SUMMARY RESEARCH AND REVIEW OF WASTE TO ENERGY FACILITY GOVERNANCE FRAMEWORK OPTIONS

Prepared for the Southern Alberta Energy from Waste Association

Prepared by Brownlee LLP
John C. McDonnell and Marlena S. Paul
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There are a myriad of solutions used and approaches taken by municipalities and other parties in relation to the ownership and governance of waste management facilities in Alberta and throughout North America. Each alternative carries its own positive and negative characteristics and as such, each option may not suit all situations or issues.

The following governance options are available to SAEWA:

1. Co-ownership/Authority
2. Regional Services Commission
3. Not-for-Profit Company (Alberta legislation)
4. Municipal Controlled Corporation
5. Society
6. Cooperative
7. Non-Profit Corporation (Federal legislation)

Case Studies

In addition to exploring the governance options available to SAEWA given Alberta's legislative landscape, we also conducted further research and analysis regarding the governance models utilized by waste to energy facilities throughout North America.

Based on our research of these facilities, we were able to confirm that the dimensions of a regional system will always vary by system. The systems examined in this Report had significant variation in their decision making authority, revenue and financing tools available, regulatory responsibilities, and waste collection/service responsibilities. Although common components existed, how the elements of each regional system were applied and how they were created defined each of the systems. The information gathered from each system informed our recommendations regarding the governance model to be utilized for SAEWA's waste to energy facility.

Summary of Recommendations

Based on our research of other waste to energy facilities as well as the answers received from those who participated in the questionnaire, it is our recommendation that the most appropriate governance

model for the waste to energy facility is a corporation created pursuant to the *Business Corporations Act*.

Utilizing a corporation governance framework will work best for SAEWA and its members because of the following factors:

1. **Corporate Entity** – A corporation under the *Business Corporations Act* will be created as a municipal waste corporation;

2. **Shareholder Percentages** – There will be a dual share structure:

    a. **Voting Rights** – All voting rights at the shareholder level will be equal, with no Participant having greater rights than others. Each will have one Class A, Common Voting Share;

    b. **Profit Entitlement/Capital Contribution Obligation** – Each Participant will be issued such number of Class D Common Non-Voting Shares which is equal to that percentage of the volume of Waste Feedstock that is provided.

3. **Board of Directors** – A board structure of between 7 and 15 directors can be chosen with no mandatory obligation that all directors be elected officials. The voting of these directors would like occur at a zone level.

4. **Council Control** – Can be accomplished in three ways:

    a. Election of Directors – The directors must be cognizant of each Participant's input on certain key issues;

    b. Participant Voting - Certain key votes such as approval of business plans, capital budgets, appointment of auditors, acceptance of new members will be voted on by each Participant on a one vote, one Participant basis;

    c. Passage of Policies – the Participants shall pass a binding policy on certain matters that must be followed by the MWC.

5. **Allocation of Risk** – The matter as to who bears what portion of the risk, is to be determined still.

Next Steps

This Report addresses just one piece of the governance analysis tasks initially identified by SAEWA and Brownlee. The remaining tasks in Phase 5 include:

i. **Presentation to Review and Recommendations to Councils**

ii. Documentation & Application Phase –This will consist of:

a. Re-creation of SAEWA's governance or Creation of New Entity;

b. Application for Ministerial Consent ;

c. Establishment of Necessary Policies; and

d. Creation of membership agreements.

1.0 INTRODUCTION

Brownlee LLP was retained by the Southern Alberta Energy from Waste Association (SAEWA) to research, review and develop a governance-related policy, structures and processes and to form a collaborative governance framework for SAEWA as outlined in the Association's Request for Proposals (RFP).

Established in 2009, SAEWA is seeking to foster sustainable waste management practices that contribute to Alberta's overall resource efficiency and environmental safeguards. SAEWA is a coalition of 72 municipal entities and waste management jurisdictions in southern Alberta (the "**Municipal Members**").

1.1 Project Scope

The project scope is divided into six phases with phase 5 of the project being the "Reporting Phase". Phase 5 includes the presentation of this written summary and review of the available governance models. Prior to the preparation of this written summary, the project scope was divided into the following 4 phases:

1. Information Gathering, Introduction & Organizational
2. Detailed Assessment, Review and Information Gathering
3. Interim Deliverables
4. Stakeholders Presentation & Meetings

Phase 5: Reporting Phase

Phase 5 includes the research of other governance models and the development of a report that summarizes regional governance systems used to manage waste to energy facilities in North America. The purpose of this report is to determine which governance model will best meet the needs of SAEWA. The following tasks were identified for this phase:

a. **Governance Model Review Summary** – preparation of a written summary of the review of the governance models (including, cost/benefit analysis, cumulative feedback comments).

This project will then progress to the next tasks outlined in Phase 5:

b. **Presentation to Review and Recommendations to Councils** - meeting between Brownlee LLP and Municipal Members of SAEWA to present the key elements of the written report, address questions and concerns, provide recommendations, and where appropriate facilitate a narrowing of choices amongst the Municipal Members for future steps and considerations; and

c. **Delivery of Final Witten Report** – finally, based upon the final inputs from the above tasks, the final report is to be delivered.

1.2 General Approach

The general approach used to complete this report was to review the available governance framework options available to SAEWA and to outline the advantages and disadvantages of each option.

We then conducted further research and analysis regarding other governance models utilized by waste to energy facilities throughout North America to determine if there were any other available models which should be considered. Where possible, information was solicited from representatives of other facilities involved in energy to waste activities to obtain an understanding of why a specific governance model was chosen for each system. We also requested general comments and feedback regarding the success of each model chosen.

Representatives from the following waste to energy facilities responded to our requests for information:

- Metro Vancouver
- Durham & York, Ontario Energy-from-Waste Facility
- Spokane Regional Solid Waste System.

The following facilities were also researched, however representatives did not respond to our requests for information:

a. Connecticut Resources Recovery Authority

b. Palm Beach County Solid Waste Authority

c. Peel Region Energy Recovery Centre

For all facilities reviewed, information was obtained through research on each facility's website and other documentation regarding each facility. Success with this methodology was limited to the accuracy of websites, the data and detail of information available on the websites, as well as the knowledge and responsiveness of the people contacted.

Research also considered previously drafted policy documents and studies made available by other waste management systems when determining their own governance models.

The facilities reviewed for this study represented a wide variety of systems in terms of population served, governance structure, solid waste services provided, types of facilities used, and facility ownership and operation. Our research focused on:

i. When and why the facility was established;

ii. Why a particular governance model was chosen by the facility;

iii. Organizational structure and governance coordination mechanisms; and

iv. System infrastructure (facility types and public vs. private ownership).

2 BACKGROUND

SAEWA is an organization comprised of 72 municipal entities and waste management jurisdictions in Southern Alberta for the implementation of energy recovery of non-recyclable waste materials to reduce long-term reliance on landfills. SAEWA's website is www.saewa.ca.

At the time of commencement of this project, the Municipal Members of SAEWA were the Village of Glenwood, Chief Mountain Regional Waste Authority (comprised of 12 members); County of Lethbridge, Foothills Regional Services Commission (comprised of 6 members); Bow Valley Waste Management Commission (comprised of 3 members); Newell Regional Waste Solid Management Authority Ltd. (comprised of 6 members); North Forty Mile Regional Waste Management Commission (comprised of 2 members); South Forty Waste Services Commission (comprised of 2 members); Taber and District Regional Waste Management Authority (comprised of 7 members); Town of Coaldale, Vulcan District Waste Commission (comprised of 8 members); Wheatland County; Will Creek Regional Waste Management Services Commission (which is comprised of 5 members); Special Areas Board; Town of Coalhurst; Crowsnest/Pincher Creek Landfill Association (comprised of 4 members); and the Municipal District of Ranchland.

SAEWA was created to assist Southern Alberta communities in finding a regional and environmentally responsible way to reduce reliance on landfills and address the disposal of:

- Residential non-recyclable and non-compostable solid waste
- Non-recyclable construction and demolition waste
- Institutional Commercial and Industrial waste
    - Including oilfield wastes and contaminated soils
- Specified risk materials such as:
    - Rendered waste, packing plant waste and dead livestock
- Non-recyclable or compostable agricultural waste

Currently, SAEWA is in the planning stages to develop an energy from waste facility that will handle the conversion of municipal and other sources of solid waste into various forms of energy. The long-term

benefit will be the development of a regionally located waste to energy facility that will service all 72 Municipal Members of SAEWA. The goal of the SAEWA's waste to energy solution will be to address the following:

- Convert waste into energy
- Develop a waste to energy facility that will serve the participating Municipal Members
- By-products of combustion that will create spin off industries; utilizing multiple forms of surplus energy
- Potential revenues to reduce Municipal Member's user fees
- Reduce the environmental footprint of the Municipal Members' communities

3 GOVERNANCE FRAMEWORK OPTIONS

3.1 Options

There are a myriad of solutions used and approaches taken by municipalities and other parties in relation to the ownership and governance of waste management facilities in Alberta and throughout North America. Each alternative carries its own positive and negative characteristics and as such, each option may not suit all situations or issues. Explaining each option is necessary to ensure that the appropriate context is created for making an informed decision respecting the structure, function and operation of SAEWA's waste to energy facility.

The following governance options are available to SAEWA:

1. Co-ownership/Authority
2. Regional Services Commission
3. Not-for-Profit Company (Alberta legislation)
4. Municipal Controlled Corporation
5. Society
6. Cooperative
7. Non-Profit Corporation (Federal legislation)

1. Co-Ownership/Authority

This is a common method that is used whereby two or more municipalities come together to jointly own or operate a certain facility. This is frequently used when municipalities come together and jointly provide services pursuant to an "Authority". Under this approach, the Municipal Members would choose to own, develop, and operate the facility together pursuant to a form of co-ownership agreement.

It is important to understand that an Authority is a description of a relationship between the Municipal Members, but at no time does it create an actual separate legal entity. It exists solely as a function of the agreement. This agreement is sole encompassing and all aspects will arise from that. It is a joint agreement whereby the Municipal Members join forces to plan, finance and deliver a service within a certain, pre-defined boundary.

This is one option that is familiar to some of the Municipal Members of SAEWA. For example, neither the Chief Mountain Regional Waste Authority nor the Taber and District Regional Waste Management Authority are separate legal entities that exist by anything other than an agreement between their constituent members to provide services through an unincorporated partnership.

(a) Key Features of an Authority

Key features of co-ownership include:

a. the parties must understand that no separate legal entity is established, and as a result the ownership, obligations, and potential liabilities are all shared;

b. obligations and liabilities may be shared on a joint and several basis (meaning that any one party can be held 100% responsible, and then have to seek contributions from the other parties) notwithstanding that the agreement may ultimately divide these responsibilities proportionately;

c. a well-drafted agreement may attempt to deal with obligations/liability, who will hold the joint property on behalf of the other parties, etc.;

d. when the underlying agreement is comprehensive, the relationship created and governed by the agreement can function very well, achieve most or all of the parties' goals, and provide for some level of liability protection;

e. however, such agreements are rarely as comprehensive as they need to be, and therefore this ownership/operation/governance model will normally fall short of the executions of the parties;

f. in the case of the separate legal entities discussed below, many of these topics are partly or wholly addressed by the underlying legislation allowing for the agreement between the Municipal Members to be simplified to some extent;

g. as authorities have no underlying legislation, all of the relationships between the Municipal Members must be documented in the agreement, often making the document a lengthy and complicated undertaking to negotiate, draft and enforce.

(b) Advantages and Disadvantages of Authorities

(i) Advantages of Authorities

There are numerous advantages to Authorities. They include:

- *No External Consents* – The Municipal Members do not need to go through the trouble of obtaining consents from Municipal Affairs or the Corporate Registrar. They simply create the Authority relationship by signing an agreement.

- *Ownership Interest in Assets* – As the Authority is not a separate legal entity, it does not have legal capacity to own the capital assets that are required to provide the service. Therefore, the Municipal Members of the Authority itself must own the assets, either jointly, or by one Municipal Member in trust for the others. The advantage of doing this is that, from time to time, we have seen instances whereby access to certain assets is denied by the corporate entity. If the Authority does not own it, this argument is diminished.

- *Ease of Creation* – Due to the fact that no legal entity is created, additional other steps (such as creation of bylaws, corporate constitution, obtaining external approvals) do not need to be taken with an Authority.

- *Commissions Can Be Members* – There is no legislative restriction preventing a Commission from being a Municipal Member of an Authority.

(ii) Disadvantages of Authorities

Despite the advantages of proceeding with an Authority, there are very significant disadvantages to an Authority. They include:

- *Exposure to Liability* – The Authority relationship does not create a separate legal entity. As is as discussed below, when separate legal entities are created, their governing legislation insulates their Municipal Members from the liability of the entity. For example, if a Corporation is chosen, the shareholders of the Corporation are not liable for the debts, penalties, fines, operational expenses, etc. of the Corporation. When there is no governing entity for the Authority, all Municipal Members can be subject to 100% of the liabilities of the Authority.

- *Complexity of Agreement* –The absence of governing legislation means that there is a vacuum regarding how the Municipal Members are to deal with each other and to deal with the Authority. Therefore, the Agreement must be all encompassing and must consider all

possibilities of the relationship that are to be considered. If anything is missing, there is little recourse to the Municipal Members to guide them through how to resolve differences.

- *"Institutional Memory" Lapses* – As stated as a possible advantage, the Authority cannot own assets in its own name. Assets are to be owned by the Municipal Members collectively or alternatively, by one Municipal Member in trust for the others. It is the latter scenario where we see problems. It is difficult from time to time for multiple parties to own a particular asset. It can be cumbersome to frequently require multiple signatures and approvals for dealing with assets in the normal course of business (for example, it does not make sense to have 9 Municipal Members of an Authority be obligated to sign off on all documents). Accordingly, Authority agreements entrust a managing partner to own the asset in trust for the Municipal Members of the Authority. When this is done, the title to that asset is only in the name of one particular party.

  It is important that the people involved with the Authority pass this knowledge onto new people involved in the organization. Unfortunately, we have seen from time to time that this knowledge is not passed onto new people and after the passage of time and the managing party of the Authority simply sees that they own title to this asset. In the event of a dispute with the others in the Authority, the managing party has then tried to assert that their ownership in name entitles them to greater rights than they should be entitled to. This problem is eliminated when a separate legal entity owns the asset.

- *Disproportionate Exposure to Liability* – As discussed above, Authorities typically operate to have a lead party own and operate the assets on behalf of the Municipal Members. When this happens, if there is an event of liability, the lead party will be fully exposed to the full brunt of the liability. There should be a proportionate sharing of liability amongst all Municipal Members with cross-indemnities to protect against this. Nonetheless, the creditor/claimant/plaintiff will likely fully pursue the lead party.

- *No Alberta Capital Finance Authority borrowing* – The Alberta Capital Finance Authority ("**ACFA**") provides financing for capital projects to Alberta public sector entities at rates that they are not typically able to obtain in the private capital market. However, this borrowing is limited only to "local authorities" which an Authority does not qualify for.[1]

[1] Section 21(a) of the *Alberta Capital Finance Authority Act* limits lending to "local authorities".

A "local authority" means a city, an educational authority, a health authority, a municipal authority, a regional authority or a town. A city and a town are clearly covered here.

A "municipal authority" is defined to be: (i) an improvement district; (ii) a Metis settlement; (iii) a municipal district; (iv) a special area; and (v) a specialized municipality.

A "regional authority" is defined to be: (i) the board of trustees of a drainage district under the *Drainage Districts Act*; (ii) an irrigation district under the *Irrigation Districts Act*; (iii) a regional airports authority created under the *Regional Airports Authority Act*; (iv) a regional services commission established under the *Municipal Government Act*; and (v) a growth management board established under the *Municipal Government Act*;

- *Borrowing Issues* – Because of the fact that an Authority does not exist as a separate legal entity, it does not have legal capacity to actually borrow money. Therefore, if a new capital project is needed, it will have to be funded by contributions from its membership. If a Municipal Member has to borrow money, this borrowing by the Municipal Member would count against the municipality's debt limit.

(c) Expansion on Operations Model Matrix

The Matrix attached to this Report as Table 2, Appendix A is expanded upon and discussed in further detail below:

(i) ***Governing Legislation of Co-Ownership/Authority***

As the Authority is not an actual legal entity, there is no governing legislation regarding its corporate status. It follows that there is nothing governing the relationship between the Municipal Members of the Authority. This relationship is purely governed by its Agreement.

(ii) ***Can an Existing Commission Be a Member of an Authority?***

Yes. As an Authority is not a separate legal entity and only exists by the power of the Agreement amongst its Municipal Members, a Commission is not restricted from being a member of an Authority.

(iii) ***Distribution of Profits/Excess Revenue***

As there is no legislation governing the Authority, there are no legislative restrictions about the distribution of profits or excess revenues to its Municipal Members.

(iv) ***Ease to Change Corporate Governance Documents***

Any change to the Authority's corporate governance document will require the unanimous consent of the Municipal Members of the Authority. There are no external approvals necessary.

(v) ***Issuance of Shares***

There are no shares that will be issued to the Municipal Members of the Authority, because there is no actual legal entity created.

(vi) ***Financial Contributions to Authority***

There is no legislation that mandates that financial contributions are to be made to the Authority. There is no requirement that dues are to be paid to the Authority.

(vii) ***Capital Contributions to Authority***

There is no legislation that mandates that financial contributions are to be made to the Authority. It is possible that the governing agreement creating the relationship of the Authority may require contributions; however it is not mandatory.

(viii) ***How to Impose Other Binding Obligations***

The Authority is a creature of the Agreement amongst its Municipal Members. It is possible to create an Agreement that will address other obligations and rights that are important to the parties, such as:

- Ownership of Assets – a comprehensive description of the proportionate ownership interest in the jointly owned assets

- Assets Upon Dissolution – a clear process for valuing and disbursing the assets upon the termination of the agreement or other dissolution of the relationship

- Decision Making - clear decision making process is established, together with establishment of a delegated committee to make key decisions. This would include a process for establishing the committee and the limits of its powers

- Insurance - provisions for the insurance coverage to be maintained for the benefit of all of the parties is very important for risk management;

- Indemnity – the ultimate equalizer to the contribution requirements contained in the agreement is the use of an indemnity agreement between the parties to ensure that all benefits received are consistent with all burdens incurred;

- Capital Budgets - an allocation and agreement upon each parties' commitment to capital costs that will be incurred by the joint endeavour, including budgeting for capital repair and replacements to the assets that shall form the joint property, and a process for establishing such budgets and revisiting them annually;

- Operating Budget - an allocation and agreement upon each party's commitment to the operating costs, and a process for establishing such a budget annually;

- Cash Calls - commitment on the part of the parties to fund any unfunded liabilities that may be incurred (e.g. unanticipated capital repairs, etc.);

- Enforcement and Collection – a comprehensive set of provisions to deal with ensuring that a failure to pay or otherwise perform obligations under the agreement can be remedied or otherwise enforced (e.g. right to perform the defaulting party's obligations; the right to recover costs of performing the other party's obligations; the right to set off debts against other amounts due, or ultimately set off debts against the defaulting party's ownership interest).

(ix) ***Disproportionate Members/Shareholder Interest***

It is a common desire of the Municipal Members in an inter-municipal/regional partnership to have a disproportionate interest. For instance, if there is one Municipal Member that proportionately creates more waste than others due to industry demands or a greater population base, it may not be equitable for that Municipal Member to be treated the same as the other Municipal Members. It may be more equitable for that Municipal Member to have a proportionately greater vote on things that affect that Municipal Member more, such as capital contributions, rates, expansions to the system, etc.

It can be difficult to accommodate this for some types of entities more than others. Some types of entities expressly state that all Municipal Members have equal voting rights.

As the Authority is not subject to any governing legislation, there is no such restriction.

(x) ***Municipal Affairs Consent Necessary to Create?***

As no separate legal entity is created, Municipal Affairs consent is not necessary to create the Authority.

(xi) ***Corporate Registrar Consent Necessary to Create?***

As no separate legal entity is created, the Corporate Registrar's consent is not necessary to create the Authority.

(xii) ***Timeframes for Consents***

Not applicable.

(xiii) ***Any Restrictions on Directors?***

There are no "directors" of an authority. The Oxford Dictionary defines a "director" to be a "A person who is in charge of an activity, department, or organization" or "A member of the board of people that manages or oversees the affairs of a business." [2]

Again, as a non-legal entity, there is no organization of the Authority for someone to be a director of.

(xiv) ***Ongoing Reporting to Municipal Affairs?***

There is no statutory requirement that the affairs of the Authority must be reported to Municipal Affairs, as it is not governed by any legislation in its ownname.

(xv) ***Are Audited Financial Statements Mandatory?***

There is no legislation governing the Authority and therefore, there is no legislative requirement that the financial statements be audited.

[2] http://www.oxforddictionaries.com/definition/english/director

(xvi) ***Can Assets be Paid to Members Upon Dissolution of Authority?***

Yes. There is no legislation prohibiting the assets from being distributed to the Municipal Members upon dissolution of the Authority.

(xvii) ***Insulation from Liability***

Perhaps the greatest downfall of the Authority is the fact that the Municipal Members are not insulated from liability of the Authority itself. It is a fundamental aspect of corporate law that liabilities of a corporate entity do not extend to the Municipal Members of that corporate entity.

For instance, see Section 46(1) of the *Business Corporations Act* which states that:

> "The shareholders of a corporation are not, as shareholders, liable for any liability, act or default of the corporation…"

As another example, Section 21 of the *Societies Act* states that:

> "No member of a society is, in the member's individual capacity, liable for a debt or liability of the society."

In the absence of governing legislation, the debts, liabilities and obligations of the Authority extend to the Municipal Members of the Authority.

2. Regional Services Commissions

Regional Services Commissions ("**Commissions**") are separate statutory corporations.[3] A Commission is different than an Authority, as it exists separately from its Municipal Members. Commissions are created pursuant to the *Municipal Government Act* (the "**MGA**") to provide certain services for municipalities.

It is a frequent assumption by many people that Commissions exist solely for the provision of utility services like water services, wastewater services or waste management services. It is true that the majority of Commissions in the Province of Alberta do provide these types of services. However, they are not limited to just providing utilities. There are numerous examples of Commissions that provide different types of services, such as:

- Emergency services (Beaver Emergency Services Commission; Foothills Regional Emergency Services Commission)
- Transportation Services (Bow Valley Regional Transit Services Commission)
- Assessment services (Capital Region Assessment Services Commission)
- Municipal planning (Oldman River Regional Services Commission)

[3] Section 602.03 of the *Municipal Government Act*.

- Airport services (Slave Lake Airport Services Commission)

Commissions can be used for many other services. Their ability to provide these alternate services is dependent upon the Municipal Members who wish to create the Commission are able to convince the Department of Municipal Afairs that this is possible.

(a) Key Features of Commission

Commissions can only be created by making an application to the Minister of Municipal Affairs. The process for creating a Commission has been substantially changed by the Department of Municipal Affairs over the past few years. They now require a significant amount of financial due diligence, the presentation of a sound business plan, a discussion of how Municipal Members may depart and the consequences of the same. The unanimous consent of all Municipal Members is also required.

The Commission is ultimately created by a Ministerial Order and a supporting Regulation, regulating the affairs of the Commission. The *MGA* also provides the Minister's office with substantial influence over the ongoing affairs of the Commission should the Minister choose to exercise this discretion. For instance, the Minister has the authority to:

- Appoint the first Board of Directors (Section 602.04(2)(a) of the MGA);
- Designate one of the Directors as the Chair (Section 602.04(2)(b) of the MGA);
- Appoint a replacement director if the municipality that appoints a director does not do so in time (Section 602.04(5) of MGA);
- Appoint directors to represent the Province of Alberta (Section 602.05 of MGA);
- Approve of the Commission's bylaws regulating how rates are to be set (Section 602.07(2) of MGA);
- Approve of the Commission's bylaws regulating how rates are to be set (Section 602.07(2) of MGA);
- Approve of the Commission's bylaws regulating how directors are to be appointed and how the chair of Commission is appointed (Section 602.07(2) of MGA);
- Approve the provision of services by the Commission outside the boundaries of its Municipal Members (Section 602.11 of the MGA);
- Authorize the rolling over of capital deficiencies and operating deficiencies over a multiple year time period (Section 602.21 of the MGA);
- Impose a budget upon the Commission, if the Minister feels that a deficiency in a budget is not properly addressed (Section 602.21 of the MGA);
- Authorize any borrowing of the Commission in excess of its debt limit (Section 602.28 of the MGA);
- Set Commission's debt limit (Section 602.29 of the MGA);
- Set the appropriate accounting standards for the Commission in its financial statements (Section 602.32 of the MGA);
- Review the Commission's annual, audited financial statements (Section 602.34 of the MGA);
- Inspect the management, administration and operation of the Commission, whenever it feels that it is necessary and appoint an inspector (Section 602.35 of the MGA);

- Make mandatory orders on the Commission that it must follow (Section 602.36 of the MGA);
- Dismiss a board or any director that fails to comply with the Minister's orders (Section 602.36 of the MGA);
- Appoint an administrator of the Commission (Section 602.37 of the MGA);
- Demand that the Commission provide it with copies of all documents that the Minister wishes to review and inspect (Section 602.381 of the MGA);
- Disestablish a Commission (Section 602.4 of the MGA); and
- Approve who is entitled to join a Commission and who is entitled to depart from the Commission.

The Minister does not have the statutory right to exercise any of these powers stated above with any other corporate entity.

Other key features of the Commission include:

i. corporate bylaws are required to govern operation and decision making. These bylaws are subject to the Minister's approval. Generally bylaws deal with the corporate operation (e.g. constitution of the Board, calling of meetings, voting, etc.), but can also be drafted to deal with on-going management and operation;

ii. generally speaking, voting power is equivalent amongst Municipal Members (1 Municipal Member 1 vote on Board of Directors). Larger Municipal Members may have the right to appoint more directors. This may lead to an unwieldy board with a large number of directors, like SAEWA has;

iii. the departure of a Municipal Member from the Commission is not possible without the consent of the Minister, evidenced by a subsequent Ministerial Order amending the initial Ministerial Order that established the Commission referred to above;

iv. the MGA does not contemplate whether a Municipal Member that departs from a Commission has a right to take along with it any value or "equity" in the Commission and this will be subject to the discretion of the Minister;

v. a Board of Directors governs the Commission and the Minister of Municipal Affairs establishes the first Board of Directors;

vi. all directors that are directly appointed by a municipality to represent the municipality must be a councillor of that particular municipality;

vii. there is the potential for significant Ministerial involvement in the establishment and operation of a Commission.

