ISSUE:

Public Sewerage System Construction Permit Approval, and Owner/User Obligations Pursuant to Part 41, Sewerage Systems, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA).

Initially, it is noted that a municipality (hereinafter local unit of government or LUG) is subject to the requirements of Section 3109(2) and Section 3109(3) of Part 31, Water Resources Protection, of the NREPA, (MCL 324.3109), for the direct or indirect discharge of raw sewage within its borders that enters the waters of the state.

Further, no person may discharge any waste or waste effluent into the waters of the state unless the person is in possession of a valid permit issued by the Department of Environmental Quality (DEQ) [Section 3112(1) of Part 31]. A person may not construct a sewerage system used or intended to be used by the public for human waste without obtaining a permit to construct in accordance with Part 41 of the NREPA.

The Water Bureau (WB) is charged with administering the Public Sewerage System program governed under Part 41. This policy is established as a direct result of an adverse ruling from the Michigan Court of Appeals invalidating R 299.2933(4), 1954 ACS 85, as amended, promulgated pursuant to Part 41[Subrule 33(4)]. Specifically, the court determined that the DEQ could not require persons who are requesting a permit for constructing and operating a sewerage system designed for public use to first obtain a resolution from the LUG as a guarantee that the LUG would assume responsibility for the operation and maintenance of the system in the event that the private owner fails to perform these functions. The court further found that the DEQ does not have the statutory authority to force the LUG to pass the resolution.

In response to the court opinion, the DEQ has established this alternative process to ensure that sewerage systems governed under Part 41 are continually operated and maintained to avoid the unauthorized discharge of raw or untreated sewage into the waters of the state; and to ensure that sewage is not potentially prejudicial to the public health. In the event that a private developer or operator in charge of the sewerage system abandons or otherwise fails to maintain proper system operation, the DEQ faces two major problems: difficulty in imposing liability against the individual users; and due to the court ruling in the Lake Isabella case, the DEQ is unable to force a municipality to comply with Subrule 33(4) of 1979 AC R 299.2933, as amended. Therefore, to ensure that privately owned public sewerage systems are properly operated and maintained in accordance with Part 41 and the rules promulgated thereunder, the WB will implement the following requirements that shall be completed before issuing a construction permit.

This policy provides guidance to staff regarding the implementation and interpretation of laws administered by the DEQ. It is merely explanatory, does not affect the rights of or procedures and practices available to the public, and it does not have the force and effect of law.

AUTHORITY:

The DEQ is granted statutory authority to regulate public sewerage systems under the provisions of Section 4102 of Part 41. The DEQ also has broad authority to reject or require modifications to a construction permit application if it finds that the proposed sewerage system plans and specifications submitted by the applicant do not adequately protect the public health or may not prevent unlawful pollution of the waters of the state. Under Section 4107 of Part 41 the DEQ is authorized to require specific conditions in the sewerage system design plans and specifications, including method of operation, to ensure that the public health is adequately protected before the owner is issued a construction permit to build the system. The DEQ is further authorized under this section to require a developer or sewerage system owner to comply with recommendations or orders from the DEQ with respect to the method of operation of the proposed sewerage system.

Further, R 299.2941, 1954 ACS 85, as amended, promulgated under Part 41 (Rule 41) provides that either proper devices are or will be in satisfactory operation before discharges to the waters of the state will occur; or a definite program or agreement, approved by the department, which governs the operation of the system must be in place before the DEQ is required to issue a construction permit. In addition, R 299.2955, 1954 ACS 85, as amended, promulgated under Part 41 (Rule 55) requires that the owner of the sewerage system operate and maintain it at all times to avoid any unlawful discharges or upsets.

DEFINITIONS:

The term "public" means that the sewerage system collects, conveys, transports, treats, or otherwise handles sanitary sewage for more than one individually owned family unit or dwelling, or more than one individually owned business.

POLICY:

The DEQ may seek civil fines and penalties and/or criminal sanctions against a municipality or any other "person" when an unauthorized discharge of sewerage occurs. If a private developer constructs a sewerage system intended for use by the public, meaning for the express purpose of treating sewage received from persons defined as public herein, the developer is obligated to maintain the operation of this system for the benefit of those intended users.

In the event that a private developer or operator in charge of the sewerage system abandons or otherwise fails to maintain proper system operation; and to ensure that privately owned public sewerage systems are properly operated and maintained in accordance with Part 41 and the rules promulgated thereunder, the following requirements under either Section A or Section B below shall be completed by the Part 41 permit applicant before the DEQ will issue a construction permit:

A. The owner of the sewerage system shall first approach the LUG and request that it pass a resolution whereby the LUG agrees to assume responsibility for operating and maintaining the sewerage system in the event that the private owner/operator becomes insolvent or otherwise is unable to continue system operation. This request shall be in writing, and shall be sent via

certified letter, in order to obtain a delivery receipt. In addition, the owner of the sewerage system and LUG, under this option, will enter into a binding agreement through which the LUG expressly agrees to assume this responsibility. An example of a resolution is attached to this Policy as Addendum A and an example of an agreement, including the required conditions, is attached as Addendum B.

B. If the LUG declines to pass the resolution and voluntarily assume responsibility, then the owner of the sewerage system shall complete the following requirements before a construction permit will be issued.

The following requirements will be listed as "completed" on a certification statement signed by the owner of the sewerage system and notarized by a public notary before the Part 41 Permit will be issued. Please note that the submittal of any falsified documents attached to the Part 41 application; or the submittal of a falsified Part 41 application is a violation of Part 41. Additionally, please note that any person who shall utter and publish as true, any false, forged, altered, or counterfeit record, deed, instrument, or other writing, . . . knowing the same to be false, altered, forged, or counterfeit, with intent to injure or defraud as aforesaid, may be guilty of a felony, punishable by imprisonment in the state prison for not more than 14 years in accordance with Section 249 of the Michigan Penal Code, 1931 PA 328, as amended, MCL 750.249.

1. The owner of the sewerage system must obtain and submit a letter to the DEQ that is signed by the local municipality in which the project is located that certifies that the municipality has declined to enter the resolution and agreement, provided under paragraph A of this guidance, accepting responsibility for the sewerage system in accordance with Section 3109 of Part 31 of the NREPA, (MCL 324.3109). If the local municipality declines to sign such a letter, or provides no response to the request, the owner of the sewerage system shall submit to the DEQ a written statement, along with the certified letter mailing receipt, that describes the unresponsiveness of the local municipality to its request.

2. The owner of the sewerage system will either retain ownership of the sewerage system or transfer ownership to a "legal entity" it has created to represent all of the users of the sewerage system, and of which all users of the sewerage system shall be a member. The "legal entity" must be a legal entity registered and authorized to conduct business in the State of Michigan. Examples of such legal entities include, but are not limited to, associations, LLCs, P.C.s, LLPs, or partnerships. When that legal entity acquires ownership of the sewerage system, it assumes the responsibility for all aspects of the sewerage system with respect to the obligations set forth under the covenant [see paragraph B(4)]. In the event, however, that the owner of the sewerage system sells the sewerage system, that new owner will also need to form a legal entity as stated herein and such legal entity shall be the registered sewerage system owner of record, and solely responsible for it.

