



The Regional Municipality of Durham
To: The Works Committee
From: Commissioner of Works
Report: 2011-WR-10
Date: June 15, 2011

SUBJECT:

Energy from Waste Facility: Durham/York Co-owners' Agreement

RECOMMENDATION:

THAT the Works Committee recommends to Regional Council that the Durham/York Energy from Waste Co-owners' Agreement be approved.

REPORT:

Attachment No. 1: The Co-owner's Agreement between the Municipality of Durham and the Municipality of York

1. PURPOSE

To action the following directive carried at a Regional Municipality of Durham (Region) Council meeting held on April 6, 2011:

"3. THAT prior to the Regional Chair and Clerk executing the Co-owners' Agreement with York Region, it come back to Durham Regional Council for approval, and that it include the sale of a 50 per cent interest in EFW facility lands to York Region at fair market value;"

2. BACKGROUND

The Regional Municipality of Durham and the Regional Municipality of York (Regions) entered into an Energy from Waste (EFW) Memorandum of Understanding (MOU) dated June 25, 2009, to govern the next steps in the EFW project. The MOU included:

- a) The preparation and issuance of a request for proposals designed to select a technology provider to implement the preferred technologies/systems identified in the Environmental Assessment;

- b) Defining the processes through which the necessary approvals for a functioning EFW facility will be obtained; and
- c) Defining the ownership model for the EFW facility and the future contractual arrangements between the Regions regarding capacity.

The EFW MOU also made provisions for the Regions to negotiate a Co-owners' Agreement which would establish terms to ensure clarity around Durham and York's shared obligations with respect to the operation of the EFW facility, including site servicing and owner obligations and responsibilities with respect to the executed Project Agreement with Covanta.

3. **DISCUSSION**

The attached Co-owners' Agreement (Attachment No. 1) is based upon the provisions of the approved EFW MOU and the April 2011 direction of Regional Council, with additional details governing the respective roles and responsibilities of the Regions for the design, construction and operation of the EFW facility.

The Regions shall own the EFW facility in partnership with one another and shall contribute to the capital costs of the design, construction and commissioning based on their respective shares: The Regional Municipality of York (York) 30,000 tonnes per year (21.4%) and The Regional Municipality of Durham (Durham) 110,000 tonnes per year (78.6%). The Regions will be responsible for paying the net operating costs of the project based on their respective shares: York 30,000 tonnes per year (21.4%) and Durham 110,000 tonnes per year (78.6%), with the exception of oversized components related to site servicing and the Covanta facility which will be equally cost shared.

The proposed management models are designed to ensure direct oversight of the project and that the Regions' interests are well covered, while balancing the need to remain at arms length and avoid transferring construction risks to the Regions. Durham, as the majority partner, will oversee the main contract at the Project Manager level and York will participate at the Project Leader and Management Committee levels.

Durham shall convey to York a fifty per cent (50%) interest in the Facility Lands, free and clear of all encumbrances, no later than 60 days following the issuance of the final building permit for the EFW facility by the Town of Clarington. The purchase price for the lands shall be calculated based on an appraised value of \$110, 000 per acre (site is approximately 29 acres).

4. FINANCIAL IMPLICATIONS

Regional Council in June 2009 (Report 2009-COW-03) approved the Durham/York Energy From Waste Project, related agreements, cost and financing.

York Region approved (September 15, 2010) \$68.3 million of capital funding for the project, based upon increased contributions to cover the cost of 50/50 land ownership, 50/50 oversized components and 50/50 funding of specific Host Community Agreement items.

5. CONCLUSION

The proposed Co-owners' Agreement is based on the provisions of the approved Energy from Waste Memorandum of Understanding and Council direction of April 2011, with additional details governing the respective roles and responsibilities of the Regional Municipality of Durham and the Regional Municipality of York for the design, construction and operation of the Energy from Waste facility.

Provisions within the Co-owners' Agreement address the cost sharing formula for capital construction and operational expenditures, governance and project management structure, cost share items within the Host Community Agreement and oversized Energy from Waste components, land ownership and waste delivery coordination.

This report has been reviewed by Finance and Legal Department staff.

Clifford Curtis, P.Eng., MBA,
Commissioner of Works

Recommended for presentation to Committee

G.H. Cubitt, M.S.W.,
Chief Administrative Officer

THIS CO-OWNERS' AGREEMENT made this day of , 2011.

B E T W E E N:

THE REGIONAL MUNICIPALITY OF DURHAM

("Durham")

- and -

THE REGIONAL MUNICIPALITY OF YORK

("York")

RECITALS:

- A. Durham and York issued a Request for Proposals dated August 22, 2008 for the design, construction, commissioning, start-up, testing, operation and maintenance of a facility for the thermal treatment of solid waste.
- B. Durham and York entered into a Memorandum of Understanding (the "MOU") dated June 25, 2009 setting out the principles upon which they would construct, operate and maintain the facility.
- C. Covanta Durham York Renewable Energy Ltd. ("Covanta") was selected as the successful proponent as a result of the Request for Proposals and was awarded the contract for the design, construction and operation of the facility.
- D. Durham and York entered into an Early Works Agreement with Covanta, dated January, 2010, which provides that the costs of pre-engineering and approvals with respect to the project be shared equally between Durham and York.
- E. Effective November 25, 2010, Durham and York jointly entered into a Project Agreement with Covanta for the design, construction and operation of the facility, for a total capital cost of \$235,759,000.00 and an initial annual operating cost of \$14,665,000.00 , subject to adjustments as provided in the Project Agreement, or as otherwise provided under this Agreement.
- F. Durham and York wish to enter into this agreement to set out their respective rights and obligations for ownership of the facility, including their respective roles in the design, construction and operating phases.