(b) Advantages and Disadvantages of a Commission

There are numerous advantages and disadvantages of proceeding with a Commission. The advantages are:

- *Ownership Interest in Assets* – Because the Commission is a separate legal entity, it has the legal capacity to own assets in its own name. That is advantageous for the following reasons:
    - There is no dispute regarding who owns the particular asset. The Ministerial regulation will state that the assets are to be owned by the Commission.
    - When the assets are owned by the Commission, the Municipal Members of the Commission likely will not be sued by a plaintiff, as they are not the registered owner.
- *Expropriation* – Section 602.13 of the MGA permits Commissions to be able to expropriate, if necessary. The other entities do not have this right (although the host municipality could expropriate for the other entity and then either transfer the land to the other entity or lease it to the other entity).
- *Recognized Service Provision Model* – Commissions are common entities to provide waste management services, with over 20 Commissions providing waste services in Alberta.
- *ACFA Borrowing* – Commissions are able to borrow from the ACFA[4]. Therefore, it may enjoy preferential access to borrowing at favourable interest rates
- *Effect of Borrowing on Debt Limits* – Borrowing does not affect municipal debt levels (subject to Public Sector Accounting Board ("**PSAB**") guidelines)
- *Insulation from Liability* – Although there is no statutory provision that protects the Municipal Members of a Commission from liability like there is in other legislation,[5] it is a fundamental principle of corporate law over the centuries of common law jurisprudence that Municipal Members of a corporate entity are not liable for the liabilities of the corporation. It is likely that this same principle will extend to Commissions.

[4] Section 21(a) of the *Alberta Capital Finance Authority Act* limits lending to "local authorities".

A "local authority" means a city, an educational authority, a health authority, a municipal authority, a regional authority or a town. .

A "regional authority" is defined to include (iv) a regional services commission established under the MGA

[5] For example, see Section 46(1) of the *Business Corporations Act* which states that:

> "The shareholders of a corporation are not, as shareholders, liable for any liability, act or default of the corporation…"

As another example, Section 21 of the *Societies Act* states that:

> "No member of a society is, in the member's individual capacity, liable for a debt or liability of the society."

There are also numerous disadvantages to Commissions. Some of them are:

- *No Membership of Other Commissions* – As many of the Municipal Members are Commissions themselves, these Commissions cannot become a Municipal Member of another Commission, for the reasons previously explained.

- *Conflicts of Interest/Political Interference* – As previously stated, only elected officials can be directors of a Commission. There is always an opportunity for non-elected officials to be directors, but only if they do not directly represent a municipality. We are aware of very few Commissions that utilize the directors at large option.

    - Frequently, when the individual councillor sits at the Board table, he/she does so solely as a representative of the municipality. This is the case, despite the fact that he/she has a fiduciary duty to represent the interests of the Commission and act in a non-conflicted manner. The result is that the governance of the Commission can be contentious, from time to time.

- *Lack of Proportionality of Interests* – The "burden/benefit" principle cannot be perfectly implemented in a Commission. As voting is done by the Directors and does not recognize proportional voting, when the "burden/benefit" principle is considered, some Municipal Members are over-represented and others are under-represented. This may be sometimes managed by allowing more than one director per municipality. However, proportionate voting is better addressed through other models.

- *No Ability to Distribute Profits* – If the Commission becomes very profitable and there is a desire to distribute some of the surplus cash, there is no ability to pay this out to the Municipal Members without first obtaining Ministerial approval. There is no guarantee that the Minister would authorize this and the approval process is likely to be cumbersome.

- *Difficult to Create* – The Department of Municipal Affairs has created a large checklist of requirements in order to approve of the Commission. The following things must be discussed by the prospective Municipal Members of the Commission and then submitted to the Department of Municipal Affairs for their review, prior to the Minister authorizing the approval of the Commission:

    - Review of bylaws;
    - Terms and conditions whereby new Municipal Members may join and how this may impact the existing services;
    - Terms and conditions whereby existing Municipal Members may depart, what they are entitled to take with them when they leave, what liability they will assume and effect on the remaining Municipal Members;
    - What happens to Commission's assets if Commission is disestablished;
    - Proposed borrowing for Commission's initial start-up costs, infrastructure construction and first five years of operations;

- List of assets and liabilities associated with first five years of operations;
- Proposed five year capital budget
- Proposed five year operating budget
- Full cost recovery rate model, which includes: debt and servicing costs; grant funding; municipal contributions; capital replacement; other revenues; minimum commitments for contracts for providing services;
- Engineering studies;
- Infrastructure audits;
- Grant eligibility/grant approvals.

Although all of the above is good information to gather and may result in prudent planning, it may be daunting at first to gather this information in order to create it. There are times when it is easier to just create the entity and then deal with these matters after the fact, before operations commence.

- *Difficult to Bring in New Members* – Ministerial consent is needed, which involves an application process. The Minister will be looking to the guidance of how the Municipal Members originally intended new Municipal Members to join, but the Minister is not bound by this.

- *Difficult for Existing Members to Depart* – Ministerial consent is needed, which involves an application process. The Minister will be looking to the guidance of how the Municipal Members originally intended existing Municipal Members to be able to depart, but the Minister is not bound by this.

- *Transfer of Assets* – Most Regulations creating the Commission are standardized. It is a standardized clause in the Regulation that once the Commission obtains ownership of a particular asset, this asset shall not be sold without the prior approval of the Minister's office. Once the Commission obtains ownership of these assets, the Commission cannot transfer the particular asset without seeking the consent of and providing justification to the Department of Municipal Affairs for the transfer. This may be cumbersome if there is an expedient need to transfer the asset

(c) Expansion on Operations Model Matrix

The Matrix attached to this Report as Table 2, Appendix A is expanded upon and discussed in further detail below:

(i) ***Governing Legislation of Commissions***

The *Municipal Government Act* is the primary legislation that governs Commissions.

(ii) ***Can an Existing Commission Be a Member of another Commission?***

No. The definition of a "member" of a Commission in Section 602.01(e) of the MGA means a "municipal authority". The definition of a "municipal authority" in Section 602.01(f) of the MGA includes a

municipal authority (as defined in Section 1(1)(p)), a Metis settlement, an Indian reserve and an armed forces base. The definition of a municipal authority references the definition in Section 1(1)(p) of the MGA to be a Municipality, an Improvement District and a Special Area.

In summary, only the following can be a Municipal Member of a Commission:

- Municipality;
- Improvement District;
- Special Area;
- Metis Settlement;
- Indian Reserve;
- Armed forces base.

Therefore, a Commission cannot be a member of another Commission.

(iii) ***Distribution of Profits/Excess Revenue***

The Commission may not pay any excess revenues/profits to its Municipal Members without Ministerial consent.

Although there is no specific statutory provision in the MGA which restricts the payment of funds directly from a Commission to Municipal Members, each specific enacting Regulation which has created a Commission in the past has contained restrictions about operating for profits or for distributions to Municipal Members. In multiple discussions with the Department of Municipal Affairs in the past, it appears to be clear that the Minister takes the position that Commissions are not permitted to distribute cash to their Municipal Members without the consent of the Minister.

(iv) ***Ease to Change Corporate Governance Documents***

It depends on what is being changed.

The bylaw that sets how the fees are to be changed and how the Chair of the Commission is to be selected is a bylaw that requires Ministerial approval. As such, this Bylaw may not be changed without Ministerial approval.

The Regulation that creates the Commission cannot be amended without Ministerial approval.

The other bylaws that are enacted that do not require Ministerial approval can be amended with a Board resolution.

(v) ***Issuance of Shares***

No shares in the Commission are issued. The consequence of this is that there is no recognition of the disproportionality of Membership interest.

(vi) ***Financial Contributions to Commission***

The MGA does not mandate that Municipal Members are to pay membership dues for being a Municipal Member of the Commission.

(vii) ***Capital Contributions to Commission***

There is no obligation imposed that the Commission can make requisitions from its Municipal Members. However, the Commission is to pass capital budgets and operating budgets annually. If the revenues and transfers to a Commission are to be less than the operating and capital expenditures over a 3 year period, this deficiency is to be covered in its budget.

This is an indirect manner of requisitions. If the Board of the Commission passes a capital budget with a substantial deficit and if operating expenses are not reduced to address the capital expenditures, the shortage will likely have to be addressed in the fees to be charged to the Municipal Member. This is similar to a capital, cash call.

(viii) ***How to Impose Other Binding Obligations***

There are three ways to impose other obligations on the Commission and/or their Municipal Members. They are:

- Membership Agreement – A membership agreement is a contract amongst the Commission and the Municipal Members that will impose mutual obligations and provide entitlements to each one of the Municipal Members. This is permitted by the power of contract that is provided to any corporate entity;

- Bylaws – The Commission is entitled to pass bylaws governing the administration of the Commission and the provision of services to its Municipal Members. These obligations can be included here;

- Service Agreements – ultimately, Commissions are created to provide services for the benefit of its Municipal Members. Commissions are also entitled to provide services to non-members (subject to either Section 602.11 of the MGA which requires Ministerial approval). It may be a good idea to have service agreements, no different than other service agreements entered into between utility provider and utility customer. These are limited to the provision of services itself and do not extend to governance matters.

(ix) ***Disproportionate Interest***

As previously stated[6], it is a common desire of the Municipal Members in an inter-municipal/regional partnership to have a disproportionate interest due to the "burden/benefit" principle. This is not necessarily universal, but it is frequently expressed.

The "burden/benefit" principle is a principle that each Municipal Member shall have the same proportionate burden as their proportionate benefit. For instance, if a Municipal Member is going to contribute 15% of the total solid waste to the corporate entity, it should have a 15% entitlement to receive services, have a 15% entitlement to enjoy in the profits of the entity, have a 15% responsibility to financially contribute to the entity and have a 15% entitlement to vote its shares on key matters not decided at the Board of Directors table.

As Commissions do not have shares issued to them and all decisions are made at the Board table (and are not Municipal Members/councils), there is no recognition of this disproportionate interest.

As is discussed in greater detail below, the "burden/benefit" principle is somewhat recommened for the Municipal Members but is not fully implemented, due to the express desire to have equal voting rights.

(x) ***Municipal Affairs Consent Necessary to Create?***

The Minister of Municipal Affairs must approve of the creation of the Commission.

(xi) ***Corporate Registrar Consent Necessary to Create?***

As the Commission is an entity created by Regulation, the corporate registrar's consent is not needed.

(xii) ***Timeframes for Consents***

It is has been our experience that it is reasonable to expect anywhere from 9 months to 18 months for the application to be approved of by the Minister of Municipal Affairs after the initial application is submitted. Of course, this assumes that all necessary details have already been worked through at that point.

(xiii) ***Any Restrictions on Directors?***

Only elected officials of a Municipality may be a director, unless the director is appointed to be a director at large and does not represent a specific municipality.[7] Non-elected officials cannot represent a municipality.

There is an issue in Canadian corporate law jurisprudence regarding a director "representing" a municipality. A director, at corporate law, has a fiduciary duty to act in the best interest of the body that the director sits on and does not in a conflict of interest to that body. Therefore, that particular

[6] See Page 13
[7] Section 602.04 of the MGA

director may be in a conflict of interest if he/she blindly follows his/her council's instructions about what the Commission may do, if these directions are not in the best interest of the Commission.

(xiv) ***Ongoing Reporting to Municipal Affairs?***

Yes. As previously advised, there is an annual requirement to provide annual, audited financial statements to Municipal Affairs.

(xv) ***Are Audited Financial Statements Mandatory?***

Yes.

(xvi) ***Can Assets be Paid to Members Upon Dissolution of Commission?***

Yes. There is no legislation prohibiting the assets being distributed to its Municipal Members upon dissolution of the Commission.

The Department of Municipal Affairs now requires that all new Commissions are to contemplate the entitlement of assets upon both the departure of a Municipal Member and upon dissolution of the Commission. However, as long as this is considered, it is permitted.

(xvii) ***Insulation from Liability***

Although there is nothing in the MGA that specifically references that Municipal Members of the Commission are insulated from liabilities of the Commission, the MGA does expressly reference that the Commission is a corporation.[8]

It is a long standing tenet of corporate law that members/shareholders of a corporate entity are not responsible for the liabilities of the corporation that they are members/shareholders of. As previously noted, the *Business Corporations Act* and the *Societies Act* expressly protect the shareholders/members of these entities from exposure to liability. There is no such similar clause in the MGA that provides this statutory protection. However, through our review of Alberta jurisprudence, we cannot find anything which states that Members would be responsible for the liabilities of the Commission.

3. Not For Profit Company (Alberta)

Not-for profit companies, also known as Part 9 Companies ("Part 9 Company") are corporate entities that are created pursuant to the *Companies Act*.

It is a historical anomaly in Alberta that the Part 9 Company still exists. The *Companies Act* was formerly the sole governing legislation for for-profit corporations and non-profit corporations. Effective as of February 1, 1982, for-profit corporations were no longer permitted to exist pursuant to the *Companies*

[8] Section 602.03 of the MGA

Act[9]. However, the *Companies Act* continued to permit non-profit corporations to exist under Part 9 of the *Companies Act* (which is why they are called "Part 9 Companies").

(a) Key Features of a Part 9 Company

Part 9 Companies can only be created for limited purposes, which are for:

> "promoting art, science, religion, charity or any other useful object, and that it is the intention of the association to apply the profits, if any, or any other income of the association in promoting its objects and to prohibit the payment of any dividend to the members of the association"[10]

Firstly, it is important to understand that although a Part 9 Company is not to operate for the purpose of applying profit for the Municipal Members of the Part 9 Company, this is not to suggest that it is to operate at a loss. Rather, it means that any of the profits/excess revenues earned by the Part 9 Company are not to be made available to the Municipal Members by distribution of profits.

The prohibition of profits is not due to an express statutory provision, but rather, Section 200 of the *Companies Act* states that the proposed Part 9 Company's objects must not be for the payment of profits to its Municipal Members. In practice, this means that the Corporate Registrar will scrutinize its proposed Memorandum of Association and Articles of Association and will ensure that it expressly prohibits the payment of dividends.

Secondly, upon a cursory glimpse of the limitations about its purpose, it may be difficult to determine how waste to energy will fit within the parameters of the promotion of "art, science, religion, charity". However, it is the phrase "or any other useful object" that is paramount. However, as the "or any other useful object" has been interpreted to be very wide and expansive, we believe it can cover waste to energy. We have assisted other clients with incorporating Part 9 Companies in the past to provide waste management services, so this is not without precedent. We are confident that should a Part 9 Company be chosen, these past incorporations may be relied upon to support the application.

Other key features of the Part 9 Company include:

a. a Part 9 Company is a company that is not permitted to distribute profits to its Municipal Members, pursuant to Section 200 of the *Companies Act;*

b. Memorandum of Association and Articles of Association are mandatory, constitutional documents for the Part 9 Company. The Memorandum of Association establishes the objects of the Part 9 Company (why it exists and what it is supposed to do).

c. The Articles of Association are very similar to a set of standard bylaws and address items that are typically contained in the bylaws.

[9] Section 2.1 of the *Companies Act*
[10] Section 200 of the *Companies Act*.

d. Membership in a Part 9 Company is achieved by one of two methods. It is achieved with each participant being a Municipal Member of the Part 9 Company or alternatively, each participant being issued shares in the Part 9 Company. The differences are:

    a. Participants in a Part 9 Company are issued shares in the Company. This is similar to the issuance of shares as in a Corporation with share capital. The key distinction here is that the issuance of shares in a Part 9 Company can mean that one Municipal Member will have greater than normal voting rights if that Municipal Member has more than one share vs. other Municipal Members. At a Municipal Member's meeting, if Participant A has 10 shares and Participant B has only 5 shares, Participant A will have double the number of votes.

    Vs.

    b. Participants in a Part 9 Company are Municipal Members in the Company. All participants are granted the same membership. The consequence is that all Municipal Members will have the same number of votes.

e. The Objects of the Part 9 Company are set forth in its constitutional Memorandum of Association. Once these Objects are established and registered with the Corporate Registrar, they are difficult to change at a later time. Both a special resolution of all Municipal Members and a Court Order must be obtained in order to change these objects.

f. As a non-profit entity, if there are any profits earned by the Part 9 Company, these profits cannot be paid out to the Municipal Members as a dividend. A Part 9 Company can issue grants to certain bodies, but the extraction of profits simply due to an abundance of cash in a Part 9 Company's bank account is not legally possible.

g. Unlike some of the other models, Ministerial consent is not required for municipalities to participate in a Part 9 Company. Due to the fact that a Part 9 Company is deemed to be a non-profit organization, Section 250(5) of the MGA permits a municipality to be a Municipal Member of a non-profit organization without the requirement of Ministerial approval.

h. Although there is no express clause in the *Companies Act* which requires that a membership agreement be entered into for certain matters such as governance, service, financing and other key matters, there is also nothing that restricts this from happening.

(b) Advantages and Disadvantages of a Part 9 Company

There are numerous advantages and disadvantages of proceeding with a Part 9 Company. Some of the advantages to a Part 9 Company are shared with some of the other entities to be considered.

Some advantages are:

- *Ownership Interest in Assets* – Because the Part 9 Company is a separate legal entity, it has the legal capacity to own assets in its own name. That is advantageous for the following reasons:

    - There is no dispute regarding who owns the particular asset. The Ministerial regulation will state that the assets are to be owned by the Part 9 Company.

    - When the assets are owned by the Part 9 Company, the Municipal Members of the Part 9 Company likely will not be sued by a plaintiff, as they are not the registered owner.

- *Insulation from Liability* – Municipal Members of a Part 9 Company are not liable for the debts or liabilities of the Part 9 Company. All a Municipal Member is liable for is for their unpaid contribution to the Part 9 Company. If a Municipal Member has shares, that Municipal Member is liable for the amount that they subscribed for, for the shares. For instance, if the subscription price is $1.00 per share, that Municipal Member is only liable for $1.00 of the total Part 9 Company's liabilities. Similarly, a participant of a Part 9 Company is only a Municipal Member, is liable for the amount of the membership. If memberships are only $1.00 each, then that Municipal Member is only liable for $1.00 of the total Part 9 Company's liabilities.

- *Ability to Recognize Disproportionate Share Ownership* – If the Part 9 Company is established by the issuance of shares instead of by membership, it is possible to issue more shares to one participant over another. This may be important if the participants wish to implement the "burden/benefit" strategy as discussed elsewhere. Of course, should the municipalities choose to set up a one Municipal Member/one vote strategy, then the Part 9 Company will be created with membership and not have any shares issued.

- *No Restrictions on Directors* – Unlike Commissions which permit only elected officials to represent a municipality on the Board of Directors[11], Part 9 Companies have no such restrictions. That is not to say that an elected official cannot be a director, but rather, a director does not have to be an elected official.

- *Effect of Borrowing on Debt Limits* – Borrowing does not affect municipal debt levels (subject to PSAB guidelines)

- *Faster to Create* – There is no approval required from Municipal Affairs to create a Part 9 Company. Part 9 Companies, as a non-profit organization, only require the approval of the Corporate Registrar, not Municipal Affairs. That time frame typically only takes one month.

- *Ability to Sell Assets* – Unlike a Commission whose enacting regulation may have a restriction on the sale of assets without Ministerial consent, there is no such requirement for the sale of assets by Part 9 Companies. As such, there is no need to obtain approval of the Minister for a sale of assets. This can expedite the process of selling assets and making transactions occur much more quickly.

[11] Section 602.04(3)(c) of the MGA

- *Commissions Can Be Members* – There is no legislative restriction preventing a Commission from being a Municipal Member of a Part 9 Company.

- *No Need for Ministerial Approval to Create* – Although this approval process can be very valuable, the department reviews take a long time and on occasions, these matters do not obtain the necessary approvals within the timeframes that are needed;

Some disadvantages of a Part 9 Company are:

- *Limited Ability to Distribute Profits* – A Part 9 Company is statutorily prohibited from paying dividends to its Municipal Members.[12] For those types of projects whereby it is not expected to be profitable, this may not be a problem. However, for those particular projects where there is a reasonable expectation of profits, the inability to payout profits to its Municipal Members may be troublesome. Although there are ways to get around this inability to distribute profits, these workarounds are less than ideal as compared to a general ability to pay out dividends directly.

- *Overly Complex Legislative Regime* – The *Companies Act* is old legislation. It has many antiquated facets, some of which make it difficult for the Part 9 Company to change its mandate, where needed. One of these difficult elements of the legislation is the requirement that the Part 9 Company must obtain a Court Order if and when the objects of the Part 9 Company need to be changed. Firstly, a special resolution of the Municipal Members of the Part 9 Company must be obtained. Additionally, the approval of the Court of Queen's Bench must also be obtained[13]. The Court must exercise its discretion, in contemplation of the interests of the Municipal Members of the Part 9 Company, as well as all creditors of the Part 9 Company. If the Court is not satisfied, it may compel a dissatisfied Municipal Member to have its interest bought out.

- *No Expropriation Rights* – There is no statutory ability for a Part 9 Company to have a right to expropriate lands, if necessary. This may be problematic if the Part 9 Company requires lands that it cannot purchase voluntarily from a land owner. Although it may be possible for the municipality where the particular lands are located to expropriate the lands and then thereafter either transfer the lands to the Part 9 Company or lease the lands to the Part 9 Company, this approach may not be supported by the legislation. Further, it would not be the ideal process for two reasons:

    - The Part 9 Company will not be driving the expropriation process, but rather, the municipality where the lands are located will drive the expropriation; and

    - The landowner might be able to advance a claim that the lands were not utilized for their intended purpose (because they were subsequently disposed of to the Part 9

[12] Section 200 of the *Companies Act*
[13] Section 34 of the *Companies Act*

Company) and as such, the lands must be reconvened back to the landowner. Although this argument will more likely than not fail, it is still a risk.

- *No ACFA Borrowing* – Part 9 Companies are not deemed to be a "local authority" as per the *Alberta Capital Finance Authority Act.*[14] As such, they cannot obtain financing from the ACFA at its preferential interest rates.

- *Lending* – Although there are many instances of private lenders lending directly to Part 9 Companies, these types of borrowings are far less common than lending directly to For-Profit Corporations, as per the *Business Corporations Act*. Lenders are not as familiar with these entities and it may be more cumbersome to obtain lending from financial institutions due to their relative unfamiliarity. Lenders are increasingly lending on income streams from the business venture and not necessarily on asset values. As such, when people (including lenders) hear "non-profit", they frequently assume that this means that it is not operated for a profit. This is a mistaken belief, but it is a hurdle to overcome.

(d) Expansion on Operating Models Matrix

The Matrix attached to this Report as Table 2, Appendix A is expanded upon and discussed in further detail below:

(i) ***Governing Legislation of Part 9 Companies***

The *Companies Act* is the primary legislation that governs Part 9 Companies.

(ii) ***Can an Existing Commission Be a Member of a Part 9 Company?***

Yes. Commissions are provided with "natural person powers"[15] under the MGA. Natural person powers means that Commissions can do anything that a "natural person" (i.e. person) can do unless it is otherwise statutorily prohibited.

There is no statutory prohibition for Commissions to join other legal entities.

(iii) ***Distribution of Profits/Excess Revenue***

A Part 9 Company may not pay any excess revenues/profits to its Municipal Members.

Section 200 of the *Companies Act* states that a Part 9 Company can only be created for certain purposes, which purposes must include the prohibition of payment of dividends to its Municipal Members. As such, profits or excess revenues cannot be paid out via dividend.

[14] Section 21(a) of the *Alberta Capital Finance Authority Act* limits lending to "local authorities". A "local authority" means a city, an educational authority, a health authority, a municipal authority, a regional authority or a town.
[15] Section 602.1 of the MGA.

There may be alternate ways of distributing cash. These include the provision of grants (when this is not framed as a dividend), payment of donations or payment for franchise rights. However, none of these methods works as well as the payments of dividends, which is prohibited.

(iv) ***Ease to Change Corporate Governance Documents***

It is difficult to change a Part 9 Companies' corporate governance documents. As previously stated, both a special resolution of the Municipal Members of the Part 9 Company (which is deemed to be 75% approval, which is a very high threshold) and a Court order must be obtained to change these documents.

Obviously, the requirement of 75% of the Municipal Members needing to approve of a substantial change could be a very difficult undertaking. It is not hard to conceive of many scenarios whereby a few upset Municipal Members could veto the proposal despite there being an overwhelming majority in support of it.

The second hurdle to overcome is the need to obtain the Court of Queen's Bench approval for the proposed change. The Court will ensure that:

- All creditors have received notification of the proposed change;
- All holders of debentures issued by the Company has received notification; and
- Any other person who may be affected by the proposed change has received notification.

Once all done, the Court will exercise its discretion, having regard to the rights and interests of the Municipal Members of the Part 9 Company (or any class of Municipal Members), as well as the rights and interests of the creditors and then make a decision regarding the proposed changes. The Court may further approve the proposed changes, deny the proposed changes or approve of the proposed changes with modifications thereto.

(v) ***Issuance of Shares***

Shares may be issued to Municipal Members of the Part 9 Company, but they do not have to be. Participants in a Part 9 Company can be a Municipal Member with or without the issuance of shares. This will need to be determined at inception of the Part 9 Company, but if there is a desire to have share capital issued to these Municipal Members, this can be done.

The benefit of the issuance of shares is that this can be a recognition of proportionality of interests in the Part 9 Company.

(vi) ***Financial Contributions to Part 9 Company***

There is no legislative requirement that membership fees or dues must be paid to the Part 9 Company. However, the Memorandum of Association and the Articles of Association may state that fees are to be paid by each Municipal Member. If this is contained in these constitutional documents, then this is an obligation that cannot be avoided by each Municipal Member.

(vii) ***Capital Contributions to Part 9 Company***

There is no obligation imposed that the Part 9 Company can make requisitions from its Municipal Members. As stated above, there can be an obligation to pay membership fees or dues, if the Articles of Association or the Memorandum of Association require this. These membership fees or dues can also contain a capital contribution component, to save up for reserves.

