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JAN 28 2013

22 January 2013

The Honorable Mike Dewine  
Ohio Attorney General  
C/O Opinions Section  
30 East Broad, 15<sup>th</sup> Floor  
Columbus, OH 43215

**OPINIONS**

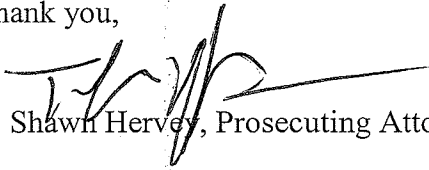
Dear Attorney General,

I am writing to request an opinion regarding the authority of a county to enter into a multi year, no bid contract or agreement, with a private contractor to build and maintain certain infrastructure projects and share or split the proceeds of raw water sales.

- 1) Whether a County may enter into a multi-year agreement with a private company that builds and operates water infrastructure projects on a non-emergency basis without engaging in statutory competitive bid process, as required by O.R.C. Section 307.86?
- 2) Whether a county may enter into a multi-year agreement with a private company that builds and operates water infrastructure projects which are constructed with the sole aim of selling raw water to oil and gas drilling companies to benefit both the County and the private company?
- 3) Whether such an arrangement creates a public/private "joint venture," that is otherwise prohibited by Article VIII, Section 6 of the Ohio Constitution and applicable statutes?
- 4) Whether such an arrangement can be utilized to make needed improvements to existing infrastructure without benefit of the statutory competitive bidding process, as required by O.R.C. Section 307.86?

Please find attached several documents to assist in narrowing your analysis regarding this matter. If you have any questions or concerns feel free to contact me.

Thank you,

  
T. Shawn Hervey, Prosecuting Attorney

October 22, 2012

*By Email*

Mike W. Currie, Esq.  
General Counsel  
Kokosing Construction Company, Inc.  
6235 Westerville Road, Suite 200  
Westerville, OH 43081

RE: Agreement for Water Sales (the "Agreement") by and between Kokosing Water LLC ("Kokosing") and Harrison County, Ohio (the "County")

Dear Mike:

You asked us to review the most recent draft of the captioned Agreement and provide our analysis as to whether the County is precluded from entering into the Agreement by virtue of Ohio Const. Art. VIII, § 6 ("§ 6"), which forbids counties from entering into joint ventures with private companies, or O.R.C. § 307.86, which requires counties to competitively bid certain contracts. We have limited our analysis to the foregoing law and have not reviewed Harrison County's code or procurement procedures as we have assumed that the County, in entering into the Agreement, will follow whatever internal procurement rules it has established.

The provisions of the Agreement pertinent to our analysis are as follows: (a) Kokosing will be the exclusive sales representative of the County for the sale of non-drinking water to customers in the oil and gas industries for use in connection with drilling operations; (b) some sales will require pipes, pumps valves and other infrastructure from the raw water source to the customer, and Kokosing will design and build that infrastructure at its sole risk and cost; (c) Kokosing will be reimbursed solely from "Raw Water Revenue" (until it is reimbursed it will receive 70% of the raw water sales revenues and the County will receive 30%); (d) Kokosing assumes all financial risk associated with the design and construction of the raw water infrastructure – if the sales are insufficient to reimburse it, Kokosing suffers the loss; (e) during the term of the Agreement the infrastructure is owned by Kokosing; and (f) at the end of the term, Kokosing has the right to either abandon or remove imbedded improvements on County property but will at all times hold and keep title to all other improvements and equipment. No tax dollars are paid to Kokosing and Kokosing receives reimbursement only if and to the extent of the raw water sales.

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## I. Ohio Law on Public-Private Partnerships

Ohio Const. Art. VIII, § 6 ("§ 6") forbids counties from entering into joint ventures or partnerships with private companies and forbids counties to lend its credit to, or in aid, of a private company. However, Ohio courts, after carefully examining the facts and circumstances of each particular case, have recognized certain transactional structures as complying with § 6. In interpreting § 6, "one must first determine whether the contemplated action produces a lending of the state's aid or credit to an individual, association, or a corporation, *or* a union of the resources of the state with a private enterprise. If not, then the proposed action will be deemed permissible under the constitutional provision, and allowed to proceed." 1999 Ohio Op. Atty Gen. No. 2, at \*14 (Feb. 1, 1999) (emphasis added). Therefore, if there is no "union of the resources" of a county and a private company, the structure complies with § 6.

When considering § 6, some Ohio courts review whether or not a "joint venture" exists between a public entity and a private company under a strict construction of what a "joint venture" is under Ohio law. *Citizens Word v. Canfield Township* (7th App. Dist. 2003), 152 Ohio App. 3d 252. Therefore, if all the elements of a "joint venture" under Ohio law are not met, it is more likely that the structure does not violate § 6. Moreover, courts consider the public entity's ownership of the property to be improved as a critical factor. *Id.* For example, a municipally-owned public utility's agreement to extend its distribution system beyond the limits of the municipality, in exchange for installment payments designed to offset the cost of such extension of services, does not violate § 6 because the municipality did not loan its credit to or in aid of anyone and the municipality owned and operated the extended lines. *Miller v. Village of Orrville* (9th App. Dist. 1934), 48 Ohio App. 87.<sup>1</sup> However, it is paramount that the public property and

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<sup>1</sup> However, the Ohio Supreme Court held unconstitutional under § 6 legislation that would allow a private company to build waterworks into the municipal water system, then lease back the right to use it to the public entity, because Court found that this constituted too close of a connection between public and private property. *Alter v. City of Cincinnati* (1897), 56 Ohio St. 47. The Court was concerned because the private waterworks and public waterworks would be joined together thereby completing "the union of public and private capital and funds in one enterprise." *Id.* at 66. Thus, further extensions of the public waterworks would be useless and valueless without the private waterworks and the "close connection and dependence one upon the other" constituted both as a single whole. *Id.* However, the Court noted that leasing a whole water-works plant owned by a private company would be acceptable because it could stand upon its own merits and not make the property of the city dependent upon the privately owned property for its value and utility.

