



**ENERGY FROM WASTE ("EFW")
MEMORANDUM OF UNDERSTANDING**



This Memorandum of Agreement dated the day of

2009 is made

B E T W E E N:

THE REGIONAL MUNICIPALITY OF DURHAM

("Durham")

-and-

THE REGIONAL MUNICIPALITY OF YORK

("York")

RECITALS

WHEREAS:

- (a) Durham and York have jointly agreed to participate in an individual environmental assessment (the "EA") to identify a preferred method or methods for processing the waste that remains after the application of Durham's and York's at-source waste diversion programs in order to recover resources and to minimize the amount of waste requiring landfill; and
- (b) Durham and York entered into a memorandum of understanding regarding the conduct of the Durham/York Residual Waste Environmental Assessment Study; and
- (c) The EA process is at a stage where the preferred technologies have now been identified as being the Thermal Treatment of Mixed Solid Waste and Recovery of Energy followed by the recovery of Materials from the Ash/Char; and
- (d) The EA process is now at a stage where additional matters are required to be evaluated by the Regions in order to assess the merits in proceeding with the EFW project; and
- (e) Durham and York wish to enter into a new memorandum of understanding governing the next steps in the EFW project including (i) the preparation and issuance of a request for proposals designed to select a technology provider to implement the preferred technologies/systems identified in the EA; (ii) defining the processes through which the necessary approvals for a functioning EFW

Facility will be obtained; and, (iii) defining the ownership model for the EFW Facility and the future contractual arrangements between the Regions regarding capacity.

NOW THEREFORE Durham and York agree as follows:

INTERPRETATION

Definitions

1. In this Memorandum of Understanding and in the recitals above,
 - (a) **“Change of Law”** means the enactment or amendment of any law on or after the date of execution of this Memorandum of Understanding which imposes requirements respecting the design, construction or operation of the EFW Facility contemplated by this Memorandum of Understanding which are materially more stringent than the requirements which existed immediately before the change;
 - (b) **“Co-Owners’ Agreement”** means the agreement to be negotiated between York and Durham governing all aspects of the operations of the EFW Facility;
 - (c) **“Durham”** means The Regional Municipality of Durham acting as a body corporate and, where the context requires, includes all employees, officers, servants and agents of The Regional Municipality of Durham;
 - (d) **“EA MOU”** means the Residual Waste Management Environmental Assessment Study Memorandum of Understanding previously executed by the parties;
 - (e) **“Energy From Waste”** (“EFW ”) means the thermal treatment of mixed solid waste and the subsequent recovery of energy followed by the recovery of materials from the ash/char for processing;
 - (f) **“Facility”** means the buildings, structures and equipment to be constructed for the thermal treatment of mixed solid waste;
 - (g) **“Host Community Agreement”** means an agreement with the lower tier municipality where the EFW Facility is proposed to be sited, which agreement is designed to address their concerns;
 - (h) **“Host Region”** means the Region within which the Facility is determined to be sited;
 - (i) **“Law”** means a statute or regulation of Ontario, or a statute or regulation of Canada applicable in Ontario;

- (j) “**Management Committee**” means the Management Committee as further described in Section 28;
- (k) “**Memorandum of Understanding**” means this Memorandum of Understanding;
- (l) “**Milestone**” means a project milestone set out in Section 26;
- (m) “**Municipal Solid Waste**” means that waste which remains subsequent to the Regions’ at-source waste diversion programs;
- (n) “**Nameplate Capacity**” means the maximum capacity of the EFW Facility before taking into account the actual operational limitations (i.e. maintenance downtime);
- (o) “**Net Operating Cost**” means the total annual operating cost of the EFW Facility, including contributions to any capital replacement reserve, less all revenue including revenues from the sale of capacity, electricity, steam and recovered materials;
- (p) “**Processing Capacity**” means the annualized throughput processing capacity of the EFW Facility which is typically 88% of the Nameplate Capacity;
- (q) “**Project**” means all processes leading up to, and including, the design, construction, and operation of an EFW Facility;
- (r) “**Study**” means the Durham/York Residual Waste Environmental Assessment Study or such other environmental screening process as may be undertaken by the parties;
- (s) “**Surplus Capacity**” means the additional capacity of 20,000 tonnes as further defined in Section 10; and
- (t) “**York**” means The Regional Municipality of York acting as a body corporate and, where the context requires, includes all employees, officers, servants and agents of The Regional Municipality of York.