There may be other instances whereby there is a need for an immediate capital contribution. Sometimes the gradual buildup of capital reserves may be insufficient. In these cases, the Part 9 Company cannot make requisitions to its Municipal Members, beyond the simple requirement to pay its fees and dues.

If there is ever a need for the Municipal Members to pay capital contributions to the Part 9 Company, this will be best accomplished by the implementation of a Membership Agreement. This would be an agreement amongst all the Municipal Members of the Part 9 Company that they will be contractually obligated to make payments to the Part 9 Company when needed. This Membership Agreement will have minimum threshold requirements, which may vary. It may state that the Board of Directors can make this determination, or that a Special Resolution of the Membership is required, or a simple majority of the membership can make this determination or it can be a unanimous requirement. There are many different ways that this can be done, but this could be implemented.

(viii) ***How to Impose Other Binding Obligations***

There are three ways to impose other obligations on the Part 9 Company and/or their Municipal Members. They are:

- Membership Agreement – A membership agreement is a contract amongst the Part 9 Company and the Municipal Members that will impose mutual obligations and provide entitlements to each one of the Municipal Members. This is permitted by the power of contract that is provided to any corporate entity. This membership agreement can address:
    - Special governance rules
    - Requirement to pay capital contributions;
    - Dispute resolution procedures;
    - Council control over budgeting/operations/capital expenditures/others;

- Articles of Association – These are similar to corporate bylaws. They will pertain to the normal governance matters such as the requirements for quorum, meeting notices, etc.;

- Service Agreements – Should the Part 9 Company start to provide services to each Municipal Member, the service agreement may contain certain obligations pertaining to the provision of services by the Part 9 Company to the Municipal Member and vice versa. These are typically limited to the provision of services itself and do not extend to governance matters.

(ix) ***Disproportionate Interest***

As previously stated[16], it is a common desire of the Municipal Members in an inter-municipal/regional partnership to have a disproportionate interest due to the "burden/benefit" principle.

The "burden/benefit" principle is a principle that each Municipal Member shall have the same proportionate burden as their proportionate benefit. For instance, if a Municipal Member is going to contribute 15% of the total solid waste to the corporate entity, it should have a 15% entitlement to receive services, have a 15% entitlement to enjoy in the profits of the entity, have a 15% responsibility to financially contribute to the entity and have a 15% entitlement to vote its shares on key matters not decided at the Board of Directors table.

This can be done with Part 9 Companies only if it is set up at the time the issuance of shares is contemplated. Without the issuance of shares, this strategy is not possible.

Again, as previously noted, the "burden/benefit" model is not being fully implemented here, but is being done in parts except for voting rights, which is being done on a one-member, one-vote system.

(x) ***Municipal Affairs Consent Necessary to Create?***

Municipalities do not require the approval of Municipal Affairs to join a Part 9 Company. Part 9 Companies, as previously stated, are non-profit corporations. Section 250 of the MGA requires municipalities to obtain Ministerial approval for the acquisition of shares in a company. Additionally, Section 73 of the MGA states that no municipality or groups of municipalities can control a for-profit corporation without Ministerial consent.

However, Section 250(5) of the MGA says that there is nothing that prevents a Municipality from obtaining membership or a share in a non-profit organization. Further, Section 73 of the MGA is only limited to for-profit corporations.

Accordingly, no consent is needed from Municipal Affairs for municipalities to join Part 9 Companies.

(xi) ***Corporate Registrar Consent Necessary to Create?***

The Corporate Registrar will review only the Articles of Association and the Memorandum of Association to ensure that these documents are compliant with the specific requirements of the *Companies Act*. They will not review the Membership Agreement or any Service Agreement.

(xii) ***Timeframes for Consents***

It is has been our experience that the approval process will take approximately one month from the time that documents have been submitted to the Corporate Registrar for review. Of course, this assumes that all necessary details have already been worked through at that point.

[16] See page 13

(xiii) ***Any Restrictions on Directors?***

Unlike Commissions, there is no requirement that only elected officials may be a director. If there is a desire to follow the Commission example, then a Membership Agreement will need to be created to restrict the eligibility of directors to be only elected officials.

In the absence of this, the only restriction on who is entitled to be a director is that the Board must be comprised of no less than 50% resident Albertans.[17]

(xiv) ***Ongoing Reporting to Municipal Affairs?***

There is no requirement under the *Companies Act* to report Municipal Affairs directly. However, the MGA requires the preparation of annual financial statements for each controlled corporation, which a Part 9 Company will be a part of.[18]

(xv) ***Are Audited Financial Statements Mandatory?***

Yes. The *Companies Act*[19] states that the directors must appoint an auditor. In fact, if no auditor is appointed, a Municipal Member of the Part 9 Company may make a court application to appoint an auditor.[20]

(xvi) ***Can Assets be Paid to Members Upon Dissolution of Part 9 Company?***

No. A Part 9 Company cannot directly distribute its assets to its Municipal Members. However, as the Municipal Members of the Part 9 Companies would be municipalities or municipal organizations, it will be possible for them to provide grants of these assets prior to dissolution.

(xvii) ***Insulation from Liability***

Municipal Members of a Part 9 Company are not personally liable for any liabilities of the Part 9 Company except to the extent that they have undertaken to be responsible for such liabilities.

Section 1(d.1) of the *Companies Act* states that Part 9 Companies that are "limited by guarantee" means that the Municipal Members are only responsible for those liabilities that they undertook to be responsible for as stated in the memorandum of association. Should a Part 9 Company be chosen, the memorandum of association would state that each Municipal Member shall be limited only to $10 of the Part 9 Company's liabilities. Therefore in an event of major liability, notwithstanding the debts of the Part 9 Company, each Municipal Member would only be responsible for $10 each of these liabilities.

[17] Section 90 of the *Companies Act*
[18] Section 279 of the MGA
[19] Section 131 of the *Companies Act*
[20] Section 131(6) of the *Companies Act*

Section 1(e) of the *Companies Act* states that Part 9 Companies that are "limited by shares" (so that shares are issued to the shareholders of the Part 9 Company, the shareholders are only responsible for the unpaid portion of their share subscription price. As shares will be issued for $10 only, in an event of major liability, notwithstanding the debts of the Part 9 Company, each Municipal Member would only be responsible for $10 each of these liabilities.

4. Corporation (Municipal Controlled Corporation or "Municipal Waste Corporation")

For the purposes of this report, the Corporation is also the same as the Municipal Waste Corporation.

(a) Key Features of a Corporation

This is a Corporation created pursuant to the *Business Corporations Act*. The overwhelming majority of private businesses in operation in Alberta are created pursuant to the *Business Corporations Act*.

A Corporation is a separate legal entity created under *Business Corporations Act*. It is not a part of each shareholder.

Key features include:

a. Articles of Incorporation, Corporation Bylaws, and a Unanimous Shareholders Agreement can be utilized to establish a clear ownership and governance structure for the parties;

b. membership is very flexible as shareholders can be added or deleted at will, subject to the provision of the Unanimous Shareholders Agreement;

c. profits of the Corporation can be paid to Municipal Members;

d. the consent of the Minister of Municipal Affairs is required under 73(2) of the MGA before one or more municipalities incorporates and controls a corporation, which consent is further governed by the requirements of the Control of Corporations Regulation (AR 284/2003);

e. differential share ownership can be used so as to recognize different levels of financial investment in the project, and therefore different levels of ownership, voting, rights to dividends (if any or applicable), etc.

Of all options the governance options, the Corporation is the most flexible of all the options available. It is the only option that can do all of the following:

- directly pay out dividends and distribute profits to its shareholders;
- have a recognition of disproportional shareholder interest. This is imperative to implement the "burden/benefit" principle. Note that this "burden/benefit" principle can extend to:
    - voting rights;

  - entitlement to dividends
  - capital contribution obligations;
  - all or just some of the above. It does not have to extend to all of the above or nothing;

- directly and easily contemplate direct council control over operations or governance of the Corporation. The other corporate options can indirectly and imperfectly do this, but this is best satisfied with the Corporation
- sell assets of the Corporation without Ministerial approval;
- distribute assets to the shareholders;
- be able to operate for a profit, should this be desired;
- be easily financeable (because private lenders and banks best understand Corporations and are generally unfamiliar with other types of entities);
- permit both councillors and non-councillors to sit as directors.

Many of the other corporate entities may enjoy some of the above rights. However, none of the other options can implement all of the above choices.

(b) Municipal Utility Corporation

When reference is made to a *"Municipal Utility Corporation"*, in most circumstances this is a reference to a Corporation created pursuant to the *Business Corporations Act*. Notwithstanding this, the *Business Corporations Act* does not specifically refer to municipal utility corporations at all. Rather, it is a descriptive term used to refer to corporations that were created by municipalities to provide utility services.

The following are examples of some of the municipal utilities corporations already existing in Alberta:

1. **EPCOR Water Services Inc.** and **EPCOR Utilities Inc.** (as owned by the City of Edmonton) and their subsidiaries to provide water services;
2. **ENMAX Corporation** (as owned by the City of Calgary) and its subsidiaries to provide electricity and natural gas services;
3. **Aquatera Utilities Inc.** (as owned by the City of Grande Prairie, the County of Grande Prairie and the Village of Sexsmith) to provide water, wastewater and solid waste services;

4. **Alberta Central East Water Corporation** (as owned by 13 municipalities, in the central east portion of the Province of Alberta) to provide wholesale water services to its members;

5. **Chestermere Utilities Incorporated** (as owned by the City of Chestermere) to provide water, wastewater, solid waste, recycling and storm water management services;

6. **NEW Water Ltd.** (as owned by Northern Sunrise County, Village of Nampa and Woodland Cree First Nation) to provide water services;

7. **Newell Regional Services Corporation** (as owned by five municipalities) to provide water services and sewage disposal services;

8. **Sheep River Regional Utility Corporation** (as owned by Town of Black Diamond, Town of Turner Valley, MD of Foothills and Village of Longview) to provide water services.

There are more examples of these types of municipal utility corporations throughout the Province of Alberta.

(c) Creation of Corporation

There is a two-step process to create the Corporation. One of the steps is the standard process to create corporations generally. The second step is seeking Ministerial approval.

Firstly, the standard process for creating the Corporation needs to be done. This involves the filing of the Articles of Incorporation with the Corporate Registrar. A certificate of incorporation will be provided by the Corporate Registrar evidencing that the Corporation exists. At the same time, a set of corporate bylaws will then be created.

Secondly, Ministerial approval must be obtained from the Minister of Municipal Affairs. Section 73 of the MGA states that no municipality may control a for profit Corporation without Ministerial consent. Section 250 of the MGA states that no municipalities may have "securities" (which constitutes shares) of a Corporation without Ministerial consent. Therefore an application must be provided which explains in detail as to what is required.

It is important to understand that at no time is the Minister obligated to provide the approval. Rather, it is within the discretion of the Minister to grant the approval and there may be other considerations that the Minister may take into account, such as political considerations, in deciding whether or not to approve of or deny an application.

The *Control of Corporations Regulation*, as enacted pursuant to the MGA provides more guidance as to what must be provided to obtain the Minister's consent. The following is to be provided:

1. Costs to Create – The costs of creating the Corporation must be provided;

2. Value of Assets – Any assets that the Corporation will transfer to the municipal shareholders (not the other way around), must be listed. This is only relevant for instances whereby municipalities acquire an existing Corporation for the purpose of buying that Corporation's assets;

3. Business Plan – A proposed business plan must be provided, which includes a cash flow projection for the first three years of the Corporation's operations;

4. Assurances to the Minister – The Minister must be satisfied that:

    a. Valid Purpose – The Corporation's purpose is consistent with the very purposes of a municipality as set forth in the MGA. These are: to provide good government; to provide services that are desirable within the municipality; and to develop safe and viable communities;

    b. Provision of Services – The Corporation will provide a regional municipal service, facility or other thing;

    c. No Assets outside Alberta – The Corporation will not own assets outside of Alberta without Ministerial consent

    d. Financial Independence – The Corporation will not be dependent upon the municipalities for its on-going operation. By necessary implication, this means that a requisition model will not be sufficient. It must be financially independent through its rates of service; and

    e. Direct Benefit – The purpose of the Corporation and the profits and dividends that are paid out by the Corporation will provide a direct benefit to the municipalities.

The Department of Municipal Affairs will carefully scrutinize this application. From our experience, their greatest scrutiny will be on the financial information regarding the application. After many discussions with Department staff over the years on many applications, the Department will not blindly accept the financial submissions in the business plan. They will review all assumptions and determine if the assumptions are reasonable. They will review the projections and determine if these are reasonable. They will then review the financial numbers to determine what happens if the assumptions are invalid and what impact it may have on operations and most importantly, on the Municipal Members.

This application will be reviewed by their regulatory department, their legal department and their financial department. All departments will make recommendations or will seek further input on the application. From there, there will be a managerial review with recommendations to be made. Next, the application will progress up to the Assistant Deputy Minister and Deputy Minister for a recommendation. Finally, the Minister will review the application, the staff recommendations and then, should it be deemed to be appropriate, approve of the application.

From previous experience, it will likely take between 9 months and 18 months for the application to be approved. This date will start after such time as the business plan and financial applications are approved.

After that point, we will complete the organization of the Corporation by the issuance of shares, signing of the Corporation's Unanimous Shareholder Agreement ("**USA**") and staffing of the Board.

(d) Governance of Corporation

Corporations are created with three separate layers of involvement.

1. Shareholders – The Corporation is created by shareholders to provide a particular service. They are the "owners" of the Corporation. Should SAEWA transition to a Corporation, the same Municipal Members of SAEWA (plus future Municipal Members, should that be desired) shall be the shareholders of the Corporation.

    a. Corporations are the most flexible corporate option.

    b. Shareholder Involvement – Their involvement in the Corporation can be as involved or as limited as they may wish. If the shareholders desire minimal involvement, their responsibilities will be limited to the election of a Board of Directors to represent them. However, through the implementation of the USA, we can take some decision making power away from the Board of Directors on certain key items and have decisions made by the shareholders (i.e. Council) instead.

    c. Using an analogy, the shareholders of the Corporation would be like the residents of the municipality. The shareholders will elect the directors to be the decision makers on behalf of the Corporation, just as residents elect councillors to be decision makers on behalf of the municipality.

    d. Shareholders have no fiduciary duty to the Corporation. They are allowed to make decisions for their sole benefit and do not need to consider the best interests of the Corporation itself (although sometimes this is wise, in order to preserve their investment).

2. Board of Directors – These are the decision makers for the Corporation. The Board of Directors has a fiduciary duty to act in the best interests of the Corporation[21]. They make the decisions on behalf of the Corporation.

    a. Using the same analogy as municipal governance, the Board of Directors are elected by the shareholders to make decisions on behalf of the Corporation, just like councillors are elected by the residents to make decisions on behalf of the municipality.

[21] Section 122 of the *Business Corporations Act*. This codifies the long standing common law principle of the duty of care that each director owes.

3. Officers – Officers of Corporations are those individuals who implement the day to day instructions of the Board of directors. They too owe a duty of care to act in the best interests of the Corporation. Unlike the Board of Directors who shall only perform a guidance function and do not devote their entire time and attention to the operations of the Corporations, officers do have this obligation to continuously monitor the affairs of the Corporation.

    a. The terms "Chief Executive Officer", "Chief Administrative Officer", "President" and "General Manager" are frequently used interchangeably to describe the same job.

(e) Advantages and Disadvantages of Corporations

As stated before, Corporations are the most flexible of all the options and models. It has numerous advantages that the others do not have. However, there are also disadvantages to be reviewed.

Advantages

Advantages to utilizing a Corporation include:

- *Ownership Interest in Assets* – Because the Corporation is a separate legal entity, it has the legal capacity to own assets in its own name. That is advantageous for the following reasons:

    - There is no dispute regarding who owns the particular asset. Once the Corporation owns the asset, it is owned by the Corporation and by no one else.

    - When the assets are owned by the Corporation, the Municipal Members of the Corporation likely will not be sued by a plaintiff, as they are not the registered owner.

- *Recognized service provision model* – As stated above, the Corporation is frequently used by municipalities in the provision of utility services. It has been our experience that once long-common assumptions are ignored (ex. Commissions are the only way to proceed) and all models are scrutinized, the use of the Corporation is frequently pursued. This is why it is a recognized service model;

- *Insulation from Liability* – Shareholders of a Corporation are not liable for the debts or liabilities of the Corporation.[22]

- *Payments of Dividends* – The Corporation is permitted to pay out dividends of profits subject to the restriction that it cannot do so if the payment of the dividends will render the Corporation unable to pay its liabilities as they become due.[23]

[22] Section 46 of the *Business Corporations Act* provides shareholders with immunity from the liabilities of the Corporation that they hold shares in.
[23] Section 43 of the *Business Corporations Act*

- *Ability to Recognize Disproportionate Share Ownership* – Shares must be issued to shareholders. However, there is no restriction that each shareholder is to hold the same number of shares, just as there is no restriction that all shareholders must be equal. It is solely within the purview of the parties to determine how best to do this.

- *No Restrictions on Directors* – Unlike Commissions which permit only elected officials to represent a municipality on the Board of Directors[24], Corporations have no such restrictions. That is not to say that an elected official cannot be a director, but rather, a director does not have to be an elected official.

- *Ability to Sell Assets* – Unlike a Commission where the enacting regulation creating it may prohibit the sale of assets without Ministerial consent, there is no such requirement for the sale of assets by Corporations. As such, there is no need to obtain approval of the Minister for a sale of assets. This can expedite the process of selling assets and making transactions occur much more quickly.

- *Commissions Can Be Members* – There is no legislative restriction preventing a Commission from being a Municipal Member of a Corporation. This is contrasted with the case of a Commission whereby one Commission cannot be a Municipal Member of another Commission.

- *Lending* – Private lenders and banks are most familiar with lending to Corporations. Through our past experience, we can advise that the process of borrowing by the Corporations is a simpler process than when other types of corporate entities are the borrowers. The lenders are not as familiar with the unique aspects of non-*Business Corporations Act* entities and as such, there are frequently delays that are attributable to that. This is not necessarily universal, but it is something that is encountered from time to time.

- *Effect of Borrowing on Debt Limits* – Borrowing does not affect municipal debt levels (subject to PSAB guidelines)

Disadvantages

The primary disadvantages to utilizing a Corporation include:

- *Difficult to Create* – Due to the regulatory requirement that the Minister of Municipal Affairs must first approve of the creation of the Corporation, the approval process can be a lengthy process. It is reasonable to assume that it could take over one year to receive the final approval of the Corporation.

- *No Expropriation Rights* – There is no statutory ability for a Corporation to have a right to expropriate lands, if necessary. This may be problematic if the Corporation requires lands that it cannot purchase voluntarily from a land owner. Although it may be possible for the municipality

[24] Section 602.04(3)(c) of the MGA

where the particular lands are located to expropriate the lands and then thereafter either transfer the lands to the Corporation or lease the lands to the Corporation, this approach may not be supported by the legislation. Further, it would not be the ideal process for two reasons:

- The Corporation will not be driving the expropriation process, but rather, the municipality where the lands are located will drive the expropriation; and
- The landowner might be able to advance a claim that the lands were not utilized for their intended purpose (because they were subsequently disposed of to the Corporation and as such, the lands must be reconvened back to the landowner. Although this argument will more likely than not fail, it is still a risk.

- *No ACFA Borrowing* – Corporations are not deemed to be a "local authority" as per the *Alberta Capital Finance Authority Act.*[25] As such, they cannot obtain financing from the ACFA at its preferential interest rates.

(f) Expansion on Decision Making Matrix

The Matrix attached to this Report as Table 2, Appendix A is expanded upon and discussed in further detail below:

(i) ***Governing Legislation of Corporations***

The *Business Corporations Act* is the primary legislation that governs Corporations.

(ii) ***Can an Existing Commission Be a Member of a Corporation?***

Yes. Commissions are provided with "natural person powers"[26] under the MGA. Natural person powers means that Commissions can do anything that a "natural person" (i.e. person) can do unless it is otherwise statutorily prohibited.

There is no statutory prohibition for Commissions to join other legal entities.

(iii) ***Distribution of Profits/Excess Revenue***

The Corporation is entitled to pay out dividends to and distribute profits to its shareholders.

There are two legislative restrictions on the payments of dividends: They are:

- Dividends cannot be paid if the payment will cause the Corporation to be unable to pay its liabilities as they become due; or

[25] Section 21(a) of the *Alberta Capital Finance Authority Act* limits lending to "local authorities". A "local authority" means a city, an educational authority, a health authority, a municipal authority, a regional authority or a town.
[26] Section 602.1 of the MGA.

- Dividends cannot be paid if the payment will cause the Corporation's liabilities and stated capital to be greater than its assets.[27]

It is important to understand that the distribution of profits is done on the basis of proportionality. If Shareholder A has 15% of the shares and Shareholder B has 30% of the shares, Shareholder B will receive twice as much dividends as Shareholder A.

(iv) ***Ease to Change Corporate Governance Documents***

It is simple to change the Corporation's corporate governance documents, assuming that the shareholders consent to this. There is no need to obtain Court approval for the change and there is no need to obtain Ministerial approval to any change.

Depending on the USA and the nature of the change, the type of shareholders' consent will vary. It can be an ordinary resolution, a special resolution or if the USA dictates, some other threshold. Regardless, no external consents will be necessary to obtain.

(v) ***Issuance of Shares***

Shares must be issued to shareholders of the Corporation. The issuance of shares is an important mechanism to recognize proportionality of interests.

(vi) ***Financial Contributions to Corporation***

There is no legislative requirement that membership fees, dues or capital contributions must be paid to the Corporation.

Pursuant to the Ministerial approval process, the *Control of Corporations Regulation* requires that the Corporation not be dependent on financial contributions from the shareholders for its ongoing operations. Accordingly, the best way to plan for shareholders to financially contribute to the Corporation is for a service agreement to be entered into with each shareholder to regulate how services are to be provided and what the charge will be for same.

(vii) ***Capital Contributions to Corporation***

There is no requirement that the Corporation be able to make requisitions from its shareholders.

If there is a need for a capital contribution from each shareholder, the Corporation can always make this request to each of them. However, unless there is a USA or a service agreement that requires a capital contribution by each of the shareholders, there is no legal obligation for them to make such a contribution.

[27] Section 43 of the *Business Corporations Act*

If there is ever a need for the Municipal Members to pay capital contributions to the Corporation, this will be best accomplished by the implementation of a USA or a service agreement. The USA would require each shareholder make a capital contribution, assuming that the other shareholders agree, via a previously agreed upon threshold. For instance, if the USA states that if 2/3 of the total shares of the Corporation vote to require a capital contribution, all shareholders must contribute accordingly.

Additionally, the terms of a service agreement could mandate that a capital contribution be made. This is not an uncommon requirement for long term utility supply contracts to require that the customer partially contribute to the capital costs of the supplier. However, this capital contribution would be dependent upon that particular shareholder agreeing pursuant to the contract with the Corporation.

It is far more secure to ensure a mandatory capital contribution exists by implementing a USA addressing this.

(viii) ***How to Impose Other Binding Obligations***

There are two contractual ways to impose obligations on the Corporation and/or their shareholders. They are:

- Unanimous Shareholders Agreement ("USA") – A USA is a membership agreement that is expressly permitted under the *Business Corporations Act*. It can address numerous issues such as:
    - Special governance rules
    - Requirement to pay capital contributions;
    - Dispute resolution procedures;
    - Council control over budgeting/operations/capital expenditures/others;
- Service Agreements – Should the Corporation start to provide services to each shareholder, the service agreement may contain certain obligations pertaining to the provision of services by the Corporation to the shareholder and vice versa. These are typically limited to the provision of services itself and do not extend to governance matters.

(ix) ***Disproportionate Interest***

As previously stated[28], it is a common desire of the Municipal Members in an inter-municipal/regional partnership to have a disproportionate interest due to the "burden/benefit" principle.

The "burden/benefit" principle is a principle that each shareholder shall have the same proportionate burden as their proportionate benefit. For instance, if a shareholder is going to contribute 15% of the total solid waste to the corporate entity, it should have a 15% entitlement to receive services, have a 15% entitlement to enjoy in the profits of the entity, have a 15% responsibility to financially contribute

[28] See Page 13

to the entity and have a 15% entitlement to vote its shares on key matters not decided at the Board of Directors table.

This can be done with Corporations only if it is set up at the time the issuance of shares is contemplated. Without the issuance of shares, this strategy is not possible.

As is noted below in the discussion regarding the recommendations, we recommended that the "burden/benefit" principle be partially applied. All voting rights shall be equal, but the remainder of the principles, such as proportionate entitlement to dividends, proportionate obligations to contribute to capital injections, proportionate entitlement to receive services shall still remain.

(x) ***Municipal Affairs Consent Necessary to Create?***

Yes. As stated previously, the *Control of Corporations Regulation* and Sections 73 and 250 of the MGA require Ministerial consent to create this Corporation.

This approval process can be a lengthy process and may take a significant period of time and financial due diligence.

(xi) ***Corporate Registrar Consent Necessary to Create?***

Yes. This is done same day electronically.

(xii) ***Timeframes for Consents***

There are two consents necessary.

The consent from the Corporate Registrar is done same day, electronically. This will be done same day as the submission.

It is estimated that once the supporting documents are prepared and submitted to the Minister for seeking its approval, the process will take approximately 9 to 18 months for the full review to be conducted.

(xiii) ***Any Restrictions on Directors?***

Unlike Commissions, there is no requirement that only elected officials may be a director. If there is a desire to follow the Commission example, then a USA will need to be created to restrict the eligibility of directors to be only elected officials.

In the absence of this, the only restriction on who is entitled to be a director is that the Board must be comprised of no less than 25% resident Albertans.[29]

[29] Section 105(3) of the *Business Corporations Act*

(xiv) ***Ongoing Reporting to Municipal Affairs?***

There is no requirement under the *Companies Act* to report Municipal Affairs directly. However, the MGA requires the preparation of annual financial statements for each controlled corporation, which the Corporation must comply with.[30]

(xv) ***Are Audited Financial Statements Mandatory?***

No. The *Business Corporations Act* states that the shareholders of the Corporation may resolve annually to not require that the financial statements of the Corporation be audited.[31] Notwithstanding this, the shareholders may elect to have the statements audited in any event.