<sup>2</sup> Also, some courts have held that Ohio Const. Art. VIII, § 13 ("§ 13") is an explicit exceptions to § 6. Under § 13, an Ohio court upheld a "cooperative agreement" between a city, a port authority, and a private developer. See *Westfield Franklin Park Mall, LLC v. Toledo/Lucas Cty. Port Auth.* (6th App. Dist. 2005), 2005 Ohio 5248. The deal was in furtherance of "commerce" under § 13, did not pledge tax revenue for payment, and gave the city a lien (on a reserve account) on the property improved. *Id.*; *State ex rel. Bd. of Cty. Commissioners of Lake Cty. v. Zupancic* (1991), 62 Ohio St. 3d 297 (holding that "commerce" and "industry" should be construed broadly and upholding funding for a construction project for a for-profit, multiunit, low-and-moderate income rental housing as a valid exception under § 13). Therefore, so long as a project furthers "commerce" or "industry" and otherwise complies with the other requirements of § 13, § 6 is allowed to be violated. However, some courts have limited § 13

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private property remain separate and distinct. Office of Attorney General (Ohio) Opinion No. 99-007, 1999 Ohio Op. Atty. Gen. No. 7 (holding that is constitutional for a school district to sell access internet access to private enterprises so long as the public and private property interests are not intertwined).<sup>2</sup>

Under § 6, profit-sharing between a county and a private company is acceptable. 1996 Ohio Op. Atty. Gen. No. 51 (Oct. 8, 1996) (allowing a situation whereby a private company helped a public entity secure an FCC license (private company paid the application costs) and then leased excess services coming from that FCC license to the private enterprise because the main factor was that the property interests remained separate and profit-sharing was not dispositive on the issue). Moreover, it was not unconstitutional for a county to enter into a contract to receive a percentage of a private company's gross revenues or earnings. *Grendell v. Ohio E.P.A.* (9th App. Dist. 2001), 146 Ohio App. 3d 1 (noting that the fact that the public entity only shared in the fees collected, not profits, and did not share in the losses, was probative).

Based upon the foregoing, it is our opinion that a court reviewing the Agreement will more likely than not find that the structure of the transaction described in the Agreement does not violate Ohio Const. Art. VIII, § 6 because: (a) there is no joint venture between the County and Kokosing because there is no sharing of losses between the parties; and (b) there is no joint ownership of a single enterprise such that the interests of the County and Kokosing are so intermingled that the County is lending its aid and credit to private company. While the County shares in the profits, as in the *Grendell* case, it does not share in the losses as the Agreement specifically states that Kokosing assumes all financial risk associated with the design and construction of the water infrastructure. There is no scenario under the arrangement contemplated by the Agreement whereby the County is required to contribute to losses or to pay any portion of the raw water infrastructure from public funds. One might argue, however, that Kokosing's ownership of the raw water infrastructure is a the "union of public and private capital and funds in one enterprise" similar to *Alter v. City of Cincinnati* (1897), 56 Ohio St. 47, where a private company built waterworks into the municipal water system, then leased back the right to use it to the public entity. However, we would argue that the arrangement contemplated by the Agreement is different because the raw water infrastructure will be owned by Kokosing, thus keeping the public property and private property separate and distinct, and, moreover, the raw water infrastructure is not part of the County's water system serving the general public but will be separate private lines and equipment serving customers in the oil and gas industries as part of the raw water sales.

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exception to nonprofit corporations and development corporations not private companies. Therefore, there is uncertainty as to how an Ohio court would apply the § 13 exception to the present situation.

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## **II. Ohio Law on Competitive Bidding**

Under Ohio law, "a public entity is not required to engage in competitive bidding in the absence of legislation requiring it." *Danis Clarkco Landfill Co. v. Clark County Solid Waste Mgmt. Dist.* (1995), 73 Ohio St. 3d 590 (citing *Shafer v. Streicher* (1922), 105 Ohio St. 528). Moreover, O.R.C. § 307.86 and the other provisions of O.R.C. §§ 307.87-.92 "relating to competitive bidding do not apply when a county enters into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the County roads it uses at no cost to the County." Office of Attorney General (Ohio) Opinion No. 2012-029 (Sept. 19, 2012) (citing *Danis*, 73 Ohio St. 3d 590). In *Danis*, the Ohio Supreme Court held that O.R.C. § 307.86 does not apply when a private company assumes the entire cost of a waste disposal facility used by county residents. Therefore, because "[t]he anticipated contract quite simply did not involve any monetary cost to the public or expenditure of public funds by the District," and O.R.C. § 307.86 only applies to contracts that exceed the statutory threshold, the project did not fall within the scope of the statute and did not require competitive bidding. *Id.* at 601. In *Danis*, the fact that the designated contractor may receive fees at a later point as a result of it being "designated" the sole repository of solid wastes does not bring it into the purview of O.R.C. § 307.86 and require competitive bidding.

Reviewing the Agreement in light of the above, the critical factor that takes the Agreement out of the operation of O.R.C. § 307.86 is that Kokosing's construction of the raw water infrastructure will not involve any monetary cost to the public or expenditure of public funds by the County—it will be paid solely by raw water infrastructure sales.