3. The owner of the sewerage system shall, before issuance of the Part 41 Permit, establish a perpetual funding mechanism in the form of an escrow agreement or other financial instrument (collectively escrow) in the two-year amount as is detailed in subparagraph B(3)(II) of this paragraph. This instrument must be payable to the owner of the sewerage system and all users of the system, jointly (this is the "legal entity"); and both shall

be obligated to maintain the escrow to ensure that sufficient funding is available and its use is restricted for the sole purpose of continuing uninterrupted system operation and maintenance in the event that the primary funding mechanism from user fees or other assessments is inadequate or becomes unavailable. The owner of the sewerage system and the users of the system (represented by the "legal entity," of which all users of the system are a member) thereby shall jointly and severally have authority to access the escrow for its intended use. The escrow shall be established and replenished by the owner of the sewerage system and the "legal entity" as stated in subparagraphs B(3)(I) and (B)(3)(II) of this paragraph.

I. A calculation of the costs to operate and maintain all operational aspects of the sewerage system for a time period of five years shall be completed by a Michigan licensed professional engineer. The engineer shall certify this operation and maintenance calculation with his legal name, and professional engineer license number, attesting that the amount is sufficient to pay for the sewerage system operation and maintenance costs for a period of five years (an example workbook for these costs is attached to this Policy as Addendum D).

II. The escrow shall be initially established by the sewerage system owner in an amount sufficient to properly operate the facility, and sufficient to conduct maintenance and necessary repairs and replacements, in accordance with all applicable laws, regulations, and permits, for a period not less than two years. Each user shall be required through the covenant to contribute an additional prorated amount as a portion of the user fee or other funding process to increase the amount of the escrow to pay for the sewerage system operation, maintenance, repairs, and replacements for a total escrow amount of not less than five years. The escrow shall be fully funded to the five-year amount not later than two years after system operation commences. The amount of the two-year escrow calculation and the five-year escrow calculation shall be the amount of money that was determined to be sufficient to pay for the sewerage system operation, maintenance, repairs, replacements, and other necessary costs for the time period stated, as was determined and certified in writing on forms prepared by the licensed professional engineer [subparagraph B(3)(I) of this paragraph].

4. The owner of the sewerage system shall establish and record on the land a "covenant running with the land" (covenant). The covenant shall be legally binding on and enforceable by all system users individually, and will require each individual system user to sign the covenant, or legally agree to the terms in another manner (as in the instance of recordation on the users' property), as a condition precedent of connecting to the sewerage system. Authority for the DEQ requiring this covenant is set forth under Rule 41 promulgated under Part 41 and shall serve as an agreement with specific conditions necessary to properly operate and maintain the sewerage system (an example covenant is attached to this Policy as Addendum E).

Conditions within the covenant shall include the following:

I. Each user shall agree through the covenant that the sewerage system owner may assess a user fee, prorated among the system users, sufficient to maintain all

operational aspects of the system, including potential upgrades, repairs, and general maintenance consistent with the system design and all applicable laws, regulations, and permits. The covenant shall provide for periodic rate increases as necessary to cover operation, maintenance, repair, and expansion costs. This agreement shall be binding on the sewerage system owner, the "legal entity" and individual users jointly.

II. Each user shall agree through the covenant that it will pay into and maintain the escrow account in an amount sufficient to operate and maintain the sewerage system for a period of five years. The covenant shall allow access to the escrow funds by the legal entity, representing all of the system users jointly, for the operation, maintenance, repair, and replacement of the sewerage system.

REFERENCES TO BUREAU PROGRAMS:

The Wastewater Facility Permits program is impacted by this policy.

METHOD OF DISTRIBUTION:

Intranet

PROCEDURE:

Responsibility	Action
Permit Application Review District Engineering Staff	Reviews permit applications submitted for the construction of privately owned, publicly used sewerage systems to ensure that the plans and specifications are adequate for the proposed sewerage system, in accordance with Part 41. The submittal shall include the plans and specifications, and the documents detailed under Option1 or Option 2 of this guidance.
OPTION 1	If the documents that are submitted with the plans and specifications are submitted under Option 1 of this guidance, those documents shall include: • A Resolution from the LUG (see Addendum A), accepting responsibility for the system, if the LUG has agreed to this option. • An Agreement (see Addendum B) between the LUG and the owner of the sewerage system. • A signed and notarized (by a public notary) checklist and Certification Statement (see Addendum C).

For Option 1, district engineering staff will review the plans, specifications, resolution, agreement, and Certification Statement.

OPTION 2

If the LUG refuses to pass a resolution and sign an agreement accepting responsibility, then the applicant shall follow Option 2 and submit an application package containing:

- A letter of declination from the LUG, declining to pass a resolution and sign an agreement for the continued operation and maintenance of the sewerage system, in the event that the owner of the sewerage system fails to properly operate and maintain it.
- A signed and notarized (by a public notary) checklist with Certification Statement. The checklist and Certification Statement (see Addendum C) shall assure:
  - That the "legal entity," of which all users of the system shall be a member, has been created and is registered by the Michigan Department of Labor and Economic Growth (DLEG), and is thereby authorized to conduct business in the State of Michigan;
  - That the Covenant has been drafted in accordance with the requirements of this Policy and has been recorded on the land that the sewerage system is to be constructed upon (an example covenant is attached as Addendum E);
  - That a Michigan licensed professional engineer has personally examined the plans and specifications for the sewerage system and has drafted the operation, maintenance, repair, and replacement costs for a five-year period for the sewerage system, based on the engineer's direct review of the plans and specifications of the proposed sewerage system (the engineer's certification is a part of the workbook attached as Addendum D); and

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- That an escrow account has been created and finalized; and is payable to the "legal entity" in the initial amount of 2/5 of the total five-year operation and maintenance cost of the sewerage system, as determined by the Michigan licensed professional engineer (workbook attached as Addendum D).

For Option 2, district engineering staff will review the plans, specifications; letter of declination by the LUG; certificate of creation of the "legal entity" by the DLEG; and the signed and notarized certification statement certifying that the permit applicant recorded the Covenant with the Register of Deeds Office, that the permit applicant has a workbook showing the five-year escrow calculations completed by the Michigan licensed professional engineer along with his certification of the document and that the permit applicant has an escrow agreement with at least a two-year escrow account.

Construction Permit

District Engineering Staff

Issues construction permit if the final plans and specifications comport with Part 41 and the administrative rules promulgated thereunder and if the Option 1 or Option 2 documents are complete and comport with this Policy.

APPROVED: _____ DATE: 10/31/07
Richard A. Powers, Chief
Water Bureau

LAST REVIEWED BY: _____ DATE: _____
Name
Title

This policy provides guidance to staff regarding the implementation and interpretation of laws administered by the DEQ. It is merely explanatory, does not affect the rights of or procedures and practices available to the public, and it does not have the force and effect of law.

ADDENDUM A

NOTICE

This document is intended strictly for use as an example document to assist in the implementation of Water Bureau Policy No. WB-010. This document should be revised to accurately reflect the specific needs of the parties represented herein. This document should not be relied upon as being legally sufficient to accurately represent all potential issues related to the specific needs of any municipality or private entity. The Michigan Department of Environmental Quality (DEQ) does not accept responsibility or assume any liability for any omission or misunderstanding of any party who relies on this document as meeting the party's expectations. The DEQ encourages the parties listed on this document to seek independent legal advice to ensure that their respective needs are met.

DIRECTIONS

- **{language like this}** should be deleted and filled in with the appropriate information.
- *Language like this* is specific directions applicable to that section of this document and should be deleted.