(xvi) ***Can Assets be Paid to Members Upon Dissolution of Corporation?***

Yes. There is no restriction upon the distribution of the Corporation's assets to its shareholders upon dissolution of the Corporation.

(xvii) ***Insulation from Liability***

Shareholders of a Corporation are only liable to third parties for the Corporation's liabilities to the extent of their unpaid share subscription price.[32]

By way of example, if a shareholder has agreed to pay $10,000 for the subscription for certain shares, but has only paid $2,000 to date, that shareholder will be liable to the Corporation's creditors in the amount of $8,000.

However, the practical way of establishing the Corporation will be to set the average subscription price at $50 with an obligation for immediate payment. Once paid, the shareholders will have no resultant liability to third party creditors.

5. Society

A Society is another non-profit entity that could be considered. Societies are created pursuant to the *Societies Act*.

SAEWA itself is a Society, so the Municipal Members will be familiar with it.

(a) Key Features of Society

Societies can only be created by five or more people (the term "people" includes municipalities and commissions) for any "benevolent, philanthropic, charitable, provident, scientific, artistic, literary, social,

[30] Section 279 of the MGA
[31] Section 163 of the *Business Corporations Act*
[32] Section 46 of the *Business Corporations Act*

educational, agricultural, sporting or other useful purpose, but not for the purpose of carrying on a trade or business".[33]

Similar to Part 9 Companies, a Society is a non-profit company. It is prohibited from having share capital and is prohibited from declaring dividends or distributing its property to its Municipal Members.[34]. As with the other non-profit entities, it is important to understand that although a Society is a non-profit entity and cannot pay dividends, this is not to suggest that it is to operate at a loss. Rather, it means that any of the profits/excess revenues earned by the Society are not to be made available to the Municipal Members by distribution of profits.

Upon a cursory glimpse of the limitations about its purpose, it may be difficult to determine how waste to energy will fit within the parameters of the promotion of "benevolent, philanthropic, charitable, provident, scientific, artistic, literary, social, educational, agricultural, sporting". The last portion of the phrase is "any other useful purpose". This is how SAEWA was incorporated by the Corporate Registrar.

Key features of the Society include:

a. incorporation of a Society must be for a useful purpose which may include "benevolent, philanthropic, charitable, provident, scientific, artistic, literary, social, educational, agricultural, sporting or other useful purpose." The merits of reducing waste, promoting "green" opportunities to generate energy and the overall promotion of recycling will fit within these enumerated objects;

b. there is no proportionality of interests in a Society. All Municipal Members are equal and each have the same voting rights as each other;

c. no Ministerial involvement or approvals are necessary to create a Society;

d. the Application for Incorporation must include a broad statement of object for the Society in order to ensure that its desired activities are properly contemplated within the authorized objects for the Society;

e. recommended that a Membership Agreement be executed to directly address the respective rights and obligations of the municipalities that become involved in the Society;

f. a Society is not permitted to issue shares to its Municipal Members. Accordingly, each Municipal Member of the Society is usually entitled to cast one vote on all matters that are properly put before the membership for a vote. Where necessary, it is possible to accommodate the need for different voting rights at the Board of Directors' level;

g. if required by the relationship, it is possible for one Municipal Member to be given the right to place two or more directors on the Board, thereby increasing the number of directors that may

[33] Section 3(1) of the *Societies Act*
[34] Section 4(1) of the *Societies Act*

have a direct appreciation for the issues and concerns of that Municipal Member in relation to the Society;

h. a Society is not permitted to distribute dividends or profits to its Municipal Members.

(b) Creation of Society

The Society is created by the submission of an application to the Corporate Registrar, along with proposed bylaws.

The Corporate Registrar will review both the application and the bylaws. The application must show the intended purposes for why the Society is to be created. The bylaws must address the following matters:

- terms of admission of Municipal Members and their rights and obligations;
- the conditions of withdrawal of Municipal Members and the manner, if any, in which a Municipal Member may be expelled;
- the mode and time of calling general and special meetings of the Society and number constituting a quorum at any of those meetings and rights of voting;
- the appointment and removal of directors and officers and their duties, powers and remuneration;
- the exercise of borrowing powers;
- the audit of accounts;
- the custody and use of the seal of the Society;
- the manner of making, altering and rescinding bylaws;
- the preparation and custody of minutes of proceedings of meetings of the Society and of the directors, and other books and records of the Society;
- the time and place, if any, at which the books and records of the Society may be inspected by Municipal Members.[35]

As the Society is a non-profit entity, similar to a Part 9 Company, the approval of the Minister of Municipal Affairs is not required for municipalities to join a Society. Section 250(5) of the MGA permits a municipality to be a Municipal Member of a non-profit organization without the requirement of Ministerial approval.

It is reasonable to expect that it will take approximately one month to create a Society. Of course, SAEWA is presently a Society now, so should a decision be made to proceed with a Society, it may make more sense to just proceed with SAEWA in its present form.

(c) Governance of Society

Societies are created with three separate layers of involvement.

[35] Section 9 of the *Societies Act*

1. Members – The Society is created by Municipal Members to provide a particular service.

    a. Member Involvement – Their involvement in the Society can be as involved or as limited as they may wish. The default position is that Municipal Members are not involved in decision making for the Society and all decisions are to be made by the Board of Directors and implemented by its officers and employees. Municipal Members will elect the Board of Directors and will approve of historical financial statements only. However, through the implementation of a membership agreement, we can take some decision making power away from the Board of Directors on certain key items and have decisions made by the Municipal Members (i.e. Council) instead.

    b. Using the analogy of municipalities with a Society, the Municipal Members of the Society would be like the residents of the municipality. The Municipal Members will elect the directors to be the decision makers on behalf of the Society, just as residents elect councillors to be decision makers on behalf of the municipality.

    c. Municipal Members have no fiduciary duty to the Society. They are allowed to make decisions for their sole benefit and do not need to consider the best interests of the Society itself (although sometimes this is wise, in order to preserve their investment).

2. Board of Directors – These are the decision makers for the Society. Jurisprudence regarding the legal standard of care of directors for corporate entities generally has stated that Boards of Directors have a fiduciary duty to act in the best interests of the Society.

    a. Using the same analogy with municipal governance, the Board of Directors are elected by the shareholders to make decisions on behalf of the Society, just like councillors are elected by the residents to make decisions on behalf of the municipality.

3. Officers – Officers of Societies are those individuals who implement the day to day instructions of the Board of Directors. They too owe a duty of care to act in the best interests of the Society. Unlike the Board of Directors who shall only perform a guidance function and do not devote their entire time and attention to the operations of the Societies, officers do have this obligation to continuously monitor the affairs of the Society.

    a. The terms “Chief Executive Officer”, “Chief Administrative Officer”, “President” and “General Manager” are frequently used interchangeably to describe the same job.

(d) Advantages and Disadvantages of Societies

The Municipal Members of SAEWA are likely aware of the advantages and disadvantages of societies, given that SAEWA itself is a Society. We summarize these below.

Advantages

Advantages to utilizing a Society include:

- *It Already Exists* – SAEWA already exists as a Society. If there is a need to proceed with a Society, there would likely be no reason to create a new one. SAEWA already exists. Even if there is a reason to create a new Society, because there is no Ministerial approval necessary, this can be created within one month.

- *Ownership Interest in Assets* – Because the Society is a separate legal entity, it has the legal capacity to own assets in its own name. That is advantageous for the following reasons:

    - There is no dispute regarding who owns the particular asset. Once the Society owns the asset, it is owned by the Society and by no one else.

    - When the assets are owned by the Society, the members of the Society likely will not be sued by a plaintiff, as they are not the registered owner.

- *Insulation from Liability* – Municipal Members of a Society are not liable for the debts or liabilities of the Society.[36]

- *No Restrictions on Directors* – Unlike Commissions which permit only elected officials to represent a municipality on the Board of Directors[37], Societies have no such restrictions. That is not to say that an elected official cannot be a director, but rather, a director does not have to be an elected official.

- *Ability to Sell Assets* – Unlike a Commission where the enacting regulation creating it may prohibit the sale of assets without Ministerial consent, there is no such requirement for the sale of assets by Societies. As such, there is no need to obtain approval of the Minister for a sale of assets. This can expedite the process of selling assets and making transactions occur much more quickly.

- *Commissions Can Be Members* – There is no legislative restriction preventing a Commission from being a Municipal Member of a Society.

- *Modern Legislation* – As a non-profit entity, its governing legislation is more "modern" than a Part 9 Company. There is no need to seek a court order to amend its constitutional documents. It has simpler reporting requirements and simpler dissolution rules. It is easier to comply with the *Societies Act*, as a non-profit entity, than to comply with the *Companies Act*.

- *Effect of Borrowing on Debt Limits* – Borrowing does not affect municipal debt levels (subject to PSAB guidelines)

[36] Section 21 of the *Societies Act*
[37] Section 602.04(3)(c) of the MGA

- *No Need for Ministerial Approval to Create* – Although this approval process can be very valuable, the department reviews take a long time and on occasions, these matters do not obtain the necessary approvals within the timeframes that are needed;

- *Commissions Can Be Members* – There is no legislative restriction preventing a Commission from being a Municipal Member of a Society.

Disadvantages

The primary disadvantages to utilizing a Society include:

- *Limited Ability to Distribute Profits* – A Society is statutorily prohibited from paying dividends to its Municipal Members.[38] For those types of projects where profits are not expected, this may not be a problem. However, for those particular projects where there is a reasonable expectation of profits, the inability to payout profits to Municipal Members may be troublesome. Although there are ways to get around this inability to distribute profits, these workarounds are less than ideal as compared to a general ability to pay out dividends directly.

- *Lack of Proportionality of Interests* – The "burden/benefit" principle cannot be perfectly implemented in a Society. One Municipal Member equals one vote. This inability to grant greater voting rights, entitlement to profits and capital expenditure obligations may be problematic. Although there has been a strong desire to show equality of voting rights, the other principles of the "burden/benefit" principle (receipt of dividends, capital injections, etc.) cannot be implemented as well with this model.

- *No Expropriation Rights* – There is no statutory ability for a Society to have a right to expropriate lands, if necessary. This may be problematic if the Society requires lands that it cannot purchase voluntarily from a land owner. Although it may be possible for the municipality where the particular lands are located to expropriate the lands and then thereafter either transfer the lands to the Society or lease the lands to the Society, this approach may not be supported by the legislation. Further, it would not be the ideal process for two reasons:

    - The Society will not be driving the expropriation process, but rather, the municipality where the lands are located will drive the expropriation; and

    - The landowner might be able to advance a claim that the lands were not utilized for their intended purpose (because they were subsequently disposed of to the Society) and as such, the lands must be reconvened back to the landowner. Although this argument will more likely than not fail, it is still a risk.

[38] Section 4(1) of the *Societies Act*

- *No ACFA Borrowing* – Societies are not deemed to be a "local authority" as per the *Alberta Capital Finance Authority Act.*[39] As such, they cannot obtain financing from the ACFA at its preferential interest rates.

- *Lending* – Although there many instances of private lenders lending directly to Societies, these types of borrowings are far less common than lending directly to Corporations under the *Business Corporations Act*. Lenders are not as familiar with these Societies and it may be more cumbersome to obtain lending from financial institutions due to their relative unfamiliarity. Lenders are increasingly lending on income streams from the business venture and not necessarily on asset values. As such, when people (including lenders) hear "non-profit", they frequently assume that this means that it is not operated for a profit. This is a mistaken belief, but it is a hurdle to overcome.

(e) Expansion on Operating Models Matrix

The Matrix attached to this Report as Table 2, Appendix A is expanded upon and discussed in further detail below:

(i) ***Governing Legislation of Societies***

The *Societies Act* is the primary legislation that governs Societies.

(ii) ***Can an Existing Commission Be a Member of a Society?***

Yes. Commissions are provided with "natural person powers"[40] under the MGA. Natural person powers means that Commissions can do anything that a "natural person" (i.e. person) can do unless it is otherwise statutorily prohibited.

There is no statutory prohibition for Commissions to join other legal entities.

(iii) ***Distribution of Profits/Excess Revenue***

The Society may not pay any excess revenues/profits to its Municipal Members.

Section 4(1) of the *Companies Act* states that a Society can only be created for certain purposes, which purposes must include the prohibition of payment of dividends to its Municipal Members. As such, profits or excess revenues cannot be paid out via dividend.

There may be alternate ways of distributing cash. These include the provision of grants (when this is not framed as a dividend), payment of donations or payment for franchise rights. However, none of these methods works as well as the payments of dividends, which is prohibited.

[39] Section 21(a) of the *Alberta Capital Finance Authority Act* limits lending to "local authorities". A "local authority" means a city, an educational authority, a health authority, a municipal authority, a regional authority or a town.
[40] Section 602.1 of the MGA.

(iv) ***Ease to Change Corporate Governance Documents***

It is easy to change a Society's corporate governance documents, assuming that ¾ of the Municipal Members of the Society approve of the change. Obviously, the requirement that 75% of the Municipal Members must approve of a substantial change could be a very difficult undertaking. It is not hard to conceive of many scenarios whereby a few upset Municipal Members could veto the proposal despite there being an overwhelming majority in support of it. However, if this is a matter that is deemed to be necessary to change by a consensus of no less than 75% of the Municipal Members, then it is easy to change.

Once the resolution of the 75% of the Municipal Members is passed, all that needs to be done is to send the revised objects and/or revised bylaws into the Corporate Registrar for registration.

Both the objects and the bylaws of the Society may be revised by the passage of a special resolution of the Municipal Members approving of the change (which is deemed to be 75% approval, which is a very high threshold) and a Court order must be obtained to change these documents.

(v) ***Issuance of Shares***

Shares may not be issued to Municipal Members of the Society. There cannot be any share capital for a Society.[41]

(vi) ***Financial Contributions to Society***

The Society can set dues that are to be paid by the Municipal Members of the Society. It is not a legal requirement that dues must be charged, but rather, they could be charged, should they so desire.

A common remedy for the failure to pay dues is to expel the defaulting Municipal Member from the Society. This may not be as effective in the instance of SAEWA or a successor. This is best illustrated by an example. Lawyers must pay membership dues to the Law Society of Alberta. If they fail to pay these dues, then their license to practice law is revoked. There would be a good incentive to therefore pay these dues.

The remedy of revoking membership would likely not be very effective if the defaulting member has no intention to ever deliver waste or use the facilities. The case law is mixed on the ability to sue in a debt action to recover the costs of dues. It would therefore be wise to supplement this with a membership agreement which expressly states that the non-payment of these fees constitutes a debt owed that can be sued upon.

(vii) ***Capital Contributions to Society***

There is no obligation imposed in legislation that the Society can make requisitions to its Members.

[41] Section 4 of the *Societies Act*

As stated above, there can be an obligation to pay membership fees or dues, only if the Society is set up that way at the beginning. These membership fees or dues can also contain a capital contribution component, to save up for reserves.

There may be other instances whereby there is a need for an immediate capital contribution. Sometimes the gradual buildup of capital reserves may be insufficient. In these cases, the Society cannot make requisitions to its Municipal Members, beyond the simple requirement to pay its fees and dues.

If there is ever a need for the Municipal Members to pay capital contributions to the Society, this will be best accomplished by the implementation of a Membership Agreement. This would be an agreement amongst all the Municipal Members of the Society that would contractually obligate the Members to make payments to the Society when needed. This Membership Agreement would have minimum threshold requirements, which may vary. It may state that the Board of Directors can make this determination, or that a Special Resolution of the Membership is required, or a simple majority of the membership can make this determination or it can be a unanimous requirement. There are many different ways that this can be done.

(viii) ***How to Impose Other Binding Obligations***

There are three ways to impose other obligations on the Society and/or their Municipal Members. They are:

- Membership Agreement – A Membership Agreement is a contract amongst the Society and the Municipal Members that will impose mutual obligations and provide entitlements to each one of the Municipal Members. This is permitted by the power of contract that is provided to any corporate entity. This Membership Agreement can address:
    - Special governance rules
    - Requirement to pay capital contributions;
    - Dispute resolution procedures;
    - Council control over budgeting/operations/capital expenditures/others;
- Corporate Bylaws – These bylaws pertain to normal governance matters such as the requirements for quorum, meeting notices, etc.;
- Service Agreements – Should the Society start to provide services to each Municipal Member, the service agreement may contain certain obligations pertaining to the provision of services by the Society to the Municipal Member and vice versa. These are typically limited to the provision of services itself and do not extend to governance matters.

(ix) ***Disproportionate Interest***

As previously stated it is a frequent desire of the Municipal Members in an inter-municipal/regional partnership to have a disproportionate interest due to the "burden/benefit" principle.

The "burden/benefit" principle is a principle that each Municipal Member shall have the same proportionate burden as their proportionate benefit. For instance, if a Municipal Member is going to contribute 15% of the total solid waste to the corporate entity, it should have a 15% entitlement to receive services, have a 15% entitlement to enjoy in the profits of the entity, have a 15% responsibility to financially contribute to the entity and have a 15% entitlement to vote its shares on key matters not decided at the Board of Directors table.

This can be done with Societies only if it is set up at the time the issuance of shares is contemplated.

(x) ***Municipal Affairs Consent Necessary to Create?***

Municipalities do not require the approval of Municipal Affairs to join a Society.

(xi) ***Corporate Registrar Consent Necessary to Create?***

The Corporate Registrar will review only the Application to create the Society (which application will set forth the objects of the Society) and its corporate bylaws to ensure that the required elements as mandated by the *Societies Act* are captured. They will not review the Membership Agreement or any Service Agreement.

(xii) ***Timeframes for Consents***

It is has been our experience that the approval process will take approximately one month from the time that documents have been submitted to the Corporate Registrar for review. Of course, this assumes that all necessary details have already been worked through at that point.

(xiii) ***Any Restrictions on Directors?***

Unlike Commissions, there is no requirement that only elected officials may be a director. If there is a desire to follow the Commission example, then a Membership Agreement will need to be created to restrict the eligibility of directors to be only elected officials.

Unlike Part 9 Companies or Corporations, there is no requirement in the *Societies Act* that a certain number of directors must be residents of Alberta or Canada.

(xiv) ***Ongoing Reporting to Municipal Affairs?***

There is no requirement under the *Societies Act* to report to Municipal Affairs directly. However, the MGA requires the preparation of annual financial statements for each controlled corporation, which a Society must comply with.[42]

[42] Section 279 of the MGA

(xv) ***Are Audited Financial Statements Mandatory?***

Yes. The *Societies Act*[43] states that the directors must appoint an auditor.

However, the *Societies Act* does state that the audit does not need to be conducted by a professional accountant if the auditor does not charge any fees for the conducting of the audit. By necessary implication and through practice, it is possible for the directors, officers or employees of the Society to conduct the audit, even if they are not accountants.

(xvi) ***Can Assets be Paid to Members Upon Dissolution of Society?***

No. A Society cannot directly distribute its assets to its Municipal Members. However, as the Municipal Members of the Societies would be municipalities or municipal organizations, it will be possible for them to provide grants of these assets prior to dissolution.

(xvii) ***Insulation from Liability***

Municipal Members of a Society are not personally liable for any debts of the Society.[44]

6. Cooperative

A Cooperative is an autonomous association of people who voluntarily cooperate for their mutual social, economic, and cultural benefit. Cooperatives include non-profit community organizations and businesses that are owned and managed by the people who use its services.

(a) Key Features

Cooperatives created pursuant to the *Cooperatives Act* are more similar to business corporations than non-profit entities. Cooperatives have the ability to issue investment shares[45], to issue dividends[46], to allocate or pay patronage returns[47], contemplation of rules and obligations with respect to insider trading[48], and permit minority Municipal Member litigation remedies such as derivative actions and oppression actions.

Other key features include:

[43] Section 25 of the *Societies Act*
[44] Section 21 of the *Societies Act*
[45] *Cooperatives Act* 108(1)

[46] *Cooperatives Act* 135(1)

[47] *Cooperatives Act* 137(1)

[48] *Cooperatives Act* sections 152-154

a. created pursuant to the *Cooperatives Act*;

b. similar to business Societies;

c. the legislation contemplates three or more people to come together to carry on a business if these people can use the services of the Cooperative;

d. expressly contemplates that the entity will provide an actual service to its Municipal Members.

(b) Advantages and Disadvantages of a Cooperative

i. Advantages

- *Membership Agreement* - Can implement a Unanimous Agreement, whereby certain decisions can be taken out of the hands of the directors and put in the hands of the shareholders (i.e. council). However, this Unanimous Agreement must meet the approval of the Director of Cooperatives and it is possible that it may be rejected

- *Effect of Borrowing on Municipal Debt Limits* - Borrowing does not affect municipal debt levels (subject to PSAB guidelines)

- *Payment of Dividends* - Has absolute and unrestricted ability to pay out profits, revenues and dividends to its Municipal Members

- *Adding Members* - Freedom to add or delete participants

- *Sale of Assets* - Can sell its assets without Ministerial approval

- *No Need for Ministerial Approval to Create* – Although this approval process can be very valuable, the department reviews take a long time and on occasions, these matters do not obtain the necessary approvals within the timeframes that are needed;

- *Commissions Can Be Members* – There is no legislative restriction preventing a Commission from being a Municipal Member of a Part 9 Company.

ii. Disadvantages

- *Lack of Proportionality of Interests* – The "burden/benefit" principle cannot be perfectly implemented in a Cooperative. By law, one Municipal Member equals one vote. This cannot be deviated from. This also means that there cannot be any proportionate payment of dividends (because the larger contributors to the system cannot enjoy the financial benefits of the same) and the capital contribution obligations will be equal, resulting in the smaller users having a greater proportionate obligation to contribute to the system.

- *No Expropriation Rights* – There is no statutory ability for a Cooperative to have a right to expropriate lands, if necessary. This may be problematic if the Cooperative requires lands that it cannot purchase voluntarily from a land owner. Although it may be possible for the municipality where the particular lands are located to expropriate the lands and then thereafter either transfer the lands to the Cooperative or lease the lands to the Cooperative, this approach may not be supported by the legislation. Further, it would not be the ideal process for two reasons:

    - The Cooperative will not be driving the expropriation process, but rather, the municipality where the lands are located will drive the expropriation; and

    - The landowner might be able to advance a claim that the lands were not utilized for their intended purpose (because they were subsequently disposed of to the Cooperative) and as such, the lands must be reconvened back to the landowner. Although this argument will more likely than not fail, it is still a risk.

- *No ACFA Borrowing* – Cooperatives are not deemed to be a "local authority" as per the *Alberta Capital Finance Authority Act*.[49] As such, they cannot obtain financing from the ACFA at its preferential interest rates.

- *Lending* – Although there many instances of private lenders lending directly to Cooperatives, these types of borrowings are far less common than lending directly to Corporations under the *Business Corporations Act*. Lenders are not as familiar with these Cooperatives and it may be more cumbersome to obtain lending from financial institutions due to their relative unfamiliarity. Lenders are increasingly lending on income streams from the business venture and not necessarily on asset values. Also, the nature of cooperatives sometimes causes people to think people (including lenders) to believe that they are "non-profit". As such, they frequently assume that this means that it is not operated for a profit. This is a mistaken belief, but it is a hurdle to overcome.

(c) Expansion on Decision Making Matrix

(i) ***Governing Legislation of a Cooperative***

The *Cooperatives Act* is the primary legislation that governs Cooperatives.

(ii) ***Can an Existing Commission Be a Member of a Cooperative?***

Yes. Commissions are provided with "natural person powers"[50] under the MGA. Natural person powers means that Commissions can do anything that a "natural person" (i.e. person) can do unless it is otherwise statutorily prohibited.

[49] Section 21(a) of the *Alberta Capital Finance Authority Act* limits lending to "local authorities". A "local authority" means a city, an educational authority, a health authority, a municipal authority, a regional authority or a town.
[50] Section 602.1 of the MGA.

There is no statutory prohibition for Commissions to join other legal entities.

(iii) ***Distribution of Profits/Excess Revenue***

A Cooperative is entitled to pay out dividends and distribute profits to its Municipal Members.

There are two legislative restrictions on the payment of dividends: They are:

- Dividends cannot be paid if the payment will cause the Cooperative to be unable to pay its liabilities as they become due; and

- Dividends cannot be paid if the payment will cause the realizable value of the Cooperative's assets to be less than the total of its liabilities and the stated capital of all its issued shares.[51]

(iv) ***Ease to Change Governance Documents***

It is simple to change the Cooperative's corporate governance documents, assuming that the Municipal Members consent to this. There is no need to obtain Court approval for the change and there is no need to obtain Ministerial approval to any change.

(v) ***Issuance of Shares***

Shares may be issued to Municipal Members of a Cooperative, but they do not have to be. Whether the Cooperative will issue membership shares will need to be determined at inception of the Cooperative. If there is a desire to have share capital issued to the Municipal Members, this can be done.

The benefit of the issuance of shares is that this can be a recognition of proportionality of interests in the Cooperative.

(vi) ***Financial Contributions to a Cooperative***

There is no legislative requirement that membership fees or dues must be paid to the Cooperative. However, the Articles may state that fees are to be paid by each Municipal Member. If this is contained in these constitutional documents, then this is an obligation that cannot be avoided by each Municipal Member.

(vii) ***Capital Contributions to a Cooperative***

There is no obligation imposed that the Cooperative must make requisitions from its Municipal Members. As stated above, there can be an obligation to pay membership fees or dues, if the Articles require this. These membership fees or dues can also contain a capital contribution component, to save up for reserves.

[51] *Cooperatives Act*, Section 136

(viii) ***How to Impose Other Binding Obligations***

There are three ways to impose other obligations on the Cooperative and/or their Municipal Members. They are:

- Unanimous Agreement– a membership agreement that is expressly permitted under the *Cooperatives Act*. It can address numerous issues such as:
    - Special governance rules
    - Requirement to pay capital contributions;
    - Dispute resolution procedures;
    - Council control over budgeting/operations/capital expenditures/others;

- Service Agreements – Should the Cooperative start to provide services to each Municipal Member, the service agreement may contain certain obligations pertaining to the provision of services by the Cooperative to the Municipal Member and vice versa. These are typically limited to the provision of services itself and do not extend to governance matters.