But the argument also could be made that *Danis* and Ohio Attorney General Opinion No. 2012-029 are readily distinguishable from this matter. In *Danis*, the contractor was designated to construct a privately owned and operated solid waste disposal facility, but was not paid in any way by the County for such construction. Rather, the only fees collected by the contractor were payments for *future* disposal of waste at the facility: "Any future tip fees to be paid by the County will be payments made in consideration of [the contractor's] receipt of wastes at that future time, and not in consideration of the District's *designation* of the [contractor's] facility as the sole repository of the identified types of solid wastes." *Danis*, 73 Ohio St. 3d at 602-03 (emphasis in original). Similarly, in the Attorney General Opinion, the County entered into an agreement with a private company that conducted oil and gas drilling operations and wind farms to have the company improve and repair the County roads it used, at no cost to the County. The County never paid for the roadwork in any way, so no public funds were expended for the roadwork.

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The Agreement between Kokosing and the County explicitly contemplates that a portion of the revenue will compensate Kokosing for "the planning, design, construction and other services required for the Raw Water Infrastructure." A court could find such distinctions significant for purposes of its analysis under R.C. 307.86, and could find that the 70% being paid to Kokosing constitutes a "cost" being incurred "by or on behalf of" the County for the construction work. We would argue, however, that (a) the actual cost of the raw water infrastructure is being paid for by Kokosing in order to create the raw water revenue and that if the revenue is not there, then the County still incurs no cost and the loss stays with Kokosing, and (b) no tax money or public funds are being expended to construct the raw water infrastructure – they are at all times being paid for by Kokosing subject to reimbursement from raw water sales only.

The above opinion is based upon current Ohio case law, which, of course, may change in the future based upon subsequent court decisions.

Very truly yours,

*Thompson Hine LLP*

## AGREEMENT FOR WATER SALES

This Agreement for Water Sales (the " Agreement") is entered into as of October \_\_\_\_, 2012 (the "Effective Date") by and between Kokosing Water LLC , an Ohio limited liability company (the "Company"), whose address is 6235 Westerville Rd., Westerville, Ohio 43081 and Harrison County, Ohio (the "County"), whose address is Harrison County Commissioners, 100 West Market Street, Cadiz, Ohio 43907.

### W I T N E S S E T H:

WHEREAS, the County is the County of certain land and/or improvements in Harrison County, Ohio and wishes to develop therefrom water for sale to the oil and gas and other industries; and,

WHEREAS, the Company has the ability and expertise to design, develop and construct such systems as are necessary for the production and delivery of water from County's water resources and to sell such water to the oil and gas and other industries;

NOW, THEREFORE, in consideration of the mutual covenants stated herein and other good and valuable consideration, the County and the Company, intending to be legally bound, covenant and agree to the following terms and conditions:

### ARTICLE 1

#### DEFINITIONS

##### 1.1 Defined Terms.

1.1.1 In addition to other terms defined throughout this Agreement, the following terms shall have the meanings indicated below:

"Contract" shall mean any engagement letter, contract, purchase order or other written agreement between the County and the Company executed in connection with the Raw Water Infrastructure including as set forth in Article 2.5.1.

"Cost of the Work" shall mean costs incurred by Company in performance of the work including all associated design, labor, equipment, material, subcontract, design, plus 10% on all such costs for overhead and profit.

"Cost Report" shall mean a monthly report to be prepared by the Company containing the following: (a) the status of all contracts and contract negotiations for the prior period and any anticipated for the following period, (b) a summary of all expenses incurred for the construction of the Raw Water Infrastructure Improvements, (c) a summary of all financial matters consistent with the terms of this Agreement reflecting income, expense and reconciliation of payments due to the Company and County and (d) such other relevant information as may be reasonably agreed upon by the County and Company from time to time.

"Legal Requirements" shall mean all federal, state or local laws, statutes, ordinances, building codes, orders, rules and regulations applicable to a Project or the Work.

"Primary Share" shall mean an amount equal to 70% of the Raw Water Revenue.

"Project" shall mean the particular project involving Raw Water Infrastructure undertaken pursuant to this Agreement.

"Raw Water Infrastructure" shall mean the raw water nodes, valves, pumps, piping, reservoirs, wells, troughs, tanks, mains, trunk and distribution lines and other infrastructure necessary to distribute and deliver the raw water from the Water Resources to customers in the oil, gas and related industries.

"Raw Water Revenue" shall mean the gross revenue generated from the sale of raw water to the oil, gas and related industries less the cost of the raw water as defined in article 7.4 of this Agreement, if any, and less ten percent (10%) of the gross revenue, which amount shall constitute the Company's compensation for the operation, maintenance, sales and collection expenses, including items such as personnel, utilities, maintenance materials and related items.

"Secondary Share" shall mean an amount equal to 30% of the Raw Water Revenue.

"Term" shall mean the period of time commencing on the Effective Date and ending on the 30<sup>15</sup>th anniversary of the Effective Date.

"Water Resources" shall mean those lands, improvements, equipment and appurtenances currently owned by, or legally available to, the County, and, in addition thereto, all such lands, improvements, equipment and appurtenances and contractual rights to water that the County may obtain during the term of this Agreement, which may be used for the production, storage, impoundment or transmission of water together with all wells, plants and other assets or improvements controlled by County whether currently in existence or constructed in the future.

"Work" shall mean, for each Project, the planning, design, construction and other services required for the Raw Water Infrastructure, and includes all design, labor, materials, equipment and services provided or to be provided by the Company to fulfill the Company's obligations, and all items of Work reasonably necessary therefore.

## 1.2 Other Terms.

1.2.1 Unless otherwise defined herein, words that have well-known technical or construction industry meanings are used in this Contract with such recognized meanings.

1.2.2 As the context may require, defined terms in the singular shall include the plural (and vice versa) and the use of feminine, masculine or neuter pronouns shall each include the other. Wherever the word "including" or any variation thereof, is used herein, it shall mean "including, without limitation," and shall be construed as a term of illustration, not a term of limitation. Wherever the word "or" is used herein, it shall mean "and/or".



