

MUTUAL CONFIDENTIALITY AND NONDISCLOSURE AGREEMENT

THIS AGREEMENT made as of the 23RD day of FEBRUARY, 2018 ("Effective Date")

BETWEEN:

D.F. BARNES SERVICES LIMITED a corporation having its place of business at 45 Pepperrell Road, St. John's, Newfoundland A1A 5N8 (hereinafter "**DF Barnes**")

AND

THE SCOTTISH MINISTERS, a in terms of the Scotland Act 1998, of Victoria Quay, Leith, Edinburgh EH6 6QQ (hereinafter "**the Scottish Ministers**")

RECITALS:

A. WHEREAS each of the parties (the "**Disclosing Party**") intends to disclose certain Confidential Information to the other party (the "**Receiving Party**"), to be used and reviewed by the Receiving Party in connection with a present, or contemplated, project or business relationship (the "**Purpose**"); and

B. WHEREAS the parties wish to set forth the terms, conditions, and restrictions which shall govern the disclosure and use of the Confidential Information.

NOW THEREFORE, in consideration of the provision by the Disclosing Party to the Receiving Party of Confidential Information, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

AGREEMENT

1. **Definitions.** In this Agreement:

(a) "**Confidential Information**" means all information of a confidential nature furnished by the Disclosing Party, directly or indirectly, to the Receiving Party, whether in writing, orally or electronically and includes all contracts, financial information, engineering reports, environmental reports, technical and non-technical data, tolls, pricing and financial data, financial and business plans, land and lease information, economic data, contractual and marketing terms and all related information such as plans, maps, drawings, notes, sketches, photographs, computer records, specifications, models, works of authorship (whether copyrightable or not and whether created by the Disclosing Party or not) and the features, mode of operation and other details of its products and services, as well as names and expertise of employees, consultants, customers and prospects, know-how, and ideas, customer and product development plans, forecasts, strategies, or other information which is or may be applicable to or related in any way to the assets, business or affairs of the Disclosing Party or its affiliates or the Purpose, together with all information derived from the foregoing but "Confidential Information" shall not include information that:

(i) was rightfully and lawfully in its possession or known by it without an obligation to keep such information confidential prior to receipt from the Disclosing Party, or

- (ii) is obtained from a third party who is not prohibited from transmitting the information to the Receiving Party by a contractual, legal or fiduciary obligation to the Disclosing Party, or
 - (iii) was developed by the Receiving Party independently from the disclosures made by the Disclosing Party pursuant to this Agreement, by employees of the Receiving Party who have not had access to any of the Disclosing Party's Confidential Information in any format or medium, or
 - (iv) is or becomes generally available to the public through no fault of the Receiving Party.
 - (b) "EISR" means the Environmental Information (Scotland) Regulations 2004 together with any guidance and/or codes of practice issued by the Scottish Information Commissioner or relevant government department in relation to such legislation
 - (c) "FOISA" means the Freedom of Information (Scotland) Act 2002 and any subordinate legislation made under such Act from time to time together with any guidance and/or codes of practice issued by the Scottish Information Commissioner or relevant government department in relation to such legislation;
 - (d) "Law" means applicable laws (including common law), statutes, by-laws, rules, regulations, orders, ordinances, protocols, codes, guidelines, treaties, policies, notices, directions, decrees, judgments, awards or requirements, in each case of any Governmental Body, having the force of law;
 - (e) "Personal Information" means any information about an identifiable individual (including the Disclosing Party's employees, customers, suppliers, directors and officers) that the Receiving Party obtains from or through the Disclosing Party, regardless of whether the information is Confidential Information;
2. **Purpose of Disclosure.** The Receiving Party recognizes that all Confidential Information disclosed by the Disclosing Party to the Receiving Party under or in connection with this Agreement is the property of the Disclosing Party. The Receiving Party acknowledges and agrees that the Disclosing Party is disclosing Confidential Information to the Receiving Party solely for the Purpose. The Receiving Party will not use, exploit or take any benefit from any of the Disclosing Party's Confidential Information for any other purpose.
3. **Prohibitions.** Except as the Disclosing Party expressly permits in writing, the Receiving Party will not:
- (a) disclose any of the Disclosing Party's Confidential Information to any third party,
 - (b) duplicate, transfer, sell, publish, transmit, modify, reverse-engineer or take any benefit from any of the Disclosing Party's Confidential Information, or
 - (c) directly or indirectly, assist, facilitate or encourage any third party to carry on any activity that the Receiving Party is not permitted to carry on, relating to this Agreement.
4. **Protection of Information.** The Receiving Party will protect the Disclosing Party's interest and keep the Disclosing Party's Confidential Information strictly confidential.
5. **Restrict Access.** The Receiving Party will restrict access to the Disclosing Party's Confidential Information to those of the Receiving Party's employees, directors, officers, agents and other

representatives (collectively, "**Representatives**") with a legitimate "need to know" such Confidential Information for the Purpose provided such Representatives are subject to confidentiality restrictions at least as stringent as those found herein. The Receiving Party will cause its Representatives to comply with the obligations set out in this Agreement. Any disclosure or use of the Disclosing Party's Confidential Information by any of the Receiving Party's Representatives other than as authorized by this Agreement will be deemed to have been a breach by the Receiving Party, and the Receiving Party will be responsible for any breach of this Agreement by its Representatives.