References

2. Unless otherwise specified, references in this Memorandum of Understanding to Sections and Schedules are to Sections and Schedules in this Memorandum of Understanding.
3. Reference to any statute or statutory provision includes reference to that statute or statutory provision as from time to time amended, extended or re-enacted.

PURPOSE OF THE MEMORANDUM OF UNDERSTANDING

4. Durham and York jointly share the belief that there is the interest, ability and capacity within the two Regions sufficient to establish and operate an EFW Facility to service the waste generation needs of the Regions and possibly other communities in the future.
5. York and Durham recognize that despite their different interests and needs with respect to the construction and operation of an EFW Facility, they both have an interest in seeing the EA process successfully concluded leading to the approval for the construction and operation of an EFW Facility.
6. Durham and York have entered into this Memorandum of Understanding in order to recognize their partnership in the conduct of the EA process for the EFW Facility, and to recognize the arrangements between them with respect to the approvals, construction, ownership, use and operation of the EFW Facility.
7. Durham and York agree that this Memorandum of Understanding is contemporaneous with, and does not derogate from, the provisions of the EA MOU which address the conduct of the Study. In the event of conflict between this Memorandum of Understanding and the EA MOU, then the provisions of the EA MOU shall be deemed to be paramount.

PARTNERSHIP PRINCIPLES

8. Durham and York acknowledge and agree that the EA identifies a maximum potential Processing Capacity for the EFW Facility of 400,000 tonnes a year of Municipal Solid Waste.
9. Durham and York agree that the capital infrastructure servicing the EFW Facility shall be sufficiently oversized during construction of the initial Processing Capacity of the EFW Facility with a view to ensuring, where deemed financially prudent, that it is capable of servicing the maximum Processing Capacity of the Facility as set out in Section 8. The parties agree that the cost of any capital infrastructure servicing the EFW Facility oversized during the construction of the initial Processing Capacity to accommodate future expansion shall be shared equally. Without limiting the generality of the foregoing, it is agreed that the cost of oversizing water and sewer connections to the EFW Facility and installing a tip floor/storage pit for a minimum of four days storage, will be shared equally by Durham and York.
10. Durham and York agree that the initial Processing Capacity required by the Regions for the EFW Facility is an annual throughput of 140,000 tonnes of Municipal Solid Waste (the "Base Tonnage"). Durham and York acknowledge that in order to achieve the initial Processing Capacity, it is necessary to design and construct a facility with a Nameplate Capacity of approximately 160,000

tonnes per year. Durham and York agree that a ownership of the initial Processing Capacity in the EFW Facility shall be as follows:

- (a) 20,000 tonnes per year by York;
- (b) 100,000 tonnes per year by Durham; and,
- (c) An additional 20,000 tonnes per year of surplus capacity to be owned and shared equally by York and Durham (the Surplus Capacity”).

As a result, the parties shall endeavour to construct a Facility sufficient to meet these requirements based upon the cost sharing principles set forth herein.

11. York shall not deliver waste pellets or waste derived fuel to the EFW Facility.

CAPITAL COSTS

12. It is a principle of the partnership between Durham and York that they shall own the Facility, in partnership with one another, and shall contribute to the capital cost of the design and construction of the Facility based on their respective shares of the Base Tonnage and Surplus Capacity. York and Durham's initial ownership interests and capital contribution shall be determined by expressing their ownership interests in Section 10 as a percentage of the total Processing Capacity of the EFW Facility as of its commencement of operations (i.e. York: 21.4%, Durham 78.6%). Any adjustment to each Region's proportionate ownership in the EFW Facility shall be made only on the basis of additional capital contributions, if any.
13. It is a principle of this Memorandum of Understanding that the cost of any upgrades to the equipment or processes of the existing operations of the EFW Facility, or any additional costs necessary to maintain the ongoing capability of the EFW Facility which are necessitated by virtue of a change in law shall be shared by the parties on the basis of their then existing respective ownership interests in the EFW Facility.
14. Neither party hereto shall sell, assign, encumber or transfer its ownership interest in the EFW Facility without the prior written consent of the other party.
15. Neither party shall encumber the EFW Facility as security for any of its obligations herein.