## ARTICLE 2

### SERVICES

2.1 Exclusive Agent. For the Term, the County hereby appoints the Company as its sole and exclusive representative for the negotiation and sale of raw water to the oil, gas and related industries. Said raw water shall be that available from the Water Resources and be that amount by which the available water capacity exceeds the needs for Municipal water supply. The County shall not sell or enter into any contract with any other sales representative, firm or person for the sale of raw water during the Term. All sales leads will be directed to the Company, who shall negotiate the sale to all prospective customers interested in purchasing raw water for the oil, gas and related industries. The negotiation by the Company for the account of the County of the sale price and delivery terms of the water shall be determined by the Company. The Company shall have no obligation to sell the County's water at a price that Company deems, in its sole discretion, not to be in the best interest of the County and/or the Company.

2.2 Company Sales Obligations. The Company shall: (a) carry out in all respects the County's instructions with respect to the negotiations of sales of the raw water; (b) report monthly on all sales made and on the status of negotiations of all sales; (c) regularly market the raw water to companies in the oil, gas and related industries; and (d) keep the County informed of current market conditions affecting the sale of raw water.

2.3 Water Sales Agreements; Raw Water. Once the price, terms and conditions for a particular raw water sale are established by the Company, the Company shall be authorized to execute, as agent for the County, a purchase order or sales agreement for the raw water sale that reflects the price, terms and conditions relating thereto.

#### 2.4 Design and Construction Services-Related to Raw Water Sales.

2.4.1 The design and construction of certain Raw Water Infrastructure may be required in connection with the sale of raw water to a particular customer. In each such instance, the Company shall cause the Raw Water Infrastructure to be designed by licensed designers or engineers and shall provide to the County, for its approval, the final design, price and construction schedule for the Raw Water Infrastructure as set forth in Article 2.5:

2.4.2 The County has no obligation to pay any costs related to the the design and construction of the Raw Water Infrastructure, as the Company shall be reimbursed, if at all, from the Raw Water Revenue, as set forth in Section 7.1 hereof, and ~~T~~the Company shall assume all financial risk associated with the design and construction of the Raw Water Infrastructure. The Company shall have no obligation to proceed with the design or construction of any Raw Water Infrastructure unless and until it has determined, in its sole discretion, that such Raw Water Infrastructure is financially feasible based upon the projected cost of the design, construction, operation and maintenance thereof and the projected revenue associated therewith.

2.5 Scope of Work Packages.

2.5.1 When the County and the Company have mutually agreed to a preliminary scope description for a particular Project relating to the Raw Water Infrastructure, which Project is to be performed on County's property, then with respect to each Project identified, the parties shall execute an agreement in the form attached hereto as **Exhibit A** ("Contract"), which shall include the following elements: (a) a detailed scope of work description that sets forth the design and construction responsibilities of the Company; (b) verification of the source of funds for the project; (c) delineation of the County's responsibilities; and (d) such other terms and conditions as the Company and the County may agree upon.

2.5.2 All Work shall be performed in a good and workmanlike manner and in compliance with Legal Requirements. Unless specifically noted otherwise, the Company shall supply all labor, material, equipment, supervision and all other items and services necessary to perform the Work.

2.5.3 The Company shall have the right, within its sole discretion, to cancel or non-perform any Project that it may determine is not in the best economic interest of either party.

2.5.4 When the County and the Company have mutually agreed to a preliminary scope description for a particular Project relating to the Raw Water Infrastructure, which Project is to be performed on property not owned by County, then Company will provide County with an estimate of the cost of the Project, which amount shall be reimbursed as set forth in Article 7 hereof.

2.6 Hazardous Materials. The Company's responsibilities, if any, for the handling and remediation of Hazardous Materials will be set forth in the Contract.

2.7 Subcontractors.

2.7.1 The Company shall, as soon as practicable after execution of each Contract, furnish in writing to the County the names of the Subcontractors, if any, for each of the principal portions of the Work. Proposed Subcontractors and sub-subcontractors shall be firms with a record of successful and satisfactory past performance with the type work or items proposed to be provided or furnished by them. Contracts between the Company and Subcontractors shall be in writing and shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Company by the terms of this Agreement and any Contract, and to assume toward the Company all the obligations and responsibilities that the Company, by this Agreement or any applicable Contract, assumes toward the County.

2.8 Liens. The Company shall indemnify the County from claims of arising out of the services, labor and materials furnished by the Company in connection with the Work and from all laborers', materialmen's and mechanics' liens filed against the property wherein the Work is located arising out of the services, labor and materials furnished by the Company.

### ARTICLE 3

#### STANDARD OF CARE; PERSONNEL

3.1 Standard of Care. The Company shall perform its services, and shall cause the entire Work described in the Contract Documents, to be executed in accordance with the standard of care and skill for design-build contractors experienced in the construction of projects of similar size, scope and complexity as the Project.

3.2 Personnel. The Company shall use or employ only qualified personnel. The Company shall enforce strict discipline and good order among the Company's employees and other persons carrying out the Work and shall be responsible to the County for the acts and omissions of the Company's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work on behalf of the Company. The Company shall maintain labor peace on the Project.

3.3 Local Preference. The Company agrees to make a good faith effort to hire personnel resident in Harrison County for the operation, maintenance and construction activities associated with this Agreement. Notwithstanding the foregoing good faith obligation, the Company will hire only such personnel as it deems to be qualified and , and only in a manner consistent with applicable law and any trade agreements to which the Company, or its subcontractors, may be subject.

3.4 Compliance with Legal Requirements. The Company shall fully comply with all Legal Requirements having to do with workers' compensation, social security, unemployment insurance, hours or labor, wages, working conditions and other employer-employee related subjects.

3.5 Equal Opportunity. The Company represents that it is and will continue to be an Equal Opportunity Employer.

### ARTICLE 4

#### COUNTY'S RESPONSIBILITIES

4.1 Water Resources. The County shall make available to the Company all sources of water available to the County along with any other land available to the County to construct water withdrawal points, additional wells, water impoundments, raw water pipelines, pumping facilities, truck loading areas and related raw water facilities. The availability to such Water Resources shall be subject and secondary to the County's municipal drinking water requirements.