- Articles of Association – These are similar to corporate bylaws. They will pertain to the normal governance matters such as the requirements for quorum, meeting notices, etc.;

(ix) ***Disproportionate Interest***

No. This cannot be implemented because the underlying feature of cooperatives are that all parties are deemed to be the same.

(x) ***Municipal Affairs Consent Necessary to Create?***

Municipalities do not require the approval of Municipal Affairs to join a Cooperative.

(xi) ***Corporate Registrar Consent Necessary to Create?***

Yes. The Corporate Registrar will review only the Articles to ensure that these documents are compliant with the specific requirements of the *Cooperatives Act*. The *Cooperatives Act* does not require bylaws or a feasibility study to be submitted with the incorporation documents.

(xii) ***Timeframes for Consents***

It is has been our experience that the approval process will take approximately one month from the time that documents have been submitted to the Corporate Registrar for review. Of course, this assumes that all necessary details have already been worked through at that point.

(xiii) ***Restrictions on Directors***

Unlike Commissions, there is no requirement that only elected officials may be a director. If there is a desire to follow the Commission example, then a USA will need to be created to restrict the eligibility of directors to be only elected officials.

In the absence of this, the only restriction on who is entitled to be a director is that not fewer than 2/3 of the directors, or any greater proportion that is provided for by the Articles, must be Municipal Members of the cooperative, or representatives of Municipal Members that are entities, or Municipal Members of members that are cooperative entities. In addition, the articles may provide for the appointment of directors who are representatives of an entity, government or any other person or organization having an interest in the activities of the cooperative, but who are not Municipal Members of the cooperative. Such directors cannot make-up more than 20% of the total number of directors.

(xiv) ***Ongoing Reporting to Municipal Affairs?***

There is no requirement under the *Cooperatives Act* to report to Municipal Affairs directly. However, the *Act* requires the presentation of financial statements at every annual meeting of the Municipal Members.[52]

(xv) ***Are Audited Financial Statements Mandatory?***

Yes. The *Cooperatives Act* require the directors to appoint an auditor.[53]

(xvi) ***Can Assets be Paid to Members Upon Dissolution of Entity?***

Yes. There is no restriction upon the distribution of the Cooperative's assets to its Municipal Members upon dissolution.

(xvii) ***Insulation from Liability***

The Municipal Members and holders of shares of a Cooperative are not liable, by reason only of being Municipal Members or holders of shares, for any liability, act or default of the Cooperative except as provided in the *Cooperatives Act*.[54] Directors may be jointly and individually liable for amounts distributed in contravention of the *Act*.[55] Directors may be jointly and individually liability for wages of employees of the Cooperative.[56]

7. Non-Profit Corporation (Federal Legislation)

The federal government has recently created the Federal Non-Profit which is another option that may be considered. It is also a "non-profit" entity. Again, being a non-profit entity does not mean that this

[52] *Cooperatives Act*, Section 228(1)(a).
[53] *Cooperatives Act*, Section 56(1)(d), 228(1)(b)
[54] *Cooperatives Act*, Section 26
[55] *Cooperatives Act*, Section 78
[56] *Cooperatives Act*, Section 79

entity must operate at a loss. Rather, it means that if any revenues are earned that exceed its liabilities, these excess revenues or profits cannot be paid out to its Municipal Members**.**

(a) Key Features

The new legislation permits the Federal Non-Profit to be very similar to the Corporation, except for two matters. The two big differences are that it does not require Ministerial consent and it cannot pay out dividends.

The similarities are that it does permit only one Municipal Member. It can be structured to permit direct Council control over it. If multiple Municipal Members do join, it can recognize disproportionality of ownership interest.

The membership agreement to control a Federal Not-for-profit Corporation is known as the Unanimous Member Agreement ("UMA"). The UMA is only valid if the Entity is known as a "non-soliciting corporation".

A non-soliciting corporation is an entity that receives no more than $10,000 per year from anyone but its Municipal Members directly or through other sources than the assessment of fees or service charges. Therefore, if the Entity is to receive grant funds from the Province in excess of $10,000, it is no longer a non-soliciting corporation and is now a soliciting corporation. A soliciting corporation cannot have a UMA.

The way around this is for the Entity to have its dues and money assessed by the Board. These dues would likely be the money that is necessary in order to preserve the water licenses, filing fees, etc.

If there is ever a need for the Entity to have external funding from the Province, yet, still remain as a non-soliciting corporation to preserve its UMA, then one or more of the Municipal Members would have to make the application for grant funding in their own municipal name. Once received, these funds would be paid over directly to the entity. A Federal Non-Profit is permitted to receive money from its own Municipal Members and still remain as "non-soliciting".

(b) Advantages and Disadvantages of a Federal Non-Profit

i. Advantages

- *Effect of Borrowing on Municipal Debt Limits* - borrowing does not affect municipal debt levels (subject to PSAB guidelines);
- *New Members* - freedom to add or delete participants, without Ministerial approval;
- *Sale of Assets Without Approval* - can sell its assets without Ministerial approval;

- *No Need for Ministerial Approval to Create* – Although this approval process can be very valuable, the department reviews take a long time and on occasions, these matters do not obtain the necessary approvals within the timeframes that are needed;

- *Distribution of Assets* - can distribute assets to Municipal Members upon dissolution. Only a "qualified donee" within the meaning of the *Income Tax Act* is eligible to receive the assets from a Federal Non-Profit Corporation. Note that a municipality is a qualified donee;

- *Commissions Can Be Members* – There is no legislative restriction preventing a Commission from being a Municipal Member of a Federal Non-Profit

ii. Disadvantages

- *Little Jurisprudence to Fill in Interpretation Gaps* - Legislation is relatively new (just came into force on October 17, 2011). As such, there is little case law interpreting any of its statutory provisions;

- *No Profits* -no ability to distribute revenues or pay dividends. Therefore, if the entity is making profits, it cannot pay them out via dividends;

- *Borrowing from ACFA* – Federal Non-Profits are not deemed to be a "local authority" as per the *Alberta Capital Finance Authority Act.*[57] As such, they cannot obtain financing from the ACFA at its preferential interest rates.

- *Lack of Proportionality of Interests* – The "burden/benefit" principle cannot be perfectly implemented in a Federal Non-Profit. By law, one Municipal Member equals one vote. This cannot be deviated from. This also means that there cannot be any proportionate payment of dividends (because the larger contributors to the system cannot enjoy the financial benefits of the same) and the capital contribution obligations will be equal, resulting in the smaller users having a greater proportionate obligation to contribute to the system.

- *Strict Financial Oversight* – Due to the nature of the *Canada Not-for-profit Corporations Act*, it will be subject to very strict auditing requirements;

- *No Expropriation Rights* – There is no statutory ability for a Federal Non-Profit to have a right to expropriate lands, if necessary. This may be problematic if the Federal Non-Profit requires lands that it cannot purchase voluntarily from a land owner. Although it may be possible for the municipality where the particular lands are located to expropriate the lands and then thereafter either transfer the lands to the Federal Non-Profit or lease the lands to the Federal Non-Profit, this approach may not be supported by the legislation. Further, it would not be the ideal process for two reasons:

[57] Section 21(a) of the *Alberta Capital Finance Authority Act* limits lending to "local authorities". A "local authority" means a city, an educational authority, a health authority, a municipal authority, a regional authority or a town.

- The Federal Non-Profit will not be driving the expropriation process, but rather, the municipality where the lands are located will drive the expropriation; and

- The landowner might be able to advance a claim that the lands were not utilized for their intended purpose (because they were subsequently disposed of to the Federal Non-Profit) and as such, the lands must be reconvened back to the landowner. Although this argument will more likely than not fail, it is still a risk.

- *Lending* – Although there many instances of private lenders lending directly to Federal Non-Profit, these types of borrowings are far less common than lending directly to Corporations under the *Business Corporations Act*. Lenders are not as familiar with these Federal Non-Profit and it may be more cumbersome to obtain lending from financial institutions due to their relative unfamiliarity. Lenders are increasingly lending on income streams from the business venture and not necessarily on asset values.

(c) Expansion on Decision Making Matrix

(i) ***Governing Legislation of a Federal Non-Profit Corporation***

The *Canada Not-for-profit Corporations Act* is the primary legislation that governs Federal Non-Profit Corporations

(ii) ***Can an Existing Commission Be a Member of a Federal Non-Profit Corporation?***

Yes. Commissions are provided with "natural person powers"[58] under the MGA. Natural person powers means that Commissions can do anything that a "natural person" (i.e. person) can do unless it is otherwise statutorily prohibited.

There is no statutory prohibition for Commissions to join other legal entities.

(iii) ***Distribution of Profits/Excess Revenue***

The Federal Non-Profit Corporation may not pay any excess revenues/profits to its Municipal Members.

There may be alternate ways of distributing cash. These include the provision of grants (when this is not framed as a dividend), payment of donations or payment for franchise rights. However, none of these methods works as well as the direct payment of dividends.

(iv) ***Ease to Change Governance Documents***

It is simple to change the Federal Non-Profit Corporation's corporate governance documents, assuming that the Municipal Members consent to this. There is no need to obtain Court approval for the change and there is no need to obtain Ministerial approval to any change.

[58] Section 602.1 of the MGA.

(v) ***Issuance of Shares***

There are no shares that are issued in a Federal Non-Profit. Accordingly, there is no ability to recognize any proportionate interests.

(vi) ***Financial Contributions to a Federal Non-Profit Corporation***

There is no legislative requirement that membership fees or dues must be paid to the Federal Non-Profit Corporation. However, the UMA may state that fees are to be paid by each Municipal Member.[59] If this is contained in the constitutional documents, then this is an obligation that cannot be avoided by each Municipal Member.

(vii) ***Capital Contributions to a Federal Non-Profit Corporation***

There is no obligation imposed that the Federal Non-Profit Corporation can make requisitions from its Municipal Members. As stated above, there can be an obligation to pay membership fees or dues, if the UMA requires it. These membership fees or dues can also contain a capital contribution component, to save up for reserves.

There may be other instances whereby there is a need for an immediate capital contribution. Sometimes the gradual buildup of capital reserves may be insufficient. In these cases, the Federal Non-Profit Corporation cannot make requisitions to its Municipal Members, beyond the simple requirement to pay its fees and dues.

If there is ever a need for the Municipal Members to pay capital contributions to the Federal Non-Profit Corporation, this will be best accomplished by the implementation of a Membership Agreement. This would be an agreement amongst all the Municipal Members of the Federal Non-Profit Corporation that would contractually obligation the Members to make payments to the Federal Non-Profit Corporation when needed. This Membership Agreement will have minimum threshold requirements, which may vary. It may state that the Board of Directors can make this determination, or that a Special Resolution of the Membership is required, or a simple majority of the membership can make this determination or it can be a unanimous requirement. There are many different ways that this can be done.

(viii) ***How to Impose Other Binding Obligations***

There are three ways to impose other obligations on the Federal Non-Profit Corporation and/or its Municipal Members. They are:

- Unanimous Member Agreement – an agreement that is expressly permitted under the *Cooperatives Act*. It can address numerous issues such as:
    - Special governance rules

[59] *Canada Not-for-profit Corporations Act*, Section 30

- Requirement to pay capital contributions;
- Dispute resolution procedures;
- Council control over budgeting/operations/capital expenditures/others;

- Service Agreements – Should the Federal Non-Profit Corporation start to provide services to each Municipal Member, the service agreement may contain certain obligations pertaining to the provision of services by the Corporation to the Municipal Member and vice versa. These are typically limited to the provision of services itself and do not extend to governance matters.

- Articles of Association – These are similar to corporate bylaws. They will pertain to the normal governance matters such as the requirements for quorum, meeting notices, etc.

(ix) ***Disproportionate Interest***

There is no ability to recognize disproportionate interests in the Federal Non-Profit.

(x) ***Municipal Affairs Consent Necessary to Create?***

Municipalities do not require the approval of Municipal Affairs to join a Federal Non-Profit Corporation.

(xi) ***Corporate Registrar Consent Necessary to Create?***

Yes. The Canadian Corporate Registrar will review only the Articles of Incorporation among other documents to ensure that the documents are compliant with the specific requirements of the *Canada Not-for-profit Corporations Act*. They will not review the UMA or any Service Agreement.

(xii) ***Timeframes for Consents***

It is has been our experience that the approval process will take approximately one month from the time that documents have been submitted to the Corporate Registrar for review. Of course, this assumes that all necessary details have already been worked through at that point.

(xiii) ***Restrictions on Directors***

Unlike Commissions, there is no requirement that only elected officials may be a director. If there is a desire to follow the Commission example, then the UMA will need to restrict the eligibility of directors to be only elected officials.

(xiv) ***Ongoing Reporting to Municipal Affairs?***

There is no requirement under the *Canada Not-for-profit Corporations Act* to report Municipal Affairs directly. However, the MGA requires the preparation of annual financial statements for each controlled corporation, the non-profit must comply with.[60]

[60] Section 279 of the MGA

(xv) ***Are Audited Financial Statements Mandatory?***

Yes. Each year the Federal Non-Profit must place financial statements before Municipal Members at every annual meeting[61], unless an exception or exemption under the *Act* applies[62].

(xvi) ***Can Assets be Paid to Members Upon Dissolution of Entity?***

Yes. There is no restriction upon the distribution of the Federal Non-Profit's assets to its Municipal Members upon dissolution.

(xvii) ***Insulation from Liability***

Members of a Federal Non-Profit Corporation are not personally liable for any liabilities of the Corporation except to the extent that they have undertaken to be responsible for.

4.0 QUESTIONNAIRE FINDINGS AND RESULTS

As you are aware in 2014, SAEWA and Brownlee LLP developed and distributed a questionnaire to all members of SAEWA. The purpose of the questionnaire was to obtain input from each member and to allow SAEWA to understand the needs and desired outcomes of the members.

The questionnaire was provided because given time constraints and geographical proximities, it would not have been feasible to meet with all participants and gather their input. This questionnaire provided everyone with the opportunity to provide input on this matter.

Ultimately, the new governance structure must be one that satisfies the needs of the Municipal Members. Although SAEWA itself exists as a separate legal entity and many of its members (waste commissions, regional waste entities) are separate legal entities, they exist as a means of municipalities regionally cooperating for their own collective benefit. These additional entities (SAEWA and the regional waste commissions) only exist due to the efforts and support of the municipalities for regional cooperation to try to find the best way to address the processing of their municipal solid waste. If the group of municipalities is unhappy with their own separate legal entities, SAEWA itself or any new entity that is created for the waste to energy facility, it will not be successful.

The information collected by this questionnaire was utilized to guide our research as well as our recommendations as outlined below.

The charts below provide the questionnaire results for all of the yes/no questions asked. Details regarding the open-ended questions can be provided upon request.

[61] *Canada Not-for-profit Corporations Act*, Section 172
[62] *Canada Not-for-profit Corporations Act*, Sections 172 and 173

Chart 1 – Questions 1 - 11

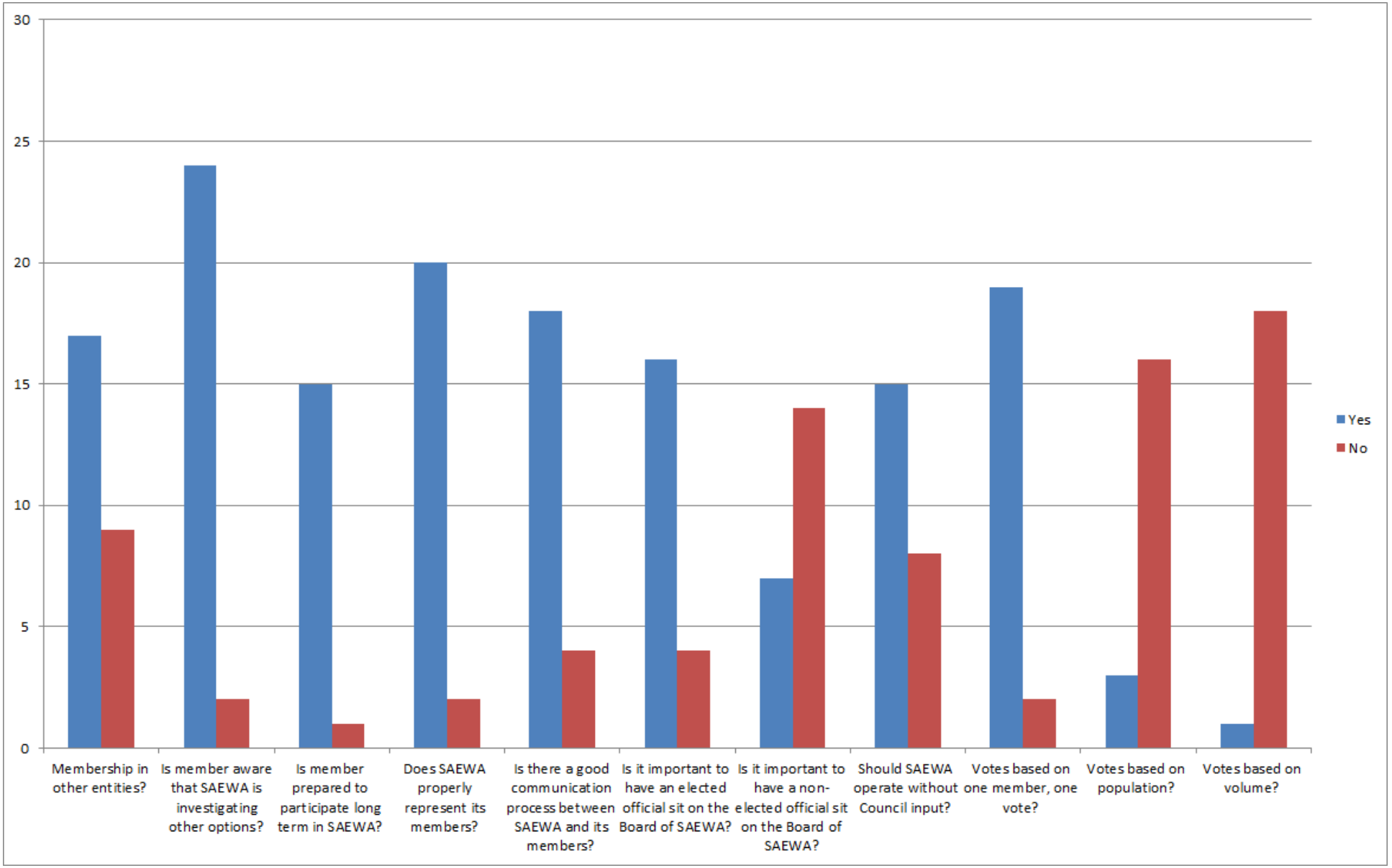
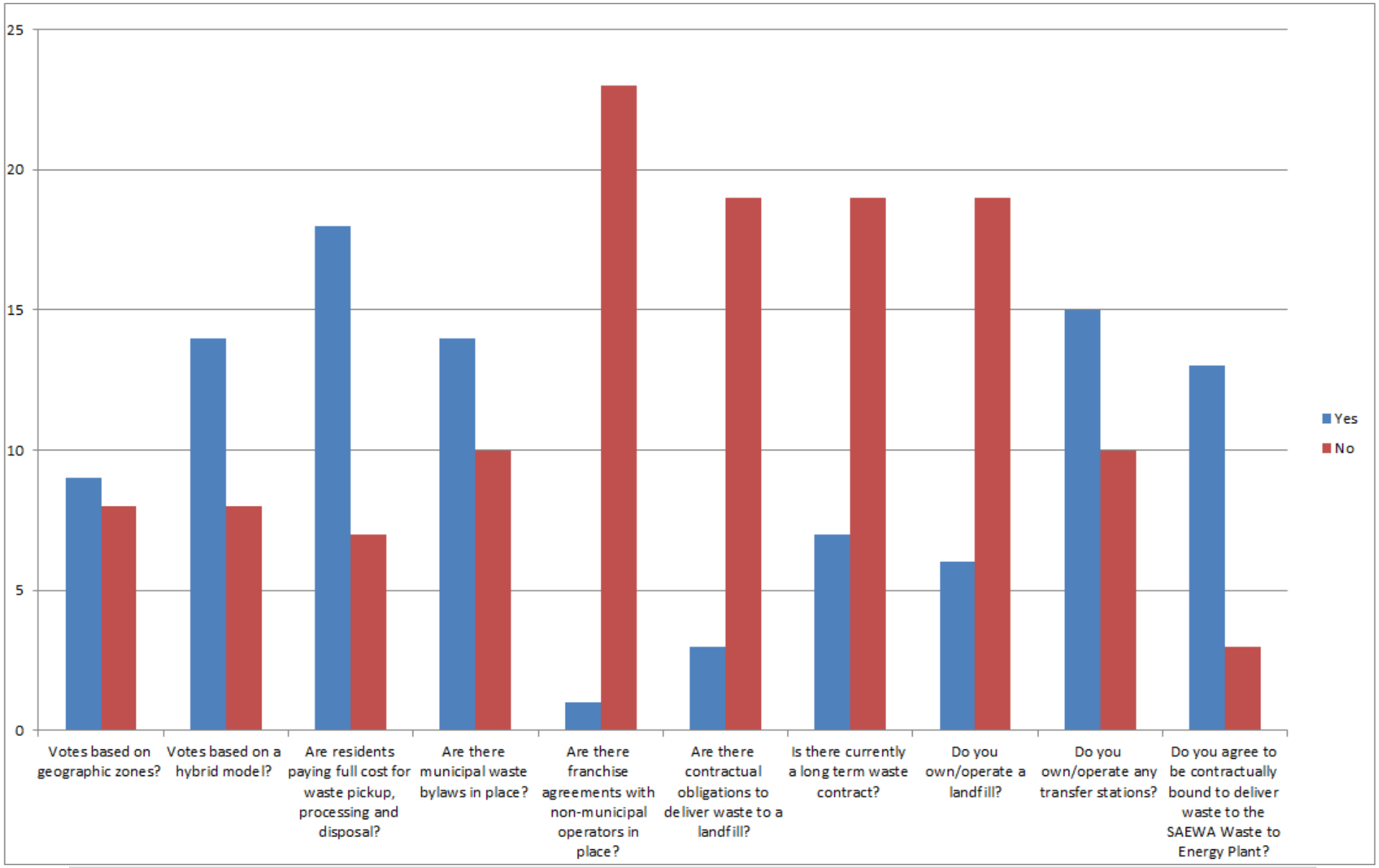


Chart 2 – Questions 12 – 13 and 19 - 26



5.0 SUMMARY OF RESEARCHED WASTE TO ENERGY FACILITIES

5.1 Governance Options Research by Other Entities

During our research, we found that many entities throughout North America have conducted extensive research regarding the governance options available to waste management systems. Two of the more comprehensive research reports are summarized below.

1. Twin Cities Metropolitan Area Study by Dakota County Staff

One research summary reviewed as part of this project was the *Draft Summary Research of Regional Solid Waste Management Governance System* put together by the Dakota County Environmental Management and Office of Planning Analysis Department staff for the Solid Waste Management Board for the Twin Cities Metropolitan Area. In this study, Dakota County staff researched 14 regional solid waste systems with a variety of governance structures. Although a majority of the regional systems researched by Dakota County managed solid waste, four of the systems had a waste to energy processing facility.

Dakota County organized each regional system researched into four "governance coordinating mechanisms":

1. **Legislation (legislatively-established)** - established by legislatures, either in response to a request from local governments or proactively to design a regional approach. In most cases, the legislation identifies the regional partners and defines their role and authorities.

2. **Interlocal agreements (joint powers agreements, etc.)** - according to this study, one of the most common methods for neighboring jurisdictions to cooperate is for them to voluntarily enter into interlocal agreements with one another for coordination or cooperation of public services. Depending on how interlocal agreements are structured, member governmental entities may or may not retain individual authorities. Interlocal agreements are entered into voluntarily by parties and take many forms, depending on the goals of the agreement. Such agreements can range from an informal hand-shake to joint powers agreements and elaborate contracts structured according to statutory requirements. Intergovernmental agreements may also take the form of a joint service agreement where two or more jurisdictions join forces to plan, finance and deliver a service within the boundaries of all participating jurisdictions.

3. **Voter-approved** - according to this study, Metropolitan Service District in Portland, Oregon is the only regional government agency in the United States whose governing body is directly elected by the region's voters. Metro's home rule charter provides for planning, policy making, and services and was approved by the voters in 1992. Metro Portland does not have a waste to energy facility.

4. **"Expanded" municipal government** - according to this study, Toronto's solid waste system is considered to be a model single government system. The City of Toronto does not have a waste to energy facility.

Dakota County staff also noted that within the regional systems researched, there was significant variation in their authorities, the tools available and tools used to most effectively manage solid waste, how they were financed, and how success was defined. No two systems were found to be alike and there was no simple way for the study to describe the range of regional solid waste governance models.

It was further noted that each regional system had its own unique aspects and powers – or legal authorities, making precise comparisons to each other very difficult. Interestingly it was found that some, but not many of the regional systems researched had the authority to adopt a budget, employ staff, adopt ordinances/bylaws and operating policies, administer grants, own equipment and property, issue bonds and collect fees and taxes.

Even with the many variations noted, Dakota County staff found that the regional solid waste systems researched appeared to have common components that, in part, influence the success and sustainability of the system (Figure 1).

Figure 1: Components of Regional Solid Waste Systems

2. Waste Processing Governance Policy Study, Ramsey County

The Joint Staff Committee for Ramsey County, Minnesota put together this study to provide the County with the governance options available for its regional waste system, the process to implement each option and the consequences associated with each. The following four governance alternatives are discussed:

1. Joint Exercise of Powers
2. Intergovernmental Service Agreement
3. Legislative Established Entity
4. Waste Management District

The study provided the following commentary regarding each alternative reviewed:

1. Joint Exercise of Powers – whereby local governments enter into agreements with each other to provide services or other functions.

    - *Strengths:* Opportunity to develop an agreement that best meets the needs of a specific region. The agreement can be structured to give authority and delegation of power to the new Joint Powers Board and/or to keep with the individual members – very flexible.

      The contracting entities hold all the decision making powers in developing the Joint Powers Agreement. This would be similar to an Authority arrangement.