6. **Ownership.** In no event shall the Receiving Party be deemed to have acquired any right, title or interest in, to or under any patent, copyright or other intellectual property right of the Disclosing Party or in any of the Confidential Information. The Confidential Information shall remain the sole property of the Disclosing Party or its assigns. The Disclosing Party exclusively owns: (a) all of the Disclosing Party's Confidential Information, (b) all copies, and recordings of any of the Disclosing Party's Confidential Information made by or for the Receiving Party, and (c) all proprietary rights or interests in or associated with the Disclosing Party's Confidential Information. Except as expressly set out in this Agreement, this Agreement grants no licence of any intellectual property or any other right in respect of the Confidential Information.
7. **Return of Property.** Upon expiration or termination of this Agreement, or otherwise, at any time and for any reason, upon the request of the Disclosing Party, the Receiving Party shall promptly:
 - (a) deliver to such Disclosing Party or destroy, as directed by such Disclosing Party, all Confidential Information in written/hardcopy form provided to such Receiving Party;
 - (b) destroy any copies of such Confidential Information in written/hardcopy form (including any extracts therefrom), all Confidential Information in electronic form, and any portion of Confidential Information that may be found in reports, analyses, notes, compilations, studies and other documents prepared by or for such Receiving Party; and
 - (c) cause one of its duly authorized officers to certify on its behalf in writing to such Disclosing Party that the requirements of subsections 7(a) and (b) have been satisfied in full.

Notwithstanding the foregoing, the Receiving Party shall not be required to destroy any portion of Confidential Information in electronic form that may be retained in back-up computer servers or systems if such information is not intentionally made available to any person, and deleted in accordance with such Receiving Party's normal document retention policies applicable to electronic information, provided that such information shall continue to be subject to the terms of this Agreement; and the Receiving Party may retain any Confidential Information for the purpose of compliance with the Receiving Party's legal, professional, regulatory or compliance duties, provided that such information shall continue to be subject to the terms of this Agreement

8. **Notification of Breach.** The Receiving Party will immediately notify the Disclosing Party of any actual, threatened, suspected unauthorized use or disclosure of Confidential Information or any other breach of this Agreement by the Receiving Party or its Representatives and will cooperate with the Disclosing Party in every reasonable way to help the Disclosing Party regain possession of the Confidential Information and prevent its further unauthorized use or disclosure.
9. **Compelled Disclosure.** If the Receiving Party becomes, or may become, legally compelled to disclose any of the Disclosing Party's Confidential Information, the Receiving Party may disclose

that Confidential Information to the extent required by Law, provided that: (a) the Receiving Party gives the Disclosing Party prompt written notice of the proposed disclosure and the reason for the proposed disclosure (unless prohibited by law from doing so); (b) the Receiving Party gives the Disclosing Party reasonable assistance and, if possible, reasonable time, to prevent or limit disclosure or to obtain a protective order; and (c) to the extent disclosure is still required by law, uses diligent efforts to limit disclosure and to obtain confidential treatment or a protective order and allows the Disclosing Party to participate in the proceeding.

The Parties acknowledge that the Scottish Ministers are subject to the requirements of the FOISA and the EISR and the Disclosing Party shall assist and cooperate with the Scottish Ministers to enable them to comply with their information disclosure obligations.

The Scottish Ministers shall be responsible for determining in its absolute discretion whether information is exempt from disclosure in accordance with the provisions of the FOISA or the EISR.

10. **Consequences of Breach.** The parties acknowledge and agree that:
- (a) due to the unique nature of the Disclosing Party's Confidential Information, there can be no adequate monetary remedy at law for any breach of the Receiving Party's obligations hereunder, that any such breach may result in irreparable harm to the Disclosing Party, and therefore, that upon any such breach or any threat thereof, the Disclosing Party shall be entitled to seek appropriate equitable relief in addition to whatever remedies it might have at law (without being required to post a bond or other security) and to be indemnified by the Receiving Party from any loss or harm, including, without limitation, attorneys' fees, in connection with any breach or enforcement of the Receiving Party's obligations hereunder or the unauthorized use or release of any such Confidential Information;
 - (b) if there is an unauthorized use or disclosure of the Disclosing Party's Confidential Information, the Disclosing Party will be entitled to seek an injunction against the Receiving Party (without waiving any other rights, recourse, or remedies to which the Disclosing Party may be entitled under this Agreement, at law or in equity) without the necessity of proving actual damages or posting a bond; and
 - (c) the prevailing party in any action to enforce this Agreement shall be entitled to seek costs and fees (including attorneys' fees and expert witness fees) incurred in connection with such action.
11. **Governing Law and Jurisdiction.** This Agreement is governed by and shall be construed in accordance with the laws of Scotland and the Parties irrevocably submit to the exclusive jurisdiction of the Scottish Courts:
12. **Term.** This Agreement shall terminate on the third anniversary of the date hereof, provided that the Receiving Party's obligations with respect to use and disclosure of Confidential Information received prior to the termination of this Agreement shall survive indefinitely. The Receiving Party's obligation to release and indemnify the Disclosing Party hereunder shall survive any termination of this Agreement. Either Party may terminate this Agreement with respect to further disclosures upon thirty (30) days written notice to the other Party.
13. **Limitations.** Nothing in this Agreement:

- (a) requires a party to disclose to the other party or to accept from the other party any particular information; or
 - (b) grants any intellectual property or other rights to a party; or
 - (c) requires the Disclosing Party to proceed with the Purpose or any proposed relationship in connection with which Confidential Information may be disclosed.
14. **Disclaimer.** ALL CONFIDENTIAL INFORMATION IS PROVIDED "AS IS". NEITHER PARTY MAKES ANY REPRESENTATION OR WARRANTY OF ANY KIND; EXPRESS OR IMPLIED, REGARDING THE TIMELINESS, ACCURACY OR COMPLETENESS OF ANY CONFIDENTIAL INFORMATION DISCLOSED IN CONNECTION WITH THIS AGREEMENT. THE DISCLOSING PARTY WILL HAVE NO LIABILITY TO THE RECEIVING PARTY OR ANY OF ITS REPRESENTATIVES ARISING FROM OR RELATING TO THE CONFIDENTIAL INFORMATION OR THEIR USE OF THE CONFIDENTIAL INFORMATION.
15. **Notices.** Notices or other communication required, permitted or contemplated under this Agreement must be in writing and will be sufficiently given and received if: (i) personally served on the other Party during normal business hours at the addresses set forth herein (personally served notices shall be deemed received by the addressee when actually delivered), (ii) received by email (with acknowledgement of receipt), or (iii) sent by first class registered mail, postage prepaid, to the intended recipient (notices so served shall be deemed to have been received by the addressee on the fifth business day following the date of mailing thereof).
- (a) Notices sent to **DF Barnes** shall be addressed as follows:

45 Pepperrell Road
St. John's, Newfoundland
A1A 5N8
Attention: [REDACTED]
Email: [REDACTED]
 - (b) Notices sent to **the Scottish Ministers** shall be addressed as follows:

The Scottish Government
Victoria Quay, Leith, Edinburgh EH6 6QQ
Attention: [REDACTED]
Email: [REDACTED]

Either party may designate different contact information by giving the other party written notice of the new information.

16. **Entire Agreement.** This Agreement supersedes all prior discussions and writings and constitutes the entire Agreement, understandings, negotiations and discussions between the parties with respect to the subject matter hereof.
17. **Waiver.** No waiver or modification of this Agreement will be binding upon either party unless made in writing and signed by a duly authorized representative of such party.
- (a) No failure or delay in:

- (i) exercising any right or remedy; or
 - (ii) requiring the satisfaction of any condition under this Agreement and no course of dealing between the Parties operates as a waiver or estoppel of any right, remedy or condition.
- (b) A waiver made in writing on one occasion is effective only in that instance and only for the purpose that it is given and is not to be construed as a waiver on any future occasion or against any other Person
18. **Severability.** In the event that any of the provisions of this Agreement shall be held by a court or other tribunal of competent jurisdiction to be illegal, invalid or unenforceable, such provision shall be limited, modified or eliminated to the minimum extent necessary so that this Agreement shall otherwise remain in full force and effect.
19. **Successors.** This Agreement will bind and benefit each party and its personal representatives, heirs and successors and permitted assigns.
20. **Independent Contractors.** The parties are independent contractors and this Agreement does not establish any relationship of partnership, joint venture, employment, franchise or agency between them.

21. which shall be deemed an original instrument for all purposes, but all of which shall comprise one and the same instrument. Delivery by electronic transmission in portable document format of an executed counterpart of this Agreement is as effective as delivery of an originally executed counterpart of this Agreement.

IN WITNESS WHEREOF, this Agreement consisting of this and the preceding six pages, is executed as follows and are delivered for the purposes of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 on the date specified on page 1 of this Agreement:-

SUBSCRIBED for and on behalf of the said
D. F. BARNES SERVICES LIMITED

at ST. JOHN'S, NL CANADA

on 23 - FEBRUARY - 2018

[Redacted signature block]

and Authorised Signatory

in the presence of

Witness:

Full Name

Address: 46 O'Neills Rd.
Outer Cove, NL
A1K 4C6

SUBSCRIBED for and on behalf of the said
SCOTTISH MINISTERS

at 5 Atlantic Quay, 150 Broomielaw,
Glasgow

on 23/02/2018

by

 

Attorney General

Print name

In the presence of:

Witness: 

Full Name: 

Address: 5 Atlantic Quay
150 Broomielaw
Glasgow