4.2 Approvals and Information. The County shall provide all available information relating to the Water Resources and existing infrastructure and render approvals and decisions with reasonable promptness to minimize delay in the orderly progress of the Work.

4.3 Property and Easements. For each Project, with respect to land owned by it and Raw Water Infrastructure improvements to be constructed thereon, the County shall, at no cost to the Company, provide such easements, rights-of-way, leases, other necessary lands and access as required for the construction use, operation and maintenance of the Raw Water Infrastructure. The County shall cooperate with the Company with respect to any efforts undertaken by it to secure such easements, rights-of-way, other necessary lands and access as required for the Raw Water Infrastructure on or over the lands of others. The Company shall be responsible for all costs incurred in obtaining such access to land or property not owned or controlled by the County, which cost shall be reimbursed in accordance with Article 7 hereof.

4.4 Tests. The County shall provide, to the extent available to the County, the results and reports of prior tests, inspections or investigations relating to any Project and involving structural or mechanical systems, chemical, air and water pollution, hazardous materials or environmental and subsurface conditions and information regarding the presence of pollutants at the Project site.

4.5 Cooperation. The County shall (a) cooperate with the Company in securing building and other permits, licenses and inspections; (b) provide all available information related to existing water, wastewater and related infrastructure necessary for planning and design of improvements; (c) assist with the marketing and sales of raw water to the oil and natural gas industry; and (d) assist with coordinating all planned improvements with other interested municipalities, counties, state agencies and other interested entities.

4.6 Raw Water Revenue Accounting. The Company shall establish a separate account to hold all Raw Water Revenue. No other funds will be co-mingled with the Raw Water Revenue. Each month the Company shall deliver to the County a statement setting forth its calculation of the Raw Water Revenue for the preceding month and setting forth of all deposits and withdrawals from Raw Water Revenue account.

## ARTICLE 5

### OWNERSHIP, MAINTENANCE AND OPERATION

#### 5.1 Title.

5.1.1 All Raw Water Infrastructure shall be the property of the Company and title thereto shall be vested in the Company throughout the Term. At the end of the Term, (a) Title to any earthen or embedded Raw Water Infrastructure shall be the property of the Company but shall vest in the County and the County shall be the owner of such property, and (b), the Company shall continue to own -at the end of the Term. Title to all other Raw Water Infrastructure, including, but not limited to pumps, motors or other similar equipment, unless the Company elects, by written notice to the County, to abandon such Raw Water Infrastructure, in which case title thereto shall remain or vest in Company the County and the County shall be the owner of such property. If the Company does not elect to abandon such Raw Water

Infrastructure, then the Company shall remove such Raw Water Infrastructure within 180 days after the expiration of the Term and shall repair any damage to the County's lands that was caused by such removal, upon delivery to the Project. The party holding title shall have all rights of ownership and tax benefits of ownership, including the right to depreciation of the improvement.

5.1.2 County shall not during the term of this Agreement, or upon its expiration, have any interest of any kind in Raw Water Infrastructure that is, or may be, constructed on property not owned by County, whether or not contiguous to County's property and Company shall have the right to control any and all such non-owned Raw Water Infrastructure..

## 5.2 Maintenance and Operation.

The Company shall be responsible for the maintenance and operation of the Raw Water Infrastructure, which shall include the procuring of appropriate insurance, payment of applicable taxes and fees, maintaining all permits mandated by any applicable Legal Requirements, performing all routine and necessary maintenance thereon and providing staff necessary for the sale and delivery of water. The Company's costs and expense in maintaining and operating the Raw Water Infrastructure shall be reimbursed from the Raw Water Revenue as set forth in Article 7 hereof.

## ARTICLE 6

### PROTECTION OF PERSONS AND PROPERTY

6.1 Safety. The Company shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Work. The Company shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to: (a) employees and other persons who may be affected thereby; (b) the Work and materials and equipment to be incorporated therein; and (c) other property at the site or adjacent thereto. The Company shall comply with all Legal Requirements governing the conduct and safety of persons at and about the Project. The Company shall ensure that its Subcontractors, employees and agents comply with such Legal Requirements.

## ARTICLE 7

### COMPENSATION AND PAYMENT

7.1 Compensation for Raw Water Sales Activities. For the Work and services relating to the Raw Water Infrastructure, and regardless of whether the Raw Water Infrastructure is on or off of the County's property, the Company shall be reimbursed the Cost of the Work solely for from the Raw Water Revenue to the extent that the Company is not reimbursed directly by the customer for whom the the Raw Water Infrastructure was constructed. At any time that the Company has outstanding unreimbursed amounts that are properly a Cost of the Work for the Raw Water Infrastructure, the Company shall receive the Primary Share of the Raw Water Revenue

and the County shall receive the Secondary Share of the Raw Water Revenue. The Company shall apply 40% of the Primary Share to retire the outstanding unreimbursed Cost of the Work for the Raw Water Infrastructure. During periods where the Company has been reimbursed for the Cost of the Work for the Raw Water Infrastructure as set forth above, the Company shall receive the Secondary Share and the County shall receive the Primary Share. Should the Company thereafter construct additional or further Raw Water Infrastructure that is not to be paid for by any third party, the Company shall once again be compensated through its receipt of the Primary Share until such time as the Cost of the Work has again been reimbursed.

7.2 Reporting. Company shall provide County with a Cost Report on a monthly basis which shall include: a) an accounting of all Raw Water Revenue during the prior month, b) the costs and expenses incurred by Company for the sales and marketing of the water, c) the costs incurred and reimbursed for all infrastructure improvements, d) the status of all existing and prospective contracts for water sales and e) any such other information as may be reasonably requested by County.