NOW, THEREFORE, the Co-Owners agree as follows:

1. DEFINITIONS

Unless this Agreement otherwise provides or the context requires, the following terms shall have the meanings set out below:

- 1.1 “Net Additional Costs” means those costs which are the responsibility of the Co-Owners as a result of the requirements contained within the Environmental Assessment or any other approval related to the Facility, issued by a body or agency having jurisdiction, including , without limitation, any obligation arising out of the Host Community Agreement as set out in Schedule “B”, or the Power Purchase Agreement, and/or any other operational costs related to the Facility, including those relating to the Facility Access Road, utilities and scale house, less revenues payable under the Power Purchase Agreement and to which the Co-Owners are entitled based upon their Ownership Interest.
- 1.2 “Agreement” means this agreement, as amended from time to time.
- 1.3 “Capital Cost” means the totality of capital costs payable to Covanta for the Design Build Work, including the Lump Sum Price to be determined on the Notice to Proceed date and calculated as the sum of the Fixed Construction Price, Construction Inflation Adjustment and Architectural Enhancements, and any Changes as more particularly set out in the Project Agreement.
- 1.4 “Change in Law” means a change in law as defined in the Project Agreement.
- 1.5 “Change Order” means a change order as defined in the Project Agreement.
- 1.6 “Change Request” means a change request as defined in the Project Agreement.
- 1.7 “Construction Work” means the building, construction and installation of the Facility as more fully set out in the Project Agreement.
- 1.8 “Co-Owner” means each of Durham and York.
- 1.9 “Durham” means The Regional Municipality of Durham acting as a body corporate and, where the context requires, its geographic area.
- 1.10 “Facility” means the buildings, structures and equipment to be constructed by Covanta pursuant to the Project Agreement.
- 1.11 “Facility Access Road” means the access road as defined in the Host Community Agreement.
- 1.12 “Facility Lands” means the lands upon which the Facility will be constructed, more particularly described as Part Lot 27, Concession Broken Front, Darlington, designated as Part 1 on Plan 40R-26782, save and except Part 1 on Plan 40R-26911, in the Municipality of Clarington, Regional Municipality of Durham, being part of PIN 26605-0082(LT) and save and except the access road to the Courtice Water Pollution Control Plant in the south-east quadrant of the lands, all

lands lying to the east thereof, and any required right-of-way for said access road. Said access road shall be solely owned by Durham.

- 1.13 “Host Community Agreement” means the agreement entered into between Durham and The Corporation of the Municipality of Clarington providing for certain services respecting the siting of the Facility.
- 1.14 “Liquidated Damages” means the liquidated damages payable by Covanta for its failure to meet certain obligations under the Project Agreement and shall include Performance Liquidated Damages, Schedule Liquidated Damages and Lump Sum Performance Liquidated Damages, as such terms are defined in the Project Agreement.
- 1.15 “Management Committee” means the management committee established under Section 8 of this Agreement.
- 1.16 “Milestone Payment” means a milestone payment as set out in the Project Agreement.
- 1.17 “Monthly Net Operating Cost” means the monthly Net Operating Cost payable to Covanta under the Project Agreement.
- 1.18 “Net Operating Costs” means the totality of the amounts payable to Covanta by the Co-Owners for the operation of the Facility, as more particularly set out in the Project Agreement, less Revenue and/or payments to the Co-Owners, as more particularly set out in the Project Agreement, including revenue from recovered materials, and/or Liquidated Damages.
- 1.19 “Notice to Proceed” means the notice to proceed as set out in the Project Agreement.
- 1.20 “Operations Component” means the provision of services and materials by Covanta in respect of the operation, maintenance and repair of the Facility as provided in the Project Agreement.
- 1.21 “Owners’ Consultant” means the consultant appointed under subsection 8.8 of this Agreement.
- 1.22 “Owners’ Representative” means the Project Managers jointly appointed by the Co-Owners under subsection 8.10 of this Agreement.
- 1.23 “Oversizing” means Facility capital infrastructure which is designed and constructed and can accommodate processing capacity beyond the initial 140,000 tonnes annual processing commitment, and as further described in Schedule “A” of this Agreement, with the cost to be shared 50/50 by the Co-Owners as further described in this Agreement.
- 1.24 “Ownership Interest” means for Durham 78.6 per cent of the Facility, and for York 21.4 per cent of the Facility, based upon each Co-Owner’s initial commitment.
- 1.25 “Payment Request” means a written request for payment submitted by Covanta pursuant to the Project Agreement.

- 1.26 “Power Purchase Agreement” means the agreement between the Co-Owners and Ontario Power Authority respecting the sale of electricity generated by the Facility.
- 1.27 “Project” means the Durham/York Energy from Waste Project.
- 1.28 “Project Agreement” means the agreement entered into between the Co-Owners and Covanta for the design, build and operation of the Facility
- 1.29 “Revenue” means all revenue accruing to the Co-Owners under the Project Agreement.
- 1.30 “Unacceptable Waste” means waste that does not conform to one or more of the elements of the definition of “municipal waste’ described in Ontario Regulation 347.
- 1.31 “York” means The Regional Municipality of York acting as a body corporate and, where the context requires, its geographic area.

