

TOWN OF AMHERSTBURG

BY-LAW NO. 2004-11

Being a by-law to authorize the signing of a Services Agreement between the Town of Amherstburg and the Ontario Clean Water Agency (OCWA) for the provision of operating and maintenance services for the Amherstburg Water Treatment Plant.

Whereas OCWA is in the business of providing operation and maintenance services for water and wastewater facilities; and

Whereas the Corporation of the Town of Amherstburg is the owner of the Amherstburg Water Treatment Plant (the Facilities); and

Whereas the Corporation of the Town of Amherstburg wishes to retain the services of OCWA to operate and maintain the Facility; and

Whereas the Corporation of the Town of Amherstburg and OCWA are entering into this Agreement to clarify and set out their respective rights and obligations with respect to the operator, maintenance, invoicing and payment arrangements for the Facility;

NOW THEREFORE THE CORPORATION OF THE TOWN OF AMHERSTBURG HEREBY ENACTS AS FOLLOWS:

1. That the Mayor and Clerk be authorized to sign the Agreement between the Corporation of the Town of Amherstburg and Ontario Clean Water Agency dated January 1, 2004 attached to and forming part of this By-law for the operation and maintenance of the Amherstburg Water Treatment Plant.
2. This by-law shall come into force and effect upon final passing thereof.

1st. Reading – February 16, 2004

2nd Reading – February 16, 2004

3rd Reading – February 16, 2004



MAYOR



CLERK

SERVICES AGREEMENT

BETWEEN

ONTARIO CLEAN WATER AGENCY

A N D

THE CORPORATION OF THE TOWN OF AMHERSTBURG

FOR THE AMHERSTBURG WATER TREATMENT PLANT

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SERVICES AGREEMENT

THIS AGREEMENT effective as of the 1st day of January, 2004,

B E T W E E N

**ONTARIO CLEAN WATER AGENCY/AGENCE ONTARIENNE
DES EAUX**, a corporation established under the *Capital Investment Plan Act, 1993, c.23*, Statutes of Ontario.

("OCWA")

A N D

THE CORPORATION OF THE TOWN OF AMHERSTBURG

(the "Client")

RECITALS

- (a) OCWA is in the business of providing operation and maintenance services for water and wastewater facilities.
- (b) The Client is the owner or beneficial owner of the Amherstburg Water Treatment Plant more particularly described in Schedule A (the "Facility").
- (c) The Client wishes to retain the services of OCWA to operate and maintain the Facility in accordance with the provisions of this agreement (the "Agreement").
- (d) The Client and OCWA (collectively, the "Parties") are entering this Agreement to clarify and set out their respective rights and obligations with respect to the operation, maintenance, invoicing and payment arrangements for the Facility.
- (e) The Council of the Client on the ___ day of _____, 200__ passed By-Law No. _____ authorizing the Client to enter into this Agreement.

NOW THEREFORE in consideration of the mutual covenants contained in this Agreement and other good and valuable consideration the receipt and sufficiency of which is hereby irrevocably acknowledged, the Client and OCWA agree as follows:

ARTICLE 1 - INTERPRETATION

Section 1.1 - Definitions

In this Agreement, definitions are set out in Schedule B, or within applicable provisions as indicated.

Section 1.2 - Interpretation

The rule of construction that a document is to be construed more strictly against the party who itself, or through its agent, drafted such document, shall not apply to this Agreement as it is agreed that the Parties, directly or through their agents, have participated in the preparation of this Agreement.

ARTICLE 2 - RESPONSIBILITIES OF OCWA**Section 2.1 - Retention of OCWA**

The Client retains OCWA to provide management, operation, administration and maintenance services, as described in Schedule C to this Agreement, in respect of the Facility (the "Services"). The Client acknowledges and agrees that OCWA bears no responsibility for the design of the Facility.

Section 2.2 - Performance of Services

- (a) OCWA shall deliver the Services in compliance with all applicable Environmental Laws, except as described in Paragraphs 2.2(b) and (c) below and in any of the following circumstances:
- (i) the Client not making the Capital Expenditures reasonably recommended by OCWA under Section 4.6 below;
 - (ii) failure of the Client to meet its representations and warranties specified in this Agreement;
 - (iii) mechanical failure of any equipment at the Facility unless the mechanical failure is due to negligent maintenance by OCWA;
 - (iv) the water transmitted to the Facility for treatment contains contaminants or other substances which cannot be treated or removed by the Facility's processes;
 - (v) the quantity or quality of water transmitted to the Facility exceeds the Facility's design or operating capacity;
- (b) OCWA may temporarily cease to provide or reduce, the level of provision of Services hereunder in the event of an emergency, a breakdown or any Uncontrollable Circumstance. OCWA shall, when practicable, endeavour to give the Client reasonable advance notice of any such occurrence.
- (c) Notwithstanding any other provision of this Agreement, delay in the performance of, or a failure to perform any term of this Agreement by OCWA, shall not constitute default

under this Agreement or give rise to any claim for damages suffered by the Client if and to the extent caused by occurrences or circumstances beyond the reasonable control of OCWA (an "Uncontrollable Circumstance"), including but not limited to any circumstances set out in Paragraph 2.2(a) decrees of government, acts of God (including but not limited to hurricanes, tornadoes, floods and other weather disturbances), sabotage, strikes, lockouts and other industrial disturbances, insurrections, war, civil disturbances, riots, explosions, fire and acts of third parties.

- (d) In the event that a deficiency in connection with the Facility is determined to exist, OCWA, in its discretion, may take remedial measures that it determines are reasonably necessary in attempting to maintain the Facility in compliance with Environmental Laws. Such measures may be beyond the scope of the Services and as such would be subject to extra costs as described in Paragraph 4.5 (f). OCWA shall use its best efforts to contact the Client and obtain the Client's approval prior to undertaking such remedial measures.
- (e) Notwithstanding Paragraph 2.2(d) above, the Client recognizes that such remedial measures taken by OCWA may be as a result of an emergency situation or an Uncontrollable Circumstance and that in such situations OCWA's primary concern will be making all reasonable efforts to maintain the Facility in compliance with Environmental Laws.