*PLEASE DELETE THIS TEXT BOX WHEN DRAFTING THE RESOLUTION

RESOLUTION

At a meeting of the (Municipality board name here), of the Municipality of, _____, _____ County, Michigan, held on the _____ day of (month) ____, (year), at (location of the meeting), at _____ o'clock a.m. /p.m.

PRESENT:

_____
_____
_____
___

ABSENT:

_____
_____
_____
___

The following Resolution was offered by member (name here) and supported by member (name here):

WHEREAS, (name of the developer/owner corporation, LLC, LLP or partnership) has proposed the construction of a new *(choose one)* Waste Water Treatment Plant (WWTP) *(or)* sanitary sewage collection system to serve (kinds of buildings here) and

surrounding properties, which properties are located in (Municipality name here) and set forth on the attached Exhibit "A"; and

WHEREAS, (name of the developer/owner, LLC, LLP or partnership), a Michigan corporation, agrees to construct said *(choose one)* (WWTP) *or* (collection system) and any accompanying appurtenances at its sole cost and to be responsible for it operation and maintenance upon completion thereof; and

WHEREAS, this Municipality Board recognizes the need for proper construction and continued adequate operation and maintenance of said sanitary sewage system to protect the public health, safety and welfare of Municipality residents;

NOW, THEREFORE, BE IT RESOLVED:

1. That (name of the developer/owner, LLC, LLP or partnership), present plans for review and approval by the Municipality Zoning Administrator (name here), as well as appropriate health and building agencies of the County of (name of affected county) and the State of Michigan, more particularly the Department of Environmental Quality of the State of Michigan; and

2. That (name of the developer/owner, LLC, LLP or partnership) obtain all necessary approvals, both State and Local, necessary to construct said (WWTP) *or* (collection system), and any appurtenances associated therewith and file copies of the same with the Municipality. Further, the cost and expense of construction, together with all necessary approvals of the (WWTP) *or* (collection system) and any appurtenances, shall be the sole and exclusive responsibility of (name of the developer/owner, LLC, LLP or partnership).

3. That (name of the developer/owner, LLC, LLP or partnership) cause to be executed an Agreement, which shall also be binding upon any assignee or successor in interest to (name of the developer/owner, LLC, LLP or partnership) , and the Municipality of _____, whereby (name of the developer/owner, LLC, LLP or partnership) agrees to operate the system and maintain it in accordance with all State and local regulations and statutes, but in the event of insolvency or other reasons including dissolution of the corporation owning the (WWTP) *or* (collection system), that the Municipality of _____ would assume responsibility for operation and maintenance if certain conditions are satisfied. Further, (name of the developer/owner, LLC, LLP or partnership) shall provide a financial assurance mechanism in the form of a (type of mechanism) to ensure funds will be available for the continued operation and maintenance of the sanitary sewage system, in the event of (name of the developer/owner, LLC, LLP or partnership) insolvency or other occurrence that results in a failure of the operation and maintenance of the sanitary sewage system; or insolvency or other occurrence of a successor or assignee that results in a failure of the operation and maintenance of the sanitary sewage system.

4. That the Agreement shall be attached to this Resolution, and shall be executed by (name of the developer/owner, LLC, LLP or partnership) prior to, or within five (5) days of the passage of this Resolution; and this Resolution incorporates, by reference, the terms and provisions of said agreement.

EXAMPLE DOCUMENT ONLY

5. That, as noted above, all the terms and provisions of the proposed Agreement (a copy of which is attached to this Resolution and specifically incorporated herein by reference) are a part of this Resolution, and in the event (name of the developer/owner, LLC, LLP or partnership) or its assignee or successor becomes insolvent, dissolves or otherwise has insufficient funds to operate or maintain the (WWTP) *or* (collection system) in a manner required by law or local regulation, the terms and provisions of said Agreement shall apply and the Municipality will take such steps as are authorized under the Agreement.

AYES:

_____

_____

_____

NAYES:

_____

_____

_____

RESOLUTION DECLARED ADOPTED

(Signed name of Municipality Clerk)
(Typed name here)
(Title of person here)

I hereby certify that the foregoing is a true and complete copy of the Resolution adopted by the Municipality Board of the Municipality of _____, County of _____, State of Michigan, at a meeting held on (month here), (Year here), and that said meeting was conducted and public notice of said meeting was given pursuant to and in full compliance with the Open Meetings Act and that the minutes of said meeting were kept and will be or have been made available as required by said Statute.

(Signed name of Municipality Clerk)
(Typed name here)
(Title of person here)

ADDENDUM B

NOTICE

This document is intended strictly for use as an example document to assist in the implementation of Water Bureau Policy No. WB-010. This document should be revised to accurately reflect the specific needs of the parties represented herein. This document should not be relied upon as being legally sufficient to accurately represent all potential issues related to the specific needs of any municipality or private entity. The Michigan Department of Environmental Quality (DEQ) does not accept responsibility or assume any liability for any omission or misunderstanding of any party who relies on this document as meeting the party's expectations. The DEQ encourages the parties listed on this document to seek independent legal advice to ensure that their respective needs are met.

DIRECTIONS

- **{language like this}** should be deleted and filled in with the appropriate information.
- *Language like this* is specific directions applicable to that section of this document and should be deleted.

*PLEASE DELETE THIS TEXT BOX WHEN DRAFTING THE AGREEMENT

AGREEMENT

This Agreement is made this **(day)** day of **(month)**, **(year)**, between **(name of developer/owner)**, a Michigan corporation, LLC, PLC, partnership or adoption of a resolution, of _____ County, Michigan, hereinafter referred to as **("short name of corporation")** and **(Municipality name)**, a Michigan General Law Municipality, referred to as **(put any shortened/alternate name the Municipality is referred to as here)**, a Michigan General Law Municipality, of _____ County, Michigan, hereinafter referred to as either **("shortened name of Municipality here")** or "Municipality" and collectively known as "the parties".

WHEREAS pursuant to the terms and provisions of this agreement and the provisions hereinafter set forth by the Adopted Resolution, the _____ Municipality will accept responsibility for the operation and maintenance of the *(Waste Water Treatment Plant)* (WWTP) *and/or (collection system)*, as defined under Part 41, Sewerage Systems, of the NREPA, P.A. 451 of 1994, in the event that (name of developer/owner) becomes insolvent or is otherwise unable to properly operate the **(WWTP and/or collection system)** in accordance with applicable laws; and

WHEREAS **(name of developer/owner)** and the Municipality desires to provide, among other things, a procedure to ensure that adequate monies will be available to cover the cost of operation of the sewage treatment facility in the interim between the time, if any, when **(name of developer/owner)** becomes insolvent and no longer able to

operate the sewage treatment facility and the time period for a creation of a special assessment district as set forth herein;

NOW IT IS AGREED AS FOLLOWS:

1. Construction:

(Name of developer/owner), or its approved assignee or transferee, at its sole cost and expense, agrees to construct an appropriate WWTP, meeting all necessary and applicable Michigan Department of Environmental Quality specifications. All applications, procedures, construction, approval, and the like, shall be obtained by (name of developer/owner) and the cost and expenses related shall be the sole and exclusive responsibility of (name of developer/owner). Further, (name of developer/owner) agrees to meet any and all Michigan Department of Environmental Quality requirements for the construction of such a WWTP, and all plans and specifications shall first be approved by the Michigan Department of Environmental Quality.