2. CAPITAL CONTRIBUTIONS

- 2.1 Subject to subsections 2.4 and 2.5 of this Agreement, Durham and York shall be responsible for the following percentage amounts of the Capital Cost of the Facility, representing their initial proportionate share of processing capacity: Durham: 78.6 per cent, York: 21.4 per cent (the “Percentage Amount”).
- 2.2 Each Co-Owner shall be responsible for payment of its respective Percentage Amount of each Milestone Payment payable to Covanta as set out in Appendix 9 of the Project Agreement.
- 2.3 In the event that the Capital Cost of the Facility is adjusted as a result of Change Orders or Change Requests approved under Article 15 of the Project Agreement, each Co-Owner shall be responsible for its respective Percentage Amount of any increase in the Capital Cost.
- 2.4 Despite subsection 2.1, the Co-Owners agree to contribute equally to the cost of the Oversizing. The Oversizing components are more particularly described in Schedule “A” of this Agreement. York shall provide to Durham its additional 28.6 per cent share for Oversizing, as described in Schedule “A”, with its share of the amount payable to be paid to Durham consistent with the percentages of Total Lump Sum price noted within Column 1 of the Milestone Payment Schedule as more fully described within the Project Agreement. Upon completion of construction of the Facility, the parties agree to retain an independent third party to calculate the actual amount payable by York to Durham for the Oversizing. The opinion of the third party shall be final and binding on Durham and York. The Oversizing payable as determined by the third party shall be compared to the amounts paid by York and reconciled. Any amounts for Oversizing owed by either Durham or York to the other Co-Owner shall be paid within thirty (30) days of the third party opinion being delivered.
- 2.5 Despite subsection 2.1 of this Agreement, the Co-Owners agree that the cost of certain capital infrastructure required under the Host Community Agreement, in

addition to the Oversizing, shall be shared equally (the "50/50 Costs") The 50/50 Costs are more particularly described in Schedule "B" of this Agreement. The Co-Owners further agree that the cost of certain obligations under the Host Community Agreement shall be shared by the parties according to their Ownership Interests as further described in Schedule "B".

- 2.6 The capital contribution or equivalent works in the amount of Two Million Dollars (\$2,000,000.00) under section 11.1.21 of the Project Agreement, shall be credited against the Co-Owners' obligations in accordance with the Project Agreement and this Agreement.
- 2.7 The Co-Owners agree that Durham shall submit all Milestone Payments to Covanta on behalf of the Co-Owners and York shall forthwith reimburse Durham for its Percentage Amount.
- 2.8 York commits to making Capital Cost payments to Durham under this Agreement within twenty (20) days of a payment notification, with payment made by Electronic Funds Transfer (EFT).

3. OWNERSHIP OF FACILITY AND FACILITY LANDS

- 3.1 Durham and York shall hold title to the Facility Lands as tenants in common each as to a fifty percent (50%) interest.
- 3.2 Durham shall convey to York a fifty percent (50%) interest in the Facility Lands, free and clear of all encumbrances, no later than 60 days following the issuance of the final building permit for the Facility by the Town of Clarington. The purchase price for the lands shall be calculated based on an appraised value of \$110,000 per acre with such acreage as determined by a Reference Plan prepared by and at the expense of Durham. Said Reference Plan shall be binding and determinative of the acreage of the Facility Lands. York shall pay the purchase price to Durham on closing.
- 3.3 Durham and York shall each have an Ownership Interest in the Facility in accordance with the following percentage interests, representing their respective initial contributions to the Capital Cost: Durham 78.6 per cent, York: 21.4 per cent (the "Ownership Interest")
- 3.4 The Co-Owners agree that if either Co-Owner makes an additional capital contribution to the Facility in order to expand the existing processing capacity, their respective Ownership Interests shall be adjusted from time to time to reflect such additional capital contributions in accordance with Section 4 of this Agreement.
- 3.5 The Co-Owners agree that neither Co-Owner may transfer, assign or encumber their respective Ownership Interest in the Facility or title to the Facility Lands without the prior written consent of the other Co-Owner.
- 3.6 Despite subsection 3.4 of this Agreement, York agrees that its Ownership Interest shall not exceed fifty percent (50%).

- 3.7 The Co-Owners agree that if they are jointly, or jointly and severally liable for any obligations or deemed statutorily, by common law, by arbitration or judgment of a court or other tribunal or board having jurisdiction to be jointly or jointly and severally liable for any obligations, the respective liability of each of the Co-Owners, as between themselves shall be limited to the percentage corresponding to each Co-Owner's Ownership Interest with respect to the Facility and 50/50 as tenants in common with respect to the Facility Lands. Each of the Co-Owners hereby agrees to indemnify and hold harmless the other Co-Owner with respect to that portion of all monies which the indemnified Co-Owner may be required to pay or liability to which it may be subject by reason of such joint and several liability which is in excess of the indemnified Co-Owner's Ownership Interest. For greater certainty, each Co-Owner's liability to Covanta under the Project Agreement shall, with respect to the other Co-Owner, be limited to the Co-Owner's Ownership Interest and each Co-Owner's liability as tenants in common shall be limited to 50 per cent.
- 3.8 Every written instrument creating an obligation of the Co-Owners to third parties in respect of the Facility shall, to the extent possible, contain provisions to the effect that the obligations to such third party shall be several and not joint and several and shall be limited to each Co-Owner's Ownership Interest in the Facility.

4. EXPANSION OF OR UPGRADES TO THE FACILITY

- 4.1 The Co-Owners acknowledge that, from time to time, upgrades may be required to be made to the Facility as a result of Change in Law. The cost of any capital upgrades to the Facility or any modifications to the operating processes at the Facility as a result of a Change in Law shall be shared in accordance with each Co-Owner's proportionate Ownership Interest in the Facility at the time the upgrade is initiated.
- 4.2 Either Co-Owner may initiate an upgrade to or an expansion of the Facility if it determines that such an upgrade or expansion is required to dispose of its own municipal waste. No upgrade or expansion shall be permitted in order to accommodate waste generated by any other municipality or entity.
- 4.3 Prior to either party initiating an upgrade or expansion, York and Durham shall determine how the processing capacity of the Facility will be shared following completion of the upgrade or expansion. Either Co-Owner may, in its sole discretion, elect not to contribute to the cost of, or own any additional capacity resulting from the expansion.
- 4.4 The Co-Owner initiating the expansion shall be responsible for obtaining all regulatory approvals related to the upgrade or expansion and shall be responsible for all costs incurred, including the cost of land acquisition.
- 4.5 If any expansion is of benefit to both Co-Owners, the costs of the expansion shall be shared based on each Co-Owner's proportionate share of the increased processing capacity resulting from the expansion and the Co-Owners' Ownership

Interests shall be adjusted based on their proportionate entitlement to processing capacity.