Section 2.3 - Excluded Services

Any services not set out in the Services are excluded from this Agreement (the "Excluded Services") and, without limiting the generality of the foregoing, those services set out in Schedule D to this Agreement are examples of Excluded Services. If the Client subsequently requests OCWA to provide the Excluded Services, the Excluded Services may be provided at additional cost to the Client following negotiation.

Section 2.4 - Standard of Care

OCWA shall deliver the Services as would a reasonable operator with like skills in like circumstances.

Section 2.5 - OCWA as Independent Contractor

In performing the Services, OCWA shall be acting as an independent contractor and only to the extent and for the specific purposes expressly set forth herein. Neither OCWA nor its employees, agents or subcontractors shall be subject to the direction and control of the Client, except as expressly provided in this Agreement.

Section 2.6 - Authorized Representatives

Each of OCWA and the Client shall be entitled to designate in writing to the other, one or more individuals who shall be authorized to represent it in connection with the day-to-day

administration of the provisions of this Agreement (the "Authorized Representatives"). Each of the Parties shall be entitled to rely on the acts and approvals given by the other Party's Authorized Representative until such time as it receives a written notification of change of the other Party's Authorized Representative.

Section 2.7 - Reporting

Within thirty days of the end of each calendar month or such other period as the Client and OCWA may agree upon, OCWA shall provide the Client's Authorized Representative with access to Client Connection to review the performance of the Facility and to download Facility Performance Reports, or OCWA will provide information describing the performance of the Facility in a format acceptable to both the Client and OCWA.

Section 2.8 - Indemnification of the Client

OCWA shall exonerate, indemnify and hold harmless the Client, its directors, officers, employees and agents from and against any and all Claims which may be suffered or incurred by, accrue against or be charged to or recoverable from the Client to the extent that such Claim is caused by OCWA's negligence or wilful misconduct when performing the Services, except where such Claim is due to a condition of the Facility which existed prior to OCWA's commencement of the Services (a "Pre-existing Condition"), including but not limited to those listed in Schedule G. Such Pre-existing Conditions shall be the ongoing responsibility of the Client. OCWA, in providing these Services, is not responsible, accountable or liable, in any way, for Pre-existing Conditions, either directly or indirectly. The Client shall be deemed to hold the provisions of this Section 2.8 that are for the benefit of the Client's directors, officers, employees and agents in trust for such directors, officers, employees and agents as third party beneficiaries under this Agreement.

Section 2.9 - Insurance

- (a) OCWA shall arrange for and maintain, subject to reasonable availability, insurance coverage of the Facility as described in Schedule E to this Agreement (the "Insurance") and, with the exception of automobile insurance, the Client shall be an additional insured under the Insurance. If there is a significant change in the Insurance, the Client will be notified of such changes.
- (b) The Client specifically recognizes and agrees that neither OCWA nor the Crown bears any responsibility for the pre-existing condition of the Facility. As such, OCWA is not required to obtain insurance for this purpose and that the Client has or will obtain its own insurance.
- (c) The Client may, at its cost, maintain additional insurance in respect of the Facility if it wishes and OCWA shall be an additional insured under such insurance.

- (d) The Client shall be responsible for securing its own insurance for any operations with which it is involved or which are Excluded Services that are not the subject of this Agreement. The Client acknowledges that it will have no recourse under OCWA's policies of insurance for any such operations.
- (e) In the event of a claim under the Insurance, the payment of deductibles is as specified in Schedule E.

Section 2.10 - Representations and Warranties of OCWA

OCWA represents and warrants to the Client that the following are true and correct:

- (a) that it has full power and authority and has taken all necessary steps to enter into and perform its obligations under this Agreement; and
- (b) OCWA's staff are trained and capable of carrying out the terms of this Agreement.

ARTICLE 3 - RESPONSIBILITIES OF THE CLIENT

Section 3.1 - Representations and Warranties of the Client

The Client represents and warrants to OCWA that the following are true and correct:

- (a) The Client has the full power and authority to enter into and perform its obligations under this Agreement.
- (b) The Client has passed all necessary by-laws and has obtained all necessary Authorizations to enable it to enter into and perform its obligations under this Agreement and to operate the Facility, including without limitation, any Authorizations required from the Ontario Municipal Board and the Ministry of the Environment, and the Authorizations are in good standing.
- (c) The Client has provided OCWA with a true copy of each of the Authorizations referred to in Paragraph 3.1(b) above prior to the date of this Agreement, including a certified copy of each municipal by-law required to authorize the Client to enter into and perform its obligations under this Agreement.
- (d) As owner or beneficial owner of the Facility, the Client is fully aware of its responsibilities and obligations regarding the operation and maintenance of the Facility and recognizes its duty to ensure the protection and safety of the users of this municipal drinking-water system.
- (e) The Client warrants that there are no Pre-existing Conditions existing at the Facility which would affect OCWA's ability to operate the Facility under this Agreement, other than what

is listed in Schedule G. The Client acknowledges and agrees that the Client shall be responsible for addressing such Pre-existing Conditions.

- (f) The Client warrants that as of the date of execution of this Agreement, to the best of the Client's knowledge, the Facility is in compliance with all Applicable Laws.

Section 3.2 - Covenants of the Client

The Client hereby covenants for the benefit of OCWA:

- (a) The Client agrees to promptly pay all amounts owing to OCWA under this Agreement as they become due, including any interest charges on late payments as determined under Section 4.8.
- (b) The Client agrees to promptly provide OCWA with any information relating to the Facility which could have a bearing on the provision of Services by OCWA, including but not limited to any engineering report required by regulation or governmental notice or order pertaining to the Facility.
- (c) The Client shall repair, maintain and keep in a good working state, in accordance with good engineering practices and the standards reasonably applicable to an owner of a like facility, all water works that belong to or are under the control of the Client and that distribute water from the Facility.
- (d) The Client agrees to: (i) immediately provide OCWA with a copy of all orders which apply to the Facility as they may be issued to the Client by any regulatory agency from time to time; and (ii) commit the necessary resources (financial, technical, legal) to address such orders.