7.3 Payment to the County. The Company shall pay to the County its share of the Raw Water Revenue as calculated pursuant to the terms of this Agreement on a monthly basis. Unless otherwise agreed, such payment shall be mailed to Harrison County Commissioners, 100 West Market Street, Cadiz, Ohio 43907.

7.4 Payment for Water Resources. In the event that County enters into an agreement with any third party pursuant to which water is made available to the County at a cost, which water is subsequently sold pursuant to this Agreement, such cost shall be deducted as a cost of sale and such amount shall be paid from the Raw Water Revenue. Company shall have the right, in its sole discretion, to determine whether water made available for sale under this Agreement is from a Water Resource for which there is a cost or a ~~Waster~~Water Resource for which there is no such cost.

## ARTICLE 8

### TERM

8.1 The terms, covenants, conditions and agreements of this Agreement shall be effective during the Term; provided, however, that this Agreement shall continue to be effective with respect to any specific Project until the Contract for that Project is terminated or expires.

## ARTICLE 9

### WARRANTY/CORRECTION OF WORK

9.1 Correction of Work. The Company guarantees that all materials and equipment furnished under this Agreement or any Contract shall be new unless otherwise specified, and that all design work shall be consistent with the standard of care set forth in Section 3.1 hereof and that all construction work will be free from faults or defects in materials or workmanship and in accordance with requirements of this Agreement or any Contract.

## ARTICLE 10

### INDEMNIFICATION

10.1 Indemnity. To the fullest extent permitted by law, the Company shall indemnify and hold harmless the County, its officers, trustees and employees (the "Indemnitees" ) from all claims for bodily injury and property damage (other than to the Work itself and other property required to be insured under Section 12.1 hereof), including reasonable attorneys' fees, costs and expenses, that may arise from the performance of the Work, but only to the extent caused by the negligent acts or omissions of the Company, Subcontractors or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable. The Company shall not be required to indemnify or hold harmless the Indemnitees for any negligent acts or omissions of the Indemnitees.

## ARTICLE 11

### DEFAULT AND TERMINATION OF THE AGREEMENT

- 11.1 Termination by the Company. Each party shall be in default to the other;
- a.) If Company fails to build the infrastructure after it determines that it is feasible to proceed with the project, or is responsible for any other material breach of any obligation under this Agreement;
  - b.) If the County fails to make the Water Resources available, cooperate in the contemplated use of the land and the acquisition of any permits and easements, or is responsible for any other material breach of any obligation under this Agreement.
- 11.2 Termination by the County for Cause. If the Company is adjudged to be bankrupt, or if it makes a general assignment for the benefit of its creditors, or if a receiver is appointed on account of its insolvency, or if it fails to supply enough properly skilled workmen or proper materials, or if it fails to make proper payment to Subcontractors or for materials or labor, or if it otherwise breaches any material obligation hereunder, then the County may, without prejudice to any right or remedy and after giving the Company thirty (30) days' written notice, during which period the Company fails to cure the violation, terminate the Contract. In the event of such termination, the County shall be obligated to pay the Company from any future water sales any costs previously incurred by the Company for the construction of the Raw Water Infrastructure.
- 11.3 Company Termination Rights.

In addition to any other rights the Company may have at law or under this Agreement with respect to cancellation or termination, the Company may, without cause and at its sole discretion,

terminate this Agreement upon not less than fourteen (14) days' written notice to the County. In addition, the Company may upon not less than fourteen (14) days' written notice to County, terminate this Agreement in the event of any default by County as set forth in Article 11.1, or if, in the reasonable opinion of the Company, there occurs any condition, change or development affecting the oil and gas drilling and exploration industry in Ohio that could reasonably be expected to have a material adverse effect on the sale or raw water to such industry. The Company shall terminate by delivering to the County a notice of termination specifying the effective date of the termination and setting forth the conditions, changes or developments creating the material adverse effect on the sale or raw water to such industry or any other material breach upon which the termination is based. Notwithstanding any termination of this Agreement, the terms and conditions of this Agreement shall continue to be effective with respect to any specific Project until the Contract for that Project is terminated or expires. In the event of such termination, the County shall be obligated to pay the Company from any future water sales any costs previously incurred by the Company for the construction of the Raw Water Infrastructure.

## ARTICLE 12

### INSURANCE AND BONDS

12.1 The Company shall carry and maintain liability insurance that shall include the limits of liability and comply with the other requirements set forth in on **Exhibit B** attached hereto.

## ARTICLE 13

### MISCELLANEOUS PROVISIONS

#### 13.1 Dispute Resolution.

13.1.1 In the event of any dispute arising by or between the County and the Company, each party shall continue to perform as required under the Contract notwithstanding the existence of such dispute. In the event of such a dispute, the Company shall continue to pay the County as provided in the Contract, excepting only such amount as may be disputed.

13.1.2 Unless the parties otherwise agree, if a Claim has not been settled or resolved by the parties within thirty (30) days after written notice of the Claim has been served by one party hereto to the other, then such Claim shall, unless otherwise agreed, be resolved by arbitration, conducted through the American Arbitration Association, in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then currently in effect. All arbitration proceedings shall be held in the Harrison County, Ohio. The agreement to arbitrate shall be specifically enforceable under applicable law in any court having jurisdiction thereof. The award of the arbitrators shall be final and binding and may be entered as a judgment in any court of competent jurisdiction.

13.1.3 In any dispute between the County and the Company, the prevailing party in any arbitration shall be awarded its reasonable attorneys' fees and costs, in addition to any other



damages or other amounts to which it may be entitled; provided, however, that a plaintiff shall never be considered to be a prevailing party under this provision if the final award is less than the last written offer of settlement issued by the defendant prior to the institution of arbitration and a defendant shall be considered to be a prevailing party if the final award is less than is less than the last written offer of settlement issued by the defendant prior to the institution of the arbitration.