- 4.6 If an upgrade or expansion initiated by one Co-Owner results in upgrades to existing equipment or results in an increase in operating costs, the Co-Owner initiating the upgrade or expansion shall be responsible for payment of the increased capital and operating costs, unless:
- a. the upgrades become a requirement as a result of a Change in Law within five (5) years of the date the upgrades are installed;
 - b. the non-contributing Co-Owner undertakes an activity within five (5) years that would have necessitated the upgrade; or
 - c. the non-contributing Co-Owner derives a net financial benefit from the upgrade,

in which case the non-contributing Co-Owner shall pay its proportionate share of the cost of the upgrade or expansion.

- 4.7 If either Co-Owner chooses to enhance the environmental monitoring program of the Facility, either on-site or off, beyond that required under the Certificate of Approval issued by the Ministry of the Environment from time to time, then the initiating Co-Owner shall be responsible for payment of any costs related thereto.
- 4.8 An expansion shall not be permitted by either Co-Owner if such expansion would prejudice the ongoing capability of the Facility to service the requirements of the other Co-Owner, in a fashion incapable of being mitigated or compensated for through alternate service arrangements at the cost of the Co-Owner advancing the expansion.

5. ENTITLEMENT TO CAPACITY

- 5.1 The Co-Owners acknowledge that the maximum processing capacity of the Facility, as identified in the Environmental Assessment, is 140,000 tonnes per year.
- 5.2 The Co-Owners shall own the processing capacity of the Facility in the following shares, representing their initial Ownership Interest: Durham 110,000 tonnes, York 30,000 tonnes.
- 5.3 The Co-Owners acknowledge that, from time to time, each Co-Owner may have an entitlement to capacity which is not reasonably required for its own use (the "Surplus Capacity") Each Co-Owner shall be entitled, on an interim basis, to use any Surplus Capacity of the other Co-Owner, at its sole option. Neither Co-Owner shall be required to use any Surplus Capacity. If either Co-Owner wishes to use any Surplus Capacity, it shall notify the Management Committee of the amount of Surplus Capacity required and the period during which it wishes to use the Surplus Capacity. The Management Committee shall provide for the allocation of the Surplus Capacity and an adjustment of the Net Operating Cost during the time the Surplus Capacity has been allocated.

- 5.4. The use of Surplus Capacity under subsection 5.3 shall not result in any adjustment to the Co-Owners' contribution to capital costs and shall not result in any adjustment to their respective Ownership Interests.
- 5.5 If neither Co-Owner requires the use of Surplus Capacity, the Co-Owners may consider marketing the Surplus Capacity to third parties, subject to agreement as to the terms upon which third parties may use the Surplus Capacity and provided such use complies with all regulatory approvals respecting the Facility.

6. NET OPERATING COSTS

- 6.1 The Co-Owners acknowledge that the Co-Owners will incur Net Operating Costs and Additional Costs related to the Facility and Facility Lands. The Co-Owners shall be responsible for the payment of all Net Operating Costs and Net Additional Costs.
- 6.2 The Co-Owners shall be responsible for payment of the Net Operating Costs based on their Ownership Interest.
- 6.3 Unless otherwise agreed, the Co-Owners shall be responsible for payment of Net Additional Costs based on their Ownership Interest.
- 6.4 The Co-Owners' proportionate share of the Net Operating Cost and Net Additional Costs shall be adjusted from time to time to reflect any adjustment in their Ownership Interest.
- 6.5 The Co-Owners shall pay their respective share of the Monthly Net Operating Cost. Durham shall submit the Monthly Net Operating Cost to Covanta on behalf of the Co-Owners and York shall reimburse Durham with respect to its proportionate share.
- 6.6 The Co-Owners shall pay their respective share of the annual adjustment submitted by Covanta to ensure that, in each year, each Co-Owner has paid its proportionate share of the Net Operating Cost as set out in subsection 6.2.
- 6.7 Durham agrees to make payment of the totality of Net Operating Costs and Net Additional Costs on behalf of the Co-Owners and York agrees to reimburse Durham with respect to its proportionate share of Net Operating Costs and Net Additional Costs based on its Ownership Interest within twenty (20) days of a payment notification, with payment made by Electronic Funds Transfer (EFT).
- 6.8 If either Co-Owner uses Surplus Capacity under subsection 5.3 of this Agreement the percentage share of the Net Operating Costs shall be adjusted so that in each operating year each Co-Owner shall be responsible for its proportionate share of the utilized processing capacity and associated Net Operating Costs and Revenues.

- 6.9 The Co-Owners undertake to review the Net Operating Cost and Net Additional Costs and agree upon any year-end adjustments in accordance with any of the provisions of Section 6 within sixty (60) days of the date of the final Covanta invoice for each operating year of the Project Agreement.