Section 3.3 - Exoneration and Indemnification of OCWA

- (a) Subject to Paragraph 3.3(c) below, the Client shall exonerate, indemnify and hold harmless OCWA, its directors, officers, employees and agents and Her Majesty the Queen in Right of Ontario, as represented by the Minister of the Environment and all directors, officers, employees and agents of the Ministry of the Environment (collectively referred to as the "Indemnified Parties") from and against any and all Claims which may be suffered or incurred by, accrue against, or be charged to or recoverable from any one or more of the Indemnified Parties that, in any way, either arise from or are connected with the operation of this Agreement.
- (b) OCWA shall be deemed to hold the provisions of this Article 3 that are for the benefit of OCWA's directors, officers, employees and agents and the other Indemnified Parties as defined above, in trust for all such Indemnified Parties as third party beneficiaries under this Agreement.

- (c) Notwithstanding the other provisions of this Section 3.3, the Client shall not be liable in respect of any Claim:
- (i) to the extent that such Claim is covered by the Insurance and where the premiums were paid for by the Client; or
 - (ii) to the extent that such Claim is caused by OCWA's negligence or wilful misconduct in providing the Services.

ARTICLE 4 - TERM, PAYMENT FOR SERVICES AND OTHER CHARGES

Section 4.1 - Initial Term of Agreement

This Agreement shall start on January 1, 2004 and shall continue in effect for an initial term of three (3) years, ending on December 31, 2006 (the "Initial Term") and then may be renewed for successive one-year terms (each a "Renewal Term") upon agreement between the Parties, subject to Sections 4.3 and 6.2 of this Agreement.

Section 4.2 - Annual Price for Initial Term

- (a) Subject to any adjustments made pursuant to other provisions of this Agreement, the Client shall pay OCWA for OCWA's provision of the Services which excludes Hydro Costs but includes the costs as of December 31, 2003 associated with the *Safe Drinking Water Act, 2002* ("SDWA"), O. Reg. 170/03 and various other regulations under the SDWA and the costs for staffing and chemicals, a price for each year of the Initial Term in the following amounts (the "Annual Price"):
- (i) For Year One from January 1, 2004 through to December 31, 2004 inclusive: \$655,368.33.
 - (ii) For Year Two and subsequent Years: \$655,368.33 plus an adjustment for inflation calculated as described below in Paragraph 4.2(b), plus an adjustment for maintaining the Insurance which is renewed annually by OCWA (if over the CPI adjustment).
- (b) Statistics Canada Consumer Price Index, All Items (Ontario) ("CPI") shall be used to calculate the inflation adjustment referred to in Paragraph 4.2(a) above. The percentage difference between the CPI during November of the previous Year as compared to the CPI of November of the current Year shall be the inflation adjustment for the next Year. For example, the inflation adjustment for Year 2005 is the CPI of November 2004 divided by the CPI of November 2003. The adjustment shall be calculated as soon as necessary information is available from Statistics Canada. In Year Two of the Agreement and subsequent Years, the inflation adjustment shall be added to the Annual Price for Year One of the Agreement on a cumulative basis.

Section 4.3 - The Annual Price in Renewal Terms

The Annual Price for any Renewal Term will be as agreed between the Client and OCWA. If the Parties cannot agree on the Annual Price for any Renewal Term within six months of the beginning of the last Year of the Initial Term or Renewal Term, as the case may be, (the "Current Term"), this Agreement will be terminated six months from the last day of the Current Term.

During this six month period, the Client shall pay the Annual Price paid for the last Year of the Current Term plus an adjustment for inflation calculated as described in Paragraph 4.2(b), pro-rated over the six month period.

Section 4.4 - Payment of the Annual Price

The Client shall pay OCWA the Annual Price for each Year of the Initial Term or any Current Term, in twelve monthly payments, in advance, on the first day of each month. Payment shall be made by the Client by pre-authorized bank debit from a bank account designated by the Client. In Year One of the Initial Term, the monthly payment of the Annual Price shall be \$54,614.03. The first payment shall be due and payable on January 1, 2004 and available in the Client's designated bank account on that date.

Section 4.5 - Items not included in the Annual Price

The Annual Price, for each Year of the Initial Term and any Renewal Term, covers all charges for the Services, but does not cover items or matters that are outside the scope of the Services, such as Excluded Services, and without restricting the generality of the foregoing, does not include the following:

- (a) any Capital Expenditures or costs resulting from any failure of the Client to implement reasonably recommended Capital Expenditures;
- (b) additional costs resulting from changes to any Applicable Laws or Environmental Laws or the application thereof, which relate to the provision of the Services. Although certain sections of the *Safe Drinking Water Act, 2002* ("SDWA"), O. Reg. 170/03 and various other regulations under the SDWA, came into force on June 1, 2003, the Parties acknowledge and agree that any additional services and associated costs related to meeting the above noted regulatory requirements have not yet been determined as of the date of execution of this Agreement, and therefore such costs have not been included in the Annual Price. OCWA reserves the right to negotiate with the Client to provide such additional services, if any, for additional cost;
- (c) Unexpected Expenses (as defined in Paragraph 4.7(a) below);
- (d) the payment of municipal taxes or municipal grants in lieu of taxes;

- (e) any charges resulting from adverse tax changes in respect of the Services or the Facility, excluding income taxes payable by OCWA on its own revenues;
- (f) any charges resulting from OCWA having to address an emergency, breakdown or Uncontrollable Circumstance and, without limiting the generality of the foregoing, such charges resulting from those situations addressed in Section 2.2 of this Agreement; and
- (g) any charges resulting from callins or emergency responses outside of the normal hours of operation as per Schedule C, section 6. - Staffing; such charges to be invoiced to the Client against a callin allowance of \$2,000.00 to be budgeted by the Client outside of the Annual Price.