OPERATING COSTS

16. York shall be responsible for paying the operating costs for a minimum of 30,000 tonnes per year of Processing Capacity in the EFW Facility during its 25 year operating term and Durham shall be responsible for paying the operating costs for

a minimum of 110,000 tonnes per year of Processing Capacity in the EFW Facility during its 25 year operating term.

17. deleted
18. It is a principle of this Memorandum of Understanding that each party shall have the right to use any Base Tonnage or Surplus Capacity not reasonably required by the other party, If either Region borrows any Base Tonnage or Surplus Capacity from the other party, the parties' respective proportionate share of operating costs for the EFW Facility as set out in Section 16 shall be adjusted accordingly for the period of time that the Processing Capacity is borrowed. Durham and York shall address in the Co-Owners' Agreement the mechanism and terms upon which the borrowing of any capacity in the EFW Facility shall be equitably determined.

EXPANSION OF THE EFW FACILITY

19. The parties agree that in the future either party hereto may require access to, and use of, additional capacity in the EFW Facility up to the maximum potential Processing Capacity of the Facility. The principles set out in Section 20 below shall govern how such expansions of the Processing Capacity of the EFW Facility shall be undertaken by the parties.
20. The parties agree that the Co-Owners' Agreement shall address the expansion of the Processing Capacity of the EFW Facility in the future (an "Expansion"). Any Expansion shall, at a minimum, be based upon the following principles:
 - (a) The Expansion shall be premised upon the requirements of the party seeking to expand the EFW Facility to dispose of its own Municipal Solid Waste and not the requirements for the disposal of waste from any other municipality or entity;
 - (b) An Expansion shall not be permitted if such Expansion would prejudice the ongoing capability of the EFW Facility to service the requirements of the other party hereto, or any entity which may have a service contract with either Region;
 - (c) The party seeking the Expansion shall be solely responsible for the conduct, and cost of, any and all processes necessary to obtain regulatory approvals for the Expansion, provided, however, that the other party shall be entitled to status as a co-proponent in connection therewith and provided that the Expansion is for the exclusive benefit of the initiating party, failing which costs shall be shared based on each party's proportionate share of the increased capacity;
 - (d) The party seeking the Expansion shall be solely responsible for all costs related to the Expansion including, without limitation, capital construction costs, equipment, land acquisitions, consultants' costs, additional host

community costs and impacts upon energy revenues, provided that the Expansion is for the exclusive benefit of the initiating party, failing which costs shall be shared based on each party's proportionate share of the increased capacity;

- (e) Any upgrades to the equipment or processes of the existing operations of the EFW Facility, or any additional costs necessary to maintain the ongoing capability of the EFW Facility which are necessitated by an Expansion which would not otherwise have been required at that time, shall be solely borne by the party seeking the Expansion. Provided that :
(i) should the upgrades subsequently become a requirement by virtue of a change of law within five (5) years of the completion of construction of the upgrade; or, (ii) should the non-contributing party undertake any expansion or activity which would have necessitated the upgrade within five (5) years of the completion of construction of the upgrade; or, (iii) should the non-contributing party derive any financial benefit which is directly attributable to the upgrade, the non-contributing party shall then contribute its proportionate share of the capital cost of the upgrade.
- (f) Any party contributing to the capital cost of the Expansion shall be entitled to an increase in its ownership interest in the EFW Facility commensurate with the percentage size of the increased capacity which it is funding.
- (g) Unless otherwise agreed by the Councils for Durham and York, at no time shall York's interest in the EFW Facility exceed 50%.

GENERAL

- 21. The parties recognize that Durham is the lead partner in the design, construction and approval of the initial Processing Capacity of the EFW Facility. As such, unless otherwise agreed between the parties, Durham shall be the primary decision maker with respect to issues concerning the Project including, without limitation, directing consultants, communications, discussions regarding power purchase arrangements, negotiations for a Host Community Agreement, and siting of the EFW Facility. Provided that Durham undertakes to consult with York if any proposed term of the Host Community Agreement would result in additional costs to York.
- 22. Subject to York Council's decision regarding its continuing involvement in the Project, York shall continue to be publicly supportive of the Project and shall assist Durham in its endeavours in proceeding with the Project, and ensuring necessary approvals.
- 23. The parties hereto agree that Durham will be responsible for the issuance and conduct of the Request for Proposals.