7. DELIVERY OF WASTE

- 7.1 Durham and York's respective shares of any daily, weekly, monthly or yearly tonnage limits set out in the Project Agreement shall be in proportion to their Ownership Interest.
- 7.2 Each Co-Owner may agree to allow the other Co-Owner to use a portion of its maximum daily, weekly, or monthly tonnage allowance described in subsection 7.1, provided that there shall be no adjustment to the Ownership Interest or percentage share of Net Operating Cost as provided in subsection 6.8 unless one Co-Owner exceeds its tonnage limit for the entire calendar year.
- 7.3 York and Durham shall make all reasonable efforts to coordinate the delivery of waste so that both Co-Owners meet their respective tonnage obligations, being 30,000 tonnes per year from York and 110,000 tonnes per year from Durham.
- 7.4 Each Co-Owner shall be responsible for delivering its proportionate share of the Guaranteed Annual Throughput as defined in the Project Agreement. Each Co-Owner shall pay its proportionate share of the Net Operating Cost (less any portion attributable to Surplus Capacity borrowed by the other Co-Owner as per subsection 5.3) regardless of whether the tonnage is actually delivered. In addition, the Co-Owners will compensate each other for any lost Revenue (including any Liquidated Damages) that would have otherwise been generated but for the failure of either Co-Owner to meet their tonnage obligations. In the event that both Co-Owners fail to meet their tonnage obligations, then the revenue shortfall resulting therefrom will be divided between the Co-Owners in proportion to each Co-Owner's contribution to the total tonnage shortfall.
- 7.5 York shall not deliver waste pellets or waste derived fuel to the Facility.
- 7.6 York and Durham shall deliver only solid, non-hazardous municipal waste as defined in Ontario Regulation 347, and shall not deliver Unacceptable Waste to the Facility.
- 7.7 York and Durham shall not deliver source separated loads of materials unsuitable for burning such as source separated organics, concrete rubble, or broken glass, regardless of whether the materials are acceptable under the applicable permits and approvals.

- 7.8 If any waste is rejected at the Facility, the Co-Owner responsible for delivery of the waste shall be responsible for removal and disposal at its own expense.
- 7.9 In accordance with the Project Agreement, Covanta will prepare and implement an annual operations and maintenance service plan in consultation with the Co-Owners. This plan will be presented to, and will be mutually agreed to, by the Co-Owners, in November of each year. The Co-Owners will meet prior to the Covanta Operations and Maintenance service plan meeting, to develop the annual waste delivery plan to optimize Facility usage.

8. MANAGEMENT OF FACILITY

- 8.1 The construction and operation of the Facility shall be overseen by a Management Committee comprised of the following or their designates:
- Durham's Chief Administrative Officer
 - York's Chief Administrative Officer
 - Durham's Commissioner of Works
 - York's Commissioner of Environmental Services
 - Durham's Commissioner of Finance
 - York's Commissioner of Finance
 - Durham's Regional Solicitor
 - York's Regional Solicitor
- 8.2 The Management Committee shall meet at least quarterly. A quorum shall be a minimum of six (6) members, of which at least three (3) shall be present from each Co-Owner.
- 8.3 The decisions of the Management Committee shall be by consensus. In the event that the Management Committee cannot achieve a consensus on any issue then either party may exercise the Dispute Resolution process set out herein in order to achieve a decision.
- 8.4 The Management Committee shall ensure that appropriate procedures are implemented to ensure that meeting agendas and all relevant background material are circulated to all members of the Management Committee a sufficient time in advance of a meeting date in order to ensure that each Co-Owner has had sufficient time to give due and appropriate consideration in advance of the meeting to the issues on the agenda.
- 8.5 Any decisions made by the Management Committee having financial ramifications will require approval by York and Durham pursuant to their own budget management policies and procedures.
- 8.6 The roles and responsibilities of the Management Committee shall be as set out in Schedule "C".

- 8.7 The Management Committee may appoint an Operations Advisory Committee who shall have the responsibilities set out in Schedule "C".
- 8.8 The Co-Owners hereby appoint HDR as the Owners' Consultant to fulfil all the duties and responsibilities of the Owners' Consultant under the Project Agreement for the Construction Work. The Co-Owners may in the future appoint a Co-Owners' consultant to fulfil the duties and responsibilities of the Owners' Consultant during the Operations Component.
- 8.9 The roles and responsibilities of the Owners' Consultant shall be as set out in Schedule "C".
- 8.10 The Co-Owners shall each appoint a Project Manager who shall jointly act as the Owners' Representative under the Project Agreement.
- 8.11 The roles and responsibilities of the Project Managers shall be as set out in Schedule "C".
- 8.12 Durham and York agree that Durham's Project Manager shall be primarily responsible for monitoring the Construction Work on behalf of the Co-Owners, subject to appropriate consultation with York. The Project Managers shall be jointly responsible for monitoring the Operations Component of the project Agreement, as more particularly set out in Schedule "C".
- 8.13 Durham and York staff time and in-house resources spent on the Project shall be the sole responsibility of each respective Co-Owner, save and except any scale house operations staff.
- 8.14 In addition to the Management Committee, the Co-Owner/Contractor Committee shall be formed and composed of the following, as the circumstances may require:
- A representative from each of the Co-Owners' Legal Departments
 - A representative from each of the Co-Owners' Health Departments
 - A representative from each of the Co-Owners' Finance Departments
 - A representative from each of the Co-Owners' Public Works Departments
 - Such other representative or representatives as the Co-Owner/Contractor Committee or the Management Committee determines necessary to carry out the roles and responsibilities of the Co-Owner/Contractor Committee
- 8.15 The roles and responsibilities of the Co-Owner/Contractor Committee shall be as set-out in Schedule "C" and its terms of reference may be as otherwise determined by the Co-Owner/Contractor Committee or the Management Committee, from time to time.

- 8.16 The Co-Owner/Contractor Committee shall meet at least quarterly, and its decisions shall be by consensus.