Section 4.6 - Capital Expenditures

- (a) "Capital Expenditures" means the charges for all capital items in relation to the Facility, including new or replacement equipment, any overhaul or rebuild of equipment, any non-routine repair; any work required by regulatory order (eg. MOE or MOL) or identified through a third party inspection (eg. EUSA, MOE, MOL); maintenance (excluding routine maintenance); any alterations and any associated installations, commissioning, including labour and preselection charges, together with OCWA's service fee.
- (b) No later than September 30th of each Year this Agreement is in force, or a date as the Parties may agree in writing, OCWA will provide the Client with an estimate of the Capital Expenditures reasonably required for the operation of the Facility for the following Year. The Client's written approval of the estimate or revised estimate authorizes OCWA to incur the Capital Expenditures included in the estimate (the "Approved Capital Expenditures").
- (c) OCWA will invoice the Client for the Approved Capital Expenditures together with any additional supporting documentation and the Client shall pay the invoice within 30 days of receipt.

Section 4.7 - Unexpected Expenses

- (a) "Unexpected Expenses" means unanticipated expenditures that OCWA reasonably incurs in order to address equipment failure, acts of third parties, or other circumstances beyond OCWA's reasonable control, including but not limited to unregulated septic dumping, illegal industrial waste discharges or overflows, an emergency situation or any situation resulting from an Uncontrollable Circumstance.
- (b) In the event that OCWA is required to incur Unexpected Expenses, the prior approval of the Client with respect to those Unexpected Expenses will be required only if time permits. Within ten days of incurring the Unexpected Expenses, OCWA will provide the Client with a report detailing the reasons the Unexpected Expenses were incurred and the

Client shall pay OCWA for the Unexpected Expenses within thirty (30) days of receipt of an invoice from OCWA.

Section 4.8 - Interest on Late Payments

- (a) **Monthly Payment of Annual Price.** If the Client's monthly payment of the Annual Price is not available in its designated bank account on the agreed to date of payment, or if a cheque payable to the Ontario Clean Water Agency, has not been received, OCWA will notify the Client that the funds were not available. On the next Business Day, OCWA will again attempt to withdraw the monthly payment if payment is by electronic transfer. If funds are not available when the second attempt to withdraw funds is made or if OCWA has not yet received a cheque for payment, OCWA will notify the Client that the payment is late, and in addition to paying the monthly payment owing to OCWA, the Client shall pay OCWA interest at that rate determined by the Minister of Finance, from time to time, as payable on overdue accounts, in accordance with the *Financial Administration Act*, R.S.O. 1990, c.F.12, plus any banking and administrative charges. Continued non-payment shall constitute a material breach under Section 6.2(b).
- (b) **Other Invoices.** Paragraph 4.8(a) shall also apply to late payments of invoices for costs for other services provided under this Agreement.

Section 4.9 - Partial Payment of Disputed Invoices

- (a) If the Client wishes to dispute any portion of an invoice, within forty-five (45) days from the date on the disputed invoice, the Client must provide written notice to OCWA of the charges in dispute. If no written notice is received within the above 45 days, the invoice shall be deemed to be approved and interest shall be payable by the Client, if still unpaid after 30 days from the Client's receipt of the invoice.
- (b) If the Client disputes any portion of an invoice, the Client shall nonetheless pay to OCWA the undisputed portion of the invoice by the due date and shall also continue to pay all monthly payments of the Annual Price due on the first of each month. If any additional amount is finally determined to be payable to OCWA, the Client shall pay OCWA the additional amount, plus interest as provided in Section 4.8 above, within ten days from the date of final determination.
- (c) If the disputed charges cannot be resolved with a reasonable time, the Parties shall seek resolution in accordance with Article 5, Dispute Resolution.

Section 4.10 - Hydro Costs

OCWA is not responsible for paying the hydroelectricity charges. The Client shall pay all hydroelectricity bills.

Section 4.11 - Debit/Credit for Significant Changes in Flows

- (a) Subject to Paragraph 4.11(b) below, if there is a significant change in flow at the Facility, as described in Part 1 of Schedule F, an invoice or credit memo, as appropriate, will be issued for the amount calculated using the formula set out in Part 2 of Schedule F.
- (b) There shall be no credit where the decrease in flow at the Facility results from a change made to the Facility or its operations, that was paid for by OCWA.

ARTICLE 5 - DISPUTE RESOLUTION

Section 5.1 - Mediation

- (a) If a dispute arises between the Client and OCWA which cannot be resolved within a reasonable time, the issue shall be referred to a mediator.
- (b) The fees and expenses of the mediator shall be divided equally between the Parties.
- (c) Involvement in mediation is on a without prejudice basis and does not preclude and is not a bar to either Party pursuing whatever legal remedies may be available, including litigation.

ARTICLE 6 - EXISTING AGREEMENTS AND TERMINATION

Section 6.1 - Existing Agreements

- (a) Subject to Paragraph 6.1(c) below, upon the execution of this Agreement, all existing agreements between the Client and OCWA or a predecessor of OCWA ("Existing Agreements") under Section 63 of the *Ontario Water Resources Act*, R.S.O. 1990, c.O.40, entered into before the 1st day of April, 1974, are terminated.
- (b) Subject to Paragraphs 6.1(a) and 6.1(c) of this Agreement, the provisions in the Existing Agreements between the Client and OCWA or the Client and one of OCWA's predecessors, shall be terminated.
- (c) Notwithstanding any other provision in this Agreement and in particular Paragraphs 6.1(a) and (b) above, all financial obligations of the Client to OCWA or any of OCWA's predecessors under any Existing Agreement, including but not limited to the obligation of the Client to pay any outstanding debt owed in respect of the Facility, shall remain in effect until such time, if applicable, that new financing arrangements have been entered into between the Client and OCWA.