This Agreement relates only to the operation and maintenance of the WWTP, in the event (name of developer/owner), a Michigan corporation, was to become insolvent at some future date, or is otherwise be unable to operate and maintain the WWTP in accordance with applicable law. The Agreement does not extend to, or contemplate, any responsibility on the part of the Municipality for the construction of the WWTP.

2. Cost of Operation/Assignment or Transfer:

The cost of operation and maintenance of the WWTP, whether by way of treatment cost, maintenance, repair, or the like, shall be the sole and exclusive responsibility of (name of developer/owner) for so long as (name of developer/owner) is financially able to do so. In the event (name of developer/owner) transfers any or all of its interest in and to the WWTP to a successor in interest or a third party, said successor in interest or third party shall be bound by the terms and provisions of this Agreement, and shall assume all of (name of developer/owner)'s responsibilities as stated in this Agreement.

(Name of developer/owner) shall not assign or transfer any part, or all, of its interest in the WWTP to any third party or successor in interest, without the express written approval of the Municipality, whose consent shall not be unreasonably withheld, but the Municipality may inquire and ascertain, to the satisfaction of any applicable governing board or commission, after a review of the financial books and records of the proposed assignee, that said assignee has sufficient financial resources to meet the obligations set forth in this Agreement. Further, any such assignment, by consent, shall not operate to relieve or release (name of developer/owner)'s liability or responsibility under the terms and provisions of this Agreement.

3. Insolvency or Inability of the Developer/Owner to Continue WWTP Operation and Maintenance

The Municipality, subject to the terms and provisions of this paragraph, agree to accept and be responsible for the operation costs of the WWTP (whether by way of actual treatment costs, operation or maintenance) in the event (name of developer/owner), a Michigan corporation, were to become insolvent or is otherwise

unable to continue operation and maintenance the WWTP, provided, however, that the following circumstances exist at the time the Municipality is requested to assume operation costs:

A. That the _____Municipality is able, pursuant to then existing law, to create a special assessment district encompassing all of the treatment facility and facilities, be they residential units, condominium units, hotel accommodations, or otherwise, that are serviced or benefit from the existence of the WWTP.

B. That there have been no violations or breaches of the terms and provisions of this Agreement, in that the perpetual escrow (as set forth below) is in fact in existence, and is paid to the Municipality; and

C. This Agreement pertains only to the insolvency or other form of dissolution of (name of developer/owner), and not to any third party assuming an ownership interest in and to said properties, unless said assumption has specifically been approved by the Municipality and provides that the terms and provisions of this Agreement would remain in effect; and

D. That there exist no claims, or potential claims, whether by way of contract, tort, or otherwise, against the WWTP, or any portion of the sewage delivery system, including appurtenant structures. It is specifically understood that any acceptance by the Municipality of the operation of the WWTP shall be solely related to the costs and expenses thereof and there shall be no assumption of liability to any third party. In the event substantial liabilities exist against the WWTP, of whatsoever source and nature, the Municipality's agreement to accept responsibility for the operation, maintenance and replacement of the WWTP as stated herein shall not terminate.

E. That the Municipality does not accept responsibility for any environmental contamination or pollution of any kind and nature as shall fall under or be defined by either Federal or State laws or regulations, as amended, that may exist at the time of the WWTP transfer. Further, (name of developer/owner) shall provide, prior to transfer, written confirmation by a reputable firm engaged in analysis and determination of environmental quality/contamination that no such contaminants or pollution exists on the property, surface water, ground water, or other body of water or natural resources over which the Municipality would assume control or the related facilities and operations pursuant to this Agreement.

F. During the term of this Agreement, (name of developer/owner), agrees to give written notice to the Municipality of any contamination or pollution known or discovered or which should have been reasonably discovered within 72 hours from the time the contaminants or pollution is known or discovered.

4. Indemnification/Existing Contamination or Pollution:

In the event that the Municipality, for any reason whatsoever, assumes the control or operation of the WWTP, which is the subject matter of this Agreement, it is specifically understood and acknowledged between the parties hereto that the Municipality assumes no liability of (name of developer/owner) or its assignees for contamination or pollution that existed or exists on or before the date of transfer of the system or operational control pursuant to this Agreement.

Further, if the Municipality takes over the premises, the facility and the system subject to the terms of this Agreement and contamination or pollution is discovered subsequent to the date of transfer or assumption of control that is attributable to a period of time before the date of transfer, then (name of developer/owner) , or its assigns, shall defend, hold harmless and indemnify the Municipality from any and all liability and expenses associated with such pollution or contamination including, but not limited to, the remedial costs as required by either Federal or State laws or regulations, together with reasonable, actual attorneys fees incurred by the Municipality in defending or participating in any litigation, administrative hearing or other procedures or hearing necessitates as a result of such pollution or contamination.

5. Financial Records:

(Name of developer/owner) agrees to provide the Municipality with a yearly financial statement setting forth the estimated cost to operate the WWTP based upon known facts and figures. Such information shall be provided to the Municipality at least sixty (60) days prior to the expiration date of the perpetual escrow, as set forth below, and said escrow shall be increased to cover the anticipated operating costs of the sewage treatment facility for the coming eighteen (18) month period. In the event such information is not provided by (name of developer/owner), then any new or continuing bond shall be automatically increased by ten (10%) percent of the face amount. The surety on any such bond shall be by a company authorized to do business in the State of Michigan, and escrow shall be in a form acceptable to the Municipality.

6. Financial Bond:

(Name of developer/owner) agrees to annually obtain and pay for a perpetual escrow in the amount of the estimated cost of operating said sewage treatment facility for a two year period. The escrow required pursuant to this section shall remain in full force and effect throughout the term of this Agreement and shall be reviewed and increased or decreased annually, to reflect the cost of operation and maintenance of the WWTP.

That the surety on said escrow shall be a company authorized and approved to do business in the State of Michigan, and the escrow shall be in a form satisfactory to the Municipality.

That the cost of said bond shall be paid for in its entirety by (name of developer/owner), and said cost shall be paid in advance, such that the escrow is "non-cancelable" during the period covered.

7. Effective Date:

This Agreement becomes effective upon the occurrence of all four of the following events:

A. Execution of the Agreement and passage of a resolution incorporating the Agreement by _____ Municipality, _____ County, Michigan;

EXAMPLE DOCUMENT ONLY

B. Acceptance and signature by (name of developer/owner), a Michigan corporation, agreeing to be bound by the terms and provisions of this Agreement;

C. The completion, including approval by the Department of Environmental Quality, of the WWTP.

IN WITNESS WHEREOF, the parties have thus accepted this Agreement on the (day here) day of (month here), (year here).

(NAME OF DEVELOPER/OWNER HERE)

By: _____
(Typed Name of Developer/Owner Here)
Developer/Owner

(NAME OF MUNICIPALITY HERE)

By: _____
(Typed Supervisor Name Here), Supervisor

By:_____

(Typed Clerk's Name Here), Clerk

DEQ

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, WATER BUREAU

NON GOVERNMENTAL OWNERSHIP CHECKLIST

Addendum to **PERMIT APPLICATION FOR WASTEWATER SYSTEMS**

Part 41, Act 451, PA 1994

Permit applications for a **non governmentally owned, publicly used sewerage systems** must include a completed copy of this checklist. Water Bureau Policy WB-010 for addressing this issue is available at http://www.michigan.gov/deq (Water Program Wastewater Construction Page).