    - *Weaknesses:* The delegation of authority and authority of Joint Powers Board needs to be determined when developing the agreement. It can be difficult to amend the agreement.

      The powers of the Joint Powers Agreement are only as strong as the powers held in common by all parties to the Joint Powers Agreement.

2. Intergovernmental Service Agreement – an agreement – formal or informal – between two or more governments about the delivery of a service or services. It is the most common form of cooperative arrangement in Minnesota

    - *Strengths:* The primary advantages of intergovernmental agreements are flexibility and expediency. Communities can combine their resources on specific projects without developing a formal organizational structure.

    - *Weaknesses:* In the absence of a more formal organization, financing for projects can be difficult to obtain.

3. Legislative Established Entity – an authority or district established by the Minnesota Legislature.

    - *Strengths:* This approach builds upon the strengths of the public sector for control in defining a consistent level of solid waste management.

    - *Weaknesses:* The counties give the powers to the legislature to develop the entity. The legislature then can develop the entity to meet its needs; thus, giving very little control of the outcome to the counties. Legislative action would be required to make changes to the entity.

4. Waste Management District – Minnesota law provides that a group of counties can petition the Commissioner of the Minnesota Pollution Control Agency to establish a waste management district, which is a unit of government with specific duties and authority established in state law. Minnesota does not currently have any Waste Management Districts.

    - *Strengths:* The various governing boards may enact ordinances, rules, and regulations to carry out their various duties, and most have enforcement responsibilities. A Waste Management District, with prior EPA approval, can construct, acquire, and operate a solid waste disposal facility, or contract with other governmental bodies or with private industry for disposal. Often have political and financial autonomy.

    - *Weaknesses:* A Waste Management District has extensive regulatory responsibility as defined by State law.

5.2 Case Studies - Governance Alternatives

In addition to exploring the governance options available to SAEWA given Alberta's legislative landscape, we also conducted further research and analysis regarding the governance models utilized by waste to energy facilities throughout North America. Where possible, information was solicited from representatives of other facilities involved in energy to waste activities to obtain an understanding of why a specific governance model was chosen for each system. We also requested general comments and feedback regarding the success of each model chosen.

During our research we were able to confirm that the dimensions of a regional system will always vary by system. The systems examined in this Report had significant variation in their decision making authority, revenue and financing tools available, regulatory responsibilities, and waste collection/service responsibilities. Although common components existed, how the elements of each regional system were applied and how they were created defined each of the systems.

Of the systems researched, we found that the following broad categories of governance models emerged:

1. Legislatively Established Systems
2. Co-ownership Systems
3. Extended Municipal Services
4. Joint Agreements

Each system researched is discussed in more detail below.

1. Legislatively Established Systems

Three of the waste to energy facilities researched were established by their respective legislatures, either in response to a request from local government or proactively to design a regional approach.

The legislatively established waste to energy facilities researched include:

i. Connecticut Resources Recovery Authority

ii. Metro Vancouver

iii. Palm Beach County Solid Waste Authority

i. Connecticut Resources Recovery Authority, Connecticut

General Information

a. Location - State of Connecticut

b. Governance – quasi-public agency; Board of Directors, appointed by the Governor, the State Senate, and the State House of Representatives

c. Legislation – State Legislation, Chapter 446d, Solid Waste Management

d. Financing – primary revenue from the disposal charges assessed to its member municipalities, electricity and recyclable sales, and interest income

e. Operation – Authority's Management Team; CRRA contracts with private waste haulers for services as well

f. Population served - 2 million

g. Website – www.crra.org

Solid Waste Management in Connecticut

The Connecticut Department of Energy and Environmental Protection (DEEP) is charged with conserving, improving and protecting the natural resources and the environment of the state of Connecticut as well as making cheaper, cleaner and more reliable energy available for the people and businesses of the state. DEEP was established on July 1, 2011 with the consolidation of the Department of Environmental Protection, the Department of Public Utility Control, and energy policy staff from other areas of state government.

Through State Legislation, Chapter 446d, Section 22a-228(b), Connecticut has formally adopted an integrated waste management hierarchy as a guiding framework for solid waste management efforts. Connecticut's system adheres to this hierarchy by emphasizing source reduction, recycling, composting, and energy recovery from solid waste, while relying on landfill disposal and incineration as a last resort.

Governance

The Connecticut Resources Recovery Authority (CRRA) is defined as a "quasi-public" agency. The CRRA manages solid waste for the municipalities in Connecticut that have voluntarily joined the CRRA, which encompasses about two-thirds of the geographic area of the State and serves about two million residents. Solid waste regulatory authority in the State of Connecticut resides with the Connecticut Department of Environmental Regulation.

In 2002, the Connecticut General Assembly amended Section 22a-261 of the General Statutes to reconstitute the CRRA Board of Directors. The statute establishes the officials responsible for appointing directors and the qualifications for each director. The statute was again amended in 2003, resulting in the current configuration of the board.

Funding

The CRRA has an annual budget of approximately $227 million (2009). The primary revenues come from the disposal charges assessed to its member municipalities, which currently average $69 - $72 per ton. Revenues are also generated from electricity and recyclable sales, and from interest income.

Infrastructure

The CRRA operates three mass burn waste to energy facilities and one refuse derived- fuel (RDF) facility. The CRRA currently owns no landfills, so waste that must be landfilled goes to privately-owned landfills, which has had the effect of driving up the overall cost of waste disposal within the CRRA managed area. The CRRA operates a methane recovery facility at the one closed landfill it owns. The CRRA also operates a system of transfer stations and recycling centers. The CRRA does not operate organics or yard waste composting facilities, and seems to leave the management of this part of the waste stream up to individual towns. The CRRA provides various solid waste public education programs to the residents it serves, but these programs do not seem to be comprehensive.

Currently, the CRRA is organized into four "projects", which essentially mean the geographic areas are served by various facilities. The CRRA contracts with private waste haulers for services. The CRRA then directs this waste to its facilities, or to a privately-owned landfill.

ii. Metro Vancouver, Canada

General Information

a. Location - Vancouver, British Columbia, Canada

b. Governance – Regional District with a 37-member Board of Directors (appointed by elected officials)

c. Legislation – *Local Government Act* and the *Community Charter*

d. Financing - generated through property taxes, fees and other charges

e. Operation - Metro Vancouver and member municipalities work collaboratively to provide waste management services to the region. Metro Vancouver coordinates the long-range planning process for recycling and disposing of solid waste in the region. Metro Vancouver also funds and manages the operating contracts for the transfer stations, waste to energy facility and landfill that make up the region's integrated solid waste management system

f. Population served - 2.3 million

g. Website - www.metrovancouver.org

British Columbia Governments and Organizations Generally

Local governments include both municipalities (and their councils) and regional districts (and their boards). Both are governed by the *Community Charter* and the *Local Government Act*. However, the authority is somewhat different in the case of regional districts. Regional districts have not been granted "natural person powers" like municipalities under the *Community Charter*. Nor have they been given exemption from elector approval for agreements with capital liabilities to the same extent as municipalities.

Regional Districts

The local government system in British Columbia is unique in Canada because, in addition to the 160 municipal governments, it is comprised of 27 regional districts. The boundaries of the regional districts are large and span nearly the entire geographic area of the province. Each regional district is divided into smaller areas called electoral areas. Regional districts are modeled as a federation composed of municipalities and electoral areas, each of which has representation on the regional board.

The governance of regional districts is managed by a Board of Directors composed of appointees from municipalities and a director elected from each electoral area. The municipal directors serve on the regional board until council decides to change the appointment. The directors from the electoral areas serve for a three-year term.

Revenue used to finance regional district operations and services is generated through property taxes, fees and other charges. Unlike municipalities, regional districts are required to match the benefits and costs of its services to the people that benefit from the services. In other words, residents pay for what they get.

Governance, Roles and Responsibilities

Metro Vancouver is both a nonpartisan political body and corporate entity operating under provincial legislation as a regional district on behalf of 22 member municipalities and one electoral area. The number of Board Directors is based on a population formula and they are elected officials appointed to the Board by their respective councils. Metro Vancouver's core services, which are provided principally to municipalities, are the provision of drinking water, sewerage and drainage, and solid waste management, but also include parks and affordable housing.

Solid waste management plans are authorized and regulated through the *BC Environmental Management Act.* Once each updated plan is approved, it becomes a regulatory document for solid waste management.

Metro Vancouver and member municipalities work collaboratively to provide waste management services to the region. Metro Vancouver coordinates the long-range planning process for recycling and disposing of solid waste in the region. Metro Vancouver also funds and manages the operating contracts for the transfer stations, waste to energy facility and landfill (with the exception of the Vancouver South Transfer Station and the Vancouver Landfill which are owned and operated by the City of Vancouver) that make up the region's integrated solid waste management system.

In conjunction with regulations and operational certificates that may apply, Metro Vancouver's approved Plan regulates the operation of these facilities. Where conflicts may exist between agreements related to such facilities and the Plan, including the Tri-Partite Agreement between Delta, Vancouver and Metro Vancouver, the Plan takes precedence.

Funding

Anyone delivering garbage to one of the Regional Facilities is charged a user fee, called a "tipping" fee, to pay for the cost of garbage disposal. The current fee for garbage is $107 per metric tonne (1,000 kg). According to Metro Vancouver's website the fee pays all aspects of managing the Metro Vancouver solid waste system, including regional district costs for waste reduction and recycling initiatives serving the region.

For single-family residents, the cost of garbage disposal is generally part of their municipality's solid waste utility fee that pays for garbage collection, recycling and organics management. For multi-family and commercial garbage, generators normally contract with a private waste hauler who delivers the waste to a Regional Facility and pays the regional tipping fee.

Municipalities and other generators can lower their waste management costs by reducing the amount of garbage they produce.

Infrastructure

Within the Metro Vancouver area, there is a mix of privately- and publicly-owned and operated solid waste facilities, which include three recycling facilities, seven transfer stations, one waste to energy facility, and one landfill. Solid waste management services are provided for the region collaboratively by Metro Vancouver, member municipalities, and the private sector. While the roles of the public and private sector responsibilities may overlap, primary roles include:

- Metro Vancouver establishes policy for waste diversion initiatives. The legal authority to actually implement many of these initiatives (e.g. mandatory recycling) lies with individual municipalities.

- Metro Vancouver funds and manages the operating contracts for the transfer stations, waste to energy facility and landfill (with the exception of the City of Vancouver's transfer station and landfill) that make up the region's integrated system.

- Member municipalities implement recycling programs and operate or coordinate much of the collection of residential and small business recyclables and garbage, and in some cases collection of residential yard waste.

- The private sector primarily provides recycling collection services (some through city contracts), and owns and operates the recycling facilities. The private sector also provides most commercial waste services, construction and demolition collection services, and food waste compost and disposal facilities.

The waste to energy facility turns 280,000 tons of municipal solid waste annually into steam and electricity. The other facilities that are part of the system are owned and operated by various cities or by the private sector.

The Board has bylaws to regulate private facilities and haulers, including recycling facilities and certain brokers of such facilities. Municipal solid waste in the region can be directed for disposal to any approved disposal facility (waste to energy and landfill) identified in the region's Integrated Solid Waste and Resource Management Plan. The management of household hazardous waste is carried out by the province, primarily through the Extended Producer Responsibility (ERP) programs.

iii. Palm Beach County Solid Waste Authority, Florida

General Information

a. Location - Palm Beach County, Florida

b. Governance – Dependent Special District governed by the Palm Beach County Board of Commissioners

a. Legislation – *Palm Beach County Solid Waste Act*

b. Financing – revenue bonds and system of user fees

c. Operation - operated by Palm Beach Resource Recovery Society, a subsidiary of Babcock & Wilcox Power Generation Group

c. Population served - 1.4 million (approx.)

d. Second waste to energy facility to be operational in 2015

e. Website: www.swa.org and http://www.swa-wteproject.com/about/

Florida Governments and Organizations Generally

In Florida the units of local government include counties, cities, towns and "special districts." The Palm Beach Solid Waste Authority (the "PBC SWA") is a dependant special district which was created by the Legislature by special act.

Special Districts

Special districts are very similar to counties or municipalities. Generally, Florida's laws treat them the same. The difference is their purpose. Counties and municipalities exist to provide a wide range of general-purpose governmental services whereas special districts are created to provide a specialized governmental service. Special districts have limited, explicit authority - not implied authority - that is specified in its charter and / or the laws under which it operates.

Specifically, a special district:

- is a unit of local government (i.e., a collegial body with authority to govern public services and facilities) created for a special-purpose;
- has jurisdiction to operate within limited geographical boundary; and
- is created by general law, special act, local ordinance, or by rule of the Governor and Cabinet.

Dependent special districts have at least one of the following characteristics:

- Its governing body members are identical to the governing body members of a single county or a single municipality;

- Its governing body members are appointed by the governing body of a single county or a single municipality;

- During unexpired terms, its governing body members are subject to removal at will by the governing body of a single county or a single municipality;

- Its budget requires approval through an affirmative vote by the governing body of a single county or a single municipality; and/or

- Its budget can be vetoed by the governing body of a single county or a single municipality.

A Dependant Special District may be created in the following ways:

i. The Legislature may create dependent special districts by special act;
ii. A county may create dependent special districts within its boundaries by ordinance, subject to the approval of the governing body of the incorporated area affected (if any); or
iii. A municipality may create dependent special districts within its boundaries, by ordinance.

Governance, Roles and Responsibilities

The *Palm Beach County Solid Waste Act*, which codifies the PBC SWA's Charter, Chapter 75-473, as amended, established the Solid Waste Authority as the countywide authority for the management of solid waste to meet the expanding problems related to the processing and disposal of solid waste within Palm Beach County.

The PBC SWA is defined by Florida law as a "Dependent Special District" and was created by the Florida Legislature. The Authority is governed by the seven elected County Commissioners of Palm Beach County, Florida which serve as its Board.

The existing internal organization consists of the Office of the Executive Director and the Office of General Counsel. Collectively, the Authority Board serves as the Agency Head and exercises regulatory and executive powers. The Executive Director administers the affairs of the Authority Board and serves as the Chief Executive Officer of the Office of the Executive Director. The administration of the affairs of the Authority Board includes the authorization to sign documents on behalf of the Authority as the responsible official or owner. This authorization includes compliance documents pursuant to existing permits and ongoing operations; applications for new facilities and operations consistent with Authority Board approval or budgetary appropriations; and contracts and financial documents as authorized by the Authority Board or pursuant to Authority Board approved policies.

The Office of the Executive Director has responsibility over three (3) areas of support services which can be generally described as (1) Operations, (2) Administration, and (3) Financial Services. These areas are administered by the Chief Operating Officer, Chief Administrative Officer and Chief Financial Officer respectively.

The Solid Waste Authority Citizens' Advisory Committee (CAC) serves the County as an advisory board to the SWA Governing Board. The eleven CAC members are appointed by the Governing Board with each Board member appointing one member from their district and the other four appointed at-large. The

CAC reviews, discusses and votes on important issues and decisions that face the SWA and the people of Palm Beach County.

The Rules of Governance of the PBC SWA govern the purpose, composition and organization of the Solid Waste Authority; the agenda and the scheduling of meetings and workshops.

Funding

The PBC SWA's system is funded through a system of user fees. The primary funding mechanism is the non-ad valorem special assessment that is included on the annual property tax bill of all Palm Beach County property owners. Additional revenue sources include tipping fees, electric sales, recycling revenue, and interest income.

The majority of the PBC SWA's initial facilities were financed with $420 million in revenue bonds issued in 1984 and 1986, and subsequent funding and refunding. The PBC SWA has a current annual budget of approximately $200 million.

The PBC SWA residential solid waste collection rates, which are included as a part of property tax assessments, are currently $156 annually for a single family home, $87 for a multi-family home, and $149 for a mobile home. These fees cover curbside collection of trash and recyclables and no-cost use by County residents of all household hazardous waste facilities.

Infrastructure

The PBC SWA manages and regulates almost all aspects of solid waste in Palm Beach County. The current PBC SWA system includes: one 2,500 ton per day a refuse-derived fuel (RDF) waste to energy facility, one landfill, a vegetation processing facility, an organics compost facility, two materials recovery facilities, six household hazardous waste drop-off facilities, five solid waste transfer stations, and over 150 public drop-off locations in the County, which are open to residents and businesses, most of which accept only paper and corrugated cardboard. All of these facilities are owned and operated by the PBC SWA, with the exception of the RDF facility, which is owned by the PBC SWA, but operated by a private vendor. The RDF produced is incinerated at a nearby Florida Power and Light power plant, for the generation of electricity.

The Palm Beach Renewable Energy Facility No. 1 was built in 1989. It is operated by Palm Beach Resource Recovery Corp., a subsidiary of Babcock & Wilcox Power Generation Group Inc., Barberton, Ohio.

Currently, Palm Beach County is divided by the PBC SWA into nine "waste collection districts." Private waste haulers bid on five-year contracts to provide waste and recyclables collection services to each of these districts. The waste hauler contracts establish fees for curbside collection and containers for each contract year, with built-in inflationary factors. Haulers are required, as a part of these contracts, to use disposal facilities specified by the PBC SWA.

New Waste to Energy Facility

When PBC SWA built its first waste to energy facility, the population of Palm Beach County was 600,000. Today that population has more than doubled to 1.3 million, and the state predicts the population could reach 1.7 million in the next 15 to 20 years. Ground broke on the Palm Beach Renewable Energy Facility No. 2 in April 2012. The new facility will use mass-burn technology and won't require the pre-processing of the RDF facility. SWA expects the new facility to be fully operational by June 2015.

2. Co-ownership Systems

The Durham York Energy Centre was the only regional waste to energy system that was created based on a co-ownership model. This model is used where two or more municipalities wish to come together to jointly provide services.

i. Durham York Energy Centre, Ontario

General Information

a. Location - Municipality of Clarington, Ontario (will serve both Durham Region and York Region in Ontario)

b. Service Method – Public-Public Partnership between 2 Regional Municipalities with a P3 operational model

c. Legislation – *Municipal Act*, *Environmental Protection Act*, *Environmental Assessment Act*, and the *Waste Diversion Act*

d. Financing

   i. Capital Costs: financed via the Federal Gas Tax Fund and contributions by each Regional Municipality

   ii. Operating Costs: revenue generation from sale of electricity and recovered metal sales. Tipping fees are not currently available

e. Operation - Public-Private Partnership with Covanta Energy Society

f. Population served - Durham - Current population of 644,910 across eight local area municipalities forecasted to reach 1 million by 2031. York - 1,032,524 in 2011

g. Website - http://www.durhamyorkwaste.ca/project/project_doc.htm

Municipal Solid Waste Service Delivery Methods in Ontario

Although the direct delivery model is one of the most common methods used in Ontario, the provincial government is pushing for alternative service delivery methods to be considered by municipalities.

Under the direct delivery method, the municipality has full responsibility for producing, funding and providing the service or program, normally using municipal employees. Most municipal services and programs are provided in this way.

The following are some of the more common alternative service delivery methods that are starting to be utilized in Ontario:

i. purchase of services
ii. municipal business Societies
iii. municipal service boards and other
iv. local entities
v. partnerships
vi. licensing;
vii. privatization

According to one 2009 study, the majority of Ontario municipalities operate their municipal solid waste departments within the municipal corporate structure and not as a separate sustainable financing entity. Only a handful of municipalities have jointly formed separate municipal solid waste organizations or associations to deliver services or raise funds.

Durham York Partnership

Durham and York Regions established a public-public partnership in June 2005 to responsibly manage residual waste not captured by the Regions' comprehensive recycling and diversion programs. Since that time, the Regions advanced the project through technology selection, site selection, impact studies, environmental assessment, exclusive public consultation, a competitive procurement process, site permitting and approvals.

A public-public partnership, generally speaking, is a relationship or intergovernmental agreement in which two or more jurisdictions, at any of the three levels of government, arrange to deliver public services or programs. The partnership can be achieved through shared services - a joint service agreement in which two or more jurisdictions act together to plan, finance and deliver a municipal service or program. For example, to achieve economies of scale or to capitalize on complementary expertise, the municipality and a school board might jointly develop and build a multiuse facility such as a combined school and public library.

This facility will be 100% publicly owned by the Regional Municipalities of Durham and York based on a 78.6% Durham and 21.4% York ownership proportion. The proportion is based on operating capacity of 110,000 tonnes annually by Durham Region and 30,000 tonnes annually by York Region.

On November 19, 2010, York and Durham received approval from the Minister of the Environment under the *Environmental Assessment Act* to proceed with design, permitting, construction and

operation of the Durham-York Energy Centre. The facility will have an initial processing capacity of 140,000 tonnes of residual waste from York and Durham Regions, while recovering recyclable metals and energy in the form of electricity and steam.

Due to the complexity of the operation, the Regions opted for a long-term operating contract with a privately-owned company specializing in energy from waste facilities. The company was selected based on a competitive procurement process and awarded to Covanta Energy Corp. The Regions' will retain oversight of the facility at all times.

Funding

Partial funding for the project was made possible by the federal Gas Tax Fund. This program provides municipalities with a source of stable and predictable funding for environmentally sustainable infrastructure, while also helping to stimulate economic development, create new jobs, and improve infrastructure to support economic growth and long-term prosperity. Municipalities may use this funding for infrastructure projects that contribute to cleaner water, air and reduced greenhouse gas emissions. This project falls under the Solid waste - thermal treatment and landfill gas recuperation category.

Through AMO, Ontario municipalities negotiated a unique agreement with the federal government that ensures the province's municipalities receive stable and predictable Gas Tax revenue on an annual basis, according to a per capita formula.

For the DYEC it appears that in addition to $100 million of up-front financing applied to project costs commencing 2011, financing approvals include application of annual Federal Gas Tax revenues, which are currently estimated at $17.6 million per year.

The remaining required financing for the capital costs was provided by Durham and York as follows:

- Durham's share is 78.6% ($215 M)
- York's contribution 21.4% ($68 M)

The estimated gross annual operating costs for the facility are approximately $14.7 million.

The estimated revenue generation from sale of electricity is anticipated to be approximately $8.5 million annually and will help offset the annual operating costs.

The estimated revenue from recovered metal sales is between approximately $250,000 to $750,000 annually, depending on commodity market prices. These recoveries will also help offset the annual operating costs.

Approval Process

The Ontario Ministry of the Environment (MOE) is responsible for the approval, licensing and monitoring of waste management operations in Ontario.

Three provincial Acts also relate to waste management in Ontario:

- *Environmental Protection Act* (EPA) authorizes the Ministry of the Environment to establish liability on the party who have failed to take all reasonable care to prevent the release of pollutants into the environment.

- *Environmental Assessment Act* (EAA) requires an environmental assessment of any major public sector undertaking that has the potential for significant environmental effects.

- *Waste Diversion Act* (WDA) mandates the development, implementation and the operation of waste diversion programs — to reduce, reuse or recycle waste. This Legislation determines what and how the DYEC recycles, and has a significant impact on many of the waste diversion programs in the Regions.

The Ontario Ministry of the Environment gave an approval of the Environmental Assessment and Notice to Proceed with the undertaking of the project in November, 2010.

In 2011, the DYEC was issued a Certificate of Approval by the Ontario Ministry of Environment.

Management Committee

As per the Co-Ownership Agreement between Durham and York, the construction and operation of the DYEC is to be overseen by a Management Committee comprised of the following or their designates:

- Durham CAO
- York CAO
- Durham's Commissioner of Works
- York's commissioner of Environmental Services
- Durham's Commissioner of Finance
- Durham's Regional Solicitor
- York's Regional Solicitor

Waste Management Advisory Committee

A Region of Durham Committee which meets to provide a forum for public and other stakeholders to monitor, review and liaise with the Region of Durham on the Energy from Waste facility including how the waste is being sorted prior to arriving on-site. The EFW-WMAC acts in an advisory role to the Durham Works Committee on issues or concerns which arise with waste division, waste management, environmental performance and monitoring of the waste to energy facility, including the construction and operational phases.

The Committee is comprised of nine voting members who are made up of five residents appointed by Durham Regional Council and four residents appointed by Clarington Council.

The Committee also includes the following non-voting members:

- Staff representative from Durham's Works Department
- Staff representative from Durham's Health Department
- Staff representative from the Regional Municipality of York
- Staff representative from the Municipality of Claringto
- Staff representative from the Ministry of the Environment
- Senior staff representative of the facility's design, build, operate (DBO) contractor and operator
- Ward 1 Local and Regional members of Clarington Council

Covanta

Covanta Energy Society is the full service contractor to design, permit, build, start up, commission and operate the 140,000-tonne-per-year facility for Durham and York Regions. Covanta is the largest provider of energy from waste services in North America, with 41 operating facilities in the United States, including 24 that were designed and built directly by Covanta.

Durham Region, York Region and Covanta have created a Limited Partnership for the facility.

Lessons Learned in Establishing a New Waste to Energy Facility (according to DYEC)

In order to be successful, the municipality needs:

- A project champion (Regional Chair)
- Dedicated staff with decision making authority
- Small team of experts
- Recognition that waste to energy is part of a waste management system
- Time (lots of it!)

P3 Model

According to Durham/York representatives, a P3 Model was chosen for this facility because:

- Not a business they had expertise in
- Exact technology unknown
- Shift design/build/operate risk to the private sector
- Design/Build/Operate (but municipally financed and owned)

P3 worked for DYEC by providing:

- A lump sum price

- A balance of building, operating and life-cycle risks
- Patents, expertise and experience

3. Extended Municipal Services

The Peel Region Energy Recovery Centre was the only system researched that utilizes an extended municipal services model. This model is used where one or more municipalities with existing systems extend their operating region to encompass surrounding municipalities and provide inter-municipal waste services.

i. Peel Region Energy Recovery Centre, Ontario

General Information

a. Location - Brampton, Ontario

b. Service Method – Design, Build, Operate, Maintain Contract delivery model

c. Legislation – *Municipal Act*, *Environmental Protection Act*, *Environmental Assessment Act*, and the *Waste Diversion Act*

d. Financing – funded in part by the sale of recovered metals and energy, tax dollar and possibly also by accepting commercial waste from businesses within Peel

e. Ownership – it appears that the facility will be owned by the municipality

f. Operation – not yet determined

g. Population served: 1.3 million

h. New Peel Energy Recovery Centre is currently in the Planning and Approval Stage – expected to be operational by 2020

i. Website - http://www.peelenergyrecovery.ca/

Status of Project

According to the Project's website, the Recovery Centre appears to be spearheaded by Council for the Region of Peel, a municipality in the Province of Ontario. Our emails and calls to representatives of the Project for further information regarding the systems planned governance model were not returned.