Section 6.2 - Termination of Agreement

- (a) At least twelve calendar months before the expiry of the Current Term, either:
- (i) the Client shall notify OCWA in writing whether it wishes to terminate this Agreement at the end of the Current Term. However, OCWA reserves the right to decline to renew the Agreement by notifying the Client in writing of its decision to decline, within thirty (30) days of receipt of the Client's written request to renew; or
 - (ii) OCWA shall notify the Client in writing that it wishes to terminate this Agreement at the end of the Current Term.

If no notice is given as indicated in Clause 6.2(a)(i) or (ii) and the Parties have not begun to negotiate the Annual Price for the next Renewal Term within the last six months of the final year of the Current Term, then the Current Term shall be extended by one year and Section 4.2 shall apply. If the Parties have begun to negotiate the Annual Price for the next Renewal Term within the first six months of the final year of the Current Term, Section 4.3 shall apply.

- (b) During the Initial Term or any Renewal Term, this Agreement may only be terminated by either the Client or OCWA ("Termination for Cause") if:
- (i) there has been a material breach of the Agreement;
 - (ii) the Party complaining of the breach has given written notice of the breach to the other Party;
 - (iii) the other Party does not correct the breach within thirty days of receiving the notice; and
 - (iv) in accordance with Paragraph 6.2(c).
- (c) Where there is a material breach and: (i) such material breach has not been corrected within the time set out in Paragraph 6.2(b) above; (ii) the material breach has not been referred to mediation pursuant to Section 5.1 of this Agreement; and (iii) the Parties have not otherwise agreed in writing, then the complaining Party may terminate this Agreement by giving at least thirty (30) days notice in writing to the other Party.
- (d) If either Party disputes the existence of a breach or that the breach is material, the dispute may be referred to mediation under Section 5.1 of this Agreement.
- (e) After the Initial Term, either the Client or OCWA may terminate this Agreement only as follows:

- (i) for any reason, upon twelve months prior written notice; or
 - (ii) if there has been a material breach of the Agreement, in accordance with the procedures described in Paragraphs 6.2(b) and 6.2(c) above.
- (f) Continued non-payment for moneys payable under this Agreement shall constitute a material breach of the non-paying Party.

Section 6.3 - Early Termination

If this Agreement is terminated for any reason prior to expiry of the Current Term, the Client shall pay OCWA for the Services rendered up to the date of termination and OCWA shall pay the Client for any moneys owed up to the date of termination in accordance with Section 6.5.

Section 6.4 - Inventory Count of Consumables/Supplies

OCWA and the Client will conduct an inventory count of consumables/supplies at the Facility on the first day of the Initial Term or as soon as the Parties may agree. If OCWA no longer operates the Facility at termination of this Agreement, OCWA shall either:

- (a) ensure that there is the same amount of consumables/supplies at the Facility on the date of termination as there was on the first day of the Initial Term; or
- (b) reimburse the Client for any shortfall.

If the amount of consumables/supplies at the Facility on the date of termination exceeds the amount on the first day of the Initial Term, the Client will either reimburse OCWA for any excess or OCWA may take possession of any excess, as OCWA may determine.

Section 6.5 - Final Settlement

If OCWA ceases to operate and maintain the Facility, there shall be a final settlement of all accounts with respect to the Annual Price and any other expenses incurred by OCWA and amounts owing by or to the Client under this Agreement and any Existing Agreement including, but not limited to the outstanding debt, if any, owed to OCWA, no later than ninety days after OCWA ceases to provide the Services or thirty (30) days after OCWA has provided the Client with a final invoice, whichever comes later.

ARTICLE 7 - INNOVATIONS

Section 7.1 - Innovations

Either Party may bring forward innovative ideas for the operation of the Facility and both Parties agree to reasonably consider such innovative ideas.

ARTICLE 8 - GENERAL

Section 8.1 - Ownership of Technology

The Client acknowledges and agrees that in providing the Services, OCWA may utilize certain technology developed by or for OCWA, whether existing now or in the future, including but not limited to technology such as WMMS, Outpost 5 and PDC (the "Technology"). The Client further agrees that the use of the Technology at the Facility does not in any way give the Client any ownership or licensing rights in or Intellectual Property Rights to, the Technology regardless of who funded the Technology.

Section 8.2 - Agreement to Govern

If there is any inconsistency between the main body of this Agreement and any Schedule to this Agreement, the provision in the main body shall govern.

Section 8.3 - Headings

The division of this Agreement into Articles, Sections and Paragraphs and the insertion of headings are for convenience of reference only and will not affect the construction or interpretation of this Agreement.

Section 8.4 - Entire Agreement

This Agreement constitutes the entire agreement between the Client and OCWA with respect to the subject matter hereof and cancels and supersedes any prior understandings, undertakings, representations, warranties, terms, conditions and agreements, whether collateral, express, implied or statutory, between the Client and OCWA with respect thereto, except for the provisions of any Existing Agreements which remain in effect in accordance with Paragraphs 6.1(b) and (c) of this Agreement.

Section 8.5 - Amendments and Waivers

No amendment to this Agreement will be valid or binding unless it is in writing and duly executed by both of the Parties hereto. No waiver of any breach of any provision of this Agreement will be effective or binding unless it is in writing and signed by the Party purporting to give such waiver and, unless otherwise provided, will be limited to the specific breach waived.

Section 8.6 - Successors and Assigns

This Agreement shall operate to the benefit of and be binding upon, the Parties hereto and their successors and assigns. This Agreement may be assigned in the discretion of either Party.

Section 8.7 - Survival

All representations, warranties and indemnities given by each of the Parties, all outstanding payment obligations, and the confidentiality obligation under Section 8.13, shall survive indefinitely the termination of this Agreement.