Items 1 through 5: Enter information as on page 1 of the PERMIT APPLICATION FOR WASTEWATER SYSTEMS (EQP4600).

1. **ORGANIZATION, AND ADDRESS** which will own the proposed wastewater facilities:	3. **PROJECT NAME**
	4. **Project Location**
2. **Owner's Contact Person** (provide name for questions): Name: Phone:	5. **County** (location of project)

6. **Operation and Maintenance Program for the proposed sewerage system:**

Use **Section A** if the local unit of government (LUG) has accepted responsibility in accordance with MCL 324.3109(3).
Use **Section B** if the LUG has declined to accept responsibility in accordance with MCL 324.3109(3) and the applicant has set up a Section B program to fulfill WB010.
Use **Section C** if the LUG has declined to accept responsibility in accordance with MCL 324.3109(3) and the applicant has fulfilled WB-010 in some other manner.

Section A For projects that the LUG has accepted responsibility.

Yes No
☐ ☐ A copy of a resolution from the LUG agreeing to accept responsibility is attached
☐ ☐ A copy of the O&M agreement between the LUG and the owner is attached

Section B For projects that the LUG has declined to accept responsibility, and the following program has been put it place.

1. **Either** ☐ A LUG signed statement of declination of responsibility is attached, or ☐ Proof of LUG unresponsiveness is attached

Yes No
2. a ☐ ☐ A "legal entity" has been created.
   b ☐ ☐ Each co-owner of the sewerage system is a member of the "legal entity."
   C ☐ ☐ A copy of the "legal entity" creation certificate from the Department of Labor and Economic Growth is attached.
3. a ☐ ☐ A Restrictive Covenant that runs with the project land is executed and is in effect. Enter Liber and Page
   b ☐ ☐ The Restrictive Covenant has been recorded on the titles of all properties served by the project.
   c ☐ ☐ The Restrictive Covenant provides for continued proper O&M of the sewage system.
   d ☐ ☐ The Restrictive Covenant fully complies with Part 41, Rules 299.2941 and 299.2955 promulgated under Part 41, and DEQ Policy WB-010.
4. a ☐ ☐ The cost of 5-years of O&M of the sewerage system has been calculated and certified by a Michigan Licensed P.E.
   b ☐ ☐ An escrow account with escrow agreement has been established in accordance with WB-010
   c ☐ ☐ The escrow account is payable to the "legal entity" and is restricted for emergency O&M of the sewerage system

Section C For projects that the LUG has declined to accept responsibility and WB-010 is fulfilled in some alternative way.

1. **Either** ☐ A LUG signed statement of declination of responsibility is attached, or ☐ Proof of LUG unresponsiveness is attached

Yes No
2. ☐ ☐ A program is in force and effect that fulfills all the requirements of WB-010
3 ☐ ☐ A full explanation of how the program intends to fulfill all of the requirements of WB-010 is included with this application.
Note: The department will review alternative O&M assurance programs to confirm that they meet all requirements.

7. **Owner's Certification**

I,_____ (name), acting as the _____ (title/position) for _____ (entity owning the proposed facilities) do hereby certify that the information provided on this checklist is true and accurate to the best of my knowledge. I also hereby certify that the documents described above on this checklist have been executed, are currently in effect, and have been completed in conformance with DEQ Policy WB-010, Part 41, Sewerage Systems, of the Natural Resources and Environmental Protection Act, 1994 PA 451 as amended, MCL 324.4101 *et seq.* and Rules 299.2941 and 299.2955 promulgated under Part 41. I will provide any document herein described to the DEQ upon request.

Signature:_____

Date: _____ Phone No: _____

SUBSCRIBED AND SWORN to before me on the _____ day of _____, _____, a notary public in and for

_____ County, Michigan.

Notary Public:_____ My Commission Expires: _____

ADDENDUM D

NOTICE

This document is intended strictly for use as an example document to assist in the implementation of Water Bureau Policy No. WB-010. This document should be revised to accurately reflect the specific needs of the parties represented herein. This document should not be relied upon as being legally sufficient to accurately represent all potential issues related to the specific needs of any municipality or private entity. The Michigan Department of Environmental Quality (DEQ) does not accept responsibility or assume any liability for any omission or misunderstanding of any party who relies on this document as meeting the party's expectations. The DEQ encourages the parties listed on this document to seek independent legal advice to ensure that their respective needs are met.

DIRECTIONS

- **{language like this}** should be deleted and filled in with the appropriate information.
- *Language like this* is specific directions applicable to that section of this document and should be deleted.

*PLEASE DELETE THIS TEXT BOX WHEN DRAFTING THE WORKBOOK

INSTRUCTIONS

Pursuant to the Sewerage System Construction Permit Approval process and the owner/user obligations set forth in Part 41, Sewerage Systems, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), this workbook has been established to assist the developer/owner of the proposed sewerage system in calculating an accurate perpetual funding mechanism (as is acceptable to the DEQ) amount based on the annual amount required to properly operate, maintain, and replace the system and system components in accordance with all local, state and federal laws and regulations.

This perpetual funding mechanism (collectively, escrow) must be payable jointly and severally to the owner and the legal entity created to provide proper operation and maintenance of the sewerage system, collectively the "user association," and both shall be obligated to maintain the escrow to ensure that sufficient funding is available and restricted for the sole purpose of continuing uninterrupted system operation and maintenance in the event that the primary funding mechanism from user fees or other assessments is inadequate or becomes unavailable. The owner and the user association thereby shall jointly and severally have the authority to access the perpetual funding mechanism for its intended use only, as allowed by the covenant running with the land (covenant).

The enclosed worksheets are for example and convenience for the licensed professional engineer or the certified wastewater treatment plant (WWTP) operator to complete and

attach any and all applicable documents to. In doing so, the licensed professional engineer or the certified WWTP operator is attesting that the calculated escrow amount is sufficient for the system operation, maintenance, and necessary replacement costs for a period of five years, including periodic rate increases as provided for in the covenant.

Use the Worksheet Table 1 and Table 2 to determine the operating Expenses, Operating Revenues, Non-Operating Revenues, and Total Escrow amount needed for years 1 through 5. Therefore, when completed, one Table 1 (Projected Expenses and Revenues), four Table 2 (Operating Revenues Calculator), and one table 3 (Replacement Needs) shall be submitted. The terms contained in these Tables are defined in "Definitions". Table 1 shall be completed for a summary of five years of the expenses and revenues of the system being permitted under Part 41. The expenses and revenues in this Table shall also exhibit increased or decreased values based on inflationary factors such as, but not limited to wastewater rates, wastewater fees, and changing costs, all relating to the terms of the covenant for the system. Table 3 should be completed for each of years 1 through 5 for values to be inserted into Table 1.