24. York and Durham shall be entitled to have equal representation upon the technical evaluation committee charged with evaluating the submissions to the Request for Proposals, commensurate with its commitment set out in Section 29.
25. The parties agree that the Host Region will be responsible for executing a Host Community Agreement with the lower-tier municipality in which the EFW Facility is to be sited.

PROJECT MILESTONES

26. Set forth below are those significant Milestones wherein representatives from each Region will seek direction from their respective Councils regarding their continued participation in the Project:
 - (a) The staff recommendation to the respective Regional Councils of the execution of a negotiated contract with the preferred Proponent for the design, construction and operation of the EFW Facility.
27. Contemporaneous with the reports to the respective Regional Councils triggered by the achievement of a Milestone set forth above, the senior Works or Environmental Services Department representative for each respective Region will identify to their Councils that said Milestone represents an opportunity to decide whether to continue with the arrangements envisioned herein or to terminate the Memorandum of Understanding and proceed otherwise.

FACILITY MANAGEMENT

28. The development and operations of the EFW Facility shall be overseen by a management committee (the "Management Committee") comprised of the Durham and York Chief Administrative Officers, Commissioners of Works or Environmental Services, Commissioners of Finance and Regional Solicitors, or their designates. The Management Committee's role and responsibilities shall be more particularly set out in the Co-Owners' Agreement. The parties agree that the general principles governing the Management Committee shall include the following:
 - (a) The Management Committee shall be empowered to establish such working groups or sub-committees as deemed necessary to address specific issues. All such working groups, or sub-committees, will report back to the Management Committee.
 - (b) The quorum for meetings of the Management Committee shall be six, with a minimum of three members from each Region being present.

- (c) Meetings of the Management Committee shall take place quarterly, or otherwise in accordance with a schedule established from time to time by the Management Committee, commencing after the date of execution of this Memorandum of Understanding. The location of the meetings of the Management Committee shall be in Durham unless otherwise agreed.
- (d) The Management Committee shall act by consensus. In the event that the Management Committee cannot achieve a consensus on any issue then either party may exercise the Dispute Resolution processes set out herein in order to achieve a decision.
- (e) 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 Region has had sufficient time to give due and appropriate consideration in advance of the meeting to the issues on the agenda.
- (f) Any decision made by the Management Committee having financial ramifications, will require approval by York and Durham pursuant to their own budget management policies and procedures.
- (g) The Management Committee will work to develop the fundamental principles upon which the Co-Owners' Agreement will be based for a term of 25 years.
- (h) The Management Committee shall meet on or before September 1, 2009.

FINANCIAL

- 29. It is a fundamental principle of this Memorandum of Understanding that, for its duration, all costs incurred by either Region related to the EA, and other costs as agreed between the parties, shall be shared equally between the parties. For greater clarity, these costs shall include the cost of conducting public EA meetings, consultants for EA meetings, all environmental studies required by the Ministry of the Environment as part of the EA submission, negotiation of power purchase agreements, development and evaluation of the RFP, negotiation of the form and content of the design build agreement and development of community host agreements. The Regions shall participate equally in establishing the scope and budget for all external consultants.
- 30. Except as otherwise provided herein, all costs related to the site preparation and development, including all infrastructure and services ancillary to the Facility, the construction of the Facility and the cost of any capital works on or off site of the Facility which are required as a term of the Host Community Agreement or as a condition of obtaining political support or municipal approvals from the Municipality of Clarington, shall be shared by the Regions according to their

proportionate contribution to the capital cost of the Facility. Notwithstanding the aforesaid, the Regions agree to share equally the cost of the following capital costs; the cost for constructing a watermain loop to service the EFW Facility, the costs related to a storm water management pond sufficient to accommodate the requirements for the Clarington Energy Park, and the costs related to the private laneway on site to accommodate truck access.