9. DISPUTE RESOLUTION

- 9.1 The Co-Owners agree that any dispute, disagreement, controversy, question or claim arising out of, in relation to, or in connection with this Agreement, (collectively, a "Dispute") which cannot be amicably settled by negotiation or mediation may be finally settled by arbitration. In the event that the Co-Owners agree to resolve any Dispute by arbitration, the arbitration shall be conducted in accordance with the Ontario *Arbitration Act 1991* and *The Municipal Arbitrations Act*. The arbitration award shall be final and binding on the Parties, subject to applicable law. All disputes arising out of or in connection with this Agreement shall be finally settled by one or more arbitrators appointed in accordance with the aforesaid statutes.

- 9.2 Before commencing any arbitration respecting a Dispute, the Co-Owners shall first attempt in good faith to resolve the Dispute through negotiation and mediation as follows:

Negotiation – The Co-Owners shall first attempt in good faith to promptly resolve the Dispute by high level negotiation between senior staff of the Co-Owners. If the Dispute is resolved, such resolution will be evidenced by an instrument in writing.

Mediation – If the Dispute has not been resolved within fifteen (15) days the Co-Owners may agree to submit the Dispute to mediation. If the matter is resolved through mediation, such resolution will be evidenced by an instrument in writing. Mediation shall be considered to have failed if a Co-Owner, at any time, gives written notice to such effect to the other Co-Owner.

- 9.3 Subject to the terms of this Agreement, the Co-Owners will bear the costs of any arbitration in the manner specified by the arbitrators. Subject to the terms of this Agreement, if the arbitrators do not specify the costs, each Co-Owner will bear its own costs and will share the costs of the arbitrators equally.

9. Notwithstanding that a matter has been referred to dispute resolution under the provisions of this Section 10, both Co-Owners shall throughout the period of Dispute Resolution endeavour to perform their respective obligations under the terms of this Agreement to the best of their abilities.

10. GENERAL PROVISIONS

- 10.1 This Agreement shall be for a term corresponding with the term of the Project Agreement, at a minimum twenty (20) years, commencing on the date of Notice to Proceed. Five years prior to the end of the term of the Project Agreement, the

Co-Owners shall jointly decide on any renewal thereof and on the terms of the renewal of this Agreement.

- 10.2 This Agreement shall supersede the MOU and the MOU shall be hereby terminated.
- 10.3 This Agreement shall not be assigned by either Co-Owner, in whole or in part, without the prior written consent of the other Co-Owner.
- 10.4 This Agreement shall enure to the benefit of and bind the Co-Owners and their respective successors and permitted assigns.
- 10.5 In the event that any payments are made by Durham or York, on behalf of the Co-Owners' joint obligations for which reimbursement from the other Co-Owner is required under this Agreement, then such reimbursement shall include reasonable interest thereon.
- 10.6 This Agreement shall be governed by and interpreted in accordance with the laws of Ontario.
- 10.7 Any notice required to be given under this Agreement shall be in writing and delivered as follows:

to Durham at:

The Regional Municipality of Durham
605 Rossland Road East
Whitby, Ontario
L1N 6A3

Attention: Regional Clerk

to York at:

The Regional Municipality of York
17250 Yonge Street
Newmarket, Ontario
L3Y 6Z1

Attention: Regional Clerk

[EXECUTION PAGE FOLLOWS]

IN WITNESS WHEREOF each of the Co-Owners hereto has duly executed and sealed this Agreement by the hands of their officers, duly authorized in this regard.

**SIGNED, SEALED AND
DELIVERED** in the presence of:

Authorized by Clause 13 Report 7 of the
Environmental Services Committee adopted by
Council on the 23rd of September, 2010.

Solicitor Approved:

) **THE REGIONAL MUNICIPALITY OF YORK**

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Name: Bill Fisch
Title: Regional Chair

Name: Bruce Macgregor
Title: Chief Administrative Officer

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DURHAM**

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Name: Roger Anderson
Title: Regional Chair and CEO

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Name: P.M. Madill
Title: Regional Clerk

SCHEDULE "A" – OVERSIZING COMPONENTS

Item	Estimated Total Cost
<i>Site Work (roadways, berms, landscaping)</i>	\$ 5,800,000
Fire Protection Piping/Equipment	\$ 1,250,000
Water Supply Piping	\$ 345,000
Sewer System Piping	\$ 85,000
Natural Gas Pipeline	\$ 1,400,000
<i>Electrical and Switchyard</i>	\$ 4,850,000
<i>Tipping Floor and Waste Storage Pit</i>	\$ 4,305,000
<i>Crane</i>	\$ 3,205,000
<i>Larger Ash Processing Equipment</i>	\$ 1,690,000
<i>Larger Ash Building</i>	\$ 1,595,000
<i>Stack</i>	\$ 2,605,000

SCHEDULE "B"

HOST COMMUNITY AND SITE SERVICING ITEMS

Item	
50-50 Cost Share Items	
	<ul style="list-style-type: none"> • Land required for construction of Energy Park Drive, a Facility Access Road, the Energy Park stormwater pond and off-site servicing excluding the sanitary trunk sewer
	<ul style="list-style-type: none"> • Construction of oversized off-site utilities (watermain, sanitary sewer, storm sewers/channels, electrical service, electrical interconnection (with hydro), natural gas pipeline and service, excluding the sanitary trunk sewer
	<ul style="list-style-type: none"> • Construction of Energy Park Drive (base road with no landscaped median, sidewalks, standard rather than decorative lighting) • Facility Access Road • Waterfront Trail
Proportional Cost Share Items	
	<p>Operational Costs such as:</p> <ul style="list-style-type: none"> • Operating costs for HHW facility • Payment in Lieu of Taxes • Advisory Committee • Ambient Air Monitoring • Owner's Consultant
Non-Cost Share Items	
	<ul style="list-style-type: none"> • Landscaped median, sidewalks, and decorative lighting for Energy Park Drive • Expropriation of lands not required for Energy Park Drive • Surplus Durham-owned Lands (Courtice WPCP) transferred to Clarington • Bowmanville Science Park EA • Land and construction costs for sanitary trunk sewer

SCHEDULE "C"**MANAGEMENT OF FACILITY**

Notwithstanding anything contained in this Schedule to the contrary, each entity responsible for the management of the Facility will abide by its authorities, approvals, policies and practices where required.