EXAMPLE DOCUMENT ONLY

EXAMPLE ENGINEER CERTIFICATION

TOTAL ESCROW AMOUNTS NEEDED

I, **John Doe, P.E.**, **a certified wastewater works engineer**, (*please choose one:* 1) a certified wastewater works engineer or 2) licensed professional engineer) in the State of Michigan, have personally examined the design specifications and operational plans for the sewerage system project proposal for **Majestic Condominiums** (name of development) located at **1234 South Road** (*address*) in the Township of **Kingsville**, County of **Queen**. The type of sewerage system proposed for **Majestic Condominiums** (*name of development*) is a **privately owned, public sewerage system with a common septic tank capable of receiving 12,000 gallons per day. A wastewater discharge permit to a public water body is required with expected effluent limits of** (*explain the type, give a short description, and if a discharge permit is required, name the type of permit and the expected effluent limits for it*). I hereby certify that the amount of the escrow sufficient to operate, maintain and perform needed replacements of the wastewater system for a period of two years is $**2,146.** The amount of escrow sufficient to operate, maintain and perform needed replacements of the wastewater system for e period of five years is $**5,450.** These amounts were calculated considering reasonable inflationary costs as provided in the attached evaluation document. These operation, maintenance and replacement costs were determined on the **7th** (*date*) day of **May** (*month*), **2005** (*year*), using the attached documents that summarize the costs of operation, maintenance and needed replacement.

_____ _____
(*Signature of certified engineer*) (*Date*)

_____
(*List credentials here*)

_____
(*Location*)

_____
(*Address*)

(____)_____
(*Phone number*)

EXAMPLE DOCUMENT ONLY

TOTAL ESCROW AMOUNTS NEEDED

I, _____ a _____, in the State of Michigan, have personally examined the design specifications and operational plans for the sewerage system project proposal for _____ located at _____ in the Township of _____, County of _____. The type of sewerage system proposed for _____ is a _____ _____. A wastewater discharge permit to a public water body is required/not required (please circle) with expected effluent limits of (please fill in if applicable) _____. I hereby certify that the amount of the escrow sufficient to operate, maintain and perform needed replacements of the wastewater system for a period of two years is $ _____. The amount of escrow sufficient to operate, maintain and perform needed replacements of the wastewater system for a period of five years is $ _____. These amounts were calculated considering reasonable inflationary costs as provided in the attached evaluation document. This certification determined on the _____ day of _____, _____, using the attached documents that summarize the costs of operation, maintenance and needed replacement.

_____ _____

(*Signature of certified engineer*) (*Date*)

_____

(*List credentials here*)

_____

(*Location*)

_____

(*Address*)

(___)_____

(*Phone number*)

DEFINITIONS FOR THE WORKSHEET

I. Operating Expenses – typical system expenses

a. **Administration:** expenses for billing, accounting, or engineering services from internal sources other than the water system.
b. **Contractual services:** expenses by outside contractors for services for O&M of the system.
c. **Equipment rental:** expenses for rent of equipment used by the system. This rented equipment can come from outside sources or from the central garage, public works, or other internal source.
d. **Insurance:** expenses for insurance of the system.
e. **Personnel services:** expenses for salaries, wages, benefits, overtime, sick and vacation leave, insurance pension plans, worker's comp.
f. **Professional services:** expenses for legal, engineering, accounting services by outside contractors.
g. **Repairs and maintenance:** expenses for repairs and maintenance of system equipment and facilities.
h. **Replacement:** expenses for the replacement of operational equipment that has a life span of less than 20 years and that is dedicated to the wastewater treatment facility to maintain system integrity.
i. **Supplies:** expenses for materials and supplies used for operation and maintenance (O&M) other than those from contractual services.
j. **Utilities:** expenses for electricity, gas, and water for operation of the system.
k. **Other:** expenses not included elsewhere (i.e. training, permit fees, etc.)

II. A. Revenues – typical sources of revenue

a. **Penalties and shutoffs:** revenues from disconnections, late fees, and penalties.
b. **Surcharges:** revenues from added demands.
c. **Wastewater rates:** revenues based on quantity of water used (this may be different for each user, and may change based on changing usage).
d. **Wastewater charges:** revenues based on a fixed component such as hook-ups, residential equivalent units, meter size, operator salaries (this is a basic charge)
e. **Other:** add revenues other internal sources such as sale of assets, etc.

B. Non-Operational Revenues:

a. **Interest income:** add revenues from notes, loans, securities, etc.
b. **Transfers in:** add revenues from funds outside the water fund; funds transferred in for expenses that are not covered by other revenues.

EXAMPLE DOCUMENT ONLY

TABLE 1
PROJECTED EXPENSES AND REVENUES
Project expenses and revenues for the next 5 years

	Operating Expenses	Year 1	Year 2	Year 3	Year 4	Year 5
a.	Personnel services	$	$	$	$	$
b.	Professional services	$	$	$	$	$
c.	Supplies	$	$	$	$	$
d.	Contractual services	$	$	$	$	$
e.	Repairs and maintenance	$	$	$	$	$
f.	Equipment rental	$	$	$	$	$
g.	Insurance	$	$	$	$	$
h.	Utilities	$	$	$	$	$
i.	Administration	$	$	$	$	$
j.	Replacement of equipment	$	$	$	$	$
k.	Other	$	$	$	$	$
l.	**Total Expenses**	$	$	$	$	$
	Operating Revenues	**Year 1**	**Year 2**	**Year 3**	**Year 4**	**Year 5**
m.	Wastewater rates	$	$	$	$	$
n.	Wastewater charges	$	$	$	$	$
o.	Penalties and shutoffs	$	$	$	$	$
p.	Surcharges	$	$	$	$	$
q.	Other	$	$	$	$	$
	Non-Operating Revenues					
r.	Interest Income	$	$	$	$	$
s.	Transfers in	$	$	$	$	$
t.	**Total Revenues**	$	$	$	$	$

* Please add the "Total Expenses" boxes at the end of year 1 and 2 to determine the amount of money that must be in a perpetual funding mechanism prior to the attainment of a construction permit for the sewerage system. Please add years 1 through 5 for the five year amount. Then put both amounts on the engineer's certification on page 4 of this packet of worksheets.

TABLE 2
OPERATING REVENUES CALCULATOR
For Table 1, Items m, n and q

a.	Wastewater Rates $_____ x Flow Amount _____= Revenue$_____
b.	Wastewater Charge $_____ x Number of Users ____= Revenue$_____
e.	Other_____$_____ x_____ = Revenue$_____

TABLE 3
REPLACEMENT NEEDS

Use this table to itemize a list of equipment that is dedicated to the operation of the wastewater system and that will effectively operate less than 20 years. Items included, but not limited to this purpose should be items like vehicles, pumps, motors and computers. This itemized list is for the procurement and installation of the equipment, accessories and appurtenances necessary during the useful life of the water system to maintain its design capacity and performance. It is not intended to provide funding for reconstruction, expansion, or upgrading.

Item	Replacement Value	Est. Life	Annual Replacement Amount
Computers	$	years	$
Pumps	$	years	$
Generators	$	years	$
Control Valves	$	years	$
Vehicles	$	years	$
Safety Equipment	$	years	$
Other	$	years	$
		Total Replacement Costs:	**$**

Note: If the estimated life of an item is less than 5 years, only account for the item once by treating it as if it had a 5 year life. See table 3(a) for an example of this table. The rest of the calculations are based on straight line depreciation of the items, prorated over its life span.

TABLE 3(A)
REPLACEMENT NEEDS EXAMPLE

Item	Replacement Value	Est. Life	Annual Replacement Amount
Computers	$ 5,000	10 years	$ 500
Pumps	$ 10,000	3 years	$ 2,000
Generators	$ 10,000	4 years	$ 2,000
Control Valves	$ 6,000	15 years	$ 400
Vehicles	$ 75,000	10 years	$ 7,500
Safety Equipment	$ 15,000	4 years	$ 3000
Other	$ 0	years	$ 0
		Total Replacement Costs:	**$15,400**

ADDENDUM E

NOTICE

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DIRECTIONS

- **{language like this}** should be deleted and filled in with the appropriate information.
- *Language like this* is specific directions applicable to that section of this document and should be deleted.