31. The parties agree that any costs which relate to the detailed design of the EFW Facility which are incurred in advance of the site preparation and development and construction thereof shall be shared by the Regions according to their proportionate contribution to the capital cost of the Facility.
32. The parties agree that host community costs, which shall be deemed to include any peer review costs incurred subsequent to the execution of a Host Community Agreement, shall be shared by the Regions according to their proportionate contribution to the capital cost of the Facility.
33. Durham and York staff time and in-house resources spent on the EFW Project shall be the sole responsibility of each respective Region.
34. York shall be consulted by Durham in the retention of all consultants related to the EFW Project. Durham shall ensure that a York has an equal opportunity to communicate with and receive work product from all consultants related to the EFW Project.

GENERAL MATTERS

Term

35. This Memorandum of Understanding shall commence on the date that it is last signed by one of the parties hereto.
36. This Memorandum of Understanding shall terminate upon the happening of one of the following:
 - (a) the execution of a Co-Owners' Agreement between the Regions which specifically indicates that it governs the relationship between them in connection with the Project and that it supersedes this Memorandum of Understanding;
 - (b) upon either party providing written notice to the other within 60 days after the achievement of a Milestone indicating their intention to terminate.
37. Notwithstanding the foregoing, nothing herein shall change the obligation imposed in the EA MOU upon the terminating party to be responsible for all costs incurred in amending the EA's Terms of Reference in order to permit the environmental assessment to continue post termination. In the event that this

Memorandum of Understanding is terminated and both Regions choose to continue with an individual EA process or other screening process, then both Regions shall bear their own costs related thereto.

General

38. This Memorandum of Understanding shall not be assigned by either party without the prior approval of the other.
39. This Memorandum of Understanding enures to the benefit of and binds the parties and their respective successors and permitted assigns.
40. No amendment to this Memorandum of Understanding shall be effective unless it is in writing and signed by both parties.
41. Any collection, use, disclosure, retention and destruction of personal information under this Memorandum of Understanding will be in conformity with the requirements of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.M.56 and the *Personal Information and Protection of Electronic Documents Act*, S.C. 2000, c.5.

Dispute Resolution

42. Any disputes or differences of opinion arising between the parties which concern or touch upon the validity, construction, meaning, performance or effect of this Memorandum of Understanding, shall first be mediated within a sixty (60) day time period prior to any dispute proceeding to arbitration. The parties shall determine a mutually agreeable location for the mediation to be conducted. The parties shall make all reasonable efforts to resolve their disputes by amicable negotiations and agree to provide, without prejudice, frank, candid, and timely disclosure of relevant facts, information, and documents to facilitate these negotiations. Any resolution of the dispute in mediation shall be kept confidential by all parties.
43. By giving a notice in writing to the other party, not later than ten (10) working days after the date of termination of the mediated negotiations, all matters remaining in dispute between the parties shall then be referred to the arbitration of a single arbitrator, if the parties agree upon one, otherwise to three arbitrators, one to be appointed by each party and a third to be chosen by the first two named before they enter upon an arbitration. The award and determination of the arbitrator or arbitrators or two of the three arbitrators shall be binding upon the parties and their respective heirs, executors, successors, administrators and assigns.

Notices

44. Any notice required herein shall be in writing and shall be delivered to the following addresses:

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

Attention: Regional Clerk
Fax No. (905) 668-9963

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

Attention: Regional Clerk
Fax No. (905) 895-3031

IN WITNESS WHEREOF Durham and York have executed this Memorandum of Understanding.

) **THE REGIONAL MUNICIPALITY OF**
) **DURHAM**

)
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)
)
) Name: Roger Anderson
) Title: Regional Chair

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)
) Name: Pat Madill
) Title: Regional Clerk

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) I/We have authority to bind the
) Corporation

) **THE REGIONAL MUNICIPALITY OF YORK**

Authorized by Private Report of the
Commissioner of Environmental Services
adopted by Regional Council at its meeting on
, 2009.

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) Name: Bill Fisch
) Title: Regional Chair

Solicitor Approved:

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) Name: Denis Kelly
) Title: Regional Clerk

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) I/We have authority to bind the
) Corporation