EFW Project Management: Construction Work**Management Committee**

The Management Committee shall be responsible for providing guidance and overall direction for the Project, including:

- review of strategic issues affecting the management and delivery of the Project
- consideration of issues referred by the Project Managers and identifying solutions within the scope of the Project Agreement
- providing the Project Managers, and the Owners' Representative with guidance, as required, for the proper conduct of the Project
- making recommendations on matters requiring Council authority, including approval of budgets, approval of scope changes and exercise of remedies including termination of the Project Agreement
- receiving reports from the Project Managers and the Owners' Representative and providing guidance and instructions
- approving those matters under the Project Agreement as more particularly set out in Appendix 1 attached

Co-Owner/Contractor Committee

The Co-Owner/Contractor Committee shall report to the Management Committee and its roles and responsibilities shall include:

- the review of quarterly progress reports submitted by the Project Manager and DBO Contractor
- the review of payment reports
- making appropriate recommendations to Project Managers with respect to change order proposals
- initiating any change in Project scope of work once approved by the Regional Councils
- making recommendations on the award of the Environmental Performance Adjustments and Service Level Adjustments in accordance with the Project Agreement

- reviewing and discussing concerns raised by Energy From Waste Site Liaison Committee

Project Manager

The Project Manager shall be responsible for co-ordination of the Project, including:

- acting as the primary contact with the DBO Contractor
- managing the Project in accordance with direction from the Management Committee
- developing procedures for monitoring, controlling and reporting on all aspects of the Project Agreement
- managing the Milestone Management Plan and payment review for the DBO Contractor and the Owners' Consultant
- overseeing the Co-Owners' sign off of acceptance tests
- preparing and submitting project status/progress reports to the Management Committee as required
- acting as the principal point of contact between DBO Contractor and Regional stakeholders
- providing information and direction to the Owners' Consultant with respect to Change Orders and Change Requests
- providing information to Durham Finance to facilitate the separate billing between the Co-Owners
- preparing initial drafts of Committee and Council reports
- responding to public enquiries and communicating with media with the assistance of the Co-Owners' communications group
- advising on any significant developments which may affect the Project and identifying what corrective actions have been taken or should be taken
- assessing and making recommendations on all Scope Changes
- monitoring EA compliance and environmental protection/monitoring
- monitoring compliance with the Certificate of Approval
- ensuring that the DBO Contractor and consultants are communicating with all regulatory authorities in a timely manner and all approvals and permits are acquired in accordance with the Project schedule

Owners' Consultant

The Owners' Consultant shall be responsible for:

- performing contract administration on the Co-Owners' behalf
- acting as the subject matter expert representing the Co-Owners on all aspects of design, build, commissioning and final acceptance
- acting as technical liaison between the Co-Owners and the DBO Contractor, including review and drafting of correspondence to the DBO Contractor
- participating / preparing construction progress reports (weekly, biweekly or monthly)
- reviewing design, document, sample and shop drawings, and ensuring compliance with applicable building codes and regulatory requirements
- onsite monitoring of all daily construction activities
- reviewing of major DBO design submittals and providing comments / concerns as necessary
- reviewing and monitoring of construction activities and milestones
- scheduling and milestone progress monitoring
- reviewing / verifying Change Orders put forward by the DBO Contractor
- monitoring payment items closely for all Milestone based – debits and credits
- reviewing and commenting on draft progress / milestone payment applications
- monitoring and reviewing equipment installation and commissioning activities
- reviewing and commenting on the acceptance test protocol prepared by the DBO Contractor
- monitoring acceptance test on behalf of the Co-Owners, and reviewing / approving the final Acceptance Test Report
- ensuring the DBO Contractor is complying with all regulatory requirements and permit requirements, and is coordinating required inspections and submissions to the regulatory authorities
- substantial performance reviews, reviewing warranty inspections, production of deficiency lists and following-up to ensure deficiency list work is scheduled and completed in a timely manner
- recommending appropriate deficiency holdback values, value of penalty / bonus adjustments according to the Project Agreement
- approving those matters under the Project Agreement more particularly set out in Appendix 1 attached

REPORTING REQUIREMENTS

The Project Manager will submit a written project progress report monthly to the Management Committee. The progress report shall include the following:

- a) Activity summary
- b) Current schedule
- c) Current cash flow, project summary report updates: including all approved Change Orders and recommended Change Orders
- d) Outstanding or new issues
- e) Key events for the next three months
- f) Miscellaneous items

EFW Project Management: Operations Component

Management Committee

The Management Committee shall be responsible for providing guidance and overall direction, including:

- review of strategic issues affecting the management and delivery of the Project
- consideration of issues referred by the Project Managers and identifying solutions within the scope of the Project Agreement
- providing the Project Managers, and Owners' Representative with guidance when required, for the proper conduct of the Project
- approval of Environmental Performance Adjustments and Service Level Adjustments in accordance with the Project Agreement
- planning future upgrades and expansions to the Facility
- making recommendations to Council including approval of budgets, approval of Scope Changes and exercise of remedies including termination of the Project Agreement
- receiving reports from the Project Managers and the Owners' Representative and providing guidance and instructions
- considering the use of Surplus Capacity by Co-Owners or third parties
- approving those matters under the Project Agreement as more particularly set out in Appendix 1 attached

Project Manager

The Project Manager shall be responsible for Project management, including:

- acting as the primary contact with the DBO Contractor
- managing the Project in accordance with direction from the Management Committee
- developing a procedure which may be required for monitoring, controlling and reporting on all aspects of the Project Agreement