*PLEASE DELETE THIS TEXT BOX WHEN DRAFTING THE COVENANT

RESTRICTIVE COVENANT RUNNING WITH THE LAND

WHEREAS, **{legal name of permittee}**, is the Developer and owner of **{name of the development}** ("**{short name to be used as reference}**") located in **{name of Township}** Township, **{name of county}** County, Michigan and is legally described on Exhibit A to this Covenant hereto *(make sure there is a legal description attached named "Exhibit A")*; and

WHEREAS, **{name of development}** will be served by a privately owned, public sewerage system (the "Sewerage System"); and

WHEREAS, the Sewerage System is comprised of a Treatment Facility and a Collection System *(change, if necessary)*; and

WHEREAS, the Treatment Facility is owned by **{legal name of owner}** and the Collection System is owned by **{legal name of owner}** *(note, if there is only one owner, please change this section accordingly)*; and

WHEREAS, pursuant to Part 41 of the Natural Resources and Environmental Protection Act, 1994 P A 451, as amended, the Michigan Department of Environmental Quality ("DEQ") has developed a Policy dated June 10, 2004, signed by the Chief of the Water Bureau that was established as a direct result of an adverse ruling from the

Michigan Court of Appeals invalidating Rule 33(4), 1975 ACS R 299.2933(4) promulgated pursuant to Part 41. Specifically, the Court determined that the DEQ could not require persons who are requesting a permit for constructing and operating a sewerage system designed for public use to first obtain a resolution from the Local Unit of Government as a guarantee that the Local Unit of Government would assume responsibility for the operation and maintenance of the system in the event that the private owner fails to perform these functions; and

WHEREAS, pursuant to the Michigan Court of Appeals adverse ruling, the DEQ was charged with establishing and implementing an alternative process for ensuring that privately owned public sewerage systems governed under Part 41 are operated and maintained to avoid the unauthorized discharge of raw or untreated sewage into the waters of the state; and

WHEREAS, the DEQ is granted statutory authority to regulate public sewerage systems under the provisions of Section 4102 of Part 41; and

WHEREAS, under Section 4107 of Part 41, the DEQ is authorized to require specific conditions in the sewerage system design plans and specifications, including method of operation, to ensure that the public health is adequately protected before the owner is issued a construction permit to build the system; and

WHEREAS, the DEQ is authorized under Section 4107 of Part 41 to require a developer or sewerage system owner to comply with recommendations or orders from the DEQ with respect to the method of operation of the proposed sewerage system; and

WHEREAS, Rule 41, promulgated under Part 41, provides that either proper devices are or will be in satisfactory operation before discharges to the waters of the state will occur; or a definite program or agreement, approved by the department, which governs the operation of the system must be in place before the DEQ is required to issue a construction permit; and

WHEREAS, Rule 55, promulgated under Part 41, requires that the owner of the sewerage system operate and maintain it at all times to avoid any unlawful discharges or upsets; and

WHEREAS, the placement of this Restrictive Covenant on **{name of development}** is required by the DEQ to ensure that the sewerage system will be operated and maintained in accordance with Part 41 of the NREPA at all times; and

WHEREAS, the Developer has established the **{name of legal entity responsible to upkeep the O&M for the sewerage system}** (**choose one, or insert other** "the **"Association"**; the **"LLC"**; the **"LLP"**; the **"Corporation"**) that has responsibilities for and rights in the property of **{name of development}**, including the Collection System portion of the Sewerage System; and

WHEREAS, the Developer has entered into an Agreement (the "Sewerage Agreement") with **{legal name of that third party}**, (**{"shortened name to be used as reference"}**) that has responsibilities for the Sewerage System and owns the Treatment Facility portion of the Sewerage System and is attached to this covenant as Exhibit B; and *(Only use this section, or portion of this section, if there is a third party owner/operator of the treatment facility; make sure that the Agreement is attached as Exhibit B)*

WHEREAS, the Developer has granted **{third party}** easement rights (the "Easement") by this covenant and located in the Sewerage Agreement over the property of **{name of development}** to allow **{third party}** to access its property and fulfill its obligations under the Sewerage Agreement; and

WHEREAS, each owner of a unit in **{name of development}** is a member of the **{legal entity}** and has individual responsibilities for paying a proportionate share of the costs of the Sewerage System; and

WHEREAS, the purpose of this covenant is to establish the necessary responsibilities for the Sewerage System and to establish procedures to ensure compliance with applicable governing law, including Part 41.

NOW, THEREFORE, in consideration of the mutual benefits to be derived by the Developer and **{legal entity}**, a **{describe what the legal entity is, i.e. a "non-profit corporation", or other}** of which all Co-Owners of **{name of development}** shall be members, the undersigned, for itself, its successors, and assigns, does hereby declare and make known to all purchasers and Owners of the Units using the Sewerage system, that Units will and shall be used, held, and/or sold subject to the following restrictions, covenants and agreements, which, by acceptance of a deed, purchase agreement, or option for a Unit, shall be deemed accepted by present and future purchasers and Owners of Units. This covenant shall run with the land and is binding upon the grantees of Units jointly as to all obligations hereunder, and on their respective heirs, personal representatives, successors, assigns and grantees.

1. Responsibility for Construction, Maintenance and Repair.

(a) The Developer and/or its contractual assignee will be responsible for the initial construction and installation of the Collection System portion of the Sewerage System. **{third party}** will be responsible for the initial construction and installation of the Treatment Facility portion of the Sewerage System, to be located within **{name of development}** and accessed via the sewer easement granted for such purposes (only use this if it is true). **{third party},** pursuant to the Sewerage Agreement shall thereafter be responsible for the maintenance, repair and ultimate replacement of the Sewerage System(make sure the Agreement addresses this), all of which shall be performed in strict conformance with all applicable statutes, ordinances, rules and regulations of the State of Michigan, **{name of county}** County, and other governmental agencies thereof having jurisdiction and in strict conformance with this section, unless and until easements to the

Sewerage System have been granted to, and accepted by, a public agency whereupon the responsibility for such maintenance, repair and necessary replacements shall be that of the public agency having jurisdiction. All costs of such maintenance, repair and/or replacement shall be costs of **{third party}** and pursuant to the Sewerage Agreement shall be assessed as costs of administration of the **{legal entity}** *(only add this if the Agreement addresses this)* and shall be jointly and severally borne by the sum of all Co-Owners, which are served thereby, and shall be assessed to the Co-Owners in accordance with attachment B to this covenant *(make sure there is an attachment B outlining costs, can be a Master Deed in some cases)*. Attachment B requires that the **{legal entity}**, and each of the Co-Owners, on behalf of themselves and their respective heirs, devisees, personal representatives, successors and assigns, and with the express intent to bind, and run with, their respective Units and **{name of development}** in perpetuity, irrevocably consent to grant the operator or operators of the Wastewater System, the authority to assess a user fee to each Unit using the system to be paid in monthly payments to the Operator of the Wastewater System at the rate proportionate to each Unit based upon the gallons of waste water generated and sent to the Wastewater System. Attachment B also grants the **{legal entity} the** authority to assess fines and penalties and to take legal action in the event any Co-Owner does not pay its required fees.