Section 8.8 - Severability

If any provision of this Agreement is determined to be invalid or unenforceable in whole or in part, such invalidity or unenforceability shall attach only to such provision and everything else in this Agreement shall continue in full force and effect.

Section 8.9 - Notices

(a) All notices required or permitted to be given under this Agreement shall be in writing and shall be deemed to be properly given if hand-delivered, sent by confirmed facsimile or by registered mail postage prepaid, return receipt requested, or by courier, to the parties at their respective addresses as set forth below, or to such other addresses as the parties may advise by like notice. Such notices if sent by facsimile, registered mail or courier shall be deemed to have been given when received.

(i) if to the Client: Town of Amherstburg
P.O. Box 159
271 Sandwich St. South
Amherstburg, ON N9V 2Z3
Telephone: (519) 736-0012
Fax: (519) 736-5403
Attention: Mr. Lou Zarlenga, Manager of Public Services

(ii) if to OCWA: Ontario Clean Water Agency
Box 790
1215 Fort Street
Sarnia, ON N7T 7J9
Telephone: (519) 344-7420
Fax: (519) 344-4337
Attention: Anthony Pizans

(b) A Party to this Agreement may change its address for the purpose of this Section by giving the other Party notice of such change of address in the manner provided in this Section.

Section 8.10 - Counterparts

This Agreement may be executed in counterparts, each of which shall constitute an original and all of which taken together shall constitute one and the same instrument.

Section 8.11 - Freedom of Information

The Client understands and agrees that this Agreement and any materials or information provided to OCWA through the performance of the Services may be subject to disclosure under the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c.F.31, as amended, or as otherwise required by law.

Section 8.12 - Confidentiality and Security

The Parties shall strictly maintain confidential and secure, all material and information provided, directly or indirectly, by the other Party pursuant to this Agreement. Subject to relevant legislation related to freedom of information or the protection of privacy and any other laws, neither Party shall directly or indirectly disclose to any person, either during or following the term of this Agreement, any such material or information provided to it by the other Party without first obtaining the written consent of the Party who provided such material or information, allowing such disclosure.

IN WITNESS WHEREOF the parties have duly executed this Agreement.

ONTARIO CLEAN WATER AGENCY

2/24/2004
Date of Signing

By: [Signature]
(Authorized Signing Officer)

03/31/2004
Date of Signing

By: Sandra Wi Harge
(Authorized Signing Officer)

CORPORATION OF THE TOWN OF AMHERSTBURG

June 7/04
Date of Signing

By: [Signature]
Wayne Hurst, Mayor

June 9/04
Date of Signing

By: [Signature]
David Mailloux, Clerk

SCHEDULE A - The Facility

Part 1. Description of the Facility

For the purposes of this agreement, the Facility is comprised of the following:

Class IV water treatment plant with a capacity of 4 million Imperial Gallons per day. A conventional water treatment facility with flocculation, coagulation, sedimentation and filtration. Also includes a 500,000 Imperial Gallon water tower.

Part 2. Street Address of the Facility

The street address of the Facility is as follows:

Amherstburg Water Treatment Plant
415 Front Road North
Amherstburg, ON N9V 2V5

Amherstburg Water Tower
Corner of Alma and Venetian Streets
Amherstburg, ON

SCHEDULE B - Definitions

In this Agreement, the following terms are defined below or in the section in which they first appear:

“Agreement” means this agreement together with Schedules A, B, C, D, E, F and G attached hereto and all amendments made hereto by written agreement between OCWA and the Client.

“Annual Price” is defined in Paragraph 4.2(a) of this Agreement.

“Applicable Laws” means any and all statutes, by-laws, regulations, permits, approvals, certificates of approval, licences, judgments, orders, injunctions, authorizations, directives, whether federal, provincial or municipal including, but not limited to all laws relating to occupational health and safety matters, fire prevention and protection, health protection and promotion, land use planning, environment, Building Code, or workers’ compensation matters.

“Approved Capital Expenditures” is defined in Paragraph 4.6(b) of this Agreement.

“Authorizations” means each of the sewer use and water by-laws, licences, certificates of approval, permits, consents and other authorizations or approvals required under Environmental Laws from time to time in order to operate the Facility.

“Authorized Representatives” is defined in Section 2.6 of this Agreement.

“Business Day” means a day other than a Saturday, Sunday or statutory holiday in Ontario.

“Capital Expenditures” is defined in Paragraph 4.6(a) of this Agreement.

“Claim” means any claim, fine, penalty, liability, damages, loss and judgements (including but not limited to, costs and expenses incidental thereto) of any kind and nature whatsoever.

“Current Term” is defined in Section 4.3 of this Agreement.

“Environmental Laws” means, any and all statutes, by-laws, regulations, permits, approvals, certificates of approval, licences, judgments, orders, judicial decisions, injunctions, and authorizations related to environmental matters or occupational health and safety and which are applicable to the regulation of the operation of water or wastewater facilities.

“Excluded Services” is defined in Section 2.3 of this Agreement.

“Existing Agreements” are defined in Paragraph 6.1(a) of this Agreement.

“Facility” is defined in Paragraph (b) of the Recitals to this Agreement and further described in Schedule A.

“Hydro Costs” means hydroelectricity costs due to operation of the Facility.

“Indemnified Parties” is defined in Paragraph 3.3(a) of this Agreement.

“Initial Term” is defined in Section 4.1 of this Agreement.

“Insurance” is defined in Paragraph 2.9(a) and further described in Schedule E.

“Intellectual Property Rights” means any copyright, trademark, patent, registered design, design right, topography right, service mark, application to register any of the aforementioned rights, trade secret, rights in unpatented know-how, right of confidence and any other intellectual or industrial property rights of any nature whatsoever in any part of the world.