- managing the payment review / approval for the DBO Contractor and distributing for comment
- acting as the principal point of contact between DBO Contractor and Regional stakeholders
- providing information to Durham Finance to facilitate the separate billing between the Co-Owners
- compiling the reports necessary for the evaluation of the Environmental Performance Adjustment and Service Level Adjustment in accordance with the Project Agreement
- preparing Committee and Council reports
- responding to public enquiries and communicating with media with the assistance of Co-Owners' communications group
- advising on any significant developments which may affect the Project in meeting its objectives and identifying what corrective actions have been taken or should be taken
- assessing and making recommendations on all scope changes
- monitoring EA compliance and environmental protection/monitoring
- monitoring compliance with the Certificate of Approval
- ensuring the DBO Contractor and consultants are communicating with all regulatory authorities in a timely manner
- ensuring that the DBO Contractor has assembled an adequate QA/QC monitoring program and it is strictly followed throughout the project
- ensuring that the DBO Contractor maintains accurate records with respect to critical correspondence and updates
- coordinating third party monitoring, studies and audits as required
- managing scale-house operations and reporting

REPORTING REQUIREMENTS

The Project Manager will submit a written project progress report on a quarterly basis to the Management Committee. The progress report shall include the following:

- g) Activity summary
- h) Current schedule
- i) Current cash flow, project summary report updates: including all approved Change Orders and recommended Change Orders
- j) Outstanding or new issues

- k) Key events for the next three months
- l) Miscellaneous items

Appendix 1**RESPONSIBILITIES UNDER THE PROJECT AGREEMENT****MANAGEMENT COMMITTEE**

- approval to amend documents (s.3.2.1)
- issuing notice to proceed (s.5.1.1)
- replacement of DBO Project Manager, Plant Manager (s.11.1.4)
- decisions on directing \$2 Million (s.11.1.21)
- adjustments to lump sum price (s.13.2.2)
- exercise of remedies for non-conformance (s.13.2.3)
- issuing change orders and approving change requests (s.15)
- major amendments to schedule as a result of force majeure (s.16.2.1)
- entitlement to performance liquidated damages (s.18.1.5)
- drawing on securities (s.20.3.3)
- exercising right to terminate for convenience, issuing notice of default and exercising remedies (s. 25, 26, 27, 28)
- dispute resolution (s.28)
- exercising option to renew (s.30.3)
- approval of planned facility shutdown (s.33.10)
- approval of recycling operations (s.34)
- receiving year end reports (s.36.4)
- approving environmental performance and service level adjustments (s.37)
- directing audits (s.39)
- initiating capital improvements to facility (s.41)
- approval of handback requirement (s.44)
- developing communications protocol

OPERATIONS ADVISORY COMMITTEE

- requiring and monitoring performance tests and procedures (s.21.3)
- co-ordination of waste disposal system, stakeholders (s.31.3.5)
- co-ordination of delivery of waste (s.32, 33.4)
- monitoring waste screening protocol (s.33.6)
- monitoring recovery of metals, handling of fly ash (s. 33.8, 33.9)
- emissions monitoring (s.33.11)
- approval of emissions testing (s. 35.2)
- receiving reports of testing (s. 35.3)
- receiving monthly operation reports (s.36.3)
- CEMS reporting (s.36.5)
- receipt of all technical reports and plans (s. 36.6, 36.7, 36.8, 36.9)
- notifying DBO if in breach (s.42.7)

OWNERS' CONSULTANT

- conducting inspections of work during construction phase (s.4.1.1)
- receiving plans from DBO demonstrating technical compliance (s.6.1.2)
- reviewing documents re: commissioning work (s.6.2.5)
- conducting acceptance testing and issuing acceptance test certificate (s.6.2.6, 6.3)
- co-ordination of Punch List work – receiving manuals and warranties (s.6.2.7)
- receipt of master project schedule (s.7)
- receipt of hazardous substance list and discharge of hazardous substances (s.10.4)
- determination of holdbacks where no discretion (s.18.1.5, 20.3.4)
- access to facility to inspect work for technical compliance (s.22.4, 31.1.2)
- advice on maintenance and compliance (s.31.5)

PROJECT MANAGERS

- issuing notices of non-conformance during construction phase (s.4.3)
- requiring additional information (s.6.1.4)
- receiving report on delays (s.6.2.3)
- emergency stop work order (s.9.1.4)
- replacement of DBO Plant Manager – construction (s.11.1.4)
- notification of claims and disputes (s.11.1.12)
- summary report of change orders and change requests (s.11.1.14)
- receipt of notices of emergencies (s.11.1.18)
- issuing payment certificates where no dispute (s.14.4.1)
- issuing final payment if no dispute (s.14.5.3)
- withholding payment if technical defect (s.14.7)
- minor amendments to schedule – less than two weeks delay (s.16.2.1)
- requests for corrective action during recall period (s.17.1, 17.2, 17.3, 17.5)
- determination of Schedule LDs (s. 18.1.2)
- substitution of performance security (s.20.3.5)
- requesting tests and procedures during construction phase (s.21.2.1, 21.3)
- receiving reports on compliance with master project schedule (s.22)
- receipt of operations and maintenance manuals (s.31.2)
- receipt of HR plan (s.31.3.1)
- daily communication to DBO (s. 31.3.8)
- delivery of Health & Safety Plan (s.31.4)
- notification of equipment failure (s. 31.6)
- requests to perform landscaping (s. 31.15)
- requesting tests and procedures during operating phase (s.21.3)
- meeting with Plant Manager and providing input into Project Managers' performance (s.31.3.6, 31.3.7)
- operation of weigh scales (s.31.9)
- developing Punch List (s.6.2.5)