(b) It is anticipated that separate portions of the Sewerage System will be located within individual Units of **{name of development}**. The construction of each portion of the Sewerage System within each Unit will be the sole responsibility of the Co-Owner(s) of the Units which are served thereof and shall be performed strictly in accordance with all applicable state, county and local public health and other statutes, regulations, rules and ordinances.

(c) Use of the Sewerage System is for **{name of development}** use only. The placement of waste into the Sewerage System, other than **{name of development}** use, is prohibited. Any costs borne by the owner to pay for remediation due to the placement of harmful substances into the Sewerage System shall be fully reimbursed by the person or persons that placed the harmful substance in the system.

2. **{legal entity}** Escrow Fund. Co-Owner Responsibilities for the Perpetual Funding Mechanism for the Operation, Maintenance and Needed Replacement of the Sewerage System:

(a) Each Co-Owner will be responsible for payment of appropriate charges/fees made for the use of the Sewerage treatment services and payment of appropriate charges/assessed fees made into the perpetual escrow fund, as set forth in the Sewerage Agreement *(make sure the Agreement outlines this)*.

(b) A perpetual escrow fund or funds *(use plural if there will be two funds due to two different owners of portions of the sewerage sytem, i.e. separate ownership of the collection and treatment facilities)* shall be established and maintained solely for the use of operation, maintenance and possible replacement of those elements of the Sewerage System. The funds are established solely for the use by the respective owners

and legal entity of the portions of the Sewerage System in the event that the owner is otherwise unable to sufficiently operate and maintain the sewerage system in accordance with all applicable laws and rules. *(Only use this portion if there is more than one owner of different portions of the sewerage system)* **{third party}**, as the owner of the Treatment Facility shall have responsibility for the establishment and funding of the escrow fund for the Treatment Facility portion of the Sewerage System. The **{legal entity}** shall have the responsibility for the establishment and funding of the escrow fund for the Collection System portion of the Sewerage System. The escrow funds shall be separate from any other fund established and held for **{name of development}** by the **{legal entity}** and **{third party}** and each shall be a beneficiary of the other's escrow fund in the event the owner of the escrow fund fails to operate and maintain its portion of the Sewerage System in accordance with all applicable laws and rules.

(c) The perpetual escrow funds shall be initially established for a two-year amount of operation, maintenance and needed replacement of the respective portions of the Sewerage System as certified by a Michigan licensed engineer and reviewed by the MDEQ for administrative completeness in the permit application process for a sewerage system construction permit under the authority of Part 41 of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended. Additionally, not later than two years after the first day of operation of the sewerage system, these perpetual escrow funds shall be increased to the amount as was certified by the Michigan licensed engineer and reviewed for administrative completeness by the MDEQ for the five-year amount of operation, maintenance and possible replacement of the sewerage system. This amount may be increased in the future as determined to be necessary by a Michigan licensed engineer; but shall never be decreased. If this fund is accessed for the sole purpose of continuing operation, maintenance and completing necessary replacement of the Sewerage System in the event that the owner is otherwise unable to sufficiently operate and maintain the Sewerage System in accordance with all applicable laws and rules, notice shall be sent to the **{legal entity}**, **{third party}** and the MDEQ within 10 days of the initial withdrawal. The notice to the **{legal entity}** shall include a description of the additional prorated fees for reimbursement of the escrow. Each Co-Owner consents and agrees to pay a prorated amount of money into the escrow account as is necessary to fully replenish it to the required amount as identified herein, in the event the escrow funds or portion thereof are utilized for the operation, maintenance, repair, replacement or for other sewage treatment purposes of the entire Sewerage System. The certified five-year amount shall be reimbursed not later than five years from the date of the initial withdrawal.

3. Consent to Fees and Special Assessment for Sanitary Sewage System. The **{legal entity}**, and each of the Co-Owners, on behalf of themselves and their respective heirs, devisees, personal representatives, successors and assigns, and with the express intent to bind, and run with, their respective Units and the **{name of development}** in perpetuity, hereby irrevocably consent to grant the operator or operators of the Sewerage System, the authority to assess a user fee to each Unit using the system to be paid in monthly payments to the Owner and Operator of the Sewerage System at the rate proportionate to each Unit based upon the gallons of waste water generated and sent to

the Sewerage System, granting the Owner and Operator of the Sewerage System the authority to assess the user fee as indicated above until such time a governmental agency may need to assume the responsibility for the operation and maintenance of the Sewerage System under the terms described in a legally binding agreement between that governmental agency and all owners of the sewerage system. In addition, in case of agreement with a governmental agency to operate and maintain the Sewerage System, the **{legal entity}** and each of the Co-Owners authorizes and consents to the establishment of a special assessment district ("SAD") to assist the governmental agency in its recovery of such expenditures, if necessary. In connection therewith, the **{legal entity}** and every co-owner of the sewerage system (Co-Owners) covenant and agree to enter into, and execute, any and all documentation from time to time determined by the governmental agency to be necessary for the establishment of such SAD. The **{legal entity}** and Co-Owners acknowledge and agree that the sum of all fees assessed as provided hereunder, whether by the Operator of the Sewerage System or the governmental agency shall be equal to 100% of all costs of operation of the Sewerage System. The **{legal entity}** and Co-Owners further acknowledge and agree that in the event a Co-Owner does not, for any reason, pay a required assessment that the **{legal entity}** will nevertheless be responsible for 100% of the costs of operation of the Sewerage System.

5. Easements for Maintenance, Repair and Replacement. The Developer, hereby grants **{third party}** an easement over the premises in **{name of development}** that shall run in duration with the Sewerage Agreement, for access to the Treatment Facility and to the remainder of the Sewerage System as necessary to allow **{third party}** to maintain and operate the Sewerage System as contemplated in the Sewerage Agreement. *(Make sure the Agreement contemplates this)* The Developer and the **{legal entity}** shall have such easements as may be necessary over the premises in **{name of development}**, including all Units, to fulfill any responsibilities of maintenance, repair or replacement that are required or permitted to perform in the Agreement.

6. Binding Nature. This Covenant shall be recorded in the **{name of county}** County Register of Deeds office, and by acceptance of a deed, purchase agreement, or option for a Unit in **{name of development}**, shall be deemed accepted by present and future purchasers and Owners of Units and shall run with the land and be binding upon grantees, of Units and on their respective heirs, personal representatives, successors, assigns and grantees.

7. Amendment. This covenant may only be amended by written document with the express consent of the Owners of the Unit it is recorded on, and the DEQ.

DEVELOPER:
{legal name of developer}

_____
By:
Its:

State of Michigan)
)ss
County of **{name of county}**)

The foregoing document was acknowledged before me on this _____ day of, _____200* by _____, on behalf of **{legal name of development}**.

_____
_____, Notary Public
_____ County, Michigan
My Commission Expires:_____
Acting in _____ County

DEVELOPER FORMED:
{legal name of legal entity}

_____
By:
Its:

State of Michigan)
)ss
County of **{name of county}**)

The foregoing document was acknowledged before me on this_____ day of, _____ 200* by_____, on behalf of **{legal name of legal entity}**.

_____
_____, Notary Public
_____ County, Michigan
My Commission Expires: _____
Acting in _____ County