“Outpost 5” means a remote monitoring and control system designed and constructed by OCWA and its consultants for the purpose of monitoring and controlling processes at water and wastewater treatment facilities and their related parts.

“Parties” is defined in Paragraph (d) of the Recitals to the Agreement.

“Parties System” is defined in Section 8.14 of this Agreement.

“PDC” or **“Process Data Collection”** means technology that allows process data to be entered into a format that can be viewed, manipulated and retrieved in the form of customized reports.

“Pre-existing Condition” is defined in Section 2.8 of this Agreement.

“Renewal Term” is defined in Section 4.1 of this Agreement.

“Services” is defined in Section 2.1 and further described in Schedule C to this Agreement.

“Technology” is defined in Section 8.1 of this Agreement.

“Termination for Cause” is defined in Paragraph 6.2(b) of this Agreement.

“Uncontrollable Circumstance” is defined in Paragraph 2.2(c) of this Agreement.

“Unexpected Expenses” is defined in Paragraph 4.7(a) of this Agreement.

“WMMS” or **“Work Management Maintenance System”** means a computer program used to determine a program of preventive maintenance activities for equipment in a facility based on a risk analysis that considers factors such as equipment life expectancy, present value and replacement cost.

“Year” means the 365 day period from January 1 to December 31 of the calendar year.

SCHEDULE C - The Services

1. Operating Duties

Subject to the provisions of this Agreement, the Services are those services set out below:

A. Water Treatment Plant and Water Tower

- inspect process control equipment to ensure proper operation of chlorinators, flash mixing, coagulation, flocculation systems, clarifier, pumps, filters, chemical feeders;
- check low lift pumping station to ensure that everything is in order (also taking routine readings);
- operate pump controls and valve controls for pumping of all process streams;
- hose down weirs, walls and channels in clarifier;
- receiving and handling of chemicals and mixing polyelectrolyte and water in a liquid feed tank;
- check filters and backwashing filters as required on a routine basis;
- inspect water tower and ground water reservoir every three to five years through visual inspection, draining, checking controls and valves, or by monitoring pressure and water levels; and
- on a routine basis, completing the operating forms for statistics for computer input and output forms and correcting the results of the output forms to ensure a proper monitoring of plant flows and process for water treatment;
- collecting samples for routine analysis and ensuring that they are shipped to the proper labs (analysis to ensure a representative analysis); and
- ensuring that the operations comply with and fulfill the requirements of the Certificate of Approval and other legal documents.

2. Routine Maintenance

OCWA will provide routine maintenance of the Facility in accordance with industry standards and equipment manufacturer's instructions. Specifically, OCWA will:

- carry out a routine lubrication program including greasing and oiling as specified in the lubrication schedule;
- perform routine maintenance duties to equipment by following the preventive maintenance procedures; by checking machinery and electrical equipment when required;
- maintain an inventory on all equipment and tools; and
- ensure the security of the project by locking doors and gates.

3. Capital Improvements

OCWA, acting as a reasonable operator, will record information on the frequency of equipment breakdown and repair costs to determine replacement needs. Parts of the

Facility requiring upgrading or improvement will be identified and brought to the attention of the Client in accordance with Sections 4.2 or 4.7 of this Agreement.

4. Optimization and Compliance of Operation

OCWA will routinely analyze, investigate and, where appropriate, implement measures to improve the effectiveness and efficiency of the Facility.

OCWA, acting reasonably, is responsible for ensuring an efficient operation of the process and keeping records on a regular basis by:

A. Water Treatment and Water Tower

- recording and analyzing water flow, chemicals used, chlorine residuals, turbidity;
- checking chemical feed pumps, and performing routine calculations and evaluations and determining operational adjustment requirements;
- calculating, recording and analyzing daily and monthly water flows, pump running hours, the amount of chlorine, fluoride, and alum used;
- routinely conducting the following water tests: chlorine residual, water temperature, colour, pH, turbidity; recording the results and making operational adjustments such as increased chemical dosages;
- completing the daily operating forms for statistics for computer input and output forms and correcting the results of the output forms to ensure a proper monitoring of plant flows and process;
- collecting samples for routine analysis for bacti and chemicals and ensuring that they are shipped to the proper labs for analysis;
- collecting water samples from the distribution system and recording chlorine residuals as currently required by Ontario Regulation 170/03;
- ensuring that the daily operations comply with and fulfill the requirements of the Certificate of Approval and other legal documents; and
- working with the Client to encourage a water conservation program such as water meters, water efficient showerheads and toilets, wise use of water and promotions.

5. Regulatory Matters

- OCWA will handle routine regulatory requirements and contacts with regulatory authorities in respect of operating issues concerning the Facility. OCWA will review any inspection reports prepared by regulatory authorities that are provided to OCWA.
- Subject to any approvals of the Municipality required by Section 4.2 of this Agreement, OCWA will either correct deficiencies identified in such inspection reports or negotiate changes to the reports with the regulatory authorities.

6. Staffing

- OCWA will staff the Facility with certified operators and other trained staff as required by regulation under the *Ontario Water Resources Act*.
- All OCWA staff at the Facility will be trained for the normal process operation and maintenance of the Facility and will also received training on how to deal with emergency situations should they arise. Staff will continue to receive training on an ongoing basis.
- OCWA staff will be available to provide 24 hour coverage at the Facility in the event of illness or emergencies.
- Normal hours of operation for the OCWA water duty operator including alarm monitoring are Monday to Sunday, 24 hours per day;
- Normal hours of operation for OCWA water maintenance and compliance staff are Monday to Friday excluding statutory holidays, between the hours of 0800 hrs and 1630 hrs. OCWA water maintenance and compliance staff will respond to callins and emergencies. All labour costs related to emergency situations during this time period are included in the Annual Price;
- Outside of the normal hours of operation and on weekends and statutory holidays, callins and emergency-related work due to, but not limited to, Facility alarms/emergencies, damage due to other contractors such as various utility companies, construction firms, telecommunications services, natural gas torpedoes and weather related conditions such as, hydro outages, ice storms, etc. are not included in the Annual Price but will be provided by OCWA based on a four hour minimum callin charge at time and a half.
- Callins and emergency responses will be invoiced out separately.