13.2 Governing Law. This Agreement shall be governed and construed in accordance with the laws of the State of Ohio.

13.3 Successors and Assigns. The County and the Company, respectively, bind themselves, their successors and assigns to the other party to this Agreement and to the successors and assigns of such other party with respect to all covenants hereof. This Agreement and any Contract may not be assigned by any party hereto except with the written consent of the other party hereto. Any assignee of either party must fully assume all outstanding obligations of the assignor.

13.4 Entire Agreement. This Agreement represents the entire and integrated agreement between the County and the Company and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both the County and the Company.

13.5 Third Party Rights. Nothing contained herein shall be deemed to give any third party any claim or right of action against the County or the Company that does not otherwise exist without regard to this Agreement.

13.6 Notices. Any notice, demand, offer, or other written instrument required or permitted to be given shall be in writing signed by the party giving such notice and shall be sent by confirmed email, personally delivered or, if mailed by Registered or Certified Mail, to the other party at the address set forth below:

If delivered to the County:

\_\_\_\_\_

Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

With a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
Phone: \_\_\_\_\_  
Fax: \_\_\_\_\_

If delivered to the Company:

\_\_\_\_\_  
\_\_\_\_\_  
Phone: \_\_\_\_\_  
Fax: \_\_\_\_\_

With a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
Phone: \_\_\_\_\_  
Fax: \_\_\_\_\_

Each party shall have the right to change the place to which notice shall be sent or delivered by sending a similar notice to the others in like manner. The effective date of any notice issued hereunder shall be as of the addressee's receipt of such notice.

13.7 Headings. The headings and captions contained herein and in the Contract are for convenience and reference only and in no way define, describe, extend or limit the scope of intent of this Agreement or the intent of any provision contained therein.

13.8 Severability. The invalidity of one or more phrases, sentences, clauses, sections or articles contained herein shall not affect the validity of the remaining portions hereof so long as the material purposes of the remaining phrase, sentence, clause, section or article can be determined and effectuated.

13.9 Exhibits. All exhibits, schedules or other attachments referenced herein and in the Contract shall be incorporated herein and into the Contract by such reference.

13.10 Independent Contractor. The Company is an independent contractor and shall not be deemed an agent, employee or partner of the County. Nothing contained herein shall be construed as constituting a joint venture or partnership between the Company and the County.

13.11 Non-Exclusive. Nothing has been construed or implied as granting to the Company a right to bid on, or perform the Work in connection with, any particular project of the County.

13.12 Counterparts. This Agreement and the Contract(s) may be executed by the parties in separate counterparts, each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute but one and the same instrument.

13.13 Remedies. Except as expressly provided otherwise, all rights and remedies provided herein are in addition to all other rights and remedies available at law or in equity.

13.14 Authority. The Company has full power and authority to enter into this Agreement and the Contract(s), and the persons signing on behalf of the Company are authorized to do so.

This Agreement is entered into as of the day and year first written above.

**KOKOSING WATER LLC:**

\_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**HARRISON COUNTY, OHIO:**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**APPROVED BY PROSECUTING  
ATTORNEY:**

\_\_\_\_\_

## EXHIBITS

- Exhibit A    Form of Contract
- Exhibit B    Insurance Requirements

**EXHIBIT A TO  
AGREEMENT**

**FORM OF AGREEMENT**

**DESIGN AND CONSTRUCTION SERVICES AGREEMENT**

THIS DESIGN AND CONSTRUCTION SERVICES AGREEMENT (this "Contract") is entered into as of \_\_\_\_\_, 20\_\_ (the Effective Date") by and between Kokosing Water LLC (the "Company") and Harrison County, Ohio ("the County").

**W I T N E S S E T H:**

WHEREAS, the County authorizes the retention of the Company to perform services necessary to accommodate raw water sales, including the planning, design, and construction of the such improvements as are necessary or desirable to deliver the raw water from the County water sources to the oil and gas industry customers; and,

WHEREAS, the County and the Company have entered into that certain Agreement for Water Sales, dated September \_\_, 2012 (the "Agreement"); and

WHEREAS, pursuant to the Agreement, the County desires to retain the Company to provide the work and services described in this Contract.

NOW, THEREFORE, in consideration of the mutual covenants stated herein and other good and valuable consideration, the County and the Company, intending to be legally bound, covenant and agree to the following terms and conditions:

1. **Project.** The Project is described on **Exhibit 1** attached hereto.
2. **Work.** The Company shall perform the Work described in the Contract Documents, which includes the services designated in **Exhibit 2**, attached hereto, which work will be subcontracted to Kokosing Construction Company, Inc.
3. **Milestone Dates.** **Exhibit 3** sets forth the schedule of key milestone dates for the Project. The milestone dates shall be incorporated into the Construction Schedule to be prepared by the Company. The Company shall immediately commence the Work upon execution of this Contract.
4. **Enumeration of Contract Documents.** The Contract Documents shall mean the Agreement, this Contract, the Drawings and Specifications, addenda, general conditions, supplementary conditions and other documents, if any, referenced and/or listed in **Exhibit 4**, attached hereto. The Company acknowledges receipt of a complete set of the Contract Documents and such documents are incorporated herein by reference.
5. **Engineer.** The engineer, who shall be under contract with the Company, for the Project is \_\_\_\_\_.

6. Substantial Completion Date. The Company shall achieve Substantial Completion of the Project on or before \_\_\_\_\_ (the "Substantial Completion Date").

7. Bonds. The Company [shall/shall not] provide a payment and performance bond in the amount of the Contract Sum.

8. Builder's Risk Insurance. The Company [shall/shall not] provide builder's risk insurance in an amount equal to the replacement value of the Work.