On May 29, 2014, it was announced that the Region had begun the provincially regulated Environmental Screening Process. The Environmental Screening process identifies and addresses the potential impacts of the project on the community and the environment. Residents, businesses, community groups,

Aboriginal groups, government agencies and other interested parties will be consulted during this process.

Funding

According to the Project's website, the project will be funded in part by the sale of recovered metals and energy, tax dollars (as a portion of municipal taxes go towards waste management services for the Region of Peel) and possibly also by accepting commercial waste from businesses within Peel.

Project Schedule

Project Planning, Procurement and Approvals began in early 2013 and will be completed by early 2017. Design and construction is expected to start in 2017 and the new Centre is expected to be operational by mid-to-late 2020.

On Friday, August 16, 2013 the Region issued an Request for Pre-qualifications to identify which Energy-From-Waste Technologies would be used for the Peel Energy Recovery Centre as well as which Respondent Teams would be prequalified to participate in the next stage of the procurement process. Four Respondent Teams were prequalified to design, build, operate and maintain the Peel Energy Recovery Centre using Mass Burn Combustion Technology. Members of each team included:

a. Covanta Energy Society on behalf of a Society to be incorporated under the name of Covanta Peel Renewable Energy Ltd.

b. SNC-Lavalin Capital Inc.;

c. Babcock & Wilcox Power Generation Group Inc.

d. AECOM Canada Ltd.; and

e. Wheelabrator Technologies Inc.

Contract Delivery Model

In a June 27, 2013 Report to Council, staff advised that it had completed a detailed comparison of the DBOM (Design, Build, Operate, Maintain) and DBFOM (Design, Build, Finance, Operate, Maintain) contract delivery models to determine which model best suited the proposed Peel Energy Recovery Centre.

Staff advised that the findings of the detailed assessment suggested that, while either contract delivery model could be used, the DBOM model was better suited for this project since it was less complex, offered a more straightforward procurement process, provided increased flexibility and allows the project to be delivered in less time than a DBFOM model.

It was noted that one significant advantage of using the DBOM delivery model is that it allows Peel to proceed immediately with procurement without the need to wait for the negotiation and approval of a P3 Canada funding agreement. Based on these findings, a DBOM contract delivery model will be used for the proposed Peel Energy Recovery Centre.

4. Joint Agreements

When the Spokane Regional Solid Waste System was first created, it utilized a joint agreement model between the County of Spokane and the City of Spokane. Recently, the joint agreement expired to reduce costs and ensure ongoing efficient operations.

i. Spokane Regional Solid Waste System, Washington

General Information

a. Location - Eastern Washington State

b. Service Method – Public-Public Partnership between 2 Regional Municipalities with the City of Spokane now operating the waste to energy facility.

c. Legislation – *Revised Code of Washington* and the *Interlocal Cooperation Act*

d. Financing – Revenue Bonds - Mandatory debt to entire County; Department of Ecology Grant ($60 million)

e. Ownership – the Regional Solid Waste System will soon be owned by County with the City of Spokane retaining ownership of the Waste to Energy Facility

f. Operation – Full service contract with Wheelabrator Spokane, Inc. to design, construct, operate and maintain for 20 years at 100% profit margin

g. Population: 470,000

h. Governing body: Liaison Board (elected County and City officials, representatives of small communities)

i. Website - www.solidwaste.org

Regulation of Solid Waste Management in Washington

The Revised Code of Washington (RCW) is the compilation of all permanent laws now in force in Washington. It is a collection of Session Laws (enacted by the Legislature, and signed by the Governor, or enacted via the initiative process), arranged by topic, with amendments added and repealed laws removed. It does not include temporary laws such as appropriations acts. The official version of the RCW is published by the Statute Law Committee and the Code Reviser.

While Washington cities and counties have primary responsibility for managing solid waste collection and disposal, they are not required to directly provide those services (see RCW 35.21.120, RCW 35.21.130, and RCW 36.58.040). The statutes do not mandate that all residents and businesses must have their trash collected by a public or private hauler.

The Washington State Department of Ecology prepares an Annual Solid Waste Status Report as part of its process to monitor progress toward the statewide purposes and goals of Ch. 70.95 RCW and to adopt rules establishing minimum functional standards for solid waste handling. Further, RCW 70.95.080 requires each county within the state, in cooperation with the various cities located within such county, to prepare a coordinated, comprehensive solid waste management plan. The statute encourages joint solid waste planning between and among adjoining cities and counties.

Solid Waste Collection and Recycling Service Options

Cities and counties have the following options with regard to solid waste collection (including recycling):

a) WUTC Sets Rates and Service Area - If a municipality does not provide collection service or contract for such service, the Washington Utilities and Transportation Commission (WUTC) sets the service area and rates for private firms that may wish to serve the municipality.

b) Municipality Collection Service and Billings - A municipality provides municipal collection service and billings.

c) Municipality Contracts with Another Municipality - Under the Washington State *Interlocal Cooperation Act*, Ch. 39.34 RCW, a municipality can contract with another local agency, city or county for solid waste collection services. Only very small cities are using this option.

d) Municipality Contracts with Private Firm with Municipality Controlling Billings and Rates - Municipality contracts with waste hauler for collection and recycling services, but continues to do billings and control rates.

e) Municipality Contracts with Private Firm with Municipality Only Controlling Rates - Municipality contracts with waste hauler for collection and recycling services, waste hauler does billings, but the Municipality controls rates.

f) Municipality Licenses or Franchises Private Firm - Municipality grants franchise or license to a waste hauler or haulers, with WUTC control over rates and billings.

<u>Governance, Roles and Responsibilities</u>

The Spokane Regional Solid Waste System (SRSWS) was created by Inter-local Agreement between Spokane County and the City of Spokane on October 11, 1988. All ten of the existing regional cities and towns, as well as Fairchild Air Force Base, subsequently joined the System by executing inter-local

agreements with the City and County of Spokane. In 2003, the newly incorporated cities of Liberty Lake and Spokane Valley also executed Inter-local agreements and joined the System.

The system used to operate as a department of the City of Spokane's government which managed solid waste facilities and contracts for the benefit of all citizens residing in Spokane County. The concurrence of the County was required for certain major decisions. A Liaison Board was established by Inter-local Agreement in 1987. Its purpose was to recommend policy and provide direction on matters pertaining to the management of solid waste and related environmental issues in the incorporated and unincorporated areas throughout Spokane County. Areas of responsibility included recycling/waste reduction, composting, solid waste disposal, household hazardous waste and litter programs. The Liaison Board was also responsible for monitoring capital assets and recommending capital improvements of the System.

On November 17, 2014, the Interlocal Agreement expired and Spokane County became the lead agency for the community's solid waste disposal system. The County is now responsible for maintaining the comprehensive solid waste management plan for Spokane County. Spokane County also owns and operates the Spokane Valley and North Spokane Recycling " Transfer Stations.

Meanwhile, the City of Spokane now owns and operates the Waste to Energy Facility and the recycling and solid waste disposal center located at the plant. The facility is operated by the City's Solid Waste Disposal Department. The City took over operations of the plant also in November 2014 to reduce costs and ensure ongoing efficient operations.

Funding

The SRSWS operates via an enterprise fund, which is funded through disposal fees, electricity sales, interest, grants and the sales of recyclables. Disposal fees are collected from residents, businesses, and haulers and at the waste to energy facility and SRSWS transfer stations.

Under the 1988 Interlocal Agreement the City of Spokane was obligated to finance certain SRSWS capital improvements and to handle solid waste disposal and related functions for the City of Spokane and other participating local government jurisdictions in incorporated and unincorporated areas of Spokane County. As specified in the Interlocal Agreement, revenue bonds were issued by the City of Spokane to pay for system capital purchases, including the waste to energy facility and transfer stations. Spokane County guarantees revenue through the County's flow control ordinance backed by the County's general fund. The Interlocal Agreements guarantee revenue by directing the regional cities to bring their solid waste to SRSWS facilities.

The facility also received a $60 million grant from the Department of Ecology.

Solid Waste Advisory Committee

Under the RCW, Chapter 70.95.165(3) (Public Health and Safety) each county must establish a solid waste advisory committee.

In 1985 the Spokane County Board of Commissioners established the Solid Waste Advisory Committee (SWAC). The SWAC is assigned the task of assisting in the development of programs and policies concerning solid waste handling and disposal and reviewing and commenting upon proposed rules, policies or ordinances prior to their adoption.

Reasons for Governance Model Chosen

The governance system was established to allow all partners in the System to have a voice in the decisions, with the primary participants-- City of Spokane and Spokane County-- having the greatest voice due to their larger populations and their greater financial risk.

Under Washington State law, Counties have the responsibility and authority to provide disposal services and solid waste planning to their citizens. Spokane County delegated that responsibility to the City of Spokane through the interlocal agreement in exchange for the City's bonding of the construction costs and operation of the facilities, as detailed below. When the bonding was retired, the County and the City wished to retain their responsibilities as outlined under State law, therefore the interlocal agreement was amended.

Bonds needed to be issued to fund the construction of the waste to energy facility, 2 transfer stations, and the closure of the old landfills. The City of Spokane had experience operating disposal facilities, as well as a greater bonding capacity than the County at that time, and an existing solid waste collection utility that stood as the guarantor of the bonds. As the holder of the bonds, it was agreed that the City would own and operate the facilities. In exchange, the County agreed to direct all waste in the unincorporated areas of the County to the City's facilities through a flow control ordinance.

The bonds that financed the System were retired at the end of 2011. At that time, Spokane County wished to recover their authority to provide disposal services. In November 2011, the existing Interlocal Agreement was amended to include an expiration date. The date was set for 3 years out, November 16, 2014, to allow the City and County adequate time to transition to the new system.

Infrastructure

SRSWS owns and operates one waste to energy facility, three recycling facilities, a household hazardous waste facility, two transfer stations, and a 10-acre landfill mostly for construction and demolition waste. Municipal solid waste and recyclables from the region are delivered to SRSWS transfer stations or directly to the waste to energy facility. Only bypassed and non-processible municipal solid waste is transported outside the regional system for disposal. There is no cost for drop-off of recyclables and household hazardous waste at SRSWS facilities. The tip fee at the waste to energy facility is $98 per ton. Other SRSWS responsibilities include planning and education and assistance for recycling and waste reduction, composting, solid waste disposal, household hazardous waste, and litter programs. Waste collection and hauling, is a combination of private, municipal contracts, and municipally-operated approaches.

5.3 Observations or "Take-Aways" of Researched Facilities

Based on our research, we determined that there were common themes associated with each successful regional waste management system. Our "take-aways" from this research were as follows:

- No two waste management "regions" are alike;
- All governance models have some form of "Board of Directors" with varied decision making authority and representation;
- The governance structures for regional waste management systems are quite variable;
- Some form of a waste management hierarchy is a universally accepted component of regional solid management systems;
- Several regional systems were established in the 1970's, or earlier; and
- Most regional waste management systems are defined by political boundaries, not by "watersheds".

6.0 RECOMMENDATIONS

SUMMARY

Based on our research of other waste to energy facilities as well as the answers received from those who participated in the questionnaire, it is our recommendation that the most appropriate governance model for the waste to energy facility is a **corporation** created pursuant to the *Business Corporations Act*.

Utilizing a corporation governance framework will work best for SAEWA and its members because of the following factors:

1. **Corporate Entity** – A corporation under the *Business Corporations Act* will be created as a municipal waste corporation;
2. **Shareholder Percentages** – There will be a dual share structure:
    a. **Voting Rights** – All voting rights at the shareholder level will be equal, with no Participant having greater rights than others. Each will have one Class A, Common Voting Share;
    b. **Profit Entitlement/Capital Contribution Obligation** – Each Participant will be issued such number of Class D Common Non-Voting Shares which is equal to that percentage of the volume of Waste Feedstock that is provided. The greater the percentage, the greater the right to receive a percentage of profits and the greater the responsibility to pay capital contributions;

3. **Board of Directors** – A board structure of between 7 and 15 directors is chosen. There should be no mandatory obligation that all directors be elected officials. The voting of these directors should occur at a zone level, because if done as a general election, there is a chance that a particular region will not have adequate representation;

4. **Council Control** – Done in three ways:

    a. Election of Directors – The directors should be cognizant of each Participant's input on certain key issues;

    b. Participant Voting - Certain key votes such as approval of business plans, capital budgets, appointment of auditors, acceptance of new members will be voted on by each Participant on a one vote, one Participant basis;

    c. Passage of Policies – the Participants shall pass a binding policy on certain matters that must be followed by the MWC.

5. **Allocation of Risk** – The matter as to who bears what portion of the risk, is to be determined still.

These factors are discussed in further detail below.

6.1 Municipal Waste Corporation

We recommend the creation of a corporation pursuant to the *Business Corporations Act*.

Although there is no such thing as a "municipal utility corporation" in the *Business Corporations Act*, this legislation is flexible enough that municipalities have colloquially referred to them as "municipal utility corporations". This is what we recommend. For the purpose of this section, we will call it the municipal waste corporation ("**MWC**").

In making this recommendation, we have investigated all possible types of legal entities to create. As outlined above, we also investigated other non-Alberta waste to energy options and how they were created and how they are governed. We have found that for the most part, those other jurisdictional corporations do not pose any advantage over the MWC option and what can be accomplished by proceeding with the MWC under the *Business Corporations Act*. The MWC can be created with enough features and flexibility that it can be used to the advantage of SAEWA and its stakeholders.

As discussed previously, the key advantages and features of the MWC are:

i. **Profits** – any profits that are earned may be paid out to each Participant. This is the only corporate model where this is possible.

ii. **Council Input** – This can accommodate both the direct input from Councils on certain strategic matters that go to the core and vision of the MWC and also leave day to day

decisions to a Board of Directors. This is the model that best accommodates council input. The *Business Corporations Act* expressly permits the shareholders of these entities to make decisions instead of the Board of Directors. When the shareholders make the decisions, they are made by council. Other corporate models can only do this imperfectly.

iii. **Recognized Utility Model** – There are numerous examples of Alberta municipal utility corporations being created in this manner. For example, see:

a) ENMAX (owned by City of Calgary);
b) EPCOR (owned by City of Edmonton);
c) Aquatera (owned by City of Grande Prairie, County of Grande Prairie, Village of Sexsmith);
d) Chestermere Utilities Incorporated (owned by City of Chestermere);
e) Alberta Central East Water Corporation (owned by 13 municipalities in central Alberta);
f) Sheep River Regional Utility Corporation (owned by Town of Black Diamond, Town of Turner Valley, MD of Foothills and Village of Longview);
g) NEW water Ltd. (owned by Northern Sunrise County, Village of Nampa, Woodland Cree First Nation).

iv. **Financing** – As an entity created under the *Business Corporations Act*, this is a vehicle that most lenders are most familiar with. This will allow all subsequent financing to proceed easier.

v. **Share Ownership** – As parties will have shares issued to them, it will be possible to: transfer shares; cancel shares; issue new shares to parties; recognize a change in proportion; remedy default scenarios; or give a party a greater proportionate ownership. This is the best model for share ownership.

vi. **Commissions can Participate** – Commissions can be a shareholder of the MWC. The Department of Municipal Affairs has approved of the Waste Commissions participation in the MWC.

vii. **Proportionate Ownership**. This entity can be used to give both a one member, one vote model as well as proportionate entitlement on a "burden/benefit" basis. This is the only model to recognize this duality.

viii. **Public-Private Partnerships** – Should the MWC feel that it is advantageous to proceed with a Public-Private Partnership (P3), it can directly contract with the private partner to provide waste services. It may also be eligible for federal funding pursuant to the P3 Canada Fund. This is most easily accomplished with the MWC.

ix. **Freedom to Sell Assets** – No Ministerial approval will be needed for the MWC to sell any of its assets.

No other corporate entity provides as much flexibility as the above.

6.2 Allocation of Risk

Any discussion on an appropriate governance structure must recognize how to appropriately allocate risk to the stakeholders. The biggest risks in this project will be financial risk, operational risk and environmental risk (although environmental risk will be a subset of operational risk).

This pursuit has the potential to be a risky venture, as there will be a significant capital outlay to build and construct the WTE Plant. Once it is built, there will also be a significant risk to ensure that it will have sufficient revenue to satisfy ongoing financial obligations.

The question remains as to who should bear this risk. It can be borne solely by the MWC, by the participants of the MWC (the "**Participants**"), or shared equally. The allocation of risk is best viewed on a spectrum. There is no right or wrong option – it depends on the most appropriate level of risk to all parties:

The options are:

a. **Most Risk to Participants** – All risks will be borne by the Participants. This will entail:

   i. All customers guaranteeing a supply of a certain quality of waste feedstock, appropriate for the WTE Plant to process ("**Waste Feedstock**") to the MWC and if they do not provide this, paying a deficiency payment, via a "Put or Pay Contract"[63];

   ii. All Participants either borrowing the money themselves and paying this to the MWC for the construction of the WTE Plant or guaranteeing the loans of the MWC to its lenders such that if there is a default, the lenders can also pursue the Participants;[64]

   iii. All Participants being obligated to provide capital contributions and/or cash calls from time to time for capital purchases. This cannot be done for ongoing operations;

   iv. Allowing the WTE Plant to be most easily financed by third party lenders, as the guarantees for the supply Waste Feedstock, the loan guarantees and contractual obligation to provide deficiency feedback will give the MWC a creditworthiness that would be not as strong otherwise;

   v. Operational responsibility remaining with MWC. It will also design and build the WTE Plant.

OR

[63] A "put or pay" contract will be discussed in greater detail in Appendix A to this Report.
[64] There are limitations for the Waste Commissions being able to do this. A workaround is discussed later in this report.

b. **Most Risk to MWC** – MWC assumes full financial responsibility and full operational responsibility. This entails:

   i. MWC doing a design, build and operate of the WTE Plant;

   ii. MWC solely financing the WTE Plant without any loan guarantees from the Participants;

   iii. Participants providing Waste Feedstock to the MWC for processing, but having no contractual obligation to either ensure a predetermined supply of Waste Feedstock or pay a deficiency payment. Participants will be free to decide to provide their Waste Feedstock to the MWC or will be free to choose another processor;

   iv. No loan guarantees granted by the Participants for any financing for the WTE Plant;

   v. No obligation of the Participants to provide capital contributions/cash calls;

   vi. This is the hardest model to finance, because there is no track record of success and there will be less recourse by the lenders.

OR

c. **Shared Risk** – This will fall somewhere within the middle. It can be a combination of the above. Likely the best scenario would be:

   i. Participants not being obligated to enter into Put or Pay Contracts. Rather, the MWC must make it attractive enough to each Participant and non-members to want to provide their Waste Feedstock to the WTE Plant.

   ii. If there are any shortages in supply of Waste Feedstock, the MWC will have to either:

      1. Increase its tippage fees for future supplies of Waste Feedstock; or

      2. Find an alternate source of additional Waste Feedstock;

   iii. Participants will be obligated to either/both:

      1. Cash Calls - Provide cash calls/capital contributions on an as needed basis for capital projects. This would not be a fundamental aspect of the MWC's business plan, but rather, would be there as a backstop in the event that capital funding is needed. The mere existence of the chance that a cash call could be called, will not count against municipal debt limits. This is logical to pursue, as the Participants will have a vested interest to ensure the success of the MWC and if it requires a capital injection to continue, those

who will benefit from the Participants should be those responsible to ensure that it will continue to succeed; and/or[65]

2. Loan Guarantees. In order to secure third party financing or obtain better financing terms from lenders due to the increased security, each Participant will be obligated to provide a loan guarantee of MWC's indebtedness to a certain amount. The granting of any guarantee will count against each debt limit.[66]

6.3 Allocation of Shares/Proportionate Ownership

There was a strong desire from most responses (but not unanimous) that there be a "one member, one vote" decision-making model. However, it has also been our experience that once major utility projects are operational, that a "burden/benefit" structure be established such that those players with a larger use on the system should have a greater obligation to contribute to capital, have a greater right to use the system and have a greater right to receive dividends. Both can be accomplished as follows:

a. **One Member, One Vote** – We will issue one Class A Common, Voting Share to each Participant. When certain matters are placed before Participants for a shareholder vote, each shareholder will have an equal vote, notwithstanding the population, geographic size, or volume of Waste Feedstock produced.

b. **Proportionate Recognition** – There will be a differential number of Class D Common, **Non-Voting** shares issued to each Participant in accordance with an estimate of Waste Feedstock produced by each Participant. For example purposes, assume that Member A produces 1,500 tonnes of Waste Feedstock annually and Member B produces 500 tonnes of Waste Feedstock annually. This determination will be used for:

   i. Proportionate Cash Call obligation – Member A will need to provide 3X as much of a cash call than Member B. This will be equitable as Member A will subject the WTE Plant to three times as much wear and tear as Member B;

   ii. Profit Entitlement – Member A will be entitled to 3X as much of the profit as Member B is entitled to.

   iii. Entitlement to Use – If there is ever a reason why there will be a limitation as to the volume of Waste Feedstock to be provided, Member A will be entitled to provide 3X as much Waste Feedstock as Member B.

[65] There are limitations for the Waste Commissions being able to do this. A workaround is discussed later in this report.
[66] There are limitations for the Waste Commissions being able to do this. A workaround is discussed later in this report.

This system will require an allocation of Class D, Common Non-Voting shares based on the predetermined volumes. A projected analysis for future Waste Feedstock delivery will need to be done and then the number of shares can be allocated proportionately. This can be reviewed periodically (ex. every 5 years) and the number of Class D, Common Non-Voting Shares can be readjusted.

If there is ever a dissolution of a Participant and a former Village (for example) rolls into a County or Municipal District, there will be clauses in the MWC's constitutional documents that the surviving County will not have 2 Class A, Common Voting Shares. It will state that the previously issued Class A, Common Voting Share to that dissolving Participant will be forfeited and redeemed. This is important in order to preserve the "one member, one vote" decision-making model.

6.4 Constitution of Board Of Directors

The Board of Directors will make most day to day decisions, subject to any restrictions imposed upon them by the MWC's constitutional documents.

Qualifications of Directors

Many questionnaire responses have indicated that they wish the Board of Directors to be limited to councillors only. A few questionnaire responses have indicated that they do not want elected officials to sit on the Board of Directors. There is no unanimous consensus on this point.

Given the lack of unanimity and prior experience in advising these types of entities, our recommendation is to not limit eligibility for the Board of Directors only to elected officials. It should be flexible enough to permit both elected officials and non-elected officials to sit on the Board of Directors. This is not to suggest that elected officials should be prevented from sitting on the Board. However, the status of being an elected official should not be the sole determining factor.

We say this due to the possibility that there may not be sufficient expertise for an elected official at a particular time, should there need to be some technical knowledge required. We are aware of many other utility projects where, at any particular time, not all elected officials are sufficiently skilled in the technical capabilities of a project. As such, their decision making has been one of "following the herd" because they do not have the technical knowledge to make the best decision. At these crucial times, it may instead be worthwhile have a non-elected official sit on the Board of Directors.

Additionally, there may be times of great flux if a substantial portion of the Board of Directors are either defeated as elected officials or the municipalities that appointed that person are not re-appointed at the organizational meeting.

Size of the Board

It is not recommended that each Participant be entitled to appoint a director to the Board of MWC. Although this option may initially make sense, as it will provide each Participant a voice at the decision

making, numerous governance studies have indicated that this leads to ineffective boards.[67] Studies show that larger boards usually end up with an executive committee making all key decisions. We understand that this is how SAEWA is currently operated. Options are:

a. Large Board with Executive Committee; or

b. Smaller Board, but more effective. This should be between 7 and 15 directors. This Board could split into further smaller committees, but all committees would need to report back to the Board

Election of Board of Directors – Assuming that a smaller board size is chosen, there are two ways to proceed. They are:

a. **General Election by all Participants –** This would be done on a one member, one vote manner. People will be nominated and a general vote will occur. There is always a risk that there will not be a director nominated by a particular zone.

b. **Zone Voting** – The Participants will be split into zones and an election will be done that way. The zone system could be split approximately into the same geographic zones as the Regional Waste Commissions. Each member of each zone will have the same number of votes to elect a director as each other member.

We would recommend that a system of zone voting be done. By proceeding solely with a general election only, there is always a risk that there will be a region that is not represented on the Board of Directors. By doing so, this could result in those parties not feeling duly represented and not being a recognized stakeholder in the MWC.

Further, if directors are elected by zones, then if there is an unhappiness by that particular zone, they will have the right to replace that director as the zone sees fit.

6.5 Council Control Over Operations

There was a common theme from the questionnaires that there be some aspect of Council control over the MWC. Although the answers to the questions above indicated that many did not want Council control over operations, many of these responses did provide a subsequent indication that this is what they wanted. Additionally, most of the responses from the municipalities did indicate that they wanted Council control. It was mostly the Waste Commissions and Authorities who indicated that they did not wish council control. Although this sentiment is not to be discounted or devalued, ultimately, all municipally controlled entities exist for the very purpose of providing a service that is established for municipalities and by municipalities. Accordingly, the municipal wishes must be recognized.