7. Emergency Situations and Safety

- OCWA will ensure that the Facility has a contingency plan in place to deal with non-routine operational situations and emergency situations such as spills, by-passes, overflows, hydro interruptions and equipment failure.

8. Snow Removal

Snow accumulation will be managed, as required, by OCWA.

SCHEDULE D - Excluded Services

Services that will not be provided by OCWA, unless at an additional cost following negotiation and approval by the Client, include but are not limited to the following ("Excluded Services"):

- thawing of water services;
- after hours service callins related to, but not limited to, unexpected emergencies due to damage caused by other contractors such as various utility companies, construction firms, telecommunications services, natural gas torpedoes and weather related conditions such as, hydrooutages, ice storms, etc. are not included in the Annual Price;
- installation and/or inspection of new water services;
- cost for non-routine sampling and lab analysis;
- payment of hydro costs;
- grass cutting;
- inspecting/maintaining curbstops;
- providing locates for subsurface infrastructure components;
- upgrading Operations Manuals;
- reviews of reports by third parties related to the Facility upgrades; and
- responding to regulatory orders issued solely to the Client.

SCHEDULE E - Insurance

A summary of the insurance coverage that OCWA will arrange for in respect of the Facility is described below:

Property Insurance

Perils: "All Risks" including earthquake and flood. Subject to policy exclusions.

Limits: Replacement Value (Subject to Annual Reports)
 - Extra expenses
 - Expediting expenses

Deductibles: \$50,000 for the year 2004, subject to change on annual basis.

Property Insured: All reported properties including buildings and equipment situated within 1,000 feet of the premises. Includes pumping stations, excludes underground sewer and water system.

Where the Client's property is repaired or replaced the Client will pay the deductible. Where OCWA's property is repaired or replaced, OCWA will pay the deductible. In cases where both the Client's and OCWA's property is repaired or replaced, the deductible will be paid by both the Client and OCWA pro rata in accordance with the total loss.

Boiler and Machinery Insurance

Coverage: Insures against loss or damage arising from an accident with Pressure Objects, Production Machines, and Machinery and Service Supply in use or connected ready for use.

Objects: Fired and Unfired Pressure Vessels (Excess of 15PSI) Piping, Production Machinery and Service Supply.

Accident: Sudden and accidental breakdown of an object which causes it physical damage, requiring its repair or replacement. Subject to policy terms, conditions and exclusions.

Limit: \$60,000,000 per loss.

Deductibles: \$2,500 for the year 2004; subject to change on annual basis.

Where the Client's property is repaired or replaced the Client will pay the deductible. Where OCWA's property is repaired or replaced, OCWA will pay the deductible. In cases where both the Client's and OCWA's property is repaired or replaced, the deductible will be paid by both the Client and OCWA pro rata in accordance with the total loss.

Commercial General Liability Insurance

Coverage: Third party liability including legal fees, for property damage and/or bodily injury as caused by negligence arising out of all Premises, Property, Products and operations of the insured.

Limit: \$20,000,000 per occurrence.

Deductible: \$50,000 for the year 2004; subject to change on annual basis.

Where OCWA is negligent the deductible will be paid by OCWA. Where the Client is negligent, the deductible will be paid by the Client. In cases where both OCWA and the Client are negligent the deductible will be divided equally.

Pollution Liability Insurance

Coverage: Pollution legal liability covering third party property damage and bodily injury and clean up costs for pollution conditions emanating from the Facilities, with a coverage limit of \$10,000,000.00 per claim or occurrence and aggregate. Coverage provides for on-site clean up of the Facilities.

Limit: \$10,000,000 per loss on a Claims Made basis with automatic, extended reporting periods. \$10,000,000 aggregate.

Deductible: \$100,000 for the year 2004; subject to change on annual basis

Where OCWA is negligent the deductible will be paid by OCWA. Where the Client is negligent, the deductible will be paid by the Client. In cases where both OCWA and the Client are negligent the deductible will be divided equally.

Where neither the Client nor OCWA is negligent the deductible will be paid as follows:

Where the Client's property is repaired or replaced the Client will pay the deductible. Where OCWA's property is repaired or replaced, OCWA will pay the deductible. In cases where the Client's and OCWA's and/or a third party's property

is repaired or replaced, the deductible will be paid by both the Client and OCWA pro rata in accordance with the total loss.

Automobile Insurance

Coverage: Automobile Liability for OCWA owned or leased vehicles.

Limit: \$2,000,000
Accident Benefits per Ontario Statutes.

Coverage: Collision

Coverage: Comprehensive

Deductible: The deductible will be paid by OCWA.

SCHEDULE F - Flow

Part 1: Changes in Flows

- (a) A significant change in flow means a flow that is at least 6% greater or 6% less than the Base Year Flow.

“**Base Year Flow**” means the annual average flow volume of the three years immediately preceding the Initial Term (years 2001, 2002 and 2003) or any Renewal Term, as may be applicable.

The Base Year Flow for the water treatment facility for the Initial Term is 3,410,815 m³ per year.

Part 2: Calculation of Flow Debit/Credit

A debit/credit amount equal to a cost per m³ of water which is greater than/less than the applicable Base Year Flow for water treatment will be levied based on a significant change in flow (as per Part 1 of Schedule F) and in accordance with the following formula:

$$\frac{\text{Annual Adjusted Fee } (\$130,449.00)}{\text{Base Year Flow } (3,410,815)} \times \text{increase or decrease in flow } (m^3)$$

SCHEDULE G - List of Pre-Existing Conditions

List of Pre-existing Conditions

As per Paragraph 3.1(e) of this Agreement, the following Pre-existing Conditions have been identified: None identified.