9. Hazardous Materials Remediation. The County has provided to the Company the following environmental site assessment reports: \_\_\_\_\_ (the "Assessment Reports"). **[Alternate 1:** The Work included under this Contract includes the abatement, remediation, removal and disposal of all Hazardous Materials identified in the Assessment Reports (the "Remediation Work"). All such Remediation Work shall be performed by subcontractors licensed to perform such Work and the Company shall provide documentation evidencing that the Remediation Work has been performed in compliance with all Legal Requirements.] **[Alternate 2:** The County shall be responsible, through its separate contractors, for the abatement, remediation, removal and disposal of all Hazardous Materials identified in the Assessment Reports (the "Remediation Work"), and the Company shall cooperate with the County's separate contractors to coordinate the Company's Work and the Remediation Work in an efficient and expeditious manner].

Unless otherwise defined herein, capitalized words and phrases shall have the meanings as are ascribed to such words and phrases in the Agreement.

This Contract is entered into as of the day and year first written above.

**KOKOSING WATER LLC**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**HARRISON COUNTY:**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**Exhibit 1 to  
Design and Construction Services Contract**

**Project**

[Insert a detailed description of the Project.]

**Exhibit 2 to  
Design and Construction Services Contract**

**Designated Services**

The Company's Scope of Work shall include each of the services indicated below (for a description of each such service, see **Exhibit B** to the Agreement):

| <b>SERVICE</b>                                 | <b>INCLUDED SERVICES<br/>INDICATED BY "X"</b> |
|--|---|
| <b>Preconstruction Services</b>                |   |
| A. Design                                      |   |
| B. Schedules                                   |   |
| C. Cost Estimates                              |   |
| D. Long-Lead-Time Items                        |   |
| E. Permits                                     |   |
|  |   |
|  |   |
| <b>Construction Phase Services</b>             |   |
| A. Bidding                                     |   |
| B. Construction Schedule                       |   |
| C. Meetings                                    |   |
| D. Progress Reports                            |   |
| E. Construction Management                     |   |
| F. Testing                                     |   |
| G. Quality Control                             |   |
| H. Punchlist                                   |   |
| <b>Additional Services</b>                     |   |
| [Add other services not included in the above] |   |



**Exhibit 3 to  
Design and Construction Services Contract**

**Contract Sum**

**Exhibit 4 to  
Design and Construction Services Contract**

**Schedule of Values**

**Exhibit 5 to  
Design and Construction Services Contract**

**Milestone Dates**

| <b>Event</b>                | <b>Date</b> |
|-----------------------------|-------------|
| Start Date                  |             |
| [Interim Milestones]        |             |
| Substantial Completion Date |             |
| Final Completion Date       |             |

**Exhibit 6 to  
Design and Construction Services Contract**

**Enumeration of Contract Documents**

1. The Contract.
2. The Agreement for Water Sales, Design, Planning and Construction Services, dated \_\_\_\_\_, by and between the County and the Company.
3. Kokosing Construction Standard Construction Terms and Conditions, a copy of which are attached hereto and made a part hereof.



**EXHIBIT B TO  
AGREEMENT**

**COST OF THE WORK**

**EXHIBIT B TO  
AGREEMENT**

**INSURANCE REQUIREMENTS FOR CONTRACTORS,  
SUBCONTRACTORS**

**A. Limits**

**1. Commercial General Liability**

- \$1,000,000      Each Occurrence
- \$1,000,000      General Aggregate – Per Project Aggregate
- \$1,000,000      Products/Completed Operations Aggregate – Per Project Aggregate
- \$1,000,000      Personal Injury

**2. Business Automobile**

- \$1,000,000      Combined Single Limit

**3. Workers' Compensation/Employers' Liability (Stop Gap)**

- Statutory Workers' Compensation – Coverage A
- \$1,000,000      Each Accident
- \$1,000,000      Disease – Policy Limits
- \$1,000,000      Disease – Each Employee

**4. Excess Umbrella Liability for Contracts where the Contract Sum is \$2,000,000 or less**

- \$2,000,000      Each Occurrence/Annual General Aggregate

**5. Excess Umbrella Liability for Agreements where the Contract Sum is \$2,000,000 to \$10,000,000**

- \$10,000,000      Each Occurrence/Annual General Aggregate

**6. Excess Umbrella Liability for Agreements where the Contract Sum is greater than \$10,000,000**

The County and the Company shall mutually agree on the excess umbrella liability limits.

**B. Other Requirements**

- 1. Commercial General and Umbrella Liability Insurance.** The Company shall maintain Commercial General Liability (CGL), and Commercial Umbrella liability insurance with the limits as set forth above, covering all operations relating to the Work. CGL insurance shall be written on ISO occurrence form CG 00 01 (or a substitute form providing equivalent coverage) and shall cover liability arising from premises, operations, independent contractors, products-completed operations, personal injury and advertising injury and liability assumed under an insured contract (including the tort liability of another assumed in a business contract). The County shall be included as additional insured under the CGL, using ISO additional insureds endorsement CG 20 10 or a substitute providing equivalent coverage, and under the commercial umbrella liability

policy, if any. This insurance shall apply as primary insurance with respect to any other insurance or self-insurance programs carried by the additional insureds.

2. **Completed Operations Liability Insurance.** The Company's CGL policy shall include coverage for the County as an additional insured with respect to completed operations, per the terms of ISO additional insured endorsement CG 20 37, or a substitute providing equivalent coverage. The Company shall maintain the completed operations coverage including the County as additional insured for at least three (3) years following Substantial Completion of the Company's Work on a particular Project.
3. **Business Auto and Umbrella Liability Insurance.** Such insurance shall cover liability arising out of any auto (including owned, hired and non-owned autos).
4. **General.** All policies shall be written by insurance companies with a Best's Rating of no less than "A:-VI".