[67] For example, see *Size Matters: Right Sizing Your Board of Directors* http://dorgerconsulting.com/2011/07/20/size-matters-right-sizing-your-board-of-directors/ and
Hot Topics & Recent Columns - What is the Right Size for Your Nonprofit's Board?
http://www.sumptionandwyland.com/index.php?option=com_content&task=view&id=40&Itemid=57&rid=83

Council control over the affairs of the MWC can be exercised in three manners:

a. **Councillors Sitting on Board** – This is a common manner of controlling the operations of a municipally controlled entity. However, when councillors sit on the Board, they usually act on the instructions of the council. There are two problems with this:

   i. **Problem #1** – Directors owe a fiduciary duty to act in the best interest of the organization where they sit on the board. Further, Directors cannot fetter their discretion to others. If a director acts solely on the instructions of their council, they may not be discharging their fiduciary duty and could be personally liable for their actions;

   ii. **Problem #2** – As it is likely that not every Participant will be able to appoint a director and rather, it will proceed with a zone voting system, most Participants will not have a councillor on the Board. Under those scenarios, they are not represented.

b. **Direct Shareholder Votes** – The governance structure can be set up such that there will be a vote of each Participant on certain key items, such as:

   i. Capital budgets – The MWC cannot implement a budget until it receives a simple majority (or perhaps 2/3) of the Participants. This is a common requirement of controlling expenses and also addressing capital requisitions;

   ii. Business plans – The MWC cannot implement a particular business plan without the approval of a simple majority of the Participants. This way the MWC cannot deviate from its original plans without obtaining the approval of a majority of the Participants;

   iii. Operating budgets – this is less common. As long as the capital budgets are contained, the expenses for operating on a day to day basis can be controlled by the Board of Directors. However, there are still organizations that have approval of operating budgets, but these organizations do not usually have as many members as the MWC will have.

   These Participant/shareholder vote would be on a one vote, one Participant basis. There appears to be little desire to have a weighted vote.

c. **Passage of Binding Policies** – Although the Participants cannot be involved in day to day decision making, they can establish the parameters of how the decision making is to be made. They can pass policies governing how the MWC will make certain key decisions. A list of policies that can be passed to bind the MWC is listed on Appendix B.

   Of these policies that are listed, none are mandatory and should they be desired, none are initially required at startup. Some may never be required or needed. However, the

inclusion of this list of policies is to make people aware of the types of policies that the Participants can impose upon the MWC as binding.

The governance and constitutional documents will be created such that the MWC will not have the discretion to choose not to follow them - if the Participants impose this requirement upon the MWC, it must be followed, without deviation.

Some common policies that should be implemented are:

i. Borrowing – set forth the limits and types of borrowing the MWC can do;

ii. Acceptance of new members – how new members may join the MWC;

iii. Default – how and should the MWC and other Participants enforce a default against one of their own.

6.6 Steps to Create the Municipal Waste Corporation

The creation of the MWC will involve the following steps:

1. **Membership** – Decisions will need to be made regarding which Participants (i.e. Commissions, authorities) are in and which are out.

2. **MOU and Interim Agreement** – During the planning and implementation stage of the creation of the MWC, a MOU and Interim Agreement should be entered into between all the Participants which will govern:

    a. **Striking of governance committee** – To empower the committee to be able to work through the minute details of the governance. It will liaise with the legal consultants, project consultants and others and finalize the structure for the governance, ownership and legal structure. It will report and make recommendations to all Participants on the final minutiae and details. The final acceptance of each recommendation is within the absolute discretion of each Council/Board of Directors;

    b. **Striking of technical committee** – To empower the committee to be able to make all technical decisions about the planning and construction of the Plant without having to continuously seek approval of the others on all decisions made. Once all technical details are finalized, the final decision about whether to proceed or not will be subject to each Council/Board of Directors. It will be the group that will work with the project planners and engineers;

    c. **Approval of all Documentation** – The governance committee and/or technical committee will work through the completion of:

i. Co-ownership agreements;

ii. Service Agreements – these agreements will regulate how the MWC will provide services to each Participant;

iii. Financing Agreements – this will be for such loan, banking and security or other agreements to facilitate the financing of the project.

Once these agreements are finalized, they will be presented to each Council with the recommendation that they be signed. Of course, each Council has the discretion to not do so.

d. **Payment of Interim Costs** – Until the Project is finalized and fully operational, this will set forth the proportionate cost sharing of the interim steps;

e. **Appointment of Managing Party** – This will appoint a lead managing partner, to guide the process through until it is fully implemented and operational;

f. **Interim Reporting** – This will state who is to report to whom and what information is to be provided, such that all Participants are fully informed and aware of what is occurring;

g. **Non-Binding Nature/Exits** – The MOU will indicate that the involvement of each Participant is not binding and that each Participant will have the option of departing from the Project during the planning stages. Eventually, there will be a need for the Participants to unconditionally agree to participate in the Project, but this commitment will not be required until after the final business terms are complete and the financial obligations are known and settled. Once the Project is complete (i.e. the siting of the WTE Plant is known; the financing of the WTE Plant is clear; the expectations of each Participant is known; and the technology to use in the WTE Plant is known), then each Participant will then be expected to either fully commit or walk away. Participation it the Project earlier does not mean that a Participant cannot back out prior to this point in time.

3. **Ministerial Application** – Pursuant to Section 73 of the MGA and the *Control of Corporations Regulation*, an application must be submitted to the Minister of Municipal Affairs for the approval to create the MWC. This application must include:

a. Business Plan – A proposed business plan, with cash flow projections for the first 3 years of the MWC's operations (or such further period of time that the Minister would like to see). It is our experience that the financial projections are what the Minister's office will most carefully scrutinize;

b. Assurances to the Minister – Assurances which show:

i. This is for a valid municipal purpose;

ii. This will provide a regional municipal service;
iii. No assets outside of Alberta will be owned;
iv. MWC will be financially independent and will not be reliant upon subsidies or requisitions from the Participants;
v. This will provide a direct benefit to each Participant and that the profits will be for the general benefit of each Participant;

c. Participant Approval – Each Participant must provide either a certified Council resolution or a certified Board resolution approving of both the governance structure and the rate structure of the MWC;

It is likely that this approval process will take between 9 months and 18 months after it is submitted.

4. **Governance Documentation** – the following documentation will need to be prepared for the creation of the MWC:

a. Articles of Incorporation – This will establish the share structure of the MWC. At a minimum, it will need to restrict the issuance of dividends on the Class A Common Voting Shares (because those shares are not proportionately issued) and that dividends are to be declared on the Class D Common, Non-Voting Shares (where there is proportionality). Additionally, it will state that no dividends are to be declared on the Class E Common, Non-Voting Shares, as further indicated in Schedule C;

b. Corporate Bylaws – This will set forth the procedures for holding Board meetings and shareholder meetings;

c. Unanimous Shareholder Agreement ("**USA**") – This is the binding, membership agreement amongst the Participants. It will address such matters as:

i. Election of Directors in zones and how voting will occur;

ii. How capital contributions/cash calls are determined to be necessary and who has to contribute what;

iii. Limitations on taking on of new Participants and the procedure for same;

iv. Dispute Resolution Procedure for resolving non-event of default disputes between members. We recommend a procedure of:

1. Negotiation – parties in dispute will meet and try to amicably resolve their dispute;

2. Mediation – if there is no resolution after the negotiation, the parties will proceed to non-binding mediation to find a mutually agreeable resolution to dispute; and

3. Arbitration – Parties will proceed to binding arbitration

v. Events of Default – What constitutes a default and what remedies are available if a default has occurred;

vi. Departure of Members – What each Participant is entitled to, if anything, if a Participant decides to depart from the MWC;

vii. Binding Effect of Policies – This will make those policies passed by the Participants binding on the MWC;

viii. Direct Council Control – what matters will be decided upon by the Participants directly and not by the Directors (ex. Capital budgets, business plans);

d. Policies to Pass – Any policy to be enacted at inception will be included;

e. Directorship Agreement – A written acknowledgment and binding document upon each Director that they are bound by certain limitations imposed upon them by the MWC and Participants.

5. **Asset Transfer** – The mere act of creating the MWC (or any other legal entity) will not mean that it will own those assets that it requires. Steps will need to be taken to transfer these assets to the MWC.

6. **Implementation Steps** – The typical steps for implementation of the MWC include:

a. Hiring of employees;
b. Placement of insurance;
c. Opening of bank accounts;
d. Registering with Canada Revenue Agency for business number, CPP, EI, GST;
e. Development of customer contracts;
f. Purchase of equipment;
g. Obtaining office space

7. **Dissolution of SAEWA** – Once the MWC is operational, the members of SAEWA will need to decide if SAEWA, as a corporate entity, needs to continue to exist. If not, appropriate steps will need to be taken to dissolve SAEWA, which shall include the payment of all of SAEWA's liabilities and the distribution of SAEWA's remaining assets.

6.7 Proportionate Share Issuance

The matter of share issuance and percentages is important for three primary reasons:

1. **Entitlement to Dividends/Profits** – When profits of the MWC are paid out to its Participants via the payment of dividends, it will not be done on an equal basis. Rather, it will be paid out in accordance of the number of shares of each class that each Participant has. For example, say in a particular year, there are excess profits in the amount of $500,000 to be paid out via dividends. This would be calculated as follows:

	Number of Class D Non-Voting Shares	Percentage of Class D Non-Voting Shares	Profits to be Distributed
Member A	10	10%	$50,000
Member B	8	8%	$40,000
Member C	35	35%	$175,000
Member D	20	20%	$100,000
Member E	27	27%	$135,000
		100%	**$500,000**

2. **Voting Percentage** – Because of the dual share structure, with only one Class A Common Voting Share issued to each Participant, all voting will be conducted on a one Participant, one vote basis. Following the below example, this is how a vote would occur on a particular item.

	Number of Class A Voting Shares	Number of Class D Non-Voting Shares	Votes at a Shareholder Meeting
Member A	1	10	1
Member B	1	8	1
Member C	1	35	1
Member D	1	20	1
Member E	1	27	1
			1

3. **Capital Contribution Obligations** – If the MWC requires a capital contribution or a cash call from time to time, the amount of money to be contributed by each Participant will be in accordance with each shareholder's percentage and not by the number of Participants. For example, if a capital contribution of $1,200,000 is required to be paid, the capital contribution requirements would be calculated as follows:

	Number of Class D Voting Shares	Percentage of Class D Non-Voting Shares	Capital Contribution
Member A	10	10%	$120,000
Member B	8	8%	$96,000
Member C	35	35%	$420,000
Member D	20	20%	$240,000
Member E	27	27%	$324,000
		100%	**$1,200,000**

6.8 Waste Commission's Participation

A major consideration in this governance project was how to accommodate the participation of the Waste Commissions. Waste Commissions are creatures of the MGA and as such, they must work within its confines.

After discussions with the Department of Municipal Affairs, the Department has indicated that the Waste Commissions:

- May have shares issued to them in the MWC;
- The issuance in the shares of MWC cannot be done by way as an investment. This will mean that any shares to each Waste Commission will be issued for nominal consideration (ex. $0.10 each);
- The shares that are to be issued to MWC must be of a class whereby they cannot be obligated to lend money to the MWC or guarantee.

Accordingly, the Department is willing to accept this governance model with the Waste Commissions as shareholders of the MWC.

Potential Problem and Workaround Solution

Possible Problem - Regardless of which governance model that is chosen, the MGA restricts Waste Commissions from lending to anyone or to guarantee the indebtedness of anyone, including for-profit or non-profit corporate entities that it is a member of.[68]

In our discussions with the Department, they indicated that currently, there is no discussion concerning amending the MGA to permit Waste Commissions from lending money to any entity or guaranteeing the indebtedness of any corporate entity that the Waste Commissions are members of. There would have to be lobbying done to the Department to seek a policy shift. In the interim, we have to assume that this will not be available.

This issue *might* pose problems for the capitalization of the MWC in the future. Although it is probable that the MWC and its members will seek capital assistance from all levels of government, the MWC may still be short capital for its project. In those instances, the most common source of financing is a capital contribution from the shareholders and/or loans from third parties.

If the capital financing from the shareholders is to come in the form of shareholder loans, the Waste Commissions are legally prohibited in doing so. Additionally, if the MWC arranges third party private financing, it can be expected that the third party lenders will request and/or require loan guarantees from all shareholders.

[68] Section 602.31 of the MGA

Might Not Be Problem - This might not be a problem if the MWC was not ever planning on relying upon loans from shareholders to capitalize it or additionally if the MWC does not anticipate that it will require shareholder guarantees of the MWC indebtedness.

We think that it would be prudent to plan for the MWC to require these shareholder loans and shareholder guarantees, however.

Workaround -

There are two workarounds to resolve this issue:

1. *Service Agreement* – It is possible for a Waste Commission to have to contribute capital funds as a capital contribution for a project. As an analogy, if a new landfill is to be constructed, it is typical that each member who is going to use the landfill will have to provide capital funds to be used for its construction.

    a. The Service Agreement will state that all users of the Waste to Energy plant will need to pay a proportionate capital contribution for the construction of the plant.

    b. This capital contribution will not be repaid by the MWC to the Waste Commissions. The issue is the requirement for repayment. As long as the capital does not need to be repaid, this is acceptable.

2. *Municipalities will Guarantee on Waste Commission's Behalf* – Should a third party lender require a loan from the MWC's shareholders in order for the lender to advance funds (which is a very typical requirement), those shareholders that are Waste Commissions will be legally prohibited from doing so.

    a. Firstly, the MWC should try to negotiate financing terms that will not require shareholder guarantees. If they do so, then this problem will not occur;

    b. Secondly, those MWC shareholders that are not Waste Commissions will guarantee the indebtedness of the MWC. The amount of the guarantee will need to be limited, as it will go against each debt limit of the municipal guarantor;

    c. Thirdly, the municipal members of each Waste Commission may also guarantee the debts of the MWC. Municipalities are not prohibited from guaranteeing the debts of other corporate entities, as long as the MWC is one of their controlled entities. This would require that each municipal member of a Waste Commission would be issued non-voting shares for the express purpose of only being able to guarantee the indebtedness of the MWC.

Note that the MWC can be created with a few options regarding the obligation to contribute capital and/or loan guarantees. It can be done either as:

1. *Permissive* – The MWC can ask each shareholder to do a loan guarantee or provide a capital loan. It is up to each shareholder to agree to this or not; OR

2. *Mandatory, but subject to the MGA* – The MWC will state that upon a previously agreed upon threshold/majority for approval, as long as this majority is reached, all shareholders are required to pay the contribution and/or grant the loan guarantee. However, this will be subject to Sections 265 and 266 of the MGA that states if a petition overturns the loan bylaw or guarantee bylaw, that municipality will not be in default for a failure to do this; OR

3. *Mandatory, but subject to the MGA* – The MWC will state that upon a previously agreed upon threshold/majority for approval, as long as this majority is reached, all shareholders are required to pay the contribution and/or grant the loan guarantee. This obligation will exist even if the local residents successfully petition the loan requirement. If so, that shareholder will be in default.

7.0 NEXT STEPS

The remaining tasks in Phase 5 include:

- **Presentation to Review and Recommendations to Councils** - meeting between Brownlee LLP and member municipalities of SAEWA to present the key elements of the written report, address questions and concerns, provide recommendations, and where appropriate facilitate a narrowing of choices amongst the members for future steps and considerations; and

- **Documentation & Application Phase** – Once the participants have resolved to proceed with a governance option, a number of steps must be taken, and documentation prepared, in order to allow for the implementation of the governance model. This will consist of:

    i. **Re-creation of SAEWA's governance or Creation of New Entity** – this will include its corporate constitution and bylaws and other related corporate matters, depending upon the final results of what previously occurred;

    ii. **Application for Ministerial Consent** – should it be necessary to apply for Ministerial consent, this will be done;

    iii. **Establishment of Necessary Policies** – these will entail how these policies are to be prepared and implemented; and

    iv. **Creation of such membership agreements** – to deal with internal governance matters that need to be discussed.

8.0 CLOSURE

We trust this report meets your present requirements with respect to Phase 5 of the project. If you have any questions or comments, please contact the undersigned.

Prepared by:

John C. McDonnell, Partner, Brownlee LLP **Marlena (Marny) S. Paul, Associate, Brownlee LLP**

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(f) "Size Matters: Right Sizing Your Board of Directors" http://dorgerconsulting.com/2011/07/20/size-matters-right-sizing-your-board-of-directors/

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APPENDIX A

Governance Options Table and Operating Models Matrix

To set the stage for the full range of potential governance structure alternatives and to summarize the information above, two tables have been developed which describe the different governance options available to SAEWA including their respective descriptions, governance characteristics, and potential advantages vs. disadvantages.

Note that the Governance Option Table is largely based on the Alberta Municipal Affairs "Governance Options for Municipal Regional Services in Alberta" document as well as a table provided in the *Alberta Capital Region Integrated Waste Management Plan* drafted by EBA Engineering Consultants Ltd. operating as EBA, A Tetra Tech Company.

Table 1: Summary of Governance Options

Description	Governance	Advantages	Disadvantages
Co-ownership (e.g. Waste Management Authority)			
• Municipal Members enter into an agreement for the investment, development, and provision of regional waste management services. • Participating municipalities pass a resolution of council to become a part of the agreement. These agreements can lead to the formation of an authority, board or committee that can oversee the provision of services on a regional basis. • Not a separate legal entity and cannot directly hold assets, own land, or borrow funds. • Subject to *Municipal Government Act* in regard to legislation restricting types of services.	• An Oversight Committee comprised of appointed elected official and/or technical expert members is created. • Committee has an advisory role only; municipal councils are ultimately accountable. • Owned and funded by Municipal Member based on an agreed-upon funding and ownership formula (typically determined through extent of usage e.g. number of customers / tonnes processed per municipality).	• Relative easy to form, requiring no approval from provincial government. • Allows for both broad representations (i.e. both political and expert members) on the Oversight Committee. • Access to funding, low borrowing rates, and tax exempt status through its municipal funding partners.	• Reliant on Municipal Member for funding (i.e. debt financing); therefore would impact debt limits of individual municipalities. • Ultimate accountability and liability remains with Municipal Member. • Allowing decision making in proportion to "share" of contribution may cause concerns of excess control by a participating municipality. • Decision making process may be cumbersome and complex since decisions must be ratified by all participating Councils.
Regional Service Commissions			
• Municipalities request to Minister of Municipal Affairs to establish a commission (per *Municipal Government Act*). • Are authorized to provide services to municipalities within and outside (with Municipal Affairs approval) the boundaries of its members. • Subject to *Municipal Government Act* in regard to legislation restricting types of	• Initially Board appointed by Minister of Municipal Affairs. • Board made up of an elected official from each Municipal Member, appointed by each respective Council. • Board is theoretically autonomous from municipalities and is accountable for all financial	• The only governance option in Alberta that can directly expropriate land. • Streamlined process for establishing – 50+ regional service commissions in Alberta. • Access to provincial funding and grants (including grants specific to regional service commissions). • Access to loans through Alberta Capital Finance Authority.	• Continued oversight by the Province, including the ability to intervene (i.e. appoint directors). • Board regulated to be elected officials from each of the Municipal Member, resulting in an absence in technical experts, and regular turnover of directors. • Restricted to providing services as described by the commission's

Description	Governance	Advantages	Disadvantages
services.	decisions, execution of contracts. • Owned and funded by Municipal Member. • Operates on cost recovery basis only (i.e. does not distribute a profit to Municipal Member).	• Income tax exempt. • Board will always have representation from Municipal Member (elected officials). • Separate and autonomous body from Municipal Member, with ability to hold assets and borrow funds. • Able to generate revenue with Municipal Member without restrictions. • Clear accountability for mandate defined in legislation.	regulation.
Municipal Controlled Corporation			
• Separate legal entity controlled by one or more municipalities in legislation. Share holder agreements permit inclusion of multiple municipalities. • Must be "for-profit" and must demonstrate financial viability through three year business plan. • Established with approval of the Minister of Municipal Affairs. Municipal controlled Societies are regulated by the *Municipal Government Act*, *Business Societies Act*, Control of Societies Regulation, and the Debt Limit Regulation. • Subject to *Municipal Government Act* in regard to legislation restricting types of services.	• Board, selected based on desired competency / representation. Typically includes limited number of elected officials. • Board accountable for all organized actions, including financial performance.	• Can provide profit distributions to Municipal Member. • Permits broad representation on Society's board – at the discretion of the municipality. • Income tax exempt as long as scope of services remains within municipal boundaries. • Clear accountability for scope of duties as defined in regulations, policies and business plans. • Profits can be distributed to shareholders without prior approvals • This is the most common business organization in the Province of Alberta. Waste to energy is a business operation • Can provide a return on investment • Most flexible of all corporate entities	• Requires Ministerial approval. • Not able to borrow directly from the Alberta Capital Finance Authority. • Lacks automatic GST exemption on fares and expenditures on goods and services, obtaining exemption is costly and time-consuming. • Shareholder agreement dictates degree of ownership and hence degree of decision-making authority, which typically puts control in favor of the municipality who bears the majority of investment. This could lead to concern re: regional control and changes in board.

Description	Governance	Advantages	Disadvantages
		available	
Not-for-Profit (Part 9 Company)			
• Municipalities form a Not-for-profit under the *Companies Act* (Part 9 Company). • A not-for-profit Society is an association of one or more shareholders whose corporate governance requires that surplus funds are used to pursue the organization's stated goals. • Subject to *Companies Act*. • Present provincial regulations restrict the scope of services for Not-for-Profits to "promoting art, science or any other useful subject."	• Board, selected based on desired competency / representation. Typically not elected officials. • Owned by the Part 9 Company and funded by Part 9 Company and rates.	• Relatively easy to establish. • Permits broad representation on Society's board – at the discretion of the municipality. • Access to preferred municipal borrowing rates. • Income and property tax exempt. • Clear accountability for scope of duties as defined in regulations, policies and business plans. • Does not have the explicit requirement to be "for-profit" as does a controlled Society. • Less restricted in financial relationship than controlled Society; can enter into fee-for-service contracts, receive municipal grants, and accept donations.	• No precedent for this type of waste management utility in Alberta. • Does not provide a return on investment for participating parties. • One-step further removed from municipal control than controlled Society. • Lacks automatic GST exemption on fares and expenditures on goods and services, obtaining exemption is costly and time-consuming.
Society			
• A Society is an incorporated group of five or more people who share a common recreational, cultural, scientific, or charitable interest. Regulated by the *Societies Act*. • Recommended that a Membership Agreement be executed to directly address the respective rights and obligations of the municipalities that become involved in the Society;	• The Society is created by Municipal Members to provide a particular service. • Board, selected based on desired competency / representation. Typically not elected officials. • Officers of Societies are selected to implement the day to day instructions of the Board of Directors.	• Easy to set up. • Independent borrowing power. • Easy entrance/exit of Municipal Members. • Municipal Affairs approval not needed to create. • No external consent necessary to transfer assets.	• Cannot borrow directly from Alberta Capital Finance Authority. • No recognition of proportionality • Inability to pay dividends. • Difficult to recognize Council input. • Not recognized as typical model for providing services.

Description	Governance	Advantages	Disadvantages
• A Society is not permitted to distribute dividends or profits to its Municipal Members.			
Cooperative			
• Autonomous association of people who voluntarily cooperate for their mutual social, economic, and cultural benefit. Created pursuant to the *Cooperatives Act*. • Expressly contemplates that the entity will provide an actual service to its Municipal Members.	• Board, selected based on desired competency / representation. • Board accountable for all organized actions, including financial performance.	• Borrowing does not affect municipal debt levels. • Has absolute and unrestricted ability to pay out profits, revenues and dividends to its Municipal Members. • Freedom to add or delete participants. • Can sell its assets without Ministerial approval. • Private parties can be members.	• Requires three or more people to create. • The purpose of the Cooperative is to have multiple parties, sharing the operating costs and capital costs and then subsequently receiving services from this Cooperative. • Cannot have an enforceable membership agreement.

Table 2: Operating Models Matrix

OPERATING MODELS FOR ALBERTA PUBLIC PROJECTS MATRIX

		CORPORATION (Municipal Utility Corporation)	COMMISSION	PART 9 COMPANY	SOCIETY	FEDERAL NOT-FOR-PROFIT CORPORATION	COOPERATIVES
DECISION – MAKING MATRIX	**Governing Legislation**	*Business Corporations Act*	*Municipal Government Act*	*Companies Act*	*Societies Act*	*Canada Not-for-profit Corporations Act*	*Cooperatives Act*
	Can a Commission be a member?	Yes	No	Yes	Yes	Yes	Yes
	Can profits of entity be paid to Members?	Yes	Only with Minister's consent	No	No	No	Yes
	Ease of changing governing corporate documents	Easy	Municipal Affairs consent necessary	Court order necessary	Easy	Easy	Easy
	Issuance of shares?	Yes	No	Yes	No	No	Yes
	How do Members financially contribute to entity?	Through rates and in membership agreement	Through setting of rates for services	Through rates/dues and membership agreement	Through rates/dues and membership agreement	Through rates/dues and membership agreement	Through rates/dues and membership agreement
	Will Members also pay entity for services provided?	Yes, if it is set it up as such	Yes, if it is set it up as such	Yes, if it is set it up as such	Yes, if it is set it up as such	Yes, if it is set it up as such	Yes, if it is set it up as such
	Are capital contributions mandatory?	Only if agreed to	Yes, through setting of rates	Only if agreed to	Only if agreed to	Only if agreed to	Only if agreed to
	Can other binding obligations be imposed upon members?	Through: 1. membership agreement and 2. service agreements	Through service agreements	Through: 1. membership agreement and 2. service agreements	Through: 1. membership agreement and 2. service agreements	Through: 1. membership agreement and 2. service agreements	Through: 1. membership agreement and 2. service agreements
	Can there be disproportionate	Yes	No	Yes	Yes	Yes	No

		CORPORATION (Municipal Utility Corporation)	COMMISSION	PART 9 COMPANY	SOCIETY	FEDERAL NOT-FOR-PROFIT CORPORATION	COOPERATIVES
	share/ membership interest?						
	Restrictions on who can be directors?	No	Only elected officials	No	No	No	No
	Municipal Affairs consent necessary to create?	Yes	Yes	No	No	No	No
	Municipal Affairs approval to sell assets?	No	Yes	No	No	No	No
	Corporate Registrar consent necessary?	Yes	No	Yes	Yes	Yes	Yes
	How long to obtain consents?	9 – 18 Months	9-18 months	About a month	About a month	About a month	About a month
	Ongoing reporting to Municipal Affairs?	No	Yes	No	No	No	No
	Are audited financial statements mandatory?	No	Yes	No	Yes	Yes	Yes
	Can assets be paid to members upon dissolution?	Yes	Yes, only with Minister's consent	Yes	No	Yes	Yes
	Is there a need to register in both provincial and federal corporate registries?	No	No	No	No	Yes	No
	Will entity automatically own assets upon creation?	No	No	No	No	No	No
	Will it be necessary to take additional steps to transfer assets to entity after its creation?	Yes	Yes	Yes	Yes	Yes	Yes