule 4, the foregoing error correction service shall not include the provision of services in respect of:
  - 1.3.1 defects or errors resulting from any modifications of the Current Release made by any person other than ET without ET's prior written consent;
  - 1.3.2 any release of the Licensed Programs other than the Current Release;
    - 1.3.2.1 use of the Current Release other than in accordance with the Program Documentation or operator error; or
    - 1.3.2.2 any defect or error in the equipment on which the Current release is installed upon (other than the Products provided by ET to the Customer) or in any programs used in conjunction with the Current Release.

#### 2 New Release

- 2.1 ET may deliver to the Customer any New Release of the Licensed Programs which ET shall from time to time make generally available to its licensees and the Customer shall be responsible for using such New Release subject to the conditions set out in clause 2 of schedule 4.
- 2.2 Within reasonable time prior to making a New Release available, ET shall make available to the Customer the purpose of the New Release and the faults, errors and bugs which such New Release addresses.
- 2.3 Notwithstanding anything else contained herein, the Customer shall not be obliged to accept or use the New Release if its use would result in any of the facilities and functions of the Licensed Programs being materially diminished or curtailed.
- 2.4 ET shall deliver to the Customer or make available for download the object code of the New Release in machine-readable form together with any amendments to the Program Documentation which shall be necessary to enable proper use of the New Release by adequately trained and experienced users. The Customer's use of the New Release shall be governed by the provisions of the relevant software licence agreement between the Customer and ET or the Customer and such third party licensor where the licence agreement is between the Customer and such third party licensor.
- 2.5 Within [30] days of the Customer receiving the New Release, the Customer shall test the New Release and shall notify ET of any problems with the New Release and ET will use reasonable endeavours to rectify any such problems. In this regard, ET shall either correct the New Release and re-issue it in accordance with this clause (as if it were a New Release) within a reasonable period of time, or withdraw it, in which event it shall remain obliged to provide the Support and Maintenance Services in respect of the Current Release.
- 2.6 If within [30] days after such delivery no such notification shall have been received by ET then, subject to ET having complied with its foregoing obligations, the Customer shall be deemed to have accepted the New Release which shall then become the Current Release and the provisions of this Agreement shall apply accordingly.

2.7 Upon acceptance of the New Release under clauses 2.5 and 2.6 of this schedule 4, the Customer shall if required by ET return to ET the previous Current Release and any part of the Program Documentation which has been superseded and all copies of the whole or any part thereof, or if required by ET shall destroy the same and certify in writing to ET that they have been destroyed.

### 3 Advice

3.1 ET shall provide the Customer between the Standard Support Hours with such technical advice by any of the telecommunications (including but not limited to electronic mail) telephone calls facsimile transmission postal mail or visits by staff of ET as shall be reasonably necessary to resolve any problems faults or errors with regard to the Current Release of the Licensed Software.

4 With regard to Licensed Programs of third parties (where ET does not own the intellectual property in such Licensed Programs), the Customer acknowledges that the Software Support Services provided will be subject to such third parties' terms and conditions. As such, ET shall not be liable or any losses or damages suffered by the Customer if ET is unable to provide the Software Support Services and/or comply with the Response Time.

5 For the avoidance of doubt, the Software Support Services is subject always to clause 4.2 of the body of Agreement.

### **PRODUCT SUPPORT SERVICES**

ET shall provide the Customer with the following Product Support Services:

1. The Product Support Services shall consist of repairing, re-calibrating and fixing of any Product supplied by ET to the Customer unless otherwise agreed by ET.
2. If the Customer shall discover that the Product fails to conform with any part of the product manual or has failed or is malfunctioning, then the Customer shall as soon as it is reasonably practicable upon discovery of the same, notify ET setting out the fault or malfunction in question and if reasonably practicable provide ET with a documented example of such failure or malfunction.
3. Upon receipt of notification from the Customer that the Product has failed or is malfunctioning, ET shall categorise the fault or malfunction. ET shall thereupon use reasonable endeavours to meet the Response Time and investigate the reported defect or error and thereafter, use its reasonable endeavours to rectify the fault or malfunction within reasonable time.
- 6 The Product Support Services exclude any maintenance of the Products which is necessitated as a result of any cause other than fair wear and tear or ET's neglect or fault, including without limitation:
  - 6.1 failure or fluctuation of electric power, air conditioning, humidity control or other environmental conditions;
  - 6.2 accident, transportation, neglect, misuse, or default of the Customer, its employees or agents or any third party;
  - 6.3 any fault in any attachments or associated equipment (whether or not supplied by ET) which do not form part of the Products;
  - 6.4 any attempt by any person other than ET's personnel to adjust, repair or maintain the Products; or
  - 6.5 any failure of fixed or removable storage media.
- 7 The Product Support Services also exclude:
  - 7.1 the provision of services other than at the Site (or such other location as ET shall have approved in writing);
  - 7.2 repair or renewal of tapes, labels, disk packs, printing cartridges or other consumable supplies;
  - 7.3 electrical or other environmental work external to the Products; or
  - 7.4 recovery or reconstruction of any data or programs lost or spoiled as a result of any breakdown of or fault in the Products.
- 8 Where a fault or malfunction of the Products occurs during the warranty period, any repair or replacement shall be carried out free of charge by ET.

- 9 Where a fault or malfunction occurs after the warranty period:
- 9.1 ET will use reasonable endeavours to carry out such repair where such Products are manufactured by ET; or
- 9.2 in respect of Products which are manufactured by third party supplier, ET will use reasonable endeavours to procure that such third party supplier repairs such Products.
- 10 Notwithstanding any other provisions in this Agreement, ET reserves the right to replace the whole of the Products or any part or parts thereof which may be found to be faulty or in need of investigation as to whether faults may exist in their operation.
- 11 ET, in effecting any such replacement, shall not remove the Products or any part or parts thereof (“the Removed Products”) until ET is ready to install equipment to replace them (“the Replacement Products”).
- 11.1 ET shall at the time of any such replacement notify the Customer of details of the Replacement Products.
- 11.2 If the Replacement Products are not equipment which are identical in all respects to the Removed Products, ET shall inform the Customer of the same in writing at the time of replacement. The Replacement Products shall not in any event provide less than an equivalent level of performance and functionality to the Removed Products.
- 12 Prior to ET removing any Products or part thereof, the Customer undertakes (provided the condition of the Removed Products reasonably allows) to copy and keep in a safe and secured manner any information or data which may be stored on the Removed Products.
- 13 Subject to clause 6 of this schedule 4, the cost of any Replacement Hardware shall be borne by the Customer.
- 14 Unless otherwise agreed, the Customer shall purchase from ET such spare parts or consumables as ET shall recommend and which are necessary for the provision of the Product Support Services, which shall be supplied at ET's list prices from time to time in force.
- 15 The Customer shall keep such spare parts at the Site. ET may draw on this stock of spare parts for the maintenance and repair of the Products.
- 16 ET shall not be liable for any delay in performing its obligations hereunder if any recommended spare parts are not available (otherwise than due to the fault of ET or by virtue of any failure or delay on the part of ET in requesting or providing such spare parts pursuant to clause 12 of this schedule 4 above). ET shall be entitled to charge the Customer for all additional expenses and costs incurred by ET as a result of such delay.
- 17 Any spare parts which are not included in ET's recommendations shall be supplied by ET at its list prices from time to time in force.
- 18 For the avoidance of doubt, the Product Support Services is subject always to clause 4.2 of the body of Agreement.



**SCHEDULE 5**

Optional Services

*[Where relevant, insert any other optional services which ET would provide- otherwise, please state N/A]*